IN THE SUPREME COURT OF FLORIDA

WILLIAM TAYLOR,

Appellant,

v.

Case No. SC04-2243
Lower Tribunal No. 01-8692

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Sandra Kushmer spent the evening of May 25, 2001, with her brother, Bill Maddox (V16/1166, 1259). Their mother, Renate Sikes, spent the evening at the hospital with her ailing husband (V16/1167). Sandra was living at her mother's house at the time, and Bill was visiting from California (V16/1161-63).

Sandra and Bill went to Harry's Bar near Mrs. Sikes' home in Riverview, Florida, around 9:30 that evening (V16/1158, 1258-59). They left the bar with the appellant, Bill Taylor, a regular at the bar known as Ken (V16/1261). Mrs. Sikes called home about 10:30, to let Sandra and Bill know that she was staying overnight at the hospital; Sandra told her that Ken was there, and Mrs. Sikes asked to have him leave (V16/1166-67, 1189). Sandra told Mrs. Sikes that she knew Ken from school (V16/1190). Mrs. Sikes called home again around 11:00, and continued to call through the night and the next day, but no one answered the phone (V16/1167-68).

Mrs. Sikes went home about 3:30 the afternoon of May 26 (V16/1168). She noticed some of Sandra's belongings outside the house, and discovered Sandra's dead body in a pool of blood on the floor inside (V16/1171-72). Bill was in a bedroom, alive and conscious but having suffered serious head injuries

(V16/1173; V23/2146-47). Jewelry and cameras were missing from the home (V16/1178, 1181-82).

On May 26, 2001, Taylor arrived at the home of an acquaintance, Tommy Riley, around 9:00 in the morning, and washed some clothes and tennis shoes (V16/1232, 1234). Taylor was driving a white pickup truck with a Tennessee tag in the window (V16/1237). Later in the day, Taylor asked Riley to cash a check for several hundred dollars from Bill Maddox's account, but Riley refused (V16/1235-36). Taylor left that afternoon with a Hispanic man Riley didn't know, in the other man's car (V16/1251-53). Riley saw Taylor at a local bar that evening, with the Hispanic man and several others (V16/1239, 1253). Taylor was buying drinks, paying with twenties, until the group left for Ybor City (V16/1240). Taylor returned to Riley's house later and spent the night there (V16/1253).

The morning of May 27, Riley heard the police were looking for Taylor, and woke him up and told him to leave (V16/1240-41). Taylor left in the white truck (V16/1241). A paper trail of credit card receipts from Bill's accounts led police to Taylor in Memphis, Tennessee (V17/1326-27). Taylor was arrested by U.S. marshals on May 29 on outstanding warrants for violating his federal probation (V10/115, V20/1769).[1] Credit cards and

[1] The jury did not hear the basis for the arrest.

receipts from the victims' accounts were found in the motel room (V20/1774).

Hillsborough County Sheriff's Detective Dorothy Flair was the lead detective and interviewed Taylor on three separate occasions (V17/1354). She initially interviewed Taylor at the federal building in Memphis, Tennessee, on May 30, 2001, the morning after his arrest (V17/1354). Taylor provided a lengthy statement detailing his involvement in the robbery, but claimed another man he could not name had shot Sandra (V17/1357-67). He acknowledged that he and the man planned the robbery after Taylor had spoken with Sandra on May 25 and learned that she and Bill would be coming to Harry's Bar that night (V17/1357-58). Taylor told the man he intended to rob Sandra, and the man wanted to participate (V17/1358, 1489).

According to his statement, later that evening Taylor met Sandra and Bill at Harry's Bar and after some time at the bar, he drove them home as planned (V17/1359-60). They had some sandwiches and beer, and then Bill retired to go to bed and Taylor and Sandra went out again (V17/1360). They returned to Sandra's mom's house around 12:30 a.m., and the other man was waiting by the driveway (V17/1360). The man told Sandra he wanted to talk to her, and she invited him in the house (V17/1361). However, when Sandra turned by the door, the man

hit her on the back of the head with a long pull bar (V17/1361). Taylor took a couple of credit cards from Sandra's purse and went inside the house, while the man stayed outside with Sandra (V17/1361). When Taylor went back to Bill's bedroom, he saw Bill on the floor in a puddle of blood (V17/1361). The other man came into the house and was going through a dresser in another room (V17/1361). The other guy claimed to have heard a noise at the back door, so the two of them went back to the kitchen (V17/1362). The other guy opened the door and said "she's leaning against the house" (V17/1362). Taylor asked what the guy was going to do, and the guy said he was going to "hit her," grabbing a shotgun that was leaning up against the wall inside the house (V17/1362). Taylor returned to Bill's room and heard a loud shot (V17/1362). He ran outside and asked the guy if he was crazy, then picked Sandra up and put her inside the house, assuming she was dead (V17/1362-63). Then he drove his truck alone to his friend Tom's, but did not go inside because Tom was asleep (V17/1363).

