IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1501

PERRY ALEXANDER TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Taylor lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Taylor.

PRELIMINARY STATEMENT REGARDING REFERENCES

The postconviction record on appeal of the denial of Mr. Taylor's Successive Motion to Vacate Death Sentence is comprised of four volumes, initially compiled by the clerk, successively paginated beginning with page one. References to the record include volume and page number and are of the form, e.g., (R. 123).

Mr. Taylor had one guilt phase trial and two penalty phases. Following this Court's affirmance of his last death sentence, Mr. Taylor filed a Successive Motion under Florida Rule of Criminal Procedure 3.851. Following the trial court's denial of relief, Mr. Taylor now appeals the decisions adverse to him in those lower court proceedings. To the extent that any citations to the record are made from Mr. Taylor's prior trial, penalty phases or postconviction hearings, the citations will be explained herein.

Generally, Perry Taylor is referred to as Mr. Taylor throughout this brief. The Office of the Capital Collateral

Regional Counsel - Middle Region, representing the Appellant, is shortened to “CCRC.”

STATEMENT OF THE CASE AND FACTS

1. Procedural History: Mr. Taylor was indicted by grand jury in Hillsborough County, Florida on November 2, 1988. 1989 ROA Vol. IX 1047-48. He was charged with first degree murder and sexual battery/great force. He pled not guilty. Jury trial commenced on May 8, 1989. The jury found Mr. Taylor guilty of the crimes charged. 1989 ROA Vol. IX 1173. The jury rendered a sentencing recommendation of death. 1989 ROA Vol. IX 1179. On May 12, 1989, the judge sentenced Mr. Taylor to death as to the first degree murder conviction, and to life on the sexual battery count. 1989 ROA Vol. IX 1182-87.

This Court affirmed Mr. Taylor's convictions, but remanded the case for resentencing before a jury on the first degree murder conviction based on prosecutorial misconduct in closing argument. *Taylor v. State*, 583 So. 2d 323 (Fla. 1991). At the second penalty phase, the jury rendered a recommendation of death by a vote of eight to four (1992 ROA Vol. IV 598, Vol. V 799). The judge sentenced Mr. Taylor to death based following the eight to four death recommendation.

This Court again affirmed Mr. Taylor's death sentence. *Taylor v. State*, 638 So. 2d 30 (Fla. 1994). Mr. Taylor filed a petition for writ of certiorari in the United States Supreme Court, which was denied on November 14, 1994. *Taylor v. Florida*, 513 U.S. 1003, 115 S. Ct. 518 (1994).

Mr. Taylor timely filed a 3.850 motion in 1996. After evidentiary hearings in 2003, 2004, and 2005, the circuit judge denied all relief. This Court affirmed. *Taylor v. State*, 3 So. 3d 986 (Fla. 2009). The Federal District Court for the Middle District of Florida and the Eleventh Circuit denied federal relief, and the United States Supreme Court denied certiorari.

2. Prior *Ring*-like Claims: Relevant to this appeal, well before *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428 (2002) was even issued, Mr. Taylor raised *Ring*-like claims in this Court. Mr. Taylor raised such claims nearly 25 years ago. Clear illustrations of this are found in the instant record on appeal. As part of Mr. Taylor's witness and exhibit list filed March 22, 2017 (2017 ROA Supp. 804-849), attached to that pleading as Exhibit B., Mr. Taylor specifically included as exhibits this Court's opinion in *Taylor v. State*, 638 So. 2d 30, 33 (Fla. 1994)("Taylor also makes the following claims (1) that the Florida death penalty statute which allows a bare majority death recommendation violates the Constitution; (2) that the death penalty statute conflicts with the Florida Rules of Criminal Procedure."). As Exhibit C., also attached his Reply Brief addressing these issues: *Taylor v. State*, 1993 WL 13012320 (1993).

As far as the reasons for including these documents as exhibits to the witness and exhibit list, the lower court was informed by Mr. Taylor:

Perry Alexander Taylor, by and through the undersigned counsel, pursuant to Fla. R. Crim. Proc. 3.851(f)(5), and provides this notice of witnesses and exhibits that he intends to present at an evidentiary hearing, primarily to lend evidentiary support for arguments against the current June 24, 2002 *Hurst* cutoff date, and in support of retroactivity under the fundamental fairness doctrine found in *James v. State*, 615 So. 2d 668 at 669 (1993)("James, however, objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on appeal against the constitutionality of the jury instruction he received. Because of this, it would not be fair to deprive him of the *Espinoza* ruling.").

See also Mosley v. State, ---So. 3d ---, 2016 WL 7406506 at 19 (Fla. 2016)("This Court has previously held that fundamental fairness alone may require the retroactive application of certain decisions involving the death penalty after the United States Supreme Court decides a case that changes our jurisprudence. For example, in *James*, this Court reviewed whether the United States Supreme Court's decision in *Espinoza v. Florida*, 505 U.S. 1079 [] (1992) should apply retroactively. *James*, 615 So. 2d at 669.")

See also J. Lewis' concurrence citing *James* in *Asay v. State*, --- So. 3d ---, 2016 WL 7406538 at 21 (Fla. 2016) ("it would be unjust to deprive James of the benefit of the Supreme Court's holding in *Espinoza* he had properly presented and preserved such a claim. *James* 615 So. 2d at 669. Similarly, I believe that defendants who properly preserved the substance of a *Ring* challenge at trial and on direct appeal prior to that decision should also be entitled to have their constitutional challenges heard").

See also J. Pariente's concurrence/dissent citing *James* in *Gaskin v. State*, ---So. 3d ---, 2017 WL 224772 at 3 (Fla. 2017)("Even without a finding a full retroactivity, under Justice Lewis's concurring in result opinion in *Asay*, *Hurst* would apply retroactively to Gaskin under *James v. State*, 615 So. 2d 668 (Fla. 1993), because Gaskin asserted, presented, and preserved a challenge to the lack of jury factfinding in Florida's capital sentencing procedure. *Asay* ---So. 3d at ---, 2016 7406538, at 20 (Lewis, J., concurring in result).")

2017 ROA Supp. 804-805. The lower court denied evidentiary hearing, denied Mr. Taylor's request to present the testimony of Dr. Harvey Moore, and denied all relief.

3. Successive Postconviction Motion: Mr. Taylor filed his first successive motion for postconviction relief on July 14, 2016. In the motion he raised 3 separate claims generally related to the trial testimony of medical examiner Dr. Miller. He also raised a fourth claim in the motion citing the United States Supreme Court decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

On January 24, 2017, Mr. Taylor filed a Motion to Amend First Successive Motion for Postconviction Relief in the lower court, including in that motion an expanded claim IV based on *Hurst v. Florida* and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). 2017 ROA Vol. II 301-325. The lower court granted the motion to amend February 8, 2017. 2017 ROA Vol. II 326-327. On March 22, 2017 Mr. Taylor filed his witness and exhibit list in preparation for evidentiary hearing, which included references to his prior *Ring*-like claims raised decades prior, as well as a new report from applied sociologist Harvey A. Moore, Ph. D. who identified approximately 140 *Caldwell*-type errors from trial. Dr. Moore ultimately concluded in his report the following:

> [A] jury which is told its work will not determine the outcome of sentencing necessarily is less likely to take its role as seriously as would be the case if it actually bore more direct responsibility for execution of sentence. . . .Based on the socio-legal standard

> established in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) we may we may conclude to a reasonable degree of sociological certainly the jury which recommended a sentence of death for Mr. Taylor [] was persuaded against the requisite level of attention to its responsibility through comments made by the court and the prosecutor, and repeated by fellow members of the venire.

Dr. Moore's Report at 2017 ROA Supp. 811.

On March 22, 2017, hours after Mr. Taylor filed his witness and exhibit list, the state filed a motion to strike Dr. Moore as a witness and moved to strike his report. 2017 ROA Vol. II 347-350. On May 2, 2017, Mr. Taylor filed a Second Motion to Amend First Successive Motion for Postconviction Relief, attaching a claim related to a new law now requiring unanimous jury verdicts for death in Florida. 2017 ROA Vol. II 351-373. On May 3, 2017, Mr. Taylor responded to the state's Motion to Strike the witness and exhibit list on May 3, 2017. 2017 ROA Vol. II 374-385.

On May 15, 2017, the lower court denied Mr. Taylor's Second Motion to Amend First Successive Motion for Postconviction Relief. 2017 ROA Vol. III 423-425. A hearing was held on the state's motion to strike Dr. Moore and his report on May 18, 2017. The lower court heard extensive qualifying testimony from Dr. Moore on May 15, 2017, then issued an order granting the state's motion to strike on June 12, 2017. 2017 ROA Supp. 850-936. On June 12, 2017 the lower court denied the Amended Claim Four of the Defendant's First Successive Motion for Postconviction Relief. 2017 ROA Vol. III 568-577. Mr. Taylor filed Motions for Rehearing on the striking of

Dr. Moore (2017 ROA Vol. III 578-583) and on the denial of Amended Claim Four (2017 ROA Vol. III 584-586). On June 29, 2017 Mr. Taylor filed a Supplement to the Motion for Rehearing on the striking of Dr. Moore including an amended report from Dr. Moore addressing some of the issues raised by the lower court in the previous order striking the report (2017 ROA Vol. III 587-627). On July 13, 2017 the lower court entered orders denying rehearing on Claim Four and on the Dr. Moore issue (2017 ROA Vol. III 628-629, 630-31). This appeal of those adverse decisions follows.

SUMMARY OF ARGUMENT

Florida has never had a constitutional system for capital punishment. Twice the State has sought death Mr. Taylor; both times the State failed to comply with the United States Constitution and Florida Constitution in obtaining the death sentence.

Hurst v. Florida, 136 S. Ct. 616 (2016) is a landmark decision issued by the United States Supreme Court that declared Florida's death penalty system unconstitutional. Based on *Hurst*, other case law, and the implications arising therefrom, Mr. Taylor's death sentence violates the United States and Florida Constitutions. This Court should vacate Mr. Taylor's death sentence.

Hurst v. Florida and this Court's subsequent decisions were not available for Mr. Taylor to present the claims he raised in the successive postconviction motion at issue. *Hurst* gave the expanded claims contained in the motion viability. Mr. Taylor

submits that the decisions in *Hurst v. Florida* and the decisions that followed are changes in the law, clarification of existing law, and newly discovered evidence in the sense that *Hurst* overcame prior unconstitutional decisions that prevented a remedy for all of the constitutional violations that occurred in his case. Mr. Taylor asserts unequivocally that these decisions should be fully retroactive and that any decision to the contrary violates his rights. Moreover, any distinction based on finality, see *Asay v. State*, 210 So.3d 1 (Fla. 2016), is arbitrary and capricious, violating the Eighth Amendment, Equal Protection Clause, and Due Process Clause of the United States and Florida Constitutions.

For several reasons, *Hurst v. Florida* should be retroactive at least back to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), not just back to *Ring v. Arizona* (2002). *Caldwell* clarified that a jury's role cannot be diminished at trial. *Ring* did not establish the right to a jury trial, the Sixth Amendment did. *Caldwell* clarified that any comments at trial that might act to diminish a juror's sense of responsibility for imposing the ultimate sentence of death cannot be constitutionally tolerated. The State of Florida has managed to disavow these *Caldwell* principles for over 30 years. Through the lens of *Hurst*, it should now be crystal clear that death sentences like Mr. Taylor's resting on a flawed capital punishment system cannot stand. *See* the recent dissents from *Truehill v. Florida*, --U.S.--, 2017 WL 2463876 (Oct. 16, 2017).

Caldwell held that just ***one*** comment at trial which carries the risk of diminishing the jury's sense of responsibility for decision-making in the death penalty process results in an unacceptable Eighth Amendment violation. Following such a comment, the United States Supreme Court ruled that the death sentence must be vacated. As Dr. Harvey Moore's report in this case details, because of Florida's flawed capital sentencing scheme, there were ***134*** such comments made at Mr. Taylor's trial. (2017 ROA Supp. 809).

The lower court should have accepted Dr. Moore's report, should have permitted Dr. Moore to testify, and should have followed the dictates of *Caldwell* and vacated the death sentence in this case. There is nothing new or novel about applying the sociological methods of content analysis to legal analysis. This type of research has been conducted since 1948 (see fn 11 of Dr. Moore's report, 2017 ROA Vol. III 591). *Frye* should not act to bar the consideration of this evidence at an evidentiary hearing. At the very least, this Court should remand this case for an evidentiary hearing for full consideration of this vital evidence ignored and stricken by the lower court.

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct. 2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from ultimately taking responsibility for imposing a sentence of death. For years, Florida trial judges instructed an advisory panel, incorrectly called a

jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. When reviewing the decisions of the trial court, this Court, and the federal courts under AEDPA, gave great deference to each previous court. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. Taylor was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. Taylor's death sentence violates the Sixth, Eighth and Fourteenth Amendments and the Florida Constitution.

