IN THE SUPREME COURT OF FLORIDA

DWIGHT T. EAGLIN,	:	
Appellant,	:	
vs.	:	Case No. SC06-760
STATE OF FLORIDA,	:	
Appellee.	:	
______________________	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record on appeal herein consists of the original 30 volumes (plus an index) and eight supplemental volumes (plus an index). Citations to the record in this brief will be by volume and page number, with an "S" to indicate when a supplemental volume is being cited.

STATEMENT OF THE CASE

On December 3, 2003, an indictment was filed in Charlotte County Circuit Court charging Appellant, Dwight T. Eaglin, and two other persons, Stephen V. Smith and Michael Jones, with two counts of first degree murder. (Vol. 1, pp. 6-7) Count I charged them with killing State Correctional Officer Darla K. Lathrem with premeditation, "or while engaged in the perpetration of, or in the attempt to perpetrate a felony, to wit: escape or resisting officer with violence, . . . by inflicting or causing to be inflicted, blunt trauma to her head[.]" (Vol. 1, p. 6) Count II charged them with killing Charles B. Fuston with premeditation, "or while engaged in the perpetration of, or in the attempt to perpetrate a felony, to wit: escape, . . . by inflicting or causing to be inflicted, blunt trauma to his head[.]" (Vol. 1, p. 6) The offenses allegedly occurred on or about June 11, 2003. (Vol. 1, p. 6)

This cause proceeded to a jury trial beginning on February 20, 2006, with the Honorable William Blackwell presiding. (Vol. 22, p. 64-Vol. 29, p. 1383)[1] The guilt phase was held from February 20-24, 2006. (Vol. 18, pp. 3511-3538; Vol. 22, p. 64-Vol. 28, p. 1198) The jury returned verdicts finding Mr. Eaglin

[1] Mr. Eaglin was tried alone. Although the disposition of the codefendants' cases does not appear in the record, for the Court's information, according to a report in the news media, Stephen Smith was sentenced to death, while Michael Jones was sentenced to life after pleading guilty.

guilty of both premeditated and felony murder as to both victims. (Vol. 18, pp. 3600-3601; Vol. 28, pp. 1192-1193) As to victim Darla Lathrem, the verdict indicated that the felonies which supported felony murder were escape or attempted escape and resisting an officer with violence or its attempt. (Vol. 18, p. 3600; Vol. 28, p. 1193) As to victim Charles Fuston, the verdict indicated that the felony which supported felony murder was escape or attempted escape. (Vol. 18, p. 3601; Vol. 28, p. 1193)

The penalty phase was held on February 27, 2006. (Vol. 29, pp. 1200-1383) After receiving evidence from both the State and the defense, including testimony from Mr. Eaglin himself, the jury returned recommendations that he be sentenced to death for both homicides, by votes of eight to four. (Vol. 19, pp. 3621-3622; Vol. 29, pp. 1378-1382)

A Spencer[2] hearing was held before Judge Blackwell on March 10, 2006. (SVol. 7, pp. 1243-1282) The State presented additional victim impact evidence at the hearing. (SVol. 7, pp. 1250-1260) Mr. Eaglin himself addressed the court briefly. (SVol. 7, pp. 1261-1262)

Both the State and the defense filed written memoranda discussing what sentences Mr. Eaglin should receive. (Vol. 19, pp. 3630-3656, 3657-3667) Attached to Mr. Eaglin's "Spencer

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[2] Spencer v. State, 615 So.2d 688 (Fla. 1993).

Hearing Memorandum" as exhibits were copies of lawsuits filed against the Florida Department of Corrections by the estates of Charles Fuston and Darla Lathrem. (Vol. 19, 3634-3656)

The sentencing hearing, at which Judge Blackwell read into the record his order sentencing Mr. Eaglin to death, was held on March 31, 2006. (Vol. 30, pp. 1385-1411) The court found that the following aggravating circumstances applied to the killing of Darla Lathrem (Vol. 19, pp. 3683-3685; Vol. 30, pp. 1389-1395): (1.) The capital felony was committed by a person previously convicted of a felony and under a sentence of imprisonment. (2.) The Defendant was previously convicted of another capital offense or a felony involving the use or threat of violence. (3.) The capital felony was committed for the purpose of preventing a lawful arrest or effecting an escape from custody. (4.) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (5.) The victim of the crime was a law enforcement officer engaged in the performance of his or her official duties. As to the killing of Charles Fuston, the court found that the first, second, and fourth aggravating circumstances that were found as to Officer Lathrem also applied to Fuston. (Vol. 19, pp. 3685-3686; Vol. 30, pp. 1395-1398) As for mitigation, the court gleaned from the presentence investigation that Mr. Eaglin had "suffered a

severely abusive childhood with a severely dysfunctional family" and gave this factor "some weight." (Vol. 19, p. 3686: Vol. 30, pp. 1398-1400) The court rejected as mitigating evidence Mr. Eaglin had presented regarding numerous lapses in security at Charlotte Correctional Institution, where the homicides occurred, and also rejected "three consecutive life sentences as a mitigator." (Vol. 19, pp. 3687-3689; Vol. 30, pp. 1401-1407) The court then imposed two sentences of death for the two homicides. (Vol. 19, p. 3689; Vol. 30, pp. 1408-1409)

STATEMENT OF THE FACTS

Guilt Phase

In June, 2003, a construction project was taking place at Charlotte Correctional Institution "to convert the prison to accommodate closed management inmates. . ." (Vol. 25, p. 463) G-Dormitory was one of the buildings being converted, and so no inmates were being housed there. (Vol. 25, pp. 463-464)

On June 11, 2003, inmates Dwight Eaglin (Appellant), Charles Fuston, and John Beaston were working as welders at the back of G-Dorm. (Vol. 25, pp. 465-470) Inmates Stephen Smith and Michael Jones, who were "the plumbers of the compound," arrived at G-Dorm late in the afternoon (Vol. 25, pp. 465-467, 470) The plumbers had access to tools to which other inmates did not have access. (Vol. 26, p. 629) Correctional Officer Mary Poliseo escorted the five inmates to A-Dormitory to work there, arriving around 4:10 p.m. (Vol. 25, pp. 470-472, 486-487) The inmates took their welding tools with them; they were in a locker, which Mr. Eaglin pulled behind him. (Vol. 25, pp. 473-474) A-Dormitory was not being used at that time to house inmates; it was being renovated. (Vol. 24, pp. 345, 406; Vol. 26, p. 639) The dorm had a camera system, but it was not working that night. (Vol. 26, pp. 657-658) At A-Dorm, Officer Poliseo came into contact with Officer Darla Lathrem, a certified correctional officer, who was 38 years old. (Vol. 24,

pp. 344-345; Vol. 25, pp. 474-475, 477, 500) When Officer Poliseo left, Officer Lathrem was by herself with the five inmates. (Vol. 25, p. 488) It was common for Officer Lathrem to be alone with five or more inmates, and common practice for only one officer to be supervising an inmate crew working at night. (Vol. 24, pp. 363-364; Vol. 25, p. 488; Vol. 26, p. 641)

A master count of inmates at Charlotte Correctional was regularly performed around 8:30 p.m. (Vol. 25, p. 491) Correctional Officer Kenneth George picked up the "count slip" for A-Dorm from Darla Lathrem around 8:55. (Vol. 25, pp. 492-494, 496) Officer George did not enter A-Dorm, but met Officer Lathrem on the sidewalk outside. (Vol. 25, p. 493) Officer George was aware that there was an inmate crew working that night, but did not see any of the inmates. (Vol. 25, pp. 494-495) When Officer George left, Officer Lathrem headed back to the dorm. (Vol. 25, p. 494)

On June 11, 2003, Mark Pate was working as a correctional officer at Charlotte Correctional Institution. (Vol. 24, p. 335) He was "sergeant over the yard[,]" which meant that his job involved any type of movement of the inmates, and feeding the inmates. (Vol. 24, p. 336) Officer Pate worked third shift, 4 p.m. to midnight. (Vol. 24, p. 337) Officer Pate would normally check on an officer who was supervising an inmate night crew at least one time a night, when he did his "lock checks," which was

normally around 10:00. (Vol. 24, p. 363, 365) He did not know of any other checks that would be made. (Vol. 24, p. 365)

Officer Pate and the other officers inside the fenced area of the prison did not carry guns or Tasers. (Vol. 24, p. 337) There was, however, a gun truck which patrolled outside of both perimeter fences; Officer Schustrom was the perimeter security officer on duty the night of June 11, 2003, and he was armed with a 12-gauge shotgun. (Vol. 24, pp. 346, 372-373, 377-388) Officer Pate and the other correctional officers did carry chemical spray. (Vol. 24, pp. 365-366) Officer Pate did not carry a body alarm, but he and the other officers carried radios that had a "man-down button" on them which worked the same way as the body alarm, which set off an alarm inside the control room when activated. (Vol. 24, pp. 366, 368)

Around 10 p.m. on June 11, 2003, Officer Pate and other officers received a "red alert" on Zone 5 from the control room via radio, which indicated that the perimeter fencing had been hit or touched. (Vol. 24, pp. 337-338) Officer Pate, who had just come out of "B-dorm," observed a ladder up against the inner-perimeter fence. (Vol. 24, pp. 338-339) The ladder was actually four or five ladders, welded or bolted together, that would form a giant U-shape to go over the inner and outer fences, "almost acting like a bridge." (Vol. 25, p. 597-598; Vol. 26, pp. 732-747) It was made of aluminum. (Vol. 27, p.

