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IN THE SUPREME COURT OF FLORIDA

DWIGHT T. EAGLIN,

Appellant,

v.

CASE NO. SC12-1760  
L.T. No. 03-CF-1525  
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE TWENTIETH JUDICIAL CIRCUIT,  
IN AND FOR CHARLOTTE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE AND FACTS

This Court summarized the relevant facts in its opinion affirming Eaglin's judgments and sentences of death:

### FACTS

Dwight T. Eaglin, who was serving a life sentence for murder when the crimes occurred in this case, was convicted of the June 11, 2003, murders of correctional officer Darla K. Lathrem and inmate Charles Fuston. The conviction and death sentence of codefendant Stephen Smith, who was tried separately for the murder of Lathrem, was affirmed by this Court and rehearing was denied. See Smith v. State, 998 So. 2d 516 (Fla. 2008), cert. denied, --- U.S. ---, 129 S. Ct. 2006, 173 L.Ed.2d 1101 (2009) (No. 08-8829). A third codefendant, Michael Jones, pled guilty to first-degree murder and received a life sentence. Id.

The evidence at trial established that in 2003, the Charlotte Correctional Institution was undergoing a renovation of the inmate dormitories. That same year, Eaglin, Smith, and Jones, who were part of a group of inmates permitted to participate in the renovation process, began planning an escape attempt. With regard to the escape plans, the inmates constructed an escape ladder and a metal tool that would hook to the outer lights of the prison, but the tool was destroyed a month before the attempted escape. Eaglin blamed Fuston and John Beaston, another inmate, for destroying the tool.

Two inmates, Kenneth Christopher Lykins and Jesse Baker, testified to what they heard about the escape plans. Lykins testified that he overheard Eaglin, Smith, and Jones talking about their upcoming escape. Specifically, Eaglin stated that he would kill Fuston before he left because "he didn't like the way he disrespected him." Lykins also overheard Eaglin state that he would kill anyone who tried to stop him from doing what he was going to do. On cross-examination, Lykins, a twelve-time convicted felon, was impeached with an affidavit in which he denied knowing anything about the escape or the killing of Lathrem and Fuston.

He explained this prior inconsistency by stating he had been concerned with his own safety.

Jesse Baker, another inmate and nine-time convicted felon, also testified to overhearing the escape plans. He specifically heard Eaglin, Smith, and Jones stating that "they would kill any bitch that got in their way." Further, Baker testified that Eaglin wanted to "straighten" Fuston, which indicated an intent to kill. Baker was impeached with the fact that he suffered from severe depression and was previously housed in the psychiatric dorm and the crisis unit of the prison.

Additional testimony from correctional officers working at the time of the escape attempt established that on June 11, 2003, Eaglin was observed attempting to jump on the outer-perimeter fence of the prison. When officers responded to the scene, Eaglin was sprayed with chemical agents and subdued. Thereafter, Officer Lathrem was found in a mop closet, huddled in a fetal position with injuries to her head area. A medium-sized sledgehammer was located near her body. Fuston was located in another cell lying on the floor with blood coming from underneath his head. He was unconscious but still breathing at that time. Beaston was found conscious in a secured cell with a large wound in the middle of his forehead. Beaston was the only surviving victim of the attacks.

The morning after the attempted escape, Eaglin was questioned regarding the murders. Eaglin stated he wanted the "chair," and that he "tried to kill those three people." Eaglin also admitted that he tried to "jump the fence."

With regard to the injuries suffered by the victims, the medical examiner, Dr. R.H. Imami, testified that Lathrem's injuries included a hemorrhage in her right eye, two injuries on the right side of her head, and injuries on her face. Dr. Imami found no evidence of defensive wounds or injuries and concluded that skull and brain injuries were the cause of Lathrem's death. The cause of these injuries was heavy, blunt force trauma. Dr. Imami opined that



Lathrem was struck at least three times and that any of the blows would have caused her death. Finally, Dr. Imami stated that she believed the sledgehammer entered into evidence caused the injuries.

Dr. Imami also conducted the autopsy of Fuston. Fuston had injuries to the right and left sides of his face and head, the back of his head, and his mouth, in addition to skull fractures caused by blunt trauma. In total, Fuston suffered three to four fatal blows. Dr. Imami did not see typical defensive wounds but she observed a small skin scrape on the back of Fuston's left hand. She opined that the scrape could have been caused when he fell or during subsequent medical intervention. Ultimately, Dr. Imami concluded that skull and brain injuries by blunt-force trauma to the head were also the cause of Fuston's death and that the trauma was caused by a hammer.

Upon the testing of evidence obtained during the investigation of the murders, Lathrem's DNA was discovered on the sledgehammer that was near her body. Both Lathrem's and Fuston's DNA were located on the pants Eaglin wore on the day of the murder. Lathrem's DNA was also located on Eaglin's left boot. On cross-examination, defense counsel referred to earlier testimony of a corrections officer who testified that he assisted in removing Lathrem's body from the mop closet and then escorted Eaglin to the visiting park. The crime laboratory analyst conceded that this scenario presented the possibility of cross-contamination between Lathrem's blood and Eaglin's clothes. She also stated that she did not analyze every item sent to her but she matched the DNA profile of Lathrem to DNA found on codefendant Smith's right shoe.

The defense presented no witnesses but moved for a judgment of acquittal, which was denied by the court. The jury convicted Eaglin of the first-degree murders of Lathrem and Fuston.

During the penalty phase, the State presented evidence of Eaglin's prior violent felony for which he was incarcerated at the time of these murders. Michael

Marr, an assistant state attorney, testified that he had previously prosecuted Eaglin for the first-degree murder of John Frederick Nichols, Jr., who died from multiple stab wounds. On January 10, 2001, Eaglin was sentenced to life imprisonment without the possibility of parole for that murder. The State also presented three victim impact witnesses regarding Officer Lathrem.

The defense presented the testimony of witnesses Daryl McCasland, Lance Henderson, Greg Giddens, James Aiken, and Eaglin himself. The theme of the mitigation presentation was that the conditions at the correctional facility contributed to the occurrence of the crime. McCasland, a senior prison inspector, testified that he had several administrative concerns regarding the prison, including the lack of key control. Lance Henderson, a corrections officer working at Charlotte Correctional, testified that he had filed an incident report prior to the murders regarding his concerns about the limited number of officers on duty for the nighttime work detail. Henderson believed the working environment was unsafe.

Greg Giddens, a corrections officer at Charlotte Correctional at the time of the murders, testified that he was also concerned about his safety. He voiced his concerns to the officer in charge. Giddens also stated that the classification of certain inmates was downgraded so they could be in the open population or assigned work detail.

Finally, James Aiken, president of a prison consulting firm, testified that the incident at the prison was facilitated by a failure of systems. He also stated that the classification of Eaglin was not handled properly and that several inmates had access to tools useful for escape activity and for causing violence. The inmate accountability, security staffing, and monitoring systems also failed.

Before Eaglin's testimony, defense counsel notified the court that they would not be presenting mental mitigation or mitigation evidence as to Eaglin's childhood. Eaglin then testified that he had

been in prison since 2001. He stated that the guards would beat and kill inmates. He also stated that after the murders he was kept in a cell for thirty-four days in boxer shorts with no toilet paper, soap, or toothpaste and the assistant warden told him that he would die in that cell.

The jury recommended that Eaglin be sentenced to death for both murders by a vote of eight to four on each murder. Following a *Spencer* [FN1] hearing, the court entered its sentencing order. The court found the following aggravators as to the murder of Lathrem: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) Eaglin had a prior violent felony conviction; (3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the murder was cold, calculated, and premeditated (CCP); and (5) the victim was a law enforcement officer engaged in the performance of legal duties (merged with escape from custody). As to the murder of Fuston, the trial court found: (1) the capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment; (2) the defendant had a prior violent felony conviction; and (3) the murder was CCP. In mitigation, the court found after reviewing a presentence investigation (PSI) report that "Eaglin suffered from a severely abusive childhood with a severely dysfunctional family." This mitigator was given some weight. However, the court rejected the proposed mitigators stemming from the allegations of prison negligence. Finding that the aggravators outweighed the mitigators, the court sentenced Eaglin to death.

FN1. Spencer v. State, 615 So. 2d 688 (Fla. 1993).

Eaglin v. State, 19 So. 3d 935, 939-41 (Fla. 2009). Following this Court's affirmance of the convictions and sentences, Eaglin

did not file a petition for writ of certiorari to the United States Supreme Court.

On January 5, 2011, Appellant filed his initial motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. (PCR V2:376-482)<sup>1</sup>. The State filed its response on March 2, 2011. (PCR V3:533-75). Eaglin filed an amendment to his motion to vacate on May 26, 2011, to which the State filed a response on July 6, 2011. (PCR V4:770-812, V6:1038-1128). After reviewing the State's responses and conducting a case management conference, the trial court entered an order denying Appellant's legal claims and granting an evidentiary hearing on claims III(a), IV, and V.<sup>2</sup> (PCR V8:1454-1556).

Prior to the evidentiary hearing conducted on February 6-10, 2012 (PCR V16-22:3102-4434), the court granted the State's motion to perpetuate the testimony of Eaglin's lead trial

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<sup>1</sup> The State will cite to the postconviction record on appeal (PCR) by referring to the volume number (PCR V\_\_:\_\_), and then the page number. The direct appeal record (DAR) will be cited in the same manner (DAR V\_\_:\_\_).

<sup>2</sup> In Claim III(a), Eaglin argued that trial counsel was ineffective in failing to argue the motion to suppress because Eaglin was allegedly incapable of understanding his Miranda rights and did not knowingly waive his rights. In Claim IV, Eaglin alleged that counsel was ineffective for failing to adequately counsel Eaglin regarding his decision to waive the presentation of certain mitigating evidence, and for failing to advise the trial court that Eaglin had a history of mental illness. In Claim V, Eaglin argued that trial counsel was ineffective for failing to investigate and prepare mitigation.

attorney, Assistant Public Defender Doug Withee, due to his health problems.<sup>3</sup> (PCR V6:1208-11; V26:5151-270). At the evidentiary hearing, collateral counsel presented testimony from Eaglin's trial attorney, Assistant Public Defender Neil McLoughlin, numerous lay witnesses, and four mental health experts, Drs. Harry Krop, David Pickar, Thomas Hyde, and Philip Harvey. The State presented rebuttal evidence from the defense investigator, Dennis Wible, and from forensic psychologist, Dr. Michael Gamache.

Assistant Public Defender Doug Withee testified that he was lead counsel in Eaglin's case, but he had the assistance of co-counsel Neil McLoughlin and also utilized investigator Dennis Wible. (PCR V26:5171-73). Withee had previously handled numerous murder trials, including five or six that went through to the penalty phase. (PCR V26:5165-71). In Eaglin's case, Withee was in charge of the penalty phase while co-counsel McLoughlin handled the guilt phase, and investigator Dennis Wible assisted the defense team. (PCR V26:5171-73). Withee testified that he could recall details about Eaglin's case, but due to his health issues and the passage of time, he could not recall all of the details. (PCR V26:5178).

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<sup>3</sup> Mr. Withee passed away on May 21, 2012, a few months after the evidentiary hearing.

Withee testified that his goal in capital cases was to always focus on the penalty phase throughout the entire trial, even during the guilt phase. (PCR V26:5177-79). In preparation for Eaglin's penalty phase, Withee and investigator Wible travelled to interview Eaglin's family members, including his mother and grandfather, but Eaglin's grandfather "very firmly" refused to speak with them. (PCR V26:5179-86). Withee testified that Eaglin's mother had intermittent contact with him as he was growing up because Eaglin was primarily in the custody of his father, grandfather, or foster families. (PCR V26:5186-89). Withee could not recall if he personally spoke with Eaglin's brother or if his retained mental health expert, Dr. Harry Krop, or his mitigation specialist, Cheryl Pettry, spoke with Eaglin's brother, but Withee recalled reviewing the notes regarding these conversations. Withee stated that Eaglin's brother was in the military and "was willing to come and meet me if absolutely necessary, but he didn't know when he could get away from his military service." (PCR V26:5190). Withee also spoke with Timothy Winge, one of Eaglin's foster parents, prior to trial, and Mr. Winge informed counsel that he should not testify because he did not want to damage Eaglin's case with negative information. (PCR V26:5189-90). Withee also had a considerable amount of contact with Jill Hussung, one of Eaglin's close

friends, as she was present at every proceeding, but she also indicated that she did not want to testify. (PCR V9:1795; V26:5191).

Prior to trial, defense counsel met with Eaglin at the jail and noted that Eaglin told him he did not want to present evidence from his family or friends at the penalty phase. (PCR V9:1807; V26:5196-200). Withee specifically recalled Eaglin not wanting to present any testimony from his mother, and counsel also testified that he had strategic reasons for not presenting any mitigation evidence regarding Eaglin's childhood. (PCR V26:5191-96). Withee testified that presenting evidence regarding Eaglin's childhood presented a double-edged sword because, although Eaglin was placed in foster homes and had a physically abusive father, he was also given a lot of opportunities when living with his grandparents. Withee did not want the jury to hear that Eaglin's father was in prison for a violent offense because the jury may infer that "the apple doesn't fall far from the tree." (PCR V26:5194). Counsel was also concerned because the jury would hear through cross-examination that Eaglin had a history of behavior issues including fighting and stealing.<sup>4</sup> (PCR V26:5194-95).

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<sup>4</sup> Withee was aware how the prosecutor had utilized cross-examination to weaken the social history mitigation in co-

Withee testified that he communicated often with Eaglin in preparation for the trial, both orally and in writing, and Withee never had any problems communicating with Eaglin. (PCR V26:5206-12). Withee did not believe that Eaglin was incompetent. (PCR V26:5211). Despite Eaglin's instructions to not involve his family, trial counsel testified that he and investigator Wible travelled to Indiana to speak with family members and his mental health expert, Dr. Krop, and his mitigation specialist, Cheryl Pettry, also investigated mitigation by speaking with family and friends. (PCR V26:5211-12). Withee did not recall receiving any foster care records, but focused on foster parent Timothy Winge because he was the most important one. (PCR V26:5213). Withee did not personally review Eaglin's school records, but he believed his investigator obtained those records. (PCR V26:5213-14). Withee testified that he discussed Eaglin's boxing career with him and also spoke to one of his coaches. (PCR V26:5213-14).