The next morning, Taylor did some laundry at Tom's, and tried to get his friends to cash checks he wrote from Bill's checkbook (V17/1363–64). Taylor provided extensive details to Det. Flair describing his activities on that Saturday, including his use of Bill's credit cards (V17/1364-65). He slept that

night at Tom's, and Tom woke him up Sunday morning to tell him the police were looking for him and he needed to leave (V17/1365). He related his travels and actions in getting to Memphis, including his continued use of Bill's credit cards and an unsuccessful attempt to wire himself money through Western Union (V17/1365-66). He offered a description of his alleged accomplice as an unknown white male, 45 to 50 years old, with short straight hair that was black with gray streaks and combed to the back, a black mustache and goatee with gray streaks, about five feet ten and 175 pounds (V17/1366). He indicated that he knew the guy from Harry's Bar, and that the guy was a construction worker that lived at a motel between the bar and a gas station (V17/1366).

Det. Flair spoke with Taylor again the next morning, after she participated in a search of the truck and spoke with a witness from a Memphis restaurant (V17/1377-79). She told Taylor that she did not believe everything he had said the day before (V17/1380). She asked him specifically about the gun, and Taylor told her the other guy had the gun with him, that they had brought it to threaten the victims in order to tie them up (V18/1405). Taylor said he didn't know the gauge of the gun, and that there was one yellow shell which the other guy loaded into the gun (V18/1405). Det. Flair told Taylor that she didn't

believe him, and he indicated the interview was over (V18/1406). She agreed and did not ask him anything else, but Taylor kept talking and then said, "I shot her. It wasn't supposed to happen" (V18/1406). She reminded him that he had invoked his Miranda rights and asked what he wanted to do, and he said he wanted to talk to her and agreed to give a tape recorded statement (V18/1406).

In this statement Taylor continued to maintain that he and another man he could not name from Harry's had burglarized Mrs. Sikes' house (V18/1413). However, Taylor stated that after Sandra was initially hit, Taylor went back to his truck and got the shotgun, loading it when he went in the house (V18/1418-19). He took the cameras from the house, but had not seen anything else he wanted, so he was leaving with the cameras and he thought Sandra was still knocked out (V18/1414-15). When he went out the back, the light was off and he was startled by a movement, so he shot the gun (V18/1413-15). He shone a flashlight around and realized it was Sandra, so he picked her up, carried her inside the house, and laid her on the floor (V18/1413-14). Taylor told Det. Flair that the gun was at a buy-and-sell shop on South US 41 (V18/1415). He continued to maintain that he did not know the name of the other individual

involved in the robbery and that shooting Sandra was never part of the plan (V18/1417-18).

Taylor provided a third statement about a month later (V18/1424). Det. Flair received a message that Taylor wanted to speak to her, and she responded to the Morgan Street Jail on June 28 (V18/1424-25). Taylor gave her a letter that he had written indicating that the guy he previously described from Harry's was not in fact involved, but that Taylor's friend, Jose Arano, and Taylor's former wife, Lorena, had participated (V18/1426-32). In the letter version, Lorena was the one to hit Sandra with a crowbar, and Jose beat Bill with the crowbar, but Taylor again acknowledged being the shooter (V18/1428-29). According to Taylor, Lorena had stayed near the door when the men went inside, and she called out that she heard a noise (V18/1428). Taylor took the gun outside and pulled the trigger when he saw someone turn the corner, then discovered he had shot Sandra (V18/1429). He took Sandra in the house, told Lorena to get in his truck, and went into a bedroom, taking Bill's keys and some watches and cameras (V18/1429).

Taylor agreed to another taped interview, where he verified the truth of the letter he had given to Det. Flair (V18/1433-41). He stated that the man he had described from Harry's that

was not involved was named Wayne, and insisted that he was now telling the truth about Jose and Lorena (V18/1436-37).

