In the Supreme Court of Florida

JOHN CALVIN TAYLOR,

Appellant,

v. CASE NO. SC11-154

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR CLAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JOHN CALVIN TAYLOR, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

This is a postconviction appeal of a trial court's denial of an initial postconviction motion in a capital case. The facts of this case, as recited in the Florida Supreme Court's direct appeal opinion, are:

> The evidence presented at trial showed Jeff Holzer, the victim's husband, arrived home early on the morning of December 30, 1997, and became concerned because his wife was not at home. After calling the police and local hospitals to see if any accidents had been reported, he called the police to report his wife missing. Later that evening, Holzer's vehicle was discovered stuck in the mud on a fire break road in a wooded area. Holzer's body was discovered a short time later off the road in the woods. She had been stabbed nine times in the abdomen and upper chest. Holzer's clothing, including her pants and underwear, had been partially removed.
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> At trial, a forensic pathologist, Dr. Bonifacio Floro, testified that of Holzer's nine stab wounds, six had penetrated her heart and three had penetrated her left lung. Dr. Floro indicated each of the wounds was potentially fatal. According to Dr. Floro, one wound, which he believed to be the initial wound, was consistent with having been made by someone sitting in the passenger's seat while Holzer was seated in the driver's seat and the rest of the wounds were consistent with the victim lying on her back. Dr. Floro also indicated that there were wounds and other signs that were consistent with Holzer struggling to escape or protect herself. Additionally, Dr. Floro discovered two small bruises inside the victim's vagina and he opined that they were made no more than twelve hours before Holzer's death.
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> Police learned that Holzer had last been seen the previous day at Buddy Boy's, a small convenience store located in St. Johns County, Florida, where she was employed. Early in the afternoon of December 29, 1997, Holzer left work to deposit money for Buddy Boy's and also to deposit money for a small meat shop that was located behind Buddy Boy's.[1] Cindy Schmermund was Holzer's

[1] As part of her duties, Holzer would periodically take the money that was received for purchases at Buddy Boy's and deposit it in Buddy Boy's account at the Barnett Bank in Green Cove Springs, Florida. As a favor, she would occasionally make a deposit for the owner of the meat shop who banked at the First Union National Bank in Green Cove Springs, Florida. Bank records showed that Holzer deposited the money for the small meat shop at First Union National Bank in Green Cove Springs at 1:22 p.m. However, the second, larger deposit for Buddy Boy's was never made.

friend and coworker. Both Schmermund and Holzer knew Taylor from having worked at Buddy Boy's.[2] Schmermund remembered Holzer leaving around 1 p.m. to make the deposit, which had to be to the bank by 2 p.m. The deposit included cash and checks, with the cash portion of the deposit totaling more than $6000. Schmermund saw Holzer pull up to Buddy Boy's gas pumps with Taylor in the car. After pumping the gas, Holzer entered the store, and Schmermund questioned her as to why Taylor was in her car. Schmermund testified that Holzer said she was giving Taylor a ride to Green Cove Springs to pick up a rental car and that "[Taylor] was harmless. [I'll] be fine. Don't worry about it. I'll be back in a minute." Several other individuals, Joe Dunn, Arthur Mishoe, and Nolan Metcalf, also saw Taylor accompanying Holzer as she was leaving to make the deposit and each testified that they each heard Holzer making various statements about taking Taylor to Green Cove Springs, including statements that she did not want anyone to tell her husband that she was giving Taylor a ride.

On the day Holzer's body was discovered, Taylor was arrested for an unrelated burglary involving the theft of a briefcase from a vehicle. At the time of his arrest, Taylor was wearing a pair of boxer shorts that were later discovered to have a blood stain that contained genetic material that was consistent with the Holzer's DNA profile.

At trial, the State introduced the testimony of James Bullard and Michael McJunkin, who lived with Taylor in the mobile home near Buddy Boy's.[3] Both Bullard and McJunkin testified that Taylor made comments about wanting to have sex with Holzer. Bullard and McJunkin also testified that Taylor was having financial problems and had been having difficulty paying his bills. Additionally, Taylor had recently been involved in an accident with his truck. While he was waiting on the insurance payments, he was driving a rented white Geo Metro.

The State also introduced evidence showing Taylor had substantial sums of money on the day of Holzer's disappearance. Most notably, Taylor was photographed depositing $1700 into his bank account at 3:48 p.m., only a few hours after Holzer had deposited money for the meat shop. Before making the deposit, Taylor had a negative balance and had recently bounced several checks. That same afternoon, Taylor went to a restaurant and lounge to give the owner some money to cover some bad checks Taylor had written. Taylor also stopped by Garber Ford Mercury,

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[2] Buddy Boy's was located near Vineyard Trailer Park, where Taylor was living in a mobile home. Taylor frequently ate at a small restaurant located inside Buddy Boy's and the employees knew and recognized Taylor from his visits.

[3] At the time of the murder, McJunkin thought Taylor was his father, but later DNA testing showed that McJunkin was not Taylor's biological son.

a car dealership in Green Cove Springs, where he expressed interest in purchasing a truck.[4] [FN4] Additionally, on the evening of December 29, 1997, Taylor and McJunkin went to a local bar. A bartender testified that Taylor bought a number of drinks for other bar patrons and, by the end of the evening, he had incurred a bill of approximately $150 to $200. In addition to paying for the drinks, Taylor gave the bartender two $100 bills as a tip.

By early morning on December 30, 1997, the police had interviewed the witnesses who had seen Taylor with Holzer. The police also learned Holzer had not deposited the money into Buddy Boy's account. Although they did not discover her car and body until later in the evening, police also knew that Holzer had not been to feed or tend to her horse. The police dispatcher put out information with Taylor's address and a description of his rental car.

Deputy Chris Strickland was off duty and was driving with a friend in the vicinity of Vineyard Trailer Park when he learned from the dispatch about Holzer's disappearance. Strickland proceeded to Taylor's mobile home and discovered that Taylor's rental car was parked outside.[5] Strickland called in for a marked unit, and shortly thereafter, Deputy Bob Lindsey arrived. Deputies Strickland and Lindsey knocked on the door of the mobile home and McJunkin answered the door and invited the officers inside. Taylor had been taking a shower and walked into the living room of the mobile home wearing only a towel. Deputy Strickland suggested Taylor get dressed, and watched Taylor get dressed to make sure that Taylor did not arm himself. The deputies informed Taylor that Holzer was missing and that he had been the last person seen with her. They also told him that Detective Ronnie Lester wanted to speak with him at the station.

Shortly after Strickland and Lindsey entered the trailer, Deputies John Noble and Shawn Lee arrived and entered the open door of the trailer. When the other deputies arrived, Deputy Strickland and his friend left. Deputy Lindsey was given Taylor's driver's license and he took it to his patrol car to see if Taylor had any outstanding warrants. From his patrol car, Lindsey had an unobstructed view of Taylor sitting in a chair inside the mobile home. He observed Taylor reach into his pocket, remove something, and shove it under the cushion of the chair where he was sitting. Alarmed that Taylor had placed a weapon under the cushion, Lindsey went quickly into the mobile

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[4] On a previous occasion, Taylor had been to the dealership and filled out paperwork pursuant to financing the purchase of a truck.

[5] Police had been by the trailer earlier in the day, but Taylor and McJunkin were at Wal-Mart, where Taylor had purchased a new pair of shoes, and a shopping mall. McJunkin testified that Taylor gave him $200 while they were out shopping.

home and asked Taylor to get up and move toward the kitchen. When asked what he had concealed, Taylor denied placing anything under the cushion. Upon obtaining Taylor's permission, the deputies looked under the cushion and discovered a roll of cash, totaling around $1600. The police handcuffed Taylor, read him his rights, and took him outside to sit in the back seat of a patrol vehicle with the door open, at which point they removed the handcuffs. At Noble's request, Taylor signed two consent forms to search the mobile home and his rental car. Deputy Noble testified that Taylor told him there was more money under the passenger's seat of his car. Noble looked under the seat and observed a purple bag full of money.

McJunkin was a key witness for the State at trial. McJunkin testified that Taylor had occasionally talked about robbing Holzer. According to McJunkin, Taylor had chosen Holzer as his target because Buddy Boy's was close to the Vineyard Trailer Park and he knew when Holzer left to make deposits at the bank. On the morning of December 29, 1997, McJunkin and Taylor were staying at the house of Taylor's estranged wife, Mary Ann Taylor. McJunkin said that after Mrs. Taylor left for work, Taylor decided to rob Holzer. McJunkin drove Taylor to Buddy Boy's and dropped him off.[6] Taylor instructed McJunkin to return to Mrs. Taylor's house and wait for him to call. Later, Taylor called from a gas station in Green Cove Springs and told McJunkin to come pick him up. After picking Taylor up, McJunkin drove to a parking lot, where Taylor proceeded to count and separate large amounts of money that he had concealed in his waistband. Taylor put the money into a purple velvet bag that had contained a bottle of "Crown Royal" liquor. According to McJunkin, Taylor said that "if [Holzer] didn't show up within a couple days everything should be fine."

McJunkin testified that he and Taylor returned to the mobile home and Taylor changed his clothes and placed the clothes and shoes he had been wearing into a trash bag.[7] According to McJunkin, Taylor threw this trash bag into a dumpster behind the restaurant where he had paid for his bad checks. McJunkin testified that at some point as they drove from location to location, they crossed the Bridge of Lions in St. Augustine and as they were driving across, Taylor directed McJunkin to throw a knife off the bridge.

