IN THE SUPREME COURT OF FLORIDA

WILLIAM KENNETH TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC17-1458
L.T. No. 292001CF008692000AHC
DEATH PENALTY CASE

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the direct appeal record ("DAR") will be referred to by the appropriate volume number followed by the page number, and the instant postconviction record ("PCR") will be cited along with the page number.

STATEMENT OF THE CASE AND FACTS

Appellant, William Kenneth Taylor, was indicted for the 2001 first-degree murder of Sandra Kushmer and the attempted murder of her brother, William Maddox, and other related offenses. He was convicted following a jury trial before the Honorable Barbara Fleischer in June 2004. The evidence demonstrated that Taylor had been out drinking and met Ms. Kushmer and Mr. Maddox. They went to Ms. Kushmer's home for some sandwiches, then Taylor and Ms. Kushmer left for another bar, leaving Mr. Maddox at the home sleeping. When Taylor and Ms. Kushmer returned, Taylor hit Ms. Kushmer in the back of the head with his shotgun. Taylor then went inside and beat Mr. Maddox severely, ransacked the home, and stole valuables. Ms. Kushmer was shot outside her home execution style. Taylor was ultimately arrested in Memphis, Tennessee, after using Mr. Maddox's credit cards along the path of his escape.

In addition to the contemporaneous felonies, Taylor had prior violent felony convictions and stipulated that he was on

felony probation at the time of Kushmer's murder. Following the penalty phase, the jury recommended imposition of a death sentence by a vote of 12 to 0. This circuit court followed the recommendation, finding three aggravating factors (on felony probation, prior violent felony convictions, and pecuniary gain), which outweighed the non-statutory mitigation offered by Taylor. This Court affirmed the convictions and sentences on June 29, 2006, with a corrected opinion issued on July 6, 2006. *Taylor v. State*, 937 So. 2d 590 (Fla. 2006). Taylor did not seek certiorari review, and his sentence became final upon expiration of the time to file a petition.

Taylor's initial motion for postconviction relief was denied following an evidentiary hearing. This Court affirmed that ruling, and denied a petition for writ of habeas corpus in the same opinion. *Taylor v. State*, 87 So. 3d 749 (Fla. 2012). Taylor then filed a federal petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on May 24, 2012, which has been stayed during the pendency of the instant litigation. *Taylor v. Secretary, Fla. Dept. of Corrections*, United States District Court Case No. 8:12-cv-1169-T-35AEP.

The instant appeal involves the circuit court's summary denial of Taylor's successive postconviction motion filed

pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The court specifically found "beyond a reasonable doubt that any *Hurst* error was harmless." (PCR 260). The court determined that this was "a highly aggravated case" and "the jury was instructed that the aggravators must be established beyond a reasonable doubt" but was not required to recommend death if the aggravators outweighed the mitigators, "and the jury recommendation was unanimous." (PCR 260). The court further found that "the evidence supporting the aggravators for Defendant's status on felony probation at the time of the murder and his prior violent felony convictions was significant and uncontested, there was no statutory mitigation, and the nonstatutory mitigation ranged from minimal to modest." (PCR 260). The court determined that the jury's contemporaneous robbery conviction "clearly" established the aggravator of the murder being committed for pecuniary gain. The court also noted that this Court has not found a *Hurst* error harmless in any unanimous jury case. (PCR 260). Consequently, the court concluded that there is no reasonable possibility that the *Hurst* error affected the sentence in this case where the jury unanimously made the requisite findings. (PCR 260).

SUMMARY OF THE ARGUMENT

The postconviction court properly denied Taylor's successive postconviction motion pursuant to *Hurst*, because the *Hurst* error was harmless. The jury in Taylor's case unanimously recommended a sentence of death, and this Court has consistently found harmless error in similar cases involving unanimous jury recommendations.

Additionally, the trial court properly determined that Dr. Moore's testimony was inadmissible as expert testimony used in support of establishing a *Caldwell v. Mississippi,* 472 U.S. 320 (1985) violation. Dr. Moore's testimony would have been based on his analysis of Taylor's trial after he and his non-legal, layperson associates had reviewed the transcripts and counted statements referencing the jury's recommendation and referring to the jury's role as advisory. Dr. Moore's opinion would have been based on his theory that repeated references made to the jury diminished the jury's sense of responsibility.

Taylor has failed to show why it was improper for the postconviction court to summarily deny his motion without allowing Dr. Moore to testify at an evidentiary hearing. Even if Taylor would have been granted an evidentiary hearing for Dr. Moore to testify, Taylor still would not be entitled to a new penalty-phase proceeding. Accordingly, this Court should affirm

the postconviction court’s denial of postconviction relief.

ARGUMENT

ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S MOTION FOR POSTCONVICTION RELIEF WHERE ANY ALLEGED *HURST* ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT BASED ON THE UNANIMOUS JURY RECOMMENDATION AND THE WEIGHTY AGGRAVATION THAT WAS UNCONTESTED AND EITHER SATISFIED IN THE GUILT PHASE OR STIPULATED TO BY APPELLANT. THE COURT ALSO PROPERLY DENIED APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING TO HAVE AN EXPERT WITNESS TESTIFY ABOUT ALLEGED VIOLATIONS OF *CALDWELL v. MISSISSIPPI*, 472 U.S. 320 (1985).