In addition to the issues arising from the *Hurst* decisions, Mr. Taylor's conviction and death sentence clearly came as consequence of the flawed testimony of the medical examiner in this case, Dr. Lee Robert Miller. Even if it has not been proven now to a 100 percent certainty that a kick was the cause of the injuries to the victim's vagina in this case, there is certainly reasonable doubt that the injuries occurred as the State claimed at trial based on Dr. Miller's flawed testimony. The conviction for sexual battery should not stand. Mr. Taylor is not guilty of sexual battery. There should have been no option for the jury to

find him guilty of felony murder or recommend death.

STANDARD OF REVIEW

The lower court summarily denied Mr. Taylor's motion without conducting an evidentiary hearing. Mr. Taylor's factual assertions should be accepted as true and the review of this Court should be *de novo*. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999); *Gaskin v. State*, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THIS COURT SHOULD CONSIDER THE MOST RECENT REPORT FROM DR. HARVEY MOORE DETAILING 134 *CALDWELL* VIOLATIONS THAT OCCURRED AT TRIAL IN THE INSTANT CASE. THIS COURT SHOULD HOLD *HURST* RETROACTIVE TO AT LEAST *CALDWELL V. MISSISSIPPI* (1985), OR AT THE VERY LEAST, SHOULD REMAND THIS CASE BACK TO THE LOWER COURT FOR A FULL EVIDENTIARY HEARING. THE SCIENTIFIC AND SOCIOLOGOCAL EVIDENCE PRESENTED IN FAVOR OF FURTHER RETROACTIVITY AND RELIEF FROM THE DEATH SENTENCE SHOULD NOT HAVE BEEN *FRYE*-BARRED BY THE LOWER COURT.

The errors that occurred at Mr. Taylor's trial were not harmless. The advisory panel at Mr. Taylor's second penalty phase did not return with a unanimous recommendation for death. Since this Court's opinion in *Hurst v. State*, 202 So. 3d 340 (Fla. 2016), the Court has repeatedly held that *Hurst* errors are not harmless in cases involving less than unanimous advisory panel recommendations. The only barrier to the lower court granting *Hurst* relief and vacating the death sentence in this case is the June 24, 2002 *Ring v. Arizona* cutoff date announced by this Court in *Asay v. State*, 210 So. 3d 1 (Fla. 2016).

Mr. Taylor submits that after the issuance of the United States Supreme Court opinion in *Caldwell v. Mississippi,* 472 U.S. 320 (1985), the State of Florida was on notice that "It is unconstitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere." *Caldwell* at 328-29. Florida's entire death penalty system was unconstitutionally premised on informing the jury that it was the trial judge and the trial judge alone who would be making the life or death decision in a capital case. The Florida legislature could have re-written our death penalty statute in accordance with the dictates of *Caldwell* after 1985, but it did not. Mr. Caldwell's death sentence was vacated by the United States Supreme Court because the prosecutor made ***one comment*** to the jury that indicated that ultimate responsibility for the death sentence was with a higher court who would review the death sentence. If the State of Florida was truly being responsible and was prudently relying on decisions from the United States Supreme Court for guidance on the constitutionality of its death penalty system, the legislature had a duty to change the state death penalty system to bring it in accordance with *Caldwell* and the United States Constitution. Any reliance on the old rule was imprudent. Mr. Taylor suspected that the old rule was unconstitutional, he filed motions raising these issues, and he

raised the issues in his direct appeal approximately 25 years ago.

Mr. Taylor's advisory panel recommended death by a 8-4 margin. While this does not suffice to meet *Hurst v. Florida*'s jury requirement or *Hurst v. State*'s unanimity requirement, it does counter any attempt by the State to show that the Sixth Amendment violations in this case are harmless - - beyond a reasonable doubt. Removed from the constitutional responsibility that subjected a fellow citizen to death, the advisory panel still returned a recommendation that would have required a life sentence if the advisory panel were a jury acting under a constitutional system.

Any attempt by the State to argue that the constitutional violations argued herein were harmless beyond a reasonable doubt fails. This Court has repeatedly held that non-unanimous death recommendations render *Hurst* errors presumptively harmful when the cases became final after *Ring. See, e.g.*, *Johnson v. State,* 205 So. 3d 1285, 1288 (Fla. 2016) (11-1 jury vote); *McGirth v. State,* 209 So. 3d 1146, 1150 (Fla. 2017) (11-1 jury vote)(Mr. Taylor will not list the multitude of cases here that were afforded *Hurst* relief based primarily on the split jury recommendations).

Perry Taylor should be afforded Hurst relief because of the dictates of *Caldwell*. Relatively recently, in the case of *McCloud v. State*, 208 So. 3d 668 (Fla. 2016), a death penalty case in a post-*Hurst* landscape, this Court was confronted with just a handful of cited *Caldwell* errors in that appeal. This Court addressed the

errors as follows:

> McCloud claims that the trial court erred by "advis[ing] the jury on five or six occasions that the ultimate decision to impose the death penalty rested with the court," in violation of the United States Supreme Court holding in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 [] (1985)("[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.") We decline to address this argument in light of our decision to vacate McCloud's death sentence on other grounds.

McCloud, Id. at 681-82. Mr. Taylor now asks this Court to address and rectify the documented 134 *Caldwell* errors that occurred in this post-*Hurst* landscape.

Dr. Harvey Moore's Revised Report: Dr. Harvey Moore completed three reports in this case. His first report is dated March 21, 2017 and is located at 2017 ROA Supp. 808-835. After the trial court struck his report purportedly on *Frye* grounds (*see* Order at 2017 ROA Supp. 850-936), Dr. Moore completed a revised report more specifically addressing the trial court's concerns. The revised report dated June 28, 2017 is located at 2017 ROA Vol. III-IV 587-627, and informs:

> You have asked me to evaluate the retrial transcript (1992 Penalty Phase) in Taylor v. State, Hillsborough County Circuit Court Case Number 88-15525 to identify any statements which, from a reasonable juror's perspective, appear to undermine the personal sense of responsibility for the outcome of trial culminating and reflected in sentencing based on guidance derived from *Caldwell*[1]. Furthermore, you have asked me to revise and expand on commentary regarding (1) the alleged novelty of the methodology selected in

1 *Caldwell v. Mississippi* 472 U.S. 320 (1985).

terms of its specific application to the law and (2) the notion that any one person can accomplish the same analysis of that conducted through panel evaluation of specific texts. A wide variety of journeyman research methodologies in the social and behavioral sciences have been applied to problems in legal analysis covering broad areas of judicial interest, such as venue change, pre-trial publicity, mediation, ethics, voir dire, jury selection, jury deliberations, the application of peremptory and cause challenges, racial discrimination, the design of patterned jury instructions and capital punishment.[2] A simple and direct method of applying a non-legal perspective to this transcript is to conduct a content analysis of the text record of statements made to the jurors during the trial in terms of two principles in *Caldwell* which frame the inquiry you seek:

- "It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the

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2 Brodsky, S. L. (2000), Change of Venue Assessments in Civil Litigation: Methodologies for a Comprehensive Evaluation. *Journal of Law and Psychiatry*, 28(3), 335-349; or, Kovera, M. B. (2002), The Effects of General Pretrial Publicity on Juror Decisions: An Examination of Moderators and Mediating Mechanisms, *Law and Human Behavior*, 26(1), 43-72; or, Posey, A.J. & Dahl, L.M. (2002), Beyond Pretrial Publicity: Legal and Ethical Issues Associated With Change of Venue Surveys, *Law and Human Behavior*, 26(1), 107-125; or, Frederick, J.T. (2011), *Mastering Voir Dire and Jury Selection: Gaining an Edge in Questioning and Selecting a Jury*. Chicago, IL: American Bar Association; or, Kalven, H. & Ziesel, H. (1971), *The American Jury*. Chicago, IL: The University of Chicago; or, Ziesel, H. & Diamond, S.S. (1978), The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court, Stanford Law Review, 30(1), 491-531; or, Frederick, J.T. (1984), Social Science Involvement in Voir Dire: Preliminary Data on the Effectiveness of "Scientific Jury Selection", Behavioral Science and the Law, 2(4), 375-394; or*, United States v. Mikos*, 539 F.3d 706 (2008); or, Perlman, H.S. (1986), Pattern Jury Instruction: The Application of Social Science Research, *Nebraska Law Review*, 65(525), 520-542; or, Tanford, J. A. (1990), The Law and Psychology of Jury Instructions, *Nebraska Law Review*, 69(71) ,72-110; or, "Deciding Death: Revising Jury Instructions to Improve Juror Comprehension of the Law" (1996), 7 Researching Law: An ABF Update 1; or, *United States v. I. Lewis Libby*, 461 F.Supp.2d 3 (2006).

appropriateness of defendant's death rests elsewhere."[3]

- "There are several reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."[4]

Innumerable Florida cases have cited *Caldwell* errors, in part or in whole, as a basis for an appeal. However, the courts do not appear to have paid any *empirical* attention to the frequency of statements that would constitute harmful error, no matter the Supreme Court decision held that even a single such sentence is sufficient to undermine the jury's role in decision-making by diminishing a juror's sense of responsibility for the outcome of trial and was sufficient grounds for reversal. While much discussed, statements which constitute *Caldwell* errors affecting the deliberations and verdicts of reasonable jurors have not been *counted* in the two most relevant cases decided by the 11th U.S. Circuit Court of Appeals.[5] Indeed, the most serious scholarly attempt to wrestle with the significance of the *Caldwell* decision examines available empirical evidence demonstrating support for the significance of *Caldwell* errors by outlining research results from studies of jury decision-making, jury perception, bias, unresponsive bystander studies, sentencing severity research and mock trial studies, yet gives no attention to the *frequency* of such errors during any specific trial.[6] If, as the Supreme Court found, even a single sentence has the power to diminish or undermine a juror's awesome sense of personal responsibility for the outcome of a capital case, any analysis of the power of such comments must begin with an informed and rigorous examination of the *number of such references* in the trial record. Without such evidence derived from the transcript, any analysis of *Caldwell* errors is incomplete. Moreover, the cumulative meaning and weight of such references, multiplied by their number during the *entire* trial, threaten to overwhelm jurors leaving them with a misapprehension of their role. [7]

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3 *Caldwell v. Mississippi,* 472 U.S. at 328-329 (1985).
4 *Caldwell v. Mississippi,* 472 U.S. at 330 (1985).
5 See *Mann v. Dugger*, 817 F.2d 1471, 1475 (11th Cir. 1987) and *Harich v. Dugger*, 844 F.2d 1464, 1470-71 (11th Cir. 1988).
6 See Mello, M. (1989) "Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes That Divide Sentencing Responsibility Between Judge and Jury," 30 *Boston College Law Review* 283.
7 See Judge Tjoflat's concurring opinion in *Harich v. Dugger* 844 F.2d 1464: 1475 11th Cir. 1988: "The chief defect in the analysis…is that it focuses too heavily on whether the

Similarly, there has been little, if any, attention to the *placement* or occasion for such statements during the trial in terms of the effects of either such factor on the decision-making of reasonable jurors. *Caldwell* statements by the court or prosecution *before* decisions on guilt and/or sentencing is reached could have the same effect as those made during the sentencing phase: "One concern expressed in *Caldwell* was that a sentencing jury, unconvinced that death is the appropriate punishment…might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts. The jury might thus tend to sentence the defendant to death because of any lingering doubts about possible error may be corrected on appeal."[8] In short, the gruesomeness of evidence necessarily adduced during the trial of a capital case, before punishment is even considered, may affect later phases of

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statements by the prosecutor and the court regarding the sentencing process were accurate in a very technical sense, and does not fully consider whether the jurors were nevertheless left with a misimpression as to the importance of their role. In my view, a proper analysis of a *Caldwell* claim requires an evaluation of how a reasonable juror would have understood the court's statements in *the context of the entire trial"*. (Emphasis added.) See also Bowers, W.J., Sandys, M., & Steiner, B.D. (1998) "Foreclosed Impartiality in Capital Sentencing: Predispositions, Guilt-trial experience, and Premature Decision Making," *Cornell Law Review.* 1476 which concludes at p. 1556 "Many jurors make premature pro-death punishment decisions, and most are absolutely convinced that death is the right punishment and stick with it thereafter. Pre-existing feelings that death is the only acceptable punishment for many kinds of aggravated murder and the belief that premeditated murder requires the death penalty substantially contribute to an early pro-death stand…Early pro-life stands are largely independent of death penalty values or predispositions but they are strongly influenced by lingering doubt as a mitigating consideration among capital jurors demonstrates that it is essential to the moral character of capital sentencing…The guilt trial has become a venue for advocating punishment stands and for injecting punishment considerations into the guilt decisions. This shift is a reflection of both unspoken assumptions about the purpose of the capital trial and the unique character and gravity of the decision. Whatever the reasons, the consequence is a system gone awry from the start."

