

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC11-154**

LOWER TRIBUNAL NO. 97-CF-1547

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**JOHN CALVIN TAYLOR, II,**

Petitioner,

v.

**STATE OF FLORIDA,**

Respondent.

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**PETITION FOR HABEAS CORPUS**

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## **JURISDICTIONAL STATEMENT**

The Florida Supreme Court (FSC) has original jurisdiction over this Petition for Habeas Corpus, Mr. Taylor was sentenced to the death penalty, and the instant Petition accompanies Petitioner/Appellant's Initial Brief from the lower tribunal's order on Appellant/Petitioner's denial of his 3.850/3.851 Motion for Post-Conviction Relief. Fla. R. App. P. 9.142(a)(5).

### **THE FACTS UPON WHICH PETITIONER RELIES**

John Calvin Taylor was indicted on February 26, 1998 for first-degree murder and robbery with a deadly weapon of Shannon Holzer. (1 R 23-24.) Taylor was tried before a jury from July 19, 1999 to July 23, 1999 and found guilty of both counts. (4 R 659-660)(17 R 2064.) At the conclusion of the August 13, 1999 penalty phase, the jury recommended a death sentence for Mr. Taylor. (5 R 847.) The court permitted the state and defense to present additional evidence and argument on September 9, 1999. (5 R 965-978.)

On October 7, 1999 the trial court sentenced Mr. Taylor to death for his first-degree murder conviction and life in prison for the robbery charge. (6 R 847)(20 R 2642.) In reaching this sentence, the court found the following four aggravating factors: (1) The defendant was previously convicted of another capital offense of a felony involving the use or threat of violence to another person; (2) The crime for which the defendant is to be sentenced was committed while he was

engaged in the commission of the crime of robbery or kidnapping; (3) The capital felony was for pecuniary gain; (4) The crime for which defendant was convicted was committed after he had previously been convicted of a felony or was under sentence of imprisonment, community control, or felony probation. (6 R 980-84.) The court merged the second and third aggravators and weighed only three aggravating factors in considering the appropriate sentence for Taylor. (6 R 979-995)(20 R 2702.)

The defense did not present, nor did the trial court consider, any statutory mitigating factors. (6 R 985.) The trial court considered the following non-statutory mitigating factors: (1) Taylor was raised in a dysfunctional family and suffered neglect and abuse during his first eleven years; (2) By the time anyone encouraged John Taylor to be interested in school, it was too late, and he dropped out in junior high; (3) While Taylor was known as a thief throughout his life, he was never known to be violent (not proven); (4) Taylor makes friends easily, he enjoys people who also enjoy him – he has done good deeds to friends and strangers (not proven); (5) Taylor enjoys family relationships and activities (not proven); (6) Taylor is a skilled, reliable worker inside and outside of prison; (7) Taylor performs well when he has structure in his life (not proven); (8) Taylor has been and may continue to be a positive influence in the lives of family members (not proven). (6 R 985-95.)

Mr. Taylor filed a direct appeal of his judgment and sentence with this Court arguing: (1) The trial court erred in denying Taylor's motion to suppress physical evidence seized from his house and vehicle, his statements made while detained in the back of the patrol car and at the police station, and the clothing seized after he was arrested; where the evidence and the statements were the poisoned fruit of illegal police action; (2) The trial court erred in permitting Joe Dunn, Arthur Mishoe, Alex Metcalf, and Cynthia Schermund to testify to hearsay statements made by the victim about giving Taylor a ride to Green Cove Springs; (3) The Trial court erred in admitting into evidence Taylor's credit application which included statements by Taylor that were lies; (4) The trial court erred in allowing the prosecutor to rehabilitate deputy Noble by admitting a prior consistent statement where the prior statement was made one year after any motive to fabricate arose; (5) The Trial court erred in admitting into evidence a pair of underwear found in the bag containing the clothing taken from Taylor when he was arrested; where the state presented no evidence Taylor was wearing underwear or that underwear was placed in the bag; and where the bag was left unattended in a cabinet for two weeks; (6) The husband/wife privilege was violated when the trial court required Taylor's wife to testify that Taylor told her Michael McJunkin needed money for a bus ticket to Arkansas; (7) The trial court erred in instructing the jury on and in finding the "under sentence of imprisonment" aggravating

circumstance based upon a 1991 Arkansas prison sentence for which Taylor was never incarcerated due to an administrative mistake; (8) The trial court erred in finding the evidence failed to prove the mitigating factors that: (i) As a child and an adult, Taylor has been known to be a thief but has not been known as a violent person, and an act of violence is out of character for him; (ii) Taylor makes friends easily, enjoys people who enjoy him, and has done good deeds for friends and even perfect strangers; (iii) Taylor enjoys family relationships and activities; (iv) Taylor appears to perform well when he has structure in his life; and (v) Taylor has been and can continue to be a positive influence in the lives of family members; (9) The death sentence is disproportionate where there were only two relatively weak aggravating circumstances and copious mitigating circumstances, including a severely dysfunctional upbringing marked by daily abuse and a complete lack of parental care or supervision. This Court denied relief in Taylor v. State, 855 So. 2d 1, 9-13 (Fla. 2003).