Withee retained a mitigation specialist, Cheryl Pettry, because she had been involved as a mitigation specialist with Eaglin's prior capital murder case out of Pinellas County in

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defendant Smith's penalty phase. (PCR V26:5258-61).



1998.<sup>5</sup> Cheryl Pettry provided all of her social history research to Withee when she came onto the case. (V26:5214-16). Additionally, investigator Wible contacted Eaglin's Pinellas County attorneys and obtained information from their files. (PCR V9:1846, 1850-52; V26:5214). Withee discussed at length his penalty phase strategy with Cheryl Pettry and he expressed his desire to avoid the double-edged sword, social history type mitigation in favor of exclusively presenting evidence regarding his prison negligence theory. Cheryl Pettry disagreed with his strategy decision. (PCR V26:5216-20).

A few months after the indictment was filed, Withee sought the appointment of psychologist Dr. Harry Krop to assist the defense. (DAR V1:44-46; PCR V26:5220-24). Withee provided Dr. Krop with "stacks of records" and believed that Dr. Krop met with members of Eaglin's family. (PCR V26:5224). Withee recalled that Dr. Krop diagnosed Eaglin with bipolar disorder and antisocial personality disorder (ASP). Withee ultimately decided not to present Dr. Krop at the penalty phase because he did not think the jury would recommend life in prison based on Dr. Krop's diagnosis of bipolar and ASP, especially when he had a

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<sup>5</sup> Eaglin was serving a life sentence for the Pinellas County murder at the time he murdered CCI Correctional Officer Darla Lathrem and inmate Charles Fuston. Although the State originally sought the death penalty in the Pinellas County case, they "came off the death penalty for some reason." (PCR V26:5216).

"monster mitigator" of gross prison negligence to present to the jury. (PCR V26:5225-32, 5256-59). Withee also stated that the trial court's ruling allowing the State to depose Dr. Krop prior to the penalty phase affected his decision-making process. (PCR V26:5235, 5247-48).

Assistant Public Defender Neil McLoughlin testified that he was co-counsel on Eaglin's case and worked primarily on the guilt phase. (PCR V19:3840-43). McLoughlin recalled meeting with mitigation specialist Cheryl Pettry a few times, but she worked primarily with co-counsel Withee. (PCR V19:3843-46). McLoughlin also testified that he accompanied Withee when he met with Dr. Krop on a few occasions in Gainesville as counsel were travelling to meet Eaglin at Florida State Prison or handling depositions of inmates or prison guards in the Stake area.<sup>6</sup> (PCR V19:3847-49). Eventually, Eaglin was moved to the county jail at Charlotte County and trial counsel met with Eaglin several times at the jail.

McLoughlin testified that he was aware of Eaglin's behavior at the time of the escape when Eaglin was found between the two

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<sup>6</sup> Although Dr. Krop dealt primarily with co-counsel Withee, McLoughlin was aware that Dr. Krop had diagnosed Eaglin with bipolar disorder and antisocial personality disorder. McLoughlin could not recall whether Eaglin was on psychotropic medication at the time of the murder or leading up to his trial. (PCR V19:3849-53).

prison fences. McLoughlin recalled that Eaglin took a fighting posture with the officers and they utilized spray and had their guns drawn when apprehending Eaglin. McLoughlin's recollection was that Eaglin told the officers to shoot him or kill him. (PCR V19:3854-55).

McLoughlin never had any concerns with Eaglin's competency at the time of trial, and if he had, he would have immediately moved for an evaluation. (PCR V19:3856-57). McLoughlin testified that even though Eaglin gave a post-trial interview to a news reporter against both counsels' advice, the interview did not give counsel a good faith basis to question Eaglin's competency. (PCR V19:3858-61, 3868-69).

McLoughlin testified that very early on in the case, co-counsel Withee began considering a penalty phase theory of negligence on the part of the Department of Corrections (DOC). (PCR V19:3853-56, 3862-68). The defense theory presented to the jury was that the prison was negligent in placing a sledge hammer and power tools in Eaglin's hands, a convicted murderer serving a life sentence, and failing to properly supervise him. Defense counsel testified that they purposefully did not want to "muddy the water" with other types of mitigating evidence or diminish the strength of the prison negligence theory by introducing other evidence like Dr. Krop's diagnosis of bipolar

and antisocial personality disorders or evidence of Eaglin's childhood. (PCR V19:3862-68, 3873-74). Trial counsel recognized the double-edged nature of presenting evidence regarding Eaglin's background and mental health given the prosecutor's ability to rebut the evidence. Additionally, McLoughlin testified that he was aware that in co-defendant Stephen Smith's case, which was tried before Eaglin's case, Smith's attorneys had taken Withee's lead and presented prison negligence as a mitigation theory as well as presenting other mitigation of Smith's challenging childhood and mental health issues and the Smith jury recommended the death penalty by a vote of nine to three. In Eaglin's case, where the only evidence presented to the jury was the prison negligence theory, the jury recommended the death penalty by a vote of eight to four and McLoughlin thought that was a "pretty good" result given the facts. (PCR V19:3862-68).

At the evidentiary hearing, collateral counsel also presented testimony from a number of Eaglin's family members and his friends. Eaglin's older brother, Kenneth Donnel Eaglin, testified that he had been in the Navy for the past twenty-one years. Kenneth Eaglin was seventeen months older than Appellant and when Kenneth was born, his mother was fifteen years old and his father was around thirty years old. (PCR V16:3120). Kenneth

Eaglin testified that when he was three years old, his mother left and the boys were raised by another family and their grandparents for about six months before moving to Kentucky with their father. (PCR V16:3123-26). Eaglin's father attended college and the boys lived with him in his dorm room. When their father attended classes, he left the boys alone in the dorm room. (PCR V19:3129-31). When the witness was four years old, he moved with his father and Appellant to Indiana and they all lived together with his paternal grandparents. (PCR V16:3132-40). Kenneth Eaglin testified that while living with his father and grandparents, he observed his grandfather physically abuse his grandmother on one occasion and testified that his father regularly beat the boys with a belt, switches, and yardsticks. (PCR V16:3132-41). The witness testified that his father held Appellant upside down by the leg and broke his leg.

When Kenneth Eaglin was in first grade, the boys left their grandparents' home and moved to Illinois with their father and his third wife. (PCR V16:3149-50). The boys received regular spankings with a belt while there, but the abuse was more curtailed. (PCR V16:3151). After about a year, the boys moved back in with their grandparents and assisted in taking care of their grandmother as she was in poor health. (PCR V16:3152-55). On the few occasions when their father would visit the boys at

their grandparents' home, he would physically abuse the boys with his belt, fists, or a stick. (PCR V16:3158-62). After living with their grandparents for five or six years, the boys moved back to Illinois to live with their father and his wife, Raelene Hand. The boys often took care of Raelene Hand's five children. (PCR V16:3163-65). When their father was home, he would often beat the boys. (PCR V16:3169-71). Their father often wrestled with the boys and would perform sleeper holds on the boys until they became unconscious. (PCR V16:3172-73). Kenneth Eaglin testified that, one time after a particularly violent beating, he reported his father to school authorities and the boys were placed in foster homes. (PCR V16:3176-78).

Kenneth Eaglin testified that Appellant's trial attorneys did not contact him in 2006 when he was living in Norfolk, Virginia.<sup>7</sup> (PCR V16:3184-85). He spoke with Cheryl Pettry prior to Appellant's murder trial in Pinellas County, but did not recall speaking with her again until a few months before his postconviction testimony. (PCR V16:3187-90). Kenneth Eaglin told Pettry that he last saw Appellant in 1992 when they got into a

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<sup>7</sup> The witness did not recall speaking with anyone from Dr. Krop's office even after reviewing a three-page report written by one of Dr. Krop's employees. (PCR V16:3204-08). Dr. Krop testified that he reviewed a report of an interview conducted by his associate with Appellant's brother, who served in the Navy and was seventeen months older than Appellant. (PCR V18:3587-88).

fight and Kenneth had to choke Appellant. (PCR V16:3192-93). Kenneth Eaglin recalled being contacted by investigator Dennis Wible in the instant case while in the Navy and giving Wible biographical information. (PCR V16:3197-203). Kenneth Eaglin was very upset with Wible because the investigator had sent a letter to the Navy which had led his commanding officer to mistakenly believe that Kenneth Eaglin was wanted for murder in Florida.<sup>8</sup> (PCR V16:3197-203). Kenneth Eaglin was deployed in the Saudi Arabian Gulf at the time of Appellant's trial. Appellant communicated with his brother by writing letters and Appellant told Kenneth that he did not want anyone in the family involved in his case. (PCR V16:3212-13).

Appellant's father, Kenneth Eaglin, testified via videoconference from an Illinois prison where he was serving a sentence for solicitation of murder of the State Attorney and for two counts of cruelty to children (Appellant and Kenneth Donnal Eaglin). (PCR V19:3894). The witness acknowledged breaking Appellant's leg during his childhood when he was spanking Appellant. (PCR V19:3896). The witness has never been diagnosed with any mental illness or psychiatric disorder, and

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<sup>8</sup> In the letter to Kenneth Donnal Eaglin's commanding officer, investigator Wible stated that he was looking for Kenneth Eaglin because his office represented his brother, "Donald Thomas Eaglin," on two counts of murder. (PCR V9:1853).

testified that his parents also had no diagnosed mental illnesses. He testified that in his opinion, Appellant's biological mother had a split personality because she could change her personality in a snap. (PCR V19:3898). The witness recalled being contacted by Appellant's initial defense counsel in his Pinellas County murder case in an attempt to obtain funds, and recalled meeting with mitigation specialist Cheryl Pettry at some unknown time, but did not recall speaking with attorneys Doug Withee, Neal McLoughlin, or investigator Dennis Wible. (PCR V19:3899-901). On cross-examination, the State introduced three letters written by Appellant's father to Doug Withee prior to Appellant's trial. In the letters, Appellant's father provided information on potential mitigation witnesses and informed trial counsel that he would add their names to his visitation list so they could meet him in person. (PCR V19:3902-09). The witness did not recall ever meeting any members of Appellant's defense team. (PCR V19:3910).

In addition to family members, collateral counsel presented a number of lay witnesses who knew Appellant. Jill Hussung testified that she met Appellant when he was about twelve years old while working at the Nachusa Lutheran Home in Illinois, a residential home for juveniles taken away from their families or in trouble with the law. (PCR V16:3220-23). Appellant had been



placed in the home because he had stolen a car and ran away from his foster home. (PCR V16:3226). While the majority of juveniles had emotional problems, Hussung described Appellant as very charismatic, a real charmer, a good athlete, very intelligent, a good student, and very hyper.<sup>9</sup> (PCR V16:3228, 3233). Appellant told Hussung about the physical abuse he suffered from his father, including that his father had broken his leg when he was three years old. (PCR V16:3229-30).

Appellant was looking for a family so Hussung introduced him to a couple she knew, Timothy and Lori Winge. (PCR V16:3229, 3237). The Winges became Appellant's foster family and Appellant had a great relationship with the Winges and their two boys. (PCR V16:3237-43). Eventually, Appellant ended up in county jail, and after leaving jail on his eighteenth birthday, he moved in with Jill Hussung in Florida where she was now working in another juvenile residential facility. (PCR V16:3243).

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<sup>9</sup> Richard Winkler, Appellant's case manager at the Illinois Department of Children and Family Services, detailed Appellant's history with his department. (PCR V20:4051-71). Winkler noted that Appellant had been identified by DCFS as having emotional problems, an adjustment disorder with slight indications of antisocial and asocial tendencies. (PCR V20:4055, 4069). Appellant successfully completed the treatment program at the Nachusa facility and was placed with foster parents. Winkler had spoken with Cheryl Pettry prior to Appellant's Pinellas County murder trial, and the witness identified staffing reports and psychological screening assessment from Nachusa that were located in trial counsels' files. (PCR V20:4066-69).

Hussung got Appellant affiliated with a local boxing gym and Appellant became a Golden Glove state champion and professional boxer.<sup>10</sup> (PCR V16:3244).

While Appellant was living in Florida, he worked with Jill Hussung's family's construction company. (PCR V16:3245). Hussung noted that Appellant remained hyper during this time and she recalled Appellant telling her that he wanted to be on medication because he thought he might hurt someone. (PCR V16:3253). Hussung took Appellant to a doctor and he was prescribed Prozac. (PCR V16:3253).

Hussung spoke with Appellant's lawyers a few times before the trial about her relationship with Appellant and his history of medication, and also attended the trial and penalty phase.<sup>11</sup>

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<sup>10</sup> Collateral counsel presented testimony from Michael Middleton and John Vinciguerra who were familiar with Appellant's boxing career. According to these witnesses, Appellant's style was a brawling style to "take two/give one," in that he would absorb punishing blows before coming back and eventually winning. (PCR V17:3406-63). The witnesses knew Appellant was on medications at the time, and if he was off his medications, he was short-tempered and irritable. Neither witness ever knew of a time when Appellant was knocked out or hospitalized. Michael Middleton spoke to Appellant's attorneys in his Pinellas County case and attended that trial, but did not talk to his Charlotte County defense team. (PCR V17:3430-32). John Vinciguerra did not have any contact with any attorneys for either of Appellant's two murder cases. (PCR V17:3453-54).

<sup>11</sup> Hussung did not recall whether she actually spoke with Dr. Krop, but acknowledged that Doug Withee sent her a letter asking her to contact the expert so he could interview her regarding background information. (PCR V9:1795; V16:3267-68).