The shotgun found at the pawn shop Taylor described on US 41 was admitted into evidence (V16/1194). Taylor's fingerprint was on the pawn receipt for the gun, and his name and address were reflected on the ticket, showing the gun was pawned on May 26, 2001 (V16/1202; V21/1840-46, 1860-69). The gun was in good working order and stained with Bill Maddox's blood (V21/1889-1902, 1972-81, 2002-03). One of Taylor's fingerprints was also found on one of the beer bottles taken from Mrs. Sikes' house (V21/1944). Cameras and accessories stolen from the Sikes house were found in Taylor's truck (V17/1374-76). In addition, the stolen credit cards, receipts, and testimony confirming Taylor's unauthorized use of the cards were admitted (V17/1337-38, 1343-48, 1377-78; V19/1662-74; V20/1760-63, 1774; V23/2104-09).

Blood stain analysis from the crime scene reflected that Sandra was shot outside near the wall, either kneeling or sitting, as the shot was about 24 to 36 inches above the ground and fired at close range (V19/1600, 1604). There was a working motion-activated light on the side of the house (V16/1170-71). The blood evidence indicated that she remained where she was shot for a short time, and then was carried into the house and deposited with some force onto the floor (V19/1609-15).

Sandra's autopsy revealed that she had been killed by a close-range shot to the mouth, with the muzzle of the gun pressed against her at the time of the shot (V19/1690, 1694-95, 1697, 1719-20; V20/1721, 1747).

Taylor was convicted as charged (V25/2477-78). In the penalty phase, testimony was presented relating to two prior violent felony convictions, based on separate robbery incidents occurring in Delaware and Nevada in 1976 (V26/2640-70). There was a stipulation entered that Taylor had been on federal probation at the time of the murder (V26/2670).

The defense presented testimony from Taylor's aunt, Idamae Newlin (V26/2674-95); a friend, Josephine Quattrociocchi (V26/2721-27); a friend and former work supervisor, Robert Railey (V26/2757-63); an inmate drug counselor, Gary Cross (V27/2751-53); a forensic psychologist, Dr. Harry Krop (V27/2774-2855); and a neurologist, Dr. David McCraney (V28/2896-2936). The State presented a forensic psychiatrist, Dr. Donald Taylor, in rebuttal (V28/2964-3038).

The jury returned a unanimous recommendation for imposition of the death penalty for Sandra's murder (V8/R1265; V29/3133-34). Circuit Judge Barbara Fleischer imposed the death sentence on September 29, 2004, finding three aggravating circumstances: prior violent felony convictions; murder committed for pecuniary

gain; and Taylor's status on felony probation at the time of the murder (V8/R1314-1317). The court rejected the statutory mental mitigating factors, but weighed the evidence of Taylor's mental functioning as nonstatutory mitigation, and ascribed varying degrees of weight to other nonstatutory mitigating factors presented (V8/R1320-25). This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Taylor's motion to suppress the evidence seized from his motel room. The court specifically found Deputy Sanders' testimony to be credible, refuting Taylor's allegation that the consent form he signed did not indicate the area to be searched. As the State established that Taylor's consent to search the room was voluntarily given, the motion to suppress was properly denied.

The death sentence imposed in this case is not subject to reversal on proportionality grounds. The trial court found three aggravating factors, without even taking into account the contemporaneous violent convictions obtained. No statutory mitigating factors were found, and the nonstatutory mitigation was not compelling. This was a brutal, senseless murder which compels imposition of the death penalty as recommended by the unanimous jury.

This Court has repeatedly rejected Taylor's claim that Florida's capital sentencing process violates the Sixth Amendment as construed in Ring v. Arizona, 536 U.S. 584 (2002). Taylor has not identified any constitutional error in the statutory scheme and no basis for relief is presented in this issue.

Taylor's request for this Court to overrule Almendarez-Torres v. United States, 523 U.S. 224 (1988), must be denied. This Court has no authority to ignore or overturn United States Supreme Court precedent. In addition, Taylor's sentence would be constitutionally sound even if it was not supported by his prior violent felony convictions.