822) Inmate Smith was a couple of steps up on the ladder, while Inmate Jones was on the ground, trying to hand something to Mr. Smith. (Vol. 24, pp. 339-340, 343) A third inmate, Appellant, Dwight Eaglin, was in between the two fences. (Vol. 24, pp. 339-341) Officer Pate approached the inmates, yelling at them to get down on the ground, but Mr. Smith and Mr. Jones ran into the back of "A-Dormitory." (Vol. 24, pp. 339-341, 343-344) Mr. Eaglin was trying to climb the outer perimeter fence, on which there was "razor ribbon." (Vol. 24, pp. 340-341)

Officer Pate left zone 5 and went into A-Dormitory to look for Officer Lathrem. (Vol. 24, pp. 345-346) He heard shots being fired [presumably from the gun truck]. (Vol. 24, pp. 345-346, 388) Officer Pate entered the dorm the same way as the two inmates, through the fire exit door, which was unlocked due to the construction. (Vol. 24, pp. 346-347) Two other officers had entered the dorm ahead of Officer Pate. (Vol. 24, p. 347) Officer Pate looked for Officer Lathrem, calling her name as he went. (Vol. 24, p. 347) He stopped at a mop closet, because there was "a large puddle of blood" coming out from under the door. (Vol. 24, p. 348) Officer Pate tried the door, but it would not open. (Vol. 24, p. 348) He banged on the door and called out Officer Lathrem's name. (Vol. 24, p. 348) He called on the radio for emergency keys and an ambulance. (Vol. 24, p. 348) The keys and a nurse arrived and the door was opened.

(Vol. 24, pp. 349-350) Officer Pate observed Officer Lathrem lying in the corner of the closet in a "fetal-type position," with injuries to her head. (Vol. 24, p. 350) Licensed Practical Nurse Robert Colgan observed that Officer Lathrem's "face was all crushed in." (Vol. 25, p. 555) She was not breathing and did not have a pulse. (Vol. 25, pp. 554-555) Nurse Colgan was "99 percent sure she was already deceased." (Vol. 25, p. 556) Officer Lathrem was removed from the closet and taken to medical on a gurney or a stretcher. (Vol. 24, pp. 350-353, 422-423; Vol. 25, pp. 556, 568-570) Treatment, including CPR, was attempted in the emergency room, but Officer Lathrem never regained consciousness, and was declared dead by paramedics. (Vol. 25, pp. 556-557) Officer Lathrem's body was taken away by the medical examiner's office at roughly 4:30 a.m. (Vol. 25, p. 600; Vol. 26, p. 686)]

After Officer Lathrem was removed from the closet, Officer Pate observed a 12- to 14-inch sledgehammer immediately outside the door. (Vol. 24, p. 351, 358-359)[3]

There were some footprints leading away from the mop closet, but neither Lee Dewey with the Criminal Investigation

[3] According to Correctional Officer Robert Williams, another State witness, the hammer was lying next to Officer Lathrem inside the closet, where the door had been before it was opened. (Vol. 24, pp. 421-422, 437-438) Licensed Practical Nurse David Keller testified that the hammer was lying just inside the door, between Officer Lathrem and the door when the closet was opened. (Vol. 25, pp. 567-568)

Division of the Florida Department of Law Enforcement nor anyone else photographed them or tried to analyze them to any of the clothing or boots collected from Inmates Eaglin, Smith, Jones, Fuston, or Beaston. (Vol. 27, p. 823)

Officer Lathrem's keys and radio were found in the metal toilet bowl in cell 3106. (Vol. 25, pp. 586, 591-592; Vol. 26, pp. 677, 691, 722-723; Vol. 27, p. 822)

Correctional Officer Timothy Belfield was an A-team (first level) responder to the red alert at Zone 5. (Vol. 24, pp. 383-384) He observed a piece of a ladder lying against the fence, and Inmate Eaglin trapped between the fences. (Vol. 24, pp. 385-386) Mr. Eaglin was wearing state-issued blue pants and shirt, leather welding vest, leather gloves, and state-issued black boots. (Vol. 24, pp. 385-397) Officer Belfield ordered Mr. Eaglin several times to lie down on the ground, but he did not comply. (Vol. 24, pp. 386-387) Mr. Eaglin was very aggravated, very upset, and very verbal, yelling and screaming. (Vol. 24, p. 387) He was saying things such as, "'You're going to have to shoot me; I'll kill you, too; I'll make you kill me.'" (Vol. 24, p. 390)

Mr. Eaglin was trying to get to the outer fence so that he

could escape over it, but there was "constantino [sic] wire,[4] razor ribbon . . . probably four or five feet up the [outer-perimeter] fence." (Vol. 24, p. 389) When he realized he was not going to be able to escape, Mr. Eaglin turned his attention toward Belfield and an officer with him, Sergeant Cullember. (Vol. 24, pp. 390-391) Mr. Eaglin was "out of control[,]" and Belfield himself was "loud and boisterous, trying to let him know the seriousness of it." (Vol. 24, p. 391) The two officers, Belfield and Cullember, went in between the fences to apprehend Mr. Eaglin, who was still in a "hyper state." (Vol. 24, pp. 392-395) Mr. Eaglin backed away from the officers, then stopped and assumed a "defensive stance" with "his hands in the air as if he was ready to fight . . ." (Vol. 24, pp. 394-396) Mr. Eaglin was sprayed with chemical agents, but they seemed to have no effect whatsoever. (Vol. 24, pp. 395-396, 404-405) The officers lunged at Mr. Eaglin and a fight ensued. (Vol. 24, pp. 396-397) They were able to subdue him and handcuff him behind his back. (Vol. 24, p. 397) Mr. Eaglin was still angry and out of control and tried to kick, bite, and head-butt the officers. (Vol. 24, p. 397) After Mr. Eaglin was removed from the fenced area, another sergeant secured his legs with shackles. (Vol. 24, pp. 397-398) Mr. Eaglin appeared to have a gash or cut from the

[4] There are several references in the trial transcript to "constantino wire." It may be that these references should be to "concertina wire" instead.

razor ribbon on one of his forearms, and he was "covered in blood." (Vol. 24, p. 399) He was placed in a holding cell. (Vol. 24, pp. 425-426, 442)

Sergeant Robert Williams, who was assigned as a dorm supervisor at Charlotte Correctional Institution on July 11, 2003, responded to a radio call that night around 9:55 or 10:00 regarding a possible escape. (Vol. 24, pp. 411-412) He observed Inmate Eaglin between the fences with his shirt off, "yelling, obviously agitated." (Vol. 24, p. 413-414) Sergeant Williams was directed by his supervisor to go to A-Dorm to secure the other inmates that had been working there and to try to locate the officer. (Vol. 24, p. 414) He entered "quad 3" through the fire exit door, but did not see the inmates there. (Vol. 24, pp. 415, 429) There were numerous tools and ladders lying all around the quad. (Vol. 26, pp. 660-661, 673-676) When Sergeant Williams looked through a window into quad 2, he observed the inmate plumbers, Mr. Smith and Mr. Jones. (Vol. 24, pp. 415-416) Sergeant Williams entered the quad and ordered the two inmates to lie face down and put their hands behind their backs, which they did. (Vol. 24, p. 416) He and Officer Kozdras then handcuffed the men. (Vol. 24, p. 416; Vol. 26, pp. 628-629) The two inmates were eventually escorted out of the quad. (Vol. 26, p. 654)

A third inmate, John Beaston, was standing in a locked cell, holding a rag to his head; he was apparently bleeding in the forehead area. (Vol. 24, p. 418) He had "a depressive skull fracture approximately a half inch." (Vol. 25, p. 574) Mr. Beaston "asked what had happened because he lost recall from the trauma." (Vol. 26, p. 667) At approximately 11:00 p.m., Mr. Beaston was taken to the Medical Department in a wheelchair. (Vol. 25, pp. 574-575; Vol. 26, p. 653)

Another inmate, Charles Fuston, was in a cell upstairs, lying face down on the floor, with a "massive amount of blood around him." (Vol. 24, p. 419; Vol. 26, p. 631) He was breathing, but was not responsive. (Vol. 24, p. 419; Vol. 26, pp. 631-632, 649-650, 665-666) When Licensed Practical Nurse David Keller arrived at this cell, the lights were off, and all he could see was "the floor covered with blood." (Vol. 25, p. 572) A C-collar was placed on Mr. Fuston, and he was placed on a backboard and taken to the emergency room on a gurney. (Vol. 25, pp. 572, 576; Vol. 26, pp. 650-653, 666)

When Charles Fuston arrived at Lee Memorial Hospital, he was comatose, and was "at or near the point of death." (Vol. 26, pp. 705, 708-709) His skull was fractured in multiple areas. (Vol. 26, pp. 702-703) He was placed on a ventilator. (Vol. 27, pp. 945-946) Mr. Fuston experienced swelling of the brain that worsened over time. (Vol. 27, pp. 946-948) He was eventually

taken off the ventilator, and he died at 1:15 p.m. on June 13, 2003. (Vol. 27, pp. 948,)

It would have taken "a very heavy object" to inflict the injuries to Mr. Fuston, and would have taken blunt trauma that was "quite severe." (Vol. 27, pp. 934, 949) The sledgehammer introduced into evidence as State's Exhibit Number 4 was consistent with the type of instrument that could have caused the injuries to Mr. Fuston. (Vol. 27, pp., 927, 937, 949)

The medical examiner, Dr. Imami, who performed the autopsies on both Darla Lathrem and Charles Fuston, opined that three or four fatal blows were struck to Mr. Fuston's head. (Vol. 27, p. 936) The cause of his death was "[c]ranial-cerebral injuries, secondary to blunt-trauma to the head." (Vol. 27, p. 937) Dr. Imami "really did not see any typical defensive wounds" to Mr. Fuston. (Vol. 27, p. 936)