(PCR V16:3260-61). She did not recall speaking with Appellant about his decision not to involve his family in the penalty phase, but testified that it made sense because Appellant did not "want to put us through this." (PCR V16:3264-65). Hussung testified that Appellant did not want to involve any of his family in the Pinellas County trial either. Hussung acknowledged that in her career working with juveniles, she had never developed a unique parental relationship such as the one with Appellant. Hussung and her family provided Appellant with emotional and financial support, found him a loving foster family, got him involved in boxing, and assisted Appellant in obtaining a job with her family. (PCR V16:3270-79).

Timothy Winge testified that Jill Hussung introduced Appellant to his family when Appellant was living at the Nachusa home for troubled boys. (PCR V17:3308-09). Appellant was twelve or thirteen when Winge first met him and Winge eventually took the courses required to become his foster parent. (PCR V17:3308-11). Winge testified that Appellant was very intelligent in school, making As and Bs, was voted class president as a junior, and was very athletic. Appellant was captain of the football team and started his boxing career as a teenager and went to the national championship of amateur boxers when in Michigan. (PCR V17:3314-19). After Appellant broke his leg playing football as

a senior, he became depressed because he could not engage in athletics and he started going the wrong way and getting into trouble. (PCR V17:3327-30). While living with the Wings, Appellant was arrested for setting off a homemade bomb in a McDonalds. (PCR V17:3343). In February, 1993, Appellant got into an altercation with Winge's stepson Joshua and broke Joshua's nose. The Wings asked for Appellant to be removed from their home and he went to a group home for about six months before he was arrested again for stolen property. (PCR V17:3343-44). Timothy Winge testified that he spoke with Cheryl Pettry several times prior to Appellant's first murder trial in Pinellas County, and also spoke to Appellant's trial counsel Doug Withee prior to the instant case. (PCR V17:3331, 3342).

In addition to the lay witnesses' testimony, collateral counsel presented testimony from four mental health experts; Dr. Harry Krop, Dr. David Pickar, Dr. Thomas Hyde, and Dr. Philip Harvey. Psychologist Dr. Harry Krop testified that he had worked with trial counsel Doug Withee since the late 1990s, and began working on the instant case in 2004. (PCR V18:3491-95). Dr. Krop testified that he probably received more records and background materials in this case than in any of the other 2000 death row cases he had ever been involved with. Doug Withee and Neil McLoughlin brought a "truck full" of about twelve boxes to his

office related to the instant case and Appellant's prior Pinellas County murder case. (PCR V18:3497). Dr. Krop interviewed Appellant's mother and brother, reviewed mitigation specialist Cheryl Pettry's work and met with her several times, reviewed Eaglin's records from his Pinellas County murder case as well as records related to the instant case, reviewed prior psychological assessments, and conducted his own interviews and neuropsychological testing with Appellant. (PCR V18:3497-502).

Based on the neuropsychological testing he conducted on Eaglin, Dr. Krop found that Eaglin had a full scale IQ of 117 and he did not see any significant neuropsychological impairment. (PCR V18:3512-27). Dr. Krop informed trial counsel Withee of his findings and summarized the potential mitigating factors he found in a memo to counsel: dysfunctional family and a serious psychiatric disorder (bipolar disorder) that had often been untreated. (PCR V18:3528-30). Dr. Krop also informed trial counsel Withee that Eaglin had a substance abuse problem and antisocial personality disorder, but Dr. Krop did not include this information in the memo. (PCR V18:3544-48, 3594-97). Dr. Krop testified that, according to the records he reviewed, Eaglin was not on medication at the time of the instant murders, but had been prescribed Lithium, Depakote, Prozac, and Zoloft in the past while in the Department of Corrections. (PCR V18:3530-

33). Dr. Krop testified that he probably had discussions with trial counsel Withee about Eaglin's state of mind at the time of the crime as that was his standard practice, but he had no specific recall at the time of his postconviction testimony. (PCR V18:3530-33). Dr. Krop recalled discussing his potential testimony with Doug Withee and counsel made the strategic decision not to call Dr. Krop as counsel had concerns with presenting Eaglin's mental health history, including his antisocial personality disorder, and thought it would be better to focus on the circumstances at the Department of Corrections. (PCR V18:3538-40, 3552).

On cross-examination, Dr. Krop noted that he never had any concerns regarding Eaglin's competency based on Eaglin's detailed statements regarding the two murders. Dr. Krop noted that there was no indication that Eaglin felt high at the time of the escape attempt or that he was feeling on top of the world. (PCR V18:3570-77). In discussing his head injuries, Eaglin disclosed to Dr. Krop that he lost consciousness on one occasion as a child when he hit his head on concrete, but had never lost consciousness during his boxing career. Eaglin detailed an extensive history of fighting outside his boxing career, from early childhood through high school. (PCR V18:3577-84). Dr. Krop's testing did not indicate any significant

neuropsychological impairment and he saw no evidence of frontal lobe damage and did not see the need for any further neurological testing or imaging. (PCR V18:3589-92). Dr. Krop did not believe that Eaglin suffered from post-traumatic stress disorder (PTSD). (PCR V18:3558-59).

Dr. David Pickar, a psychiatrist, testified that he reviewed material provided to him by collateral counsel and met Eaglin on one occasion for about an hour and a half and conducted a psychiatric evaluation at that time. (V18:3641-50). Dr. Pickar reviewed Eaglin's records from DOC and was impressed by the monitoring, treatment, and medication Eaglin received in DOC for his bipolar diagnosis. (PCR V18:3653-55). However, in the time period leading up to the escape attempt, Eaglin experienced problems with the medications he was taking and ultimately, Eaglin stopped taking his medications prior to the murders. (PCR V18:3674-705). Dr. Pickar opined that Eaglin was not properly medicated at the time of the murders and his escape attempt demonstrated suicidal behavior. (PCR V18:3705-07). Dr. Pickar was uncertain in the diagnosis of PTSD made by another of Eaglin's postconviction experts. (PCR V18:3668-69).

Dr. Thomas Hyde, a behavioral neurologist, testified that he was retained by collateral counsel to conduct a neurological examination of Appellant. Dr. Hyde testified that Eaglin

performed completely normal on the Mini Mental State exam and his physical exam was also normal. However, Dr. Hyde testified that this did not mean that Eaglin did not have brain dysfunction. (PCR V19:3765-72). Based on his review of the case and examination of Appellant, Dr. Hyde noted that Eaglin had suffered repeated closed head injuries as a result of his boxing career and was at high risk for post-concussive syndrome or chronic traumatic encephalopathy (CPE). Additionally, Dr. Hyde diagnosed Eaglin with bipolar disorder and PTSD. (PCR V19:3768). Dr. Hyde testified that he was aware that Eaglin had scored an IQ of 126 on an intelligence test given in 1989 by Dr. Pearson, and Dr. Philip Harvey had recently tested Eaglin with the WAIS-IV and obtained a score of 118. Dr. Hyde opined that the eight point drop raised concerns about brain damage from the chronic trauma of boxing and/or his bipolar disorder. (PCR V19:3771-72).

When Dr. Hyde interviewed Eaglin in June, 2010, Eaglin gave him details about the murders, but claimed that he was feeling manic that day, had racing thoughts, felt high like he was on top of the world, had been suffering from insomnia at the time,<sup>12</sup> and had been taking Prozac, marijuana, and crystal meth which he obtained from other inmates. (PCR V19:3811-12). Based on

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<sup>12</sup> Dr. Hyde testified that Eaglin did not volunteer these symptoms, but after the doctor prompted Eaglin with the symptoms of mania, Eaglin endorsed them. (PCR V19:3814).



Eaglin's drug usage, bipolar disorder, and self-reported feelings of mania, Dr. Hyde testified that Eaglin was "unable to appreciate the criminality of his actions and to conform his actions to the dictates of the law" at the time of the murders. (PCR V19:3826-27).

Dr. Philip Harvey, a psychiatrist retained by collateral counsel, testified that he examined Eaglin in October, 2010, and focused primarily on administering psychological tests to Appellant. Dr. Harvey administered the Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV), a standardized assessment for intellectual functioning, and subparts from the Repeatable Battery of Neuropsychological Status (RBANS). (PCR V20:3922-31). Dr. Harvey obtained a full scale WAIS-IV IQ score on Eaglin of 118 which was nearly identical to the score Eaglin obtained on Dr. Krop's Wechsler Abbreviated Scale of Intelligence (WASI) (117), and eight points lower than the score Appellant obtained in 1989 when he was thirteen on Dr. Pearson's Wechsler Intelligence Scale for Children - Revised (WISC-R) test. (PCR V8:2563; V20:3931-34). Dr. Harvey testified that Eaglin's learning score on the testing is very poor compared to his IQ which suggests an acquired impairment that probably occurred at some point after the 1989 IQ testing. Dr. Harvey noted that Eaglin's profile is consistent with reported cases of

chronic traumatic encephalopathy (CTE), bipolar disorder, or both. (PCR V20:3955-63).

Prior to resting their case, the defense informed the court that one of their witnesses, mitigation investigator Cheryl Pettry, had been scheduled to arrive in Charlotte County on Tuesday, February 7, 2012, the second day of the five-day scheduled evidentiary hearing, but Pettry called collateral counsel and left a message that she had to cancel her travel plans due to illness. (PCR V20:4108-19). Since that time, collateral counsel had not had any contact with Pettry and did not have any information on her unavailability. The trial judge informed counsel to keep attempting to contact the witness and even indicated that she would allow the witness to testify after the scheduled hearing on Monday, February 13th if she was available. (PCR V20:4120). At the conclusion of the final day of the scheduled hearing, collateral counsel moved to bifurcate the hearing to an unspecified future date so that Pettry could conceivably testify. The trial judge noted that Pettry's work product had been introduced at the proceedings and collateral counsel had been given the opportunity to admit additional work product, that collateral counsel had no information regarding Pettry's health condition or her future availability, and therefore, the court denied counsel's request to bifurcate the

hearing. (PCR V22:4404-27). The court, however, allowed collateral counsel the opportunity to file an affidavit from Pettry and to file any additional exhibits regarding Pettry's work if a stipulation were worked out with the State. (PCR V16:3039-41; V22:4426-27). Collateral counsel subsequently filed an affidavit from Cheryl Pettry and related exhibits. (PCR V16:3042-98). The State moved to strike the affidavit and documents, and the trial court denied the motion. (PCR V16:3099-101, V22:4435-36).

The State presented two rebuttal witnesses at the evidentiary hearing, Dennis Wible, an investigator with the Public Defender's Office who worked with trial counsel on Eaglin's case, and neuropsychologist, Dr. Michael Gamache. Dennis Wible testified that Assistant Public Defender Doug Withee sent him an Investigation Request Form about a month after the murders asking him to get newspaper stories, video surveillance from Charlotte Correctional Institution (CCI), and information on DOC and CCI personnel because the defense theory was to blame the prison system for the incident. (PCR V9:1845; V21:4135). The same day, Wible sent trial counsel an email advising Withee of Eaglin's Pinellas County murder conviction and letting Withee know he would try and get the records from the Pinellas County public defenders. (PCR V21:4137-38). Wible

testified that as a result of his request to the Pinellas County Public Defender's Office, his office received at least three boxes of records from Pinellas County, including mitigating information. (PCR V21:4138, 4202).

Investigator Wible testified that he interviewed Eaglin on two occasions; once with trial counsel Doug Withee, and once on his own. (PCR V21:4139). On July 23, 2003, Wible and Withee interviewed Eaglin at Florida State Prison and Eaglin provided some information on his upbringing including that he was removed from his home because his father was abusive and broke his leg. Eaglin did not give much detail about his family as he did not know his siblings or have much interaction with them. (PCR V21:4142). Wible testified that Eaglin told Doug Withee at this interview that he did not want his family called to testify at his trial. (PCR V21:4145-46). Eaglin mentioned his boxing career and gave a detailed statement regarding the murders and even asserted that the murders were on videotape. (PCR V21:4144). After their meeting, Wible filed a request from DOC for Eaglin's mental health and medical records and their office ultimately received those records. (PCR V21:4145).

In discussing the potential mitigating witnesses contacted by the defense team, Wible testified that Eaglin gave him the name of his fight manager and his contact information, but Wible

was unsuccessful in contacting Jim McLaughlin despite trying several times. (PCR V9:1847-48, V21:4150). Wible testified that he summarized the information contained in the Pinellas County trial counsels' files including information on Eaglin's friends, mental health records, foster homes, medical records and medication history, and gave that three-page summary to Doug Withee. (PCR V9:1850-53; V21:4152-53). Wible testified that, even though it went against their clients' wishes and upset him, the defense team contacted his family members. Wible and Doug Withee travelled to Indiana and interviewed Eaglin's mother, and they attempted to contact his grandfather, aunt, and brother (PCR V9:1853-56; V21:4154-61). In their letters to Eaglin's mother and grandfather, the defense team told Eaglin's family members to locate any other people with relevant information because the defense team did not have much to work with based on Eaglin's failure to provide such information. (PCR V21:4158). The defense team attempted to contact Eaglin's father, and Wible testified that he was ninety percent certain that they visited Eaglin's father at a prison, but he gave them no information. (PCR V21:4169-70, 4178-79). Wible also attempted to locate Eaglin's foster parents, but he could not find information on them. (PCR V21:4170).

Forensic psychologist and neuropsychologist Dr. Michael Gamache testified that he did not examine Eaglin or administer any psychological tests, but rather, reviewed among other things, the notes, raw data, and clinical data utilized by Drs. Krop, Harvey, Hyde, and Pickar, as well as reviewing the mental health and medical records obtained from DOC and Eaglin's school records. (PCR V21:4226-27, 4230-34). Dr. Gamache noted the numerous historical diagnoses found in Eaglin's records: antisocial personality disorder; post-traumatic stress disorder; bipolar disorder; chronic traumatic encephalopathy (CTE), or post-concussive disorder; depression; anxiety; and polysubstance dependence. (PCR V21:4227-28). Dr. Gamache testified that his review of the data only supported the diagnoses of antisocial personality disorder, polysubstance abuse (both illegal drugs and prescription medications), and some type of mood disturbance; Dr. Gamache was not convinced that Eaglin had bipolar disorder, and Eaglin certainly was not symptomatic at the time of the escape attempt. (PCR V21:4228-35, 4283-300). Dr. Gamache further testified in detail that the data he reviewed did not support a diagnosis of post-traumatic stress disorder or CTE. (PCR V21:4235-56).