Mr. Taylor filed a Petition for Writ of Certiorari with the United States Supreme Court; the Court denied the petition on March 8, 2004. Taylor v. Florida, 541 U.S. 905 (2004). Taylor filed his initial motion to vacate judgments of conviction and sentence under the Florida Rules of Criminal Procedure 3.850/3.851 on October 27, 2004, including two claims: (1) Access to files and records pertaining to Mr. Taylor's case in the possession of various state agencies

have been withheld in violation of §119.01, Fla. Stat., the Due Process Clause and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions of the Florida Constitution. Mr. Taylor cannot prepare an adequate Rule 3.850 Motion until he has received public records materials and has been afforded due time to review and amend; (2) A jury must find all aggravating circumstances (other than the prior violent felony convictions) beyond a reasonable doubt. (1 PCR 4-13.)

Taylor filed an amended 3.850/3.851 on April 26, 2007 alleging, in addition to claims (1) and (2) above: (3) Taylor's counsel was ineffective in the pretrial, guilt, and penalty phases of trial. Taylor was denied the right to a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments – PRETRIAL (a) Taylor's counsel was deficient in his representation of Taylor due to his failure to efficiently partake in the discovery and investigation process. These actions resulted in Taylor's trial counsel having insufficient knowledge of the facts surrounding Taylor's case, insufficient knowledge as to the substance of the witnesses' testimony, and insufficient knowledge as to available defenses of Taylor; GUILT PHASE (a) Taylor's counsel was ineffective and deficient in his representation of Taylor because he failed to impeach state witnesses when relevant impeachment evidence was available; (b) Taylor's counsel was deficient in his representation of Taylor because he failed to file a motion for change of

venue, as Taylor's case was widely publicized; (c) Taylor's counsel was ineffective and deficient in his representation of Taylor because he failed to object to the prosecution's misconduct, including the prosecution's statements toward inflaming the passions and minds of the jury; (d) Taylor's counsel was deficient in his representation of Taylor by failing to fully explore and present witnesses and evidence in support of Taylor's motion to suppress evidence; PENALTY PHASE

(a) Taylor's counsel was ineffective in failing to utilize a mental health expert to effectively establish mitigating circumstances; (b) Taylor's counsel was ineffective and deficient in his representation of Taylor by failing to object to jury instruction regarding improper aggravators and burden shifting to Taylor to prove death not appropriate; (c) Taylor's counsel was ineffective and deficient in his representation of Taylor by failing to request a curative instruction to jury on non-aggravating circumstances; (d) Taylor's counsel was ineffective by failing to rebut the weight of the state's presented aggravators; (4) The State knowingly presented false material information which prejudiced Taylor and thereby was a violation of Giglio v. United States; (5) Taylor has newly discovered evidence of such nature to produce an acquittal or retrial. Therefore, Taylor's convictions are in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments; (6) Taylor's trial was fraught with procedural and substantive errors, which cannot be viewed as harmless when viewed as a whole. The combination of errors deprived Taylor of a

fair trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments; (7) Taylor is innocent of first-degree murder. There is insufficient evidence to support his conviction and sentence; (8) Taylor was denied a proper direct appeal from his judgments of conviction and sentences of death in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Art. V, § 3(b)(1) of the Florida Constitution, and § 921.141(4) of the Florida Statutes, due to omissions in the record. Taylor is being denied effective assistance of post-conviction counsel because the record is incomplete; (9) Taylor's sentence is unconstitutional under Ring v. Arizona; (10) Florida's capital sentencing statutes are unconstitutional on their face and as applied for failing to prevent the arbitrary and capricious imposition of the death penalty and for violating the guarantee against cruel and unusual punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. To the extent these issues were not properly litigated at trial or on appeal, Taylor received a prejudicially ineffective assistance of counsel; (11) Defendant may not be executed by lethal injection without violating the constitutions of the United States and Florida. The law enacting lethal injection is unconstitutional. The waiver provision is unconstitutional. It is an unconstitutional special criminal law. It violates the prohibition against ex post facto laws. (2 PCR 49-202.)