8 *Harich v. Dugger* 844 F.2d 1464 at 1473. This case, on the other hand was decided by two separate juries: one during the guilt phase and a separate group which heard evidence both on the nature of the wrongdoing and mitigation.

the trial.[9] *Caldwell* errors can have an effect on determination of both guilt and the appropriate sentence. In any case, even when there may be two separate juries hearing the case, deciding respectively guilt or sentence, the immediate effect of gruesome evidence as recounted in the summary of facts for the sentencing group may have a different but unknown impact.

Method. Content Analysis is a methodology common to many disciplines in the social and behavioral sciences including Sociology, Psychology, and Social Psychology, the Information and Library Sciences and other disciplines. Typically it is used for the evaluation of text, video, audio and other observational data and may include both qualitative, quantitative and mixed modes of research frameworks.[10] Although not an element of legal training, the application of content analysis to the law was neither "novel" nor "speculative" when, approximately 70 years ago, the *University of Chicago Law Review* introduced the method to its readers: "Conclusions are drawn solely from the incidence of materials within the categories"-- and the method has since enjoyed broad acceptance and a long tradition of use both nationally and internationally.[11] The method and conclusions derived from its

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9 See, for example, Bright, D. A. & Delahunty-Goodman, J. (2006), "Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-making," *Law and Human Behavior*, 30(2), 183-202.

10 See White, M., & Marsh, E. (2006), Content Analysis: A Flexible Methodology, *Library Trends, 55* (Summer); or, Babbie, E. R. (2007), *The Basics of Social Research* (4th ed., p.416), Belmont: Wadsworth Publications. See also Neuendorf, K. A. (2017), *The Content Analysis Guidebook* (2nd Ed.) Los Angeles: Sage Publications, Inc. See also Schreier, M. (2012), *Qualitative Content Analysis in Practice* (p.9) Los Angeles: Sage Publications, Inc. for the difference between quantitative and qualitative content analysis. See also Weber, R. P. (1990). *Basic Content Analysis* (2nd Ed.) California: Sage Publications, Inc.

11 Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review*: 15(4); see also Hall, M. E. & Right, R.F. (2008) , "Content Analysis of Judicial Opinions, *California Law Review*, 96(1) p. 63: "Professor Herman Oliphant, in his inaugural address as President of the American Association of Law Schools [see Oliphant, H. (1928), "A Return to Stare Decisis", *American Bar Association Journal, 161*] Our case material is a scientific goldmine for scientific work. It has not been scientifically exploited...We should critically examine all of the methods now used in any of the social sciences and having any useful degree of ***objectivity***"; or Gupta, S. K. (1982), Applicability of

application are not speculative when quantitative results are applied only to an accepted legal or scientific principal. At its most fundamental level, the technique provides a systematic means of codifying and counting references (such as *Caldwell* errors) based on explicit coding standards executed by multiple reviewers. "Basic content analysis relies mainly on frequency counts of low-inference events that are manifest or literal and that do not require the researcher to make extensive interpretive judgments."[12] By using a panel of coders as opposed to relying on a single, expert review, conclusions are cleansed of individual biases and variance in the interpretation of the meaning for any particular sentence.

A panel of six coders read the trial transcript and recorded observations which fit any of the following categories derived from *Caldwell*:

- Any suggestion they might make with respect to the ultimate recommendation for punishment can be corrected on appeal by the sitting judge, appellate court, or executive decision-maker; or,
- Any suggestion that only a death sentence and not a life sentence will subsequently be reviewed; or,
- Any suggestions indicating that the jury's responsibility for any ultimate determination of death will rest with others, *e.g.* an alternative decision maker such as the judge or a higher state court.

The unit of analysis chosen for this review was the *sentence*. Reviewers were asked to count any comment uttered before the jury which either directly, or, implicitly fell into the categories above in their judgment.[13] Disagreements were adjudicated in a

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Content Analysis in Legal Research," *Journal of the Indian Law Institute*, 24(4), 751-755

12 Drisko, J. W., & Maschi, T. (2015). *Content Analysis*. New York: Oxford University Press, 2015.

13 Implicit comments were those which included restatement of the question, in whole or in part, by one party to another before the larger audience as within the case when the prosecution partially repeats a question or response made by a juror to ensure common understanding. The significance of implicit statements is reflected in the opinion of Judge Tjoflat writing for the U.S. Court of Appeals 11th Circuit in *Mann v. State* 844 F.2d 1446, 1458(fn14) "In light of the prosecutor's repeated suggestions throughout the proceedings that the jury's role was unimportant, we are satisfied that when jurors heard

review by the full panel. Inter-coder reliability was established by identifying *errors* reflecting judgments that could not be corrected by review of the panel due to a fundamental disagreement over the meaning of the comment and *mistakes*, *e.g.*, accidental oversights or misreads which were identified by a vote on review.

The results of this analysis are summarized in Table I, attached at Tab A. The inter-coder reliability rate for errors was 97% with 134 comments (four discrepancies) out of a total of 138 observations. (See Table I at Tab A.) Coding mistakes which were resolved upon review and did not reflect disagreement on content included 17% (93) of the 536 judgments.

My resume and those of the coders are attached at Tab B. Two of the coders (Ms. Deery and Mr. Ali) respectively are graduate and undergraduate Psychology majors at the University of South Florida. Mr. Brennan, the fourth coder, is a journalist who actually covered the *Caldwell* case for *The Meridian Star* before the Mississippi Supreme Court. None have any previous experience in conducting content analysis and the entire panel consists of an availability sample of jury-eligible citizens. The coders were trained and tasked by me prior to the exercise in accordance with standard content analysis protocol and guidelines.

Coder training is an essential first step in any human-coded content evaluation. It is a *myth* that anyone can do content analysis, though, because "…indeed anyone can do it, but only with some training and with substantial research planning."[14] The impression this is a novel technique in the law when applied to evidence should diminish as familiarity with its broad application in both the social sciences and legal analysis grows. [15] All coders were trained beginning with a read of the *Caldwell* decision. All coders followed a fixed protocol which defined the categories and each member of the team was oriented to the task by means of

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the trial judge say "as you have been told," they understood the reference to be the prosecutor's portrayal of their role."

14 Neuendorf, K. A. (2017), *The Content Analysis Guidebook* (2nd Ed.) Los Angeles: Sage Publications, Inc., pp. 7-8.

15 See Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review*, 15(4) at p. 924: "…judicial reaction to novelty will disappear with repeated use of the device. As the argument in the *News* so well demonstrates, when a novel technique is used before a judging body it finds itself on trial, while the matter in issue which it seeks to convey is relegated to the status of a waif tugging at the judicial robes for a sign of recognition."

practice sessions involving other cases.

Results. Table I at Tab A identifies 134 sentence-long statements by Judge Diana M. Allen, or, State Prosecutor, Ron Hanes, or, by jurors who directly or implicitly repeated questions posed by the State during voir dire which the coders found to fit the categories described above. On their face, these sentences appear to diminish the role of jurors or the jury as the final arbiter of the punishment in accord with existing Florida law which requires the judge to set the penalty. A total of 83 sentences or 62% ***directly*** reflected the juror's inferior position in setting punishment while 38% (51) ***implicitly*** asserted sentencing would actually be determined by some other party. Moreover, 72% (97) of these statements were made before the jury heard evidence concerning mitigation while 28% (137) were made largely at the conclusion of the evidentiary phase. (See Table I at Tab A.)

To further evaluate the content of the transcript we conducted a machine read to count the incidence of two key phrases frequently recognized by coders in the content analysis as opposed to complete sentences: "advisory sentence" and "recommend a sentence" using Adobe XI. [16]

Table II

	Machine Search	Content Analysis
Before Evidence	5% (2)	72% (97)
After Evidence	95% (41)	28% (37)
Total	100% (43)	100% (134)

This machine approach to word count generated fewer reference sentences than the content analysis. (See Table II.). A full list of the reference sentences containing these phrases is attached at Tab C. Only 5% (2) of the references caught by the electronic review occurred the presentation of evidence to the jury, while 95% (41) after presentation of evidence. Conversely, 72% (97) of the sentences identified by the panel of coders were made before the presentation of evidence with 28% (37) occurring after. Clearly, the machine read is a clumsy tool, unable to identify nuances of meaning or to identify implicit meanings. The comparison of the results of the two methods highlights the number of references that may have undermined the juror's sense of personal responsibility for the outcome of the trial *before* the sentence for Mr. Taylor was considered.

16 Adobe Systems Incorporated. (n.d.). Adobe Acrobat X (Version 10.0.0) [Computer software].

Analysis. These results are not surprising given that Florida law directly tasked the sitting judge in the trial with the actual sentencing decision in death penalty cases. However, inasmuch as *Caldwell* was decided on the basis of a single assertion the U.S. Supreme Court held was sufficient to establish a constitutional flaw, the sheer number and weight of such statements, in this case, supports the conclusion jurors might well apply themselves to the awesome responsibility of addressing the question of life or death for the defendant with either more or less intensity for reasons unrelated to either evidence or testimony. A simple content analysis of the trial transcript of this case demonstrates the suspect statements constitute many multiples and variations of the type of single statement the Supreme Court has held is harmful error. While the present analysis does not allow specification of the incremental power of such multiple statements, by using content analysis, the data are available here for direct inspection. As observed by the editors of the *University of Chicago Law Review* in 1948, "…content analysis is unlike expert testimony founded on what judges consider to be the 'occult arts' of ballistics, chemistry and physiology. Its assumptions can be tested by one accustomed to logical reasoning."[17] Moreover, the impact of *Caldwell* statements *before* the verdict is reached cannot help but similarly diminish a juror's personal sense of responsibility for the outcome of the trial. While it is not possible to establish on the basis of a simple content analysis alone whether there is any linear relationship between the number of sentences and the harmfulness of error in terms of the meaning these sentences convey, we can observe more is *more*.

Further, two concepts common to the social sciences, education and the law accelerate the impact of any statements which suggest the jury, or jurors, hold a responsibility for sentencing inferior to other actors for the outcome of trial. These include (1) the role of repetition in learning and (2) the concept of primacy-recency.

The value of repetition in learning and education is apparent to all readers who have mastered the multiplication tables in arithmetic. Repetition is common to *all* disciplines of learning whether manual or intellectual in nature. The mechanism of repetition in learning is addressed frequently in both education

17 See Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review* 15(4) at p. 924.

and social psychology.[18] Repetition as used in this analysis merely reflects a count of the number of sentences identified by the four coders in comparison to the standard set by the United States Supreme Court in *Caldwell*—a single statement by the prosecutor. In light of this standard, the more frequent repetition of problematic sentences in this case underscores the fact the jurors sense of responsibility for the outcome of the trial may have been diminished more than a hundredfold of that suspected by the court in Mr. Caldwell's trial.

The second concept in social psychology concerns the primacy-recency effect in learning.[19] In short, respondents are most likely to retain those statements made early in the learning process and

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18 See, for example, the discussion in Jensen, E. (2005), *Teach with the Brain in Mind,* Alexandria, Virginia: The Association for Supervision and Curriculum Development, which references the importance of repetition as part of seven factors critical for learning due to the nature of neural networking and the strengthening of conditioned responses through repetition leading to increased recall and application; see also Cacioppo, J., & Petty, R. (1989), Effects of Message Repetition on Argument Processing, Recall, and Persuasion, *Basic and Applied Social Psychology, 10*(1), 3-12; or, Melton, A. (1970), The Situation with Respect to the Spacing of Repetitions and Memory, *Journal of Verbal Learning and Verbal Behavior,* 9(5), 596-606; or, Wogan, M., & Water, R. H. (1959), The Role of Repetition in Learning, *The American Journal of Psychology,* 72, 612-613; or, Rock, I. (1957), The Role of Repetition in Associative Learning, *The American Journal of Psychology,* 70(2), 186-193; or, Repovs, G., & Baddely, A. (2006), The Multi-Component Model of Working Memory: Explorations in Experimental Cognitive Psychology, *Neuroscience,* 139(1), 5-21.

19 Murdock, B. B. (1962), "The Serial Position Effect of Free Recall", *Journal of Experimental Psychology,* 64(5), 482-488; or, Troyer, A. (2011), Serial Position Effect, *Encyclopedia of Clinical Neuropsychology*, 2263-2264; or, Lind, E., Kray, L., & Thompson, L. (2001), Primacy Effects in Justice Judgments: Testing Predictions from Fairness Heuristic Theory, *Organizational Behavior and Human Decision Processes,* 85(2); or Caldwell, H.M., Perrin, L.T., Gabriel, R., Gross, S.R. (2001), Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communicating into the Direct Examination," *Notre Dame Law Review,*76, 423.

those heard late in the experience. As noted above, 72% (97) of the sentences identified were found at the beginning of the trial during the court's opening remarks and *voir dire* by the prosecution before the presentation of evidence and testimony. Based on this finding, both the *placement* and repetition of the sentences counted in Table I may, by the logic of the *Caldwell* decision, further accelerate the impact of those sentences in reducing the jury's attention to its responsibility in recommending life or death for a defendant.