The autopsy performed on Darla Lathrem revealed that she had incurred several skull fractures. (Vol. 27, pp. 896-908) Her injuries were limited to the head area. (Vol. 27, pp. 908-909) There was no evidence of any defensive wounds, and no evidence of any sexual assault. (Vol. 27, pp. 909-910) The cranial-cerebral injuries were the cause of her death. (Vol. 27, p. 912) She was struck with heavy, blunt force trauma at least three times, two on the right-hand side of the head, and one in the face. (Vol. 27, pp. 912, 941) Any one of the blows would

have caused Officer Lathrem’s death. (Vol. 27, p. 913) She most likely would have lost consciousness immediately after any of the blows. (Vol. 27, p. 939) The sledgehammer introduced into evidence as State’s Exhibit Number 4 was consistent with the type of instrument that could have caused the injuries to Officer Lathrem. (Vol. 27, pp. 914-915)

Kenneth Lykins was a 12-time convicted felon who was an inmate at Charlotte Correctional Institution on June 11, 2003, and was still an inmate in the Florida Department of Corrections when he testified at Eaglin’s trial. (Vol. 25, pp. 501-502) His job assignment at Charlotte C.I. was “security tool cart;” he did work that did not involve class A tools, which were saws and cutting-type tools. (Vol. 25, pp. 502-503) Several times, Mr. Lykins had worked in A-Dormitory, but only during the day. (Vol. 25, p. 509) The work that was being done there in June, 2003 included plumbing, lockers being welded underneath beds, cells being “pressure washed and reconstruction-painted,” and an addition being built in the TV room area for a nurses’ station and for “psychiatrists and stuff like that to come in and evaluate inmates.” (Vol. 25, pp. 509-510)

Mr. Lykins was housed in D-Dormitory, which was an open-bay dormitory; it did not have two-man cells, but had “lines and rows of bunks” and was “just a large room.” (Vol. 25, pp. 471, 505)

In the weeks leading up to the evening of June 11, 2003, Mr. Lykins heard Dwight Eaglin talking to Stephen Smith and Mike Jones about attempting to escape when they were sitting around the beds at night in D-Dormitory. (Vol. 25, p. 511) These discussions went on for over a month. (Vol. 25, pp. 511-512) Mr. Lykins was asked if he wanted to escape with that crew, but his response was, "No, thank you." (Vol. 25, p. 511) They were going to build a ladder 16-feet high and 23-feet across and hook it on light pole outside the last perimeter fence so that it would not set off alarms. (Vol. 25, p. 512) Tommy [Mr. Eaglin] was going to go over first because he was stronger and faster than Mr. Smith and Mr. Jones. (Vol. 25, pp. 512-513, 522-523) Mr. Eaglin would then wait in a ditch for the gun truck to come along, and he would hit the officer in the head with a small hammer. (Vol. 25, p. 513) Once he had a gun and a truck, Mr. Eaglin would then help assist Mr. Jones and Mr. Smith over the fence. (Vol. 25, p. 513) If that plan did not work, they were going to have knives and go to the officers' housing, which was less than a mile away, and obtain a vehicle. (Vol. 25, pp. 513-514)

It was Mr. Lykins' understanding that Mr. Eaglin and Charlie Fuston had "had words a couple of days before this incident occurred," and Mr. Eaglin "was going to kill Charlie before he left because he didn't like the way he disrespected

him." (Vol. 25, p. 514) Mr. Eaglin also said that he would kill anybody who tried to stop him from doing what he was going to do. (Vol. 25, p. 514)

On June 13, 2003, Mr. Lykins gave an affidavit in which he swore that he had no knowledge of the escape attempt or the killings. (Vol. 25, pp. 516-519) He testified at trial that he was in fear for his life when he gave that statement. (Vol. 25, p. 520) Later, in July, 2003, when he had been moved to Polk Correctional Institution and felt safe, Mr. Lykins told FDLE agents about the statements Mr. Eaglin had made. (Vol. 25, p. 521) Mr. Lykins also answered questions regarding what he knew about the escape and the statements Eaglin had made when he was deposed by defense counsel. (Vol. 25, p. 522)

Another inmate, Jesse Baker, who had been convicted of a felony nine times, was also at Charlotte Correctional Institution in June of 2003. (Vol. 25, pp. 524-525) He, Dwight Eaglin, Michael Jones, Stephen Smith, and Kenneth Lykins were all housed in D-Dorm, while John Beaston and Charlie Fuston were housed in a different dorm that was not an open-bay dorm, but had cells. (Vol. 25, pp. 525, 528-531)[5]

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[5] Correctional Officer Mary Patricia Poliseo testified that Mr. Beaston and Mr. Fuston lived in "F-Dorm" (Vol. 25, pp. 471-472), whereas Jesse Baker testified that they lived in "G-dorm." (Vol. 25, pp. 528-531)

Mr. Baker worked as a plumber, and sometimes worked on A-Dorm, but never during the evening work time after the main meal. (Vol. 25, pp. 525, 531) The work on A-Dorm was almost completed; an inspection had been scheduled, which the supervisor informed all those who worked on A-Dorm, including Mr. Eaglin. (Vol. 25, pp. 532-533)

In the weeks leading up to the escape attempt, Mr. Baker heard Inmates Eaglin, Smith, and Jones bragging about what they were going to do. (Vol. 25, pp. 534-535) "They just said they was [sic] gonna escape and anyone got in their way they would kill them. They said they would kill any bitch that got in their way." (Vol. 25, pp. 535, 538) The men were trying to make something to go over the perimeter fence without setting off the alarms. (Vol. 25, p. 535) A month before the June 11 escape attempt, they had made a metal thing to go over the outside fences and hook to the outside lights so that it would not "touch the gates to set them off[,]" but "it got cut up." (Vol. 25, p. 535) They were mad about this; Tommy [Eaglin] "blamed Charlie and Beatson [sic]" for destroying the metal piece. (Vol. 25, pp. 536-537) Mr. Eaglin indicated his intent to kill Charlie Fuston when he said that "if he ever got the chance he would straighten Charlie." (Vol. 25, p. 537)

Mr. Baker had been housed in the "psych dorm" at Charlotte C.I. for his own safety when he was experiencing severe

depression, and he also went into the crisis unit because of his depression and was placed on medication. (Vol. 25, pp. 539-540) He was not on medication the day he testified at Dwight Eaglin's trial. (Vol. 25, p. 540) He had solved his problems by taking a deep breath and saying everything was going to be all right. (Vol. 25, p. 540)

On cross-examination, Defense counsel for Mr. Eaglin was precluded from asking Mr. Baker about a disciplinary report he had received for lying to a corrections officer. (Vol. 25, pp. 540-543)

Special Agents Steve Uebelacher and Andrew Rose with the Florida Department of Law Enforcement came into contact with Dwight Eaglin at approximately 9:30 a.m. on June 12, 2003 in an administrative office at Charlotte Correctional Institution. (Vol. 28, pp. 1062-1064, 1078-1079) After Mr. Eaglin came into the room and was introduced to the two agents, he said that he wanted the electric chair, and said, "'I'll make it easy on you; I tried to kill those three people." (Vol. 28, pp. 1064-1065) Agent Uebelacher slowed him down, read him rights, and began a taped statement. (Vol. 28, pp. 1065-1067) The tape was played for Mr. Eaglin's jury. (Vol. 28, pp. 1069-1076) When Mr. Eaglin was asked what happened the previous night, he said he "decided to jump the fence." (Vol. 28, p. 1072) When he was asked about the correctional officer, Mr. Eaglin responded: "I'm not going

to talk to you about that right now." (Vol. 28, p. 1073) At the end of the tape, Mr. Eaglin said that he wanted "the chair." (Vol. 28, p. 1076)

Agent Uebelacher also recounted parts of a conversation he overheard 10-12 days later at Florida State Prison between Dwight Eaglin and Stephen Smith when they were in adjacent cells. (Vol. 28, p. 1077-1078) Mr. Eaglin said to Mr. Smith, "'Well, I'm trying to get the chair.'" Mr. Smith said, "'At least you get a TV.'" Mr. Eaglin responded: "'Yeah, that's what I'm saying,'" and he was laughing. (Vol. 28, p. 1077) Later in the same conversation, Dwight Eaglin said: "'They ain't gonna stick me in Mother F'ing Charlotte. Damn, that's why I tried that Mother F'ing fence, Dog. I said, Goddamn that thing—that F'ing thing fell over to the side. It was F'd up." (Vol. 28, pp. 1077-1078)

N. Leroy Parker was a Crime Analyst Supervisor with the Florida Department of Law Enforcement whose specialties were blood stain analysis and shooting reconstruction. (Vol. 27, pp. 834-835) He examined photographs of the crime scene, specifically the mop closet. (Vol. 27, p. 836) Mr. Parker found one area of impact blood spatter inside the closet and one outside. (Vol. 27, pp. 842-843) The spatter outside was about two feet high, and was consistent with an individual being struck with a hammer while they were lying prone or very near to

the floor. (Vol. 27, p. 844) Blood around the door was consistent with an individual being dragged from outside into the closet. (Vol. 27, p. 845) The impact spatter inside the closet and cast-off blood stains in the closet were consistent with someone taking a sledgehammer and striking someone on the ground, then drawing the hammer back for a second blow. (Vol. 27, p. 846) Mr. Parker also examined the pants that were seized from Mr. Eaglin by the Florida Department of Law Enforcement after the attempted escape and found areas of blood spatter as well as contact stains. (Vol. 27, pp. 852-858) The height of the impact spatter on the pants indicated that the source of the blood was "somebody on or very near to the ground." (Vol. 27, p. 857)

Mr. Parker also found contact stains and impact spatter on pants and a white T-shirt from Stephen Smith. (Vol. 27, pp. 862-863)

