IN THE SUPREME COURT OF FLORIDA

STEPHEN RICHARD TAYLOR,

Petitioner,

v.

WALTER A. MCNEIL,
Secretary, Fla. Dept. Corr.,

Respondent.

Case No. SC10-143

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION & PRELIMINARY STATEMENT

This Response In Opposition To Petition for Writ of Habeas Corpus opposes each aspect of Petitioner Steven Richard Taylor's Petition for Writ of Habeas Corpus. This Response is filed pursuant to Fla.R.App.P. 9.100(j) and this Honorable Court's Order dated January 27, 2010.

The following reference conventions are used in this Response, unless otherwise indicated in the discussion:

"Taylor" or "Petitioner"	The Petitioner Steven Richard Taylor in this case;
"Petition"	Taylor's Petition for Writ of Habeas Corpus filed in this Court 1/27/2010;
"Response"	This Response In Opposition To Petition for Writ of Habeas Corpus;
"R"	The record volumes from the direct appeal of this case, culminating in the Florida Supreme Court opinion reported at Taylor v. State, 630 So. 2d 1038 (Fla. 1993);
"TT"	The trial transcript volumes from the direct appeal of this case;
"PCR"	The postconviction record on appeal;
"IAC"	Ineffective assistance of counsel.

Any applicable volumes are designated with Roman numerals, and any applicable page numbers are designated with Arabic numbers, for example "R/I 5-6" would designate pages 5-to-6 of volume I of the record on appeal.

Unless the contrary is indicated, **bold-typeface** and any **bold-underlined** emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; case citations within quotations are *italicized*, and other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

Respondent submits a Case Timeline as an overview of the major events in the case and then summarizes aspects of the record that are most pertinent to resolving the two issues of this habeas petition. Additional details are discussed under each issue.

Case Timeline.

DATE	NATURE OF PLEADING OR EVENT
9/15/1990-9/16/1990	Victim Alice Vest was murdered in her home (See, e.g., TT/XVII 204-205, 218-47);
3/7/1991 & 9/12/1991	Indictment charging Taylor with the Murder of Ms. Vest and with a Burglary on her dwelling (R/I 5-7) and then a superseding Indictment adding Sexual Battery on Ms. Vest(R/I 78-80);
10/7/1991-10/10/1991	Guilt-phase of jury trial (TT/XVII 181-TT/XXI 801), resulting in the jury finding Taylor guilty as charged of the three counts (TT/XXI 797-99; R/II 214-16);
10/17/1991	Penalty-phase of jury trial (TT/XXI 802-879), resulting in the jury recommending the death penalty by a vote of 10-2 (TT/XXI 879-82; R/II 261);
11/6/1991; 12/9/1991	Sentencing proceedings (TT/XXIII; TT/XXV), resulting in the trial court imposing the death penalty on the murder and prison sentences on the other counts (TT/XXV 903-906; R/II 280-307);
1992	Direct-Appeal Initial Brief by David A. Davis on Taylor's behalf in SC #79,080 (**the IAC claims in Petition pertain to this appeal**);
12/16/1993	On direct appeal, this Court in Taylor v. State, 630 So.2d 1038 (Fla. 1993), rejected five guilt-phase and three penalty-phase issues;
10/3/1994	United States Supreme Court denied certiorari at Taylor v. Florida, 513 U.S. 832, 115 S.Ct. 107 (1994);
1995-2009	State postconviction proceedings in the trial court

	and pending appeal to this Court (PCR/I-PCR/XI);
1/27/2010	Taylor's habeas Petition, to which this pleading responds in opposition.

Because the Petition now claims that appellate counsel was ineffective in not raising two claims in the 1992 direct appeal, Respondent provides as background this Court's summary of the trial evidence and findings when it affirmed the convictions and death sentence on direct appeal. Respondent also excerpts, from that same opinion, lists of the direct appeal issues.

The Murder and Sentencing.

> The record reflects that on September 15, 1990, at about 11:30 p.m., the victim, fifty-nine-year-old Alice Vest, returned to her mobile home in Jacksonville after spending the evening with a friend. Earlier that evening, the appellant, Steven Richard Taylor, and two friends were out driving and listening to the radio. Around midnight, the driver of the car dropped off Taylor and his friend [Gerald Murray[1]], who was later to become his accomplice, near the victim's neighborhood.
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> Sometime in the early morning hours of September 16, a Ford Ranchero was stolen from a residence near the place where Taylor had been dropped off. At about 4:30 a.m., after the vehicle had been stolen, a passing motorist noticed the Ford Ranchero parked in a driveway next door to the mobile home where the victim lived. Later that morning, the Ford Ranchero was found abandoned behind a used car dealership only a few blocks from where Taylor lived at the time.
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> On the same morning, neighbors discovered the victim's battered body in the bedroom of her mobile home. The medical examiner testified that the victim had been stabbed approximately twenty times, strangled, and sexually assaulted. The medical examiner further testified that most of the stab wounds were made with a knife found at the scene of the crime, while the remaining stab wounds were made with a pair of scissors that were also found at the scene. The

[1] The convictions and death sentence of co-perpetrator Murray were affirmed in Murray v. State, 3 So.3d 1108 (Fla. 2009); Murray's case is now at the postconviction stage in the trial court.

medical examiner stated that the victim was alive while she was being stabbed, that she was strangled with an electrical cord, and that the strangulation had occurred after the victim was stabbed.

The medical examiner also testified that the victim's lower jaw had multiple fractures and that she had received several blows to her head. The examiner testified that the fractures of the victim's jaw could have resulted from being struck with a broken bottle found on the bed next to the victim, and that contusions to the victim's head were consistent with being struck by a metal bar and candlestick also found at the scene. Finally, the medical examiner testified that the victim's breasts were bruised, and that the bruises resulted from 'impacting, sucking, or squeezing' while she was alive. In the medical examiner's opinion, the victim was alive at most ten minutes from the first stabbing to the strangulation. On cross-examination, the examiner stated that he did not know whether the victim was conscious during all or any part of the attack.

The testimony at trial also revealed that the phone line to the mobile home had been cut, that the home had been burglarized, and that various pieces of jewelry were missing.