A standard jury instruction at the start of Florida jury trials, made in this case, holds that statements offered by the attorneys and the court during *voir dire* and/or opening of counsel are *not* evidence and should not be considered by the jury in reaching its decision. The "story model" of juror decision-making now dominant among attorneys and trial scientists underscores the seriousness of such framing effects in determining trial outcomes.[20] Statements by the court and prosecution frame the jury's orientation to the tasks in its subsequent performance. On balance, a jury which is told its work will not determine the outcome of trial necessarily is less likely to take its role as seriously as would be the case if it actually perceived itself as bearing more direct responsibility for sentencing.

Conclusion. Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable degree of Sociological certainty the jury which recommended a sentence of death for Mr. Taylor in *State v. Taylor* more likely than not was partially persuaded against paying the requisite level of attention to its awesome responsibility for a decision of life or death for the defendant as a result of comments made by the court, prosecutor, or other actors.

Harvey A. Moore, Ph.D.

This report is reprinted in its entirety in this brief because

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20 See Krauss, D. A.; Sales, B. D. (2001), "The effects of clinical and scientific expert testimony on juror decision making in capital sentencing." *Psychology, Public Policy, and Law*, 7(2), 301; or, Pennington, N., & Reid, H. (1993), *Inside the Juror.* Cambridge: The Press Syndicate of the University of Cambridge; see also, Bennett, W., Feldman, M. (1984), *Reconstructing Reality in the Courtroom,* Rutgers: New Jersey.

of the significance of the findings contained therein, and because it so definitively demonstrates that the trial court should not have stricken the contents of the report based on *Frye v. United States*, 294 F. 1013 (D.C. Cir. 1923) considerations.

There is nothing irrelevant, speculative, or unreliable about the report from Trial Practices, Inc. Dr. Moore's first revised report dated April 13, 2017 was submitted as an exhibit at the hearing on the State's Motion to Strike his report and the scheduled evidentiary hearing. *See* 2017 ROA Vol. III 493-97. As seen at "TAB A" of the report, Table I, Dr. Moore and his team of coders identified an astounding 134 *Caldwell* errors from the trial transcripts. This evidence should have been considered by the lower court. Again, Dr. Moore's report is far from unreliable. What is unreliable is the death sentence imposed in this case following the 8-4 recommendation from a mere advisory panel instructed that they were not actually responsible for any resulting death sentence. *See* J. Pariente's recent dissent in *Lambrix v. State*, - So. 3d-, No. SC 17-1687 (September 29, 2017):

> As I stated in *Hitchcock*, '[f]or the same reasons I conclude that the right announced in *Hurst* under the right to jury trial (Sixth Amendment and article I section 22, of the Florida Constitution) requires full retroactivity, I would conclude that the right to a unanimous jury recommendation of death announced in *Hurst* under the Eighth Amendment requires full retroactivity.' [] 'Reliability is the lynchpin of Eighth Amendment jurisprudence, and a death sentence imposed without a unanimous jury verdict for death in inherently unreliable.[]' The statute under which

> Lambrix was sentenced, which only required that a bare majority of the twelve-member jury recommend a sentence of death, was unconstitutional, and therefore unreliable, under both the Sixth and Eighth Amendments.

Lambrix, Id. at 4-5, Pariente, J. dissenting.

In *Caldwell*, the United States Supreme Court vacated a death sentence because of just ***one comment*** from the prosecutor in his responsive closing argument that served to diminish the jury's role in sentencing. As Dr. Moore's report reveals, there were ***134 such comments*** from all of the participants at Mr. Taylor's trial, including the prosecutor, the defense attorney, and the trial judge. This is because Florida's entire capital sentencing scheme is unconstitutionally premised upon a diminished jury role. *Hurst v. Florida* instructs that this is unconstitutional. Properly instructed juries, not judges, need to be the responsible parties at a penalty phase.

In *Mosely v. State*, 209 So. 3d 1248 (Fla. 2016) this Court stated that "We now know after *Hurst v. Florida* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*. From *Hurst*, it is undeniable that *Hurst v. Florida* changed the calculus of capital sentencing in this State." *Mosely*, *Id.* at 1281. Florida should know now after *Hurst* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Caldwell*, not just *Ring*.

Juries obviously need to be properly instructed as such to fulfill Sixth and Eighth Amendment protections. The role of Florida juries in capital sentencing has been diminished to 2002, as well as well beyond. No Florida jury in a capital case pre-dating *Hurst* has ever been properly instructed. The jury in this case clearly was not properly and constitutionally instructed. Mr. Taylor should receive relief.

The "Amended Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing" rendered June 13, 2017 (2017 ROA Supp. 850-936)

The lower court should have considered Dr. Moore's report, and should have permitted Dr. Moore to testify at an evidentiary hearing. At page 3 of 7 of the order (2017 ROA Supp. 852), the lower Court states that "In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle." Dr. Moore's content analysis did not employ novel scientific methods in this case. Content analysis of legal authority is a not a new or novel scientific principle. It has been around since at least 1948. *See* fn 11 of Dr. Moore's revised report: *CONTENT ANALYSIS—A NEW EVIDENTIARY TECHNIQUE*, Univ. of Chicago Law Review, Vol. 15 No. 4, pp. 910-925 (Summer of 1948)(2017 ROA Vol. III 591); *see also SYSTEMATIC CONTENT ANALYSIS OF JUDICIAL OPINIONS,* 96 Cal. L. Rev. 63 (2008). There is nothing scientifically novel about a

trained sociological team performing legal content analysis of a court case: i.e., reading a trial transcript and reporting on perceived errors and events that occurred at the trial.

At page 4 of 7 of the order, the lower court states, “After reviewing the State’s motion, Defendant’s response, and the evidence and argument presented at the May 18, 2017, hearing, the Court first finds Defendant’s allegations in his amended claim four are purely legal and do not require an evidentiary hearing. The Court further finds Dr. Moore’s report and testimony are not needed to resolve the outstanding issues in [] amended claim four.” (2017 ROA Supp. 853-54). If the lower court were inclined to grant relief from the death sentence, the Appellant would agree with that. But in light of the court’s denial of amended claim four, Dr. Moore’s testimony and report was in fact needed. Mr. Taylor had a right to access to the courts to present evidence in support of his claims. *See IN RE: AMENDMENTS TO the FLORIDA EVIDENCE CODE,* 210 So. 3d 1231, 1239 (2017)(The Florida Supreme Court, citing “concerns includ[ing] undermining the right to a jury trial and denying access to the courts,” opted to “decline to adopt the *Daubert* Amendment [] due to the constitutional concerns raised.”)(also submitted as supplemental authority in this case May 16, 2017). 2017 ROA Vol. III 464-475.

At page 5 of 7 (2017 ROA Supp. 854) the lower court states, “The Court does not take issue with the use of content analysis as

a means of researching and collecting data. However, there was little to no evidence presented to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue prejudice." In making this finding, the Court overlooks supplemental authority filed May 16, 2017 in this case entitled *TAKING CALDWELL V. MISSISSIPPI SERIOUSLY: THE UNCONSTITUTIONALITY OF CAPITAL STATUTES THAT DIVIDE SENTENCING BETWEEN JUDGE AND JURY,* 30 B.C. L. Rev. 283 (1989)(Assistant Professor at Vermont Law School, concluding after reviewing extensive studies and research, including mock trial studies:

> The *Caldwell* Court set out a strict test for determining whether diminished sentencer responsibility so inheres in a sentencing procedure so as to render it constitutionally invalid: 'Because we can not say that this effort had *no effect* on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.' [*Caldwell* at 341]. There is, simply no way, that one can confidently conclude that the [] statutes of Alabama, Florida, and Indiana do not yield such a result. Such a degree of unreliability in a capital sentencing scheme is constitutionally unacceptable.

2017 ROA Vol. III 426-463. This article was acknowledged and mentioned by Dr. Moore in his May 18, 2017 testimony at transcript pages 20-21 (2017 ROA Vol. IV 20-21). In that article from 1989, Michael Mello used content analysis to investigate trials in Alabama, Indiana, and Florida for biased language and undue prejudice in light of a comparison of the selected trials to the *Caldwell* decision. So not only has content analysis been generally

used and widely accepted in the legal context, it has been specifically used to evaluate death penalty cases in states like Florida and Alabama who clearly have violated the dictates *Caldwell* for over 30 years.

The previously-referenced article, *SYSTEMATIC CONTENT ANALYSIS OF JUDICIAL OPINIONS,* 96 Cal. L. Rev. 63 (2008), confirms that content analysis of legal authority continues to be both widely accepted and used to analyze legal authority and legal cases. *Hurst v. Florida* was released January 12, 2016, less than two years ago. *Hurst* and its progeny will surely be the topics of continued research and continued content analysis. The lower court should not have overlooked Dr. Moore's report and the *Caldwell* errors that occurred in this case, especially considering the holdings of *Hurst v. Florida* (2016). The current record before this Court is full of evidentiary support for the admission Dr. Moore's evidence in this case. All prongs of *Frye* for admissibility of Dr. Moore's evidence were met by Mr. Taylor.

At page 6 of 7(2017 ROA Supp. 855) the lower court "f[ound] that even if Dr. Moore's testimony and methods could meet the required standards, his testimony is still inadmissible as it enters into the purview of the Court's decision making authority." Just because the trier of fact has the ability to make a decision on a factual and legal question does not mean that expert evidence is inadmissible just because it might "invade" the purview of the

factfinder. In the typical high stakes auto negligence case, for example, in a civil wrongful death suit, attorneys regularly present expert testimony from an experienced and qualified accident reconstruction expert who typically explains why a driver was or was not at fault. Yes, the jury or trial judge at a bench trial can make this decision on their own; but the parties have the right to present evidence (*see* Fla. Stat. 90.703 "Opinion on Ultimate Issue--Testimony in the form of an opinion [] otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.").

To deny the parties the opportunity to present their case is denial of access to the courts. Because this is a case where this Court's decision might literally determine whether Mr. Taylor lives or dies, and because death is different, this Court should consider Mr. Taylor's evidence and grant relief, or remand to the lower court for proper consideration.

On a related/similar issue, this Court once faced the question of admissibility of expert testimony from an attorney in a postconviction death penalty case at an evidentiary hearing. The issue was whether it was proper for expert testimony to be used to establish ineffective assistance of counsel. In essence, the proposed attorney expert would be conducting a content analysis of the trial transcripts to determine if counsel fell below standards. Justice Pariente in a special concurrence urged the following in

Lynch v. State, 2 So. 3d 47 (Fla. 2008):

> In this case, the trial court allowed a complete proffer of Norgard's expert testimony but then disallowed all of it. The State essentially argued that, due to his vast experience in death penalty cases, the trial judge, Judge Eaton, did not need an expert to assist him in determining whether the attorney was deficient in his performance. I certainly agree that Judge Eaton is among the most knowledgeable judges in Florida on the death penalty. My concern, however, is that we do not appear to predicate the admissibility of expert testimony in postconviction proceedings on a particular judge's level of experience in the area of the death penalty. Ultimately it is this Court's decision, as a mixed question of law and fact, as to whether the attorney's conduct was deficient. While expert testimony is not necessary to establish a violation of *Strickland,* it is certainly one more useful source of evidence in allowing the court to make this all-important decision.
>
> ….
>
> I would urge trial judges, as they have done in the past, to allow expert testimony on these issues if the witness is qualified, prepared and available to testify. Such testimony may not be the key element in establishing deficiency but it certainly provides a useful "guide" in determining whether counsel's performance was reasonable.

Id. at 87-88, 88. This Court should consider Dr. Moore's report, or at the very least, remand to the trial court and direct that his testimony be heard and considered. Dr. Moore was certainly qualified, prepared, and available to testify.

At page 6 of 7 (2017 ROA Supp. 855) the lower court states that "While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based

on the arguments and the law." Since the lower court was simply inclined to follow adverse precedent on the issue of partial retroactivity and deny the 3.851 Motion, then Dr. Moore's testimony was absolutely necessary in this case. The adverse precedent cited by the State in similarly-situated cases ignores *Caldwell* considerations. If one *Caldwell* error is enough to overcome the State's harmless error arguments in a United States Supreme Court case, certainly some 140 *Caldwell* errors in this case should overcome these arguments as well. If any date line had to be drawn in these *Hurst* cases, the date should have been 1985, not 2002. This Court has now addressed and cured most *Caldwell* errors prospectively issuing *IN RE: STANDARD JURY INSTRUCTIONS IN CAPITAL CASES*, 214 So. 3d 1236 (Fla. 2017), but the time has come to retroactively cure these errors. (See Notice of Supplemental Authority filed May 10, 2017 (2017 ROA Vol. II-III 386-422)).