Roshale Gaytmenn, a crime laboratory analyst in the biology section of the Florida Department of Law Enforcement, testified as the State's DNA expert. (Vol. 27, pp. 980-1002; Vol. 28, pp. 1011-1052) She examined various items of evidence pertaining to this case for DNA, using the Short Tandem Repeats (or STR) method. (Vol. 27, p. 986; Vol. 28, pp. 1011-1028) When Ms. Gaytmenn was working a case, she normally attempted "to get a DNA profile at 13 areas[,]" although in some cases she might

only attempt nine or six, depending upon the case specifics. (Vol. 28, p. 1016) When she examined a swab in this case that was represented as coming from a shower adjacent to cell 2-214, she was able to get a DNA profile from four areas, and that profile matched the DNA profile of Charles Fuston. (Vol. 28, pp. 1011-1017) "[T]the frequency of occurrence of that profile in unrelated individuals would be 1 in 30,000 Caucasians; one in 5,000 African-Americans, and 1 in 32 Southern Hispanics." (Vol. 28, p. 1017) When Ms. Gaytmenn examined the sledgehammer that was admitted into evidence as Exhibit Number 4, which tested positive for blood, she attempted to obtain a DNA profile from nine areas, and was able to do so. (Vol. 28, pp. 1018-1021, 1041-1042) This DNA profile matched the DNA profile of Darla Lathrem at all nine areas. (Vol. 28, p. 1021) "The frequency of the DNA profile from the hammer [was] approximately 1 in 30 trillion Caucasians; 1 in 27 trillion African-Americans; and 1 in 86 trillion Hispanics." (Vol. 28, p. 1021) Ms. Gaytmenn performed several tests on an item that was represented as being the pants of Dwight Eaglin. (Vol. 28, pp. 1022-1023) She found chemical indications for the presence of blood and attempted to perform DNA analysis on several of the stains. (Vol. 28, p. 1023) Four of the stains from which she was able to obtain a DNA profile matched that of Dwight Eaglin. (Vol. 28, p. 1024) The fifth stain, which was on the bottom left leg of the pants

and was very small, contained a mixture of DNA. (Vol. 28, p. 1024-1026, 1033) Assuming that Dwight Eaglin was a contributor to the mixture, Ms. Gaytmenn "was able to get a profile for the foreign contributor at three areas" and "was unable to exclude at four areas." (Vol. 28, p. 1024) "At the three areas [she] was able to match a contributor, that profile matched Darla Lathrem at three areas. And four additional areas [she] was unable to exclude her [Darla Lathrem] as a contributor to the mixture of blood DNA." (Vol. 28, p. 1024) The frequency at which the DNA profile existed in the general population was One in 22,000 Caucasians, one in 26,000 African-Americans, and one in 10,000 Southeastern Hispanics. (Vol. 28, p. 1024) An additional stain that was on the back of the left leg of the pants at the knee area gave chemical indications for blood, and the DNA profile developed therefrom matched that of Charles Fuston at nine areas. (Vol. 28, pp. 1025-1026) The frequency of occurrence of that profile in unrelated individuals was one in 3.6 trillion Caucasians, one in 2.2 trillion African-Americans, and 1 in 1.1 trillion Southeastern Hispanics. (Vol. 28, p. 1025) Finally, Ms. Gaytmenn examined boots that were admitted into evidence as boots of Dwight Eaglin, first attempting to find areas that gave positive indications for blood, and then attempting to obtain a DNA profile from those areas. (Vo. 28, pp. 1026-1027) Blood from the left boot in the area "right

below where the laces would be" (this stain was about the size of a quarter) yielded a DNA profile that matched that of Darla Lathrem at nine areas. (Vol. 28, pp. 1027-1028, 1033) The frequency at which that profile might exist in the general population was approximately one on 30 trillion Caucasians, one in 37 trillion African-Americans, and one in 86 trillion Southeastern Hispanics. (Vol. 28, p. 1028) Ms. Gaytmenn also analyzed shoes represented as coming from Stephen Smith. (Vol. 28, p. 1039) The zipper on the right shoe gave positive indications for the presence of blood, and a DNA profile that matched that of Darla Lathrem at all nine areas. (Vol. 28, p. 1041) The frequency estimations provided by Ms. Gaytmenn were "estimations within a 10-fold difference." (Vol. 28, p. 1036)

After the State rested, defense counsel moved for a judgment of acquittal, which was denied. (Vol. 28, pp. 1108-1109)

The defense rested without presenting any evidence. (Vol. 28, p. 1110)

Penalty Phase

State's Case

The State presented four witnesses at the penalty phase, which was held on February 27, 2006. (Vol. 29, pp. 1200-1384) Assistant State Attorney Michael Marr from the Sixth Judicial

Circuit testified regarding his prosecution of Dwight Eaglin for a previous first-degree murder that occurred in Pinellas County in 1998. (Vol. 29, pp. 1238-1248) According to Mr. Marr, the 27 year old victim was stabbed to death in the parking lot of an adult establishment called Temptations after he discovered Mr. Eaglin attempting to steal a CD changer from the rear compartment of a Geo Tracker that Mr. Eaglin had stolen. (Vol. 29, pp. 1240-1242) Mr. Eaglin's story at the time was that the victim had attacked him because he wanted Mr. Eaglin's gold chain. (Vol. 29, p. 1242) However, Mr. Marr testified that there was no physical evidence or other evidence to support this claim of self-defense. (Vol. 29, 1242-1243) Mr. Eaglin had blood on him after the incident, but no injuries. (Vol. 29, p. 1243) The case was submitted to the jury on alternative theories of premeditation and felony-murder during the course of a burglary to a vehicle, and the jury returned a general verdict of guilty. (Vol. 29, pp. 1243, 1245-1246) On January 10, 2001, Mr. Eaglin was sentenced to life imprisonment without possibility of parole. (Vol. 29, p. 1243)

The other three State witnesses at penalty phase were victim impact witnesses: Pat Rollins, Darla Lathrem's sister (Vol. 29, pp. 1248-1250), Virginia P. Noble, a neighbor of Darla Lathrem (Vol. 29, pp. 1250-1252), and Lieutenant Roderick

Spears, who worked with Darla Lathrem at Charlotte Correctional Institution. (Vol. 29, pp. 1253-1254)[6]

Defense Case

The first defense penalty phase witness was Daryl McCasland of the Office of the Inspector General, Florida Department of Corrections. (Vol. 29, pp. 1256-1282) He was "instructed to look into the incident [at Charlotte Correctional Institution] to see if any policies or procedures may have been violated." (Vol. 29, p. 1257) Mr. McCasland conducted over 100 interviews and generated a report dated January 15, 2004, which was admitted into evidence as Defense Exhibit E. (Vol. 29, pp. 1258-1259, 1280-1282; SVol. 2, p. 201-SVol. 6, p. 1154) Dorm A was the last one being renovated, and Mr. McCasland concentrated on this dorm. (Vol. 29, p. 1260) His findings were "focused strictly from April 19th to June 11th [2003], because that's when A-Dorm opened up for construction, reconstruction." (Vol. 29, p. 1280)

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[6] The defense had filed a pretrial motion to have victim impact evidence presented to the court alone, and not to the jury. (Vol. 16, pp. 3017-3022) The court entered an order denying the motion, but requiring the State to proffer any victim impact evidence before it was presented to the jury. (Vol. 16, p. 3073) The subject was addressed again at the beginning of the penalty phase. (Vol. 29, pp. 1202-1214) Although the trial court indicated his preference that victim impact evidence be presented at the Spencer hearing, he ultimately permitted the State to present its testimony after a proffer, over defense objections. (Vol. 29, pp. 1202-1214)

Mr. McCasland learned that there had been a request from one of the regional maintenance supervisors to have an additional officer placed in the dorm during construction hours so that the number of inmates and construction activity could be increased, but he found no evidence "to indicate that there were ever two officers working in this area during evening hours or that this requirement was effectively communicating [sic] to the shift supervisor." (Vol. 29, pp. 1261-1262)

Mr. McCasland found several "administrative concerns," including a lack of key control, inconsistencies as to whether body alarms were being provided for everybody, failure to follow a policy that all inmates working the evening detail were to be secured in hand restraints when escorted back to the dormitories after the master roster count, which took place at 8:30 p.m., failure to follow a policy that tools were to be secured outside the perimeter or outside the compound, and failure consistently to conduct face-to-face security checks in Dorm A. (Vol. 29, pp. 1262-1267, 1270)

On the night of the incident, Charlotte Correctional Institution had an optimum level of security as far as the number of officers was concerned; they needed 32 officers "to fill the essential holes[,]" and there were 41 on duty. (Vol. 29, p. 1277)

The size of the inmate night work crews varied from two to five inmates, with the average being 4.3. (Vol. 29, p. 1279)

Officer Lathrem would have had a radio with a panic button, but Mr. McCasland did not know whether or not it was working. (Vol. 29, p. 1270)

The second defense witness, Lance Henderson, was a correctional officer at Charlotte who had supervised a nighttime work detail in F-Dorm in April, 2003. (Vol. 29, pp. 1284-1285) There were maybe eight inmates in the crew, and Officer Henderson was the only officer in charge. (Vol. 29, p. 1285-1286)

Prior to the events of June, 2003, Officer Henderson had filed an incident report expressing his concerns about the number of correctional officers on duty supervising nighttime work details and the fact that he felt that the working environment was unsafe for the officers. (Vol. 29, p. 1286) He slid it underneath the colonel's door because he was afraid it would come up missing, and later discussed it with Colonel Heideshell, who said he would look into it. (Vol. 29, pp. 1286-1287) Officer Henderson did not know of any action having been taken on his report. (Vol. 29, p. 1287) He was never assigned to any more nighttime work details after he filed his report. (Vol. 29, pp. 1287-1288)

