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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-_____

STEVEN DOUGLAS HAYWARD,

Petitioner,

v.

MICHAEL D. CREWS, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The present habeas corpus petition is the first filed by Mr. Hayward in this case. The petition preserves claims arising under decisions of the United States Supreme Court and puts forth substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Those claims demonstrate that Mr. Hayward was deprived of effective assistance of counsel on direct appeal and that his convictions and death sentences were obtained and affirmed on appeal in violation of fundamental constitutional guarantees.[1]

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, section 3(b)(9) of the Florida Constitution. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Fla. Const. Art. I, § 13.

Jurisdiction over the present action lies in this Court because the fundamental constitutional errors challenged herein arise in the context of a capital

[1] Citations to the record on direct appeal appear as "(R.___)." Citations to the postconviction records appear as "(PCR.___)." All other citations shall be self-explanatory.

case in which this Court heard and denied a direct appeal. *See*, *e.g.*, *Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981); *see also Wilson*, 474 So. 2d at 1163. The Court's exercise of its habeas corpus jurisdiction and its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Hayward requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

Petitioner Steven Douglas Hayward was charged by information with one count of second-degree murder, robbery with a firearm, burglary of a conveyance while armed and possession of a firearm or ammunition by a convicted felon. (R. 1) Those charges were *nolle prosed* (R. 48) and Hayward was subsequently indicted on charges of first-degree murder, robbery with a deadly weapon, burglary of a conveyance while armed and possession of a firearm or ammunition by a convicted felon. (R. 3) The charges arose from the February 1, 2005 early morning robbery and shooting death of Daniel Destefano, was delivering newspapers to a Fort Pierce convenience store. Hayward was arrested several days later.

Hayward was found guilty as charged. After penalty phase proceedings, the jury, by vote of 8-to-4, recommended death. The trial court sentenced Hayward to death.

This Court affirmed Mr. Hayward's conviction and sentence on direct appeal. *Hayward v. State*, 24 So. 3d 17 (2009), *cert denied, Hayward v. Florida*, 130 S. Ct. 2385 (Fla. 2010).

Hayward filed a Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend (PCR. 557-678) which he later amended with leave of the court. (PCR. 842-963) After conducting a limited evidentiary hearing, the circuit court denied postconviction relief. (PCR. 2223-2246) Hayward timely filed his notice of appeal.

Hayward files this petition simultaneously with his Initial Brief in his appeal of the denial of postconvcition relief.

CLAIM FOR RELIEF

MR. HAYWARD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(A) AND 17 OF THE FLORIDA CONSTITUTION. APPELLATE COUNSEL FAILED TO ARGUE THAT HAYWARD WAS DENIED DUE PROCESS DUE TO THE IMPROPER ADMISSION OF TESTIMONY BY AN INCOMPETENT WITNESS, WHICH CONSTITUTED FUNDAMENTAL ERROR.

Mr. Hayward had a constitutional right to effective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), which extended to his direct appeal to this Court. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985). "A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant

does not have the effective assistance of an attorney." *Id*. The two-prong test articulated in *Strickland* that governs ineffective assistance of counsel claims applies equally to ineffectiveness allegations of trial counsel and appellate counsel. *See Orazio v. Dugger*, 876 F. 2d 1508 (11th Cir. 1989). A defendant is prejudiced by the deficient performance of appellate counsel when the deficiencies compromise the appellate process to such a degree as to undermine confidence in the correctness of the result. *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). Such deficiencies and prejudice occurred in Mr. Hayward's case.

Appellate counsel failed to present for review to this Court compelling issues concerning Mr. Hayward's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellate counsel's brief was deficient and omitted meritorious issues which, had they been raised, would have entitled Mr. Hayward to relief.

In *Wilson v. Wainwright*, this Court said:

> [O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel in Mr. Hayward's case failed

to perform its constitutionally-required function, as articulated in *Wilson*, of ensuring that all critical errors in the lengthy record were identified, highlighted for the Court and presented in the light of zealous advocacy. Appellate counsel's failure to focus the Court's attention on substantial constitutional errors amounted to a violation of *Strickland*.

As this Court stated in *Wilson*:

> The criteria for proving ineffective assistance of appellate counsel parallels the *Strickland* standard for ineffective trial counsel: Petitioner must show 1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result.