Capital cases in the State of Florida will no longer be using archaic instructions and language describing a jury's role as merely "advisory." To satisfy evolving standards of decency in capital cases, even pre-*Ring* death sentences need to be vacated as well as the post-*Ring* death sentences. To satisfy equal protection considerations, every capital defendant who received what we now-know-to-be unconstitutional instructions at trial should receive relief by virtue of the *Caldwell*, *Ring*, and *Hurst* rulings. Juries in the State of Florida played a mere advisory role both before

and after the chosen arbitrary date June 24, 2002.

This Court should consider the report of Dr. Harvey Moore and vacate the death sentence in this case. In the alternative, this Court should remand this case to the lower court to hear Dr. Moore's testimony and consider the contents of his report.

ARGUMENT II

TO THE EXTENT THAT RETROACTIVE APPLICATION IS NECESSARY, THIS COURT SHOULD FIND THAT *HURST V. FLORIDA* AND *HURST V. STATE* ARE RETROACTIVE TO ALL OF MR. TAYLOR'S CLAIMS BECAUSE DENYING MR. TAYLOR RELIEF BASED ON NON-RETROACTIVITY VIOLATES MR. TAYLOR'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Hurst v. Florida and *Hurst v. State*, aside from all the *Caldwell* considerations discussed at length above, should be retroactive on all cases. If the rights at issue are important enough to apply to some cases retroactively, they are important enough to apply to all cases retroactively. This Court has found *Hurst* retroactive to the date that *Ring* was issued and non-retroactive to the cases that came before. This left behind numerous individuals such as Mr. Taylor whose cases became final before *Ring*. The parsing of relief based on the date of *Ring* was not based on the strength of the evidence favoring death, the lack of mitigation supporting life, or on any meaningful criteria. This has rendered the death sentences that remain unconstitutional. This Court should find that *Hurst* and the claims that developed

based on *Hurst* and pleaded in Mr. Taylor's motion are not barred by non-retroactivity.

There are federal and state law standards for determining whether a new rule applies retroactively. Mr. Taylor argues each in turn on the issues that this Court has found non-retroactivity and on the issues which this Court has not yet determined retroactivity. It is also argued that retroactivity does not apply to his Eighth Amendment claims because the state is never allowed to carry out arbitrary and capricious punishment or cruel and unusual punishment. Finally, as far as Mr. Taylor has previously raised *Ring*-like claims, he argues in this section generally and specifically under the distinct arguments below, that the law of the case should not apply.

1. Mr. Taylor Is Entitled To Retroactive Application Under Federal Law: Whether a new rule of law is applied retroactively is determined first under the federal standard. *See Welch v. United States*, 136 S. Ct. 1257, 1264, 194 L. Ed. 2d 387 (2016). The federal test, however, does not prohibit a state from granting greater retroactivity to its own cases. *Danforth v. Minnesota*, 552 U.S. 264, 277, 282, 128 S.Ct. 1029, 1039, 1042 (2008). Florida traditionally has done so. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (holding that *Hitchcock* claims should be raised in Rule 3.850 motions); *Meeks v. Dugger*, 576 So. 2d 713 n.1 (Fla. 1991) ("Because this petition was filed prior to our disposition of *Hall* . . . we

will allow the instant claim to be raised in a petition for a writ of habeas corpus."). Florida's test from *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980) is distinct from the federal retroactivity test established in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). *See Falcon v. State*, 162 So. 3d 954, 956 n.1 (Fla. 2015) (recognizing that determining retroactivity under *Witt* and *Teague* requires separate inquiries).

A state is not free to deny retroactive application of a new law that should be found retroactive under the federal standard of retroactivity. In *Montgomery v. Louisiana*, 136 S. Ct. 718, 725, (2016), the state courts denied relief under *Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) based on a finding of non-retroactivity under state law. *Montgomery,* at 727. On certiorari review, the United States Supreme Court considered whether *Miller* adopted a new substantive rule that applies retroactively on collateral review and whether the state court could refuse to give retroactive effect to the *Miller* decision. *Id*. The Court reversed the state denial based on retroactivity grounds because:

> Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution. If a state collateral proceeding is open to a claim controlled by federal law, the state court "has a duty to grant the relief that federal law requires." *Yates,* 484 U.S., at 218, 108 S.Ct. 534. Where state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a

> substantive constitutional right that determines the outcome of that challenge.

Id. at 731–32. Accordingly, based on *Montgomery*, a state court may not constitutionally refuse to give retroactive effect to a substantive constitutional right. While *Danforth* allows a state court to extend more retroactivity than federal constitutional law requires, a state may not refuse to apply new law retroactively when the new law meets the requirements for retroactive application.

Welch considered retroactive application of the constitutional rule announced in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The United States Supreme Court held in *Johnson* that a sentencing increase under federal sentencing was void-for-vagueness. *Id*. at 2556. In *Welch*, the Court found *Johnson* retroactive because it "affected the reach of the underlying statute rather that the judicial procedures by which the statute is applied." *Welch*, 136 S.Ct. at 1265. The Court explained:

> "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id*., at 351–352, 124 S.Ct. 2519 (citation omitted); *see* Montgomery, supra, at ––––, 136 S.Ct., at 728. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is

> punishable." *Ibid*. "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id*., at 352, 124 S.Ct. 2519.

Welch v. United States, 136 S. Ct. 1257, 1264–65 (2016).

The Court went on to hold that the rule announced in *Johnson* was substantive. *Id.* The Court explained:

> By striking down the residual clause as void for vagueness, *Johnson* changed the substantive reach of the Armed Career Criminal Act, altering "the range of conduct or the class of persons that the [Act] punishes." *Schriro, supra,* at 353, 124 S.Ct. 2519. Before *Johnson,* the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After *Johnson,* the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. The residual clause is invalid under *Johnson,* so it can no longer mandate or authorize any sentence.
>
> *Johnson* establishes, in other words, that "even the use of impeccable factfinding procedures could not legitimate" a sentence based on that clause. *United States v. United States Coin & Currency,* 401 U.S. 715, 724, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971). It follows that *Johnson* is a substantive decision.

Welch at 1265.

Hurst v. State and *Hurst v. Florida* announced substantive rules that apply retroactively under federal retroactivity standards. While the central holding of *Ring* was certainly applicable to Florida, *Hurst v. State* and *Hurst v. Florida* went beyond *Ring* in scope as Florida's death penalty system differed

from the Arizona system at issue in *Ring*. *Hurst v. Florida* and *Hurst v. State* demand that a jury find each element beyond a reasonable doubt. This Court also found that jury unanimity is required to narrow the class of individuals subjected to the death penalty to those "convicted of the most aggravated and the least mitigated of murders." *Hurst v. State* at 202 So.3d at 50. These decisions place murders without a jury trial on the elements that subject an individual to death beyond the State's power to punish by death.

The new rule based on the old right to a jury trial of *Hurst v. Florida* was more than procedural because of the nature of Florida's death penalty system. While the United States Supreme held that *Ring* was not retroactive in the federal habeas context under the federal retroactivity test articulated in *Teague v. Lane*, 489 U.S. 288 (1989)(*see Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519 (2004)), the Arizona system of *Ring* was different than Florida's death penalty statute and system at issue in *Hurst v. Florida* and *Hurst v. State*. Florida's death penalty system required not just fact-finding on whether aggravating factors existed, but whether the aggravating factors were sufficient and able to overcome the mitigating factors, and whether death should be imposed. *Hurst v. Florida* corrected the unconstitutionality of the judge solely making those decisions, but all of those decisions were substantive. Depending on what the judge decided, and now

post-*Hurst v. Florida*, the jury's decision, determines whether an individual is sentenced to the greater penalty of death or the lesser penalty of life.

Mr. Taylor raised in his successive motion that he was entitled to relief because he was denied the right to the state proving each element beyond a reasonable doubt. While this is a freestanding basis for relief, it is also definitive proof that the change in the law in *Hurst v. Florida* and *Hurst v. State* were substantive. *Hurst*, unlike *Ring*, addressed the proof-beyond-a-reasonable-doubt standard in addition to the jury trial right, and the Supreme Court has always regarded such decisions as substantive. *See Ivan V. v. City of N.Y.*, 407 U.S. 203, 204–05, 92 S. Ct. 1951, 1952, (1972).; *see also Powell v. Delaware*, 153 A.3d 69 (Del. 2016) (holding *Hurst* retroactive under Delaware's state *Teague*-like retroactivity doctrine and distinguishing *Summerlin* on the ground that *Summerlin* "only addressed the misallocation of fact-finding responsibility (judge versus jury) and not . . . the applicable burden of proof."). Moreover, with *Hurst v. Florida and Hurst v. State*, unlike in *Summerlin*, there is an Eighth Amendment unanimity rule at issue in addition to the Sixth Amendment's jury-trial guarantee. *See Summerlin*, 542 U.S. at 353.

Under federal retroactivity, there is no partial retroactivity. The obvious reason for this is that it would violate due process and equal protection. Changes in the law are either

retroactive of not. Under this Court's duty to apply substantive law retroactively, *Hurst v. Florida* and *Hurst v. State* should apply retroactively to Mr. Taylor. To deny Perry Taylor retroactive relief under *Hurst v. Florida*, on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay*, while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley*, violates Mr. Taylor's right to Equal Protection of the Laws under the Fourteenth Amendment to the Constitution of the United States (e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)) and his right against arbitrary infliction of the punishment of death under the Eighth Amendment to the Constitution of the United States (e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Espinoza v. Florida*, 505 U.S. 1079 (1992) (per curiam)).

2. Mr. Taylor is entitled to retroactive application under State Law: Under Florida retroactivity law, non-retroactivity should not bar relief for Mr. Taylor. The Court's splintered opinions following *Hurst v. Florida* should be reconsidered to the extent that they deny relief to Mr. Taylor based on retroactivity based on the date that *Ring* became final. Moreover, the splitting of retroactivity of *Hurst* based on *Ring* has imparted further unconstitutionality in Mr. Taylor's case and Florida's death penalty system and should be remedied.

In *Mosley v. State,* 209 So. 3d 1248, 1275 (Fla. 2016), *reh'g denied* Feb. 8, 2017, the majority found that *Hurst* and *Hurst v. State* applied retroactively to cases which became final after *Ring* was issued. The majority analyzed retroactivity under the fundamental fairness approach of *James v. State*, 615 So.2d 668 (Fla. 1993)(and *Witt v. State*, 387 So.2d 922, 926 (Fla. 1980)).

The majority found that *Mosley* was entitled to retroactive application of *Hurst v. Florida* and *Hurst v. State* under the fundamental fairness approach of *James* "because Mosley raised a *Ring* claim at his first opportunity and was then rejected at every turn . . .." *Id.* at 1275. While this decision was correct, and fair, it was not based on anything about the nature of the crime or Mr. Mosley's mitigation. Certainly, relief was appropriate, but the majority's basing the decision on the finality date of Mr. Mosley's case had no relation to the actual wrongfulness of the constitutional violations it remedied, the nature of Mr. Mosley's case or the actual functioning of Florida's death penalty scheme.

The majority also found *Hurst and Hurst v. State* retroactive to Mr. Mosley's case under the *Witt* standard. *Id.* at 1276. The *Witt* standard grants retroactive application of changes if,

> ". . .the change: (a) emanates from this Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance." *Witt*, 387 So.2d at 931. Determining the retroactivity of a holding "requir[es] that [this Court] resolve a conflict between two important goals of the criminal justice system—ensuring finality of decisions

> on the one hand, and ensuring fairness and uniformity in individual cases on the other—within the context of post-conviction relief from a sentence of death." Id. at 924–25. Put simply, balancing fairness versus finality is the essence of a *Witt* retroactivity analysis. See *id.* at 925.

Id. The majority decided that the first two prongs were met because *Hurst v. State* and *Hurst v. Florida* emanated from the United States Supreme and this Court and were constitutional in nature. *Id.* The third prong required the majority to decide whether the change in the law was a development of fundamental significance. As the majority explained,

> To be a "development of fundamental significance," the change in law must "place beyond the authority of the state the power to regulate certain conduct or impose certain penalties," or alternatively, be "of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of *Stovall* and *Linkletter*." *Id.* at 929. We conclude that *Hurst v. Florida*, as interpreted by this Court in *Hurst*, falls within the category of cases that are of "sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" from Stovall14 and Linkletter, which we address below. *Id.*
>
> The three-fold test of *Stovall* and *Linkletter* requires courts to analyze three factors: (a) the purpose to be served by the rule, (b) the extent of reliance on the prior rule, and (c) the effect that retroactive application of the new rule would have on the administration of justice. *Witt*, 387 So.2d at 926; *Johnson*, 904 So.2d at 408.

Id. at 1276–77.

The majority found the threefold test of *Stovall* and *Linkletter* was met. *Id*. at 1277. The majority declared that the purpose of the new rule announced in *Hurst v. Florida* is,

> to ensure that capital defendants' foundational right to a trial by jury—the only right protected in both the body of the United States Constitution and the Bill of Rights and then, independently, in the Florida Constitution—under article I, section 22, of the Florida Constitution and the Sixth Amendment to the United States Constitution—is preserved within Florida's capital sentencing scheme. *See Hurst*, 202 So.3d at 57.

