IN THE SUPREME COURT OF FLORIDA

NO.

STEVEN RICHARD TAYLOR,

Petitioner,

v.

WALTER McNEIL,

Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Steven Taylor's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Taylor was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original jury trial proceedings shall be referred to as "R" for the record. The postconviction record on appeal shall be referred to as "PCR."

All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

This petition presents questions that were ruled upon during direct appeal, but should now be revisited in light of subsequent case law, omitted facts, as well as correcting error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Taylor is entitled to habeas relief.

PROCEDURAL HISTORY

Taylor was indicted for murder, burglary, and sexual battery by a grand jury in Duval County, Florida, in 1991 (R 5-7, 78-80). Taylor was found guilty after a jury trial (R 797-98). Taylor's jury recommended a sentence of death (R 879). On December 9, 1991, the Court sentenced Taylor to death as to the first degree murder conviction (R 905).

On direct appeal this Court affirmed Taylor's convictions and sentences. Taylor v. State, 630 So. 2d 544 (Fla. 1993)[1]. Taylor filed a petition for writ of

[1]Issues raised on direct appeal were: (1) denying Taylor's motion to suppress statements he made to a police officer while he was in custody and after invoking his right to counsel; (2) instructing the jury that it could consider Taylor's efforts to escape from the Duval County jail; (3) admitting evidence that Taylor wanted a fellow inmate to secure a gun and handcuff key and hide them in the hospital bathroom so that he could escape; (4) admitting evidence that the stolen vehicle was seen parked near the victim's mobile home on the morning of the murder and found later that day within several blocks of Taylor's residence; and

certiorari in the United States Supreme Court, which was denied on October 3, 1994. Taylor v. Florida, 115 S. Ct. 99 (1994). On November 1, 1995, Appellant filed a shell motion entitled Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend, raising a total of forty-five (45) claims for relief (PCR 1-2). On June 23, 2003, Appellant filed a Supplemental Motion to Vacate Judgments of Convictions and Sentence with Special Request for Leave to Amend, raising one (1) claim for relief (PCR 520-523). On May 13, 2004, Appellant filed an Amended Motion to Vacate Judgments of Convictions and Sentences with Special Request for Leave to Amend, raising thirty-two (32) grounds (PCR 557-690). On May 23, 2005, Appellant filed a Motion for Postconviction Relief to Vacate Judgment of Conviction and Sentence by a Person under the Sentence of Death and Incorporated Memorandum of Law, raising twenty-one (21) grounds[2].

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(5) admitting cumulative photographs of the victim's body; (6) whether the trial court erred in finding that the murder was especially heinous, atrocious, or cruel; (7) whether the trial court erred in instructing the jury on the heinous, atrocious, or cruel aggravating factor; and (8) whether it is cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17, of the Florida Constitution to execute a mentally retarded person.

[2] Claims asserted in Amended 3.850 Motion are: (1) access to records, (2) production of records, (3) trial attorney

The State filed Responses to the Appellant's Supplemental and Amended Motions on July 15, 2003; June 14, 2004; June 23, 2004; and June 6, 2005.

On December 13, 2005, the Court conducted a Huff hearing and issued an Order on June 15, 2006, stating that an evidentiary hearing was required as to Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the Ake claim), and Claim IX.

On July 18, 2007, Appellant filed a Motion for Leave to Amend Claim XII, Amended Claim XII, and Motion to take Judicial Notice. On July 30, 2007, the Court issued an Order granting the Appellant's Motion to take Judicial Notice and the Motion for Leave to Amend Claim XII. On August 1, 2007, the State filed a Response opposing the Defendant's Motion.

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file, (4) ineffective Assistance Counsel DNA, (5) Prosecutor Comments, (6) ineffective Assistance Counsel - Timothy Coward, (7) instruction regarding experts - withdrawn at evidentiary hearing, (8) instruction on reasonable doubt - withdrawn at evidentiary hearing, (9) ineffective assistance at penalty phase - withdrawn at evidentiary hearing, (10) prosecutor prepared sentencing order - withdrawn at evidentiary hearing based on prosecutor's assertion, (11) ineffective experts, (12) prior Mental Retardation ruling, (13) Ring issue, (14) prosecutor comment on requirement of death - withdrawn at evidentiary hearing, (15) burden shifting, (16) responsibility of jury, (17) instruction on pecuniary gain aggravator, (18) failure to acknowledge mitigation - withdrawn at evidentiary hearing, (19) automatic aggravator, (20) electrocution and lethal injection unconstitutional, and (21) Apprendi issue.

On August 6 and 7, 2007, an evidentiary hearing was held on Claims IV and VI (excluding the ineffective assistance of counsel claims in paragraphs 7 and 13), Claims X and XI (excluding the Ake claim), and Claim IX. At the beginning of the August 6, 2007, evidentiary hearing, Appellant asked the Court to withdraw from its consideration Claims VI paragraphs 2-8, VII, VIII, IX, X, XIV, and XVIII. (PCR 7-9).