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[6] Two witnesses, Arthur Mishoe and his sister Heather Mishoe, saw an individual fitting McJunkin's description sitting in a white car near Buddy Boy's shortly before Holzer left to make the deposit.

[7] McJunkin testified that he was with Taylor when he went to the restaurant, car dealership, and the bank where Taylor deposited the $1,700. McJunkin was unsure of the exact chronology of events on the day of the murder. He was able to testify as to the locations he and Taylor traveled to, but he was not sure in which order they went to the various locations.

> At trial, Taylor's defense was that McJunkin had committed the robbery and murder. Taylor took the stand in his own defense. Taylor did not deny requesting a ride or leaving Buddy Boy's with Holzer in her car. Taylor alleged that he walked to Buddy Boy's after McJunkin had taken his rental car to the mobile home, leaving Taylor stranded at his wife's house. Taylor claimed that he asked Holzer to take him to his mobile home to pick up his rental car. According to Taylor's version of events, Holzer dropped him off at the mobile home and McJunkin was there playing video games. Taylor claimed Holzer gave McJunkin a ride to Green Cove Springs to visit a friend and some time later, McJunkin called him from a gas station near the scene of the crime to pick him up. During his testimony, Taylor denied telling Deputy Noble about additional money under the passenger's seat of the rental car. Taylor also explained that the money he deposited in his bank account and the money that he hid under the seat cushion in the trailer was money he had stolen from the briefcase of a man named Chip Yelton.[8]

Taylor v. State, 855 So.2d 1, 9-13 (Fla. 2003)(footnotes in original)

The jury found Taylor guilty of first-degree murder and robbery with a deadly weapon. At the penalty phase, the State presented evidence of a prior violent felony Taylor had committed and Taylor introduced the testimony of a number of witnesses with regard to his troubled childhood. By a vote of ten to two, the jury recommended the death penalty, and the trial court sentenced Taylor to death. The trial court found four aggravating circumstances, two of which were

[8] It was Taylor's confession to this burglary that resulted in his arrest on December 30, 1997. During the defense case, Yelton testified that his briefcase had been stolen out of his truck a week before the murder. Yelton could not remember exactly how much money the briefcase contained, but he believed it was no less than $3,000 and no more than $5,000. In closing arguments, the State argued that the amount of money found in the car plus the other money that could be attributed to Taylor (i.e., bank deposit, money hidden under the cushion, and known spending) exceeded the amount of money in Yelton's briefcase. Hence, the State argued it was important to Taylor's defense that he deny knowing about the additional money located in the car.

merged.[9] In mitigation, the court found Taylor had proven three nonstatutory mitigating circumstances.[10] After weighing the aggravators and mitigators, the trial court determined that the aggravation "greatly outweighs the relatively insignificant nonstatutory circumstances established by this record" and sentenced Taylor to death. *Taylor*, 855 So.2d at 13. (footnotes in the original).

On appeal to the Florida Supreme Court, Taylor raised nine issues and an additional supplemental issue. The nine original issues were: (1) the trial court erred in failing to suppress evidence seized from Taylor's house and vehicle, Taylor's statements, and the clothing seized from Taylor when he was arrested; (2) the trial court erred in letting several witnesses testify about hearsay statements made

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[9] The four aggravating circumstances were: (1) Taylor was previously convicted of another violent felony; (2) the crime was committed while Taylor was engaged in the commission of a robbery; (3) the murder was committed for pecuniary gain; and (4) Taylor was under sentence of imprisonment at the time the murder was committed. The trial court merged the murder in the course of a felony and pecuniary gain aggravators and considered them as a single aggravator.

[10] The trial court's order reflected the following mitigation: (1) Taylor was raised in a dysfunctional family and suffered neglect and abuse during his first eleven years (proven); (2) by the time Taylor was encouraged to have an interest in education, it was too late, and he dropped out of junior high school (proven); (3) as a child and adult Taylor was known to be a thief, but not a violent person and an act of violence is out of character for him (not proven); (4) Taylor makes friends easily, enjoys people who enjoy him, and does good deeds for friends and strangers (not proven); (5) Taylor enjoys family relationships and activities (not proven); (6) Taylor has shown that he can be a skilled, reliable, and diligent worker inside and outside of prison (proven); (7) Taylor performs well when he has structure in his life (not proven); (8) Taylor has been and can continue to be a positive influence in the lives of family members (not proven).

by the deceased victim; (3) the trial court erred in admitting the credit application that Taylor filled out at the car dealership; (4) the trial court erred in allowing a prior consistent statement by Deputy Noble to be introduced; (5) the trial court erred in admitting the pair of boxer shorts with the victim's blood stains; (6) the marital privilege was violated when Taylor's wife was required to testify about certain communications she had with Taylor; (7) the trial court erred in instructing the jury on and finding the "under sentence of imprisonment" aggravating circumstance; (8) the trial court erred in failing to find several nonstatutory mitigating circumstances; and (9) the death sentence is disproportionate. *Taylor*, 855 So.2d at 13, n.11. Taylor also filed a supplemental brief on whether Florida's death penalty sentencing scheme is unconstitutional in light of the United States Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The Florida Supreme Court affirmed the convictions and sentence. *Taylor v. State*, 855 So.2d 1 (Fla. 2003). The opinion was a three Justice plurality opinion. Justice Lewis, who was the required fourth Justice, concurred without opinion. His entire concurrence reads: “concurs in result as to the conviction, and concurs as to the sentence.” Thus, there was no actual opinion regarding the issues raised. The Florida Supreme Court rejected the *Apprendi* Sixth Amendment constitutional challenge relying on their prior precedent in *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), *cert. denied*, 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*,

831 So.2d 143 (Fla.2002), *cert. denied*, 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002). *Taylor*, 855 So.2d at n.11.

Taylor filed a motion for rehearing regarding the motion to suppress issue arguing that Taylor's consent to the search of the cushion, the search of his car and to go down to the station was involuntary because his detention was illegal. Taylor cited the United States Supreme Court's then recently released opinion in *Kaupp v. Texas*, 538 U.S. 626, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003), as support. The Florida Supreme Court denied rehearing and issued the mandate on September 8, 2003.

Taylor then sought certiorari review in the United States Supreme Court raising the motion to suppress issue arguing that the Florida Supreme Court's Fourth Amendment analysis was in conflict with *Kaupp*. The United States Supreme Court denied certiorari review on March 8, 2004. *Taylor v. Florida*, 541 U.S. 905, 124 S.Ct. 1605, 158 L.Ed.2d 248 (2004). So, Taylor's conviction and sentence became final on March 8, 2004.

Taylor filed his first 3.851 motion in this Court on October 27, 2004, raising two claims. On April 23, 2007, Taylor, after the appointment of new counsel, filed an amended 3.851 motion, raising eleven (11) claims: 1) that the rule of criminal procedure governing capital postconviction public records production, rule 3.852(f), violates due process and equal protection; 2) that, under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), all aggravators must be found by the jury by written special verdicts; 3) numerous claims of ineffective assistance of trial counsel in guilt

and penalty phase; 4) that the prosecutors, now Judge Collins and now State Attoreny Angela Corey, knowingly presented the false testimony of Michael McJunkin in violation of *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); 5) newly discovered evidence that McJunkin was the actual perpetrator; 6) a claim of cumulative error; 7) claim of actual innocence based on witnesses' contradiction; 8) a claim that trial counsel was ineffective for failing to obtain a complete appellate record because a charge conference and a couple of bench conferences were not included in the record on appeal; 9) under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), all aggravators must be found by the jury by written special verdicts; 10) Florida's death penalty statute is a violation of the Eighth Amendment; and 11) Florida's lethal injection statute is unconstitutional on various grounds including the prohibition on cruel and unusual punishment.

The State agreed to an evidentiary hearing on claim III which contained numerous subclaims of ineffective assistance of trial counsel. The State, however, asserted that the remaining claims, claims I, II, IV, V, VI, VII, VIII, IX, X and XI, should be summarily denied. On October 31, 2007, the trial court conducted a *Huff* hearing. The trial court granted an evidentiary hearing on claims III, IV, and V.

On April 10, 2010, the trial court conducted an evidentiary hearing. Both parties submitted post-evidentiary hearing memorandums of law. On October 28, 2010, the trial court denied the

amended 3.851 motion to postconviction relief. The trial court's order addressed all eleven claims.

SUMMARY OF ARGUMENT

ISSUE I

Taylor asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Patrick McGuiness, were ineffective for not presenting the testimony of the retained mental health expert, Dr. Krop, at penalty phase. The trial court properly found no deficient performance and no prejudice. As the trial court found, trial counsel "made an informed decision not to call Dr. Krop." Dr. Krop's opinion raised the possibility of a diagnosis of anti-social personality disorder and Dr. Krop found no major mental illness. Nor is there any prejudice. Taylor did not present any mental health expert at the evidentiary hearing. Dr. Krop's finding of no mental illness was not challenged in any manner. The trial court properly denied this claim following an evidentiary hearing on the matter.

ISSUE II

Taylor also asserts that his trial attorneys, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Patrick McGuiness, were ineffective for not filing a motion for change of venue. The claim fails for lack of proof. Despite being granted an evidentiary hearing on the claim, counsel produced no real evidence to support the claim. Additionally, there was no deficient performance for not filing a meriltess motion for change of venue. There was no legal basis to file such a motion because there was no difficulty in selecting a jury. Nor was there any prejudice. Any

motion for change of venue would have been denied by the trial court because the prosecution occurred in a different county and in a different judicial circuit. Thus, the trial court properly denied the claim of ineffective for not filing a motion for change of venue.