In December of 1990, Taylor moved out of the duplex he had been sharing with a friend. In January, 1991, while Taylor's former roommate was removing a fence behind the duplex, he discovered a small plastic bag buried in the ground near the fence. The bag contained the pieces of jewelry taken from the victim's home during the attack and burglary. The roommate turned the jewelry over to the police and gave a statement. Later that month, Taylor visited the duplex with some friends. The former roommate testified that, at some point during the visit, Taylor went into the backyard and stared at the place where the fence had stood. During the following month, Taylor again returned to the duplex with friends. One of the accompanying friends testified that Taylor went into the backyard and returned a few minutes later with dirty hands. In response to the friend's inquiry as to what he was doing, Taylor allegedly responded that he had left some things there and that they were gone.

On February 14, 1991, the Duval County sheriff's office executed a search warrant on Taylor which authorized the officers to take blood, saliva, and hair samples from Taylor. Taylor was taken to the nurses' station at the county jail so that the samples could be taken, but not before Taylor invoked his right to counsel. Later that day, after the samples were taken, Taylor asked the investigating officer how long it would take to get the results back. Instead of directly responding to the question, the investigating officer asked Taylor why he wanted to know. Taylor responded that he was just wondering when they would be back out to pick him up. Taylor did not have long to wait. Two days later, on February 16, Taylor was arrested, and, on

March 3, a grand jury returned a two-count indictment against Taylor for first-degree murder and burglary. The indictment was amended on September 12, 1991, to add a third count for sexual battery.

At trial, the State presented the testimony of Timothy Cowart, who had shared a cell with Taylor in the Duval County jail. Cowart testified that, in a jailhouse conversation with Taylor in early April, Taylor stated that he had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead. Cowart also testified that Taylor said the State could place him, but not his accomplice, at the scene of the crime, and that the State could convict him with the evidence it had. Taylor allegedly asked Cowart to hide a gun and handcuff key in the bathroom at the hospital; Taylor would then feign an illness, get taken to the hospital, and have a chance to escape.

A Florida Department of Law Enforcement lab analyst, who was an expert in serology, testified that semen found on a bed covering and on a vaginal swab taken from the victim could not be tested. However, the analyst testified that semen found in the victim's blouse matched Taylor's DNA profile.

In the guilt phase, Taylor presented only one witness, an agent of the Federal Bureau of Investigation. The agent testified that certain hairs found on the victim's body and clothing matched the pubic hairs of Taylor's accomplice. On cross-examination, the agent conceded that it is possible to commit a sexual battery and not leave any fibers or hair. Taylor then rested his case and the jury found him guilty as charged.

At the penalty phase proceeding, the State rested without presenting any additional evidence. Taylor presented the testimony of five witnesses. First, Taylor called Charles Miles, who lived next door to Taylor during Taylor's adolescence. Miles stated that Taylor frequently played with Miles' son and that Taylor was always very polite and respectful. Miles testified that on one occasion he and Taylor sat in Miles' garage and talked at length about religion. Taylor's next witness was Lloyd King, his uncle. King testified that Taylor had always been a polite person. The third witness, Judy Rogers, was a friend of the family who testified that she thought Taylor had a learning disability. Taylor's next witness was another uncle, Don King, who testified that, during fifth and sixth grades, Taylor experienced difficulty in reading and that his reading comprehension was poor. King also stated that Taylor was a very passive person. As his last witness, Taylor called his adoptive mother, Lenette Taylor, who testified that Taylor had experienced difficulty concentrating in school and that she had tried unsuccessfully to get him into special education classes. She

testified that Taylor's I.Q. had been tested and found to be around 68 to 70, which, according to her, is in the mildly retarded range. On cross-examination, she acknowledged that, in 1979, when he was nine years old, Taylor had tested in a normal intellectual range.[2] The record further reflects that, although defense counsel had Taylor examined by two mental health experts, counsel found it to be in Taylor's best interest not to present the experts' testimony at trial. As an additional mitigating factor, Taylor offered evidence that he was only twenty years old at the time of the murder.

The jury recommended the death sentence by a vote of ten to two. In sentencing Taylor to death, the trial judge found the following aggravating factors: (1) the murder was committed during the course of a burglary and/or sexual battery; (2) the murder was committed for financial gain; and (3) the murder was committed in an especially heinous, atrocious, or cruel manner. As the sole nonstatutory mitigating factor, the trial judge found that Taylor was mildly retarded. The trial judge sentenced Taylor to death for the first-degree murder, to fifteen years' imprisonment for the burglary, and to twenty-seven years' imprisonment for the sexual battery.

Taylor, 630 So.2d at 1039-41.

Direct Appeal Issues.

Guilt Phase

In his appeal of the guilt phase of his trial, Taylor claims that the trial court erred in: (1) denying Taylor's motion to suppress statements he made to a police officer while he was in custody and after invoking his right to counsel; (2) instructing the jury that it could consider Taylor's efforts to escape from the Duval County jail; (3) admitting evidence that Taylor wanted a fellow inmate to secure a gun and handcuff key and hide them in the hospital bathroom so that he could escape; (4) admitting evidence that the stolen vehicle was seen parked near the victim's mobile home on the morning of the murder and found later that day within several blocks of Taylor's residence; and (5) admitting cumulative photographs of the victim's body.

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[2] On postconviction, Taylor raised a mental retardation claim (See, e.g., PCR/XI 2054-57), but he has not pursued mental retardation as an issue in the pending postconviction appeal in this Court (SC09-1382).

Penalty Phase

> Regarding the penalty phase of his trial, Taylor raises the following three claims: (1) whether the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (2) whether the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating factor; and (3) whether it is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17, of the Florida Constitution to execute a mentally retarded[3] person.

Taylor, 630 So.2d at 1041-42. After the listings of the issues, this

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[3] As footnoted supra, in postconviction, Taylor raised a mental retardation claim, but he has not pursued it in his appeal from the trial court's denial of postconviction relief. In postconviction proceedings, Taylor introduced no new evidence of mental retardation. (See, e.g., PCR/VI 1108-14, 1130-37)

On the other hand, a mental retardation claim was raised on direct appeal, which this Court rejected:

> The only evidence of Taylor's alleged mental retardation was presented by his mother, who testified that Taylor's IQ had been tested and that his IQ was 68 to 70. She also stated that Taylor's IQ was tested in 1979, when Taylor was nine years old, and was found to be normal for his age. No other evidence of Taylor's mental condition was presented. The record does indicate, however, that Taylor was examined by two mental health experts and that his trial counsel determined that it would be in Taylor's best interest for neither expert to testify. Consequently, neither the jury, the trial judge, nor this Court has any other empirical data of Taylor's mental condition. In his sentencing order, the trial judge found Taylor was 'mildly retarded' and that his mild retardation was a nonstatutory mitigating factor even though Taylor 'was a functioning adult; living away from the parental home; engaging in adult occupations and the father of a child.' In weighing the mitigating and aggravating circumstances, the trial judge gave 'this one mitigating circumstance slight weight.' We find that this record supports the trial judge's conclusion and the imposition of the death penalty.