Id. The majority concluded,

> Thus, because *Hurst v. Florida* held our capital sentencing statute unconstitutional under the Sixth Amendment to the United States Constitution, and Hurst further emphasized the critical importance of a unanimous verdict within Florida's independent constitutional right to trial by jury under article I, section 22, of the Florida Constitution, the purpose of these holdings weighs heavily in favor of retroactive application.

Id. at 1278. The majority found that, as far as post-*Ring* cases were concerned, "fairness strongly favors applying *Hurst* retroactively to" the time that *Ring* was issued." *Id.* at 1280. The majority found that, "From *Hurst* [v. State], it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State. Thus, this factor weighs in favor of granting retroactive relief to the point of the issuance of *Ring*." *Id*. at 1280.

Lastly, the majority found that the effect on the administration of justice would not be so great as to deny retroactive application to the post-*Ring* cases. *Id.* at 1281. The majority considered that:

> Of course, any decision to give retroactive effect to a newly announced rule of law will have some impact on the

> administration of justice. That is not the inquiry. Rather, the inquiry is whether holding a decision retroactive would have the effect of burdening "the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit." *Witt*, 387 So.2d at 929–30. By embracing this principle as an analytical lynchpin, together with the other two prongs of the three-part test, the Court was attempting to distinguish between "jurisprudential upheavals" and "evolutionary refinements," the former being those that justify retroactive application and the latter being those that do not.

Id. at 1281–82. The Court found that it did not so burden the administration of justice because, capital punishment "connotes special concern for individual fairness because of the possible imposition of a penalty as unredeeming as death." *Witt*, 387 So.2d at 926. "In this case, where the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice. *State v. Glenn*, 558 So.2d 4, 8 (Fla. 1990)." *Id*. at 1282.

This was a fair and just decision. The right to a jury trial under the United States Constitution and the Florida Constitution is a basic and fundamental right that has been at the core of the rights that human dignity and justice require. Mr. Mosley will now receive a fair jury trial where the ultimate question of whether he lives or dies will be determined by fact-finding made by representatives of the community in the form of a jury. The exact same reasoning should apply to Mr. Taylor's case and allow his

claims to be heard on the merits.

The Court considered retroactivity of what appears to be just *Hurst v. Florida* for pre-*Ring* cases in *Asay v. State,* 210 So.3d 1, 15 (Fla. 2016), *reh'g denied* Fla. Feb. 1, 2017. The majority found that *Hurst v. Florida* did not apply retroactively to allow relief for Mr. Asay under the Sixth Amendment.

The majority opinion mentions this Court's *Hurst* decision "[o]n remand from the United States Supreme Court," holding "'that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury.'" *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016)[and] "that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous." *Id*. at 11. The majority went on to characterize Asay's claim as asking for "retroactive application of *Hurst v. Florida*." *Id*. There is no further mention of this Court's post-remand *Hurst* decision in the majority opinion and whether the more extensive findings of this Court in *Hurst v. State* gave Mr. Asay more extensive alternatives for relief that were not barred by non-retroactivity.

In *Asay*, the majority went on to hold:

> After weighing all three of the above factors, we conclude that *Hurst* should not be applied retroactively to Asay's case, in which the death sentence became final before the issuance of *Ring*. We limit our holding to this context because the balance of factors may change

> significantly for cases decided after the United States Supreme Court decided *Ring*. When considering the three factors of the *Stovall/Linkletter* test together, we conclude that they weigh against applying *Hurst* retroactively to all death case litigation in Florida. Accordingly, we deny Asay relief.

Id. at 22. The majority found that the first prong of the *Stovall/Linkletter* test, the "purpose of the new rule" weighed in Mr. Asay's favor. The majority discussed the importance of the right to a jury trial under the United States and Florida Constitutions. "[T]his Court has taken care to ensure all necessary constitutional protections are in place before one forfeits his or her life []." *Id.* at 18. The majority found that the reliance on the old rule weighed "against retroactive application of *Hurst v. Florida*" to Mr. Asay's pre-*Ring* case. *Id*. at 19. The majority found this Court had previously relied upon Supreme Court precedent and the breadth of the Court's prior reliance.

Lastly, the majority considered the "Effect on the Administration of Justice." The majority recognized that this Court's prior analysis of the retroactivity of *Ring* under the first prong of *Witt* "was impacted by an incorrect understanding of the Sixth Amendment claim . . .." The majority found that the Court's conclusion in *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005) that "to apply *Ring* retroactively in Florida would . . .'would consume immense judicial resources without any corresponding benefit to the accuracy or reliability of penalty phase

proceedings'" was correct. *Id*. at 22; *citing Johnson* at 412.

Respectfully, the majority was wrong to find that the reliance and the effect on the administration of justice weighed against retroactive application of *Hurst v. Florida*. The constitutionality of Florida's death penalty scheme was previously upheld and it took until 2016 for the United States State's Supreme Court to remedy what was obvious in 2002 when *Ring* issued.

Reliance on the old rule must account for Florida's unwillingness to change the statute that denied the right to a jury trial on the elements necessary for a death sentence. The legislature never had any of the limits that the Florida and federal courts had when considering the application of *Ring*. This Court went so far as to request a change in Florida's death penalty system following *Ring*, only to be met with legislative obstinacy. *See State v. Steele*, 921 So. 2d 538, 548 (Fla. 2005) (asking "that in light of developments in other states and at the federal level, the Legislature [to] revisit the statute to require some unanimity in the jury's recommendations). Whereas many states followed *Ring* and changed their statutes, Florida did not, something that this Court told them to do.

The effect on the administration of justice based on full retroactivity would not place any more burden on the system overall. As we have seen in practice, the prosecutors are considering whether it is even necessary to seek death. The State

and the trial courts have been more than capable of handling the cases in which relief has been granted on *Hurst* so far. Overall, the impact on the system pales in comparison to the importance of the rights at issue post-*Hurst* and the importance of those rights in determining the most aggravated and least mitigated. If Florida is to have a death penalty, full retroactivity allows Florida to move forward with full confidence that no individual is executed undeservedly or in violation of the law.

Regarding the effect on the administration of justice and the burden of retrials, this Court overlooks the fact that one option would be to hold *Hurst* fully retroactive, and to simply impose a life sentence in all of these death cases like the State of Delaware did following *Hurst v. Florida*. See *Powell v. Delaware*, 153 A. 3d 69 (Del. 2016). One way to look at this is that the State of Florida had an opportunity to obtain a unanimous recommendation and failed. The State should be not permitted a second bite of the apple, especially in a death case.

Justice Pariente's opinion, concurring in part and dissenting in part, recognized that the retroactivity of *Hurst v. State* also needed to be decided in favor of full retroactivity. *Id*. at 32. (Pariente, J., concurring in part and dissenting in part). As Justice Pariente described the issue:

> Our recent decision in *Hurst* is undoubtedly a decision of fundamental constitutional significance based not only on the United States Supreme Court's decision in

> *Hurst v. Florida*, but also on Florida's separate constitutional right to trial by jury under article I, section 22, of the Florida Constitution. Not only did the United States Supreme Court hold that Florida's capital sentencing scheme was unconstitutional based on the Sixth Amendment to the United States Constitution, but this Court also held in Hurst that capital defendants are entitled to unanimous jury findings of each aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances and a unanimous jury recommendation of death as part of Florida's constitutional right to a trial by jury under article I, section 22, of the Florida Constitution. *Hurst*, 202 So.3d at 44.

Id. (Footnotes omitted). Justice Pariente concluded:

> Applying decisions of fundamental constitutional significance retroactively to defendants in similar circumstances is essential to "ensuring fairness and uniformity in individual adjudications." *Witt v. State*, 387 So.2d 922, 925 (Fla. 1980). This Court has always recognized that "death is different," so we must be extraordinarily vigilant in ensuring that the death penalty is not arbitrarily imposed. Therefore, I dissent from the majority's holding not to apply *Hurst* retroactively to all death sentences that were imposed under Florida's unconstitutional capital sentencing scheme.

Id. (Footnotes omitted).

In *Gaskin v. State*, the Court decided retroactivity with no *Hurst* issues before it. Mr. Gaskin did not have a motion raising the *Hurst* and *Hurst* related claims. Nevertheless, simply relying on *Asay* the majority found:

> Finally, Gaskin's argues that he is entitled to relief in light of *Hurst v. Florida*. Because Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under *Hurst v. Florida*. *See Asay v. State*, ---So.3d ----, ----, 2016 WL 7406538 at *13 (Fla. 2016) (holding that *Hurst* is not retroactive to cases that became final before the United States Supreme Court decided Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556

> (2002)). Accordingly, we affirm the circuit court's order summarily denying Gaskin's successive postconviction motion.

Gaskin v. State, 218 So. 3d 399, 401 (Fla. 2017).

Justice Pariente again determined that *Hurst v. State* and *Hurst v. Florida* should be retroactive "to all death sentences imposed under Florida's prior, unconstitutional capital sentencing scheme." *Id*. at 401; *Asay v. State*, 210 So.3d 1 (Fla. 2016) (Pariente, J., concurring in part and dissenting in part); see *Hurst v. Florida*, 136 S. Ct. at 622 (holding Florida's capital sentencing scheme unconstitutional). Justice Perry dissented on the *Hurst* issue based on his dissent in part in *Asay*. *Id*. at 404. Justice Lewis dissented without an opinion.

Justice Pariente's dissent in *Gaskin* also found that *Hurst* should apply because, "the record on appeal reveals that Gaskin argued that 'section 921.141 . . . was unconstitutional on its face' for the reasons espoused by the United States Supreme Court in *Ring* and *Hurst v. Florida* and then further explained by this Court in *Hurst* []". *Id*. at 3. Justice Pariente took great care to show exactly how Mr. Gaskin had raised the issues that would form the basis of the Court's opinion in *Ring*, *Hurst v. Florida* and ultimately this Court's decision *Hurst v. State*.

Justice Pariente's opinion was correct. While it is argued here that it is unconstitutional and unfair to allow the death sentences of the pre-*Ring* cases stand, the unfairness and

unconstitutionality of the majority's pre- and post-*Ring* split only serves as aggravation. Florida now has a death penalty system where individuals are sentenced to death not because they have the most aggravated and least mitigated case, but because their case became final before *Ring*. This does not even take into account the date of offense; an individual's case can become final after a retrial many years after the date of offense that occurred well before *Ring*.

Under the *Witt* or *James* approach, both *Hurst* and *Hurst v. State* should apply retroactively to allow a decision on the merits of Mr. Taylor's claims. Mr. Taylor raised *Ring*-like claims on direct appeal approximately 25 years ago. *See* 2017 ROA Supp. 836-849 (Appendix B and C of Witness / Exhibit List). Fundamental fairness requires that this Court allow a remedy for all of the denials of Mr. Taylor's rights.

Under the Florida standard of *Witt*, retroactivity should also not be a bar to relief. The exact same reasoning that allowed a remedy for Mr. Mosley applies to the pre-*Ring* claims based on *Hurst v. State* and *Hurst v. Florida*, and the claims that have yet to be decided but became viable after those decisions. Moreover, to the extent that Mr. Taylor has raised claims involving the Eighth Amendment, an Eighth Amendment violation can never stand regardless of retroactivity. The State is never allowed to carry out arbitrary and capricious punishment or that which is contrary

to evolving standards of decency.

When the lower court denied Mr. Taylor's successive claims, this Court had yet to, and still has not, decided the constitutional claims that Mr. Taylor raised in his motion in postconviction and, accordingly, has not decided whether non-retroactivity prevented relief for the violations. While this Court applied *Hurst v. Florida* and *Hurst v. State* retroactively in *Mosley*, the majority only considered *Hurst v. Florida* in deciding retroactivity in *Asay*. This Court needs to determine the retroactivity of the claims beyond the simple Sixth Amendment component of *Hurst v. Florida*, the claims that this Court recognized in its own opinion in *Hurst v. State*, and the issues that have arisen based on the effects of both decisions. The United States Supreme Court left a number of decisions for this Court to answer following the high court's decision in *Hurst v. Florida*. Indeed, these decisions were properly left to this Court as an initial matter because this Court is most able to consider the actual functioning of Florida's death penalty system throughout its history. Moreover, state law and the Florida Constitution greatly increase the effects from *Hurst v. Florida* and its continued application.

There was no material difference between Mr. Mosley's case and those of Mr. Asay and Mr. Gaskin. There is no material difference in this case. Under Florida law, *Hurst v. Florida* and

Hurst v. State should apply retroactively to Mr. Taylor and all of his claims should be determined on the merits.

