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

REPLY BRIEF OF THE APPELLANT

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REPLY TO STATEMENT CONCERNING ORAL ARGUMENT

Mr. Taylor disagrees with the State's position regarding oral argument in this case. Since this appeal may determine whether Mr. Taylor lives or dies, this Court should permit oral argument in this case. Mr. Taylor disagrees with the State's assertion here that the claims were "properly denied as procedurally barred or meritless as a matter of established law."

REPLY TO STATEMENT OF THE CASE AND FACTS

Mr. Taylor agrees with much of the Appellee's assessment of the statement of the case and facts in this section. Except, at page 3, the State contends that "On May 18, 2017 the lower court held a hearing on the State's motion to strike Dr. Moore's testimony and his report, and to allow Appellant to proffer this evidence." While Mr. Taylor agrees with the first part of that sentence, he disagrees with the second portion of that sentence. This particular hearing was not conducted as a proffer of the full substance of Dr. Moore's anticipated testimony.

The hearing was simply to establish Dr. Moore's education, training, experience and qualifications to testify an evidentiary hearing. It was essentially a hearing to see if the court would move forward with an evidentiary hearing. As seen in the transcripts at 2017 PC ROA Vol. IV 1-64, this testimony was not conducted as a proffer of his full testimony. Had this been a full proffer, Dr. Moore would have fully explained the process by which this particular content analysis exercise was conducted, and he would have given specific examples of the approximate 140 statements made during the Taylor trial that diminished the jury's sense of responsibility for their recommendation of death. He also would have explained the implications of the repetitive comments diminishing the jury's role at trial. Instead, Dr. Moore's testimony at this hearing was limited to establishing his

qualifications to testify about the content analysis that he performed in this case.

REPLY TO SUMMARY OF ARGUMENT

In this section, at page 5, the State claims that "Appellant's argument that *Hurst v. Florida*, 136 S. Ct. 616 (2016), as interpreted by *Hurst v. State*, 202 So. 3d 40 ((sic) [Fla.] 2016) should be held retroactive to *Caldwell v. Mississippi*, 472 U.S. 320 (1985), is unpreserved as Appellant did not raise this argument in the lower court." The State claim above is recklessly disingenuous at best, and intentionally misleading at worst.

After the lower court granted the State's Motion to Strike Dr. Moore and the evidentiary hearing, at the first opportunity in a written Motion for Rehearing filed on June 22, 2017, at page 1 of the motion, the Appellant specifically argued the following:

> The Defendant hoped to have this Court consider the testimony of Dr. Harvey Moore because death is different, and the Defendant should have the full opportunity to present any and all evidence tending to show this Court that the errors that occurred at the Defendant's trial were harmful, not harmless. ***Hurst* relief should be afforded to Mr. Taylor because *Hurst* should be held retroactive back at least to the date of *Caldwell v. Mississippi* (1985), not just the date of *Ring v. Arizona* (2002).**

2017 PC ROA Vol. IV 578 (emphasis added). The Appellant concluded the lower court motion at pages 5-6 as follows:

> 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.**

2017 PC ROA Vol. IV 582-83 (emphasis added).

Had the Appellant been permitted to present his case at a June 15, 2017 evidentiary hearing, he would have presented the substantive testimony of Dr. Moore who identified nearly 140 *Caldwell*-type errors from the Taylor trial transcripts during a content analysis of the trial and the *Caldwell* opinion. Had Mr. Taylor been given this opportunity to present his case at an evidentiary hearing, following Dr. Moore's testimony, Mr. Taylor likely would have requested and been provided an opportunity to present written or oral closing arguments in support of *Hurst* retroactivity back to *Caldwell* (1985) instead of just back to *Ring* (2002).

When the lower court following the State's motion struck the scheduled June 15, 2017 evidentiary hearing date, struck the contents of the report, and struck Dr. Moore's as a witness, the lower court precluded further development of this planned argument, and precluded further argument in support of full *Hurst* retroactivity instead of half retroactivity. The State cannot cite to failure to preserve this argument when they filed successful motions to preclude development of this argument, and effectively shut down the Appellant's opportunity to present this argument.

