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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-____

DWIGHT T. EAGLIN,

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. Eaglin 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. Eaglin 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.

Citations to the Record on the Direct Appeal shall be:

(R.) -- Record on Direct appeal;

(PCR) -- Record of Post-Conviction Appeal (where necessary)

(S-PCR) -- Supplemental Record of Post-Conviction Appeal

(T.) -- Evidentiary Hearing transcripts (where necessary)

All other citations shall be self-explanatory.

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 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. Eaglin requests oral argument on the claims asserted in the present petition.

STATEMENT OF CASE AND FACTS

The Circuit Court for the Twentieth Judicial Circuit, in and for Charlotte County, Florida, entered the judgments of convictions and death sentence at issue

in this case. On June 11, 2003, a grand jury indicted Mr. Eaglin, along with co-defendants Stephen Smith and Michael Jones, on two counts of first-degree murder for the homicides of Charlotte Correctional Officer Darla Lathrem and inmate Charles Fuston, at Charlotte Correctional Institution (CCI). (R. 6-7) At the time of the offense Mr. Eaglin was serving a life sentence for the first-degree murder in Pinellas County, Florida. Mr. Eaglin and his codefendants were part of an inmate workgroup who were participating in the renovations of a dormitory wing at CCI. The homicides occurred during an escape attempt by the three inmates on the last night of the dormitory renovation.

The trial commenced on February 20, 2006 before Judge William Blackwell. On February 24, 2006, the jury found Mr. Eaglin guilty of the murders of Darla Lathrem and Charles Fuston. (R. 1192-1195) The court conducted a penalty phase proceeding on February 27, 2006. The defense team limited its penalty phase presentation to Florida Department of Corrections personnel and a prison systems expert regarding the lack of security at CCI at the time the offense occurred. The jury recommended that Mr. Eaglin be sentenced to death for each murder by a vote of eight-to-four. (R. 1379) The trial court sentenced Mr. Eaglin to death. (R. 1387-1410)

The Notice of Appeal to this Court was docketed on April 21, 2006 as SC06-760. Appellate counsel filed motions to supplement the record on April 30, 2007

and July 16, 2007. On September 18, 2007, appellate counsel Moeller filed a Motion for Extension of Time for filing his initial brief on direct appeal in Eaglin v. State, Case No. SC06-760. Moeller filed a final Motion to Compel Completion of Appellate Record in this Court on January 7, 2008. Appellate counsel filed his initial brief in this case on January 28, 2008.

Oral argument was held February 5, 2009. An opinion issued June 4, 2009, *Eaglin v. State*, 19 So. 3d 935 (Fla. 2009). Specifically, this Court determined that "[a]ny negligence on the part of the prison does not reduce the moral culpability of Eaglin for the murders of Lathrem and Fuston. Eaglin has presented no case law recognizing third-party negligence as a factor in lessening the fault of a defendant."

Mr. Eaglin timely filed a Motion to Vacate Judgment of Convictions and Sentences with Special Request for Leave to Amend and later filed an Amended Motion to Vacate Judgments of Conviction and Sentence. The Honorable Christine Greider summarily denied several claims and held an evidentiary hearing on others. On July 20, 2012 the trial court denied Mr. Eaglin postconviction relief, Mr. Eaglin timely appealed.

This Petition is being filed simultaneously with Mr. Eaglin's initial brief following the denial of his motion for post-conviction relief.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL ISSUES WHICH WARRANT REVERSAL THAT WERE EITHER PRESERVED BY OBJECTIONS AT TRIAL, OR WHICH CONSTITUTED FUNDAMENTAL ERROR

Mr. Eaglin had the constitutional right to the effective assistance of counsel for purposes of presenting his direct appeal 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 (11th Cir. 1989).

Because the constitutional violations which occurred during Mr. Eaglin's resentencing were "obvious on the record" and "leaped out upon even a casual reading of transcript," it cannot be said that the "adversarial testing process worked in [Mr. Eaglin's] direct appeal." *Matire v. Wainwright*, 811 F. 2d 1430, 1438 (11th Cir. 1987). The lack of appellate advocacy on Mr. Eaglin's 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).

A. Appellate counsel failed to identify and plead an actual conflict of interest created when Judge Blackwell appointed Dr. Harry Krop as a confidential competency expert for Mr. Eaglin's co-defendant where Dr. Krop had served as a confidential mental health expert on Mr. Eaglin's defense team at trial.