The state filed a response to the amended 3.850/3.851 on June 25, 2007. (3



PCR 229-303.) Following a October 31, 2007 Huff<sup>1</sup> hearing, the court granted an evidentiary hearing on certain sub-claims of Claim Three (ineffectiveness of trial counsel at guilt and penalty phases), Claim Four (Giglio violations); and Claim Five (newly discovered evidence of a different perpetrator). (6 PCR 972-73.)

## CLAIM I

**APPELLATE COUNSEL RENDERED A CONSTITUTIONALLY DEFICIENT PERFORMANCE IN NEGLECTING TO ARGUE ON DIRECT APPEAL THAT THE TRIAL COURT ERRED IN FAILING TO COMPLY WITH THE REQUIRMENTS OF THIS COURT'S DECISION IN CAMPBELL V. STATE AND SPECIFICALLY CONSIDER AND WEIGH EACH ESTABLISHED MITIGATING AND AGGRAVATING FACTOR IN ITS SENTENCING ORDER RESULTING IN A VIOLATION OF TAYLOR'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION**

### **I. Background and Applicable Law**

The trial court, in its sentencing order, failed to adequately consider and assign a weight to each established mitigating and aggravating factor. Rather than carefully evaluating each of the mitigating and aggravating factors in condemning Taylor to death, the court merely stated:

In weighing the aggravating factors against the mitigating factors the Court understands that the process is not simply arithmetic. It is not enough to weigh the number of aggravators against the number of mitigators, but rather the process is more qualitative than quantitative. The Court must and does look to the nature and quality of the aggravators and mitigators which it has found to

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<sup>1</sup> Huff v. State, 622 So.2d 982 (Fla. 1993).

exist.

The court finds that the aggravating circumstances in this case far outweigh the non-statutory mitigating circumstances.

The aggravating circumstances in this case are: the defendant's previous conviction for a violent crime, the fact that the murder was committed during the commission of armed robbery and for pecuniary gain. Also, the fact that the defendant was under sentence in the State of Arkansas at the time of the commission of these crimes, greatly outweighs the relatively insignificant non-statutory circumstances established by this record.

(6 R 994-95.)

When reviewing a petition for writ of habeas corpus based on a challenge of ineffective assistance of appellate counsel, this Court must “first determine, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.” Suarez v. Dugger, 527 So. 2d 190, 192-93 (Fla. 1988) (quoting Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986), cert. denied, 480 U.S. 951, 107 S. Ct. 1617, 94 L. Ed. 2d 801 (1987)(internal citations omitted)).

**II. The omission by appellate counsel is of such magnitude as to constitute a substantial deficiency falling measurably outside the range of professionally acceptable performance**

In this case, appellate counsel in Point 8 of Taylor's direct appeal raised a claim discussing one aspect of the trial court's errors with respect to its sentencing order,<sup>2</sup> but failed to raise the related issue of the trial court's failure to comply with this court's precedent in Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), and its progeny. Had counsel included a claim on direct appeal based on the failure of the trial court to properly weigh and evaluate each found mitigating and aggravating factor on an individualized basis in its sentencing order, this Court would have reversed the case finding that the trial court's sentencing order was wholly inadequate when considering its errors in sum; or in the alternative this Court would have remanded for the trial court's proper evaluation of the relative weights of the aggravating and mitigating factors as required under Campbell.

The failure of appellate counsel to raise a meritorious or preserved issue on appeal demonstrates a deviation from the norm for appellate attorneys and is not professionally acceptable performance. Jackson v. Dugger, 580 So. 2d 161, 162

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<sup>2</sup> Appellate counsel argued in Point 8 of the direct appeal: THE TRIAL COURT ERRED IN FINDING THE EVIDENCE FAILED TO PROVE THE MITIGATING FACTORS THAT (1) AS A CHILD AND AN ADULT, TAYLOR HAS BEEN KNOWN TO BE A THIEF BUT HAS NOT BEEN KNOWN AS A VIOLENT PERSON, AND AN ACT OF VIOLENCE IS OUT OF CHARACTER FOR HIM; (2) TAYLOR MAKES FRIENDS EASILY, ENJOYS PEOPLE WHO ENJOY HIM, AND HAS DONE GOOD DEEDS FOR FRIENDS AND EVEN PERFECT STRANGERS; (3) TAYLOR ENJOYS FAMILY RELATIONSHIPS AND ACTIVITIES; (4) TAYLOR APPEARS TO PERFORM WELL WHEN HE HAS STRUCTURE IN HIS LIFE; 5) TAYLOR HAS BEEN AND CAN CONTINUE TO BE A POSITIVE INFLUENCE IN THE LIVES OF FAMILY MEMBERS.