Taylor, 630 So.2d at 1043. Justice Barkett's concurring opinion concluded that "it is clear that the evidence for mental retardation here rests on speculative and poorly substantiated testimony, that even if mental retardation exists it is much less serious than that at issue in Hall [Hall v. State, 614 So.2d 473, 479-82 (Fla.1993) (Barkett, C.J., dissenting)]. Were the evidence of retardation firmer, I might be inclined to a different result." Taylor, 630 So.2d at 1043-44.

Court's opinion discussed each issue.

ARGUMENTS IN OPPOSITION TO EACH HABEAS CLAIM

General Principles and Scope of Habeas Review.

ISSUES I and II raise two claims alleging that Taylor's direct-appeal appellate counsel was ineffective in 1992.

"Habeas petitions are the proper vehicle by which to raise ineffective assistance of appellate counsel claims, and the analysis of these claims follows the two-pronged analysis of *Strickland* [Strickland v. Washington, 466 U.S. 668 (1984)] as to both deficient performance and prejudice." Davis v. State, 875 So.2d 359, 372-73 (Fla. 2003)(citing Rutherford v. Moore, 774 So.2d 637, 642 (Fla. 2000)).

To prevail, the Petition must meet both of Strickland's prongs. See, e.g., Strickland, 466 U.S. at 687 ("two components...counsel's performance was deficient...deficient performance prejudiced the defense"); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)("court need not address the performance prong if the defendant cannot meet the prejudice prong, ... or vice versa").

Concerning the application of Strickland's first prong to an IAC appellate counsel claim, "this Court must determine … whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance." Lowe v. State, 2 So.3d 21, 42 (Fla. 2008).

In other words, Taylor must establish that his counsel's choice of direct-appeal issues was "so patently unreasonable that no competent attorney would have chosen it," Haliburton v. Singletary, 691 So.2d 466, 471 (Fla. 1997)(Strickland claim attacking trial counsel).

"In raising such a claim, '[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based.'" Lowe, 2 So.3d at 42 (quoting Freeman v. State, 761 So.2d 1055, 1069 (Fla. 2000)).

"The object of an ineffectiveness claim is not to grade counsel's performance." 466 U.S. at 697. The standard is also not whether counsel would have had "nothing to lose" in pursuing a matter. See Knowles v. Mirzayance, __U.S.__, 129 S.Ct. 1411, 1419 (2009)(reversed Court of Appeals, which used "… improper standard of review … [of] blam[ing] counsel for abandoning the NGI claim because there was nothing to lose by pursuing it").

"[A]ppellate counsel [cannot] be deemed ineffective for failing to prevail on an issue that was raised and rejected on direct appeal." Lowe, 2 So.3d at 42 (citing Spencer v. State, 842 So.2d 52 (Fla. 2003)). An adverse decision on an issue in the direct appeal procedurally bars it from a subsequent habeas proceeding, and a direct appeal issue is not properly brought in a habeas petition. See Jones v. Moore, 794 So.2d 579, 583 n.6 (Fla. 2001)(citing Parker v. Dugger, 550 So.2d 459, 460 (Fla. 1989) (habeas is not proper to relitigate issues that could have been or were raised on direct appeal)).

Appellate counsel's performance is not deficient if the legal issue that appellate counsel failed to raise was meritless or would have had "little or no chance of success." Spencer, 842 So.2d at 74. Appellate counsel has a "professional duty to winnow out weaker arguments in order to concentrate on key issues" even in capital cases. Thompson v. State, 759 So.2d 650, 656, n.5 (Fla. 2000)(citing Cave v. State, 476 So.2d 180, 183 n.1 (Fla. 1985)).

Consistent with the prohibition against evaluating counsel based upon hindsight, an IAC claim is not properly based upon case law released after the direct appeal. See Bradley v. State, 2010 WL 26522, *13, SC07-1964 & SC08-1813 (Fla. Jan. 7, 2010)(revised opinion; "counsel cannot be deemed ineffective for failing to predict a later Supreme Court decision")(citing Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982)); State v. Lewis, 838 So. 2d 1102, 1122 (Fla. 2002) ("appellate counsel is not considered ineffective for failing to anticipate a change in law"); Nelms v. State, 596 So.2d 441, 442 (Fla. 1992)(counsel not responsible for case law decided three years later); see also Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838 (1993)(Strickland's prohibition against evaluating trial defense counsel's performance based on hindsight is a protection for counsel).

Generally, "appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object." Spencer, 842 So.2d at 74. Thus, demonstrating fundamental error in the trial is a necessary condition for establishing an IAC claim based upon an unpreserved alleged error. See Spencer, 842 So.2d at 74.

For Strickland's prejudice prong, the petitioner must show that the appellate process was compromised to such a degree as to undermine confidence in the correctness of the result. Rutherford, 774 So.2d at 643. Strickland's prejudice prong requires a showing that the appellate court would have afforded relief on appeal. See United States v. Phillips, 210 F.3d 345, 350 (5th Cir. 2000).

Where a defendant has been provided a counsel on appeal who has followed state procedure, there is a "strong … presum[ption] that the result of the proceedings on appeal is reliable," and a petitioner must "prove the presumption incorrect in his particular case." Smith v. Robbins, 528 U.S. 259, 286-87 (2000).

Analogously, a federal habeas petitioner cannot prevail on ineffective assistance of appellate counsel unless the issue was a "dead bang winner." Moore v. Gibson, 195 F.3d 1152, 1180 (10th Cir. 1999).

Here, neither of the two habeas issues meet the foregoing tests.