3. Law of the Case: Even if the Court does not find *Hurst* retroactive to Mr. Taylor's case, the law of the case is overcome because having raised these claims, adhering to the law of the case would result in a manifest injustice. This Court explained in *State v. Owen*, 696 So.2d 715 (Fla. 1997):

> Generally, under the doctrine of the law of the case, "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner Enters., Inc. v. Department of Revenue,* 452 So.2d 550, 552 (Fla.1984). However, the doctrine is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case. *See Strazzulla v. Hendrick,* 177 So.2d 1, 3 (Fla.1965) (explaining underlying policy). This Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case. *Preston v. State,* 444 So.2d 939 (Fla.1984).
>
> An intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case. *Brunner, 452 So.2d at 552; Strazzulla,* 177 So.2d at 4.

Id. at 720. On a very basic level, the denial of relief based on *Hurst* and *Ring* when Mr. Taylor raised *Ring*-like claims as much as 25 years ago is fundamentally unfair and a manifest injustice.

While all of his claims should be reviewed now in the context of Florida's constitutional death penalty scheme, his prior *Ring*

claims are worthy of the utmost judicial scrutiny. If relief is not available for Mr. Taylor under *Hurst v. Florida* and *Hurst v. State*, the law of the case should be overcome to allow consideration of Mr. Taylor's *Ring* and *Caldwell* claims through the lens of *Hurst*.

The majority decision in *Mosley* found that "Florida's capital sentencing statute has essentially been unconstitutional since *Ring* in 2002 . . .." *Mosley* at 1275. Respectfully, it is submitted that it has been unconstitutional for much longer and may never have been constitutional ever. While *Apprendi*, *Ring* and *Hurst* were a step forward in recognizing the extent of the right to a jury trial, those rights have long existed in this State and this Nation. This Court should grant relief.

ARGUMENT III

THIS COURT SHOULD VACATE MR. TAYLOR'S DEATH SENTENCE BECAUSE, IN LIGHT OF *HURST* AND SUBSEQUENT CASES, MR. TAYLOR'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE HIS DEATH SENTENCE WAS CONTRARY TO EVOLVING STANDARDS OF DECENCY AND IS ARBITRARY AND CAPRICIOUS. THE LOWER COURT ERRED IN SUMMARILY DENYING THE MOTION TO AMEND THE HURST CLAIM TO INCLUDE THE SUBSTANTIVE RIGHTS CREATED BY THE ENACTMENT OF NEW MARCH 13, 2017 LAW CHAPTER 2017-1 REQUIRING UNANIMITY FOR DEATH SENTENCES.

Mr. Taylor remains sentenced to death not because of where his case falls on the aggravation and mitigation continuum, but because of where his case falls on the calendar. From now on, individuals facing a death sentence will have the protection of a jury. Individuals for no other reason than their case became final

after *Ring* was issued will receive new trials that follow the constitutional requirements of *Hurst v. Florida* and *Hurst v. State*. They will receive an actual sworn jury fully and constitutionally instructed on the jury's role as the ultimate decision maker. The State will also have the burden of proving each aggravating factor and that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt.

"Death is different." *Woodson v. North Carolina*, 428 U.S. 208, 305 (1976). The United States Supreme Court has made clear:

> Under the Eighth Amendment, the death penalty has been treated differently from all other punishments. [ ] Among the most important and consistent themes in this Court's death penalty jurisprudence is the need for special care and deliberation in decisions that may lead to the imposition of that sanction. The Court has accordingly imposed a series of unique substantive and procedural restrictions designed to ensure that capital punishment is not imposed without the serious and calm reflection that ought to precede any decision of such gravity and finality.

Thompson v. Oklahoma, 487 U.S. 815, 856, 108 S. Ct. 2687, 2710, (1988)(internal citations omitted).

In *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726 (1972), the United States Supreme Court found that the death penalty, as applied throughout the United States, violated the Eighth and Fourteenth Amendment's prohibition of cruel and unusual punishment. *Id*. at 239–40, 2727. The Court did not find the death penalty itself was unconstitutional and later allowed the death penalty under narrow circumstances. See *Gregg v. Georgia,* 428 U.S.

153, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), *et al*. *Furman* "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg,* 428 U.S. at 188, 96 S. Ct. at 2932.

The Supreme Court has recognized the importance of a jury in meeting the commands of the Eighth Amendment. As stated in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, "one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." *Id.* at 181–82, 2929, citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 15, 88 S.Ct. 1770, 1775 (1968). A jury is "a significant and reliable objective index of contemporary values because it is so directly involved." *Id*. citing *Furman v. Georgia*, 408 U.S., at 439-440, 92 S.Ct., at 2828-2829 (Powell, J., dissenting). Mr. Taylor had no jury, thus his death sentence had none of the Eighth Amendment reliability of a jury verdict.

A sentencer must consider "any relevant mitigating evidence," *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct 1821 (1987). The majority opinion in *Lockett*

v. Ohio, 438 U.S. 586, 605; 98 S. Ct. 2954, 2964-65(1978) explained:

> [T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 605; 2954 (Emphasis and footnotes omitted).

To meet the requirements that the death penalty be limited to the most aggravated and least mitigated of murderers, the Supreme Court requires, "that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* at 189, 2932. In *Gregg*, the Court upheld Georgia's death penalty scheme and found,

> The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant.

Id. at 206, 2940–41. Mr. Taylor, unlike all post-*Hurst* defendants will have, had no jury to determine his death sentence in the

guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

In Mr. Taylor's case, the advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory. Had this been an actual jury trial, this would have been contrary to *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633 (1985). In *Caldwell*, the Supreme Court stated and held that it,

> has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated.

Id. at 341, 2646. Any reliance or argument based on the advisory recommendation in Mr. Taylor's case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell*. An advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell*.

The Supreme Court has also limited the death penalty under the Eighth Amendment based on evolving standards of decency.

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is

> applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam); Robinson v. California,* 370 U.S. 660, 666–667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (plurality opinion). As the Court explained in *Atkins,* the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic " 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " 536 U.S., at 311, 122 S.Ct. 2242 (quoting *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.
>
> The prohibition against "cruel and unusual punishments," like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Trop v. Dulles,* 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion).

Roper v. Simmons, 543 U.S. 551, 560–61, 125 S. Ct. 1183, 1190 (2005). Florida has been an outlier, for a very long time. The United States Supreme Court in *Hurst* and this Court's decision on remand show that standards of decency have evolved to require that a jury find all of the facts necessary to sentence Mr. Taylor to death, beyond a reasonable doubt.

On remand in *Hurst v. State*, this Court found that the right to a jury trial found in the United States Constitution required

that all factual findings be made by the jury unanimously under the Florida Constitution. This Court found that the Eighth Amendment's evolving standards of decency and bar on arbitrary and capricious imposition of the death penalty require a unanimous jury fact-finding.

> [T]he the foundational precept of the Eighth Amendment calls for unanimity in any death recommendation that results in a sentence of death. That foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. *See Gregg*, 428 U.S. at 199, 96 S.Ct. 2909. The Supreme Court subsequently explained in *McCleskey v. Kemp* that "the Court has imposed a number of requirements on the capital sentencing process to ensure that capital sentencing decisions rest on the individualized inquiry contemplated in Gregg." *McCleskey v. Kemp*, 481 U.S. 279, 303, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). This individualized sentencing implements the required narrowing function that also ensures that the death penalty is reserved for the most culpable of murderers and for the most aggravated of murders. If death is to be imposed, unanimous jury sentencing recommendations, when made in conjunction with the other critical findings unanimously found by the jury, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process.

Hurst v. State, 202 So. 3d 40, 59–60 (Fla. 2016). The Court cited to Eighth Amendment concerns finding that, "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that

the aggravating factors *outweigh* the mitigation before a sentence of death may be considered by the judge." *Id.* at 54. (Emphasis in original). "In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to a trial by jury, we conclude that juror unanimity in any recommended verdict resulting in death sentence is required under the Eighth Amendment." *Id*. at 59.

This Court went a step further than the United States Supreme Court did in *Hurst v. Florida* based on evolving standards of decency requiring unanimous jury recommendations for death sentences. "Requiring unanimous jury recommendations of death before the ultimate penalty may be imposed will ensure that in the view of the jury—a veritable microcosm of the community—the defendant committed the worst of murders with the least amount of mitigation. This is in accord with the goal that capital sentencing laws keep pace with 'evolving standards of decency.'" (internal citations omitted). *Hurst v. State,* at 60. The standards of decency have evolved such that Mr. Taylor cannot be sentenced to death without a jury unanimously finding all of the facts necessary to subject him to death.

Mr. Taylor was sentenced to death in violation of the Eighth Amendment. His death sentence was arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. It is even more arbitrary and capricious when it is

considered that a post-*Ring* defendant with the same advisory panel recommendation will receive relief full constitutional protections at any subsequent retrial. Any reliance on the non-unanimous advisory panel is misplaced and a violation of *Caldwell*. A mere recommendation of 8-4 would be inadequate under the *Hurst v. State*. To subject Mr. Taylor to the death penalty based on Florida's previous unconstitutional system when a non-unanimous advisory recommendation would today violate the United States and/or the Florida Constitution, is the very definition of arbitrary and capricious. As Justice Stewart stated in concurrence, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310, 92 S. Ct. at 2763 (Potter, J, concurring).

Following *Hurst v. Florida* and *Hurst v. State*, Mr. Taylor may not be subject to the death penalty. Mr. Taylor was sentenced to death without the reliability of jury fact-finding and unanimity that the Eight Amendment guarantees. His death sentence violates the Eighth and Fourteenth Amendments because it is contrary to evolving standards of decency and because his case is not the most aggravated and least mitigated when it is considered that the post-*Ring* cases will have a unanimous determination that such is true.

On May 2, 2017 the Appellant filed a motion in the lower court to further expand his *Hurst* claims based on the Governor signing

the March 13, 2017 new Chapter 2017-1 law requiring juror unanimity in capital sentencing. *See* 2017 ROA Vol. II 351-73. This motion was summarily denied. 2017 ROA Vol. III 423-25.

A capital defendant's right to a life sentence unless a jury returns a death recommendation is a substantive right. Whether viewed as a legislatively created right that applies retrospectively or a constitutional right identified in *Hurst v. State*, it is a substantive right, not a procedural rule. The right to a life sentence unless a jury unanimously returns a death recommendation as noted in *Hurst v. State* did not arise from the Sixth Amendment principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, or *Hurst v. Florida*. It is derived either from legislative enactments or the Florida Constitution or both. A state created right that carries a liberty or life interest with it is protected by the Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court has recognized that States "may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980). "Once a State has granted prisoners a liberty interest, [the US Supreme Court has] held that due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" *Id*. at 488-89. *See State v. Robinson*, 873 So. 2d 1205, 1209 (Fla. 2004) ("It is the Due Process Clause that protects the individual against the

arbitrary and unreasonable exercise of governmental power.”).

Failing to grant Mr. Taylor the benefit of the substantive right contained in Chapter 2017-1 violates Art. I, §§ 9, 16, Fla. Const., the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment. The lower court erred in summarily denying this claim. This Court should vacate Mr. Taylor’s death sentence following this mere 8-4 recommendation.

ARGUMENT IV

BASED ON NEWLY DISCOVERED EVIDENCE, THERE IS AT A REASONABLE DOUBT AS TO THE STATE’S THEORY AT TRIAL THAT A SEXUAL BATTERY OCCURRED IN THIS CASE. THEREFORE THE CONVICTION FOR FELONY MURDER AND THE RESULTING DEATH SENTENCE MUST BE VACATED.

Mr. Taylor was charged with the sexual battery and murder of a woman who voluntarily accompanied him to a baseball field dugout for sex in the middle of the night. Mr. Taylor admitted flying into a rage and kicking the woman to death when she bit him during consensual oral sex. The sexual battery charge was grounded on injuries to the victim which the medical examiner testified suggested a large object had been inserted in her vagina. Under Florida law, if the injury were caused by a kick rather than the deliberate insertion of an object, a sexual battery did not occur. If no sexual battery occurred, the conviction for sexual battery is invalid, the basis for finding felony murder is invalid, and the aggravating factor that the murder occurred during a sexual battery is invalid. At most, the homicide is second degree murder.

The only evidence that the injury was caused by something other than a kick was the testimony of the State's medical examiner, Dr. Miller, at the guilt trial. On a penalty phase retrial, Dr. Miller began to express doubts that a kick could not have caused the injury. At the postconviction hearing, Dr. Miller fully conceded that a kick was the possible, if not probable, cause of the injuries supporting the sexual battery conviction. 2007 ROA Vol. XII 1949-51. However, because of an off-hand remark by Dr. Miller at the conclusion of his testimony about the kick, that the injury from the kick was a one-in-a-million shot, the state courts refused to recognize that Dr. Miller's opinion had changed (and therefore raised a reasonable doubt about the sexual battery). The federal district court endorsed the state courts' refusals to recognize the shift in opinion.