When the lower court granted the State's Motion to Strike Dr. Moore and the evidentiary hearing, this violated Mr. Taylor's due process rights and effectively shut down his planned argument.

The State's Motion to Strike Dr. Moore was originally scheduled for hearing May 4, 2017. Because Dr. Moore was ill with severe flu and laryngitis, he could not make it to the hearing. *See* 2017 PC ROA Vol. IV 671-686. Because Dr. Moore was unavailable, the defense suggested that the court hear purely legal arguments on the issue of Dr. Moore's report and testimony. If provided the opportunity, in addition to talking about Dr. Moore's qualifications and the long history of content analysis of trial transcripts and judicial opinions, the defense likely would have made legal arguments in support of the admissibility and relevance of Dr. Moore's testimony and report. If provided the opportunity, the defense likely would have presented arguments that *Hurst* should be retroactive back to *Caldwell* (1985). The lower court declined the defense request to present argument at this May 4 hearing.

> MR. HENDRY: [T]he defense is prepared to answer all the nonevidentiary legal issues which would involve whether or not it would be proper to strike Dr. Moore. So I would suggest that that if we - since we're here and we're ready to argue, argue the motion, [] if the Court is inclined to grant the State's motion absent Dr. Moore's testimony. . . .there's a lot of arguments, I'm sure the State is prepared to make, and counterarguments from the defense, and so I would just suggest that, if Your Honor would be okay with that.
>
> THE COURT: Not really. I kind of just want to get it done. I don't want to hear argument. . . .So I just want

> finality on this issue, that's all I want is finality, that's it.

2017 PC ROA Vol. IV 680-81. After testimony was taken from Dr. Moore on May 18, 2017 following the State's Motion to Strike, without ever hearing legal argument at a Case Management Conference on the *Hurst* issues, the lower court granted the State's Motion to Strike on June 13, 2017 (2017 ROA Supp. 850-936). On that same day, the lower court and entered a final order denying Claim IV (the *Hurst* claim)(2017 ROA Vol. III 568-583).

Predecessor CCRC-M counsel filed a successor motion back on July 14, 2016. (2017 ROA Vol. I 66-88). Under Claim IV of that motion, counsel specifically argued the following in the heading of that claim:

> **MR. TAYLOR'S DEATH SENTENCE CANNOT BE SUSTAINED IN LIGHT OF THE DECISION IN HURST V. FLORIDA, ___ U.S. ___, 136 S. Ct. 616 (2016).**

2017 PC ROA Vol. I 83 (emphasis in original). The refined ***argument*** that *Hurst* should be retroactive back to *Caldwell* and afford Mr. Taylor relief from his unconstitutional death sentence was certainly made later in the lower court, albeit severely truncated due to adverse evidentiary rulings in the lower court. The claim was that Mr. Taylor should be afforded *Hurst* relief. The subsequent argument following adverse case law on retroactivity was that *Hurst* should be retroactive as far back as *Caldwell* (1985). If provided an evidentiary hearing, the *Caldwell* retroactivity argument would

have been further refined and developed. The State should not be permitted to prevail with their repetitive claims in their Answer Brief that Mr. Taylor's argument advocating for retroactivity back to *Caldwell* was somehow unpreserved after they effectively shut down the opportunity to fully present the evidence and argument in the lower court.

In his Amendment to Claim IV of his successive 3.851 motion filed January 24, 2017, the Appellant raised the following issue:

> 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*.

2017 PC ROA Vol. III 312. These *Caldwell* issues were certainly raised and preserved in the lower court. The State should not be permitted to defeat these arguments on appeal just by falsely claiming the arguments were not made in the lower court.