Gregory Giddens was a corrections officer who worked at the Charlotte Correctional facility from approximately August, 1998 until August, 2003. (Vol. 29, p. 1291) He was assigned to supervise inmates on night work detail in Dorm A once or twice a week for a period of perhaps six months. (Vol. 29, p. 1292) He normally supervised five inmates, and there was never another officer with him. (Vol. 29, pp. 1292-1295) Officer Giddens was concerned about his safety, and he voiced his concerns "on a daily continuing." (Vol. 29, p. 1295) "There were all kinds of security problems." (Vol. 29, p. 1295) Radios did not work, there would be "varying assignments of keys," and they once lost a ladder. (Vol. 29, p. 1295) Officer Giddens made sure that he always had a body alarm. (Vol. 29, p. 1296) Only once or twice in six months did another officer come to check on Officer Giddens. (Vol. 29, pp. 1296-1297)

According to Officer Giddens, the master roster count, in which each inmate had to be identified by name and department of corrections number, took place around 10:00 at night. (Vol. 29, p. 1297)

When an officer was supervising an inmate work crew, there were times when his back would be to inmates, because they would be working in different parts of the building, performing different tasks. (Vol. 29, pp. 1298-1299)

Officer Giddens had filed written complaints in the past that had "been shredded." (Vol. 29, p. 1299)

The "scuttlebutt" was that some inmates had their classification "downrated in order for them to be in the open population ward" or be assigned to the nighttime work detail. (Vol. 29, pp. 1300-1301)

The deadline to complete construction on Dorm A was June 30 or July 1, and there was a "big push" to have the work "done by a court deadline in order to be within the regulation of the lawsuit." (Vol. 29, p. 1301)

Charlotte Correctional Institution was built to house 1150 inmates. (Vol. 29, pp. 1301-1302) Each dorm usually housed 146 or 148 inmates. (Vol. 29, p. 1302) In June, 2003, the prison was probably about 300 inmates below capacity because of the renovation of the two dorms. (Vol. 29, p. 1302)

James Aiken was president of a prison consulting firm and an expert in prison and inmate management who was retained by the defense, and was provided with a "wealth of information." (Vol. 29, pp. 1305-1307) He opined that there were various systems failures at Charlotte Correctional Institution that facilitated the events of June 11, 2003. (Vol. 29, pp. 1307-1328) One of them was a failure in classifications; a high-security inmate such as Mr. Eaglin, who was serving a sentence of life without parole for murder, should not have been working

after dark and after the master roster count. (Vol. 29, pp. 1307-1309) Other failures existed in the tool control system, the inmate accountability system, the security staffing system, the monitoring system, as well as with the construction itself, where the officers supervising the inmates did not seem to have any expertise in the building trade. (Vol. 29, pp. 1310-1316) The various systems failures provided a "grand opportunity" for Mr. Eaglin to attempt his escape. (Vol. 29, p. 1327)

The final witness for the defense was Dwight Thomas Eaglin himself. (Vol. 29, pp. 1344-1353) Among other things, Mr. Eaglin stated that, while the inmates in the prison system had to follow the rules, the corrections officers did not; they beat and killed inmates, but none of them went to prison for it. (Vol. 29, p. 1347) He also described his treatment after the events of June 11: he "was in a room for 34 days with nothing but a pair of boxer shorts. No toilet paper, no soap, no toothpaste." (Vol. 29, p. 1348) Assistant Warden Berry at Florida State Prison told him that he "was going to die in that cell." (Vol. 29, p. 1348) At least twice a month, they would do tours through the prison; when they walked by Mr. Eaglin's cell, they would say, "[T]hat's the cell where we killed Frank Valdez at." (Vol. 29, p. 1348) He acknowledged that he saw an opportunity to escape and planned to escape from his "unlawful imprisonment." (Vol. 29, pp. 1350-1351)

SUMMARY OF THE ARGUMENT

Defense counsel was unduly restricted in cross-examination of State witness Jesse Baker, an inmate in the Florida State Prison system, when the court refused to allow counsel to ask Baker about a major Disciplinary Report (or DR) he had received for lying to a correctional officer. Baker's testimony was important to the State's case in that he recounted conversations he allegedly heard in which Mr. Eaglin, Michael Jones, and Stephen Smith planned their escape and talked about how they would kill if necessary to effect the escape. Defense counsel should have been permitted to impeach Baker's credibility by showing that he had lied on a previous occasion.

The court below erred in refusing to permit Dwight Eaglin's penalty phase jury to see and hear a videotape of a news report that was relevant to the defense presentation, as it concerned the security conditions at Charlotte Correctional Institution and the attitude of the Department of Corrections with regard to correctional officers' safety.

This Court cannot have confidence that the sentencing outcome in this case is reliable, and cannot adequately fulfill its function of proportionality review. Although 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 Institution constituted a valid mitigating circumstance.

The court below erred in factoring Dwight Eaglin's supposed lack of remorse into the sentencing equation. This Court has repeatedly stated that lack of remorse has no place in the capital sentencing process.

There was insufficient evidence to justify the submission of the CCP aggravating factor to Mr. Eaglin's jury and the court's finding of this circumstance in his sentencing order. Although the escape attempt may have been planned well in advance, CCP would only apply if there was a careful plan or prearranged design to kill Darla Lathrem and Charles Fuston. The prosecutor's argument to the jury at penalty phase may have misled them into thinking that the planning that went into the escape itself could justify a finding of CCP. Finally, Mr. Eaglin had at least a pretense of moral or legal justification for his actions due to the conditions in the prison system and what he viewed as his unlawful imprisonment.

Pursuant to Ring v. Arizona, 122 S.Ct. 2428 (2002), Florida's scheme of capital punishment violates principles of due process of law and the right to trial by jury, and Mr. Woodel's sentence of death imposed under such a scheme cannot be permitted to stand.

ARGUMENT

ISSUE I

THE COURT BELOW ERRED IN REFUSING TO PERMIT DEFENSE COUNSEL TO IMPEACH THE CREDIBILITY OF STATE WITNESS JESSE BAKER BY ASKING HIM ABOUT A DISCIPLINARY REPORT THAT HAD BEEN FILED AGAINST HIM FOR LYING TO A CORRECTIONAL OFFICER.

Two inmates, Kenneth Lykins and Jesse Baker, both of whom had multiple felony convictions, testified that they heard discussions among Dwight Eaglin, Michael Jones, and Stephen Smith as the trio planned its escape attempt. On cross-examination of Jesse Baker, defense counsel sought to question him about a DR, or disciplinary report, he had received while incarcerated. (Vol. 25, pp. 540-543) Counsel explained that the DR was "a major one, for lying to a corrections officer[,]" for which Mr. Baker had been given "60 days in solitary[.]" (Vol. 25, pp. 540-542) However, the jury was never permitted to hear about the DR, as the trial court sustained an objection by the prosecutor to this testimony. (Vol. 25, pp. 540-543)

Full and fair cross-examination of a witness in a criminal case is a right, not merely a privilege, and stems from constitutional guarantees of due process (Amendment XIV) and the right to confront one's accusers (Amendment VI). McDuffie v. State, ___ So.2d ___, 32 Fla. L. Weekly S763, 2007 WL 4123241 (Fla. Nov. 21, 2007). It is particularly important that this

right be accorded to one who is charged with first-degree murder. Id. "While the trial court may exercise discretion over the scope of cross-examination, it must insure that there will be ample latitude for pertinent inquiry and that such limitations as are placed on the cross-examination are done with solicitude for the defendant's Sixth Amendment rights. [Citations omitted.]" Lee v. State, 422 So.2d 928, 931 (Fla. 3d DCA 1982). "Curtailment of a defendant's right to cross-examination of State witnesses is a power to be used sparingly." Salter v. State, 382 So.2d 892, 893 (Fla. 4th DCA 1980). Allowable cross-examination includes not only matters covered on direct examination, but "matters affecting the credibility of the witness." § 90.612(2), Fla. Stat. (2006).

Dwight Eaglin's jury should have been permitted to hear about Mr. Baker's DR for lying to a correctional officer, as it would have impeached his credibility. Cliburn v. State, 710 So.2d 669 (Fla. 2d DCA 1998) is instructive. There, the appellate court reversed in part and remanded for a new trial due to the trial court's refusal to admit evidence that the victim had previously been jailed for filing a false police report in another matter. Similarly, in Williams v. State, 386 So.2d 25 (Fla. 2d DCA 1980), the court reversed and remanded for a new trial where the trial court excluded evidence that a State witness had lied to the police on a previous occasion, as this

went to the witness' credibility. The court noted the "'well recognized rule that limiting the scope of cross-examination in a manner which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony constitutes error. . .'" Id. at 26 [quoting with approval from Stradtman v. State, 334 So.2d 100, 101 (Fla. 3d DCA 1976), approved, 346 So.2d 67 (Fla.1977).] Mr. Eaglin's jury might well have found the fact that Jesse Baker had been punished for lying to a correctional officer to be very relevant and important in assessing the trustworthiness (or lack thereof) of his testimony, and the jury should have been allowed to know about this. Subsection 90.610 of Florida's Evidence Code provides for the credibility of a witness to be attacked by evidence that he has been convicted of a crime involving dishonesty or a false statement, which is at least analogous to Inmate Jesse Baker's situation, where he was "convicted" of breaking the rules of the Florida Department of Corrections when he lied to an officer.

The testimony of Jesse Baker and Kenneth Lykins was an important component of the State's case. The prosecutor referred to their testimonies in his closing argument to the jury during the guilt phase. (Vol. 29, pp. 1118, 1141-1142) He relied heavily upon their testimony at the penalty phase in arguing that the jury should find the "cold, calculated and premeditated" aggravating circumstance. (Vol. 29, pp. 1360-1361)

And the sentencing judge similarly relied heavily upon the testimony of Mr. Baker and Mr. Lykins in finding CCP in his sentencing order. (Vol. 19, pp. 3684-3686)

This Court has "long held that it is 'fatal error for the trial court to deny defense counsel the right of cross-examination for the purpose of laying a predicate for impeachment.' *See Coco [v. State],* 62 So.2d [892] at 896 [Fla. 1953]." McDuffie, supra. The defense was able to impeach the other "jailhouse snitch," Kenneth Lykins, by showing that he had filed a false affidavit two days after the escape attempt saying that he knew nothing about it. The court below abused his discretion[7] by disallowing the defense attempt to impeach the credibility of Jesse Baker by asking him about his DR for lying to a correctional officer. Therefore, Appellant must receive a new trial. Amends. VI and XIV, U.S. Const.; Art. I, §§ 9, 16, and 22, Fla. Const.