Dr. Gamache discussed Eaglin's IQ scores on the WISC-R (126) in 1989 when he was thirteen years old and on the WAIS-IV

(118) given by Dr. Harvey in 2010 and testified that Eaglin's scores were not evidence of brain damage. Dr. Gamache was concerned with the defense experts' misrepresentations at the hearing, and explained to the judge that the WAIS-IV was recently redesigned and that an individual like Eaglin who is highly intelligent, but has a relatively slower processing speed, will receive a lower IQ score. However, this is exactly what Dr. Gamache would expect given Eaglin's intelligence and the slight drop in scores was not evidence of brain damage. (PCR V21:4257-63, 4279-83).

Dr. Gamache testified that the two statutory mental mitigating factors were not present in this case. Dr. Gamache stated that, even assuming that Eaglin had a mental illness at the time, there was no evidence to support a finding that it was an extreme mental or emotional disturbance. Likewise, Dr. Gamache did not find that Eaglin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.<sup>13</sup> (PCR V21:4300-08). Dr. Gamache noted that his review of Eaglin's records clearly supported a diagnosis of antisocial personality

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<sup>13</sup> Dr. Gamache conceded that if Eaglin had abused Prozac and crystal methamphetamine at the time of the murders as he self-reported, it would diminish his ability to conform his conduct to the requirements of the law. (PCR V21:4305-06).

disorder. Dr. Gamache did not consider antisocial personality disorder mitigating in nature and was aware, based on his experience in capital cases, that defense attorneys were cautious when dealing with this factor. (PCR V21:4308-10).

After hearing the testimony from the evidentiary hearing and reviewing the written closing arguments, the trial court issued a detailed order denying Eaglin's postconviction claims. (PCR V23:4570-4604). This appeal follows.



### SUMMARY OF THE ARGUMENT

The postconviction court properly found that Eaglin failed to establish that his penalty phase counsel was ineffective for investigating or presenting mitigation evidence at the penalty phase. Trial counsel thoroughly investigated Eaglin's background and mental health, despite Eaglin's instructions not to involve his family. At the penalty phase, Eaglin knowingly waived the presentation of background mitigation evidence from his family and agreed with trial counsels' strategic decision to forego presenting mental mitigating evidence. As trial counsel explained at the postconviction evidentiary hearing, the presentation of mental mitigating evidence that Eaglin suffered from bipolar disorder, antisocial personality disorder, and polysubstance abuse would have been a double-edged sword as it would have allowed the State to emphasize detrimental information about Eaglin.

In addition to failing to establish deficient performance, Eaglin failed to establish any prejudice as there is no reasonable probability that the mitigation evidence introduced at the postconviction proceedings would have changed the outcome given the substantial aggravation in this case. Eaglin was serving a life sentence for murder when he attempted to escape from prison and killed a fellow inmate and a prison guard with a

sledgehammer. The sentencing court was aware of, and gave some weight to, Eaglin's family history of neglect, abandonment, and cruelty. There is no reasonable probability that the addition of mental health testimony, and more detailed testimony regarding his family background, would have changed the outcome in this case.

Eaglin failed to present any evidence regarding his claim that trial counsel was ineffective for failing to argue in his motions to suppress that Eaglin was incapable of understanding his Miranda rights. Accordingly, the postconviction court properly found the claim waived. Additionally, the court addressed the merits of the claim and found that Eaglin failed to carry his burden under Strickland of establishing deficient performance and prejudice. There was no evidence presented that Eaglin did not understand his rights, and even assuming that counsel was deficient for failing to raise this argument, there can be no showing of prejudice as Eaglin's post-Miranda statements were cumulative to other spontaneous comments he made which were not suppressible.

The postconviction court properly summarily denied Eaglin's claim that the State utilized inconsistent theories of prosecution in his case and the trial of his codefendant, Stephen Smith. The lower court took judicial notice of Stephen

Smith's case and noted that the records conclusively refuted his claim. Likewise, the court properly summarily denied Eaglin's claim that the State withheld exculpatory evidence regarding codefendant Michael Jones's plea agreement. The evidence of a plea agreement with Jones, occurring after Eaglin's trial, was not exculpatory, the State never suppressed any evidence of the plea agreement as it was done in open court, and Eaglin was not prejudiced in any manner by the alleged suppression. As the postconviction court correctly noted, the record clearly refuted all of the necessary elements of a Brady violation.

## ARGUMENT

### ISSUE I

THE POSTCONVICTION COURT PROPERLY DENIED EAGLIN'S CLAIM OF INEFFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL.

In his first issue on appeal, Eaglin combines a number of his postconviction claims regarding trial counsel's alleged ineffectiveness at the penalty phase. The postconviction court granted Eaglin an evidentiary hearing on these claims, and after conducting a week-long hearing, the court denied the claims based on a finding that Eaglin failed to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). (PCR V23:4570-4604). The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of penalty phase counsel claims.

In order for a defendant to prevail on a claim of ineffective assistance of counsel pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the

fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See Johnson v. State, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. Johnson, 921 So. 2d at 500. When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Strickland, 466 U.S. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

On appeal, when reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prongs de novo. Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, the lower court properly identified the applicable law in analyzing Eaglin's claims, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Eaglin was not entitled to postconviction relief.

#### A. Eaglin's Limited Waiver of Mitigation

In his first sub-claim, Eaglin alleges that his limited waiver of mitigation was not knowing and voluntary and that the

trial court's colloquy with Eaglin failed to comply with the requirements of Koon v. Dugger, 619 So. 2d 246 (Fla. 1993), and its predecessors (citing Muhammad v. State, 782 So. 2d 343 (Fla. 2001), and Farr v. State, 621 So. 2d 1368 (Fla. 1993)). Eaglin did not raise this argument in his postconviction motion or amendment (PCR V2:376-482, V4:770-812), and is therefore barred from asserting it now on appeal. See Bates v. State, 3 So. 3d 1091, 1103 n.6 (Fla. 2009). Additionally, even had Eaglin raised this claim in his postconviction motion, it would be procedurally barred as it is a claim that could have, and should have, been raised on direct appeal. In fact, Eaglin presented a similar claim on appeal, and this Court rejected his argument. See Eaglin v. State, 19 So. 3d 935, 945-46 (Fla. 2009).

On direct appeal, Eaglin argued that his penalty phase was unreliable because all available mitigating evidence was not presented to the jury and trial court. In rejecting his claim, this Court noted:

As to the claim that all available mitigation was not presented, the record affirmatively establishes that Eaglin instructed his counsel to forego the presentation of evidence regarding his childhood. As to mental mitigation, defense counsel indicated to the court that he felt that the evidence should not be presented to the jury. Although counsel did not specifically state his reasons for his decision to forego mental mitigation, the record demonstrates that Eaglin agreed with his counsel's decision.

. . .

First, in this case, Eaglin did not waive all mitigation. We have explained the distinction between the waiver of the right to present mitigation and the decision to limit mitigation. See Boyd v. State, 910 So. 2d 167, 189 (Fla. 2005). Importantly, we have extended the duty of the trial court to consider all mitigating evidence contained in the record to the extent it is "believable and uncontroverted," Muhammad v. State, 782 So. 2d 343, 363 (Fla. 2001), only to cases in which there is a complete waiver of all mitigation.

Id. Contrary to collateral counsel's assertions in his brief, the trial court was not required to conduct any inquiry with Eaglin or his counsel or have counsel proffer any evidence because this was not a case where the defendant instructed his counsel to waive his right to present mitigating evidence. Compare Koon v. Dugger, 619 So. 2d 246 (Fla. 1993) (setting forth procedures to follow to ensure that a defendant knowingly waives his right to present mitigating evidence) with Boyd v. State, 910 So. 2d 167, 189 (Fla. 2005) (distinguishing Koon because the defendant did not waive his right to present mitigation when he knowingly waived testimony from his family and friends, but testified on his own behalf during the penalty phase and allowed his pastor to testify). As this Court properly noted on direct appeal, Eaglin did not waive all mitigation, but rather presented testimony from four witnesses regarding the alleged negligence of the prison system and Eaglin himself testified before the jury and at the Spencer hearing.



Finally, even if this Court were to address the instant sub-claim, Eaglin's argument lacks merit as this Court has previously noted that the record "affirmatively" established that Eaglin instructed his counsel not to present mitigating evidence regarding his childhood, and Eaglin agreed with trial counsel's decision not to present mental mitigation. Eaglin, 19 So. 3d at 945 (noting that "the record demonstrates that the waiver of mitigation concerning his childhood was prompted by Eaglin himself because he did not want his family to be involved"). During the penalty phase, defense counsel informed the trial court that he had numerous discussions with Eaglin "about putting on a lot of social work things, issues regarding childhood and things of that nature. And it was his opinions at the outset and I believe remains his opinion that we would not do that as far as putting his family through some things that he didn't feel would be fair to them, and as far as putting on Mr. Tim [Winge] who was a foster parent of his in the early years. And we have gone ahead with our preparation on the basis of his wishes along those lines." (DAR V29:1341-42). Thereafter, the trial court questioned Eaglin about his desire not to present this type of mitigation evidence and he concurred with his counsel's representations. Defense counsel then informed the court that he also had discussed presenting mental mitigation

with Eaglin and counsel made the strategic decision not to present such evidence because it would be "dangerous" to present such evidence to the jury. (DAR V29:1342-43). Eaglin informed the court that he agreed with his attorney's decision regarding the mental mitigation and told the court that "when I talked to the doctor, he told me that it was just between him and I. And he wouldn't talk to anybody else. I wouldn't have made any discussion with him if I thought he was going to talk to anybody besides my attorney." (DAR V29:1343). The trial record clearly supports a finding that Eaglin voluntarily and knowingly waived the presentation of this specific mitigating evidence.

The testimony at the evidentiary hearing failed to overcome the validity of Eaglin's record waiver. No testimony was presented at the hearing as to what Eaglin was specifically told with regard to waiving mitigation. Doug Withee testified that when he discussed not bringing in family background evidence with Eaglin, Eaglin was bright and alert, and counsel never had any difficulty communicating with Eaglin; Eaglin appeared to understand the whole picture. (PCR V26:5210-11). Both the direct appeal record and the testimony of the trial attorneys establish that counsel discussed these potential avenues of mitigation with Eaglin, and there has not been any indication that Eaglin did not appreciate the consequences of his failure to present

additional mitigation at the penalty phase. Other witnesses, including Eaglin's brother, also confirmed that Eaglin did not want his family members to testify. (PCR V16:3213, 3264-65). More importantly, Eaglin himself did not testify at the evidentiary hearing, and there is no evidence that he would have allowed the presentation of this type of mitigating evidence, including evidence of an abusive childhood or mental health mitigation. This fact alone is fatal to Eaglin's claim. See generally Gilreath v. Head, 234 F.3d 547, 551-52 (11th Cir. 2000) (stating that, in order to establish prejudice under Strickland, a defendant in these circumstances must establish that had he been more fully advised about the mitigating evidence, he would have allowed counsel to present it to the jury).

As Eaglin's claim in this postconviction appeal regarding the adequacy of the trial court's colloquy is barred and without merit, this Court should deny the instant sub-claim. See generally Medina v. State, 573 So. 2d 293, 295 (Fla. 1990) (issue raised on direct appeal procedurally barred in postconviction proceedings).

B. Eaglin's Claim of Incompetency is Procedurally Barred

Eaglin next argues that he was not competent to make the

decision to waive mitigating evidence regarding his childhood and was incompetent when he agreed with trial counsel's strategic decision to forego presenting mental mitigation. Eaglin's claim that he was "incompetent" at the time of his limited waiver of mitigation is procedurally barred as this claim was not raised on direct appeal or in Eaglin's postconviction motion. See Nelson v. State, 43 So. 3d 20, 33 (Fla. 2010) (stating that defendant's postconviction substantive due process claim that he was tried and convicted while incompetent was procedurally barred as he failed to raise it on direct appeal). In claim IV of his postconviction motion, collateral counsel alleged that trial counsel was ineffective for failing to advise the trial court of Eaglin's history of "major mental illness" and non-compliance with medication before the colloquy, but Eaglin never alleged that he was legally incompetent at the time and did not have a rational and factual understanding of the proceedings. (PCR V2:396-407). As this claim was not raised below, the instant sub-claim must be denied as procedurally barred.

To the extent that this Court addresses Eaglin's barred claim, the State submits that the evidence adduced at the evidentiary hearing regarding Eaglin's mental state at the time of his waiver clearly establishes that Eaglin was competent.