ISSUE I: HAS THE PETITION DEMONSTRATED IAC OF APPELLATE COUNSEL BASED UPON THE TRIAL COURT NOT CONDUCTING A FRYE HEARING SUA SPONTE (PETITION 9-16, RESTATED)

ISSUE I contends that the trial court should have sua sponte required a Frye hearing[4] for the admissibility of a DNA analysis; that this omission

[4] It appears that Taylor's defense counsel, while he conducted extensive examinations of the DNA witness at trial and refused to stipulate to that witness's expertise (See TT/XIX 556-69, 585-86, 594-623), did not request a formal Frye hearing.

constituted fundamental error; and that appellate counsel's failure to raise it on direct appeal is Strickland IAC. ISSUE I fails to demonstrate either of Strickland's prongs. It has no merit.

As a preliminary policy matter, Respondent notes that the Petition's position would establish a per se rule requiring a Frye hearing whenever there is any anticipated evidence in a scientifically developing area regardless of the situation in a particular case. Therefore, even where the defendant does not contest his presence at the crime scene or contends that sex with the victim was consensual or contends that an accomplice was the main perpetrator, a Frye hearing would be required. See Jackson v. State, 983 So.2d 562, 576 (Fla. 2008)(discussion of fundamental error as "structural defects"). Respondent submits that there should be no such per-se rule.

In addition to the public policy rationale against a per-se rule, a "short answer" to this issue is that the Petition fails to cite to any controlling case law that existed in 1992,[5] when appellate counsel wrote

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[5] For example, the Petition's footnote (p. 14 n.4) to Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA **1994**), quashed State v. Vargas, 667 So.2d 175 (Fla. 1995), is irrelevant here due to its vintage. Further, the Petition overlooks a number of aspects of the First DCA's Vargas opinion, in addition to this Court quashing it (albeit on a search and seizure ground), that belie ISSUE I. For example, "Dr. Tracey testified as an expert in the field of molecular biology and population genetics. He had worked and done research in **RFLP** analysis, and had reviewed work done at the FDLE lab, and said it is **widely accepted** in the general scientific community as a reliable testing method." Dr. Tracey's population-statistics testimony concerned "principally within ethnic or within racial groups." Vargas, 640 So.2d at 1146. Taylor is white. (See, e.g., R/I 1) "Dr. Wakeland testified

his Initial Brief, that held that the DNA test here must be tested in a Frye hearing even where a Frye hearing is not requested. Thus, the Petition fails to cite to any case law in 1992 clearly indicating that failure to conduct a Frye hearing constitutes fundamental error. As such, the Petition fails to meet its burden of demonstrating that appellate counsel's performance was unreasonable or that inclusion of such an issue on appeal was so obvious at that time that any competent appellate attorney would have raised it. See, e.g., Bradley, 2010 WL 26522, *13 (citing Muhammad, 426 So.2d at 538); Lewis, 838 So. 2d at 1122 ("appellate counsel is not considered ineffective for failing to anticipate a change in law"); Nelms, 596 So.2d at 442 (counsel not responsible for case law decided three years later).

Therefore, Armstrong v. State, 862 So.2d 705, 713 (Fla. 2003), rejected a Frye-based claim against trial counsel concerning its 1991 trial:

> We further note the error in Armstrong's assertion that his trial counsel provided ineffective assistance by failing to challenge more specific elements of DNA testing, such as autoradiograms and population substructuring, through a *Frye* hearing. This trial occurred in 1991, six years prior to this Court's clarification of

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[that] … the existing controversy in the scientific community relates 'totally' to the calculation of the probability that someone else in the population could also match the crime scene DNA sample" but admitted that "he was not an expert in forensic DNA analysis, and he had not done any forensic work. He agreed that the concept of applying population genetics to DNA profiles was **widely accepted** within the scientific community, and that **a large number of labs use the FBI data bases**." Id. at 1147. The First DCA ultimately held that the FBI databases would not support DNA results at a level of "one in 30 million and one in 60 million" but that "a more conservative calculation may be possible, which would be generally accepted in the relevant scientific community." Id. at 1150-51.

> the *Frye* test in *Brim v. State*, 695 So.2d 268 (Fla. 1997), that each stage of the DNA process, i.e., the methodology for determining DNA profiles, as well as the statistical calculations used to report the test results, are subject to the *Frye* test. Armstrong's trial counsel cannot be found ineffective for not demanding the satisfaction of a more complex test than was required by the law at the time of trial.

The same rationale applies here to the hindsighted IAC appellate counsel claim.

The Petition (p. 15) does cite to a **1984** Florida case of Bundy v. State, 455 So.2d 330 (Fla. 1984), but the Petition fails to discuss how it might relate to the ISSUE I fundamental-error claim. Bundy, 455 So.2d at 343, does discuss the use of some scientific evidence, but it does not address fundamental error and concludes: "Reviewing the trial judge's determination in light of the massive pretrial and trial record pertaining to this issue, we find that the trial judge did not abuse his discretion by so ruling. We therefore find appellant's contention to be without merit." No reasonable appellate counsel would have concluded that Bundy requires a Frye appellate issue contending fundamental error, and the Petition's burden is to demonstrate that no competent appellate counsel would have omitted it.

Concerning Strickland's prejudice prong, the Petition's failure to present any 1992 controlling case law undermines the claim rather than undermining confidence in the outcome of the appeal. Thus, the Petition fails to establish either of Strickland's two prongs when its burden was to demonstrate both.

In sum, the Petition is fatally flawed due to its failure to cite to any palpable law that should have triggered appellate counsel to raise a

lack of a formal Frye hearing as fundamental error.

The Petition's hindsighted discussion fails to make the case for fundamental error even almost 20 years after the trial. A fundamental error is "error that '"reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error."'" Kilgore v. State, 688 So.2d 895, 898 (Fla. 1996)(quoting State v. Delva, 575 So.2d 643, 644-45 (Fla. 1991)). This Court has characterized fundamental error as "structural." Jackson, 983 So.2d at 576. "[T]he fundamental error doctrine should be used 'very guardedly,'" Hopkins v. State, 632 So.2d 1372, 1374 (Fla. 1994), and, therefore, even alleged Constitutional issues can constitute non-fundamental error, See Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). See also White v. State, 753 So.2d 548, 549 (Fla. 1999)(state Constitutional due process "not raised to the trial court or to the district court of appeal during the direct appeal from his conviction"; "not preserved"); Hill v. State, 549 So.2d 179, 182 (Fla. 1989)("constitutional argument grounded on due process and *Chambers* was not presented to the trial court … procedurally bars"); Frengut v. Vanderpol, 927 So.2d 148, 153 (Fla. 4th DCA 2006)("We do not address this [res judicata] issue ... not preserved").