In the district court's order denying the habeas petition, the judge wrote that Dr. Miller testified in the postconviction hearing that "the 'injuries could have been [caused by] a hard blow from a shoe going directly in [to the vagina]. That didn't come up [at trial] and it certainly seems a reasonable possibility, maybe even a probability []." *Taylor v. Secretary, Dept. of Corr.*, --F. Supp. 2d--, 2011 WL 2160341 at 27 (M.D. Fla. 2011). But the court then agreed with the state courts that Dr. Miller's postconviction testimony that a kick was a reasonable possibility "is not inconsistent with his trial testimony that within a reasonable

degree of medical probability the interior injuries were caused by something inserted into the vagina, and that those injuries were not consistent with having been inflicted by someone kicking the victim in that area." *Id.* at 27.

The district court also adopted the bad faith reading the state courts gave to Dr. Miller's testimony that the kick which caused the injury was one in a million. The interpretation the state courts made of the one in a million statement nullified Dr. Miller's testimony that a kick was not only possible, it was probable. There is no evidence Dr. Miller intended to nullify, and every indication he was simply expanding on his opinion that a kick caused the injuries.

Dr. Miller testified in the postconviction hearing that he agreed with the defendant's postconviction expert medical examiner, Dr. Wright, that the injuries could well have been caused by a kick. In doing so, he attempted to blame trial counsel for a lack of diligence:

> [T]here was something that wasn't brought up by any of the attorneys in any of those [pre-trial] depositions you referred to and **perhaps I should have brought it up myself. It was brought up by a subsequent witness [for the postconviction hearing, Dr. Wright] whose deposition I read.**
>
> . . . .
>
> Dr. Wright said the injuries to the inside of the vagina were . . . probably sustained by a kick or a blow. Whereas I said they were sustained by a stretch injury. . . . **I agree that if a blow had been struck where the toe of the shoe actually went, went into the vagina stretching the vagina it would have introduced the**

> **injuries that I've described.**
>
> . . . [T]he attorneys didn't bring it out that it could have been a hard blow from a shoe going directly in. That didn't come up and **it certainly seems a reasonable possibility, maybe even a probability**, in reading Dr. Wright's [deposition].
>
> . . . .
>
> **I'm saying that [the ten internal radial lacerations] could have been the result of a kick.** One of many scenarios where something went in there that was wider than the vagina and stretched it. We talked about kicks and blows earlier on. But the subject of the shoe or the foot actually entering the vaginal canal didn't come up. That was - **it's a one-in-a-million shot.**
>
> Q What do you mean a one-in-a-million shot?
>
> A Well, it's you can kick somebody an awful lot in that area and not have your toe actually go up into that narrow vaginal canal.

2007 ROA Vol. XII at 1949-51 (emphasis added).

An after-the-fact probability explaining the occurrence of an unlikely event which actually occurred has an entirely different connotation than an estimate made before an occurrence.

Dr. Miller has now made clear that he considers the victim's genital injuries were possibly, perhaps probably, caused by a kick, an act which negates the sexual battery in this case. He says, in affidavit (2017 ROA Vol. I 87-88) and will testify consistently at hearing, that the "one-in-a-million" statement was an unfortunate misstatement, and that he in no way intended to back away from his full testimony at the postconviction hearing which was that the kick, not a sexual battery by insertion of object, was "a very reasonable possibility."

When analyzing the cause of an injury after it has occurred,

any estimate of the likelihood of the injury before it occurs, the "ex ante" likelihood of the injury, becomes irrelevant. The 7th Circuit Court of Appeals explains:

> Life is full of surprises. [The defendant's] story is not impossible, just improbable. And it is only a confusion between ex ante and ex post probabilities that might make one think that the government could never prove a person guilty beyond a reasonable doubt of an improbable crime. The probability that X could shoot Y between the eyes from a thousand paces might be one in a million before X pulled the trigger, but once Y shows up with a bullet hole between the eyes the probability that X is the author of this improbable wound shoots up, and that is the probability that is relevant to the issue of guilt.

U.S. v. Morales, 902 F.2d 604, 607 (7th Cir. 1990). If the State were trying to prove that Mr. Taylor injured the area in question with a kick, there is no doubt the State would acknowledge the wisdom of the *Morales* analysis.

The jury in the guilt phase trial heard Dr. Miller's testimony that there were no injuries in the genital area caused by kicking, 1989 ROA Vol. I at 87, leaving the only other option to be penetration of a large object for sexual gratification, a conclusion that supported conviction for sexual battery. *Id*. at 82-83. Had the jury known that one or more kicks were administered in the genital area causing the injuries, it would be as if victim Y in the *Morales* case not only had a bullet wound between the eyes, but also one an inch lower, inflicted by a bullet from the same gun. Actually, the analogy is better made if Y's body is considered

to have been found full of bullet holes. The victim in this case suffered multiple kicking blows suggesting that the kick to the genitals was only one of many hits such that the “one in a million” shot landed only as a coincidental result of the rage-induced kicking, not the result of preternatural forces.

Dr. Miller acknowledged that Dr. Wright’s analysis of the genital injuries was the correct one, and contrary to his own testimony at the trials: “Dr. Wright said the injuries to the inside of the vagina were . . . probably sustained by a kick or a blow. Whereas I said they were sustained by a stretch injury.”

The forensic pathology expert at the postconviction hearing, Dr. Ronald Wright, was board certified in anatomic, clinical and forensic pathology and a Diplomate of the National Board of Medical Examiners, and a medical examiner since 1972. 2007 ROA Vol. X at 1526-29. He testified that the genital injuries were caused by kicking: "She was kicked." *Id.* at 1537. The victim did not suffer a sexual battery by intrusion of an object penetrating the vagina. She was kicked. *Id.* at 1545. The defendant's tennis shoes could have caused the injuries. *Id.* at 1538.

Dr. Wright testified that the genital injuries occurred after the victim died, to a reasonable degree of medical probability. *Id.* at 1531. The pattern of kicking injuries in this case is always associated with someone who is in a rage. The injuries were consistent with Mr. Taylor being in a rage. *Id.* at 1581.

The State's rebuttal witness, Dr. Lynch, was the only witness who concluded that the injuries were not the result of a kick. Her testimony contradicted both Dr. Wright and Dr. Miller. Dr. Miller is the only witness to have personally viewed the injuries at issue. Dr. Lynch was a practicing ob/gyn doctor in a local hospital, not a forensic pathologist, nor did she have any training or skills in forensic medicine. *Id.* at 1617. She had only treated six to eight sexual battery victims, all of whom were alive, in her entire career, *id.* at 1596. Her practice consisted of treating live patients for the usual conditions attended to by an ob/gyn doctor. Over the continuing objection of the defense to her lack of qualifications, *id.* at 1605, 1610, 1615, the ob/gyn doctor said it was impossible for a kick to cause the vaginal injuries unless the foot was able to fit into the vagina. *Id.* at 1630.

Contrary to the testimony of both Dr. Wright and Dr. Miller, forensic pathology experts, she claimed the defendant's shoes could not have penetrated a couple of centimeters to cause the injuries. *Id.* at 1631. However, her testimony that the shoes could not fit was immediately vitiated by her followup testimony that a baby's head is larger than the opening she claimed could not accommodate the toe of a sneaker, a fact she actually was qualified to testify about. *Id.* at 1631. Her testimony that the injuries could only be caused by a kick if the shoe could fit into the vagina, when taken with her testimony that a baby's head would fit,

fully supports the testimony of the two experts, highly trained forensic pathologists. The state courts' acceptance of the testimony of a witness not qualified as a forensic expert, and incompetent therefore to render an opinion as to causation, is an unjustified application of the rules of evidence such that "the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law." *Chambers v. Mississippi*, 410 U.S. 284, 289-90 (1973).

Given the testimony establishing the fact that, at the very least, there was a reasonable doubt whether the injury was caused during the commission of a sexual battery (a kick is not for sexual gratification, any penetration occurred after death), the state courts' persistence in sustaining a conviction for sexual battery required an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Compare the evidence outlined in the record and here with the unsupported conclusions of this Court:

> In essence, the postconviction court concluded that, at trial, Dr. Miller testified that the lacerations were not, within reasonable medical probability, caused by a kick. Similarly, at the evidentiary hearing, Dr. Miller testified that it was his opinion that there was only a one-in-a-million chance that the lacerations could have been caused by a kick. Hence, **because the record refutes Taylor's contrary interpretation of the testimony,** Taylor fails to show that Miller's postconviction testimony qualifies as newly discovered evidence. **While it is true that Miller's trial testimony did not admit to this one-in-a-million possibility, we find this omission insufficient to overturn the trial court's**

conclusion that sufficient "new evidence" had not been established.

Taylor v. State, 3 So.3d 986, 993 (Fla. 2009) (emphasis added).

This Court's conclusion that there was no contradiction between the trial testimony that the injuries were not caused by a kick and the postconviction recantation that the injuries were, indeed, caused by a kick to "a reasonable possibility, maybe even a probability," is a clearly unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

The state courts should not accept the testimony of a witness unqualified to testify about causation over the testimony of two highly qualified experts, one of whom was the eyewitness at autopsy to the injury. Reliance on an unqualified, incompetent, witness also is contrary to or involved an unreasonable application of clearly established Federal law, i.e. *Chambers*.

The jury in the guilt phase trial was told that only the insertion of a large object, i.e. sexual battery, could have caused all of the injuries to the genital area. Had they known that a kick had been delivered to the genital area (the State would not have called an unqualified witness such as Dr. Lynch to impeach their own medical examiner), they would have had the opportunity to attribute the injuries to a kick. This would have especially been so had Dr. Miller disclosed his opinion that a kick

reasonably, maybe probably, caused the injury.

The courts have ignored the additional claim of prejudice arising from the wrongful conviction for sexual battery. Murder during commission of a sexual battery was found to be an aggravating factor. To the contrary, the sexual battery aggravator was not proven at trial. If there is no sexual battery, there is no felony murder. If there is no felony murder, there is nothing here in the facts of this case to support the death penalty.

The newly discovered evidence (rejected as newly discovered in the postconviction hearings because of the interpretation of "one-in-a-million" to mean there was virtually no possibility the injuries were not the result of sexual battery) of Dr. Miller's position that the courts have misinterpreted his "one-in-a-million" remark to negate his belief that the kick was the possible, if not probable, cause of the injury, requires a new trial. The trial juries never heard that there was a "very reasonable possibility" that the evidence negated sexual battery.

Being told that the victim suffered the sexual battery, which is the only evidence contradicting Mr. Taylor's confession to second degree murder at worst, undermined the jury's confidence in believing Mr. Taylor's testimony. Had they known the actual facts, they would have acquitted on the sexual battery charge, the felony murder charge, and the premeditated murder charge which could only have been sustained in reliance on the unsupported evidence

presented by the State. Had the jury known the evidence supported Mr. Taylor's confession contrary to the erroneous testimony of Dr. Miller, they would have believed the facts justified only conviction for a lesser charge. The outcome of the trial would have been conviction for a lesser offense, and the death penalty would have been taken off the table.

Dr. Miller's evidence was not previously available because he was not aware of the incorrect interpretation of his testimony and therefore was unaware of the need to come forward to correct the errors. Good-faith efforts by the defense to contact him were unsuccessful until June 2015.

Newly Discovered Evidence: Newly discovered evidence establishes that Mr. Taylor is innocent of the rape conviction which was used to support conviction on a theory of felony murder, and as an aggravating factor supporting a death sentence. Dr. Miller's affidavit establishes that his off-hand remark that the kick was "one in a million" was misconstrued by the trial court and this Court. The correct testimony at trial would have resulted in conviction for a lesser offense.

Ineffective Assistance of Counsel: Dr. Miller testified in postconviction proceedings that the only reason he did not testify at trial that the kick was a likely cause of the injuries in question was because he was not asked the right questions. Assuming that he had always been prepared to testify to a kick as causation

(possibly in conflict with his postconviction testimony that he concluded it was a kick based on reviewing Dr. Wright's report and testimony) at trial, trial counsel was ineffective for failing to ask the questions. Trial counsel was also ineffective for failing to retain a forensic pathologist who could make the correct determination of causation sufficient to guide trial counsel in his questioning of Dr. Miller, and who could have testified to the jury that the causation was a kick, not sexual battery. The correct testimony at trial would have resulted in conviction for a lesser offense. The lower court erred in summarily denying the claims related to the medical examiner's misleading trial testimony.

CONCLUSION

Florida's death penalty system has been unconstitutional since the death penalty was reenacted after *Furman v. Georgia*. *Hurst v. Florida* and *Hurst v. State* have corrected some of the unconstitutionality but, based on the fracturing of retroactivity, the cases that remain are even further removed from rights guaranteed by the United States Constitution and the Florida Constitution. Mr. Taylor's death sentence was unconstitutional when he received it and even more so if this Court allows it to stand. He was unconstitutionally convicted of sexual battery and felony murder based on the misleading testimony of the medical examiner. This Court should grant relief.

CERTIFICATE OF SERVICE

We certify that a copy hereof has been furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on Suzanne Bechard, Assistant Attorney General, on November 1, 2017.

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We hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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