ISSUE III

Taylor next asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Patrick McGuiness, were ineffective for not objecting to the prosecutor referring to the proceeds of this murder as "blood money" and referring to the big grin on Taylor's face when depositing the proceeds in his bank account. There was no deficient performance because any objection would have been baseless. The trial court properly found no deficient performance. Nor is there any prejudice because any such objection would have been properly overruled. The trial court properly denied this claim of ineffectiveness for not objecting following an evidentiary hearing on the claim.

ISSUE IV

Taylor asserts his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, this claim is procedurally barred because the Sixth Amendment right to a jury trial claim was raised in the direct appeal of this case. Furthermore, *Ring* does not apply to this particular case because the prior violent felony aggravator and the under sentence of imprisonment are present. Recidivist aggravators are exempt from

the holding in *Ring*. Both of these aggravators are not required to be found by the jury under any view of *Ring*. Taylor had previously been convicted of armed robbery. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury convicted Taylor of robbery with a deadly weapon. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Taylor's jury recommended a death sentence by a vote of ten to two. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PRESENT THE TESTIMONY OF THE RETAINED MENTAL HEALTH EXPERT FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Taylor asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Patrick McGuiness, were ineffective for not presenting the testimony of the retained mental health expert, Dr. Krop, at penalty phase. The trial court properly found no deficient performance and no prejudice. As the trial court found, trial counsel "made an informed decision not to call Dr. Krop." Dr. Krop's opinion raised the possibility of a diagnosis of anti-social personality disorder and Dr. Krop found no major mental illness. Nor is there any prejudice. Taylor did not present any mental health expert at the evidentiary hearing. Dr. Krop's finding of no mental illness was not challenged in any manner. The trial court properly denied this claim following an evidentiary hearing on the matter.

The trial court's ruling

Taylor raised a claim of ineffectiveness for failing to consult and present the retained mental health expert as subclaim six and subclaim fourteen of Claim III in his postconviction motion. The trial court rejected the claim of insufficient consultation finding that trial counsel had "many phone calls and discussions with Dr. Krop" as far back as September 21, 1998. The trial court also found

that there was no deficient performance because trial counsel "made an informed decision not to call Dr. Krop." The trial court also found no prejudice because anti-social personality disorder was the diagnosis.

Evidentiary hearing testimony

At the evidentiary hearing, defense counsel testified that he made the decision not to call Dr. Krop to testify along with co-counsel McGuinness and Taylor himself. (Evid. H at 8). Defense counsel testified that he wrote a letter dated September 21, 1998 to Dr. Krop, who had been appointed as a confidential mental health expert. (Evid. H at 36 exhibit #17). Dr. Krop conducted an interview on September 23, 1998 and defense counsel was present for that interview and took notes. (Evid. H at 36). Defense counsel had personal notes to follow up with Dr. Krop regarding Taylor's I.Q. and impulsivity. (Evid H. at 37). Defense counsel was "pretty certain" that Dr. Krop could not provide anything "useful" for mitigation in the penalty phase. (Evid H. at 37). Defense counsel spoke with Dr. Krop and Dr. Krop stated that "when you have impulsivity, you have anti-social." (Evid H. at 37). Taylor was high on the MMPI four scales meaning Taylor acts without thinking about the consequences. (Evid. H at 38). Dr. Krop reported to defense counsel that he did not see any neuropsychological problems. (Evid. H at 38). Defense counsel sent a family tree and his notes of his interviews with Taylor's family members to Dr. Krop. (Evid. H at 39).

Defense counsel Chipperfield testified that he discussed the decision about whether or not to present Dr. Krop with co-counsel McGinness. (Evid. H at 39-40). Defense counsel's trial notes contain a notation that Taylor, according to Dr. Krop, was "probably anti-social." (Evid. H at 40). Defense counsel explained that the problem with an anti-social diagnosis is that it is often viewed by the jury "to be aggravating rather than mitigating." (Evid H. at 41).

Defense counsel was familiar with the prosecutor, Angela Corey, and knew that she was "capable" and would know how to handle an anti-social diagnosis. (Evid H at 41). There was also a concern that the State would get an expert as well. (Evid H at 42). But even if it was too late for the State to hire its own mental health expert to diagnose Taylor as anti-social, the diagnosis from a defense expert presents a problem because it is "very easy" for a prosecutor to exploit such a diagnosis. (Evid H at 42). Defense counsel explained that the prosecutor can "just run through the D.S.M. IV" criteria and cross-examine the defense expert on those criteria. (Evid H at 42).

Defense counsel testified that anti-social is a diagnosis that makes a person look like he will not obey the law in the future which is "not a good thing to put in front of the jury." (Evid H at 42). The possibility of anti-social being raised was a factor in defense counsel's decision not to present Dr. Krop. (Evid H at 43).

Dr. Krop's report dated September 8, 1999 stated that there was no evidence of any major mental illness or organic brain damage. (Evid H at 43). Dr. Krop had told defense counsel that there was no major

mental illness on the phone as well. (Evid H at 43). Dr. Krop's evaluation found that the neuropsychological testing was "inconsistent with any organic impairment" and that there was "no evidence of any major mental illness" and no "significant psychopathology." (Dr. Krop's report dated September 8, 1999). Dr. Krop also found, despite "a history of antisocial behavior", the the MMPI-2 does not reflect antisocial tendencies. His opinion was that Taylor's past involvement with the criminal justice system was related to his immaturity, poor impulse control and past substance abuse. Dr. Krop's opinion was Mr. Taylor's "antisocial tendencies have decreased over the years." Dr. Krop thought that Taylor would continue to develop a more mature approach to problem solving and noted research that antisocial personality disorders tend to burn out with age.

Standard of review

This Court reviews claim of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Merits

The Florida Supreme Court recently explained the legal test for ineffective assistance of counsel claims in *Bradley v. State,* 33 So.3d 664, 671-672 (Fla. 2010)(citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A claim for ineffective assistance of trial counsel must satisfy two criteria. First, counsel's performance must be shown to be deficient. Deficient performance in this context means that counsel's performance fell below the standard guaranteed by the Sixth Amendment. When examining counsel's performance, an objective standard of reasonableness applies, and great deference is given to counsel's performance. The defendant bears the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" This Court has made clear that strategic decisions do not constitute ineffective assistance of counsel. There is a strong presumption that trial counsel's performance was not ineffective.

Second, the deficient performance must have prejudiced the defendant, ultimately depriving the defendant of a fair trial with a reliable result. A defendant must do more than speculate that an error affected the outcome. Prejudice is met only if there is a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Both deficient performance and prejudice must be shown.

The presumption that defense counsel's decisions were reasonable is even stronger when dealing with highly experienced capital defense counsel. *Reed v. Sec'y, Fla. Dept. of Corr.,* 593 F.3d 1217, 1244 (11th Cir. 2010)(noting defense counsel's "extensive experience as a trial lawyer" where counsel had thirteen years' experience and had tried more than thirty homicide cases, most of which were capital cases and explaining that the presumption that counsel's performance is reasonable is "even stronger" when counsel is particularly experienced citing *Chandler v. United States*, 218 F.3d 1305, 1316 & n. 18 (11th Cir. 2000)(en banc)). Lead defense counsel, Chief Assistant Public Defender Alan Chipperfield, has vast experience in capital cases. Alan Chipperfield was admitted to the Florida Bar in 1976 and is currently the Chief Assistant Public Defender in the 8th Judicial Circuit. He started handling capital cases in approximately 1983. (Evid H at 39). So, at the time of this trial in 1999, defense counsel had been handling capital cases for a large, busy Public Defenders Office for over fifteen years. He is widely considered one of the finest and most experienced capital defenders in North Florida.

Furthermore, Chief Assistant Public Defender Chipperfield had co-counsel, Assistant Public Defender Patrick McGuinness. Co-counsel McGinness had been handling capital cases before 1983. (Evid H at 39). Here, not one, but two highly experienced public defenders, both of whom had tried numerous capital cases, made these strategic decisions. (Evid H at 40).

Chief Assistant Public Defender Chipperfield testified that his standard practice was "to do a study of the defendant's entire life

which means you contact relatives including not just parents, brothers and sisters but extended family cousins, neighbors, coaches, ministers, anybody who has had contact with him over his lifetime, get employment records, psychiatric records, criminal records, visit his home." (Evid. H at 10). Chief APD Chipperfield testified at the evidentiary hearing that he obtained Taylor's school records from the Polaski County Special School District in Little Rock, Arkansas. (Evid H at 51-52 discussing exhibit #21). Chief APD Chipperfield also contacted school teachers, such as Mr. Miller, but Mr. Miller did not recall Taylor. (Evid H at 52). Chief APD Chipperfield testified that he also obtained Taylor's employment records. (Evid H at 53 discussing exhibit #22). Defense counsel spoke with Roy Osbun who worked with Taylor when Taylor was about 16 or 17 years old. (Evid H at 53). Defense counsel's file contains a written summary of Osbun's possible mitigation testimony. (Evid H at 53). Defense counsel, additionally, spoke with Rick Halbert of Halbert Pipe & Steel and Danny Burch of the Arkansas River Boat Company. (Evid H at 53).