Taylor's attack on the standard penalty phase jury instructions must be denied as procedurally barred. The court below modified the standard instructions to address Taylor's concerns, and his current appellate argument does not identify any error in the modified instructions as given. In addition, the standard instructions do not unconstitutionally shift the burden of proof or denigrate the role of the jury. Taylor has offered no reasonable basis for reconsideration of these claims, which have been consistently and repeatedly rejected by this Court.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM TAYLOR'S MOTEL ROOM.

Taylor's first issue challenges the trial court's denial of his motion to suppress the evidence seized from his motel room at the time of his arrest. This Court extensively discussed the appropriate standard of review in Connor v. State, 803 So. 2d 598, 605-08 (Fla. 2001). Connor requires a strong deference to a trial court's findings of historical fact, and de novo review of the mixed questions of fact and law which ultimately determine the constitutional issues.

A review of the testimony presented at the suppression hearing fully supports the denial of Taylor's motion. Both Taylor and Scott Sanders, a supervising deputy in the U.S. Marshal's office, testified about the circumstances surrounding Taylor's consent to the search (V10/94-132). Their testimony was consistent about most of the details regarding Taylor's arrest around 11:30 p.m. on May 29, 2001, outside the Stuckey's Motel in Memphis, Tennessee (V10/95, 114-117). Both agreed that, after Taylor was taken into custody, Sanders presented a consent form which Taylor voluntarily signed (V10/99-101, 118-121).

According to Taylor, however, he was presented with a consent form that had not been completed; the area designating the place to be searched was left blank (V10/99-102). Taylor stated that he did not question the omission, because Sanders allegedly told him that they needed to search the truck in order to impound it (V10/106). He also acknowledged that he did not question the consent form to search his truck when it was presented to him the following day, despite his alleged understanding that the truck is what had been searched at the time of his arrest (V10/109-110). He claimed that he never knowingly agreed to a search of his motel room (V10/100-01).

Deputy Sanders, on the other hand, testified that he was not interested in searching Taylor's truck, since he knew it would be impounded and processed for evidence; Sanders did not want to disturb any possible evidence that might be located there (V10/129-130). On the other hand, although it was not the basis for the arrest, he was aware of the homicide investigation in Florida and wanted to secure any possible evidence from the motel room to assist in that investigation (V10/118). To that end, when he discovered that he did not have any of the consent forms he usually carried from his office, he borrowed one from the Shelby County Sheriff's officers that were present and assisting with Taylor's arrest (V10/118). He added his agency

to the top of the form and wrote in the place to be searched, noting the room number, location, and address of the motel (V10/119-120).

Sanders was a veteran law enforcement officer who had completed similar consent forms on many prior occasions (V10/121). The trial court specifically found his testimony to be credible, a finding which is entitled to deference and which Taylor offers no basis to set aside (V10/137). Given that finding, affirmance of the denial of the motion to suppress is legally compelled. See Riechmann v. State, 581 So. 2d 133, 137-38 (Fla. 1991) (where suppression hearing offered distinct conflicts between defendant's account and officers' testimony, and trial court resolved the factual disputes in favor of the State, the record supported the denial of the motion to suppress and no abuse of discretion would be found).

In addition, it should be noted that suppression would not be appropriate in this case even if Taylor's asserted lack of consent could be supported, as this evidence would have been inevitably discovered by lawful means, given Taylor's arrest on an outstanding federal warrant. Clearly Taylor would not be returning to his motel room and any items abandoned in the room would be provided to the police. On these facts, the

exclusionary rule does not apply. Maulden v. State, 617 So. 2d 298, 301 (Fla. 1993).

Furthermore, it is readily apparent that any possible error on this issue would be harmless beyond any reasonable doubt. The only evidence admitted against Taylor subject to the suppression motion consisted of a couple of credit cards and receipts. Taylor's possession and unauthorized use of the victims' credit cards was acknowledged in his confession and well established by other independent testimony at trial. See V17/1337-38, 1343-48, 1377-78; V19/1662-74; V20/1760-63, 1774; V23/2104-09. As the underlying probative fact was never disputed by Taylor, and was fully supported by other evidence, the duplicitous nature of this evidence renders any possible error clearly harmless.

The trial court properly denied Taylor's motion to suppress the evidence seized from his motel room following his arrest based on his voluntary consent to the search, and this issue offers no basis for disturbing Taylor's convictions. His request for a new trial must be rejected.

ISSUE II

WHETHER THE DEATH SENTENCE IS PROPORTIONATE.