Had legal argument at the Case Management Conference been permitted in this case, counsel for Mr. Taylor would have made arguments similar to arguments he made at the Steven Evans case (the Steven Evans case is currently pending before this Court, Case SC17-869). It bears mentioning here that the Steven Evans case became final on Friday June 21, 2002, just one business day before *Ring* issued. At the Case Management Conference in the Steven Evans case held on March 16, 2017, the undersigned counsel made the following argument:

> MR. HENDRY: What I am doing is that I am providing further argument as to why [] *Hurst* relief should be retroactive to at least 1985. . . .*Caldwell* said, it is an Eighth Amendment violation to allow a death sentence where a jury's role is diminished with just one comment. …
>
> So the standard Florida jury instructions do that as a matter of course. They repeatedly diminish the jury's role and responsibility in capital sentencings. [] *Ring* was established June 24, 2002. Apparently that's the timetable the Florida Supreme Court has chose[n] by which to grant retroactive effect. But there's absolutely no reason for them not to go back to 1985, because we have known since 1985 that you cannot do it, and they have done it, and they have violated Mr. Evans' Sixth Amendment and Eighth Amendment rights.

Evans v. State, Case SC17-869, 2017 ROA 419-20. The transcript in this death penalty case is mentioned here to show the Court what type of legal argument would have been made had the lower court permitted legal argument at the Case Management Conference in the case at bar. The Evans Case Management Conference transcript illustrates that these arguments were formulated in early 2017, well before the filing of the Initial Brief in this case. After striking Dr. Moore as a witness, the lower court just summarily denied the *Hurst* claim by written order (2017 ROA Vol. III 568-577) without first hearing legal arguments like the one shown above in the Steven Evans case.

Dr. Moore's first report in the Taylor case was completed March 21, 2017, just 5 days after the Case Management Conference was held in the Steven Evans case. *See* 2017 ROA Vol. Supp. 808-835. But retroactivity-back-to-*Caldwell* arguments were already

formulated in the pre-*Ring* cases, and were becoming more fully developed. The arguments were never fully developed in this case because the lower court denied evidentiary hearing.

With the striking of Dr. Moore, the striking of evidentiary hearing, and the summary denial of Amended Claim IV, the only forum available for Mr. Taylor to argue retroactivity-back-to-*Caldwell* in the lower court was in motions for rehearing. On June 26, 2017 Mr. Taylor filed a "Motion for Rehearing on Denial of Amended Claim Four." On pages 1-2 of this motion, he specifically argued that "this Court overlooks the fundamental fairness doctrines of the *James* case, **and overlooks sound and reasonable arguments in favor of retroactivity back to *Caldwell v. Mississippi* (1985).**" 2017 ROA Vol. III 584-85 (emphasis added). Mr. Taylor argued further in the motion for rehearing: "**Because death is different, Florida's June 24, 2002 cutoff date violates the Eighth Amendment. *Hurst* should at least be retroactive to 1985.**" 2017 ROA Vol. III 585 (emphasis added). The State's answer brief at page 5 claiming that Mr. Taylor's retroactivity-back-to-*Caldwell* argument "is unpreserved as Appellant did not raise this argument in the lower court" is perplexingly disturbing.

Continuing at page 5, the State asserts: "*Hurst v. State* is not retroactive to death sentences that were final prior to the decision in *Ring v. Arizona*." For all the reasons stated in the Initial Brief and in this Reply Brief, *Hurst* should be retroactive

back at least to *Caldwell* (1985).

At page 6, regarding the claim concerning the medical examiner's testimony, the State asserts that "this claim has been raised and rejected both in the postconviction court and on direct appeal." Though this may have been the case, the claim was rejected based on what has now been revealed as a medical examiner's flawed testimony. The misunderstood basis for previous denials of relief has since been clarified by the medical examiner in a post-evidentiary hearing affidavit. *See* 2017 ROA Vol. I 87-88.