Accordingly, issues of evidentiary admissibility have been subjected to the preservation requirement. Indeed, this Court recently applied those principles to several claims in the direct appeal of Taylor's accomplice, Gerald Murray. For example, based on preservation, Murray v. State, 3 So.3d

1108, 1116 n.4 (Fla. 2009), rejected an appellate challenge to the admissibility of the testimony of a "latent print expert" that explained an aspect of the chain of custody.

More to the point, Hadden v. State, 690 So.2d 573, 580 (Fla. 1997), applied preservation to Frye testing:

> [I]t is only upon proper objection that the novel scientific evidence offered is unreliable that a trial court must make this determination. Unless the party against whom the evidence is being offered makes this specific objection, the trial court will not have committed error in admitting the evidence.

Hadden, 690 So.2d at 580, discussed Glendening v. State, 536 So.2d 212 (Fla. **1988**), which was case law in 1992, thereby indicating to a reasonable appellate counsel at that time that Frye-type testing was subject to preservation principles:

> [I]n *Glendening v. State*, 536 So.2d 212 (Fla. 1988), we addressed the question of whether it was improper for an expert witness to testify to her opinion about whether the alleged victim had been sexually abused. *Glendening*, 536 So.2d at 219-20. The defendant objected to this question. However, **the objection was not on the basis that the testimony was scientifically unreliable**; rather, the objection was that the question called for an opinion on the ultimate issue in the case and that the witness was not competent to make this conclusion. *Id*. at 220. As the defendant did not make a *Frye* objection, the only basis upon which the trial court could rule on this evidence was the relevancy standard for expert testimony as outlined in the evidence code. *Glendening*.[FN6] **Accordingly, this was the only basis for the appellate court to rule on the evidence**. *See Terry v. State*, 668 So.2d 954, 961 (Fla.1996) (finding that in order for an argument to be cognizable on appeal, it must be the specific contention asserted as the legal ground for objection, exception, or motion below); *Steinhorst v. State*, 412 So.2d 332, 338 (Fla.1982) (same).
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> [FN6] Similarly, in *Toro v. State*, 642 So.2d 78 (Fla. 5th DCA 1994), the district court found that the defendant's objection at trial that the testimony of the State's expert exceeded the scope of the proffer was **insufficient to preserve the issue of whether this testimony was scientifically reliable under *Frye***.

Respondent submits that under Hadden's analysis of Glendening, any appellate claim of fundamental error would have failed on direct appeal. A fortiori, given Glendening, the Petition has failed to demonstrate that all reasonable and competent appellate counsels in 1992 would have asserted a Frye claim that had not been preserved in the trial court. Further, Hadden and its approval of Toro render this habeas claim meritless. While it is not appropriate to hindsightedly evaluate counsel's performance based on subsequent case law, Strickland's prejudice prong is not demonstrated where subsequent case law undermines the basis for the claim. See Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838 (1993)(basis of claim overruled by subsequent case law; "Court of Appeals, which had decided *Collins* in 1985, overruled it in *Perry* four years later"; "To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him"). See also Wright v. State, 857 So.2d 861, 876 (Fla. 2003)(IAC appellate counsel; "Wright next argues that appellate counsel failed to raise the fact that Wright objected to the State's questioning of the hair expert"; a "self-vouching" claim unpreserved).

Thus, while the Petition's discussion (p. 13) of Hayes v. State, 660 So.2d 257, 264 (Fla. 1995)(RFLP), cannot be used against appellate counsel's performance writing an Initial brief three years earlier, it nevertheless undermines the Petition's Strickland claim. Hayes took

"judicial notice that DNA test results are generally accepted as reliable."[6] Hayes' qualification concerning Frye-testing how the RFLP testing was implemented in a particular case illustrates the case-bound nature of the inquiry and therefore its non-fundamental nature. Hence, Henyard v. State, 689 So.2d 239, 249 (Fla. 1996), discussed the Frye evidence there and reasoned that "contrary to Henyard's assertion, Hayes does not hold that testing procedures which do not meet NRC recommendations are per se unreliable and thereby render the test results inadmissible."

The rejection of an IAC trial counsel claim in Overton v. State, 976 So.2d 536, 551 (Fla. 2007), is instructive:

> Prior to the *Frye* hearing, even the trial court acknowledged that case law established that RFLP DNA testing results would be admitted here and the *Frye* hearing was unnecessary on that DNA matter. Moreover, Dr. Litman previously advised Overton's counsel that **RFLP DNA evidence should be admitted in this case**. Overton's counsel requested the *Frye* hearing to challenge only the newer STR technology. Overton correctly concedes that his counsel possessed proper discovery from the FDLE Lab to challenge the RFLP testing that the FDLE Lab conducted, but, contrary to Overton's position, **there was no reason to challenge the clearly admissible RFLP DNA evidence**.

Thus, there was no per se requirement of a full Frye hearing in Overton. Further, like here (TT/XIX 594-22), in Overton, 976 So.2d at 551, defense counsel used cross-examination to adversarially challenge the evidence. Accordingly, Overton, 976 So.2d at 553 n.15, also rejected a claim "that the failure of his counsel to participate more fully during the Frye

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[6] If postconviction evidence is improperly used here, even Taylor's own expert testified that the RFLP technique became generally accepted as a reliable technique (although by 2007, he said that he knew of no labs that were still using it). (PCR/IX 443-45)

hearing was per se ineffectiveness under *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)." To the contrary, in Overton, cross-examination satisfied requisite "adversarial testing." Analogously, here defense counsel's cross-examination of the FDLE expert during trial (TT/XIX 594-22) belies any suggestion that the lack of a Frye hearing undermined the structural integrity of the trial, thereby further negating the Petition's fundamental error contention.

To summarize the discussion thus far: Murray, Glendening, Hadden, Wright, Toro, Hayes, Henyard, and Overton each support the rejection of ISSUE I.