Trial counsel Withee testified that Eaglin was highly intelligent and alert, had no problems communicating with him, and appeared to "understand the whole picture." (PCR V26:5210-11). Co-counsel Neil McLoughlin further testified that they never had any questions regarding Eaglin's competency at the time of trial. After Eaglin gave an interview with a news reporter against his attorneys' advice following the penalty phase, Public Defender Bob Jacobs asked the trial attorneys to seek a competency determination, but trial counsel did not have a good-faith basis to file such a motion as Eaglin was competent. (PCR V19:3856-59). Additionally, prior to trial, counsel moved to appoint Dr. Krop, an experienced forensic psychologist, to examine Eaglin, for among other reasons, to determine whether he was competent to proceed. (DAR V1:45-46). Dr. Krop examined Eaglin and informed trial counsel Withee that Eaglin was highly intelligent and did not suffer from any significant neurological impairment. (PCR V18:3526). Dr. Krop had no concerns regarding Eaglin's competency. (PCR V18:3570). Although Dr. Krop would have testified that Eaglin had been previously diagnosed with bipolar disorder, and he diagnosed Eaglin with antisocial personality disorder, such diagnoses do not equate to a finding that Eaglin did not have the ability to consult with his counsel with a reasonable degree of rational

understanding and have a rational and factual understanding of the proceedings. Because the direct appeal record and the postconviction proceedings do not call into question Eaglin's competency in any manner, this Court should deny the instant sub-claim.<sup>14</sup>

C. Ineffective Assistance of Penalty Phase Counsel

Eaglin claims that trial counsel was ineffective for failing to inform the trial court of his mental health diagnosis of bipolar disorder and his failure to take medication at the time of his limited waiver of mitigation, was ineffective for failing to adequately advise Eaglin regarding his waiver, and was ineffective in investigating Eaglin's background and mental health history. After conducting a week-long evidentiary hearing on Eaglin's claim, the trial court issued a detailed order denying relief. In its order, the lower court properly identified the applicable law, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Eaglin was not entitled to postconviction relief. (PCR V23:4570-604).

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<sup>14</sup> Collateral counsel further makes the unsubstantiated claim that Eaglin was "paranoid and suicidal" at the penalty phase and Spencer hearing. Initial Brief at 58. Collateral counsel's conclusory allegation should be rejected given the complete lack of evidentiary support for this allegation.

Eaglin first argues that trial counsel was ineffective for failing to notify the court and jury that Eaglin had bipolar disorder and was not taking medication at the time of the murder and at trial. Collateral counsel asserts that two "experts"<sup>15</sup> had informed trial counsel Withee of Eaglin's mental condition, but Withee unreasonably dismissed the condition because "everyone is bipolar." The postconviction court reviewed the facts from the trial and testimony from the evidentiary hearing and issued a

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<sup>15</sup> Collateral counsel erroneously refers to mitigation specialist Cheryl Pettry as a mental health expert in his Initial Brief. See Initial Brief at 57. The testimony and documentary evidence established that Pettry was a mitigation investigator for the attorneys in this case, and there has never been any evidence which would qualify her as an expert.

Collateral counsel also argues in footnote six of his brief that the trial court denied him a full and fair hearing and abused its discretion in denying a continuance to hear the testimony of Pettry. This argument is without merit. As the trial court noted, this case had been set for an evidentiary hearing for months, collateral counsel did not have any contact with Pettry at the time of the hearing when she failed to appear, and counsel could not even provide a tentative time schedule when Pettry may be available in the future. Given counsel's request for an indefinite delay, the trial court acted within its discretion in denying the motion to continue. See Randolph v. State, 853 So. 2d 1051 (Fla. 2003) (noting that trial court's ruling on motion for continuance will only be reversed when abuse of discretion is shown and generally is not found unless the ruling results in undue prejudice to the defendant). Here, the court allowed Eaglin to introduce Pettry's work product and allowed Pettry to file an affidavit. Eaglin has failed to establish an abuse of discretion or any prejudice based on the court's ruling.

detailed order rejecting Eaglin's argument and found that he failed to establish deficient performance or prejudice.

11. The record reflects that the defense team visited Defendant's mother, grandfather, and other family members, retained a defense mental health expert, and retained a mitigation specialist. The record shows that trial counsel moved for Dr. Krop to be appointed as an expert, and later filed a notice of intent not to offer mental mitigation. An email appears in the record, wherein Mr. Withee and investigator, Dennis Wible, are given permission by the Public Defender to travel to interview Defendant's mother, grandfather, and other family members. Copies of these documents are attached. During a hearing on February 17, 2005, Mr. Withee informed the trial court that the defense was "working on mental mitigation continuously and have been since day one." (February 17, 2005 transcript p. 5). On February 27, 2006, Mr. Withee informed the trial court that he had discussed mitigation with Defendant and "it was his opinion at the outset and I believe remains his opinion that we would not do that," and it was Defendant's wish not put the family on to testify (Trial transcript p. 1341). Defendant stated on the record that he agreed, this was his decision, and he had "instructed my counsel not to even do that." (Trial transcript p. 1342) Mr. Withee went on to inform the trial court that he had made a decision not to present mental mitigation due to his fear that it would be dangerous "as far as the jury is concerned." (Trial transcript p. 1343). Defendant agreed with this decision, further stating that he would not have talked to Dr. Krop if he thought that the doctor "was going to talk to anyone besides my attorney." (Trial transcript p. 1343).

12. Mr. Withee testified at the deposition to perpetuate testimony that he listed Dr. Krop as a penalty phase witness as a courtesy, but withdrew Dr. Krop as a witness after the trial court issued a ruling permitting the State to depose Dr. Krop, as he felt this ruling would have violated Defendant's Fifth Amendment privilege (Deposition transcript p. 85). Mr.



Withee stated it was his strategic decision not to use the mental health information he received from Dr. Krop during the penalty phase, in favor of what he felt was the stronger mitigator of prison negligence (Deposition transcript p. 107). Mr. Withee believed that Defendant's social history was a "double edged sword" because if he introduced the negative aspects of Defendant's background, the State would cross-examine with all the positive aspects of Defendant's life (Deposition transcript p. 70). He did not want to present evidence that Defendant was bipolar, because he did not want to give the jury the impression that the diagnosis was justification for Defendant's behavior (Deposition transcript p. 78).

13. The defense theory was to focus on the "monster mitigator" of negligence on the part of the Department of Corrections (Deposition transcript p. 78). This negligence relates not to allegations that the Defendant's mental illness was untreated, but rather that the Department of Corrections would permit Charlotte Correctional Institution (a then "Closed Management Facility") to allow inmates to assist in remodeling and construction efforts that would place construction tools in the hands of inmates, ultimately arguing that the prison system placed into the hands of inmates the deadly weapons ultimately used in this case (See, e.g. Deposition transcript pp. 80, 82, 107; Evidentiary hearing transcript pp. 720-721, 732)).

14. Mr. Withee recalled that members of the defense team, including mitigation specialist Cheryl Pettry, spoke with Defendant's mother, brother, boxing coach, friend Jill Hussung, and foster father Tom Winge (Deposition transcript pp. 30, 36, 38, 39, 40, 41, 62, 64): Mr. Withee recalled that Mr. Winge specifically indicated that he did not want to testify, as his testimony regarding Defendant's criminal history would be harmful to Defendant (Deposition transcript pp. 39, 44). Mr. Withee's decision not to present social history or mental health mitigation was clear trial strategy, made after having investigated social and mental health mitigation, and with Defendant's complete agreement with that strategy at that time.

15. Attorney Neil McLaughlin, co-counsel to Mr. Withee, testified at the evidentiary hearing and confirmed the defense strategies articulated by Mr. Withee. According to Mr. McLaughlin, the defense team, with the assistance of their mitigation specialist and the input of Dr. Krop, were aware of and had investigated the Defendant's childhood and history of mental illness (Evidentiary hearing transcript pp. 720, 734, 751). It was the decision of the Defendant and his attorneys to focus on the negligence of a prison system putting a bipolar, convicted murderer on a construction work crew (Evidentiary hearing transcript pp. 729, 732). The defense preferred this strategy rather than risk the State rebutting negative childhood and mental health issues with the Defendant's positive accomplishments, despite having been raised in an abusive household (Evidentiary hearing transcript pp. 734-735). In arriving at this decision, Mr. McLaughlin testified that the Defendant was well aware of and in agreement with this strategy (Evidentiary hearing transcript p. 733). In essence, the theme of the Defendant's case was: "Don't kill Tommy because they [Department of Corrections] can't control him" (Evidentiary hearing transcript pp. 731-732, 733).

16. Defendant's brother, Chief Petty Naval Officer Kenneth Donnal Eaglin, was the first defense witness called to testify at the evidentiary hearing. Officer Eaglin has served in the United States Navy for more than 21 years; despite having been raised in the same or worse conditions as his brother, the Defendant (Evidentiary hearing transcript p. 11). With regard to the Defense strategy to not address the child history and mental health mitigators, Officer Eaglin understood from speaking with Defendant, that the Defendant expressly did not want involvement from his immediate family during the penalty phase (Evidentiary hearing transcript p. 107). Officer Eaglin's testimony regarding this decision is consistent with Mr. McLoughlin's testimony that the defense team believed if they presented Defendant's negative background, the State would have presented all the positive aspects, and made the comparison with Defendant's brother, who grew up in the same

circumstances, yet became a Chief Petty Officer in the Navy who has served honorably for 21 years.

17. Dennis Wible, investigator for the Public Defender's Office, testified that he requested and received the Public Defender's file, consisting of two or three boxes, from Pinellas County (Evidentiary hearing transcript p. 987). He requested and received Defendant's mental health and medical records from the Department of Corrections (Evidentiary hearing transcript p. 994). Investigator Wible testified that he worked with Mr. Withee and visited the Defendant twice during the pendency of the proceeding (Evidentiary hearing transcript p. 988). During those meetings, the Defendant provided information to Investigator Wible about his family, his background, and the offenses (Evidentiary hearing transcript pp. 991-992, 997). The Defendant unequivocally instructed Investigator Wible and Mr. Withee that he did not want his family involved in the trial (Evidentiary hearing transcript pp. 994-995). Notwithstanding those instructions from the Defendant, Mr. Wible tried several times to get in touch with Defendant's boxing coach, but was not able to reach him (Evidentiary hearing transcript p. 999). He testified that he did contact Defendant's mother; and tried to contact Defendant's aunt, grandfather, and brother (Evidentiary hearing transcript p. 1003). He travelled to Indiana with Mr. Withee to interview Defendant's family, despite the fact that Defendant did not want his family involved (Evidentiary hearing transcript p. 1010). Defendant's grandfather did not want to speak with them, and he was unable to get in contact with the other family members (Evidentiary hearing transcript p. 1013). Mr. Wible attempted to contact Defendant's father in the Illinois Department of Corrections, and the father gave them no useful information, so he did not write a report (Evidentiary hearing transcript p. 1018).

(PCR V23:4579-84).

As the court properly found when denying this claim, trial counsel had a strategic reason for not presenting evidence of

Eaglin's mental health. Trial counsel testified that presenting mental health mitigation from Dr. Krop would have been a "double-edged sword" as the State would have elicited substantial testimony regarding Dr. Krop's diagnosis of antisocial personality disorder and polysubstance abuse. Trial counsel thoroughly investigated Eaglin's mental health background, obtained all of his DOC records, and provided a "truckload" of records to Dr. Krop for his review. Trial counsel also discussed his strategic decision with Eaglin, and Eaglin was in agreement with counsel not to present mental mitigation.

As this Court has repeatedly recognized, trial counsel does not perform deficiently by making a strategic decision to forego presenting mental mitigation, after investigation, when it would open the door to the introduction of prejudicial information. See Nelson v. State, 43 So. 3d 20, 31-32 (Fla. 2010) (holding that it was reasonable for trial counsel to forego presenting mental health evidence that could damage the defendant's chances with the jury); Sexton v. State, 997 So. 2d 1073, 1082-84 (Fla. 2008) (trial counsel did not perform deficiently by failing to present mental health mitigation which would be so inflammatory that it would counteract any possible mitigation); Derrick v. State, 983 So. 2d 443, 458 (Fla. 2008) (counsel reasonably decided not to put on deplorable circumstances of childhood,

including sexual abuse, and adopted strategy to “go positive”); Johnson v. State, 921 So. 2d 490, 501 (Fla. 2005) (finding that trial counsel was not deficient for failing to present a mental health expert who found that defendant had no serious mental health disorders, and the introduction of testimony concerning his alleged adjustment disorder and sexual disorder would have opened the door to discussion of his antisocial features or traits); Reed v. State, 875 So. 2d 415, 436-37 (Fla. 2004) (counsel not ineffective for failing to present “double-edged sword” mitigation); Griffin v. State, 866 So. 2d 1, 9 (Fla. 2003) (no deficient performance where omitted mitigation opens the door to other damaging testimony). Furthermore, “the reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” Henry v. State, 937 So. 2d 563, 573 (Fla. 2006), quoting Stewart v. State, 801 So. 2d 59 (Fla. 2001), and Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000). In the instant case, trial counsel thoroughly investigated Eaglin’s mental health background, retained a well-respected forensic mental health expert, and chose not to present evidence of Eaglin’s bipolar disorder diagnosis because it would have opened the door to testimony regarding Eaglin’s antisocial personality disorder and polysubstance abuse.

The fact that Eaglin's postconviction counsel has retained additional mental health experts who testified to additional or different diagnoses than Dr. Krop does not alter the reasonableness of trial counsel's strategic decision. The law is well established that trial counsel has "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. In this case, trial counsel certainly made a reasonable investigation into Eaglin's mental health for potential mitigating evidence. The defense team obtained Eaglin's mental health records from DOC, obtained records and mitigation information from the attorneys and mitigation specialist who worked on Eaglin's prior Pinellas County murder case, interviewed Eaglin and other family members and acquaintances regarding Eaglin's life, and provided voluminous background material to Dr. Krop. The fact that collateral counsel has retained additional experts who came to different diagnoses does not affect trial counsel's strategic decision to forego presenting testimony from Dr. Krop. See Johnson v. State, SC12-1204, slip op. at 50-52 (Fla. Jan. 9, 2014) (noting that postconviction mental health experts often have different diagnoses and arrive at different conclusions, but trial counsel does not perform unreasonably by relying on the conclusions of

his mental health expert who examined the defendant prior to trial); Asay v. State, 769 So. 2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction); Dufour v. State, 905 So. 2d 42, 56 (Fla. 2005) ("There was evidence of clear justification for not utilizing [the consulted expert] as a witness [and] ... [t]rial counsel was not ineffective simply because after receiving an initial unfavorable report from [one expert] they did not proceed further to seek additional experts for mental mitigation evidence.").