Trial counsel Douglas Withee retained Dr. Harry Krop as a confidential mental health expert to assist in the preparation of Mr. Eaglin's case. (R. 46-47). Dr. Krop and his associate met with Mr. Eaglin and performed testing on several occasions. Dr. Krop reported his prospective testimony in support of mitigation:

> 1. Mr. Eaglin derives from a dysfunctional family which includes a history of emotional abuse, negative role modeling and domestic violence. The environment was often chaotic and unpredictable.
>
> 2. Mr. Eaglin suffers with a serious psychiatric disorder. He has been diagnosed with BiPolar Disorder which has often been untreated. Records indicate that the Defendant was not on medication at the time of the alleged offense.

(PCR. 3527, Ex. X). Counsel filed a notice that he intended to call Dr. Krop in support of mental health mitigation. Over defense objection, the State deposed Dr. Krop. However, Dr. Krop did not testify at the trial and the trial court refused to consider the opinions proffered in his written report. The jury heard no testimony from Dr. Krop, was unaware of his report, and had no access to the information in a presentence investigation report presented at the *Spencer* hearing.

After filing a Notice of Appeal to this Court, appellate counsel filed two motions to supplement the record. Appellant counsel thereafter worked with trial counsel for at least part of four months to assist in supplementing the record on

appeal with the PSI, which had originally been requested by appellate counsel in the motion to supplement the record. On September 18, 2007, appellate counsel Moeller filed a Motion for Extension of Time for filing his initial brief on direct appeal in *Eaglin v. State*, Case No. SC06-760, offering the following rationale for that requested extension:

> Appellant is entitled to a complete record on appeal so that he may receive a full and fair review of his cause, and may receive the effective assistance of counsel to which he is entitled under the Sixth Amendment to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Florida.
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> ***
>
> Undersigned counsel has been working with trial co-counsel for Appellant, Neil McLoughlin, in an attempt to have the PSI included in the official record of the proceedings below so that the record on appeal can be supplemented with this important document. This has not yet been accomplished, but should be done in the near future.[1]

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[1] The State argued at Mr. Eaglin's postconviction case management conference that trial counsel was off the case by the time these issues arose, thus there was no *Brady* or *Strickland* issue involving trial counsel. (PCR. 1670-71) Yet the record reveals that trial counsel McLoughlin was still involved in the case prior to the eventual relinquishment of jurisdiction to the trial court. Moeller's constitutional concerns about a complete record were applicable to trial counsel as well. On September 28, 2007, prior to this Court's relinquishment, McLoughlin filed a Motion to Supplement the Record and a Motion to Set Hearing in the trial court, and copies of those motions were attached to Moeller's subsequent October 23, 2007 Motion for Reconsideration in this Court, in which he advised the Court that he was continuing to work with McLoughlin. Had McLoughlin known about it, he should have included the Jones material including the plea agreement in a motion to supplement and asked for an evidentiary hearing about the Dr. Krop conflict issue.

This Court relinquished jurisdiction to "to rule on appellant's motion to supplement the record with the PSI; ensure that the record is supplemented with the PSI and further requests that the State cooperate with the appellant in this effort." (Order of October 31, 2007). The language of the order indicates that the State had been less than cooperative until that point.

On January 7, 2008, Appellant Counsel Moeller filed a Motion to Compel Completion of Appellate Record to ensure that the PSI was made part of the supplemental record. The day before the scheduled oral argument, the State filed as supplemental authority this Court's affirmance of the codefendant Stephen Smith's convictions and death sentences. *See Smith v. State*, 33 Fla. L. Weekly S 727 (Fla. Sept. 25, 2008).

After being appointed as Mr. Eaglin's counsel, CCRC South counsel reviewed the Charlotte County Clerk of Court files of co-defendants, Michael Jones, Case No. 03-001527CF, and Stephen V. Smith, Case No. 03-1526 CF. With the exception of a 2005 Florida Department of Law Enforcement proffer by Jones that was provided to trial counsel Withee, but not retained in the files provided by the public defender to CCRC, no files or records related to the co-defendants' cases were provided in postconviction discovery, but counsel found several documents in the co-defendant's court files that were not provided to counsel during the public records process that were material to claims filed in the trial

court.[2]

Mr. Jones's court file included the transcript of a hearing before the Judge Blackwell at which Jones plead guilty and was sentenced to life in prison without the possibility of parole. Judge Blackwell took judicial notice of "the three previous competency examinations and reports." Assistant State Attorney Feinberg, who also prosecuted Mr. Eaglin, appeared at the Jones plea hearing. Thus, the State Attorney was aware that Judge Blackwell had appointed Dr. Krop in both Mr. Jones's and Mr. Eaglin's case.