[7] "A trial court ruling with regard to the admissibility of evidence is reviewed under the abuse of discretion standard. [Citation omitted.]" Barnes v. State, ___ So.2 ___, 2007 WL 4191972 (Fla. Nov. 29, 2007).

ISSUE II

THE COURT BELOW ERRED IN REFUSING TO ADMIT INTO EVIDENCE AT PENALTY PHASE THE TAPE OF THE NEWS REPORT INVOLVING "JANE," A FORMER TRAINING ASSISTANT AT CHARLOTTE CORRECTIONAL INSTITUTION.

Before the penalty phase of Mr. Eaglin's trial actually began, the court and counsel discussed the admissibility of a videotape that the defense wished to put into evidence. (Vol. 29, pp. 1214-1226) The tape was played for the court (Vol. 29, pp. 1221-1224), and defense counsel presented the court with an affidavit to authenticate the tape. (Vol. 16, pp. 3057-3058; Vol. 29, 1221) The tape was of a news story that aired on WZN-TV on November 5, 2003. (Vol. 16, p. 3057) On the tape, a young woman named "Jane" described her experiences as a training assistant at Charlotte Correctional Institution. She was required to conduct a head count alone of 65 inmates in an open dormitory, (apparently, D-dormitory), but her fear of being killed, in the wake of the killing of Darla Lathrem three weeks earlier, prevented her from doing so, and she resigned her position. The tape also featured a brief interview with Sterling Ivey [Public Affairs Director, Florida Department of Corrections], who defended requiring "Jane" to conduct the head count by herself.

Although the prosecutor stated several objections to the tape, the court ultimately ruled it inadmissible on relevancy grounds. (Vol. 29, pp. 1214-1226)

The tape in question was an important part of the defense presentation at penalty phase, and Mr. Eaglin's jury should have been permitted to see it and hear it, and give it such weight as the jury felt it deserved. Among other things, the tape was relevant to show the rather cavalier attitude of the Department of Corrections regarding officer safety, and how this attitude impacted an employee of the Department. One wonders why the court saw fit to exclude this particular piece of evidence, while allowing the defense to put on other evidence concerning the many security lapses and policy failures which led to the incident in this case.

". . .[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." Gardner v. State, 530 So.2d 404, 405 (Fla. 3d DCA 1988), citing Faretta v California, 422 U.S. 806 (1975); Washington v. Texas, 388 U.S. 14 (1967) (right to call witnesses and present a defense is fundamental to due process of law); Amends. VI and XIV, U.S. Const., Article I, §§ 9, 16, and 22, Fla. Const.

There is a "low threshold for relevance" that must be met regarding what evidence a capital defendant may introduce in support of a sentence less than death. Hannon v. State, 941 So.2d 1109, 1168 (Fla. 2006). The tape in question met this threshold, and should have been permitted.

This Court's admonition in Guzman v. State, 644 So.2d 996, 1000 (Fla. 1994) is pertinent here:

> We are . . .concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

(Emphasis supplied.) Dwight Eaglin was on trial for his life, and yet the trial judge unduly restricted his ability to mount a defense by his ruling excluding the tape in question. As a result, Mr. Eaglin must receive a new trial.

As this issue deals with the admissibility of evidence, an abuse of discretion standard of review applies. Troy v. State, 948 So.2d 635, 650 (Fla. 2006).

ISSUE III

THIS COURT CANNOT HAVE CONFIDENCE IN THE RELIABILITY OF THE SENTENCING OUTCOME IN THIS CASE, BECAUSE NOT ALL AVAILABLE MITIGATING EVIDENCE WAS FULLY DEVELOPED AND PRESENTED TO APPELLANT'S JURY AND TO THE SENTENCING COURT, AND THE SENTENCING COURT FAILED TO GIVE ADEQUATE CONSIDERATION TO ALL AVAILABLE MITIGATING EVIDENCE PRESENT IN THE RECORD.

A. The Jury's Sentencing Recommendations

This is not a case in which the defendant waived the presentation of any and all mitigating evidence, or was a death "volunteer." See, for example, Koon v. Dugger, 619 So.2d 246 (Fla. 1993). Mr. Eaglin and his counsel did present a case in mitigation at penalty phase, unorthodox though it might have been, focusing as it did upon the many security lapses at Charlotte Correctional Institution which culminated in the events of June 11, 2003, thus essentially putting the system on trial. However, the defense waived or did not present at least two areas of potentially life-saving mitigating evidence of the type that is typically relied upon by defendants in capital sentencing proceedings, having to do with Mr. Eaglin's mental state and his abusive childhood.

At a status hearing held before Judge Blackwell on February 17, 2005, defense counsel for Mr. Eaglin said that he was "working on mental mitigation continuously and have been since

day one" and that counsel had "been all over the country developing social information for purposes of phase II[.]" (SVol. 7, p. 1200)

The record contains a one-page report from Licensed Psychologist Dr. Harry Krop dated October 20, 2005, which was attached to Mr. Eaglin's "Notice of Mental Mitigation Pursuant to FRCRP 3.202(b)(c)," which notice was filed on November 23, 2005. (Vol. 16, pp. 3002-3003) Dr. Krop's report states that he interviewed and tested Dwight Eaglin, and found the following "potential mitigating factors" (Vol. 16, p. 3003):

> 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.

On January 30, 2006, the defense filed a Notice of Intent Not to Offer Mental Mitigation and a Notice of Intent Not to Offer Dr. Harry Krop as a Defense Witness. (Vol. 17, pp. 3333-3334)

The presentence investigation (PSI) contains further details regarding Mr. Eaglin's troubled childhood (Svol. 8, p. 1296):

> [Mr. Eaglin's foster father] indicated that the defendant was given up as a Ward of the State some

> time between the ages of 13-15 and the defendant had gone through several foster homes. Tim Winge and his wife, Laura, took the defendant in some time between the ages of 13-15. He indicated that the defendant, whom he called Tommy, did well in school up until the 11th grade when he broke his leg and dropped out of school. His foster father indicated Tommy had an extremely rough childhood, indicating his father may have sexually abused and assaulted the defendant and other children in the household. The defendant told his foster father that his father broke his leg in front of the other children to teach the other children a lesson. Mr. Winge indicated that the defendant was extremely close with him and his foster mother and the defendant took it extremely hard when his foster mother died of cancer on April 30, 2003. He felt that this may have contributed to some of the defendant's issues. He indicated he did not see any type of psychological problems; however, did feel the defendant may have been on Paxil at one time. The defendant's foster father also indicated that his mother had little or nothing to do with the defendant, giving him up to the State at a very young age. Mr. Winge also related an incident that the defendant had related to him that cause[sic] the defendant a very great deal of emotional trauma. The defendant indicated to Mr. Winge that his father and mother had gone on vacation and while on vacation the defendant's father kicked his mother out of the car and that the defendant never saw his mother again after that incident. Mr. Winge stated that he is only aware that the defendant has one biological brother, Donnie Eaglin, who is approximately two years older than the defendant. Mr. Winge concluded the conversation by indicating this defendant was an extremely good child up until the time he broke his leg and started hanging around with the wrong crowd in high school. He related that he felt the defendant had an extremely troubled childhood with a completely dysfunctional family.

The PSI also indicates that Mr. Eaglin "had utilized cocaine and alcohol during his teenage years with prescribed

Prozac." (Svol. 8, p. 1296)

According to the PSI, Mr. Eaglin's father, Kenneth Eaglin, and half-brother, Joshua Boyer, were both inmates incarcerated in prisons in Illinois. (Svol. 8, p. 1295)

Obviously, the evidence of Mr. Eaglin's mental health issues and horrible childhood that is in the record is not well-developed; one senses that what is in the record is only the tip of the iceberg, a mere hint of what could have been presented to the jury and the judge. Unfortunately, Mr. Eaglin's jury never had the opportunity to consider this potentially compelling mitigation.

During the penalty phase, there was a brief discussion among the court, counsel, and Mr. Eaglin regarding his waiver of this mitigation. (Vol. 29, pp. 1341-1343) Defense counsel represented that he and Mr. Eaglin had had "discussions about putting on a lot of social work things, issues regarding childhood and things of that nature[,]" and that Mr. Eaglin did not feel that it would be fair to put his family through that. (Vol. 29, pp. 1341-1342) Mr. Eaglin confirmed that he had "instructed [his] counsel not to even do that." (Vol. 29, p. 1342) With regard to the mental mitigation, defense counsel represented that they had had "various discussions on that" and counsel felt it "would be on the dangerous side as far as the jury [was] concerned. So [he had] made the decision on mental

mitigation not to go ahead." (Vol. 29, pp. 1342-1343) 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. (Vol. 29, p. 1343)

This Court is very aware that evidence of the type that was available, but waived, in this case is admissible and is often relied upon to support a sentence less than death. ". . .[I]t is well settled that evidence of family background and personal history may be considered in mitigation. [Citation omitted.]" Power v. State, 886 So.2d 952, 959 (Fla. 2004). Accord: Stevens v. State, 552 So.2d 1082 (Fla. 1989). "Childhood trauma has been recognized as a mitigating factor. [Citations omitted.]" Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988). Evidence that the defendant lived in an abusive environment as a child would constitute a valid nonstatutory mitigating factor. Santos v. State, 591 So.2d 160 (Fla. 1991). See also, Nibert v. State, 574 So.2d 1059 (Fla. 1990); Muhammad v. State, 782 So.2d 343, 361-362 (Fla. 2001); Eddings v. Oklahoma, 455 U.S. 104 (1982), and many other cases.