(Fla. 4th DCA 1991)(granting petitioner’s writ of habeas corpus and authorizing a new appeal where appellate counsel failed to raise the issue of Williams rule evidence).

In Campbell this Court held that if a death sentence is imposed, the court must not only consider any and all mitigating evidence, but must “expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence.” Campbell, 571 So. 2d at 419 (footnote omitted). Appellate counsel appropriately raised a claim under this portion of Campbell, alleging that the trial court failed to appropriately evaluate the evidence supporting or negating each proposed mitigating circumstance in its written order. However, the trial court also neglected to undertake the weighing process proscribed by this Court in Ferrell v. State, 653 So. 2d 367 (Fla. 1995):

This evaluation must determine if the statutory mitigating circumstance is supported by the evidence and if the non-statutory mitigating circumstance is truly of a mitigating nature. A mitigator is supported by the evidence if it is mitigating in nature and reasonably established by the greater weight of the evidence. Once established, the mitigator is weighed against any aggravating circumstances. It is within the sentencing judge’s discretion to determine the relative weight given to each established mitigator; however, some weight must be given to all established mitigators. The result of this weighing process must be detailed in the written sentencing order and supported by sufficient competent evidence in the record. The absence of any of the

enumerated requirements deprives this Court of the opportunity for meaningful review.

Id. at 371. The result of the weighing process can only be satisfied “if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word ‘process’ lightly.” Hudson v. State, 708 So. 2d 256, 259 (Fla. 1998)(vacating the appellant’s death sentence and remanding to the trial court for a proper evaluation and weighing of all non-statutory mitigating factors).

Clearly the trial court in this case did not discuss or assign a weight to the mitigators. (6 R 994-95.) In its written sentencing order, the trial court was even brief in describing its weighing process. (6 R 994-95.) The court only stated that “[t]he court finds that the aggravating circumstances in this case far outweigh the non-statutory mitigating circumstances.” (6 R 994-95.) The only weight that the court provides to describe the mitigating factors is to say that they are “relatively insignificant” as a whole. (6 R 994-95.)

The failure of appellate counsel to include this claim was not a strategic decision; it was a serious error. It was a failure on counsel’s part to properly research and make an appropriate, meritorious claim on appeal since the appellate court would have clearly been required to remand this case to the trial court given the insufficiency of the sentencing order. Accordingly, the omission of this claim by appellate counsel was substantially deficient and fell measurably outside the

range of professionally acceptable performance.

**III. Appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result**

The appellate counsel's failure to raise a Ferrell issue regarding the trial court's sentencing order undermines the confidence in the correctness of the direct appeal decision. The trial court's sentencing order completely failed to adequately include a detailed writing that described the result of his weighing process, as noted in the above section. Had appellate counsel included the absence of the trial court's weighing process in the written sentencing order, the appellate court would have remanded this case to the trial court for a proper sentencing order.

When a trial court's sentencing order fails to provide a written sentencing order articulating the weighing process, the case must be remanded to the trial court for a proper sentencing order. Ferrell, 653 So. 2d at 371 (remanding to the trial court for a new sentencing order); see also Hudson, 708 So. 2d 256. The Court takes this process very seriously. Hudson, 708 So. 2d at 259. Absent an explanation of the weighing process by the trial court in its sentencing order, the appellate court is deprived of a meaningful review of the case and the case must be remanded.

In the present case, the trial court's sentencing order only stated that "[t]he court finds that the aggravating circumstances in this case far outweigh the non-statutory mitigating circumstances," and that the aggravating factors outweigh

“the relatively insignificant non-statutory circumstances established by this record.” (6 R 994-95.) The trial court did not sufficiently describe how it weighed the three factors of mitigating evidence against the imposition of the death penalty. Had appellate counsel raised the issue on direct appeal in this case, that court clearly would have been required to take the same action as this Court did in Ferrell and remand the case back to the trial court.

This deficiency compromised the appellate process of reviewing the sentencing order and greatly undermined the confidence of the appellate court’s decision. Therefore, this court should grant the petitioner’s writ of habeas corpus and allow a new appellate proceeding.

### **CONCLUSION**

Based on the reasons specified above, Taylor requests that this court grant his writ of habeas corpus and allow a new appeal.

RESPECTFULLY SUBMITTED,

/s/ Frank Tassone

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a copy of the foregoing has been delivered via hand to the Office of the State Attorney, Clay County Courthouse, Green Cove Springs, FL and sent via U.S. Mail to Assistant Attorney General, Charmaine Millsaps, at PL-01, The Capitol, Tallahassee FL 32399 on this 21st day of October, 2011.

/s/ Frank Tassone  
A T T O R N E Y