Mr. Jones's court file includes a Court Order dated August 18, 2006, wherein Judge Blackwell comments: "Court doesn't accept plea today. Orders re-evaluation for competency at the time of the offense and now by Dr. Williamson and Dr. Shadle and Dr. Harry Crop. All 3 doctors to be paid by the court."[3] At this

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[2] Following the September 15, 2011 Case Management Conference, counsel filed 13 documents from *State v. Michael Jones*, Charlotte Co. Case No. 03-001527CF – (DEP) attached to a Notice of Filing which was date stamped September 19, 2011. Supp. PCR. 19-21. However, the attached documents are not in the Record or Supplemental Record. A motion to supplement the record is being filed along with copies of the documents that were attached to the Notice of Filing that appears in the record.

[3] According to this Court's docket in SC06-760, The Order of Insolvency and Appointment Order appointing the Public Defender for the 12th Circuit for the direct appeal was docketed on September 8, 2006. Judge Blackwell signed the order appointing the public defender on August 25, 2006, one week **after** he refused to accept the signed plea agreement from Mr. Eaglin's co-defendant Jones. In other words, Jones signed the plea agreement and a hearing was held wherein

point trial counsel for Mr. Eaglin was on notice concerning these events, or should have been. As the state argued at the case management conference, "[o]bviously trial counsel was aware that there was a codefendant in this case and could have been following along with this case as to what was transpiring. It's quite common in these kinds of cases where they follow up with the codefendant and see what exactly is happening in their case." (PCR. 1669).

Judge Blackwell thereafter entered a corrected order dated October 3, 2006, appointing Dr. Douglas Shadle, Dr. Thomas Willingham and Dr. Harry Krop as experts for a competency evaluation of Michael Jones. The order specified that:

> The experts appointed shall submit their written reports directly to this Court with copies to the Attorney for the State and the Attorney for the Defendant, (addresses set forth in the Certificate of Service below.) All reports and documents generated in this case are to be sent to the respective parties before this date.
>
> It is ORDERED that Dr. Krop is also appointed to consult with counsel for the Defendant, and report confidentially only to counsel his opinion as to whether or not Defendant was competent at the time of the offense. This written report is to be rendered only to Thomas Marryott, Esquire and Jesus Hevia, Esquire for assistance in trial preparation.
>
> Doctors Shadle, Willingham and Krop are ordered to send all billings to Court Administration (address omitted) to be processed for payment.

Dr. Krop was appointed by Judge Blackwell as Jones' confidential expert a week **before** Eaglin obtained appellate counsel.

(See FN2, Document #4)

The court files also include a sealed copy of a document entitled "Medical Report Dr. Krop" noted as "D2442759" dated 11/02/06.[4] A November 8, 2006 Order for Costs, signed by Judge Frank Porter, is included in Mr. Jones court file as "D2452472." Dr. Krop's attached Bill for Services indicates that he billed $3,705.74. This included four hours of Review of Materials, seven and a half hours of psychological evaluation, and an additional 1.25 hours for review of materials/report. See FN3, Documents 5 and 6.

Undersigned counsel consulted with Dr. Krop during the process of preparing Mr. Eaglin's rule 3.851 motion. Dr. Krop never revealed to postconviction counsel that he had been appointed as a confidential expert in Mr. Eaglin's co-defendant's case and Mr. Eaglin had no knowledge of Dr. Krop's relationship with Mr. Jones. Mr. Eaglin's trial counsel never advised undersigned counsel or Mr. Eaglin that Judge Blackwell had appointed Dr. Krop as a confidential expert for Mr. Jones or that he had prepared a report.

The postconviction court denied any evidentiary development of this claim. Undersigned counsel was unable to question trial counsel under oath about whether

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[4] A request for the court to unseal this report in postconviction was filed separately. That motion was denied after the court reviewed the report in camera. (PCR. 11490-1151).

they were aware (i) that Jones had signed a plea agreement before any appellate counsel was assigned to Mr. Eaglin; (ii) that Judge Blackwell had refused to sign off on the Jones plea agreement on August 18, 2006 and had appointed three competency experts; and (iii) that one of the three experts was Dr. Harry Krop, Mr. Eaglin's penalty phase confidential expert.