As purported support for this issue, the Petition (pp. 9-12), at length, block-quotes and discusses Zack v. State, 911 So.2d 1190, 1198, 1201 (Fla. 2005). The Petition essentially argues as follows: since Zack held that the omission of a Frye hearing in that case was not fundamental and since the facts in this case are different from Zack, it must have been fundamental in this case. To the contrary, Zack does not assist the Petition in meeting its Strickland burdens. First, Zack's vintage is 2005 and so it is improper to evaluate appellate counsel's Strickland effectiveness using a case that did not exist until 13 years after the Initial brief; appellate counsel could not have known about Zack in 1992. Second, Zack held that there was no fundamental error there; it is not precedent for showing when there is fundamental error. Third, the leap the Petition takes from Zack to this case illustrates how non-obvious any arguable application of Zack is, thereby failing to show that "no competent

attorney" would have omitted the Frye claim.

Additionally, fourth, Zack's analysis, in rejecting that appellant's interpretation of case law concerning fundamental error, suggests that fundamental error is not implicated:

> Zack argues that pursuant to *Arnold v. State*, 807 So.2d 136 (Fla. 4th DCA 2002), the failure to order a *Frye* hearing on new or novel scientific evidence is fundamental error. Actually, *Arnold* states that the trial court needs to give all the parties an opportunity to be heard at a *Frye* hearing, and that the opposing party should be permitted to offer evidence in rebuttal. *Arnold* does not address a trial court's duty to sua sponte order a *Frye* hearing.

Zack, 911 So.2d at 1201. Zack, 911 So.2d at 1201, then discussed the prejudice prong and concluded that under the facts of that case, there was no prejudice.

> We have considered and rejected Zack's claim that a *Frye* hearing was necessary. We will not reverse this conviction based on the trial court's failure to order its own *Frye* hearing when we have determined that the admission of the disputed evidence was not prejudicial.

Like its attempted use of a case decided 13 years after appellate counsel wrote the Initial Brief, the Petition (pp. 12, 14) also digresses into a discussion of evidence from a postconviction evidentiary hearing held in 2007 (PCR/VII et seq.), 15 years after the Initial Brief was written. As in attempting to argue Zack, such a hindsighted argument is inappropriate under Strickland. (The State addresses the postconviction evidence in its Answer Brief on the postconviction appeal that accompanies this habeas; it is improper to discuss it here.)

Further, as summarized in this Court's direct appeal opinion, the trial evidence was not "weak at best" and not insufficient (Petition 12-13). To the contrary, arguendo, even if Frye had been preserved and raised on

appeal and even if error had been established on direct appeal, any error would have been harmless on direct appeal, which further negates Strickland's prejudice prong here. **In addition to the DNA evidence** –

- The night of the murder, Taylor, along with accomplice Murray, was dropped off near the victim's residence (TT/XVIII 367-74);
- The night of the murder, a Ford Ranchero was stolen from a residence near the place where Taylor and Murray had been dropped off (TT/XVIII 384-89); at 4:30 a.m. it was seen backed into a driveway next door to the mobile home where the victim lived (TT/XVIII 378-82); and, later that morning, it was found abandoned only a few blocks from where Taylor lived at the time (TT/XVIII 390-92; see TT/XIX 477-83);
- Jewelry stolen from the victim (See, e.g., TT/XVII 207-15) during the murder was recovered from the backyard of where Taylor had lived; it had been buried there (TT/XVIII 396-402; see TT/XIX 474-76);
- Within weeks, Taylor was seen in the backyard looking at the area where the jewelry had been buried (TT/XVIII 402-404), then about a month later Taylor went into the backyard and returned a few minutes later with dirty hands; in response to the friend's inquiry as to what he was doing, Taylor responded that he had left some things there and that they were gone (TT/XVIII 406-409);
- Taylor admitted to a detective that scientific analysis would reveal incriminating evidence when he asked the investigating officer how long it would take to get the results back because he was just wondering when they would be back out to pick him up (See TT/XIX 504-505);
- Taylor admitted to inmate Timothy Cowart that he[7] had been involved in a burglary and that it was a messy job; that the lady surprised him inside the trailer; and that he stabbed her and choked her and then strangled her with a cord to make sure she was dead (TT/XIX 508-509, 516); Taylor said that the State could place him, but not his accomplice, at the scene of the crime, that the State could convict him with the evidence it had, and

[7] Cowart's trial testimony is the subject of one of the postconviction claims pending before this Court. The State discusses it in its Answer brief in case SC09-1382.

that he was concerned he would receive life without parole or death (TT/XIX 515-516); Taylor asked Cowart to help him escape because of Taylor's concern about this case (TT/XIX 512);

- FDLE serologist Hanson testified that she identified semen on the victim's blouse and on the victim's comforter as having Taylor's blood type (Type A secretor) (TT XIX 538-41).

See also this Court's summary of the facts, block-quoted supra, in Taylor, 630 So.2d at 1039-41; Jackson, 983 So.2d at 576-78 (harmless error-type analysis applied to a claim alleging "failure to provide defense counsel"; "complete deprivation of counsel during resentencing, as occurred in *Gonzalez*, is fundamental error … partial deprivation of counsel under the facts in this case, however, is not").

In other words, and returning to the Petition's Strickland burdens, appellate counsel was not on notice that the trial court's omission of a Frye hearing was fundamental error so that any competent appellate attorney would have included the claim on direct appeal, and, if that issue had been raised in the direct appeal, it would not have prevailed because it was not fundamental error. Neither Strickland deficiency nor Strickland prejudice has been shown.

For each and all of the foregoing reasons, ISSUE I has no merit.

ISSUE II: HAS THE PETITION DEMONSTRATED IAC BASED UPON TAYLOR'S COUNSEL NOT RAISING ON DIRECT APPEAL CLAIMS PERTAINING TO THE PROSECUTOR'S ARGUMENT AND JURY INSTRUCTIONS ON THE PRESUMPTION OF INNOCENCE (PETITION 16-18, RESTATED)[8]

ISSUE II claims that it was fundamental error for the prosecutor to argue the following to the jury:

> You will recall that during our opening statements I was somewhat careful to not overstate the evidence because during your opening statements there is, as the Court pointed out, a presumption of innocence. And the presumption of innocence does not leave the defendant **until evidence has been presented that wipes out that presumption**. There is no longer a presumption of innocence, the evidence has been presented, more evidence than I referred to in the opening statement.

