Electronically Filed 12/17/2013 10:16:50 AM ET

RECEIVED, 12/17/2013 10:18:36, John A. Tomasino, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-1785

DWIGHT T. EAGLIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

NEAL A. DUPREE
CCRC-SOUTH
Florida Bar No. 311545

WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850

ELIZABETH STEWART
Staff Attorney
Florida Bar No. 87450

CAPITAL COLLATERAL
REGIONAL COUNSEL - SOUTH
1E. Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

ARGUMENT IN REPLY TO RESPONSE

Other than what is contained herein, undersigned counsel will rely on the argument presented in the Petition to this Court. The Response states that neither of the "sub-issues" that were raised in Mr. Eaglin's Petition would have been successful if they had been argued by appellate counsel in the Petitioner's direct appeal. Response at 10. The State takes the position that either the arguments are meritless or that appellate counsel was not be found ineffective where he failed to raise issues that, while possibly not frivolous, "might have had some possibility of success" pursuant to *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002).

Factually, counsel notes that Valle raised completely different issues as fundamental error. The "sub-issues" in Valle involved appellate counsel's failures (i) to raise the trial's court's denial of trial counsel's motion to waive the penalty phase jury, (ii) to raise the CCP instruction given, (iii) to raise certain comments by the prosecutor during voir dire, and (iv) to raise the trial court's denial of a motion to suppress. *Id.* at 909-910. This Court found no prejudice in any of these areas and did not consider whether there was deficient performance, citing *Porter v. State*, 788 So. 2d 917, 925 (Fla. 2001). Of course both this Court's process and result concerning the *Strickland* claim in *Porter* has subsequently been found wanting. *Porter v. McCollum*, 558 U.S. 30 (2009).

Here, both as to the failure by appellate counsel to raise the Dr. Krop

conflict claim in any manner or form and the more generic claim that appellate counsel failed to insure that there was a complete record on appeal, the prejudice resulting from those errors is facially evident. In light of the State's objections below to any opportunity for evidentiary development concerning trial counsel's directly related omissions in the same two areas of inquiry, which were upheld by the lower court, the State's comments regarding the possibility of success should be disregarded.

The Response also states that "Petitioner further alleges, without any specificity, that this alleged conflict of interest prejudiced his case." Response at 13. The conflict was set up by Judge Blackwell's appointment of Dr. Krop in the Jones' case. The judge knew that Dr. Krop had been a confidential expert in the Eaglin case. He had presided over Mr. Eaglin's trial. Actually, Petitioner pointed out the basis for the conflict allegation in the Petition, specifically that (i) that co-defendant Jones had signed a plea agreement before any appellate counsel was even assigned to Mr. Eaglin; (ii) that Judge Blackwell had refused to sign off on the Jones plea agreement on August 18, 2006 [because of his questions about the competency of Mr. Jones] and had appointed three competency experts; and (iii) that one of the three experts appointed was Dr. Harry Krop, Mr. Eaglin's penalty phase confidential expert. The Petition also included the related issue that Judge Blackwell had noted on the record after finally accepting the plea bargain that he

believed Mr. Jones was malingering. The Petition explained the conflict claim:

> [I]t 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.

Petition at 14-15. The Response contends that "Petitioner strains the bounds of reason by arguing that prejudice should be presumed under the standard set forth in *United States v. Cronic*, 466 U.S. 648 (1984), 'due to the level of breach occurring,' and claims that Eaglin was actually or constructively denied counsel on appeal." Response at 13-14. Far from flying beyond the scope of reason's binds, the argument that appellate counsel's failure to identify and make sure the Dr. Krop conflict claim was of record is the type envisioned in *Cronic* where "the process loses its character as a confrontation between adversaries, [and] the constitutional guarantee is violated." *Id.* at 657. Appellate counsel completely failed to identify, investigate or to plead the conflict claim. The State was well aware of the plea agreement with Mr. Jones and the appointment of Mr. Eaglin's expert as a competency expert in the co-defendant's case before Mr. Eaglin was even appointed direct appeal counsel.

The Response argues that "Contrary to collateral counsel's assertions, Eaglin's appellate counsel was not "functionally and constructively absent" during the appeal, but rather, filed a detailed brief raising six issues." Response at 14, fn. 2. *Cronic* teaches that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance." *Cronic* at 662. Appellate counsel was apparently handicapped by a lack of knowledge and communication even though he worked closely with trial counsel and filed "a detailed brief."

