

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC\_\_\_\_\_**

---

**KAYLE BARRINGTON BATES,**

**Petitioner,**

**v.**

**JAMES R. McDONOUGH,**

**Secretary, Florida Department of Corrections**

**Respondent.**

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**PETITION FOR WRIT OF HABEAS CORPUS**

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## **INTRODUCTION**

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Bates was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his conviction and death sentence violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as (R. \_\_) and (Vol. \_\_\_\_, T. \_\_). Citations to the postconviction record shall be as (PC-R. \_\_).

## **JURISDICTION**

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Art. V, § 3(b)(9), Fla. Const. The Constitution of the State of Florida guarantees that “[t]he writ of habeas corpus shall be grantable of right, freely and without cost.” Art. I, § 13, Fla. Const.

## **REQUEST FOR ORAL ARGUMENT**

Mr. Bates requests oral argument on this petition.

## **PROCEDURAL HISTORY**

The Circuit Court for the Fourteenth Judicial Circuit, in and for Bay County, Florida, entered the judgments of conviction and sentence of death at issue in this case.

On July 6, 1982, Mr. Bates was charged by indictment with first-degree murder, kidnapping, sexual battery and armed robbery. On January 20, 1983, the jury returned a verdict finding Mr. Bates guilty of first-degree murder, kidnapping, attempted sexual battery and armed robbery.

On January 21, 1983, the jury voted in favor of death. On March 11, 1983, the court followed the jury's recommendation and sentenced Mr. Bates to death.

On direct appeal, this Court affirmed the conviction, but vacated the death sentence and remanded to the circuit court for reconsideration. Bates v. State, 465 So. 2d 490 (Fla. 1985).

Following remand for reconsideration of the sentence for first-degree murder, the Circuit Court for the Fourteenth Judicial Circuit, in and for Bay County, Florida, reimposed the death sentence. This Court affirmed. Bates v. State, 506 So. 2d 1033 (Fla. 1987). Mr. Bates sought a writ of certiorari from the United States Supreme Court, which was denied. Bates v. Florida, 108 S. Ct. 213 (1987).

On September 7, 1989, a death warrant was signed on Mr. Bates. On October 6, 1989, Mr. Bates timely filed a motion for postconviction relief with the trial court. On November 3, 1989, Mr. Bates also filed a Writ of Habeas Corpus. The trial court granted a new sentencing based on Mr. Bates' claim of ineffective assistance of counsel at the penalty phase. The Florida Supreme Court affirmed



the granting of a new sentencing proceeding and remanded to the circuit court, but denied Mr. Bates' petition for writ of habeas corpus. Bates v. Dugger, 604 So. 2d 457 (Fla. 1992).

Initially, the resentencing was held on January 30 and 31, 1995 and February 1 and 2, 1995, but ended in a mistrial. On May 15-25, 1995, another resentencing was held. On May 25, 1995, the jury returned a recommendation for death. On July 25, 1995, the Circuit Court for the Fourteenth Judicial Circuit, in and for Bay County, Florida followed the jury's recommendation and sentenced Mr. Bates to death. The Florida Supreme Court affirmed. Bates v. State, 750 So. 2d 6 (Fla. 1999). Mr. Bates timely petitioned the United States Supreme Court for certiorari. This petition was denied on October 1, 2000.

After certiorari was denied, Mr. Bates was originally represented by Capital Collateral Counsel for the Northern Region as this is the region from which his conviction and sentence originated. However, on March 28, 2001, the Capital Collateral Counsel for the Northern Region certified a conflict of interest and requested the circuit to appoint conflict-free counsel. On March 29, 2001, Judge Sirmons signed an order releasing Capital Collateral Counsel for the Northern Region from its obligation to represent Mr. Bates and appointed Capital Collateral Regional Counsel-South to represent Mr. Bates. Undersigned counsel filed a notice of appearance on July 12, 2001.

On September 7, 2001, Mr. Bates filed his initial motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851.

On October 30, 2001, pursuant to Fla. R. Crim P. 3.852, counsel for Mr. Bates timely filed numerous Demands for Public Records from various state agencies involved in this case. On November 1, 2002 and March 12, 2004, this Court held a hearing on agency objections and all outstanding public records. Mr. Bates continued to receive public records through July 2004.

Mr. Bates filed an Amended Motion to Vacate on September 24, 2004. The circuit held a Huff hearing on March 4, 2005. Mr. Bates was denied an evidentiary hearing on all but a fraction of one ineffective assistance of counsel claim presented in his Rule 3.851 post-conviction motion (PC-R2. 688-97). The circuit court held an evidentiary hearing on October 16-17, 2006. On February 28, 2007, the circuit court denied relief (PC-R2. 889-900).