(TT/XXI 698-99) The prosecutor then detailed the evidence proving Taylor's guilt. (See TT/XXI 699-726) The Petition also contends that the following jury instruction constituted fundamental error:

> The defendant has entered his plea of not guilty. This means you must presume or believe that the defendant is innocent. This presumption of innocence stays with the defendant as to each material allegation in the charge and through each stage of the trial **until that presumption of innocence has been overcome by the evidence to the exclusion of and beyond a reasonable doubt**. Now, to overcome the defendant's presumption of innocence, the State has the burden of proving the following two elements: Number one, that the crime with which the defendant is charged was in fact committed, and two, that the defendant is the person who committed the crime.

(R/XXI 762-63) The trial court then provided additional details concerning the State's burden of proof. (See R/XXI 763-96)

ISSUE II argues that, since the prosecutor's argument and the jury instruction constituted fundamental error, it was IAC for appellate counsel

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[8] This issue overlaps ISSUE VII in SC09-1382, and so the Respondent's argument here overlaps the State's argument there.

not to raise these matters in his 1992 Initial brief. ISSUE II has failed to meet either of Petitioner's Strickland burdens.

As in the Petition's ISSUE I, this claim fails to cite to any controlling case law that would have alerted all competent appellate attorneys that it was fundamental error for the prosecutor to discuss the presumption of innocence and the trial court to instruct the jury as they did in this case. Indeed, the prosecutor did not misstate the law at all, but rather, simply argued that the State met its burden. See Dailey v. State, 965 So.2d 38, 44 (Fla. 2007)("the prosecutor's statements concerning Dailey's presumption of innocence … when read in context … appear to be a statement by the prosecutor of her belief that the State satisfied its burden of proof. Therefore, counsel's failure to object was not deficient"); Mann v. State, 603 So.2d 1141, 1143 (Fla. 1992)("Merely arguing a conclusion that can be drawn from the evidence is permissible fair comment"). If such a claim had been preserved at trial and raised on appeal, it would have been rejected. A fortiori, it did not constitute fundamental error. See discussion of fundamental error in ISSUE I supra.

Belcher v. State, 961 So.2d 239, 246 (Fla. 2007), rejected an IAC trial counsel claim that attacked a prosecutor's comment that was almost identical to this one:

> Belcher claims that trial counsel should have objected to the following statement by the prosecutor, Mr. De La Rionda, during voir dire questioning of the panel of prospective jurors:
>
> Mr. De La Rionda: Do all of you understand that as we sit here today the defendant, Mr. Belcher, is presumed to be innocent? Do all of you understand that?
>
> (Affirmative response from prospective jurors)

> Mr. De La Rionda: Okay. Do you understand that does not mean he is innocent? It means he is **presumed to be innocent until you hear the evidence to the contrary**? Can all of you agree with that?
>
> (Affirmative response from prospective jurors)

Belcher held, in part:

> The transcripts indicate that the prosecutor was merely explaining the presumption of innocence to prospective jurors. In addition, as the lower court concluded, **we do not see a proper basis for defense counsel to object**.

Further, concerning prejudice, Belcher, 961 So.2d 246-47, held:

> Belcher cannot establish any prejudice. He admits in his brief, and the trial transcripts confirm, that the jury was correctly instructed on both the presumption of innocence and the reasonable doubt standard of proof by the trial court.

Here, the jury was instructed in language that Belcher explicitly approved. Counsel's actions cannot be Strickland prejudicial where they were proper under subsequent case law. See Lockhart v. Fretwell, 506 U.S. 364.

Further, here it was clear to the jury that the State bore the burden of proving each and every element of the offense beyond a reasonable doubt. The trial judge told the jury in so many words in voir dire:

> I advise you that the defendant in every criminal case is presumed innocent. The defendant does not have the duty to prove himself innocent, and in fact, the defendant does not have to put on any evidence, nor does he have to testify. ***
>
> The State, the prosecution must prove the defendant guilty beyond and to the exclusion of every reasonable doubt. ***

(TT/XVII 107-108) Defense counsel, in voir dire, stressed the presumption and the State's burden. (See TT/XVII 150-53, 160) After the jury was sworn, the trial judge again instructed the jury on the State's burden:

> It is your solemn responsibility to determine if the State proves the charge beyond a reasonable doubt. ***

> ***
>
> I admonish you that should not form any definite or fixed opinion of this case until you have heard all of the evidence, the arguments of the attorneys, and the court's instructions on the law ***
>
> ***
>
> The defendant has entered his plea of not guilty. This means that you must presume or believe that the defendant is innocent. Now, this presumption of innocence stays with the defendant as to each material allegation in the charge and through each stage of the trial until that presumption of innocence has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. Now, to overcome the defendant's presumption of innocence, the State has the burden of proving the following elements: *** Now, that's the State's burden and the defendant is not required to prove anything.
>
> Whenever the words reasonable doubt are used you must consider the following: *** In summary, if you have a reasonable doubt then you should find the defendant not guilty, but if you have no reasonable doubt then you should find the defendant guilty.
>
> ***

(TT/XVII 189-94)

At the end of the trial and after the judge instructed the jury that the State has the burden of overcoming the presumption of innocence (TT/XXI 762-63), he explained:

> Now, the constitution requires the State to prove its accusations against the defendant. It is not necessary for the defendant to disprove anything, nor is the defendant required to prove his innocence. It is up to the State to prove the defendant guilty … .

(TT/XXI 766-67) A little later, the trial court reiterated the State's burden as to each charge (TT/XXI 770-74, 777-87), for example:

> Before … you can find the defendant guilty of first degree premeditated murder the State must prove the following elements beyond a reasonable doubt: ***

(TT/XXI 770) The trial court repeatedly reiterated the State's beyond-a-reasonable-doubt burden as it went over the verdict form with the jury.

(See TT/XXI 791-95)

Indeed, immediately after the passage from the prosecutor that this ISSUE II targets, the prosecutor detailed the evidence that he contended met the State's burden of proving the defendant guilty beyond a reasonable doubt. (See TT/XXI 712-26)

Under any pertinent case law, the prosecutor's argument and the judge's jury instruction were proper and certainly did not constitute fundamental error. A fortiori, neither the prosecutor's argument nor the jury instruction nor both-combined was fundamental error.