Chief APD Chipperfield also obtained Taylor's prison records. (Evid H at 54). Defense counsel spoke with two prison guards. (Evid H at 54). Defense counsel also spoke with Deputy Warden Diane Branham or Tim Murphy regarding Taylor's prior incarceration. (Evid H at 55).

Chief APD Chipperfield also interviewed numerous family members. Defense counsel Chipperfield and co-counsel APD Patrick McGuinness personally went to Arkansas to investigate Taylor's background. (Evid H at 56,60). They met with Todd Taylor, Jeff Taylor, and Barbara

Taylor. Defense counsel took notes of these meetings. (Evid H at 56 discussing exhibit #24).

Chief APD Chipperfield also investigated Taylor's prior convictions in an attempt to minimize their weight. (Evid H at 57 discussing exhibit #25). Defense counsel noted that many of the prior convictions were property crimes. (Evid H at 57). Taylor had 22 prior convictions and defense counsel wanted the jury to know that the majority of these prior convictions were non-violent. (Evid H at 57-58). Defense counsel verified that each of the prior convictions actually existed and investigated the details as necessary. (Evid H at 58). Defense counsel may have contacted some of the defense counsel involved in the prior convictions was well. (Evid H at 59). Defense counsel also took the deposition of the victim of the prior robbery, Robin Lynn Manning. (Evid H at 59).

Chief APD Chipperfield took all the steps that a good attorney defending a capital case takes. He investigated his client's background, spoke with family members, got school records, prison records, criminal history records and consulted a mental health expert, Dr. Krop. He retained Dr. Krop at least 10 months prior to the trial.[11] While Chief Assistant Public Defender Chipperfield consulted with Dr. Krop he choose not to present Dr. Krop at the penalty phase.

[11] At the evidentiary hearing a letter from Chief APD Chipperfield to Dr. Krop was introduced as Exhibit #17. (Evid H at 36 exhibit #17). The letter was written in September of 1998. The trial was in July of 1999. So, defense counsel started consulting with a mental health expert approximately ten months before trial.

It is important to note what defense counsel actually did at the penalty phase when discussing a claim of ineffectiveness regarding failing to present more mitigation at the penalty phase of a capital trial. Chief APD Chipperfield presented numerous witnesses during the penalty phase, including the defendant's father, the defendant's younger sister, the defendant's half-brother, two aunts, a niece, a step-daughter, a bus driver who drove the defendant to school as a child, two former employers, a step-mother, an ex-wife, his current wife, a former cellmate, a supervisor at Arizona State Prison who knew the defendant, and a licensed clinical social worker who had interviewed the defendant's family.

There was no deficient performance. The mental health expert defense counsel consulted prior to the penalty phase, Dr. Krop, informed defense counsel that Taylor did not have any major mental illness. And there was nothing presented at the evidentiary hearing to contradict this. Taylor presented no mental health expert testimony at the evidentiary hearing. No evidence was presented that Taylor suffers from any major mental illness (or even minor mental illness) that defense counsel did not discover and present. There simply was no mental mitigation to present. If "counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the experts' findings does not constitute ineffective assistance of counsel." *Hodges v. State*, 885 So.2d 338, 348 (Fla. 2004).

Instead of mental mitigation (which did not exist and still does not), defense counsel presented an extensive mitigation case based

on lay witnesses testimony in a effort to humanize Taylor including his extreme poverty. This Court has repeatedly held that a mitigation strategy of presenting family members in an effort to humanize a capital defendant is a reasonable penalty phase strategy. *Bradley v. State*, 33 So.3d 664, 679 (Fla. 2010)(rejecting a claim of ineffective for failing to present a mental health expert where counsel presented a humanization mitigation case in an attempt to portray the defendant as "a hard-working, productive member of society who had simply deviated from his generally good character"citing numerous cases); *Rutherford v. State*, 727 So.2d 216, 223 (Fla. 1998)(finding the presentation of a "humanization" mitigation case where counsel presented family members rather than mental health experts to testify about alcoholism and PTSD was not ineffective).

Nor was there any prejudice. The trial court found as one of the three non-statutory mitigators that was proven that "Taylor was raised in a dysfunctional family and suffered neglect and abuse during his first eleven years." *Taylor*, 855 So.2d at 13, n.10. Taylor's troubled childhood was proven and was found as mitigating. Furthermore, postconviction counsel did not present a mental health expert at the evidentiary hearing or any testimony regarding any other diagnosis. This is not a case where significant mental mitigation exists that was not presented to the jury. *Orme v. State*, 896 So.2d 725, 733 (Fla. 2005)(finding counsel ineffective where counsel failed to discover defendant's bipolar disorder).

Postconviction counsel faults trial counsel for not requesting the appointment of a second mental health expert. IB at 16. Defense

counsel is not required to go expert shopping to be effective. *Dufour v. State*, 905 So.2d 42, 55-59 (Fla. 2005)(rejecting a claim that counsel was ineffective for not seeking a second mental health expert after receiving an unfavorable report diagnosing the defendant as anti-social from the first mental health expert citing *Asay v. State*, 769 So.2d 974, 984 (Fla. 2000)). Postconviction counsel did not take its own advice to trial counsel - he did not get a second expert opinion either. Postconviction counsel did not present a mental health expert that had an alternative diagnosis at the evidentiary hearing.

This argument also ignores the problem that even if trial counsel was able to find a second defense expert who did not diagnosis Taylor as having an anti-social personality disorder, the prosecution will easily be able to find its own mental health expert that would have definitively diagnosed Taylor as being anti-social. As this Court explained in *Dufour*, when defense counsel makes a motion for a second expert, the motion puts the prosecution on notice that the first expert likely made an unfavorable diagnosis. *Dufour*, 905 So.2d at 57.

In *Wong v. Belmontes*, 558 U. S. -, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009), the Supreme Court per curiam reversed the Ninth Circuit's granting of habeas relief. The Court concluded that counsel was not ineffective at penalty phase for failing to investigate and present family and expert mitigating evidence. The Court rejected the claim in part because the family mitigation was cumulative. Belmontes also argued that counsel should have presented expert testimony in the penalty phase to "make connections between the various themes in the

mitigation case and explain to the jury how they could have contributed to Belmontes's involvement in criminal activity."

The *Belmontes* Court, after reasoning that there was no need for such expert testimony, also noted that any expert's testimony would have opened the door to damaging additional aggravation evidence. The Court observed that "the worst kind of bad evidence would have come in with the good" mitigation. The Court also observed that "[i]t is hard to imagine expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder."

In *Reed v. Sec'y, Fla. Dept. of Corr.*, 593 F.3d 1217, 1248 (11th Cir. 2010), the Eleventh Circuit rejected a claim that defense counsel in a capital case was ineffective for failing to present a mental health expert. The Court noted that the proposed mitigation evidence was weak, and most of it was alloyed with negative information. The diagnosis of antisocial personality disorder and narcissistic personality disorder "was more harmful to Reed than mitigating." *Reed*, 593 F.3d at 1248 (citing *Parker v. Sec'y, Fla. Dept. of Corr.*, 331 F.3d 764, 788 (11th Cir. 2003); *Clisby v. State of Ala.*, 26 F.3d 1054, 1056 & n.2 (11th Cir. 1994) and *Weeks v. Jones*, 26 F.3d 1030, 1035 n.4 (11th Cir. 1994)). The mental health expert himself in *Reed* admitted that it is an unflattering diagnosis. Indeed, as part of his diagnosis, Dr. Larson characterized Reed as selfish, self-indulgent, hedonistic, and exploitative. The *Reed* Court concluded that "[i]t is certainly not ineffective assistance of counsel for an attorney not to call an expert when doing so causes his client to run the risk

of having the state successfully make his client look like a sociopathic killer." *Reed*, 593 F.3d at 1249.

In *Bradley v. State*, 33 So.3d 664, 676-680 (Fla. 2010), this Court rejected a claim of ineffective assistance of counsel for failing to present a mental health expert in a capital case. Bradley asserted that the two experts defense counsel hired should have been presented to the jury during the penalty phase. Bradley also contented that counsel should have presented all mental health information to the judge at the *Spencer* hearing. The post-conviction court found that trial counsel conducted an extensive penalty phase and mitigation investigation. *Bradley*, 33 So.3d at 676.

At the evidentiary hearing, trial counsel testified that he obtained and reviewed records outlining Bradley's social and medical history including Bradley's drug treatment records, criminal history records, medical records, divorce records, child support records, and some records from the Department of Children and Families. Trial counsel hired Dr. Harry Krop, a psychologist, and Dr. Roger Szuch, a family counselor and expert in dysfunctional families, to assist him in preparation of possible mental health mitigation. *Bradley*, 33 So.3d at 677. When asked why he did not present the mental health experts to testify during the penalty phase, trial counsel explained that he did not ask his experts to testify because they had information that he wished to keep from the jury. Trial counsel decided that, instead of presenting potential mitigation through expert testimony, it would be better to present it through the testimony of Bradley's family. *Bradley*, 33 So.3d at 678.

The Florida Supreme Court found no deficient performance because the decision not to present the experts was a strategic choice "based on an informed and reasoned plan of action." *Bradley*, 33 So.3d at 679. Trial counsel "painstakingly" investigated potential mitigation, including mental mitigation material and then strategically determined that presenting all the drug and mental information to the jury would not be beneficial, would open the door to the prosecution's cross-examination concerning it, and would conflict with his theory that Bradley was generally a hard-working, productive member of society who had simply deviated from his generally good character." *Bradley*, 33 So.3d at 679 (citing humanizing cases). The Florida Supreme Court concluded that these "informed choices were reasonable strategic decisions." The Florida Supreme Court noted that Bradley presented no mental health experts at the evidentiary hearing.