The Response goes on to state that "Eaglin cannot demonstrate that he was prejudiced in any manner by appellate counsel's failure to identify this alleged conflict of interest." Response at 15. The facts related to Mr. Eaglin's appeal fit the profile of a case where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Cronic* at 660. As noted in the Petition, Dr. Harry Krop, the defense confidential expert in Mr. Eaglin's case, was also appointed by Judge Blackwell, on August 17, 2006, as a confidential expert in the case of Mr. Eaglin's codefendant, Mr. Jones. Mr. Eaglin pled below that Dr. Krop was working under a conflict of interest when he accepted appointment as a confidential expert in Mr. Jones' case. Mr. Eaglin did not obtain counsel for his direct appeal until a week **after** Dr. Krop was appointed as an expert in the Jones case. Neither trial counsel,

who continued to be involved in the case, nor appellate counsel Moeller made any attempt to investigate, preserve or raise this claim.

On September 18, 2007, more than a year after he was appointed, 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, that offered a rationale for the 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.
>
> ***
>
> 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.

Trial co-counsel McLoughlin continued to work on the Eaglin case before and after the relinquishment of jurisdiction by this Court back to the circuit court, which was Judge Blackwell. *See* Order of October 31, 2007 in *Eaglin v. State*, Case No. SC06-760. The constitutional issues raised by appellate counsel Moeller in his motion to obtain a complete record were applicable to trial counsel as well.[1] Trial

[1] The postconviction court denied the Dr. Krop conflict claim and the associated *Strickland* claim as it related to trial counsel. The Order relied on the State's argument that "trial counsel cannot be ineffective for failing to raise this issue

counsel must have been aware of the Dr. Krop issue.[2] In fact, on September 28, 2007, trial co-counsel McLoughlin filed a Motion to Supplement the Record and a Motion to Set Hearing in the lower court, and copies of those motions were attached to appellate counsel Moeller's October 23, 2007 Motion for Reconsideration in this Court in Case No. SC06-760, a motion in which he advised the Court that he was continuing to work with McLoughlin.

In these circumstances Mr. Eaglin's right to confrontation, due process and an individualized and reliable hearing were violated by Judge Blackwell's action in

---

during the relinquishment of jurisdiction, because the sole purpose of the relinquishment was for DOC to file the PSI in the court file so the appeals clerk could supplement the record on appeal with it," and that "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." (PCR. 1471). The lower court should have allowed complete evidentiary development on the issues related to Dr. Krop's appointment as a confidential expert for two co-defendants in a double capital murder case. Likewise, the lower court should have allowed evidentiary development on the inter-related issues of trial counsel's and appellate counsel's failure to assure that there was a complete record on appeal and their joint failure to ensure that the information about the Jones' plea agreement was of record. The lower court's finding of facts was mistaken where trial counsel was still involved directly in the case and in attempting to supplement the record.

[2] Trial co-counsel Douglas Withee testified at the evidentiary hearing below that "I don't know if I talked to Dwight at any length about Mr. Jones. I may have. It wasn't any of my concern. Mr. Jones received completely different treatment than Mr. Eaglin received for various reasons that only Tom Marryott, attorney, can explain." (S-PCR. 155). How much more Withee knew about the Jones case was beyond the scope of the evidentiary hearing below.

appointing Dr. Krop as a confidential mental health expert for co-defendant Jones in circumstances 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.[3]

The Response states that "Petitioner fails to cite *any* authority which mandates that a co-defendants unrelated trial records are required to be made a part of his record on appeal. Likewise, Petitioner has failed to offer any support or citations for his assertion that "[t]he lack of appellate advocacy in Mr. Eaglin's behalf is identical to the lack of advocacy present in other cases in which this Court has granted habeas corpus relief." Petition at 27. Part and parcel of the problem is that this Court has been reluctant to grant habeas corpus relief, leaving that task to the federal courts. *See Porter v. McCollum*. Petitioner has never claimed that *unrelated* portions of Mr. Jones's record on appeal are material. Rather, the argument has been that all records *related* to the appointment of psychologist Dr. Harry Krop in the Jones case are relevant and material to the conflict of interest