Williams v. State, 967 So.2d 735, 759 (Fla. 2007), rejected the claim regarding instructions pertaining to the presumption of innocence -

> that the trial court committed fundamental error by failing to instruct the jury that the presumption of innocence applied to the charge of felony murder. Williams notes that the trial court did instruct the jury that the presumption of innocence applied to the allegations in the indictment; however, felony murder was not alleged in the indictment.

Williams reasoned:

> This Court has held that **jury instructions 'are subject to the contemporaneous objection rule**, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred.' *Walls v. State*, 926 So.2d 1156, 1180 (Fla.2006) (*quoting State v. Delva*, 575 So.2d 643, 644 (Fla.1991)).

Williams "conclude[d] that the failure here to request a specific instruction on the presumption of innocence with regard to the felony murder charge waived the instant challenge." Williams, Id. at 759-60, also relied on a jury instruction much like the one here:

> In *McCrae v. State*, 510 So.2d 874 (Fla.1987), this Court held in postconviction proceedings that trial counsel was not ineffective for failing to request special additional instructions on the presumption of innocence because 'the general standard instructions on the

> presumption of innocence ... were sufficient to apprise the jury of the applicable principles.' *Id*. at 878. In the instant case, the trial court read the standard jury instruction regarding the presumption of innocence:
>
> > The defendant has entered a plea of not guilty. This means you must presume or believe that the defendant is innocent. The presumption stays with the Defendant, as to each material allegation in the indictment, through each stage of the trial, **unless it has been overcome by the evidence**, to the exclusion of and beyond a reasonable doubt.
>
> Therefore, even though the standard jury instruction for the presumption of innocence that the trial court read to the jurors referenced 'the indictment,' we conclude that the trial court's reading of this instruction was 'sufficient to apprise the jury of the applicable principles.' McCrae, 510 So.2d at 878.

See also Haliburton v. State, 561 So.2d 248, 251 (Fla. 1990)("sixth point on appeal is that the trial court committed error in refusing to declare a mistrial due to alleged attempts by the prosecutor to shift the burden of proof. The record discloses that the trial judge properly instructed the jury on the burden of proof and we find this argument without merit").

The Petition's attempted reliance upon Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990), is misplaced for several reasons. First, there unlike here, the prosecutor initially minimized and perhaps even mocked the presumption of innocence, arguing, for example, in voir dir:

> There's nothing magical about those terms [i.e., 'presumption of innocence' and proof 'beyond a reasonable doubt']. The presumption of a person being innocent was designed to protect those persons who are, indeed, not guilty of a crime [Objection] But was not intended to let those who are guilty escape justice. [Objection]

Id. at 471. Therefore, these comments set the stage for the prosecutor's closing argument in that case. Second, as detailed above, unlike Mahoney, here "the trial court's overall charge on the presumption of innocence and burden of proof was … sufficiently specific," 917 F.2d at 473-74, to ensure

that the jury understood the presumption and the prosecution's burden. Third, here, the prosecutor repeatedly accepted the beyond-a-reasonable burden on the State and properly argued that the evidence met that burden. (See TT/XXI 712-26) Fourth, Mahoney does not address the limited and precise language here. Fifth, Mahoney was not even decided by a court in this federal circuit. And, sixth, in Mahoney, the appellate claim was preserved with objections, rendering its holding not at a level of fundamental error. See also Coday v. State, 946 So.2d 988, 995 (Fla. 2006)(applied preservation principle to standard jury instruction on premeditation); Green v. State, 907 So.2d 489, 501-502 (Fla. 2005)("Green failed to object to the burglary instruction"; "Green's claim has not been preserved because he failed to object at trial")(applying Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990)); Overton v. State, 801 So.2d 877, 901 (Fla. 2001)("Issues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial"); Esty v. State, 642 So.2d 1074, 1079-80 (Fla. 1994)("defense counsel objected to the standard jury instruction on reasonable doubt" but "counsel never requested that a different instruction be given and never submitted an alternative instruction. Thus, the issue has not been preserved for review"); Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994)("Wuornos contends that the jury's role was improperly diminished by jury instructions and prosecutorial comments. This issue was waived for lack of a proper objection and, even if not waived, would be meritless").

Thus, Spencer v. State, 842 So.2d 52, 74 (Fla. 2003), rejected a

related claim and reasoned:

> Spencer also claims that appellate counsel was ineffective for failing to raise several other instances of prosecutorial misconduct even though no objection was raised at trial. This Court has stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object.

Spencer collected cases on preservation and fundamental error and cited, for example, Ferguson v. Singletary, 632 So.2d 53, 58 (Fla. 1993)(finding appellate counsel was not ineffective in failing to raise allegedly improper comments by the prosecutor which were not preserved for appeal by objection). See also Thompson v. State, 759 So.2d 650, 665 (Fla. 2000)("As for Thompson's alternative ineffectiveness claims, we have previously stated that trial counsel's failure to object to standard jury instructions that have not been invalidated by this Court does not render counsel's performance deficient").

Moreover, Respondent also submits, even if Belcher, Williams, and the other authorities discussed supra are ignored and even if one were to incorrectly conclude that there was error, any such error would be harmless in light of all of the other explanations, admonitions, and qualifications concerning the State's burden submitted to the jury and in light of the evidence of guilt as bulleted near the end of ISSUE I supra. See Wuornos, 644 So.2d at 1010 ("Wuornos also argues the State committed various forms of prosecutorial misconduct in the penalty phase"; "misstated the burden of proof regarding heightened premeditation"; "We find all of these claims to be poorly supported by the record and of minor consequence singly or in their totality. Any error would be harmless and clearly was cured by the

trial court's instructions to the jury").

For the forgoing reasons, the prosecutor's argument and the judge's instructions were not error at all, were certainly not fundamental error, and, if erroneous at all, were harmless. Any appellate claim would have been meritless and would not have prevailed; the Petition, therefore, has failed to demonstrate Strickland deficiency and Strickland prejudice. The Petition's burden was to demonstrate both prongs; it demonstrated neither.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court deny Taylor's habeas petition. Neither issue overcomes the "strong … presum[ption]," Smith v. Robbins, 528 U.S. at 286-87, supporting the reliability of the result of the direct appeal. Neither issue demonstrates a "dead bang winner," Moore v. Gibson, at 1180; indeed, both claims are losers.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on April 30, 2010: Michael P. Reiter, Esq.; 5313 Layton Drive; Venice, FL 34293.

CERTIFICATE OF COMPLIANCE

I certify that this Response was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
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