Taylor next challenges the propriety of the death sentence imposed in this case. He claims that Sandra's murder is not among the most aggravated or least mitigated, and that the sentence is disproportionate compared to other capital cases.

A proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences, to insure that the death penalty is being uniformly imposed. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

The aggravating factors found in this case are: (1) defendant was previously convicted of violent felonies; (2) murder committed for pecuniary gain; and (3) defendant was on felony probation at the time of the murder (V8/1315-17). There were no statutory mitigators found, but the trial court gave varying degrees of weight to nonstatutory mitigation, including Taylor's antisocial and borderline personality disorders, his long history of substance abuse, and a lack of parental

nurturing (V8/1317-25). The jury recommended the death sentence by a vote of 12 to 0 (V8/1265; V29/3133-34).

Factually similar cases supporting the death penalty for Taylor include: Griffin v. State, 820 So. 2d 906, 916-17 (Fla. 2002) (defendants shot two victims in well-planned robbery, similar aggravating and mitigating factors, except Griffin had no significant prior criminal history); Zack v. State, 753 So. 2d 9, 25-26 (Fla.) (defendant and victim left bar together, went to victim's home, where defendant raped and killed victim), cert. denied, 531 U.S. 858 (2000); Cole v. State, 701 So. 2d 845, 853 (Fla. 1997) (defendants befriended the victims while camping, raped one victim and killed the other, stealing their property), cert. denied, 523 U.S. 1051 (1998); Shellito v. State, 701 So. 2d 837, 845 (Fla. 1997) (victim shot during robbery, similar aggravating and mitigating factors); Moore v. State, 701 So. 2d 545, 551-52 (Fla. 1997) (defendant robbed and killed a friend); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991) (defendant and others lured victim into roadside ambush, to rob and kill him; like Taylor, Wickham had spent most of his adult life incarcerated).

Taylor's argument on this issue makes no effort to compare this case with factually similar capital cases. Rather, he simply asserts that the case cannot be among the "most

aggravated" because the aggravating factors of heinous, atrocious or cruel and cold, calculated and premeditated did not apply. Although this Court has acknowledged the relevance of these factors in a proportionality review, this Court also recognized that their presence or absence is "not controlling." Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). Of course, this Court has upheld a number of death sentences as proportionate when neither HAC nor CCP were applied. See Taylor v. State, 855 So. 2d 1, 32 (Fla. 2003), cert. denied, 541 U.S. 905 (2004); Griffin; Bryant v. State, 785 So. 2d 422, 437 (Fla. 2001); Shellito; Moore; Sliney v. State, 699 So. 2d 662, 672 (Fla. 1997), cert. denied, 522 U.S. 1129 (1998); Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996), cert. denied, 520 U.S. 1123 (1997); Vining v. State, 637 So. 2d 921, 928 (Fla. 1994).

The three aggravating factors applied in this case were each allocated "great weight" by the trial judge (V8/1315-17). The prior violent felony conviction aggravator did not encompass the contemporaneous crimes Taylor committed, but was premised on two prior, separate violent incidents (V8/1315). As the trial court noted, Taylor had been incarcerated for twenty-three of the last twenty-seven years, and the protracted, violent nature of his criminal history supports the great weight given this factor (V8/1315).

In addition, although HAC and CCP were not found and weighed in aggravation, the evidence demonstrated that Taylor's actions in holding the shotgun to Sandra's face and firing when she was already injured, defenseless, and not threatening his escape were both brutal and deliberate, facts which can be considered in proportionality even in the absence of HAC and CCP. See Sliney, 699 So. 2d at 672 (noting brutality of attack in upholding proportionality of sentence, despite trial court's failure to find HAC). As previously noted, the aggravating factors applied in this case do not take into account the other offenses committed at the time of the murder, including the brutal contemporaneous attack on Bill.[2] When the totality of the circumstances are considered, Sandra's murder is among the most aggravated and well supports the death sentence imposed.