On September 10, 2007, the State filed their closing argument (PCR 1782). The Appellant filed his closing argument on September 12, 2007 (PCR 1842). On October 5, 2007, the State filed a Motion to Strike and Objection to Defendant's Written Closing Argument and Memorandum of Law (PCR 1916). Appellant filed his Response to State's Motion to Strike and Objections and Motion to Amend the Pleadings to Conform with the Evidence (PCR 1923). The State subsequently filed their Opposing Motion to Amend the Pleadings to Conform with the Evidence (PCR 1928). Appellant filed his reply on October 12, 2007 (PCR 1939).

On June 22, 2009, the trial court entered its order denying Appellant's postconviction motion (PCR 2024). On June 26, 2009, the trial court filed its order granting the State's Motion to Strike Appellant's closing arguments and

denied Appellant's Motion to Amend the Pleadings to Conform with the Evidence (PCR 2066). The Appellant filed his Notice of Appeal on July 14, 2007 (PCR 2068). The Appellant filed his Motion for Rehearing on July 31, 2007 (PCR 2072). The trial trial declined ruling on the Motion for Rehearing for Lack of Jurisdiction (PCR 2082).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). See Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues that directly concern the judgment of this Court during the appellate process, and the legality of Mr. Taylor's convictions and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The fundamental errors challenged herein arise in the context of a capital case in which this Court heard and denied petitioner's direct appeal. See Wilson, 474 So.2d at 1163; Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Taylor to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v.

Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The end of justice begs the Court to grant the relief sought in this case, because the Court has done so in past, similar cases. This petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as these pled herein, is warranted in this action. As the petition shows, habeas corpus relief would be proper on the basis of Mr. Taylor's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Taylor asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

ISSSUE I

WHETHER APPELLANT'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE APPELLATE COUNSEL FAILED TO ARGUE FUNDAMENTAL ERRER OCCURED WHEN THE TRIAL COURT DID NOT ORDER A FRYE HEARING *SUA SPONTE*?

A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or if not properly preserved, would constitute fundamental error. Harrell v. State, 894 So.2d 935 (Fla. 2005). Smith v. State, 521 So.2d 106, 108 (Fla. 1988) (warning that "[t]he doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application"). To be fundamental, an error must "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." Brown v. State, 124 So.2d 481, 484 (Fla. 1960).

The trial record is clear that neither trial counsel nor the trial court even mentioned the issue of Frye, let alone requested a hearing in accordance with Frye. The issue of whether fundamental error occurs when a trial court fails to order a hearing pursuant to Frye *sua sponte*

was raised before this Court in Zack v. State, 911 So.2d 1190, 1201 (Fla. 2005). In Zack this Court stated:

> Zack argues that although defense counsel failed to request a *Frye* hearing on the issue of whether PCR DNA was generally accepted in the scientific community, the trial court should have conducted a hearing *sua sponte.* Because counsel did not request a *Frye* hearing, this is simply a rewording of Issue 1 above. Zack argues that pursuant to *Arnold v. State,* 807 So.2d 136 (Fla. 4th DCA 2002), the failure to order a ***Frye*** hearing on new or novel scientific evidence is **fundamental** error. Actually, *Arnold* states that the trial court needs to give all the parties an opportunity to be heard at a *Frye* hearing, and that the opposing party should be permitted to offer evidence in rebuttal. *Arnold* does not address a trial court's duty to *sua sponte* order a *Frye* hearing.
>
> We have considered and rejected Zack's claim that a *Frye* hearing was necessary. **We will not reverse this conviction based on the trial court's failure to order its own *Frye* hearing when we have determined that the admission of the disputed evidence was not prejudicial.** (emphasis added).

Although this Court in Zack didn't specifically address whether fundamental error occurs when the trial court fails to order a Frye hearing *sua sponte*, the language highlighted above suggests that it could if such evidence was prejudicial. Petitioner contends that admission of the DNA in his case was prejudicial and improperly admitted. It was fundamental error for the trial court not to hold a Frye hearing upon its own motion.

