IN THE SUPREME COURT OF FLORIDA

NO. SC10-143

STEVEN RICHARD TAYLOR,

Petitioner,

v.

WALTER McNeil,

Secretary, Florida Department of Corrections,

Respondent.

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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ISSSUE I

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

Respondent argues at page 12 of its Response that Petitioner has cited no controlling law when this case was before this Court that held the DNA test here must be tested in a *Frye* hearing even when a *Frye* hearing is not requested. Respondent is wrong, as will be described below.

Apparently, Respondent does not consider Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) as controlling law.

> **Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.**

In addition, the court in Andrews v. State, 553 So.2d 841 (Fla. 5th Cir. 1988), acknowledged *Frye* required scientific evidence must satisfy a special foundational requirement not applicable to other types of expert testimony before admitting evidence. Stevens v. State, 419 So.2d 1058, 1063 (Fla. 1982)(A court should admit evidence of scientific tests and experiments only if the reliability

of the results are widely recognized and accepted among scientists.); Ramirez v. State, 542 So.2d 352 (Fla. 1989)(This Court, as most other courts, will accept new scientific methods of establishing evidentiary facts only after a proper predicate has first established the reliability of the new scientific method.)

Stevens **was cited by this Court in Murray v. State, 838 So.2d 1073 (Fla. 2002). The question of objection by an opposing party to the introduction of novel science was discussed in *Murray*:**

> **If the reliability of a test's result is recognized and accepted among scientists, admitting those results is within the trial court's discretion. *Stevens v. State*, 419 So.2d 1058 (Fla.1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983). When such reliable evidence is offered, "any inquiry into its reliability for purposes of admissibility is only necessary when the opposing party makes a timely request for such an inquiry supported by authorities indicating that there may not be general scientific acceptance of the technique employed." *Correll v. State*, 523 So.2d 562, 567 (Fla.), cert. denied, 488 U.S. 871, 109 S. Ct. 183, 102 L.Ed.2d 152 (1988) (emphasis supplied). Id. at 1078.**

Petitioner contends that Murray holds for the proposition, as well as *Stevens*, *Correll,* and *Frye*, that the proponent of novel science must first establish its reliability before the court may admit the evidence. It is only after the science has been previously determined to be

reliable, does an opposing party need to make a timely request for an inquiry that the science is not generally accepted, or the procedures used were not accepted.

There is no dispute—nor has the Respondent argued—that in 1991, DNA was still novel science and had not been determined to be reliable by Florida courts. Consequently, Respondent is incorrect that no controlling case law existed establishing that prior to admitting novel science, reliability must be established by the proponent of the evidence. It is only after a determination of the science's reliability, must an opposing party request inquiry.

At page 12 Respondent also states: Thus, the Petition fails to cite any case law in 1992 that clearly indicates that failure to conduct a *Frye* hearing constitutes fundamental error. Concerning the question of prior case law regarding fundamental error, Respondent may be correct regarding *Frye* hearings. However, the question of fundamental error, in general, was established long before Appellant's case. 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"); Brown v. State, 124 So.2d 481, 484 (Fla.1960)(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.)

However, one case suggests that, depending upon the facts, fundamental error is not required for review when no contemporaneous objection was made below. In Timot v. State, 738 So.2d 387 (4th DAC 1999), at footnote 3 the court states:

> **The state urges that the proper procedure would be for the defense to move pretrial for exclusion of DNA evidence as approved in Ramirez v. State, 651 So.2d 1164 n. 4 (Fla.1995). That is the better procedure but, so far as we are advised, defendant's failure to request a pretrial hearing does not ipso facto preclude appellate review.**

In *Timot*, counsel objected to the expert's testimony during trial about the statistical calculations, albeit prematurely. On appeal, the court found the issue concerning the statistics was not preserved, because no objection was made in a timely fashion. However, as to the Frye issue, the *Timot* court held that it could review the issue notwithstanding that no request for a *Frye* hearing was made.

In the instant case, Mr. Tassone also did not request a pretrial hearing under *Frye*. However, he did voir dire Dr. Pollock on the science issue, as well as his

qualifications. Hence, the trial court was put on notice that that DNA science was being presented.

Petitioner contends that failure to conduct a *Frye* hearing allowed the State to introduce inadmissible evidence that reached down into the trial itself and constituted injustice. DNA was a major focus of the trial; without which, the State had only weak circumstantial evidence, speculation, and testimony from an unbelievable snitch.

At page 21 of the Response, Respondent states: "Taylor admitted to a detective that scientific analysis would reveal incriminating evidence when he asked the investigating officer how long it would take to get the results back because he was just wondering when they would be back out to pick him up." Respondent is rather free with their factual license about what Mr. Taylor actually said or meant. He never stated to any detective that scientific analysis would reveal incriminating evidence against him.

For all anyone knows, Mr. Taylor's declaration about when “they would be back to pick him up” was due to his belief that law enforcement was going to plant evidence against him. This interpretation is as reasonable as any put forth by the State.

Notwithstanding Respondent's suggestion otherwise, the DNA evidence was the crux of the State's case, and without it, they could not have obtained a conviction. Appellate counsel's failure to raise the *Frye* issue on appeal, whether preserved or not, amounted to fundamental error and was ineffective assistance.

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 ABOUT PRESUMPTION OF INNOCENCE AND THE INSTRUCTIONS FOR PRESUMPTION OF INNOCENCE VIOLATED A FUNDAMENTAL RIGHT?

Inasmuch as Respondent's argument provides no new light on this issue, Petitioner will rely upon his Petition in support of his argument. However, Petitioner would point out that Respondent complained that the case cited by Petitioner, *Mahoney*, is not within our federal circuit. Yet, Respondent cites no 11th Circuit Court of Appeals cases that dispute the holding in *Mahoney*.

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 June 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