In addition, Taylor's characterizations of the mitigation presented as "substantial" and "extensive" are not well taken. Taylor reaches this conclusion by listing off the different

[2] Taylor was convicted of attempted first degree murder (relating to the attack on Bill Maddox), as well as robbery with a deadly weapon, robbery with a firearm, armed burglary, and felon in possession of a firearm (V8/1212-13; V25/2477-78). The trial judge required the State to select between the pecuniary gain aggravating factor, and any aggravating factor based on the murder occurring during the course of a robbery or burglary, as the court was concerned that the jury would not understand how to properly "merge" the factors (V25/2453). The State sought consideration of the pecuniary gain factor and neither the jury nor the trial judge considered the contemporaneous robberies and burglary to support the death sentence (V26/2571).

nonstatutory mitigating factors found, without exploring the evidentiary support or the nature and extent of the factors. The trial court's findings do not reflect a showing of compelling mitigation. Notably, the trial court did not find any statutory mitigation to exist, although there was nonstatutory mitigation with regard to Taylor's mental functioning and background. Judge Fleischer extensively reviewed the expert testimony presented, concluding, "[t]he Court has not seen or heard any credible, objective evidence that the Defendant has brain damage due to trauma or any other source" (V8/1320). The mental mitigation found below appears comparable to that described in Shellito, Ferrell, Cole and Zack, and does not demonstrate any error in the conclusion of the court below "that this murder is among the most aggravated and least mitigated" (V8/1325).

Additional background mitigation revolves around Taylor's extensive substance abuse, learning disability, and unsatisfactory relationship with his stepfather. The evidentiary support for these mitigators was not persuasive, and does not generate any significant reduction of Taylor's moral culpability. Simply glossing over the list of mitigation does not provide any meaningful guidance to this Court in determining proportionality. For example, although the trial court provided

“minimum” weight to Taylor being “a good and dependable worker” based on testimony from Robert Railey that Railey had been a foreman to Taylor when Taylor worked at a ship building company, there was no testimony as to how long the employment lasted or any other examples of Taylor as a dependable worker. As the trial court noted, Taylor was unemployed for the twenty-three years he was incarcerated (V8/1323-24). When the evidentiary underpinnings of Taylor’s case for mitigation are reviewed, the proportionality of Taylor’s sentence is confirmed.

The death sentence imposed for Sandra’s murder is not disproportionate when compared to other factually similar cases. Taylor’s request for a life sentence on this basis must be denied.

ISSUE III

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL.

Taylor's next issue challenges the trial court's denial of his motion to declare Florida's statute to be facially unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002). As this is a purely legal issue, appellate review is de novo. Trotter v. State, 825 So. 2d 362, 365 (Fla. 2002).

This Court has repeatedly rejected Taylor's claim that Ring invalidated Florida's capital sentencing procedures. See Winkles v. State, 894 So. 2d 842, 845-46 (Fla. 2005); Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator (HAC) case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Even if the Sixth Amendment included a right to jury sentencing, as Taylor submits, he could not prevail on this

claim, given the unanimous recommendation for death his jury returned (V8/1625; V29/3133-34). In addition, his death eligibility is satisfied by the prior violent felony convictions, which need not be found by a new jury. Almendarez-Torres v. United States, 523 U.S. 224 (1988); Winkles; Doorbal v. State, 837 So. 2d 940, 963 (Fla.), cert. denied, 539 U.S. 962 (2003). Furthermore, his jury convicted him of other crimes, including robbery and burglary, which also establish his death eligibility (V8/1212-13; V25/2477-78). Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003). Therefore, any possible inconsistency between Florida's procedures and Ring's expansion of the jury role would not compel relief in this case.

ISSUE IV

WHETHER THE EXISTENCE OF THE PRIOR VIOLENT FELONY AGGRAVATING FACTOR BARS THE APPLICATION OF RING V. ARIZONA TO DEATH SENTENCES.

Taylor next asks this Court to reconsider its prior decisions denying relief under Ring v. Arizona, 536 U.S. 584 (2002), based on the existence of a prior violent felony aggravating factor. This is a legal claim subject to de novo review.

Of course, it is not necessary for this Court to even consider this issue, since Ring has been rejected as a basis for relief even in cases where no prior violent felony conviction applied. See Butler; Davis v. State, 859 So. 2d 465, 479-80 (Fla. 2003). As Justice Pariente has recognized, a unanimous jury recommendation, as in the instant case, necessarily connotes a jury finding of aggravation to satisfy Ring. Davis, 859 So. 2d at 485 (Pariente, J., dissenting).

Further, even if the claim is considered, no relief is warranted. This Court's recognition of the prior conviction aggravator as a death qualifier not subject to Ring's jury requirement is premised on Almendarez-Torres v. United States, 523 U.S. 224 (1988). See Belcher, 851 So. 2d at 685. Although Taylor asserts that Almendarez-Torres is no longer valid

precedent, this Court has acknowledged that it does not have the authority to find that a United States Supreme Court decision has been implicitly overturned. Bottoson, 833 So. 2d at 695, quoting Rodriguez De Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989).