Petitioner also contends that the facts in Zack are substantially different from the instant case. In Zack this Court found as follows:

> The factual findings indicate that trial counsel did not challenge the DNA evidence and that **Zack conceded the fact that he had engaged in sexual contact with Smith and was responsible for her death. Thus, the PCR and RFLP DNA evidence was offered to demonstrate facts that Zack did not dispute.** Trial counsel told the jury that he would not dispute this evidence because doing so would have served no purpose for the defense at trial. Based on these facts, we agree with the trial court's legal conclusion and find trial counsel's strategy sound. Trial counsel's decision to not challenge the DNA evidence did not constitute deficient performance in this case.
>
> In addition, Zack has not shown that he suffered any prejudice from trial counsel's decision not to challenge the DNA evidence. **Zack admitted to engaging in sexual contact with Smith and confessed to causing Smith's death. Thus, the facts supported by either type of DNA evidence were already established.** ***See Zack v. State*****, 753 So.2d 9, 14 (“After he was arrested, Zack confessed to the Smith murder and to the Pope and Chandler thefts.”). The issue at trial was Zack's level of intent. The PCR DNA evidence did not go to Zack's level of intent.** Therefore, the evidence did not undermine Zack's defense. Had this evidence been challenged, we are confident that the outcome of the trial would not have been affected. We therefore deny relief on this claim. (emphasis added).

Zack, 911 So.2d at 1198.

In Petitioner's case, the facts are totally different from Zack, except that both trial attorneys had little, if

any, knowledge about the science of DNA. Petitioner's counsel had no knowledge of Frye (PCR 1393) or that he could attack novel science through Frye (PCR 1395). Petitioner's counsel failed to conduct any research on DNA or Frye (PCR 1398). Although Petitioner's counsel hired an expert: (1) counsel asserted in his motion for continuance that neither he nor his expert were ready for trial (R 161), (2) counsel's expert had a conflict with the trial date (PCR 161), (3) neither counsel nor the expert were aware that a second analyst existed until the trial was in progress (PCR 1371, 1373), (4) neither counsel nor the expert were aware that the second analyst's opinion would contradict Dr. Pollock's opinion (PCR 1369), and (5) neither counsel nor the expert knew that Dr. Pollock had violated two protocols in making his opinion (PCR 1266).

In addition, the evidence against Petitioner, notwithstanding DNA evidence, was weak at best. Jason Leister testified that Petitioner was washing his hands at the house where the victims belongings were allegedly buried. When questioned by Leister, Petitioner said he left some things there, but they were gone (R 409). Randy Taylor, not Petitioner, had found jewelry buried in the back yard (R 474). Timothy Cowart testified that Petitioner confessed to him (R 474). Timothy Cowart was a jail-house

snitch. Ms. Hanson testified that Petitioner's blood type was A, and that A type blood was found on evidence at the scene[3]. Absent the DNA, none of the evidence presented at Petitioner's trial was persuasive beyond a reasonable doubt.

It wasn't until 1995, in Hayes v. State, 660 So.2d 257 (Fla. 1995), when this Court found RFLP DNA testing generally accepted in Florida, with the following caveat:

> Forensic DNA analysis should be governed by the highest standards of scientific rigor in analysis and interpretation. Such high standards are appropriate for two reasons: the probative power of DNA typing can be so great that it can outweigh all other evidence in a trial; and the procedures for DNA typing are complex, and judges and juries cannot properly weigh and evaluate conclusions based on different standards of rigor. Id. at 262.

* * *

> We take judicial notice that DNA test results are generally accepted as reliable in the scientific community, provided that the laboratory has followed accepted testing procedures that meet the Frye test to protect against false readings and contamination. Id. at 264.

Petitioner doesn't believe there is any dispute that RFLP DNA was a novel science being used in forensics in 1991. The Florida Department of Law Enforcement laboratory had just been opened for business in April 1990), and this

[3] However, no testimony was presented at Petitioner's trial indicating what blood type the co-defendant (Murray) had.

was FDLE's first DNA lab (R 555). FDLE was supposedly utilizing FBI protocols in their laboratory (R 560). Dr. Pollock testified he had been admitted four times as an expert on DNA and once he testified in the fourth circuit[4] (R 556). At the evidentiary hearing Dr. Pollock was questioned about the general acceptance of the procedure of RFLP. Dr. Pollock stated: "Well, not precisely what we were doing in Florida, but the general FBI procedure was generally accepted, yes." (PCR 1698)(emphasis added). Yet, Dr. Pollock changed one of the FBI protocols (PCR 1686) and violated another (PCR 1265-1266).

The trial court was put on notice that the state intended to introduce DNA evidence when defense counsel requested the appointment of a DNA expert (R 87). Moreover, when trial counsel began to voir dire Dr. Pollock it became apparent from counsel's questions there were experts in the field that believed that forensic DNA and databases were not reliable at that time (R 556-569).