REPLY TO ISSUE I

Regarding the *Hurst* retroactivity-back-to-*Caldwell* arguments, again at page 8 the State falsely asserts that "Appellant did not argue below that *Hurst* should be held retroactive to *Caldwell*; therefore the claim is unpreserved." As discussed previously and extensively in this brief, this argument was in fact made in the lower court several times.

Rare must be the postconviction case that was summarily denied without the benefit of legal argument at a Case Management Conference. This is one of those rare cases. As a consequence of the motions of the State argued in front of a lower court all too interested in finality rather than due process of law and the Sixth and Eighth Amendments, Mr. Taylor was denied the opportunity prior to the lower court's written order denying his claim to argue the merits of his case at a Case Management Conference.

Florida Rule of Criminal Procedure 3.851(f)(5)(B) states that "At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts." At the March 23, 2017 Case Management Conference, the following occurred:

> THE COURT: So we're here for a case management, right?
> MR. HENDRY: Yes.
> MS. BECHARD: Yes.
> THE COURT: Okay. So we're going - I'm not going to hear from any witness, so I don't—**all I'm going to do is give you an evidentiary hearing date**, assuming that you ask for an evidentiary hearing.

2017 ROA Vol. IV 662 (emphasis added). At this Case Management Conference, the lower court scheduled an evidentiary hearing, scheduled a hearing on the state's motion to strike, but never heard or invited legal argument. Subsequently the lower court struck the evidentiary hearing, granted the State's Motion to Strike, then summarily denied the *Hurst* claim before hearing any legal argument. Before summarily denying the *Hurst* claim, once the court entered an order striking the evidentiary hearing, the lower court should have scheduled the issue for purely legal argument in accordance with the rule.

At page 8 the State asserts that "Dr. Moore testified during the **proffer** that he was familiar with the *Caldwell* case." (emphasis added). The hearing held May 18, 2017 was not a "proffer" of Dr. Moore's testimony. May 18, 2017 was simply a hearing following the

State's Motion to Strike his testimony. This was merely an expert witness qualification hearing, not a full proffer of the evidence he would be presenting at an evidentiary hearing.

Dr. Moore ultimately was not permitted to testify because the State persuaded the lower court to grant their motion to strike. The State is wrongly suggesting in their Answer Brief that Dr. Moore's testimony, qualifying testimony that was basically limited to Dr. Moore's education, training, and experience in content analysis, was a full proffer for this Court to accept or reject. The hearing was merely concerning a witness qualification issue that was wrongly decided by the lower court. Dr. Moore was certainly well-qualified to testify, and content analysis of trials and judicial opinions is far from novel or new. This Court should, at the very least, remand this case back to the lower court for a full proffer and consideration of his substantive testimony. The lower court merely heard a preview of Dr. Moore's testimony on May 18, 2017. The lower court should have permitted, heard, and considered more.

Regarding the content analysis process, at page 9 the State refers to two of the coders simply as "an undergraduate student, [and] a graduate student in psychology." Should there be any doubt to these two individuals' qualifications to serve as coders in this content analysis, Ms. Derry's and Mr. Ali's education, training, and experience are listed and were made a part of this

record. *See* 2017 ROA Vol. IV 618-20. The State identifies one of the chosen participants simply as a "former *Tampa Tribune* journalist." The State fails to acknowledge here that coder Thomas Brennan was actually a "Senior Staff Writer" with the Tampa Tribune who served in that position for 24 years (1987 through 2011). *See* 2017 ROA Vol. IV 616-17. The State also fails to acknowledge that prior to joining the *Tampa Tribune* Mr. Brennan worked as a reporter in Mississippi and "actually covered the *Caldwell* case for *The Meridian Star* before the Mississippi Supreme Court." 2017 ROA Vol. III 593. Dr. Harvey Moore's preeminent qualifications are found in his 11 page *Curriculum Vitae* at 2017 ROA Vol. III 605-615.