## CLAIM I

**MR. BATES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ART. I §§ 9, 16(a) AND 17 OF THE FLORIDA CONSTITUTION, AND FULL REVIEW BY THE FLORIDA SUPREME COURT AND THE ORIGINAL TRIAL COURT BECAUSE THE TRANSCRIPT IS UNRELIABLE AND INCOMPLETE.**

Mr. Bates cannot be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of an accurate record of the trial proceedings. Fla. Const. Art. V., sec. 3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977); McKenzie v. State, 754 So. 2d 851 (Fla. 2<sup>nd</sup> DCA 2000). The record of Mr. Bates' resentencing is unreliable and incomplete because a substantial portion of the jury selection process was not recorded by the court reporter. Mr. Bates has been prejudiced by this incomplete record because neither post-conviction counsel, direct appeal counsel, the trial court, nor this Court can fully review the resentencing proceedings for error with any confidence that the record relied upon is correct or complete.

Prior to the resentencing proceedings, counsel for Mr. Bates, Thomas Dunn, became unavailable for the first day of the resentencing proceeding. Pursuant to a Writ of Prohibition, Mr. Dunn obtained a stay of the resentencing proceedings from the Florida Supreme Court (PC-R2. 459). However, rather than staying the

proceedings as mandated by the Florida Supreme Court, jury selection went forward on Monday, May 15, 1995, and some jurors were excused (PC-R2. 657-670). Mr. Bates was not present, nor was his lead attorney. Only co-counsel Harold Richmond was present to observe. He requested that the court reporter transcribe the proceeding, but it was not recorded. Mr. Richmond also said that there was no opportunity for him to object (PC-R2. 664-65).

After the Florida Supreme Court stayed Mr. Bates' resentencing for twenty four hours, Judge Sirmons engaged in a telephone conference with the prosecution and Mr. Dunn during which the attorneys discussed that the voir dire for resentencing was not to begin for twenty four hours. There is no transcript of the phone exchanges between Mr. Dunn and Judge Sirmons, nor was Mr. Richmond privy to these exchanges. Of importance is the fact that the record does contain a transcript of the initial introduction to the jury pool, however once the Judge began excusing potential jurors there is no record.

There can be no meaningful appellate review without absolute confidence in the reliability and completeness of the record below. Parker v. Dugger, 111 S. Ct. 731, 739 (1991). The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, the appellant, and the appellate court(s). Mayer v. Chicago, 404 U.S. 189, 195 (1971) ("State must provide a full verbatim record where that is necessary to assure the indigent as effective an

appeal as would be available to the defendant with the resources to pay his own way”); Entsminger v. Iowa, 386 U.S. 748, 752 (1967) (holding that “petitioner was precluded from obtaining a complete and effective appellate review of his conviction by operation of the clerk’s transcript procedure”). Of course, Eighth Amendment considerations demand even greater precautions in capital cases. See Penry v. Lynaugh, 488 U.S. 74 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Here, no record exists of the jury proceedings or the telephone conference regarding the stay.

In Dobbs v. Zant, 113 S. Ct. 835, 122 L.Ed.2d 103 (1993), the United States Supreme Court held that:

The Court of Appeals erred when it refused to consider the full sentencing transcript. We have emphasized before the importance of reviewing capital sentences on a complete record. Gardner v. Florida, 430 U.S. 349, 361, 97 S. Ct. 1197, 1206, 51 L.Ed 2d 393 (1977) (plurality opinion). Cf. Gregg v. Georgia, 428 U.S. 153, 167, 198, 96 S. Ct. 2909, 2922, 2936, 49 L.Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (Georgia capital sentencing provision requiring transmittal on appeal of complete transcript and record is important "safeguard against arbitrariness and caprice"). In this case, the Court of Appeals offered no justification for its decision to exclude the transcript from consideration. There can be no doubt as to the transcript's relevance, for it calls into serious question the factual predicate on which the District Court and Court of Appeals relied in deciding petitioner's ineffective assistance claim. As the Court of Appeals itself acknowledged, its refusal to

review the transcript left it unable to apply the manifest injustice exception to the law of the case doctrine, and hence unable to determine whether its prior decision should be reconsidered.

Dobbs v. Zant, 113 S. Ct. 835, 122 L.Ed. 2d 103 (1993).

Full appellate review of proceedings resulting in the ultimate sentence of death is required in order to ensure that the punishment accorded to the capital defendant comports with the Eighth Amendment. See, Proffitt v. Florida; Johnson v. State, 442 So. 2d 193 (Fla. 1983) (Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, 3(b)(1) Fla. Const.; 921.141(4) Fla. Stat. (1985). Indeed, Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added).