Collateral counsel further alleges that trial counsel was deficient in failing to advise Eaglin regarding his limited waiver of mitigation. Collateral counsel takes issue with the trial court's order denying this claim. At the outset of the court's order, the court set forth Eaglin's allegations in this claim and stated:

Additionally, the Defendant believes that detailed evidence regarding his family background and psychiatric history needed to be heard by the trial court and jury. He argues that even where a defendant instructs counsel not to present mitigation, counsel must first investigate potential mitigation and advise the defendant of the possible merit in that mitigation evidence. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986); Blanco v. Singletary, 943 F.2d 1477, 1502 (11th Cir. 1991). Defendant alleges that counsel did not make use of his mitigation specialist, did not

present evidence that Defendant had bipolar disorder, and counsel did not explain to Defendant the process of lethal injection and risks involved, such that his waiver was involuntary. **As it relates to the portion of the claim regarding counsel's alleged failure to advise Defendant regarding his waiver of penalty phase mitigation and failure to explain the process of lethal injection, no evidence was presented as to this issue during the evidentiary hearing, and this portion of the claim is deemed waived.**

(PCR V23:4578) (emphasis added). The postconviction court proceeded to discuss, over the next six pages, the evidence presented at the evidentiary hearing and noted that Eaglin "unequivocally instructed" the defense team not to involve his family and was in "complete agreement" with trial counsel's decision to forego presenting mental health and social history mitigation in favor of the prison negligence theory which trial counsel utilized. (PCR V23:4578-84).

Eaglin argues that the court erred in finding his claim "waived" because evidence was presented regarding trial counsel's failure to advise Eaglin regarding his limited waiver. Eaglin relies on the State's questioning of trial counsel Withee wherein Withee indicated that he did not specifically discuss with Eaglin in any detail the waiver of presenting evidence regarding his background and childhood. Although the trial court



found this claim waived,<sup>16</sup> the court addressed the claim in detail and found that Eaglin had not demonstrated deficient performance and prejudice as required by Strickland.

As the postconviction court correctly found, the record conclusively establishes that Eaglin was in "complete agreement" with trial counsel to waive mitigating evidence regarding his mental health and background. At the time of the penalty phase, Eaglin acknowledged that he agreed with counsel's representation that he did not want family members, including foster father Tim Winge, to testify to mitigation. (DAR V29:1341-42). Judge Blackwell advised Eaglin that typically evidence about unfortunate early years and poor family circumstances would be presented, and that this would be Eaglin's last opportunity to present that kind of evidence. (DAR V29:1342). When asked if he understood this, Eaglin responded, "I instructed my counsel not to even do that." (DAR V29:1342). Counsel then advised the trial court that a strategic decision had been made against presenting any mental mitigation through Dr. Krop, and Eaglin confirmed his

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<sup>16</sup> The portion of Eaglin's claim regarding trial counsel's failure to advise Eaglin of the process of lethal injection was waived as no evidence was presented on this sub-claim. Likewise, as previously noted, Eaglin did not testify at the evidentiary hearing regarding the wavier and never presented any evidence that he would have not waived this type of mitigation had he been given more information. As such, the court properly found that "no evidence was presented" as to this issue.

agreement with that decision. (DAR V29:1342-43).

At the evidentiary hearing, trial counsel Doug Withee testified that Eaglin did not want to involve his mother in his case. Collateral counsel uses this testimony to argue that Eaglin was willing to involve others in his mitigation case if only trial counsel would have investigated it. As noted, there has been no testimony from Eaglin to support this claim. Furthermore, it is evident that Eaglin's desire not to involve his family extended beyond his biological mother. The discussion conducted at the penalty phase clearly reflects that Eaglin had discussed the matter with counsel and did not want to put "his family" through the experience, and foster father Tim Winge was even specifically mentioned by name. (DAR V29:1341-42). Eaglin confirmed to Judge Blackwell that he agreed with Withee's representations, and acknowledged that he had instructed counsel to not put on "that kind of evidence like unfortunate early years of life and poor family circumstances." (DAR V29:1342). At the evidentiary hearing, co-counsel Neil McLaughlin testified that Eaglin was in agreement with trial counsel's strategy not to "muddy the waters" with mitigating evidence regarding his background and childhood, but rather, pursue the prison negligence mitigation theory. (PCR V19:3866). Defense investigator Dennis Wible also confirmed that Eaglin instructed

his attorneys not to involve his family. (PCR V21:4145-46). Eaglin's brother, Kenneth Donnel Eaglin, and Eaglin's good friend, Jill Hussung, also confirmed that Eaglin did not want to present any family background witnesses at the penalty phase. (PCR V16:3213, 3264-66). With this background, it is readily apparent that Withee's recall of the details of discussions and limitations placed on Eaglin's record waiver is faulty. This is certainly not surprising, given Withee's significant health difficulties at the time of his testimony and the lapse of time.

This is not a case where the scope of the mitigation investigation is at issue. The defense's mitigation specialist, Cheryl Pettry, had completed an extensive background investigation for purposes of developing mitigation for Eaglin's prior murder charge in Pinellas County. In addition, the defense used the services of investigator Wible to conduct supplemental mitigation research into Eaglin's case. In postconviction, Eaglin has not identified any mitigation, or even a source of mitigation, that was not known to the defense prior to Eaglin's record waiver of mitigation. As such, this Court should find that the record clearly supports the postconviction court's finding that trial counsel did not perform deficiently in investigating and advising Eaglin regarding the mitigation case.

The testimony at the evidentiary hearing demonstrated that the defense team conducted a substantial, thorough and complete investigation. Trial counsel had the benefit of obtaining Eaglin's prior records from his Pinellas County murder case wherein the State had initially sought the death penalty. Trial counsel obtained the records from Eaglin's prior counsel and also retained the mitigation expert, Cheryl Pettry, who had performed an extensive investigation into Eaglin's background at that time. Defense investigator Wible summarized the boxes of information obtained in the Pinellas County records for trial counsel and Pettry also provided trial counsel with her prior work product. Trial counsel retained a mental health expert, Dr. Krop, and by Dr. Krop's own admission, trial counsel provided him with more material to review than in any of his previous two thousand capital cases. Dr. Krop and his staff interviewed Eaglin, his brother and mother, and reviewed Cheryl Pettry's eight-page outline of mitigating evidence. Trial counsel and his investigator interviewed Eaglin's mother, father, brother; attempted to interview his grandfather (who declined); spoke to Eaglin's foster father Tim Winge who did not want to testify because he had negative information; and had quite a bit of contact with Eaglin's good friend Jill Hussung who had known Eaglin since he was twelve years old.

Eaglin has fallen far short of meeting his burden under Strickland of overcoming the strong presumption that his trial attorneys performed reasonably and fulfilled the guarantees of the Sixth Amendment. It is a very rare case where a defendant is not able to find something in postconviction which was unknown to, or undiscovered by, his defense team, but this appears to be such a case. In investigating mitigation, the defense team explored several avenues of mitigation, including Eaglin's mental health, his family and background, and negligence by the Department of Corrections which contributed to the escape attempt as well as the murders of officer Lathrem and inmate Fuston. Ultimately, trial counsel made a strategic decision to only present evidence of DOC negligence in mitigation. Trial counsel felt, in hindsight, the strategy had proved successful, in that four jurors voted for a life recommendation. Trial counsel was aware that prior to Eaglin's case, co-defendant Smith, who was not the actual killer, received a nine to three death recommendation despite presenting a mitigation theory of DOC negligence, mental health mitigation, and evidence of a horrific childhood.

Even if an attorney or most attorneys would not have chosen to submit the DOC negligence theory exclusively as mitigation, trial counsel's determination to do so must be upheld since it

was a considered strategy, selected after full consideration of the other options. Chandler v. U.S., 218 F.3d 1305, 1314-18 (11th Cir. 2000). Withee had years of experience handling capital cases, and discussed his desired strategy with co-counsel, with Dr. Krop, with Cheryl Pettry, and with Eaglin himself. Even if mitigation investigator Pettry did not agree with counsel's decision, her opinion does not overcome the presumption of trial counsel's reasonableness. See Chandler, 218 F.3d at 1316 (when reviewing the performance of seasoned trial attorneys, the strong presumption of correctness ascribed to their actions is even stronger). Current counsel's preference for a different tactic likewise does not suffice to demonstrate deficient performance. Because the record supports the postconviction court's finding that trial counsel did not perform deficiently, this Court should affirm the denial of relief.

Although not required to address the prejudice prong of Strickland given Eaglin's failure to establish deficient performance, this Court should also find that the lower court properly found that Eaglin failed to establish that he was prejudiced. See Waterhouse v. State, 792 So. 2d 1176, 1182 (Fla. 2001) (noting that "[w]hen a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he

has made a showing as to the other prong"); Zakrzewski v. State, 866 So. 2d 688, 692 (Fla. 2003). "Under Strickland, a defendant is prejudiced by his counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.'" Porter v. McCollum, 558 U.S. 30, 40 (2009) (quoting Strickland, 446 U.S. at 694). A proper analysis requires a court to consider the totality of the available mitigation evidence, both that adduced at trial and the evidence adduced in the postconviction proceedings, and reweigh it against the evidence in aggravation. Id. at 41. This necessarily requires a determination as to how the relevant aggravating and mitigating factors were weighed at trial, along with determining how the evidentiary support for those factors would change with the new information developed in postconviction.

In addressing Eaglin's ineffective assistance of penalty phase counsel claims, the postconviction court found that trial counsel did not perform deficiently by failing to investigate and present evidence from lay witnesses or Dr. Krop, and also found that even had Eaglin agreed to allow counsel to present this information, there was no reasonable probability of a

different outcome.<sup>17</sup> The postconviction court extensively discussed the testimony presented at the week-long evidentiary hearing, and in addressing Strickland's prejudice prong, the court stated:

Even if trial counsels' performance was in some way deficient, and even if all the evidence Defendant now wishes presented had been introduced at trial, there is no reasonable probability of a different outcome. Chief Petty Officer Eaglin testified that Defendant's mother left when he was three years old, thus, even had she been called to testify at trial, it is unlikely she would have been able to provide any information about Defendant except his first year or so, and nothing of the rest of Defendant's life (Evidentiary hearing transcript p. 16). Mr. Wible testified that the mother confirmed this information when she was interviewed by the defense team (Evidentiary hearing transcript pp. 1011-1012). Chief Petty Officer Eaglin would have been able to testify about the childhood of abuse suffered by the and

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<sup>17</sup> In the instant case, trial counsel thoroughly investigated mitigating evidence and Eaglin directed counsel not to involve or present any background evidence from his family and agreed with counsel's decision not to present mental mitigation. In order to establish prejudice for his claim that trial counsel performed ineffectively in investigating his background and mental health, Eaglin should make two showings: (1) that had trial counsel conducted a more detailed investigation, the defendant would have allowed him to present such evidence, and (2) that had such evidence been presented, the result of the proceedings would have been different. See Grim v. State, 971 So. 2d 85, 96 (Fla. 2007) (stating that where defendant refused to allow counsel to present voluntary intoxication defense with expert witness, he failed to establish prejudice in postconviction when there was no evidence that he would have changed his mind and allowed counsel to present evidence from another expert); Gilreath v. Head, 234 F.3d 547, 551-52 (11th Cir. 2000). Because Eaglin never testified that he would have allowed any of this type of evidence to be presented, this Court should find that he failed to establish prejudice.



Defendant, where they were beaten every day by their father (Evidentiary hearing transcript pp. 34-39, 45, 52-54, 60-61, 63-64, 67-68, 70-71). Presumably, the paternal grandfather, with whom the boys lived at times, would also have been able to corroborate this abuse, had the grandfather not refused to cooperate, but his testimony would have been cumulative. Despite testimony of the admittedly horrific childhood Defendant and his brother endured, Chief Petty Officer Eaglin, the person who spent the most time with Defendant during his formative years, presented no testimony that Defendant was negatively affected mentally by that abuse. Chief Petty Officer Eaglin testified that their abusive childhood did not result in the Defendant behaving erratically or unpredictably, or that the physical abuse endured by either of them resulted in the Defendant being physically or psychologically impaired (Evidentiary hearing transcript p. 78). The evidence of the horrific childhood, had it been presented as fully as Defendant now wishes, would not have outweighed the aggravating factors in this case, especially in light of the fact that Chief Petty Officer Eaglin endured the same abuse as Defendant, and overcame his background. Defendant has failed to meet his burden as to either prong of Strickland. . . .

. . .

The Court finds trial counsel was not ineffective in failing to call these lay witnesses during trial. Even if Defendant had agreed or requested that his attorneys present social history or mental health mitigation evidence through these witnesses, their testimony would not have been sufficiently mitigating so as to outweigh the aggravating factors. These witnesses, and Defendant's brother, were closest to him, observed him daily, and did not testify as to frequent depression or mood swings. None of the witnesses testified that Defendant had been knocked out, experienced memory loss or confusion, or was hospitalized as a result of boxing. None of the witnesses testified as to Defendant suffering any seizures. The testimony of these witnesses shows that Defendant was given numerous opportunities, took advantage of those opportunities, and was successful

at boxing and in the construction business. Any potential mitigation evidence regarding Defendant's abusive childhood or alleged boxing injuries would have been countered in cross examination by all the positive aspects of Defendant's life and his accomplishments in spite of enduring an abusive childhood. Mr. Withee testified that one of his trial strategies was not to present social history or mental health evidence for that reason, and the Court finds this trial strategy reasonable.

(PCR V23:4583, 4589).