At page 9 the State mentions that in the lower court "The State argued that Dr. Moore's testimony and report were inappropriate and unnecessary for the resolution of the purely legal threshold matter of whether *Hurst v. State* was retroactive to Appellant's case." In making this argument, the State fails to acknowledge the hundred-plus *Caldwell* violations that occurred at the Appellant's trial. This Court previously announced a cutoff date for *Hurst* relief of June 24, 2002, the date that *Ring* was published, but Mr. Taylor respectfully suggests that the more appropriate cutoff date would be June 11, 1985, the date that the United States Supreme Court stated the following:

> 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. Contrary to the State's arguments, Dr. Moore's report is absolutely appropriate and necessary in part to help the Appellant persuade this Court that the previously-announced June 24, 2002 *Hurst* cutoff date is not constitutionally tolerable.

At page 11 the State again asserts the following: "In the lower court, Appellant sought through Dr. Moore's testimony and report to establish that *Caldwell* was violated in his trial. This is not the same argument he now raises on appeal. Appellant now argues that *Hurst* should be held retroactive to *Caldwell* instead of *Ring*. This claim was not raised below and is therefore not preserved for appellate review." The Appellant certainly raised the claim that he should be afforded *Hurst* relief. This is clearly seen in Claim IV and its amendments. After pleading the *Hurst* claim, the Appellant was denied the opportunity to present argument in favor of retroactivity-back-to-*Caldwell*. A written order denying the claim was issued before the claim was scheduled for Case Management Conference and argument. The Appellant made these arguments in his motions for rehearing as previously discussed in this Reply brief. Rather than address and refute the retroactivity-back-to-*Caldwell* argument, the State continues to deny that it was made in the lower court.

At page 12, the State again asserts that "Appellant proffered

Dr. Moore's testimony and report." Dr. Moore's testimony was not proffered. On May 18, 2017 Dr. Moore's qualifications were discussed, he provided and explanation of the method and history content analysis, then a short time later the lower court struck him as a witness and struck the June 15, 2017 evidentiary hearing date. 2017 ROA Supp. 850-936. Dr. Moore was never given an opportunity to fully discuss the content analysis that he performed in this particular case.

Also at page 12, the State cites to "*Hall v. State*, 212 So. 3d 1001, 1032-33 (Fla. 2017)" to defeat these claims. *Hall* is inapplicable here. *Hall* was a state habeas claim: a claim that appellate counsel was ineffective for failing to raise issues that the standard jury instructions in Florida diminished the jury's sense of responsibility for the sentence. Perry Taylor is not raising ineffective assistance of his appellate counsel claims for failing to raise *Caldwell*-type claims. He is arguing that *Hurst* should be retroactive back to *Caldwell*. Mr. Taylor is arguing that his rights to a properly instructed jury were violated, and therefore he should receive *Hurst* relief, even if his case was final prior to *Ring*. The denial of Mr. Hall's state habeas claim against his appellate counsel should not serve as authority for the denial of Mr. Taylor's claims.

Also at page 12, the State suggests that the jury's role must have been improperly described at trial in order for Mr. Taylor to

prevail on a *Caldwell* claim. This is not what *Caldwell* requires. If a jury's role is diminished, a *Caldwell* violation has been established. This is exactly what happened in Mr. Taylor's case, nearly 140 times. It would make no sense to require something different than the role that was described to the jury in Mr. Taylor's case to prevail on a *Caldwell* claim. Through the lens of *Hurst*, we now know that Mr. Taylor's jury was instructed in an unconstitutional manner. To suggest that they need to have been instructed in a constitutional manner in order for Mr. Taylor to prevail is to suggest the absurd.