In addition to the missing proceedings, the record in Mr. Bates case is confusing and unorganized. The volume numbers and record on appeal page numbers are not sequential. For example, the circuit court's sentencing occurs immediately following jury voir dire. Then, rather than following sequential numbering the record begins numbering from one. Furthermore, there are page numbers missing altogether. In many instances, counsel cannot accurately cite to the record due to this confusion. Appellate counsel was, and post-conviction

counsel is, prevented from rendering effective assistance in the absence of a complete record. Moreover the Florida Supreme Court's review could not be constitutionally complete. See, Parker v. Dugger, 111 S. Ct. 731 (1991).

The trial judge was required to certify the record on appeal in capital cases. 921.141(4), Fla. Stat. (1996). When errors or omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Mr. Bates' former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court. See, Fla. R. Jud. Admin. 2.050.

**A. Appellate Counsel for Mr. Bates was Constitutionally Deficient for Failure to Ensure a Proper Record on Direct Appeal, and This Failure Violated Mr. Bates' Constitutional Due Process Right to Receive Transcripts for Use at the Appellate Level, as Well as His Right to Effective Assistance of Counsel.**

In this case, Mr. Bates' lead counsel, Mr. Dunn, was also Mr. Bates' counsel on direct appeal. Mr. Dunn was not present for the unreported portions of the jury selection. Therefore, it would have been impossible for him to be made aware of the proceedings in their entirety. Yet, counsel failed to ensure a meaningful appellate review for Mr. Bates in that counsel failed to obtain a complete and accurate transcript of the record prior to the direct appeal. At the very least, appellate counsel could have moved the trial court for a reconstruction of the

record. Counsel's failure to obtain or move for a complete transcript of all proceedings below was ineffective assistance of counsel on appeal.

Mr. Bates had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal to the Florida Supreme Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11<sup>th</sup> Cir. 1989).

The United States Supreme Court recognized a due process right to receive transcripts for use at the appellate level in Griffin v. Illinois, 351 U.S. 12 (1956). In Hardy v. United States, 375 U.S. 277 (1964), Justice Goldberg, in his concurring opinion, wrote that since the function of appellate counsel is to be an effective advocate for the client, counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy." Hardy, 375 U.S. at 288.

Because there exists no complete or accurate record of the resentencing proceedings, it cannot be said that the "adversarial testing process worked in [Mr. Bates'] direct appeal." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11<sup>th</sup> Cir.



1987). Moreover, the review conducted by the Florida Supreme Court could not be constitutionally complete without an adequate record of the proceedings. See Parker v. Dugger, 111 S. Ct. 731 (1991). When errors or omissions in the transcript of the proceedings occur, as here, re-examination of the complete record in the lower court is required. Delap v. State, 350 So. 2d 462 (Fla. 1977).

**B. Postconviction Counsel for Mr. Bates Has No Means to Fully Review the Proceedings Below With a Defective Record.**

In capital cases, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution demand a verbatim, reliable transcript of all proceedings in the trial court. Due to the failure of direct appeal counsel to obtain a complete record of the resentencing proceedings, undersigned counsel, who was not present at the resentencing proceedings in this cause, has no means to fully review the proceedings below with a defective and incomplete record, and thus, cannot provide effective assistance to Mr. Bates. United States v. Cronin, 466 U.S. 648 (1984); Harding v. Davis, 878 F. 2d 1341 (11<sup>th</sup> Cir. 1989).

It is impossible for undersigned counsel to faithfully discharge our duties to Mr. Bates without a complete and accurate transcript of the proceedings leading to Mr. Bates' death sentence. In Hardy v. United States, 375 U.S. 277 (1964), Mr. Justice Goldberg, concurring, stated:

appointed counsel must be provided with the tools of an advocate. As any effective appellate advocate will attest,

the most basic and fundamental tool of his profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.

Hardy v. United States, 375 U.S. 277, 288 (1964) (Goldberg, J., concurring) (footnote omitted).

Similarly, Mr. Bates' rights to appeal and meaningful access to the courts are negated because neither appellate counsel, postconviction counsel, nor this Court can fully review the proceedings below. Hardy v. United States, 375 U.S. 277 (1964) (holding counsel's duties on appeal could not be discharged without a complete transcript). In Bounds v. Smith, 430 U.S. 817 (1977) and Lewis v. Casey, 518 U.S. 343 (1996), the Court held that the right to access to the courts requires "meaningful" access.