Id. at 1163 (citing *Johnson v. Wainwright*, 463 So. 2d 207 (Fla. 1985)).

Applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice and Guidelines for the Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). "Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of defendant's conviction or punishment." Commentary to ABA Guideline 6.1 (2003). Appellate counsel failed to raise a number of such grounds. In light of the serious reversible error that

appellate counsel failed to raise, there is more than a reasonable probability that the outcome of the appeal would have been different.

While appellate counsel is not ineffective for failing to raise issues which were procedurally barred because they were not properly raised at trial, *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000), such failure does warrant reversal if it constitutes fundamental error, which has been defined as error that "reaches 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." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)); *see also Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997) (describing "fundamental error" as error "so prejudicial as to vitiate the entire trial"), *cert. denied*, 523 U.S. 1083 (1998).

MR. HAYWARD WAS DENIED DUE PROCESS DUE TO THE IMPROPER ADMISSION OF TESTIMONY OF AN INCOMPETENT WITNESS OFFERED BY THE STATE, WHICH CONSTITUTED FUNDAMENTAL ERROR

Roosevelt McDowell testified at the guilt phase of Mr. Hayward's capital trial, and McDowell's statements to the police were also testified to at the motion to suppress. The record reflects that McDowell was infirm and disoriented. With each statement he gave, McDowell's story changed. Much of his testimony was incoherent, contradictory and made no logical sense. Mr. McDowell was not able to consistently or even logically recall the sequence of events he purportedly

witnessed.

According the motion to suppress testimony of Officer Coleman, McDowell initially told police that he witnessed a black male flee the crime scene wearing "dark clothing and some type of a ski cap or mask." However, in his own words, Mr. McDowell testified at trial that he saw a man with dreadlocks with nothing on his head – "just hair." (R-T. 1524). Later, he insisted that the "I didn't see no stocking cap" (R-T. 1529), but on redirect examination, he testified the suspect was wearing a hat. (R-T. 1539). According to the police, McDowell initially told Officer Grecco that he saw the victim leaving with a gun in his hand, trying to reload it. However, during trial Mr. Roosevelt was emphatic that he did not see a gun.

Even when testifying at the trial, McDowell's recollections were jumbled and changed several times. First, he testified that on the morning of the incident he awoke to hollering, "I don't have no more, I don't have no more," and then heard shots. (R-T.. 1519) He then testified that he heard two small shots and then *10 to 15 minutes* later he heard the third shot. (R-T. 1519-20). Then he said that it was only after the first two shots that he heard "I don't have no more," and "right thereafter [he] heard the big shot went off." (R-T. 1520). He first stated that after the shots were over he opened the door and looked out, however, he later testified that between the first two shots and the third shot he opened the door and looked

out. (R-T. 1521, 1523, 1525).

On cross examination McDowell's testimony changed yet again. He stated that he was on his way to the bathroom when he heard the shots and only opened the door after all of the shots were fired. (R-T. 1536). McDowell later reiterated that the two shots woke him up and he did not go to the bathroom between the first two and third shots. (R-T. 1540). When defense counsel read back to him his initial statements to the police, where he told the police that he got out of bed and was on his way to the bathroom when he heard two shots, McDowell testified that he went to the bathroom only after the first two shots woke him up, and on the way he heard the third shot. At some point he then heard "I ain't got no more" and then the second person "roughed [the victim] up." (R-T. 1545) However, McDowell initially told the police there was no fighting between the two people at the scene. (R-T.1546)

"A witness is incompetent to testify if the trial court determines the witness is (1) unable to communicate to the jury; (2) unable to understand that duty to tell the truth; or (3) unable to perceive and remember the events." *Rutherford v. Moore*, 774 So. 2d 637, 646 (Fla. 2000). The record reflects that McDowell was incompetent to testify and should have been disqualified as a witness. At the time he testified, McDowell was "very old, and very sick," and "on death's doorstep" and his condition had made it very difficult for the State to even get him to the

courthouse to testify. (R-T. 1515-6). As a result of his physiological deterioration his testimony was inconsistent and he was unable to recall even the most basic details of the events he purportedly witnessed. He could not accurately recall the sequence of the shots, the time period between the shots, or whether he heard the victim's statements before or after the shots were fired, and could not accurately recall the description of the second person at the scene. Even when the State questioned whether he meant to say that it was *10 to 15 minutes* between when he heard the first and last shots, McDowell insisted this was correct. (R-T. 1519-20) Clearly, McDowell was not able to perceive and remember the events that he was called to testify to.