The Florida Supreme Court also concluded that there was no prejudice from the failure to present experts at the penalty phase. *Bradley*, 33 So.3d at 680. The Florida Supreme Court explained that there is no reasonable probability that presenting the experts' testimony would have resulted in a lesser sentence in a case where there were four aggravating factors, including HAC and CCP. *Bradley*, 33 So.3d at 680. See also *Dufour v. State*, 905 So.2d 42, 55-59 (Fla. 2005)(explaining that "trial counsel is not deficient where he makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony" citing *Griffin v. State*, 866 So.2d 1, 9 (Fla. 2003) and *Reed v. State*, 875 So.2d 415, 437 (Fla. 2004)).

Here, defense counsel in this case hired the same two experts as in *Bradley*. (Evid H at 38-39).[12] Here, as in *Bradley*, the defendant presented no mental health expert at the evidentiary hearing. Here, as in *Bradley*, there is no reasonable probability that presenting the experts' testimony would have resulted in a lesser sentence in a case where there were four aggravating factors including a prior robbery that was similar to this robbery/murder and for which Taylor should have still been in prison for committing.

Contrary to postconviction counsel's assertion, there was indeed a strategic reason not to present Dr. Krop. IB at 17. Dr. Krop's preliminary, tentative diagnosis, during the initial telephone conversations with trial counsel, was anti-social personality disorder. This Court has repeatedly rejected claims of ineffectiveness for failing to present a mental health expert when anti-social personality disorder is the diagnosis. *Heath v. State*, 3 So.3d 1017, 1030 (Fla. 2009)(concluding that it was a reasonable strategic decision of counsel not to present to the jury evidence of defendant's antisocial personality disorder diagnosis because such evidence would harm rather than help the defendant's penalty phase presentation); *Jones v. State*, 998 So.2d 573, 585 (Fla. 2008)(rejecting a claim of ineffectiveness for failing to present mental health expert testimony as mitigating evidence because the only psychological diagnosis the experts could agree upon was that

[12] The transcript of the evidentiary hearing records Dr. Roger Szuch's name as Dr. Such but the reasonable inference from the description of the doctor area of expertise is that this is the same mitigation specialist as in *Bradley*.

Jones suffered from antisocial personality disorder which "would likely have proved more harmful than helpful."); *Looney v. State*, 941 So.2d 1017, 1028-1029 (Fla. 2006)(observing that: "this Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation."); *Reed v. State*, 875 So.2d 415, 437 (Fla. 2004)(stating: "this Court has acknowledged in the past that antisocial personality disorder is 'a trait most jurors tend to look disfavorably upon" quoting *Freeman v. State*, 852 So.2d 216, 224 (Fla. 2003)). In Judge Posner's words, "antisocial personality disorder" is merely "fancy language for being a murderer." *Lear v. Cowan*, 220 F.3d 825, 829 (7th Cir. 2000).

Dr. Krop had informed defense counsel that Taylor probably suffered from anti-social personality disorder. Defense counsel's notes reflect this fact. The trial court's decision is an implicit finding that defense counsel's testimony regarding his conversations with Dr. Krop was credible.

While Dr. Krop found no antisocial tendencies in his written report; he did note that Taylor had "a history of antisocial behavior." Dr. Krop's opinion in his written report was Mr. Taylor's "antisocial tendencies have decreased over the years." The prosecutor would have a field day with this conclusion, pointing out that Taylor had committed a similar crime years earlier but did not murder the victim in that crime, as he did in this case. And Taylor was suppose to be in prison for that crime when he committed this armed robbery/murder. Taylor's "antisocial tendencies" have increased, not decreased, over the years. The prosecutor certainly would not have

been shy about highlighting the inconsistency between Dr. Krop's opinions and Taylor's conduct in this case.

Additionally, even if Dr. Krop final diagnosis was that Taylor was not anti-social, the State could have obtained their own expert to diagnosis Taylor as being anti-social. The State could have presented an expert to clarify any waffling by the defense expert. Any true measure of the prejudice prong requires that courts foresee the prosecution likely steps if such mitigation is presented. Defense counsel was understandable wary of presenting mental health testimony, which raised the possibility of a diagnosis of anti-social personality disorder, when the defense expert could find no signs of any major mental illness. There was a serious possible downside to presenting mental mitigation but no upside.

Instead of presenting a mental health expert that could be cross-examined regarding a possible diagnosis of anti-social personality disorder, defense counsel presented a mitigation specialist who could not. Mr. Szuch was a mitigation specialist who testify during the penalty phase regarding Taylor's troubled childhood and that the Taylor family was "severely dysfunctional." (T. Vol. 19 2481); *Taylor*, 855 So.2d at 13 (noting "Taylor introduced the testimony of a number of witnesses with regard to his troubled childhood."). As a mitigation specialist, Mr. Szuch could not be cross-examined regarding Taylor's anti-social personality disorder. Postconviction counsel relies on trial counsel's description at the evidentiary hearing of Mr. Szuch as being "loosely" classified a mental health expert. Regardless of the classification or label, the

fact remains that a mitigation specialist, because he is not a true mental health expert (only a loosely classified one), cannot be cross-examined regarding a diagnosis because he does not make one. Far from being a weakness; their not being a true mental health expert is a strength. Indeed, that is often one of the reasons why they are employed.

Postconviction counsel also faults trial counsel for not asking the "right" questions of the mental health expert and for not specifically explaining the concept of the statutory mental mitigators to the expert. IB at 16. It is simply silly to assert that Dr. Krop does not know what the statutory mental mitigators are, or that Dr. Krop needs trial counsel to inform him of the concept of statutory mental mitigation. IB at 16. Dr. Harry Krop is listed in 52 of this Court's reported cases over a span of more than twenty years, starting in 1988 and appearing as recently as January of 2012. *Robinson v. State*, 520 So.2d 1, 2 (Fla. 1988)(noting that in the penalty phase the "defense presented Dr. Harry Krop, a clinical psychologist, who testified to six nonstatutory mitigating circumstances: . . ."); *Douglas v. State*, 2012 WL 16745, 4, n.6 (Fla. 2012)(listing as one of the postconviction claims that trial counsel rendered ineffective assistance during the penalty phase in failing to present the testimony of "star penalty phase witnesses," including Dr. Harry Krop). Several of these reported cases refer to Dr. Krop's testimony regarding statutory mental mitigation. *Israel v. State*, 985 So.2d 510, 519 (Fla. 2008)(noting that "[b]ased on Dr. Krop's testimony, the trial court found the two statutory mental health

mitigators to be applicable."); *Ponticelli v. State*, 941 So.2d 1073, 1093 (Fla. 2006)(reciting that "at the evidentiary hearing, Krop testified that this evaluation enabled him to testify that both statutory mental health mitigators applied in Ponticelli's case."). Dr. Krop has extensive experience with capital cases which is why trial counsel consulted him in the first place. Dr. Krop does not need trial counsel, or anyone else, to explain the concept of statutory mental mitigation to him or explain that he is being hired to discover both statutory and non-statutory mental mitigation.

Taylor's reliance on *Hurst v. State*, 18 So.3d 975, 1009-1015 (Fla. 2009), is seriously misplaced. In *Hurst*, this Court held that defense counsel's failure to have defendant examined by a mental health expert was deficient performance. Furthermore, the *Hurst* Court found that that deficiency resulted in prejudice because a reasonable investigation would have disclosed statutory and non-statutory mitigation. In *Hurst*, "no mental evaluation was ever done." *Hurst*, 18 So.3d at 1009. This Court vacated the death sentence and remanded for a new penalty phase.

Here, however, unlike *Hurst*, defense counsel retained a mental health expert with extensive experience in capital cases and had that expert evaluate Taylor. Furthermore, here, unlike *Hurst*, no statutory or non-statutory mental mitigation was presented at the evidentiary hearing. Unlike *Hurst*, no "significant mental mitigation was available." Unlike *Hurst*, where the neuropsychological testing conducted for the evidentiary hearing, suggested Hurst suffered from brain damage, Dr. Krop had found no

evidence of organic brain damage or any other mental illness prior to the trial and no evidence of any brain damage or mental illness was presented at the evidentiary hearing in this case. The trial court properly denied the claim of ineffectiveness for not presenting Dr. Krop at the penalty phase. *Hurst* has no application to a case where defense counsel fully investigated mental mitigation and then made a tactical decision not to present that mitigation.

There was no deficient performance, nor any prejudice. The trial court properly denied this claim following an evidentiary hearing on the matter.

ISSUE II

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR FAILING TO MOVE FOR A CHANGE OF VENUE FOLLOWING AN EVIDENTIARY HEARING? (Restated)

Taylor asserts that his trial attorneys, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Patrick McGuiness, were ineffective for not filing a motion for change of venue. The claim fails for lack of proof. Despite being granted an evidentiary hearing on the claim, counsel produced no real evidence to support the claim. Additionally, there was no deficient performance for not filing a meriltess motion for change of venue. There was no legal basis to file such a motion because there was no difficulty in selecting a jury. Nor was there any prejudice. Any motion for change of venue would have been denied by the trial court because the prosecution occurred in a different county and in a different judicial circuit. Thus, the trial court properly denied the claim of ineffective for not filing a motion for change of venue.