The postconviction court properly reviewed the totality of the mitigating evidence and determined that there was no prejudice in this case. The aggravating facts in Eaglin's case were egregious beyond absolution by the fact that he had a troubled childhood and may suffer from bipolar disorder. The trial court found three aggravating factors supported both murders: (1) murders committed by a person under sentence of imprisonment; (2) prior violent felony convictions; and (3) murders committed in a cold, calculated and premeditated manner (DAR V19:3685-86). The murder of Officer Lathrem established the additional aggravating circumstances that (4) the murder was committed for the purpose of effecting an escape and (5) the victim was a law enforcement officer. Against this aggravation, the new mitigation presented in postconviction revealed that Eaglin had been diagnosed with bipolar and antisocial personality disorders, had refused to take his medications months

before but was taking illegal drugs at the time of the murders, and suffered physical and emotional abuse as a child. Such evidence does not reasonably reduce Eaglin's moral culpability for the brutal, unnecessary murders Eaglin committed, and confidence in the outcome of Eaglin's penalty phase is not undermined.

Collateral counsel now suggests that trial counsel should have presented both mental mitigation and family background evidence at the penalty phase in addition to the DOC negligence offered. Prejudice cannot be shown with either or both of these categories of mitigation. The mitigating value of Eaglin's childhood difficulties is diminished by the fact that Eaglin was 27 years old at the time of the offenses. See Douglas v. State, 878 So. 2d 1246, 1260 (Fla. 2004) (affirming the assignment of little weight to mitigation of abusive childhood based on it being remote in time where the defendant was 25 at the time of the capital murder). In addition, the primary abuser, Eaglin's father, was out of the picture for much of the time, and Eaglin was completely removed from any abusive environment when he was eleven years old. After that, he was given support and nurturing care, and provided with an escape from his harsh early years. He was ultimately joined with a new family and friends that admired his athleticism and encouraged his positive development. He was

brought to Florida where his prior boxing experience blossomed to a successful professional career, which apparently ended because he could not control his illegal drug use, or maintain any necessary prescribed medication. As the lower court noted, Eaglin's older brother was raised in the same abusive environment, but he went on to enjoy a successful career in the Navy.

The weight of the background mitigation is also reasonably diminished by the negative information about Eaglin's prior violence and criminal behavior. The postconviction testimony revealed that Eaglin had a history of fighting with peers dating to childhood: Eaglin set off a homemade bomb at McDonald's after going to live with the Winges, broke the nose of his foster family's teenaged son, and fought with his brother so violently the last time they saw each other, in 1992, that Kenneth Eaglin tried to choke the defendant.

Clearly Eaglin's father earned his prison sentence for the cruelty and abuse shown to his children. However, Eaglin had only limited exposure to his father, and all of his contact came many years prior to killing of Officer Lathrem and Charles Fuston. Furthermore, the trial court considered and weighed Eaglin's difficult childhood before imposing the two death sentences. The trial court noted that Eaglin had a "family

history of neglect, abandonment, and cruelty," and suffered a "severely abusive childhood with a severely dysfunctional family." (DAR V19:3686). On these facts, the more-detailed postconviction evidence of Eaglin's family background would not substantially impact the weighing of the sentencing factors. As the lower court correctly found, there is no reasonable probability of a different result at sentencing had this evidence been presented. Compare Willacy v. State, 967 So. 2d 131, 144 (Fla. 2007) (finding no prejudice where damaging information would do more harm than good); Asay v. State, 769 So. 2d 974, 988 (Fla. 2000) (holding that no prejudice established where the omitted mitigation opens the door to testimony of a defendant's violent past).

Similarly, the mental health mitigation offered by Eaglin's mental health experts was not compelling and does not support any finding of prejudice. Dr. Krop's findings do not seriously diminish Eaglin's moral culpability, which is why trial counsel strategically omitted Dr. Krop's information from the defense case. Despite it being a "major mental illness," Dr. Krop could not reasonably relate Eaglin's bipolar disorder to the well-planned and brutally executed murders at issue in this case. Additionally, the weight of this potential mental health mitigation is reduced by the accompanying diagnosis of an

antisocial personality disorder and polysubstance abuse. A diagnosis of bipolar disorder certainly does not insulate a defendant from receiving a death sentence. See Zommer v. State, 31 So. 3d 733, 742 (Fla. 2010); Perez v. State, 919 So. 2d 347, 372 (Fla. 2005); Alston v. State, 894 So. 2d 46 (Fla. 2004). Although Dr. Krop testified that he accepted the bipolar disorder diagnosis because it was so well documented in the records, the testimony of Dr. Gamache cast doubt into the reliability of that diagnosis. Dr. Gamache testified that although Eaglin's records showed a history of some kind of mood disturbance, he was not convinced that Eaglin suffered from bipolar disorder because his records lacked consistent information about the symptoms and Eaglin's performance on psychotropic medication.

Likewise, Dr. Gamache disagreed with collateral counsel's retained mental health experts, Drs. Hyde, Pickar and Harvey. The postconviction court extensively discussed these experts' opinions and diagnoses (PCR V23:4592-97), and noted that Dr. Gamache's testimony contradicted a number of their findings. Dr. Gamache found that Eaglin's records supported a diagnosis of mood disorder, polysubstance abuse, and antisocial personality disorder, but did not support the postconviction experts' diagnoses of posttraumatic stress disorder (PTSD), chronic

traumatic encephalopathy (CTE), or postconcussive syndrome.<sup>18</sup> Dr. Gamache's opinions were well supported by Eaglin's records and his opinions were more credible than Eaglin's postconviction experts.<sup>19</sup>

Even when considering the totality of the evidence regarding Eaglin's mental health diagnoses, it is clear that there is no reasonable probability of a different result had this mitigation been offered at the penalty phase. The evidence as to whether Eaglin's mental condition supported any statutory mental mitigating factors was conflicting. Additionally, if offered, the testimony would have been prejudicial to the defense as it would have reminded the jury of Eaglin's history of violent behavior and criminal activity. The strong aggravating factors supporting the brutal double murders Eaglin committed while trying to escape prison would continue to outweigh the DOC negligence theory presented in mitigation, as

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<sup>18</sup> Dr. Krop, who examined Eaglin prior to trial, also testified that Eaglin did not meet the diagnostic criteria for PTSD, nor was the diagnosis supported by his medical or mental health records. (PCR V18:3616-18). Collateral counsel's retained expert, Dr. Pickar, was also uncertain of Dr. Hyde's diagnosis of PTSD. (PCR V18:3668-69)

<sup>19</sup> The postconviction court specifically made a credibility finding as to Dr. Hyde's testimony and found his testimony "less than credible." (PCR V23:4602). Dr. Hyde testified that he diagnosed Eaglin with bipolar disorder based on Eaglin's self-reporting and that some of the self-reporting was the result of prompting on Dr. Hyde's part.

well as the family background and mental health mitigation offered in postconviction. Cf. Smith v. State, 998 So. 2d 516 (Fla. 2008); Smith v. State (II), \_\_\_ So. 3d \_\_\_\_, 2013 WL 5312085 (Fla. Sept. 12, 2013) (upholding Eaglin's codefendant's death sentence even when there was substantial evidence of Smith's horrific childhood and mental health issues). Here, there is no reasonable probability that the mitigation evidence presented at the postconviction proceeding would have changed the outcome of the proceedings. Because the postconviction court correctly found that Eaglin failed to demonstrate that his attorneys performed unreasonably in their investigation and presentation of mitigation at his penalty phase and failed to establish any possible prejudice, this Court should affirm the court's ruling denying this claim.



## ISSUE II

EAGLIN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSELS' ARGUMENTS PRESENTED IN THE MOTIONS TO SUPPRESS IS WITHOUT MERIT.

Eaglin claims that trial counsel was ineffective for failing to move to suppress Eaglin's post-arrest statements due to Eaglin's purported inability to understand and waive his constitutional rights. The trial court granted Eaglin an evidentiary hearing on this claim, but no evidence was presented at the evidentiary hearing in support of this claim. Thus, the trial court stated that the claim was waived. Additionally, after addressing the merits of the claim, the postconviction court found that Eaglin failed to meet his burden of establishing an ineffective assistance of counsel claim.

Eaglin first argues in his brief that the court erred in denying the claim as "waived" because the court "ignored" the evidence presented at the evidentiary hearing regarding trial counsel's decision to argue that Eaglin was incapable of understanding his rights due to his bipolar disorder and manic state at the time of his interrogation. Contrary to Eaglin's assertions, the court did not ignore any evidence, but correctly noted that, despite being granted a hearing on this claim, collateral counsel failed to ask any questions of trial counsel

regarding the motion to suppress. The court stated:

5. As to Claim III(a), Defendant argues that counsel was ineffective for failing to argue in the motion to suppress that Defendant was incapable of understanding his Miranda rights, and that he did not knowingly waive those rights. Defendant argues that counsel raised the issues of duress and ill treatment in the motion to suppress statements, but that counsel failed to argue that Defendant's mental state prevented him from intelligently waiving his rights. Defendant contends that numerous witnesses described Defendant's erratic behavior since his mother had died, and that he had urged the officers to shoot him during the escape attempt. Defendant also argues that counsel did not provide the trial court with any testimony regarding Defendant's "known serious mental health condition," in that Dr. Krop had diagnosed Defendant with bipolar disorder. Defendant believes that, since diminished mental capacity is one factor a court can consider in a totality of the circumstances analysis of a waiver, had this issue been raised, the "totality of the circumstances analysis would have changed dramatically" and the trial court would "likely" have granted suppression.

6. Douglas Withee, trial counsel, testified during a deposition to perpetuate testimony that he was aware of Dr. Krop's diagnosis that Defendant had bipolar disorder and antisocial personality disorder (Deposition transcript pp. 76, 78). Mr. Withee was never specifically questioned regarding the motion to suppress proceedings. Trial co-counsel, Neil McLoughlin, testified that he was aware that Dr. Krop had diagnosed Defendant with bipolar disorder and antisocial personality disorder (Evidentiary hearing transcript pp.719-720). Mr. McLoughlin was not specifically questioned as to the motion to suppress proceedings before the trial court. **Postconviction counsel failed to inquire as to why Mr. Withee and Mr. McLoughlin did not present to the trial court information regarding Dr. Krop's diagnosis during the motion to suppress proceedings. Thus, those claims are deemed waived.**

(PCR V23:4575-76) (emphasis added).

Even if the postconviction court erred in finding the claim waived, the court properly denied the claim after addressing the merits as Eaglin failed to carry his burden under Strickland. As the court noted when addressing the claim, Eaglin failed to establish deficient performance and prejudice, especially considering the fact that Eaglin's post-Miranda statements were cumulative to the non-suppressible statements he spontaneously made prior to his interrogation.

7. Even if these claims were not waived, the record refutes the claims. During the motion to suppress proceedings, held on February 20, 2006, Officer Belfield testified that he observed Defendant between the fences during the failed escape attempt, and Defendant was mad, screaming at the officers that they would have to kill him (Motion to suppress transcript p. 17). Ms. Otwell, a nurse, testified that she observed Defendant in a holding cell following his apprehension, and Defendant was alert and oriented, responding to her questions verbally (Motion to suppress transcript p. 22). Agent Uebelacker testified that when Defendant entered the room for an interview subsequent to the offenses, Defendant immediately stated that he wanted the electric chair, and that he "tried to kill those three people." (Motion to suppress transcript p. 45). This statement was unsolicited, not in response to any questions, and was made prior to Agent Uebelacker's reading of his Miranda rights. (Motion to suppress transcript p. 46). Defendant testified at the motion to suppress hearing. He admitted that he had made that statement, that he had also recited his rights during the taped statement, and understood those rights (Motion to suppress transcript p. 58). During trial, the recording of Defendant's statement was played (Trial transcript pp. 1064-1076). The record shows that Defendant voluntarily made the statements that were

the subject of the motion to suppress, and voluntarily and knowingly waived his Miranda rights. Defendant recited his rights, said he understood, and indicated that he had been through this before. Defendant's actions were not those of someone who was incapable of understanding his rights. To the extent that Dr. Krop diagnosed Defendant with bipolar disorder, there was no testimony presented at the evidentiary hearing that bipolar disorder alone would render someone incapable of understanding their rights. Even if trial counsel were in some way deficient, there is no prejudice, as there is no reasonable probability of a different outcome. It does not appear likely that the trial court would have granted the motion to suppress based solely on the knowledge that Defendant had been diagnosed with bipolar disorder. Further, Defendant's pre-interrogation statements and conversations with the codefendant were not subject to suppression, and the post Miranda statements were cumulative to the non-suppressible statements, such that Defendant was not prejudiced. Defendant has failed to meet his burden as to either prong of Strickland. Therefore, **Ground III(a) is DENIED.**

(PCR V23:4575-77).

In this case, Eaglin's experienced trial counsels filed several motions directed at the statements made by Eaglin, and litigated several theories for suppression, including an alleged Miranda violation and a lack of voluntariness. (DAR V10:1777-86, 1792-93; V14:2682-83; V17:3335-36; V20:3868-89). After hearing substantial testimony and argument from counsel on the motions to suppress, the trial court denied the motions and allowed the State to present evidence from Florida Department of Law Enforcement Officer Steve Uebelacker regarding Eaglin's statements made on June 12, 2003, the day following the murders.

Agent Uebelacker testified that when Eaglin was first brought into the interview room on June 12, 2003, he made spontaneous statements indicating that he "wanted the electric chair" and that he had "tried to kill those three people." (DAR V28:1064-65). Agent Uebelacker discussed with Eaglin if he was willing to talk with them and proceeded to read Eaglin his Miranda rights and took a taped statement. (DAR V28:1065-71). After freely and voluntarily waiving his rights, Eaglin told the agents he "decided to jump the fence" and "wanted to get the death penalty" and the electric chair. (DAR V28:1072, 1076). Agent Uebelacker further testified that about 10-12 days later, he overheard Eaglin tell codefendant Smith that he was "trying to get the chair" and heard Eaglin talk about his failed attempt to get over the fence. (DAR V28:1077-78).