Charlotte County is a small jurisdiction with a limited number of capital prosecutions. The instant case along with the cases of co-defendants Jones and Smith were heard before Judge Blackwell and prosecuted by the same State Attorney's office. If trial counsel did know about the plea agreement and the appointment of Dr. Krop as a confidential expert for Jones, but failed to take any action, including failing to inform appellate counsel, then that inaction prejudiced Mr. Eaglin's case. *See Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). The facts are simply not known because the lower court failed to grant an evidentiary hearing,

The relinquishment concerned the inclusion of a missing PSI from the appellate record. That PSI was the basis for the only mitigation found by the trial court, namely that "Eaglin suffered from a severely abusive childhood with a severely dysfunctional family." The source of that information was a DOC interview with one of Mr. Eaglin's foster parents. The trial court refused to rely on Dr. Krop's findings or report, which the lower court, but not the jury, was aware

of. Only counsel's deficient performance limited the content of the motions to supplement the record filed in this Court and the circuit court.

Dr. Krop's contact with Mr. Eaglin, as well as his meetings with the mitigation specialist who had been hired by Doug Withee, provided him with privileged information prior to his evaluation of Michael Jones and his ultimate findings about Jones's and Eaglin's competency at the time of the crime. The documents from the Jones court file were not provided to Mr. Eaglin in the postconviction public records process, nor were they contained in trial counsels files. The contents of Dr. Krop's report on Mr. Jones are referenced in Dr. Krop's billing noted *supra* and Judge Blackwell's comments during a hearing in Jones's case on July 20, 2007. The transcript of the hearing is attached to Judge Blackwell's August 14, 2007 *Order Denying Defendant's Motion To Set Aside Plea* (Document #13), wherein the Judge states:

> I would judicially notice that in this case and in getting to either trial or plea stage, there were three different competency evaluations ordered by this Court. And in response to each of those competency evaluations the evaluators all reported that the defendant was malingering. The defendant appears to have a talent for discussing his medication, his psychiatric conditions and treatment, but it is obvious to this Court that he knows what he's doing.

A claim alleging conflict of interest and/or ineffective assistance of counsel is properly raised in a collateral proceeding. *See Bruno v. State*, 807 So. 2d 55 (Fla. 2001). In *Smith v. White*, 815 F. 2d 1401 (11th Cir. 1987), the federal appellate

court described the test that distinguishes actual from potential conflicts of interest:

> We will not find an actual conflict of interest **unless appellants can point to specific instances in the record to suggest an actual conflict or impairment of their interests**...Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative causes of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remain(s) hypothetical. *Smith*, 815 F.2d at 1404.quoted in *Reynolds v. Chapman*, 253 F. 3d 1337, 1343 (11th Cir. 2001).

The postconviction court conducted an in-camera examination of Dr. Krop's sealed report on Mr. Jones, finding no *Brady* material and no indication of conflict of interest. (PCR. 1149-51). While Mr. Eaglin has not had access to Dr. Krop's report, the order does provide a description:

> Dr. Krop's report states that Mr. Jones did discuss the incident with him, but the report does not relate what was discussed. Dr. Krop's report is directed at, and focused on, determining Mr. Jones' sanity at the time of the offense, and his competency to proceed to trial. The emphasis of the report is on Mr. Jones' psychiatric and medical history, and his demeanor during the evaluation. There is nothing in Dr. Krop's report that would indicate any conflict of interest arising from Dr. Krop's evaluations of both Mr. Jones and Defendant.

(PCR. 1150). However, it is not the content of Dr. Krop's report that establishes the existence of a conflict of interest, it is the simple fact that he was working as a confidential psychologist for two co-defendants with opposing interests. Mr. Eaglin requested an evidentiary hearing to prove that a conflict of interest existed at a time before Mr. Eaglin was appointed appellate counsel. Mr. Eaglin's defense team member Dr. Krop was laboring under an actual conflict of interest later when

appellate counsel was being assisted by trial counsel in supplementing a deficient record on appeal, and finally, the conflict of interest continued when the case was back in the trial court on relinquishment.

Assuming Dr. Krop never communicated with Mr. Eaglin's trial counsel about his confidential expert status on the Jones case, and he testified that he had no further contact with trial counsel after the decision was made to end his deposition and not present his testimony (PCR. 35, 39-40, 3566-67), it can also be demonstrated that the apparent conflict adversely affected the representation Mr. Eaglin received. *See Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980).

If trial counsel and appellant counsel never knew about the appointment of Dr. Krop, they were dispossessed of the opportunity to raise the conflict claim. If they did know and simply failed to act in Mr. Eaglin's best interest, by keeping him in the dark, they lost the opportunity to investigate the conflict claim below and to re-open Mr. Eaglin's case. An evidentiary hearing was necessary to do this, with the sealed expert reports from the Jones file made available to counsel for Mr. Eaglin, with the other principals involved (trial counsel, Dr. Krop, Judge Blackwell and the state attorney) called as witnesses if to prove adverse effect. There would be no prejudice to Michael Jones, who is now deceased.