The State was the proponent of the DNA evidence and was, therefore, obligated to establish that the technology

[4] Dr. Pollock did not state that the case he testified in for the fourth circuit was Vargas v. State, 640 So.2d 1139 (Fla. 1st DCA 1994); approximately four months earlier Vargas' defense counsel presented testimony of experts who stated that the FBI database was not generally accepted in the scientific community.

and procedures utilized were generally accepted in the scientific community before the court admitted the evidence. Bundy v. State, 455 So.2d 330 (Fla. 1984); Barrel of Fun, Inc. v. State Farm Fire and Casualty Company, 738 F.2d 1028 (C.A. 5 (La.) 1984); Ramirez v. State, 651 So.2d 1164 (Fla. 1995); Brim v. State, 695 So.2d 268 (Fla. 1997). In Brim, this court placed the obligation upon the trial court to determine general acceptance:

> This standard requires a determination, by the judge, that the basic underlying principles of scientific evidence have been sufficiently tested and accepted by the relevant scientific community. To that end, we have expressly held that the trial judge must treat new or novel scientific evidence as a matter of admissibility (for the judge) rather than a matter of weight (for the jury). In Ramirez, we wrote:
>
> In utilizing the Frye test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at hand. The trial judge has the sole responsibility to determine this question. The general acceptance under the Frye test must be established by a preponderance of the evidence. Id. at 272.

In the instant case, neither Defense Counsel nor the trial court required the state to first establish the requirements of Frye before admitting the DNA evidence. The trial court's failure to hold the state to its legal requirement before admitting DNA evidence constitutes fundamental error, and appellate counsel was ineffective in

failing to raise this issue before this court on direct appeal.

ISSUE II

> WHETHER APPELLATE'S FOURTH,FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN APPELLATE COUNSEL FAILED TO ARGUE THAT THE PROSECUTOR'S COMMENT ON PRESUMPTION OF INNOCENCE AND THE INSTRUCTIONS ON PRESUMPTION OF INNOCENCE VIOLATED A FUNDAMENTAL RIGHT?

The standard of review for Ineffective Assistance of Appellate Counsel is *de novo,* pursuant to Strickland v. Washington, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

The prosecutor's statement in closing argument was "the presumption of innocence does not leave the defendant until the evidence has been presented that wipes away that presumption. There is no longer a presumption of innocence as evidence has been presented." (R 698-99).

The instructions presented at trial were as follows:

> The defendant has entered his plea of not guilty. This means you must presume or believe that the defendant is innocent. This presumption of innocence stays with the defendant as to each material allegation in the charge and through each stage of the trial until that presumption of innocence has been overcome by the evidence to the exclusion of and beyond a reasonable doubt. Now, to overcome the defendant's presumption of innocence, the State has the burden of proving the following two elements: Number one, that the crime with which the

> defendant is charged was in fact committed, and two, that the defendant is the person who committed the crime. (R. Vol. 21, p762-763).

Although trial counsel did not object to either the prosecutor's statement that the presumption of innocence is gone because evidence was presented or to the instructions regarding presumption of innocence, the fact remains that Appellant's fundamental right to said presumption was violated.

Appellate counsel was ineffective in failing to raise this issue on direct appeal. At foot note 2 in Mahorney v. Wallman, 917 F.2d 469 (10th Cir. 1990), the court stated:

> We consider the prosecutor's comments impermissible because they undermined two fundamental aspects of the presumption of innocence, namely that the presumption (1) remains with the accused throughout every stage of the trial, including, most importantly, the jury's deliberations, and (2) is extinguished only upon the *jury's* determination that guilt has been established beyond a reasonable doubt.

The Mahorney court went on to further point out the following:

> Of particular significance in this regard is this court's opinion in *Brinlee v. Crisp,* 608 F.2d 839 (10th Cir.1979), *cert. denied,* 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733 (1980), which specifically identified the "constitutionally rooted presumption of innocence" as one of those basic rights whose violation may provide a ground for vacation of a state conviction independent of the more general due process concerns underlying fundamental fairness analysis. *Id.* at 854. *See generally Cool v. United States,* 409 U.S. 100,

> 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335 (1972) (referring to "constitutionally rooted presumption of innocence"); *Zygadlo v. Wainwright,* 720 F.2d 1221, 1223 (11th Cir.1983) ("[t]he constitution grants every defendant a presumption of innocence"), *cert. denied,* 466 U.S. 941, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984). In light of such precedent, our review of petitioner's prosecutorial misconduct claim, which rests squarely upon the presumption of innocence, is not constrained by the fundamental fairness principle recognized in *DeChristoforo.* Id. at 472.

The State's comment and the instructions were a misstatement of Appellant's constitutional right to presumption of innocence. That right remains with a defendant, not when the evidence is in, but after all the instructions are given and during jury deliberations they determine the presumption has been removed beyond a reasonable doubt, and not before. In addition, the instructions by the trial court were erroneous. The jury was permitted to determine that the presumption was overcome if they believe the defendant committed the crime charged without having even heard the elements of the offense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Steven White, Assistant Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, Florida 32399-1050 on January 25, 2010.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the type used in this brief is Courier New 12 point.

__/s/ Michael Reiter_____
Michael Reiter