Mr. Hayward was prejudiced by McDowell's testimony. The State relied upon McDowell's statements as a basis for its felony murder theory at trial, and the trial court found that there was sufficient evidence supporting this theory. (R-T. 2038-9). Furthermore, when sentencing Hayward to death, the trial court relied up McDowell's statements in finding two aggravators: (2) that the murder was committed during the course of a robbery; and (3) that the murder was committed for pecuniary gain. The court ultimately merged the two aggravators and gave the single aggravating circumstance "great weight." With respect to the robbery aggravator the court found,

> [t]he testimony of Roosevelt McDowell irrefutably described an armed robbery or an attempted robbery. The clear statements of the

> victim exclaiming "I don't have no more; I don't have no more, followed by two shots from the .22 caliber revolver are further evidence of an armed robbery.

(R. 1271-2) In finding the murder was committed for pecuniary gain the court again referred specifically to McDowell's testimony:

> 2) Daniel DeStephano was shot by Steven Hayward in the course of the commission of a robbery;
>
> b)Daniel Destephano had already given Steven Hayward everything he had or at least everything he intended to give voluntarily. (i.e. "I don't have no more".)
>
> c) Shots were fired after Daniel DeStephano stated "I don't have no more".
>
> d) The first two lighter-sounding gunshots (.22 caliber) resulted in two bullets entering DeStephano's body; followed by a louder gunshot (.357 Magnum) which necessarily caused the injury to the Defendant's left hand.
>
> e) The blood of the Defendant on DeStefano's pants, vehicle and other belongings reflects a continued pursuit for pecuniary gain after both DeStefano (sic) and the Defendant had been shot.
>
> In other words, since Daniel DeStefano purportedly gave all he had, the only way the Defendant was going to possibly get more would be to shoot him and search him and his vehicle for additional pecuniary gain.

(R. 1273)

The admission McDowell's testimony, while ignoring the fact that he was clearly not competent to testify, constituted fundamental error. Without his

testimony the jury would not have recommended a death sentence and the trial court would not have imposed the sentence. Both the jury and the trial court would not have found two of the three aggravators used to sentence Mr. Hayward to death. The trial court's reliance on McDowell's testimony demonstrates that this error "reaches down into the validity of the trial itself to the extent that a verdict of guilty [and the sentence of death] could not have been obtained without the assistance of the alleged error." *Urbin v. State*, 714 So. 2d 411, 418 n.8 (1998) (quoting *Kilgore v. State*, 688 So. 2d 895, 898 (Fla. 1996)). The error was "so prejudicial as to vitiate the entire trial"). *Chandler v. State*, 702 So. 2d 186, 191 n.5 (Fla. 1997).

As such, confidence in the correctness and fairness of the result of the appellate proceeding is undermined.

Appellate counsel's failure to present this meritorious issue demonstrates that counsel's representation of Mr. Hayward on direct appeal involved serious and substantial deficiencies. *Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). Appellate counsel's failure to present such errors to this Court on direct review entitle Mr. Hayward to relief.

Because the constitutional violations which occurred during Mr. Hayward's trial were "obvious on the record" and "leaped out upon even a casual reading of the transcript," it cannot be said that the "adversarial testing process worked in

[Mr. Hayward's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). In light of the serious reversible error that appellate counsel never raised, relief is appropriate. For the foregoing reasons and in the interest of justice, Mr. Hayward respectfully urges this Court to grant habeas corpus relief.

CONCLUSION

For the reasons stated herein, Petitioner Steven Hayward respectfully requests that this Court grant his petition for writ of habeas corpus and order a new trial and/or penalty phase proceeding, and grant any other relief that this Court deems just and proper.

Respectfully submitted,

/s/ Paul Kalil

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to counsel for Appellee, Leslie T. Campbell, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive, 9th Floor, West Palm Beach, Florida 33401 by electronic mail this 17th day of September, 2013.

s/ Paul Kalil
PAUL KALIL
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