The postconviction court properly denied Taylor's *Hurst* motion. In *Hurst v. Florida*, the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of *Ring v. Arizona*, 536 U.S. 583 (2002). This Court has required that *Hurst* be retroactively applied to cases that were not final when the *Ring* opinion was issued, and *Hurst* retroactively applies to Taylor's case. *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Taylor, however, is not entitled to relief because the *Hurst* error in his case was harmless.

To find a *Hurst* error harmless, it must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances. *Davis v. State*, 207 So. 3d 142, 174 (Fla. 2016). This Court has consistently found *Hurst*

errors harmless in cases that where defendants were sentenced pursuant to a unanimous jury recommendation for death. *Cozzie v. State*, No. SC13-2393, 2017 WL 1954976 (Fla. May 11, 2017); *Morris v. State of Florida*, No. SC14-1317, 2017 WL 1506853 (Fla. April 27, 2017); *Tundidor v. State*, No. SC14-2276, 2017 WL 1506854 (Fla. April 27, 2017); *Oliver v. State*, No. SC12-1350, 2017 WL 1282098 (Fla. April 6, 2017); *Middleton v. State*, No. SC12-2469, 2017 WL 930925 (Fla. March 9, 2017, revised opinion); *Hall v. State*, 212 So. 3d 1001, 1033-34 (Fla. 2017); *Kaczmar v. State*, No. SC13-2247, 2017 WL 410214, at *4 (Fla. Jan. 31, 2017); *Knight v. State*, No. SC14-1775, 2017 WL 411329, at *15 (Fla. Jan. 31, 2017); *King v. State*, 211 So. 3d 866 (Fla. 2017); and *Davis v. State*, 207 So. 3d 142 (Fla. 2016).

In this case, the jury **unanimously** recommended Taylor's sentence of death. The jury was informed that, before it could recommend a sentence of death, it first needed to determine whether sufficient aggravating circumstances existed and then whether the aggravation outweighed the mitigation. (DAR V8/1266). The jury was also instructed that regardless of its findings with respect to aggravating and mitigating factors, it was **never required** to recommend a sentence of death. (DAR V8/1266). Nevertheless, the jury unanimously recommended death in Taylor's case. Accordingly, the postconviction court properly

found that "there is no reasonable possibility that the *Hurst* error affected the sentence in this case where the jury unanimously made the requisite findings." (PCR 260). The unanimous recommendations in this case "are precisely what [this Court has] determined in *Hurst* to be constitutionally necessary to impose a sentence of death." *Davis*, 207 So. 3d at 175.

In addition, all the aggravation in Taylor's case was supported by unanimous jury convictions or stipulation. As the postconviction court properly noted, "this was a highly aggravated case." (PCR 260). The jury found Taylor guilty of attempted murder, which satisfied the prior violent felony aggravator. *See Jackson v. State*, 213 So. 3d 754, 788 (Fla. 2017) (explaining that the jury was not required to find the existence of the aggravating circumstance that Jackson committed the murder during the course of sexual battery because he had already been convicted of sexual battery at the time he was sentenced); *See also King v. State*, 211 So. 3d 866, n.7 (Fla. 2017); *and Kopsho v. State*, 209 So. 3d 568 (Fla. 2017). The jury also found Taylor guilty of robbery, which established the pecuniary gain aggravating factor. Lastly, Taylor stipulated to having been on felony probation. Accordingly, all the aggravation in this case was satisfied and undisputed.

In contrast to Taylor's weighty aggravation, there was no statutory mitigation and, as noted by the postconviction court, "the nonstatutory mitigation ranged from minimal to modest." (PCR 260). The State met its burden of demonstrating harmless error in this case, and the postconviction court properly denied Taylor's successive motion. For these reasons, the lower court's order must be affirmed.

Next, Taylor challenges the trial court's order denying his motion to supplement regarding Dr. Moore. Dr. Moore had been retained in the Perry Taylor case (CF 88-15525) and the case of Ray Lamar Johnston (CF 97-13379), and he opined that *Caldwell v. Mississippi,* 472 U.S. 320 (1985), had been violated because the jury members were repeatedly advised throughout trial that their recommendation was merely advisory. In his motion, Taylor explained that he would like Dr. Moore to conduct a similar analysis of his case and for the record to be supplemented with Dr. Moore's report. Taylor requested that the court grant an evidentiary hearing, or in the alternative, to allow him to adopt the testimony of Dr. Moore from the Perry Taylor and Johnston proceedings.

The postconviction court chose to rely upon the testimony of Dr. Moore from the Perry Taylor and Johnston proceedings, and the court attached the testimony to its order denying Taylor's

motion to supplement. (PCR 177-240). Therefore, to the extent that Taylor's brief argues that the court erred in refusing to consider the expert testimony, Taylor is mistaken. The court certainly considered, and even relied upon, Dr. Moore's testimony in entering its order. The court, however, found that Dr. Moore's testimony was inadmissible. Taylor has failed to show how the postconviction court erred in reaching this conclusion.