Prejudice exists in Mr. Bates' case because it is apparent that neither the parties nor the courts can rely upon the accuracy of the record. Effective appellate and postconviction review begins with affording the appellate an advocate and the necessary tools for that advocate to perform effectively. Evitts v. Lucey, 469 U.S. 387 (1985). Obviously, one such tool is a complete record. See Dobbs v. Zant, 506 U.S. 357 (1993); Gardner v. Florida, 430 U.S. 349 (1977).

## CLAIM II

### **APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON APPEAL THE STATE'S PRESENTATION OF INADMISSIBLE, IRRELEVANT, INFLAMMATORY AND UNFAIRLY PREJUDICIAL EVIDENCE.**

Mr. Bates had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeals to this Court. Strickland v. Washington, 466 U.S. 668 (1984). "A first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." Evitts v. Lucey, 469 U.S. 387, 396 (1985). The Strickland test applies equally to ineffectiveness allegations of trial counsel and appellate counsel. See Orazio v. Dugger, 876 F. 2d 1508 (11<sup>th</sup> Cir. 1989).

Because the constitutional violation which occurred during Mr. Bates' trial was "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. Bates'] direct appeal[s]." Matire v. Wainwright, 811 F. 2d 1430, 1438 (11<sup>th</sup> Cir. 1987). The lack of appellate advocacy on Mr. Bates' behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). Appellate counsel's failure to raise the State's use of inadmissible, irrelevant, inflammatory and unfairly prejudicial evidence demonstrates that his representation of Mr. Bates

involved a "serious and substantial deficienc[y]." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986).

In presenting its case to the jury, the State relied on gruesome, irrelevant photographs which depicted the victim's body. The State presented seven photographs of the autopsy and at least five additional photographs depicting the victim's body (R. 285-88). These photographs were presented during the State's opening statement (Vol. 9, T. 8) as well as during witness testimony (R. 297).

Just prior to opening statements, the State announced its intent to use one of the pictures depicting the victim as she was found in the woods during its opening argument. Defense counsel stated its objection to photographs of the victim being used throughout the course of the proceeding (Vol. 9, T. 8), but expressed particular concern using such a prejudicial photograph during opening statements without any contextual testimony as to the photograph's relevance (Vol. 9, T. 11-12). This allowed the State to prejudice the jury with the gruesome depiction of the victim before they heard any evidence or testimony, and before they had any context for the photograph. During opening statements, the photograph was not necessary or relevant to demonstrate any fact.

Prior to the testimony of the medical examiner, defense counsel again renewed its objection to all 12 photographs depicting the victim (R. 284). The State proffered the content and purpose of each photograph through the medical

examiner's testimony. The proffer only demonstrated that any photographs depicting the victim, in addition to the autopsy photographs, were merely cumulative and would only serve the same purpose accomplished through the autopsy photographs (R. 286-87).

Photographs of a crime are usually admitted into evidence when relevant to any matter that is in dispute, such as to establish the element of intent or the circumstances of death. See Adams v. State, 412 So. 2d 850, 854 (Fla. 1982); Booker v. State, 397 So. 2d 910, 914. However, photographs should be excluded when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). While this Court has found photographs depicting the wounds sustained by the victim admissible, see State v. Wright, 265 So. 2d 361 (Fla. 1972), photographs should be excluded when they are repetitious or "duplicitous." Alford, supra; Adams, supra; see also Mazzarra v. State, 437 So. 2d 716, 718-19 (Fla. 1<sup>st</sup> DCA 1983).

Here, Mr. Bates had already been found guilty in a previous proceeding before a different jury. As such, there was **no** question of identity, **no** question of manner or cause of death, and **no** question of any element of the crime. There was absolutely **no** probative value or reason to admit the photos. Any photos depicting the victim's body and injuries other than the autopsy photographs were cumulative

and duplicitous. The prejudice from the photos of the body of the victim substantially outweighed the nonexistent probative value. The trial court committed "clear abuse" when it admitted these photographs. Duest v. State, 462 So. 2d 446 (Fla. 1985).

The trial court's error in admitting irrelevant, inflammatory and unfairly prejudicial photographs was preserved at trial and available for appeal. Appellate counsel was ineffective in failing to present this issue.

### **CONCLUSION**

For all of the arguments discussed above, Mr. Bates respectfully urges this Court to grant habeas corpus relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been furnished by United States Mail, postage prepaid to Ms. Meredith Charbula, Asst. Attorney General, Dept. of Legal Affairs, The Capitol, PL-01, 400 S. Monroe St., Tallahassee, FL 32399-6536 on this \_\_\_\_\_ day of January, 2008.

Respectfully submitted,

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**CERTIFICATE OF FONT**

This is to certify that the Petition has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (1), Florida Rules of Appellate Procedure.

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TERRI L. BACKHUS