Evidentiary hearing testimony

At the evidentiary hearing, post-conviction counsel inquired of defense counsel whether he filed a motion for change of venue. (Evid H at 12). Defense counsel stated that, while the case did not receive the volume of publicity that some of his other cases in Jacksonville had received, because this murder occurred in a smaller town, the murder was “absolutely” known to the people around here. (Evid H at 13). Defense counsel also stated that Buddy Boy’s was a very popular

store in St. Johns County and that people from Clay County go there, so a lot of people knew about the murder. (Evid H at 13).

The trial court's ruling

The trial court denied this claim, following an evidentiary hearing on the matter, finding:

> In the Defendant's eleventh subclaim, he alleges trial counsel was ineffective because he failed to file a motion for change of venue. This claim is insufficiently pled as the Defendant does not provide citations to the record to establish that it was difficult to seat a jury or that the actual jurors in the case were exposed to articles on the case. *Knight v. State,* 923 So.2d 387. 401(Fla. 2005)(denying a claim of ineffectiveness for failing to move for a change of venue as facially insufficient because it was conclusory where the defendant did not assert that there was a reasonable probability the news coverage affected the outcome of the trial). A change of venue is not necessary if prospective jurors are qualified to serve and can assure the court that they are impartial despite any extrinsic knowledge of the case. *Knight*, 923 So.2d at 402. The Florida Supreme Court has rejected a claim of ineffective assistance of counsel in a capital case based on counsel's failure to file a motion for change of venue because the defendant failed to demonstrate a legal basis for the motion. *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007). In this instant case, there was no legal basis for a change of venue motion as the Defendant has failed to establish undue difficulties in selecting a jury. The newspaper articles relied on by the Defendant were from during the trial, that than pre-trial. As jurors are instructed not to read the newspaper during trial, the Defendant has failed to establish ineffective assistance of counsel on the part of trial counsel. The Defendant's eleventh subclaim is denied.

Standard of review

This Court reviews claim of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim,

this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Failure of proof

Despite being granted an evidentiary hearing, Taylor did not produce evidence to support this claim. *Lukehart v. State*, 70 So.3d 503, 518 (Fla. 2011)(finding a postconviction claim failed "for lack of proof" where the defendant was granted an evidentiary hearing on the claim of ineffectiveness for failing to move to suppress based on a local policy issue but failed to present evidence regarding the local policy at the evidentiary hearing). Changes of venue are not granted merely because there was extensive publicity regarding the murder. *Rolling v. State*, 695 So.2d 278 (Fla. 1997)(explaining that pretrial publicity is normal and expected in certain kinds of cases and "that fact standing alone will not require a change of venue"). The *Rolling* Court explained that the trial court must consider numerous factors, such as: (1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred; (2) whether the publicity consisted of straight, factual news stories or inflammatory stories; (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; (4) the size of the

community in question; and (5) whether the defendant exhausted all of this peremptory challenges in determining whether to grant a motion for change of venue.

Taylor did not even attempt to establish any of the *Rolling* factors at the evidentiary hearing. The only factor even discussed was the size of the community. But this raises the issue of what community? While the counties are next to each other, Buddy Boy's is in St. John's County, not Clay County, where this trial took place. The community most familiar with the store, the victim's parents and the victim herself necessarily did not sit on this jury. This prosecution occurred in a different county and a different judicial circuit. This claim should be denied based on a failure of proof regarding the publicity.

Taylor's reliance on *Spera v. State*, 971 So.2d 754 (Fla. 2007), is misplaced. *Spera* is limited to situations where the trial court strikes the postconviction motion as insufficiently pled or summarily denies the claim as insufficiently pled. *Spera* does not apply when counsel is granted an evidentiary hearing and then does not prove the claim at the evidentiary hearing. *Spera* does not apply to this case.

And there are limits to *Spera* even when dealing with summary denials. *Kirkpatrick v. State*, 2011 WL 5111732 (Fla. 2d DCA 2011)(reversing the summary denial of several claims as insufficiently pled in accordance with *Spera* but noting that if the defendant files an amended motion which does not cure the facial insufficiencies, the postconviction court may summarily deny the claims on the merits citing *Verity v. State*, 56 So.3d 77, 78 (Fla.

2d DCA 2011)); *Nelson v. State*, 977 So.2d 710 (Fla. 1st DCA 2008)(noting that "*Spera* does not mandate repeated opportunities" for a defendant to amend facially insufficient claims); *Oquendo v. State*, 2 So.3d 1001, 1006 (Fla. 4th DCA 2008)(explaining that provided a postconviction movant has been afforded at least one opportunity to amend an insufficient claim, the trial court has discretion as to whether to permit any further amendments relying on *Nelson*.). Taylor has had numerous opportunities, including in his post-evidentiary hearing memorandum of law, to cure the deficiencies in this claim and has not done so. Indeed, in his brief to this Court, he still has not included any record citations to establish that there was any difficulty selecting a jury. *Spera* did not create a merry-go-round where counsel may obtain a second evidentiary hearing on the same claim based on his own failings.

Merits

There was no deficient performance. There was no legal basis to file a motion for change of venue. If prospective jurors can assure the court that they are impartial despite their extrinsic knowledge, they are qualified to serve, and a change of venue is not necessary. *Knight v. State*, 923 So.2d 387, 402 (Fla. 2005)(rejecting an ineffective assistance of counsel claim of failing to request a change of venue because "there was no legal basis for a change of venue, counsel was not ineffective for failing to request one" where the court noted there was no difficulty in seating a jury and only 34 of the 106 venire members questioned had been exposed to any news

coverage citing *Patton v. State*, 784 So.2d 380, 389-90 (Fla. 2000)). Furthermore, the prosecution did not occur in the county where the victim lived and the popular store was located. Counsel is not deficient for failing to file a meritless motion.

Nor was there any prejudice. A motion for change of venue under these circumstances, where the prosecution occurred in a different county and there was no difficulty in seating a jury, would not have been granted.

In *Dillbeck v. State*, 964 So.2d 95, 104 (Fla. 2007), the Florida Supreme Court rejected a claim of ineffectiveness for failing to file a motion for change of venue in a capital case. The Florida Supreme Court found that Dillbeck failed to demonstrate a legal basis for filing a motion for change of venue. Dillbeck produced no evidence of extensive pretrial publicity (newspaper articles, etc.) in support of the claim. The Florida Supreme Court also noted that there were no undue difficulties in selecting an impartial jury because the jurors assured the court during voir dire that they could be impartial despite their extrinsic knowledge about the case. Therefore, any motion for change of venue would have been denied. The *Dillbeck* Court explained that to establish prejudice from the failure to move for a change of venue, the defendant must establish that the motion would have been granted if filed.

Here, as in *Dillbeck*, there was no deficient performance because there was no legal basis for a motion to change venue. Here, as in *Dillbeck*, there were no undue difficulties in selecting a jury. Post-conviction counsel does not provide any record cites

establishing that it was difficult to seat a jury or that the actual jurors in this case were exposed to the articles. *Knight v. State*, 923 So.2d 387, 401 (Fla. 2005)(denying a claim of ineffectiveness for failing to move for a change of venue as facially insufficient because it was conclusory where defendant did not assert that there was a reasonable probability that the news coverage affected the outcome of the trial). While here, unlike *Dillbeck*, post-conviction counsel did supply newspaper articles regarding the murder, the articles do not establish pre-trial publicity. Post-conviction counsel improperly relies on newspaper articles published during trial rather than pre-trial articles. During trial, jurors are instructed not to read the newspaper. Here, as in *Dillbeck*, there was no ineffective assistance of counsel.

ISSUE III

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIM OF INEFFECTIVENESS FOR NOT OBJECTING TO THE PROSECUTOR'S COMMENTS? (Restated)

Taylor asserts that his trial counsels, Chief Assistant Public Defender Alan Chipperfield and Assistant Public Defender Patrick McGuiness, were ineffective for not objecting to the prosecutor referring to the proceeds of this murder as "blood money" and referring to the big grin on Taylor's face when depositing the proceeds in his bank account. There was no deficient performance because any objection would have been baseless. The trial court properly found no deficient performance. Nor is there any prejudice because any such objection would have been properly overruled. The trial court properly denied this claim of ineffectiveness for not objecting following an evidentiary hearing on the claim.

Trial

At the trial, the prosecutor referred to a "spending spree"; "blood money"; and Taylor depositing money into his bank account "with a big grin on his face" after having left the victim undressed in palmetto bushes. (T. 1909-1910).

Evidentiary hearing testimony

At the evidentiary hearing, defense counsel Chipperfield testified that while not prosecutorial misconduct, the prosecutor's comment about a "spending spree with blood money" was inflammatory

and he should have objected. (Evid H at 14). He objects as much as he can in a capital case. (Evid H at 14). However, defense counsel Chipperfield did not view the prosecutor's comment about the victim "bled out in those woods with no one knowing where she was" as objectionable. (Evid H at 14 quoting T. 1909-1910). Defense counsel Chipperfield viewed that as a proper comment on the evidence and noted those were the facts of the case. (Evid H at 14-15). Nor did defense counsel Chipperfield view the prosecutor's comments about McJunkin being too stupid to have committed the crime as being bolstering. (Evid H at 15 quoting T. 1936). Defense counsel noted that McJunkin "was not a mental giant." (Evid H at 16). Moreover, defense counsel noted that the comment was an accurate portrayal of McJunkin's mental abilities albeit pejorative. (Evid H at 16).