Dr. Moore testified (in the Taylor Perry and Johnson cases) that he understood that *Caldwell* meant that there is "an unacceptable risk that a juror's sense of responsibility will be diminished by statements which – which reduce their responsibility for the outcome." (PCR 207). To determine whether that concept "propagated in *Caldwell*" could have been violated, he read through the entire trial transcripts in Perry Taylor's case and Johnston's case and determined how many statements appeared within the transcript that tended to diminish the jury's role. (PCR 209-210).

He used laypeople to serve as "coders" to assist him with reading through the transcripts and selecting the number of phrases that could be subject to *Caldwell* violations. (PCR 212-13). Dr. Moore explained that just "about all that's required" to be a coder is to be able to "read the English language." (PCR

216). Dr. Moore and the coders then reviewed the phrases selected within the transcripts to see if they all had counted the same phrases. Dr. Moore explained that sometimes phrases were missed; for instance, at least two coders had missed the fact that the recommendation form was titled "advisory sentence." (PCR 217). Moore testified that he and the coders identified approximately 130 statements in Perry Taylor's case. (PCR 218). In the Ray Lamar Johnston case, Dr. Moore and his team identified 60 statements. (PCR 219).

Taylor has failed to show why he was entitled to have Dr. Moore testify in his own case. Dr. Moore's analysis would be based on undisputed facts contained within the record and whether a *Caldwell* violation occurred is a purely legal claim not warranting an evidentiary hearing. By Dr. Moore's own admission, anyone who can read could have done what he and his team of coders did in the other capital cases. Taylor has not explained why Dr. Moore's testimony would be relevant and admissible and not invade the postconviction court's decision-making ability and duty to review the record.

By the same token, Taylor has further failed to explain how Dr. Moore and his team of non-attorney laypeople are qualified to determine whether a *Caldwell* error could have been violated in his case. Taylor was sentenced pursuant to the standard jury

instructions, and "this Court has repeatedly held that challenges to 'the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate *Caldwell v. Mississippi'* […] are without merit." *Hall v. State*, 212 So. 3d 1001, 1032 (Fla. 2017). According to Dr. Moore's analysis, however, all references to the jury's recommendation and their role being advisory would have been flagged and counted as statements that offend the concept "propagated in *Caldwell.*" It was entirely proper for the postconviction court to find Dr. Moore's testimony inadmissible in an evidentiary hearing to establish a *Caldwell* violation, and as such, the court properly summarily denied Taylor's *Hurst* claim.

It is further worth noting that Taylor's *Hurst* motion did include a *Caldwell* claim. (PCR 121). Furthermore, the postconviction court granted Taylor the opportunity to file a motion to supplement his successive motion with additional argument, but Taylor elected not to amend his motion. (PCR 254). However, even if Taylor would have amended his postconviction motion to have included the findings of Dr. Moore, supplemented the record, and been granted an evidentiary hearing for Dr. Moore to testify, he still would not have been entitled to a new sentencing proceeding.

Any substantive claim based on *Caldwell* was untimely and procedurally barred. In addition, any variation of a *Caldwell* claim would have been meritless. This Court has consistently rejected *Caldwell* challenges, and the inclusion of Dr. Moore would not have impacted Taylor's claim. The jury was properly instructed on its role based on the law existing at the time of Taylor's trial. The fact that the law changed years later to require the jury to play a larger role at sentencing does not support any suggestion that the jury was misled regarding its role at that time.

Certainly, jurors in all the cases where this Court has found *Hurst* errors to be harmless were also told that their recommendation was only advisory, since that was the appropriate instruction on the law at the time of the trials. Given that this Court has persistently held that the standard jury instructions do not violate *Caldwell*, having Dr. Moore count the number of times that language in the standard jury instructions was used throughout trial and provided to the jury within their instructions and recommendation form would not render the instructions and arguments in Taylor's case violative of *Caldwell*. Taylor has failed to meet his burden of showing entitlement to relief. Taylor has certainly failed to show why

the lower court's order should not be affirmed based on the Court's precedent in *Hurst*, *Davis*, and *Mosley*.

Lastly, Taylor's final request for this Court to rehear his previously denied postconviction claims is baseless and completely without merit. The postconviction court properly determined that there is no legal authority that would permit or require it to re-evaluate and reconsider previously presented postconviction claims. (PCR 265-66). *Hurst* cannot be used to resurrect Taylor's previously adjudicated claims.

CONCLUSION

Appellee respectfully requests that this Honorable Court affirm the postconviction court's order denying Taylor's successive motion for postconviction relief and order denying his motion to supplement. Taylor is not entitled to *Hurst* relief, and the postconviction court's orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 2nd day of October, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Kevin T. Beck, Esquire, Law Office of Kevin T. Beck, P.A., 615 27th Street South, Suite E, Saint Petersburg, Florida 33712, **kevintbeck@hotmail.com**

CERTIFICATE OF FONT COMPLIANCE

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

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