The State cites to *Romano v. Oklahoma*, 512 U.S. 1 (1994) to defeat Mr. Taylor's *Caldwell* claim. This case is just as inapplicable as *Hall*, perhaps even more inapplicable than *Hall*. The State is focusing on the following language from *Romano*: "To establish constitutional error under *Caldwell*, a defendant must show that the comments or instructions to the jury 'improperly described the role assigned to the jury by local law.' *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)." Though that might be the holding of *Romano*, that is not a requirement for relief under *Caldwell*. There is a vital distinguishing factor from the Oklahoma capital system and the Florida capital system. In Oklahoma, the jury is instructed that they are actually making the decision concerning life or death. In Florida, jurors like Mr. Taylor's jurors were instructed that they were making a mere recommendation to the trial

judge, who would consider that recommendation and then make the decision for life or death. The *Romano* case is distinguishable and inapplicable to the case at bar because of that vital distinction.

> Mr. Romano's case was decided adversely because:
>
> The trial court's instructions, moreover, emphasized the importance of the jury's role. As the Court of Criminal Appeals observed: 'The jury was instructed that it had the responsibility for determining whether the death penalty should be imposed
>
> ...
>
> It was never conveyed or intimated in any way, by the court or the attorneys, that the jury could shift its responsibility in sentencing or that its role in any way had been minimized,' Romano II, 847 P. 2d at 390.

Id. at 9. Obviously things were quite different in Florida prior to *Hurst*. The jury's role was completely deemphasized at Mr. Taylor's trial. *Romano* should not serve as authority for the denial of Mr. Taylor's claims.

Regarding split retroactivity, an unpublished concurring opinion in The Eleventh Circuit of Appeal stated the following:

> Mr. Hannon is set to be executed tonight. No one disputes that he was sentenced to death by a process we now recognize as unconstitutional. Neither does anyone dispute that others who were sentenced to death under those same unconstitutional procedures are eligible for resentencing under Florida's new law. The Florida Supreme Court's retroactivity analysis therefore leaves the difference between life and death to turn on "either fatal or fortuitous accidents of timing." *Asay*, 210 So. 2d 31 (Lewis, J., concurring in result); see id. 40 (Perry, J., dissenting)("The majority's application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice.").

...

> [Mr. Hannon's] impending execution is a stark illustration of the problems with Florida's retroactivity rule. In particular, I cannot fathom why the need to "cur[e] individual injustice" compels retroactive application of *Hurst* to cases that became final after, but not before, *Ring*. *Mosely*, 209 So. 2d at 1282 (quotation omitted). To the contrary, I say **finality should yield to fairness, particularly when the State is taking the life of this man based on a death sentence that was unconstitutionally imposed.**

Hannon v. Sec'y Fla. Dept. of Corr., No. 17-14935, 7-8 (11th Cir. (Fla.) 2017)(emphasis added).

To deny Perry Taylor retroactive relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), on the ground that his death sentence became final before June 24, 2002 under the decisions in *Asay v. State*, 210 So.3d 1 (Fla. 2016), while granting retroactive *Hurst* relief to inmates whose death sentences had not become final on June 24, 2002 under the decision in *Mosley v. State*, 209 So.3d 1248 (Fla. 2016), 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); *Espinosa v. Florida*, 505 U.S. 1079 (1992) (per curiam)). This Court should reverse the lower court and cure this injustice.

Regarding Fla. Stat. 90.702 and testimony on the ultimate issue, at page 13 the State suggests that the lower court was some other entity besides **"the trier of fact,"** (emphasis in original), and therefore the lower court was not to be assisted by expert testimony under this rule. The State basically argues here that because the lower court judge was not really "the trier of fact" in this matter, Fla. Stat. 90.702 should not apply. The lower court judge was the trier of fact in this proceeding. At page 14 the State quotes that portion of the lower court's order wherein she basically stated she was the trier of fact. At page 14 the State asserts, quoting the lower court's order denying the admission of Dr. Moore's testimony, "It was the postconviction court's 'duty to review the record and draw appropriate conclusions based on the arguments and the law.' (R856)." The lower court in Mr. Taylor's *was* the trier of fact, just like the lower postconviction court who decided the ineffective assistance of counsel issues in the case of *Lynch v. State*, 2 So. 3d 47 (Fla. 2008)(the lower court declined to accept the testimony of an experienced attorney on the issue of trial attorney deficiency).