The trial court's ruling

The trial court found no deficient performance stating that the "Defendant has failed to establish that the action of trial counsel were deficient." The trial court noted that "other jurisdictions have found colloquial expressions such as blood money not to be objectionable" citing *Commonwealth v. Mendes*, 806 N.E.2d 393, 407 (Mass. 2004). The trial court noted that the other comments were, as defense counsel testified, proper comments on the evidence because "those were the facts of the case."

Abandonment

Despite being granted an evidentiary hearing, counsel presented no witnesses in support of this claim. Postconviction counsel did not call trial counsel or the prosecutor to testify at the evidentiary hearing. Rather, the state called both trial counsel and the prosecutor at the evidentiary hearing. This Court has condemned "evasive maneuvers" at capital postconviction evidentiary hearings. *Asay v. State*, 769 So.2d 974, 982-983 (Fla. 2000)(finding the trial court properly refused to reconsider its ruling and grant an evidentiary hearing on the claim because counsel at the evidentiary hearing refused to call the witness at the evidentiary hearing which appeared "to be an evasive maneuver rather than a genuine attempt to ensure that the trial judge and this Court could adequately address the merits of this claim.")

Standard of review

This Court reviews claims of ineffective assistance of counsel *de novo*. *Douglas v. State*, - So.3d -, -, 2012 WL 16745, 5 (Fla. January 5, 2012)(stating that, "in reviewing a trial court's ruling after an evidentiary hearing on an ineffective assistance of counsel claim, this Court employs a mixed standard of review, deferring to the postconviction court's factual findings that are supported by competent, substantial evidence, but reviewing the postconviction court's application of the law to the facts de novo" citing *Mungin v. State*, 932 So.2d 986, 998 (Fla. 2006)). The standard of review is *de novo*.

Merits

There was no deficient performance because none of the prosecutor's comments were objectionable. Regarding the prosecutor's comments about a spending spree with blood money, the comment is not objectionable. The definition of blood money, according to the dictionary, is money obtained ruthlessly at the expense of other lives or suffering. WEBSTER'S NEW WORLD DICTIONARY (2nd ed.). That was exactly the State's theory of the motive for this murder. Colloquial expressions such as blood money are not objectionable. *Commonwealth v. Mendes*, 806 N.E.2d 393, 407 (Mass. 2004)(finding a prosecutor's comment regarding "blood money" to be fair comment on the "overwhelming evidence of the defendant's motive to kill" rather than prosecutorial misconduct).

Regarding the prosecutor's comments about the victim "bled out in those woods with no one knowing where she was." As defense counsel acknowledged, these comments simply reflect the actual facts of the case. Shannon's body was located with pants and panties around her knees in the woods. (XV 1707).

Regarding the prosecutor's comments about McJunkin being too stupid to the commit this crime, calling a State's witness too stupid to have committed the crime by himself, while not sweet, is not legally objectionable. The prosecutor was explaining that McJunkin simply did not have the brain power to plan this robbery/murder. While defense counsel considered the comment to be derogatory, it is hard to see the basis for an objection by a defense counsel to the prosecutor referring to state's own witness as stupid, rather than the defendant.

He was counsel for Taylor, not McJunkin. This was not an etiquette class; it was a first degree murder trial.

Nor was there any prejudice from counsel's failure to object to any of these comments. The plaid black and white boxer shorts Taylor was wearing when he was arrested, the day after the murder, had a blood stain on them. (XV 1651, 1665). That blood was a "DNA match" of the victim's DNA. (XV 1691). At trial, Dr. Martin Tracy, a professor of biology at Florida International testified that only 1 in 1900 persons had that type of DNA. (XV 1702). And in the postconviction proceedings, defense counsel without objection from the state, was allowed to retest the boxer shorts using a newer type of DNA testing, STR DNA testing. The STR DNA tests established that it was the victim's blood that was on Taylor's boxer shorts at one in 30 sextrillon. It was the fact that the victim's blood was on Taylor's boxer shorts, not these comments that convicted Taylor.

Furthermore, eyewitnesses who knew both the victim and Taylor, saw Taylor get into the victim's car. Those eyewitnesses saw the victim giving Taylor a ride into Green Cove Springs because she was going into town to deposit the store's money in the bank but she never made it to the bank. The State has both scientific evidence of guilt and eyewitness testimony establishing that Taylor was the last person seen with the victim while she was alive. It was not the prosecutor's words that convicted the defendant; it was the evidence.

ISSUE IV

WHETHER FLORIDA'S DEATH PENALTY STATUTE VIOLATES THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL? (Restated)

Taylor asserts his death sentence violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). First, this claim is procedurally barred because the Sixth Amendment right to a jury trial claim was raised in the direct appeal of this case. Furthermore, *Ring* does not apply to this particular case because the prior violent felony aggravator and the under sentence of imprisonment are present. Recidivist aggravators are exempt from the holding in *Ring*. Both of these aggravators are not required to be found by the jury under any view of *Ring*. Taylor had previously been convicted of armed robbery. Furthermore, one of the aggravating circumstances found by the trial court was the during-the-course-of-a-felony aggravator. This Court has repeatedly held that *Ring* does not apply to cases where the jury convicts a defendant in the guilty phase of a separate felony. The jury convicted Taylor of robbery with a deadly weapon. *Ring* was satisfied in the guilt phase in this particular case. Moreover, the jury necessarily found an aggravating circumstance when recommending a death sentence. Taylor's jury recommended a death sentence by a vote of ten to two. In Florida, a jury must find an aggravating circumstance before recommending a death sentence. Florida's death penalty statute does not violate the Sixth Amendment right to a jury trial, as this Court has repeatedly held.

The trial court's ruling

Taylor raised two *Ring* claims in his postconviction motion - claim II and Claim IX. As to claim II, the trial court denied the *Ring* claim finding the claim to be procedurally barred by the law of the case doctrine because a Sixth Amendment claim was raised in the direct appeal. The trial court, following this Court's precedent of *Kormondy v. State*, 845 So.2d 41, 54 (Fla. 2003) and *State v. Steele*, 921 So.2d 538 (Fla. 2005) concluded that "written jury findings of aggravators are not required." As to claim IX, the trial court noted that the same claim, that *Ring* required all aggravators be found by written special verdicts, was raised as claim II and then found the claim procedurally barred by the law of the case doctrine.

Standard of review

The standard of review is *de novo*. Constitutional challenges to statutes are reviewed *de novo*. *Miller v. State*, 42 So.3d 204, 215 (Fla. 2010)(stating "[w]e review a trial court's ruling on the constitutionality of a Florida statute de novo" regarding a Sixth Amendment challenge to Florida's death penalty scheme pursuant to *Apprendi* and *Ring*).

Procedural bar

This claim is barred by the law of the case doctrine. Taylor raised this Sixth Amendment claim on direct appeal. The Florida Supreme Court ruled:

> Subsequent to the filing of briefs in this case, we allowed the parties to file supplemental briefing on whether Florida's death penalty sentencing scheme is unconstitutional in light of the United States Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This Court addressed similar contentions in *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *cert. denied,* 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002), *cert. denied,* 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), and denied relief. We find that Taylor is likewise not entitled to relief on this supplemental claim.

Taylor, 855 So.2d at 13, n.11. Taylor's claim is procedurally barred because it was raised and rejected on direct appeal.

While the Florida Supreme Court relied upon and cited only *Apprendi*, not *Ring*, the claim is fundamentally a Sixth Amendment claim. Furthermore, this Court took the claim to be a *Ring* claim because this Court cited *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *cert. denied,* 537 U.S. 1070, 123 S.Ct. 662, 154 L.Ed.2d 564 (2002), and *King v. Moore*, 831 So.2d 143 (Fla.2002), *cert. denied,* 537 U.S. 1067, 123 S.Ct. 657, 154 L.Ed.2d 556 (2002), in support of its decision to reject the claim. *Bottoson* and *King*, of course, are *Ring* cases. Furthermore, *Ring* was decided prior to issuing of the opinion in the direct appeal. The United States Supreme Court issued *Ring* on June 24, 2002 and the direct appeal opinion was issued by the Florida Supreme Court on September 8, 2003. Thus, *Ring* was decided over a year prior to the decision in this case. Moreover, the United States Supreme Court had granted certiorari in *Ring* by the time of supplemental briefing. Both Taylor's supplemental initial brief and the State's supplemental answer brief noted that the United States Supreme Court had granted certiorari review in *Ring*. Thus, even the

specific *Ring* based claim was raised and rejected on direct appeal. This claim is procedurally barred.

Merits

> The Sixth Amendment states:
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Supreme Court in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury.

Ring was the application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to capital cases. Arizona's death penalty statute, which was at issue in *Ring*, was judge-only capital sentencing. Florida's death penalty statute, in contrast, as the *Ring* Court itself noted, is a hybrid system involving both a judge and a jury. *Ring*, 536 U.S. at 608, n.6, 122 S.Ct. at 2442, n.6 (noting that Arizona, like Colorado, Idaho, Montana and Nebraska, "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges" and noting that four States, Alabama, Delaware, Florida and Indiana, "have hybrid systems, in which the jury renders an advisory verdict but the judge makes the

ultimate sentencing determinations."). Florida's scheme is jury plus judge sentencing, not judge only sentencing.