With regard to Mr. Eaglin's psychological condition, the bipolar disorder from which he suffers was characterized by Dr. Krop as "a serious psychiatric disorder." And this Court has itself characterized bipolar disorder as a "serious mental

illness." Offord v. State, 959 So.2d 187, 193 (Fla. 2007). Had Dr. Krop testified at Mr. Eaglin's trial, he could perhaps have offered evidence that he qualifies for one or both of the statutory "mental mitigators" found in subsections 921.141(6)(b) and (f) of the Florida Statutes. The American Bar Association has taken the position that defendants should not be

> sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

Resolution 122A, adopted by the House of Delegates of the American Bar Association August 7-8, 2006. This document may be accessed at http://www.abanet.org/leadership/2006/annual/dailyjournal/hundredtwentytwoa.doc. But see, Lawrence v. State, 969 So.2d 294, 300 (footnote 9) (Fla. 2007), where this Court declined to extend the protections of Atkins v. Virginia, 536 U.S. 304 (2002), which bars execution of the mentally retarded, to defendants suffering from mental illness.

Because Mr. Eaglin's jury did not receive any of this mitigating evidence, their death recommendations cannot be considered reliable. Four of the 12 jurors recommended life; had the jury been aware of this additional mitigation, enough of them might have voted with the four to return recommendations of

life instead of death. [Only two more votes were needed for a life recommendation. Rose v. State, 787 So.2d 786, 807 (Fla. 2001) (". . .[T]he principle that a six-to-six vote by an advisory jury is a life recommendation is well established. [Citations omitted.]")] It is questionable how much weight, if any, should be given to the jury recommendations under these circumstances. See Muhammad, supra, 782 So.2d at 361-362 (jury's death recommendation should not have been given "great weight" where Muhammad refused to present mitigating evidence, and the trial court did not provide another means for the jury to be apprised of available mitigating evidence). But see, Boyd v. State, 910 So.2d 167 (Fla. 2005), which indicates that Muhammad's prohibition on giving great weight to the jury's death recommendation would not apply where the defendant did not waive all mitigation.

"Under Florida's capital sentencing statute, it is the jury's function, in the first instance, to determine the validity and weight of the evidence presented in aggravation and mitigation. [Citations omitted.]" Holsworth, supra. Mr. Eaglin's jurors were not able fully to perform this function where they were not apprised of all available mitigating evidence.

B. The Court's Consideration of Mitigation

Some of what has been stated above applies equally to the court's consideration of mitigation. Like the jury, the court was not provided with a fully-developed case in mitigation. However, the court had more to work with than Mr. Eaglin's jury, because the court was privy to Dr. Krop's report and the PSI.

". . . [M]itigating evidence *must* be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." Farr v. State, 621 So.2d 1368, 1369 (Fla. 1993) (In Farr the trial court erroneously failed to consider a psychiatric evaluation and PSI.) See also, Santos, 591 at 164.

In his sentencing order, the court below did discuss Mr. Eaglin's traumatic childhood, to the extent that information regarding his childhood was contained in the PSI. (Vol. 19, p. 3686) The court concluded that a mitigating factor did exist "in that the Defendant suffered a severely abusive childhood with a severely dysfunctional family and the only family warmth he experienced was with his later foster parents." (Vol. 19, p. 3686) The court gave this mitigating factor "some weight." However, the court did not address the notation in the PSI regarding Mr. Eaglin's use of "cocaine and alcohol during his teenage years with prescribed Prozac." Moreover, the 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.

An additional problem with the court's handling of mitigation is that he did not find Mr. Eaglin's evidence regarding the multiple security lapses, systems failures, etc. at Charlotte Correctional Institution to be mitigating in any way. The court discussed the defense evidence, but ultimately concluded that the failures within the prison did not constitute a mitigating factor. (Vol. 19, pp. 3687-3689) There are few limits on the evidence that a capital defendant may introduce in support of a sentence less than death. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, supra; Hannon v. State, 941 So.2d 1109 (Fla. 2006). However, allowing a capital defendant to introduce mitigating evidence is meaningless if, as here, the sentencer does not give it effect, does not use it to counterbalance whatever may exist in aggravation. See, Boyde v. California, 494 U.S. 370 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989). Perhaps the most compelling argument that the sentencing court should have found Mr. Eaglin's evidence to constitute valid mitigation is that four of the jurors apparently did so, as they voted for life. The sentencing court could have given such weight to this factor as he deemed

appropriate, Merck v. State, ___ So.2d ___, 2007 WL 4259197 (Fla. 2007), but Mr. Eaglin was entitled to at least have it weighed in the sentencing balance.

C. Conclusion

For the reasons discussed above, this Court cannot have confidence in the reliability of the sentencing outcome in this case. Nor is the Court able properly to fulfill its proportionality review function where less than all available mitigating evidence was presented to the judge and jury and made part of the record of this case. In Muhammad, this Court noted that proportionality review is made "difficult, if not impossible" where the defendant fails to present mitigating evidence; the Court is unable "to adequately compare the aggravating and mitigating circumstances in this case to those present in other death penalty cases." 782 So.2d at 365. This concern also exists, albeit to a lesser degree, where less than all available mitigating evidence is presented and fully considered by judge and jury. Dwight Eaglin's sentences of death must not be permitted to stand. Amends. VI, VIII, XIV, U.S. Const.; Art. I, §§ 9, 16, 17, 22, Fla. Const.

Mr. Eaglin's issue involves matters of law, and so should be reviewed de novo. State v. Dempsey, 916 So.2d 856 (Fla. 2d DCA 2005); Knarich v. State, 932 So.2d 257 (Fla. 2d DCA 2005).

ISSUE IV

THE COURT BELOW ERRED IN USING DWIGHT EAGLIN'S SUPPOSED LACK OF REMORSE AGAINST HIM IN SENTENCING MR. EAGLIN TO DEATH.

Near the end of his written order imposing two death sentences upon Appellant, Dwight T. Eaglin, the trial court wrote (Vol. 19, p. 3689): "Finally, the court recalls that this Defendant testified during the penalty phase and again in the Spencer hearing. At neither time did he express anything like genuine remorse. His attitude bordered on arrogance." In the next paragraph, the court concluded that the aggravating circumstances in this case greatly outweighed the mitigating circumstances, and then went on to sentence Mr. Eaglin to death for the murders of Darla Lathrem and Charles Fuston. (Vol. 19, p. 3689)

This Court has held that "lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). "'It is error to consider lack of remorse for any purpose in capital sentencing.'" Colina v. State, 570 So.2d 929, 933 (Fla. 1990), quoting from Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985). This Court has "clearly stated that

lack of remorse is a nonstatutory aggravating circumstance and cannot be considered in a capital sentencing. [Citations omitted.]" Shellito v. State, 701 So.2d 837, 842 (Fla. 1997) Clearly, Mr. Eaglin's remorseless attitude as perceived by the trial court made such a negative impression upon the judge that he felt compelled to use it as a factor in his decision to sentence Mr. Eaglin to two death sentences. Use of this irrelevant factor in the capital sentencing process has been repeatedly condemned by this Court. The sentencing court's reliance upon this improper element calls into question the reliability of the court's sentencing determination. Mr. Eaglin should not be punished for his "attitude." Therefore, in order to comport with constitutional principles of due process of law and to avoid the infliction of cruel or unusual punishment, Mr. Eaglin's sentences of death cannot be permitted to stand. Amends. VIII & XIV, U.S. Const., Art I, §§ 9, 17, Fla. Const.

This issue involves a matter of law and so should be examined using the de novo standard of review. State v. Dempsey, 916 So.2d 856 (Fla. 2d DCA 2005); Knarich v. State, 932 So.2d 257 (Fla. 2d DCA 2005).

ISSUE V

THE EVIDENCE PRESENTED BELOW WAS INSUFFICIENT TO SUPPORT THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE.

The court below instructed Mr. Eaglin's penalty phase jury that one of the circumstances they could consider in aggravation was that the crime "was committed in a cold and calculated and premeditated manner and without any pretense of any moral or legal justification." (Vol. 29, p. 1369) The court also found this circumstance to exist in his sentencing order, as to both killings. (Vol. 19, pp. 3684-3686) While there was ample evidence to show that the escape was planned well in advance, the evidence fell short of establishing that the homicides met the standard of heightened premeditation required for this factor to apply.

In order for CCP to be found, the defendant must have had "a careful plan or a prearranged design" to kill. Besaraba v. State, 656 So.2d 441, 444 (Fla. 1995); Jackson v. State, 648 So.2d 85, 89 (Fla. 1994). This aggravator involves a heightened "premeditation beyond that normally sufficient to prove premeditated murder." Perry v. State, 522 So.2d 817, 822 (Fla. 1988) "Evidence of a plan to commit a crime other than murder . . . is in and of itself insufficient to support CCP." Jennings v. State, 718 So.2d 144, 152 (Fla. 1998). See also,

Castro v. State, 644 So.2d 987 (Fla. 1994); Vining v. State, 637 So.2d 921 (1994). Although there was evidence adduced below that much planning went into the escape attempt, and some evidence (albeit from two "jailhouse snitches" whose testimony was of questionable reliability, at best) that Mr. Eaglin may have contemplated the possibility of killing if someone attempted to thwart the escape, the evidence fell short of establishing that the homicides themselves were sufficiently planned and prearranged to qualify as CCP.

Mr. Eaglin would note that, in his penalty phase argument to the jury on the matter of CCP, the prosecutor emphasized the degree of planning that went into the escape attempt. (Vol. 29, pp. 1359-1361) Although there was no objection to this argument, the jury may have been misled into thinking that CCP would apply if the attempted escape was well-planned and thought out in advance, which is not the law.