At page 14, the State again asserts that "In sum, Appellant's argument that *Hurst* should be held retroactive to *Caldwell* rather than *Ring* is unpreserved for appellate review because the claim was not raised below." Just because the State makes the same false claim five times in a brief should not lend it any support or

credence. Though Mr. Taylor was denied the opportunity to fully develop this argument in the lower court, it most certainly was raised below.

REPLY TO ISSUES II-III

Regarding issues II-III, at pages 15-20 the State simply block quotes the lower court's order denying these claims. At pages 21-22, the State simply cites to this Court's relatively recent precedent finding retroactivity only back to *Ring*. Following the reasoning in *James*, to deny retroactive application of *Hurst* when Mr. Taylor previously raised *Hurst*-like claims over 25 years ago violates fundamental fairness. The State has suggested that there is no mandate for this Court to be fundamentally fair under *James*. Putting every other issue in this case aside, to deny Mr. Taylor the fundamental fairness extensions of *James* amounts to a constitutionally intolerable injustice.

Regarding the argument that Fla. Laws Chapter 2017-1 should be retroactive and afford Mr. Taylor relief, at page 23 the State merely block quotes the lower court's order denying this claim. Then at page 24 the State cites to *Florida Ins. Guar. Assn., Inc. v. Devon Neighborhood Assn., Inc.*, 67 So. 3d 187 (Fla. 2011), and asserts that based on this case, and based on the lack of clear legislative intent that the law be retroactive, there should be no retroactivity. Death is different. Mr. Taylor's very life could be taken by the State should this Court fail to afford him evolving

Sixth and Eighth Amendment protections. This Court should vacate this death sentence that was undeniably unconstitutionally imposed.

In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), this Court acknowledged the following:

> The Supreme Court has described the jury as a 'significant and reliable objective index of contemporary values.' *Gregg*, 428 U.S. 181 []. 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.' *Trop v. Dulles*, 356 U.S. 86, 101 [](1958)(plurality opinion)(holding that Eighth Amendment must 'draw its meaning from the evolving standards of decency that mark the progress of a maturing society').

Hurst, Id. at 60. So even if there is no clear legislative intent that Fla. Laws Chapter 2017-1 be retroactive, this Court should still vacate the sentence of death in this case based on this Court's above reasoning in *Hurst v. State*. The advisory panel in the case recommended death only by a vote of 8-4. Should this Court fail to vacate this death sentence, this Court will have failed to keep pace with the evolving standards of decency in capital sentencing. Unanimous recommendations of death are now required by mandate of Fla. Laws 2017-1 and by mandate of *Hurst v. State*. This Court stated in *Hurst v. State* that death sentences based on less-than-unanimous recommendations amount to an Eighth Amendment

violation. Therefore, this death sentence must be vacated because it clearly violates the Eighth Amendment. This Court should reverse the lower court's order and vacate this death sentence.

REPLY TO ISSUE IV

Regarding issue IV, the sexual battery conviction and the kick, at pages 25-32 the State simply block quotes the lower court's order denying this claim. At page 33, the State suggests that this successive claim is untimely. This claim is in fact timely because it was filed within one year of the newly discovered evidence: Dr. Miller's affidavit dated July 17, 2015 regarding his "one in a million" remark. In the affidavit, Dr. Miller asserts that his remark "was an unfortunate choice of words and I regret it. A 'one in a million' shot implies near impossibility and in this case this is not true." 2017 ROA Vol. I 88.

Accurate 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. This newly discovered evidence claim is not procedurally barred as the State suggests. This Court should reverse the lower court's order summarily denying relief.

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 remaining sentences of death 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. This Court should reevaluate the capital sentencing situation in the State of Florida and hold *Hurst* retroactive to June 11, 1985, the date that the *Caldwell* opinion was published. Mr. Taylor 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 will be 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 December 7, 2017.

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CERTIFICATE OF COMPLIANCE

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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