To prevail on this claim, Mr. Eaglin needs to demonstrate: (a) that the defense could have pursued a plausible alternative strategy; such as requesting a

new expert evaluation and calling Dr. Krop to testify in trial court prior to the appointment of appellate counsel or during the relinquishment period (along with the other witnesses mentioned herein) to prove the existence of a conflict; (b) showing that this alternative strategy was reasonable; and (c) providing evidence that the alternative strategy was not followed because it conflicted with trial counsel's and/or the defense expert's divided loyalties. *See Walton v. State*, 847 So. 2d 438, 445-46 (Fla. 2003)(Obvious conflict of interest where co-defendant's confidential expert is allowed to testify for the State in another co-defendant's case, "[b]ecause these two co-defendants' interests were antagonistic to each other, it is unlikely that [expert] could render a truly objective opinion with regard to both."). Here, Dr. Krop's report was used as part of a plea negotiation of a co-defendant. Mr. Eaglin was effectively denied the services of counsel where the conflict claim was not preserved.

Due to the level of breach occurring, Mr. Eaglin was actually or constructively denied counsel, and prejudice is presumed. *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). Under either *Strickland* or *Cronic*, Mr. Eaglin is entitled to relief. In these circumstances Mr. Eaglin's right to confrontation, due process and an individualized and reliable hearing were violated by the Judge Blackwell's action in appointing Dr. Krop as a confidential mental health expert for his co-defendant where Dr. Krop was burdened by an actual conflict of interest

adversely affecting counsel's representation, in violation of the sixth, eighth, and fourteenth amendments and the corresponding provisions of the Florida constitution.

Mr. Eaglin argued at the postconviction case management conference for additional discovery and a full and fair opportunity to explore the claim raised below in an evidentiary hearing where Dr. Krop and the other witnesses listed in the Rule 3.851 amendment could be heard on the conflict of interest claim and the related claims concerning the plea agreement and Jones' competency. (PCR. 1599-1691). Appellate counsel should have been aware of the Dr. Krop Claim:

> The State also mentions in their response that there's no prejudice pled. Now, again, there's a problem in that particular circumstance with this claim that there was insufficient information that was provided other than the [2005 Jones] proffer, which obviously would have been available to us if it was in the trial files, but there was essentially no public records provided by the State Attorney's Office about any of the plea negotiations or anything having to do with the Jones case or any of the Jones files. There were no records about the Jones competency proceedings that took place in circuit court, three different competency proceedings during the pendency of the proffer, and then the plea offer and then Judge Blackwell's reluctance to take the plea offer, and three different attempts to determine whether or not Mr. Jones, the co-defendant, was competent to accept a plea.
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> Ultimately Judge Blackwell called the co-defendant, Mr. Jones, in open court a malingerer, even though he ultimately accepted the plea. And there was no showing, as I said, that trial counsel, appellate counsel on relinquishment of Mr. Eaglin's case back to circuit court in October and November of 2007 knew about the plea agreement that had been entered into by the State and Mr. Jones, even though it hadn't yet been accepted by Judge Blackwell.

> In fact, in that very same time period that Mr. Eaglin's case was back in circuit court, he was apparently represented by Public Defender [Moeller], who was carrying forward the direct appeal, at that very same time period, that was the time period in which the plea agreement was actually initially signed by Mr. Jones, and then Judge Blackwell refused to accept the plea agreement. For that reason we think the prejudice is self evident.

(PCR. 1650-51). It is simply unknown what was in Dr. Krop's report and the other expert reports that Judge Blackwell was basing his "malingerer" comment on. Trial counsel and appellate counsel should have considered that finding as the functional equivalent of calling Jones a liar. The lower court denied the conflict claim without an evidentiary hearing, explaining:

> Defendant argues that the appointment of [D]r. Krop as confidential expert for codefendant Jones created an actual conflict of interest where Dr. Krop had been the confidential expert of Defendant. Postconviction counsel argued in the amended motion that he consulted with Dr. Krop, who did not reveal he had been appointed as an expert in Jones' case, that Defendant was unaware of this fact, and that trial counsel either did not know, or failed to take any action to prevent the subsequent appointment of Dr. Krop as an expert to Jones. Postconviction counsel contends that "[c]learly Dr. Krop's extensive contact with" Defendant . . . "would have influenced his interview with Michael Jones about his competency at the time of the prison killings and his ultimate findings." The defense believes that trial counsel should have raised the issue of this alleged conflict of interest during the period when jurisdiction was relinquished back to the trial court during the direct appeal.
>
> Trial counsel had no basis to raise the issue of Dr. Krop during the relinquishment, and at that time trial counsel no longer represented the Defendant, since appellate counsel had been appointed. It does not appear that trial counsel's performance was in any way deficient on this issue. The argument that the subsequent appointment of Dr. Krop as confidential expert to Jones after he had been a confidential expert