This Court has repeatedly, over the years, rejected *Ring* challenges to Florida's death penalty scheme. As this Court has recently noted: "we have repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." *Ault v. State*, 53 So.3d 175, 205-206 (Fla. 2010)(rejecting a *Ring* challenge to Florida's death penalty scheme citing *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), and *King v. Moore*, 831 So.2d 143 (Fla. 2002)).

Ring does not apply to this particular case because both the prior violent felony aggravator and the under sentence of imprisonment aggravator are present. Taylor had previously been convicted of armed robbery and was mistakenly released from prison in Arkansas. Recidivist aggravators are exempt from the holding in *Ring*. The United States Supreme Court exempted prior convictions from the holding of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), explaining that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The exception announced in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), for prior convictions, survived *Apprendi* and *Ring*. *Tai A. Pham v. State*, 70 So.3d 485, 495-496 (Fla. 2011)(explaining that the express exceptions to *Apprendi* were

unaltered by *Ring*).[13] This Court has repeatedly rejected *Ring* claims where the prior violent felony aggravator is present. *Evans v. State*, 975 So.2d 1035, 1052-1053 (Fla. 2007)(rejecting a *Ring* claim where the prior violent felony aggravator was present citing *Duest v. State*, 855 So.2d 33, 49 (Fla. 2003)). And this Court has rejected *Ring*

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[13] The continued validity of *Almendarez-Torres* has been questioned by several of the Justices as well as several courts. The United States Supreme Court's decision in *Oregon v. Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009), upholding a judge's power to impose consecutive sentences without special findings by the jury, however, shows that *Almendarez-Torres* is alive and well.

Furthermore, *Almendarez-Torres* was correctly decided. The Sixth Amendment right to a jury trial is just that - a right to a jury - that is one jury. A defendant is entitled to one jury trial, not two. Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175 (1998)(explaining that recidivism should be exempt from the elements rule because the defendant has already received a full trial and due process for the prior conviction and observing that the prior conviction received "the totality of constitutional protections" which distinguishes the use of prior convictions from other sentence enhancers and concluding that requiring full trial rights for the prior conviction would be "redundant".) Any defendant, who is a recidivist, has already had a jury find the underlying facts of the prior conviction at the highest standard of proof. The judge, in a recidivist situation, is merely taking judicial notice of a prior jury's verdict. With the prior violent felony aggravator which requires a conviction, a prior jury heard the evidence and found Taylor guilty beyond a reasonable doubt. This prior jury completely satisfies the Sixth Amendment. Taylor is not entitled to two jury trials on his prior convictions.

Furthermore, the vast majority of criminal defendants plead. This means these defendants waived the right to a jury trial. If *Almendarez-Torres* is overruled, a defendant will have resurrected his right to a jury trial that he waived when he pled by the act of committing a second offense. Overruling *Almendarez-Torres* would create the odd result of unwaiver by criminal conduct. Moreover, the prosecution often agrees to a plea to avoid the time and trouble of a trial. For the prosecution to have to prove a crime years after it was committed, with all the attendant problems of lost evidence, missing witnesses and foggy memories, because the defendant committed another crime, seems to be a breach of the original plea agreement. *Almendarez-Torres'* logic is sound.

claims when the under sentence of imprisonment aggravator is present as well. *Hodges v. State*, 55 So.3d 515, 540 (Fla. 2010)(stating that: "[t]his Court has repeatedly held that Ring does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable); *Smith v. State*, 998 So.2d 516, 529 (Fla. 2008)(stating: "We also have held that the aggravator of murder committed while under sentence of imprisonment may be found by the judge alone."). Neither of these aggravators are required to be found by the jury under any view of *Ring*.

Moreover, if *Ring* applied and required that the jury find one aggravator, then *Ring* was satisfied in the guilt phase in this particular case. One of the aggravators found by the trial court was the "during the course of a felony" aggravator. The jury found Taylor guilty of robbery with a deadly weapon in the guilt phase. Basically, the jury unanimously found this aggravator in the guilty phase. *Ring* was satisfied before the penalty phase even began. As this Court recently reiterated in "*Ring* is not implicated when the trial court has found as an aggravating circumstance that the crime was committed in the course of a felony." *Baker v. State*, 71 So.3d 802, 824 (Fla. 2011)(citing *McGirth v. State*, 48 So.3d 777, 795 (Fla. 2010)(citing *Robinson v. State*, 865 So.2d 1259 (Fla. 2004)). Accordingly, *Ring* is not violated in a case where the jury unanimously finds an aggravator in the guilty phase by convicting a defendant of an separate, underlying felony.

Moreover, the jury recommended death thereby necessarily finding an aggravator. The United States Supreme Court, in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), a case that was a precursor to *Apprendi* and *Ring,* explained that Florida's death penalty does not violate the Sixth Amendment. It was a footnote in *Jones* stating "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," that essentially become the holding in *Apprendi*. *Jones*, 526 U.S. at 243 n.6. The *Jones* Court explained that if there is a jury recommendation of death, the Sixth Amendment right to a jury trial is not violated. The *Jones* Court explained that in *Hildwin*, a Florida case, a jury made a sentencing recommendation of death, thus "necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." *Jones*, 526 U.S. at 251, 119 S.Ct. at 1228. See also *State v. Steele*, 921 So.2d 538, 546 (Fla. 2005)(explaining that a finding of an aggravator "is implicit in a jury's recommendation of a sentence of death" citing *Jones*). A jury in Florida is instructed that they may not recommend death unless they find an aggravator. So, a jury that recommends death has necessarily found at least one aggravator. According to both the United States Supreme Court in *Jones* and the Florida Supreme Court in *Steele*, a jury's recommendation of death means the jury found an aggravator which is all *Ring* requires.

Taylor's jury recommended death by a vote of ten to two. His jury necessarily found at least one aggravator in order to recommend death. There can be no violation of the Sixth Amendment right to a jury trial where the defendant had a jury and that jury necessarily found an aggravator.

Taylor's reliance on *Evans v. Sec'y, Dep't of Corr.*, 2:08-cv-14402-JEM (S.D. Fla. June 20, 2011), is misplaced. First, a federal district court is a trial court and like any other trial court, its rulings are not binding precedent of any sort. As the United States Supreme Court has explained, a "decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, - U.S. -, n.7, 131 S.Ct. 2020, 2033, n.7, 179 L.Ed.2d 1118 (2011). One federal district judge's view certainly does not trump this Court's numerous and repeated holdings, over the last decade, that Florida's death penalty statute does not violate *Ring*.

Furthermore, *Evans* is distinguishable. As the district court in *Evans* itself noted, *Evans* did not involve the prior violent felony aggravator, the under sentence of imprisonment aggravator, or the during-the-course-of-a-felony aggravator, as this case does. *Evans v. Sec'y, Dep't of Corr.*, 2:08-cv-14402-JEM at 80, n.25 citing *Coday v. State*, 946 So.2d 988, 1023 (Fla. 2006)(Pariente, J., dissenting on *Ring*). This case involves all three of these aggravators.

And most importantly, *Evans* is incorrectly decided and is due to be reversed by the Eleventh Circuit.[14] There is a special, highly deferential standard of review in federal habeas cases and the district court in *Evans* improperly refused to apply that standard. The Eleventh Circuit is highly likely to reverse on that basis alone. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011)(reversing a panel decision because the panel refused to apply the required AEDPA deference to the state court). Even under *de novo* review, *Evans* is incorrectly decided because the district court in *Evans* refused to follow controlling Supreme Court precedent of *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), which held that special verdicts are not required. The district court basically joined the dissent in *Schad* by requiring special verdicts regarding aggravators. District courts are not free to follow the dissent; rather, they must follow the majority opinion. The Eleventh Circuit will follow the majority in *Schad*. While the district court found the jury's recommendation to be meaningless, the United States Supreme Court thinks otherwise. In *Jones*, the United States Supreme Court found a jury recommendation of death to be quite meaningful. This Court should reject the reasoning of *Evans* and follow its long established precedent that Florida's death penalty statute does not violate *Ring*.

Harmless error

[14] Evans is pending on appeal in the Eleventh Circuit. *Sec'y, Fla Dep't of Corr., v. Evans*, 11-14498-P.

Furthermore, if even there had been a violation of the Sixth Amendment right to a jury trial, violations of the Sixth Amendment right to a jury trial, including *Ring* claims, are subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(finding that error in the judge determining the issue of materiality rather than properly submitting the materiality issue to the was harmless). A rational jury would have found an aggravator. Indeed, a rational jury would have found the exact same aggravators the judge did. A rational jury would have found the during-the-course-of-a-robbery aggravator if asked to complete a special verdict form given that they convicted Taylor of robbery in the guilt phase. A rational jury would have also found the under-sentence-of-imprisonment aggravator if asked to do so. A rational would have also found the pecuniary aggravator if asked to do so. The State tied Taylor to this murder, in part, because of his having a roll of cash, totaling around $1600, despite being unemployed. Any error was harmless.

The trial court properly denied the two *Ring* claims. Accordingly, the trial court's order denying the three claims of ineffectiveness following an evidentiary hearing and summarily denying the two *Ring* claims should be affirmed.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court denial of the 3.851 motion following an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Frank Tassone, Tassone & Dreicer, 1833 Atlantic Blvd., Jacksonville FL 32207 this 24th day of January, 2012.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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