Taylor has not established that he is entitled to any relief in this issue, and this Court must deny his request for a new sentence on this basis.

ISSUE V

WHETHER FLORIDA'S STANDARD JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFT THE BURDEN OF PROOF.

Taylor also asserts that Florida's standard jury instructions are unconstitutional. According to Taylor, the instructions impermissibly shift the burden of proof, unconstitutionally requiring the defense to establish that life is the appropriate sentence. This is a legal issue to be reviewed de novo.[3]

It must be noted initially that this argument has not been preserved for appellate review. Although Taylor objected to the standard instructions on the basis of alleged burden shifting, the trial judge below agreed to modify the standard instructions to address Taylor's concerns (V11/405-06; V25/2404-2455). Specifically, as to the burden shifting issue, the judge switched the language to provide that the jury must determine whether the aggravating factors outweighed the mitigation

[3] If Taylor were challenging the denial of requested jury instructions, his argument would be subject to an abuse of discretion standard. Darling v. State, 808 So. 2d 145, 163 (Fla. 2002). However, the judge below granted his request, and in fact modified the standard jury instructions. He does not challenge the modified instructions as given or the refusal to incorporate additional defense instructional requests. Since his argument is limited to the facial validity of the standard instructions (which were not given to his jury), the standard of review is de novo.

(V26/2620-21; V29/3120). The judge acknowledged that the law did not require her to deviate from the standard instructions, but noted that she intended to provide "extreme due process" to Mr. Taylor to ensure that his trial was constitutionally sound (V11/405).

Following the modification, Taylor did not continue to object to the standard instructions as unconstitutionally shifting the burden of proof. The only instructional issue preserved for appellate review was the extent to which Taylor's proposed penalty phase instruction alternatives (found at V8/1179-1211) differed from the instructions actually given by the court (see V25/2404-55; V26/2580-2598, discussing final objections to penalty phase instructions). Taylor has made no effort to explain how the instructions actually given failed to address his concerns, or to analyze any practical differences between the instructions he requested and those actually provided to the jury.[4] Therefore, his current argument was not the instructional issue preserved for appellate review, and must be denied as procedurally barred.

In addition, Taylor's burden shifting claim has been rejected many times. See Shellito v. State, 701 So. 2d 837, 842-43 (Fla. 1997); Robinson v. State, 574 So. 2d 108, 113, n.6

[4] At trial, he acknowledged that the court's changes relieved his major concerns (V25/2404).

(Fla. 1991); Arango v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 U.S. 1140 (1982). Taylor has offered no reasonable basis for departing from the well established precedent rejecting his claim. Obviously, any possible defect in the standard instructions would be harmless in this case, since Taylor's jury did not receive the standard instructions. He is not entitled to a new penalty phase proceeding on this issue.

ISSUE VI

WHETHER FLORIDA'S STANDARD JURY INSTRUCTIONS VIOLATE CALDWELL V. MISSISSIPPI.

Taylor's final issue asserts that Florida's standard jury instructions unconstitutionally denigrate and minimize the role of the jury in the sentencing process, in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). Once again, this issue has not been preserved for appellate review, as the standard instructions were not provided to Taylor's jury, and his trial objection was directed to the instructions as given (V26/2580-81, 2592-96, 2598, 2619-21; V29/3119-28). Taylor fails to acknowledge that the court below made a concerted effort to describe the jury role as accurately as possible, and to emphasize the importance of the jury's recommendation beyond that noted in the standard instruction (V11/405-06; V12/503-504; V26/2620; V29/3119-20).

In addition, this Court's consistent rejection of this claim compels the denial of relief. Everett v. State, 893 So. 2d 1278, 1282 (Fla. 2004) (noting standard instructions have been repeatedly upheld against this claim). Further, such error would be harmless in this case, since the standard instructions were not given. Taylor's plea for a new sentencing on this issue must be denied as procedurally barred and meritless.

CONCLUSION

Based on the foregoing arguments and authorities, this Court must affirm the judgments and sentences imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea Norgard, Special Assistant Public Defender, P. O. Box 811, Bartow, Florida, 33830, this _____ day of August, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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