> to Defendant created a conflict of interest is pure speculation. As Defendant indicates in his amended motion, Dr. Krop was appointed on his case on March 22, 2004, and completed his interviews in mid 2004. He did not testify in Defendant's case. A copy of the order appointing experts is attached. Dr. Krop was not appointed in the Jones case until October 3, 2006, after Defendant's trial. Defendant cannot establish any prejudice from this subsequent appointment after his trial, as Dr. Krop had no further actions to perform on his case when the case was disposed of and on appeal. It does not appear that the subsequent appointment created any conflict of interest on the part of Dr. Krop, and Defendant has failed to establish any prejudice from this subsequent appointment.

(PCR. 1470-1471).

The trial court's finding that there was no deficient performance and no prejudice was made without witness testimony or an opportunity to challenge a facially apparent factual dispute in an evidentiary hearing.[5] The court's finding that "it does not appear" that a conflict of interest was created when Mr. Eaglin's co-

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[5] Counsel argued at the case management conference that the claims concerning co-defendant Jones' plea to life, the three associated competency evaluations and the Dr. Krop conflict claim were all interconnected, that the related public records had not been noticed or produced to trial counsel, appellate counsel or postconviction counsel, and required evidentiary development in order for Mr. Eaglin to prove prejudice. (PCR. 1650-51) Only Jones' November 10, 2005 FDLE proffer was provided, to trial counsel, attached to a pre-trial discovery notice dated December 22, 2005. (PCR. 1506) Although Jones eventually signed a plea agreement on August 17, 2006, Judge Blackwell did not sign off on the plea until January 19, 2007, after the conclusion of the competency evaluations of Mr. Jones. (PCR. 1507-11) The appointment order including Dr. Krop was first entered on August 17, 2006 and then filed again on October 3, 2006. (PCR. 1556) The 2005 proffer was provided to trial counsel, but none of the information regarding the Jones plea and the associated competency evaluation involving Dr. Krop was provided to Mr. Eaglin prior to the filing of his postconviction claims.

defendant Jones obtained Dr. Krop's appointment as a confidential defense expert is itself based on speculation and is an abuse of discretion. Counsel for Mr. Eaglin argued that the trial court's denial of all the public records requests, with the exception of supplemental requests made to the public defender, including requests for the records from the state attorney in the co-defendant's cases, crippled petitioner's opportunity to properly plead prejudice. (PCR. 1622)

Counsel also argued that Dr. Krop's testimony would be necessary at an evidentiary hearing to determine the impact that his interviews and evaluation of Mr. Eaglin had on his findings in Jones, findings which were sealed and unavailable to counsel for Mr. Eaglin, or whether his evaluation of Jones affected his opinions regarding Mr. Eaglin. (PCR. 1661) Counsel also relied during the case management conference on the *Walton* case, noted *supra*, for the proposition that a conflict existed where Dr. Krop was serving two codefendants (PCR. 1662-63).[6] Appellate counsel should have been informed about the Jones' plea agreement, the appointment of Dr. Krop and the conflict that was created, the subsequent competency evaluations, Judge Strickland's finding that Jones was a malingerer, and the final January 2007 plea agreement that the judge accepted.

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[6] Dr. Krop, trial counsel for both Mr. Eaglin and Mr. Jones, and assistant state attorneys Feinberg and Lee were included in the Witness List filed on September 15, 2011. (S-PCR. 14-18)

On direct appeal, appellate counsel argued that

> [a]lthough the defense did present a case in mitigation, the jury never received evidence regarding Mr. Eaglin's traumatic childhood and serious psychiatric disorder that might well have resulted in life recommendations had the jury heard it. Nor is this evidence fully developed in the record. And the sentencing court failed to consider all available mitigating evidence, especially Dr. Krop's report regarding Mr. Eaglin's mental condition, and should have found that the defense evidence regarding the many systems failures at Charlotte Correctional Instiution constituted a valid mitigating circumstance.

Initial Brief at 42-43.