At the postconviction proceedings, neither of Eaglin's attorneys were questioned about expanding their arguments for suppression to include an element relating to Eaglin's mental condition. Counsel was not asked about preparing the motions to suppress or about any defense theories or strategies with regard to the admission of Eaglin's statements. None of the experts presented at the hearing expressed any reservations about Eaglin's ability to understand and waive his constitutional rights. To the contrary, the experts agreed that Eaglin is

intelligent, with an IQ well above average. No one suggested that Eaglin's various diagnoses or the failure to take medications affected his ability to understand and waive his constitutional rights. There was nothing offered at the hearing to overcome the presumption that counsel performed reasonably in challenging Eaglin's statements, and as the lower court correctly found, there was no evidence presented to suggest that Eaglin did not have the mental ability to understand and waive his Miranda rights.

The transcript of Eaglin's interview with Agent Uebelacker further defeats any suggestion that Eaglin's mental condition rendered him unable to understand and waive his rights. At the beginning of the brief interview, when the officers first questioned Eaglin about understanding his rights, Eaglin responded by reciting almost verbatim his Miranda rights himself (DAR V16:3080). Any doubt as to Eaglin's capacity to understand is put to rest a few pages later, when Eaglin in fact affirmatively invoked his rights: "I would like to speak to my attorney before I answer any questions and I will not have anybody from the state agency while I'm in a custodial interrogation come forward and ask me any more questions until my lawyer is present. Thank you." (DAR V16:3085).

Eaglin's argument focuses on the postconviction experts' opinions suggesting that Eaglin was suffering a manic episode and demonstrating suicidal behavior at the time of the escape attempt. Even accepting this testimony as true,<sup>20</sup> none of the testimony offered at the evidentiary hearing addressed Eaglin's state of mind at the time of the Miranda waiver the day after the attempted escape. Instead, Eaglin notes that Dr. Harvey speculated that Eaglin could have been having a manic episode at the time of the escape attempt. (PCR V20:3967-70). Dr. Harvey further testified that manic episodes can last days in duration, and collateral counsel thus speculates that Eaglin was manic at the time of his statements to Agent Uebelacker the day following the murders.

Postconviction relief cannot be granted based on speculation. Valle v. State, 70 So. 3d 530, 550 (Fla. 2011); Maharaj v. State, 778 So. 2d 944, 951 (Fla. 2000). Even if Eaglin was bipolar and experiencing a manic episode at the time he spoke to Agent Ueberlacker, he failed to offer any evidence that his ability to understand and waive his constitutional rights was compromised. Of course, even if Eaglin suffered from a severe mental disturbance, suppression would not be required

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<sup>20</sup> The testimony that Eaglin was suffering a manic episode and was suicidal was not credible and refuted by the testimony of Dr. Gamache.

in the absence of some demonstration of police misconduct, which has not even been identified. Colorado v. Connelley, 479 U.S. 157, 167 (1986); Chavez v. State, 832 So. 2d 730, 749 (Fla. 2002). Eaglin has not provided any analysis to demonstrate how the postconviction evidence of his mental state at the time of the attempted escape and statements to Agent Ueberlacker could impact the trial court's prior rulings to deny suppression.

Although this Court need not consider the prejudice prong of Strickland given Eaglin's failure to establish deficient performance, it is clear that Eaglin cannot establish any prejudice based on trial counsel's performance regarding the motion to suppress. Eaglin asserts that inclusion of testimony about his mental health "would likely" have resulted in suppression of his statements, but provides no support for this conclusory comment. He has not cited a single case where suppression has been granted on similar facts. Moreover, Eaglin does not even offer a conclusory allegation that the necessary prejudice has been shown. Eaglin never states that suppression would result in a reasonable probability of a different outcome at trial. See Wainwright v. State, 896 So. 2d 695, 700 (Fla. 2004) (no prejudice could be demonstrated for allegation of ineffective assistance of counsel for failing to litigate motion to suppress where evidence other than confession showed result



of proceeding would not be different); Mansfield v. State, 758 So. 2d 636, 644-45 (Fla. 2000) (finding error in admitting confession harmless where it was "not the centerpiece of the State's case"). Eaglin's identification of the substance of the statements admitted against him includes spontaneous statements Eaglin made to Agent Uebelacker **prior** to being given his Miranda warnings, "I'll make it easy on you; I tried to kill those three people," which could not have been suppressed even if there were any problems identified with the validity of Eaglin's waiver. Even with those statements, Eaglin's admissions added very little to the State's case. See Eaglin, 19 So. 3d at 939-40. Eaglin was caught in the act of escaping, and even in postconviction, he has not identified any potential defense to his charges. There was an abundance of evidence against him including his statements to fellow inmates and his pre-Miranda spontaneous statements. As the postconviction court correctly noted, there was no reasonable probability of a different result even if Eaglin's statements were suppressed.

### ISSUE III

THE POSTCONVICTION COURT PROPERLY SUMMARILY DENIED EAGLIN'S CLAIMS THAT THE STATE UTILIZED INCONSISTENT THEORIES OF PROSECUTION AND WITHHELD EXCULPATORY EVIDENCE.

The postconviction court summarily denied Eaglin's claims that the State utilized inconsistent theories of prosecution in the trials of his case and co-defendant Stephen Smith's case and his claim that the State withheld exculpatory evidence regarding a plea deal in co-defendant Michael Jones's case. The State submits that the court properly denied these two claims as the record conclusively refutes his allegations.

This Court has stated that a "defendant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient." Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000); see also Parker v. State, 904 So. 2d 370, 376 (Fla. 2005). "The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden." Griffin v. State, 866 So. 2d 1, 9 (Fla. 2003). Where the postconviction motion lacks sufficient factual allegations, or where the alleged facts do not render the

judgment vulnerable to collateral attack, the motion may be summarily denied. Hamilton v. State, 875 So. 2d 586, 591 (Fla. 2004). Additionally, this Court has stated that “[a] postconviction court’s decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review.” Ventura v. State, 2 So. 3d 194, 197 (Fla. 2009).

A. Alleged Use of Inconsistent, Irreconcilable and Misleading Theories of Prosecution

In claim eight of his postconviction motion, Eaglin alleged that the State argued inconsistent positions at his trial and at the trial of his codefendant, Stephen Smith. Collateral counsel never specifically explained the alleged “inconsistent” and “diametrically opposed” positions the State took at the two trials, but noted in his pleadings and in his Initial Brief that the State elicited evidence at Stephen Smith’s trial that Smith had planned the escape for a long period of time and eventually brought Eaglin into the plan because he was faster and stronger. Collateral counsel alleged that the State argued that “Smith was the ringleader and that Eaglin was just the muscle.”

The State first submits that the instant claim is

procedurally barred as Eaglin could have raised this claim on direct appeal. Collateral counsel alleges that the State argued an inconsistent position at Stephen Smith's trial in June, 2006,<sup>21</sup> and Eaglin's Initial Brief on direct appeal was not filed in the Florida Supreme Court until January, 2008. Thus, Eaglin could have raised this issue on direct appeal, and because he did not, his claim is now procedurally barred.

Even if this Court addresses Eaglin's procedurally barred claim, the State submits that he is not entitled to postconviction relief based on an alleged due process violation. As this Court stated in Walton v. State, 3 So. 3d 1000, 1005-06 (Fla. 2009), the United States Supreme Court specifically declined to rule on the question of whether the prosecutor's use of inconsistent theories constituted a due process violation in Bradshaw v. Stumpf, 545 U.S. 175 (2005). This Court noted that the Bradshaw Court "express[ed] no opinion on whether the prosecutor's actions amounted to a due process violation, or whether any such violation would have been prejudicial." Walton, 3 So. 3d at 1005 (quoting Bradshaw, 545 U.S. at 187); see also Bradshaw, 545 U.S. at 190 (Thomas, J., concurring) (explaining that "[the Supreme] Court has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting

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<sup>21</sup> Eaglin's trial took place on February 20-24, 2006.

defendants based on inconsistent theories.”); Fotopoulos v. Secretary, Dep’t of Corr., 516 F.3d 1229 (11th Cir. 2008).

Even assuming that the State’s use of inconsistent theories constitutes a due process violation, the record supports the lower court’s summary denial of this claim. The postconviction court took judicial notice of codefendant Smith’s trial, reviewed the records, and determined that the records conclusively refuted Eaglin’s claim that the State used inconsistent theories. (PCR V8:1468). The State’s evidence and argument at both trials has always been that Smith began planning an escape, and ultimately, Eaglin joined in the escape plans and was an active participant in the planning of the escape. Once the plan was set in motion, the State’s evidence at both Eaglin’s and Smith’s trials established that Eaglin was the “muscle” because he was personally responsible for wielding the sledgehammer and killing the victims. As Judge Blackwell, who presided over both trials, pointed out at Smith’s trial, he was not going to allow the State to argue that Smith used the sledgehammer given the evidence and argument presented at Eaglin’s earlier trial. (PCR V8:1468, citing Smith’s record (FSC Case No. 06-1903; DAR V36:1305)). As the record clearly refutes Eaglin’s claim of inconsistent theories of prosecution, this

Court should affirm the lower court's summary denial of the instant claim.

B. Alleged Brady Violation

Eaglin alleged in his amended postconviction motion that the State withheld exculpatory evidence from him in violation of Brady v. Maryland, 373 U.S. 83 (1963). Eaglin claimed that the State had obtained and failed to disclose proffered testimony from co-defendant Michael Jones<sup>22</sup> and failed to disclose that Jones was offered a plea agreement in exchange for his cooperation. The postconviction court reviewed the record and found that Eaglin's allegations of a Brady violation were refuted by the record. (PCR V8:1469-70).

In order to establish a Brady violation, a defendant must establish three elements: (1) the evidence at issue was favorable to the defendant, because it was either exculpatory or impeaching; (2) the evidence was suppressed by the State; and (3) the suppression resulted in prejudice. Johnson v. State, 921 So. 2d 490 (Fla. 2005). Under the Brady standard of materiality, the undisclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the

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<sup>22</sup> As the lower court correctly noted in its order denying this claim, collateral counsel conceded at the case management conference that Jones's proffered testimony had been disclosed to trial counsel prior to trial. (PCR V8:1470).

defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667 (1985). A criminal defendant alleging a Brady violation bears the burden to show prejudice, i.e., to show a reasonable probability that the undisclosed evidence would have produced a different verdict. Strickler v. Greene, 527 U.S. 263, 281 n.20 (1999).

In the instant claim, collateral counsel alleged that neither Eaglin nor his trial counsel were aware that the State had obtained a proffer from co-defendant Michael Jones regarding the incidents that took place at CCI on June 11, 2003. Counsel further alleged that at the time of Eaglin's trial in 2006, he and his attorneys were not aware that the State had offered Jones a plea agreement of life imprisonment in exchange for his cooperation, and that the State Attorney's office would use "its best efforts" to encourage DOC to place Jones in a correctional facility outside the State of Florida. Collateral counsel claimed that this information was "undiscovered" until May 20, 2011, when collateral counsel reviewed Michael Jones's records at the Charlotte County Clerk of the Circuit Court's office.

On November 10, 2005, Assistant State Attorney Daniel Feinberg and FDLE Special Agent Steve Uebelacker took proffered

testimony from Michael Jones while in the presence of Jones's trial counsel. (PCR V8:1516-55). During this proffer, the State made it clear that no plea agreement had been entered into as of that time. On December 22, 2005, the State provided a transcript of this proffer to Eaglin's trial counsel, Assistant Public Defender Douglas Withee. (PCR V8:1506). Thus, as collateral counsel conceded, and the postconviction court noted, this aspect of his claim was refuted by the record and properly denied.

Likewise, once the State and Jones entered into a plea agreement, the State did not hide the fact that they would use their "best efforts" to urge DOC to transfer Jones to a facility outside of Florida. As was noted at Jones's plea colloquy on January 19, 2007, *in open court*, "[t]he State Attorney's office has agreed to use its best efforts to encourage the Department of Corrections to allow the defendant to serve his sentence outside the State of Florida, pursuant to the Interstate Compact. We understand, and Mr. Jones understands, that the State Attorney's Office cannot require the Department to do so, and that therefore, the State Attorney's Office cannot guarantee that the defendant would be allowed to serve his time outside the State of Florida. Mr. Jones understands that." (PCR V8:1513-15). Obviously, the two letters subsequently written by



Assistant State Attorney Feinberg were consistent with the State's representations in open court at Jones's plea hearing.

As the lower court noted when denying this sub-claim, any evidence regarding Jones's plea to first degree murder in January, 2007, in exchange for the State's promise to use "its best effort" by asking DOC to allow Jones to serve his time outside the State of Florida, is not evidence that is "favorable to the defendant, because it was either exculpatory or impeaching." Jones did not testify at Eaglin's trial in February, 2006. Furthermore, at that time, Jones had not entered into any plea agreement with the State. Thus, there was no information available regarding any plea negotiations that could have been used at Eaglin's trial as impeachment. Additionally, the plea agreement was not "suppressed" by the State as the plea took place in open court and a transcript of the plea hearing has been in Jones's court file for years. Finally, as the lower court correctly noted, any evidence of the State's plea agreement with Jones did not result in any prejudice to Eaglin since Jones did not testify at his trial and the plea was not entered into until after Eaglin's trial. (PCR V8:1470). Accordingly, this Court should affirm the lower court's ruling as the record clearly refutes Eaglin's allegation of a Brady violation.

### C. Cumulative Error Claim

In his last claim of error, Eaglin asserts he is entitled to relief because of cumulative error. However, where the individual errors alleged are either procedurally barred, or without merit, the claim of cumulative error also fails. Downs v. State, 740 So. 2d 506, 509 n.5 (Fla. 1999). As argued throughout this Brief, Eaglin's claims are either procedurally barred or without merit. As such, his cumulative error claim is also without merit and was properly denied. The judgment of the postconviction court must be affirmed.

**CONCLUSION**

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to William M. Hennis, III, Assistant CCRC, Law Office of the Capital Collateral Regional Counsel, Southern Region at [hennisw@ccsr.state.fl.us](mailto:hennisw@ccsr.state.fl.us), this 10th day of January, 2014.

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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