In addition, contrary to what the prosecutor said in his argument to the jury (Vol. 29, p. 1361), Mr. Eaglin had at least a pretense of justification for his actions. In his penalty phase testimony he described how only the inmates had to abide by the rules, while the guards did not. (Vol. 29, p. 1347) The guards, he said, beat and killed inmates, but none of them went to prison for it. (Vol. 29, p. 1347) He concluded that he was trying "to escape an unlawful imprisonment[.]" (Vol. 29, p.

1351) Thus, he expressed at least a pretense of a legal or moral justification for what he did.

The trial court should not have submitted the CCP aggravating circumstance to Mr. Eaglin's jury, or found it to exist in his sentencing order. Mr. Eaglin must receive a new penalty trial. See Bonifay v. State, 626 So.2d 1310 (Fla. 1993) and Omelus v. State, 584 So.2d 563 (Fla. 1991).

As Mr. Eaglin's issue involves a matter of law, the de novo standard of review applies. State v. Glatzmayer, 789 So.2d 297 (Fla. 2001); State v. Dempsey, 916 So.2d 856 (Fla. 2d DCA 2005); Knarich v. State, 932 So.2d 257 (Fla. 2d DCA 2005).

ISSUE VI

DWIGHT EAGLIN IS ENTITLED TO LIFE SENTENCES BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATED HIS DUE PROCESS RIGHT AND HIS RIGHT TO A JURY TRIAL WHICH REQUIRE THAT A DEATH-QUALIFYING AGGRAVATING CIRCUMSTANCE BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

Mr. Eaglin's issue presents a question of law, and so the standard of review is de novo. State v. Glatzmayer, 789 So.2d 297 (Fla. 2001); State v. Dempsey, 916 So.2d 856 (Fla. 2d DCA 2005); Knarich v. State, 932 So.2d 257 (Fla. 2d DCA 2005).

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000) and Jones v. United States, 526 U.S. 227, 243 n. 6 (1999), the United States Supreme Court held that any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Basing its decision both on the traditional role of the jury under the Sixth Amendment and principles of due process, the Apprendi Court observed:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened, it necessarily follows that the defendant should not-at the moment the state is put to proof of those circumstances-be deprived of protections that have until that point unquestionably attached.

530 S.Ct. at 2359. The Apprendi Court held that the same rule applies to state proceedings pursuant to the Fourteenth Amendment. 530 S.Ct. at 2355. These essential protections include (1) notice of the State's intent to establish facts that will enhance the defendant's sentence; and (2) a jury's determination that the State has established these facts beyond a reasonable doubt.

These principles have been applied in subsequent cases as well, such as Blakely v. Washington, 542 U.S. 296 (2004) (defendant's Sixth Amendment right to trial by jury was violated where he was sentenced to more than three years above the 53-month statutory maximum of the standard range for his offense on the basis of the sentencing judge's finding that he acted with deliberate cruelty) and Cunningham v. California, 127 S.Ct. 856 (2007) (defendant's right to trial by jury was violated by California's determinate sentencing law, which authorized judge, not jury, to find facts exposing defendant to elevated upper term sentence).

In Jones, 526 U.S. at 250-251, the Court distinguished capital cases arising from Florida.[8] In Apprendi, 530 S.Ct. at 2366, the Court noted that it had previously

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[8] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989).

> rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649. . .(1990)[.]

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v. Moore, 786 So.2d 532,536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001). In Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), however, the United States Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990), and held that the Sixth and Fourteenth Amendments to the United States Constitution require the jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

A defendant convicted of first-degree murder may not be sentenced to death without an additional finding. At least one aggravator must be found as a sentencing factor. Like the hate crimes statute in Apprendi, Florida's capital sentencing scheme exposes a defendant to enhanced punishment—death rather than life in prison—when a murder is committed "under certain circumstances but not others." Apprendi, 120 S.Ct. at 2359. This Court has emphasized that "[t]he aggravating circumstances in Florida law 'actually define those crimes. . .to which the death penalty is applicable. . ." State v. Dixon, 283 So.2d 1,

8 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943 (1974).

Dwight Eaglin was sentenced to death pursuant to section 921.141, Florida Statutes (2003), which does not require a jury finding that any specific aggravating factor exists. Section 921.141(2) governs the advisory sentence rendered by the jury in this case and provides as follows:

> (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based on the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations whether the defendant should be sentenced to life imprisonment or death.

On its face, this statute does not require any express finding by the jury that a death qualifying aggravating circumstance has been proven. Moreover, this Court has never interpreted this statute to require the jury to make findings that specific aggravating circumstances have been proven. See Randolph v. State, 562 So.2d 331, 339 (Fla.), cert. denied, 498 U.S. 992 (1990); Hildwin v. Florida, 490 U.S. 638, 639 (1989). Consequently, the statute plainly violates the Sixth and Fourteenth Amendment requirements of Jones, Apprendi, and Ring, and is unconstitutional on its face.

Mr. Eaglin's case illustrates how section 921.141 violates the requirement that the jury must find a death qualifying aggravating circumstance. Pursuant to section 921.141, the jury was instructed to consider five aggravating circumstances as to Darla Lathrem's death (Vol. 29, pp. 1368-1370): 1) under sentence of imprisonment; 2) previous conviction of another capital offense or a felony involving use or threat of violence; 3) crime committed for the purpose of effecting an escape from custody; 4) cold, calculated, and premeditated; and 5) victim was a law enforcement officer. The jury was instructed on the same aggravators as to the killing of Charles Fuston, except the last one. (Vol. 29, pp. 1370-1372)

The judge instructed the jury that it was their duty to render to the court an advisory sentence based upon their determination as to whether sufficient aggravating circumstances existed to justify imposition of the death penalty, and whether sufficient mitigating circumstances existed to outweigh any aggravating circumstances found to exist. (Vol. 29, p. 1368) The jurors were further instructed that, if they found sufficient aggravating circumstances existed, it would then be their duty to determine whether mitigating circumstances existed that outweighed the aggravating circumstances (Vol. 29, p. 1372), and that, if one or more aggravating circumstances was established, the jury

> should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(Vol. 29, p. 1374)

The jurors were instructed that it was not necessary that the advisory sentence of the jury be unanimous. (Vol. 29, p. 1374)[9] They were never instructed that all must agree that at least one specific death-qualifying aggravating circumstance existed—and that it must be the same circumstance. Thus, the sentencing jury was not required to make any specific findings regarding the existence of particular aggravators, but only to make a recommendation as to the ultimate question of punishment.

The jury ultimately returned advisory sentences recommending by votes of eight to four that the court impose the death penalty for each of the murders in this case. The advisory sentences did not contain findings as to which specific aggravating circumstance(s) was (were) found to exist. (Vol. 19, pp. 3621-3622; Vol. 29, pp. 1378-1379)

It is likely in any case that some of the jurors will find certain aggravators which other jurors reject. What this means is that a Florida judge is free to find and weigh aggravating

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[9] Defense counsel filed a Motion to Require Unanimous Jury in the Penalty Phase (Vol. 16, pp. 3023-3026), which was denied. (Vol. 16, p. 3077)

circumstances that were rejected by a majority, or even all of the jurors. The sole limitation on the judge's ability to find and weigh aggravating circumstances is appellate review under the standard that the finding must be supported by competent substantial evidence. Willacy v. State, 696 So.2d 693, 695 (Fla. 1997).

An additional problem with the absence of any jury findings with respect to the aggravating circumstances is the potential for skewing this Court's proportionality analysis in favor of death. An integral part of this Court's review of all death sentences is proportionality review. Tillman v. State, 591 So.2d 167 (Fla. 1991). This Court knows which aggravators were found by the judge, but does not know which aggravators and mitigators were found by the jury. Therefore, the Court could allow aggravating factors rejected by the jury to influence proportionality review. Such a possibility cannot be reconciled with the Eighth and Fourteenth Amendment requirement of reliability in capital sentencing.

The flaws in Florida's capital sentencing scheme discussed above constitute fundamental error which may be raised for the first time on appeal. In Trushin v. State, 425 So.2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because

the arguments surrounding the statute's validity raised fundamental error. In State v. Johnson, 616 So.2d 1, 3-4 (Fla. 1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process.

In Maddox v. State, 760 So.2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b), as amended in 1999 to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed, were entitled to argue fundamental sentencing errors for the first time on appeal. To qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious; such as a sentencing error which affected the length of the sentence. Id. at 99-100. Defendants appealing death sentences do not have the benefit of Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So.2d 1015, 1026 (1999).

The facial constitutionality of the death penalty statute, section 921.141, Florida Statutes, is a matter of fundamental

error. The error is apparent from the record, and it is certainly serious because it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes far beyond the liberty interests involved in sentencing enhancement statutes.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have a jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Thus, Florida's death penalty statute is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence be found by the jury to have been proven beyond a reasonable doubt, as set forth in Jones, Apprendi, and Ring. This issue constitutes fundamental error, and can never be harmless. This Court must reverse Mr. Eaglin's death sentences and remand for life sentences to be imposed instead.

Mr. Eaglin recognizes that in King v. Moore, 831 So.2d 143 (Fla. 2002) and Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and

subsequent cases this Court rejected arguments similar to those raised herein, but asks the Court to revisit these important issues, and raises them here to preserve them for possible further review in another forum.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, your Appellant, Dwight T. Eaglin, prays this Honorable Court for relief as follows: (1) reverse his convictions and sentences and remand for a new trial; or (2) vacate his sentences of death in favor of life sentences; or (3) reverse his death sentences and remand to the lower court for a new penalty trial before a new jury; or (4) reverse his death sentences and remand for reconsideration of his sentences by the court. Mr. Eaglin also requests such other and further relief as this Honorable Court deems appropriate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Attorney General's Office, Concourse Center #4, 3507 E. Frontage Rd.—Suite 200, Tampa, FL 33607-7013, (813) 287-7900, on this 26th day of January, 2008.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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