It is clear from the direct appeal record that appellate counsel was well aware of the importance of Dr. Krop's role in Mr. Eaglin's case. In Issue III of the initial brief on direct appeal, appellate counsel argued that the trial court should have taken note of the letter report by Dr. Krop, which had been filed in the court file along with a January 30, 2006 Notice of Intent to offer Dr. Krop as a mental health mitigation witness. Initial Brief at 59-60 ("[T]he court failed to mention and come to grips with Dr. Krop's report, which showed that Mr. Eaglin suffers from a "serious psychiatric disorder," namely, bipolar disorder. Thus, the court did not fulfill his obligation to consider all mitigation contained anywhere in the record").

The brief also noted that trial counsel had made a decision not to present Dr. Krop at the penalty phase in consultation with Mr. Eaglin, and that "Mr. Eaglin indicated his agreement with counsel on this issue, and suggested that he would not have spoken with Dr. Krop if the doctor was going to reveal their discussions to

anyone except defense counsel." (Initial Brief at 55-56). There was every reason to try to get Dr. Krop out of the case because Mr. Eaglin did not trust his own expert. Finding that Dr. Krop was now working for the unsentenced codefendant was an additional reason to return to trial court to supplement and further develop the record based on previously undisclosed facts that prejudiced Mr. Eaglin and that supported his distrust of his confidential expert.

Appellate counsel was well aware that expanding the record to get as much mitigation evidence in as possible was critical to Mr. Eaglin's case. He filed four motions to supplement in this Court during the pendency of the appeal. Because of appellate counsel's deficient performance and fundamental error in failing to identify, investigate and plead an actual conflict of interest that was created when Judge Blackwell appointed Dr. Krop as a confidential competency expert for Mr. Eaglin's co-defendant in the circumstances described herein where Dr. Krop had served as a confidential mental health expert on Mr. Eaglin's defense team at trial, Mr. Eaglin's opportunity to receive a new proceeding where mental health mitigation could be presented through an alternative expert was substantially prejudiced. Habeas corpus relief is warranted.

B. Appellate counsel failed to assure there was a complete record on appeal to allow the Dr. Krop conflict claim and any issue related to the Jones' plea agreement and Judge Blackwell's finding that Jones was a malingerer to be raised on direct appeal.

Mr. Eaglin was denied his right to a complete record on appeal in order to

obtain appellate review. Mr. Eaglin was constructively deprived of his right to effective appellate counsel where appellate counsel was provided an inaccurate and incomplete transcript. Complete and effective appellate review requires a proper and complete record on appeal. Adequate appellate review is impossible when the trial record is missing and the record fails to accurately reflect what occurred. Here, the materials from the Jones court file concerning the Dr. Krop conflict claim and the Jones plea agreement should have been made part of the Eaglin direct appeal record.

The issue was whether Mr. Eaglin could be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide 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. 2nd DCA 2000). "It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record." *Parker v. Dugger*, 111 S. Ct. 731, 739 (1991). Where the record is incomplete or inaccurate, there can be no meaningful review.

Mr. Eaglin has a constitutional right to a complete transcript on appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956); *Entsminger v. Iowa*, 386 U.S. 748 (1967); *Mayer v. Chicago*, 404 U.S. 189 (1971). In a capital case, the fifth, sixth, eighth and fourteenth amendments to the United States Constitution demand a verbatim,

reliable transcript of all proceedings in the trial court. *Parker v. Dugger*.

The right to a transcript on appeal is meaningless unless it is an accurate, complete, and reliable transcript. New appellate counsel, who was not at the trial proceedings in this cause, had no means to fully review the proceedings below with a defective transcript, and thus, was unable to render effective assistance.[7] *United States v. Cronic,* 466 U.S. 648 (1984); *Harding v. Davis*, 878 F.2d 1341 (11th Cir. 1989). In addition, Mr. Eaglin was one of three co-defendants implicated in the two murders for which he was convicted of and ultimately sentenced to death for by the trial court. There was no attempt by trial counsel or appellate counsel to incorporate the relevant and material portions of the records from the co-defendant's cases in the record on appeal of Mr. Eaglin's case. The documentation of the circumstances cited *supra* regarding the Jones' case were not incorporated into Mr. Eaglin's record on appeal. There was no attempt to obtain materials related to the Dr. Krop conflict of interest claim or the Jones plea bargain, including during the relinquishment period ordered by this Court in October-December 2007. Therefore, Mr. Eaglin's right to appeal and to meaningful access to the courts are negated because both appellate counsel and this

[7] Appellate counsel was not the same as trial counsel because the Legislature has provided that the Public Defender located in the same city as the District Court of Appeal will handle appeals throughout the district. '27.51 (Florida Statutes 1979).