[3] The lower court should have allowed complete evidentiary development on the issues related to Dr. Krop's appointment as a confidential expert for two co-defendants in a double capital murder case. Likewise, the lower court should have allowed evidentiary development on the related issues of trial counsel's and appellate counsel's failure to assure that there was a complete record on appeal and their failure to ensure that the information about the Jones' plea agreement was of record.

claim where Dr. Krop was a confidential mental health expert for Mr. Eaglin. Likewise, the State's Response is in error when it claims that "There is no possibility that this information regarding a codefendant's subsequent case would have been relevant to Eaglin's pending appeal and thus, no motion to supplement would have been granted. See generally Fla. R. App. P. 9.200." Response at 15. This is simply a smokescreen. The petitioner has the obligation to make sure the record on appeal is complete. See Fla. R. App. P. 9.200(e) & (f).

In a case involving a co-defendant's potential testimony, the Third DCA remanded back to the circuit court for further proceedings, taking judicial notice of the co-defendant's record on appeal, because the allegations made below were not conclusively refuted by the appellant's existing record. *Echevarria v. State*, 976 So. 2d 84, 85 (Fla. 3d DCA 2008). Co-defendant Jones' case was tried later only because he agreed to give a statement and to testify against Eaglin if the State so desired. He ultimately signed a plea agreement on August 17, 2006 which remained unratified until January 19, 2007 because of the trial court's concerns about the co-defendant's competency. Thus resulted the appointment of Dr. Krop, who was Mr. Eaglin's only trial level mental health expert, as one of the three competency experts appointed by Judge Blackwell, on August 17, 2006 in Mr. Jones' case.

Appellate courts in Florida have also remanded for fact finding regarding information in the record of co-defendant's cases where the information needed to support a claim was unavailable in the appellant's record on appeal. *See Gomez v. State*, 613 So. 2d 119, 121 (Fla. DCA2 1993) ("we have a record which contains a motion alleging an illegal seizure of items from Gomez with no evidence offered that there was a seizure. Further, even if there was a seizure, both the evidence and a police report of which we are aware do not rule out the possibility that Gomez may be required to proceed to trial on these two crimes by virtue of other evidence obtained from the codefendants of Gomez. In addition, the prosecution apparently possesses a taped confession from Gomez to these crimes and this record contains no facts regarding how the law enforcement officers obtained the confession. Under the circumstances, we are compelled to remand this case for additional evidence at a hearing on the motion to suppress"). The necessity for appellate counsel to supplement the record with relevant and material information from a co-defendant's record is not unknown in Florida law.

Finally, the Response states that "Even if this Court were to find that counsel had performed deficiently by [not] seeking to supplement the record with Jones' case records, Petitioner has failed to establish that the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. *See Groover v. Singletary*,

656 So. 2d 424, 425 (Fla. 1995)." Response at 17. In *Groover* this Court approached the *Strickland* claim by analyzing whether deficient performance was present rather than approaching from the prejudice prong first. In the circumstances below, there has been no opportunity to establish the "compromise of the appellate process" outlined in the petition. As noted *supra*, to the extent that the failure by appellate counsel to include information memorializing the Dr. Krop conflict of interest issue in the record sounded in related claims of trial counsel's ineffectiveness, the lower court's summary denial of any evidentiary development must be considered by this Court in any appraisal of fundamental error. Mr. Eaglin is entitled to relief.

CONCLUSION

Based upon the foregoing and the record, Mr. Eaglin respectfully urges this Court to grant a new trial and/or penalty phase proceeding, and grant such other relief as the Court deems just and proper.

Respectfully submitted,

NEAL A. DUPREE
CCRC-SOUTH
Florida Bar No. 311545

/s/ William M. Hennis III
WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850

ELIZABETH STEWART
Staff Attorney
Florida Bar No. 87450

CAPITAL COLLATERAL REGIONAL
COUNSEL - SOUTH
1E. Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE AND FONT COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO RESPONSE TO PETITION FOR WRIT of HABEAS CORPUS has been filed with the Court electronically with a copy furnished by electronic service to Stephen D. Ake, Esq., Office of the Attorney General, Stephen.ake@myfloridalegal.com , on December 16th, 2013.

I FURTHER HEREBY CERTIFY that this petition complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ William M. Hennis III
WILLIAM M. HENNIS III
Litigation Director
Florida Bar No. 0066850