Court were unable to fully review the proceedings below on direct appeal. *Evitts v. Lucey; Hardy v. United States*, 375 U.S. 277 (1964). In *Hardy*, the United States Supreme Court held that the duties of an attorney could not be discharged on appeal without a whole transcript. Similarly, 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 encompasses a "meaningful" access. *See Parker v. Dugger*.

In *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977), the court held that where counsel on appeal is different than trial counsel specific, prejudice need not be shown when there are transcript deficiencies. Prejudice is presumed. A demonstration of substantial omissions from the transcript is sufficient to require a new trial. This is consistent with *Harding v. Davis*.

Here, however, specific prejudice exists because it is apparent that neither the parties on direct appeal nor this Court could rely on the accuracy of a record where any indication of the work by Dr. Krop as a confidential expert for co-defendant Jones was not present in the record on appeal. Certainly the mandatory proportionality review conducted by this Court on direct appeal was impaired as a result of this incomplete record. Here, as in *Parker v. Dugger*, habeas corpus relief is mandated.

The Supreme Court in *Entsminger v. Iowa*, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. *See also Moore v. Rose,*

19 F. 3d 1433 (6th Cir. 1994). In *Commonwealth v. Bricker*, 487 A.2d 346 (Pa. 1985), the court citing *Entsminger*, condemned the trial court's failure to record and transcribe the sidebar conferences so that appellate review could obtain an accurate picture of the trial proceedings. *Entsminger* was cited in *Evitts v. Lucey*, 469 U.S. 387 (1985), in which the court reiterated that effective appellate review begins with giving an appellant an advocate and the tools necessary for the advocate to do an effective job. In *Gardner v. Florida*, 430 U.S. 349 (1977)(death sentence reversed), the Supreme Court recognized the need for a complete record. *See also Dobbs v. Zant*, 506 U.S. 357 (1993).

The constitutional due process right to receive transcripts for use at the appellate level was acknowledged by the United States Supreme Court in *Griffin v. Illinois*, 351 U.S. 12 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. *Id*. at 19. The sixth amendment also mandates a complete transcript. 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.

Mr. Eaglin 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 (11th Cir. 1989).

The lack of appellate advocacy on Mr. Eaglin's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief. Appellate counsel for Mr. Eaglin failed to ensure that a complete record of the lower court proceedings was compiled.

The beginning point for any meaningful appellate review process is absolute confidence in the completeness and reliability of the record. The appeal of any criminal case assumes that an accurate transcript and record will be provided counsel, appellant and the appellate court. *Mayer v. Chicago*, 404 U.S. 189, 195 (1971); *Entsminger*. Eighth Amendment considerations demand even greater precautions in a capital case. See *Atkins v. Virginia*, 536 U.S. 304 (2002): *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); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the Eighth amendment. See*, Proffitt v. Florida*; *Dobbs v. Zant*, 113 S.Ct. 835 (1993), *Johnson v. State*, 442 So. 2d 193 (Fla. 1983)(Shaw, J. dissenting). In a capital case, the fifth, sixth, eighth and fourteenth amendments to the United States Constitution demand a verbatim, reliable transcript of all proceedings in the trial court. *Parker v. Dugger*, 876 F.2d 1511 (11th Cir. 1989). This the Petitioner never had. Mr. Eaglin is entitled to a new trial.

CONCLUSION

The errors described above, and appellate counsel's failure to present such errors to this Court on direct review, entitle Mr. Eaglin to relief. Appellate counsel's failure to present the meritorious issues discussed above demonstrates that the representation of Mr. Eaglin involved serious and substantial deficiencies. *See Fitzpatrick v. Wainwright*, 490 So. 2d 938, 940 (Fla. 1986). The burden remains on the State to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. *Chapman v. California*, 386 U.S. 18 (1967). 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. Eaglin respectfully urges this Court to grant habeas corpus relief.

Respectfully submitted,

/s/ William M. Hennis

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the preceding has been filed through the E-FILING Portal for the Florida Supreme Court on Monday, August 26, 2013, and that a true copy of the foregoing has been provided to Stephen D. Ake, Assistant Attorney General, 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, *capapp@myfloridalegal.com*, by United States Mail and electronic mail this 26th day of August, 2013.

*/s/ William M. Hennis*_____
WILLIAM M. HENNIS III
Litigation Director

CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing petition is prepared in Times New Roman 14-point font.

*/s/ William M. Hennis*_____
WILLIAM M. HENNIS III
Litigation Director