Electronically Filed 10/30/2013 04:40:40 PM ET

RECEIVED, 10/30/2013 16:43:42, Thomas D. Hall, Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA

Case No. SC12-1760
Lower Court Case No. 03-1525CF

DWIGHT T. EAGLIN,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

AMENDED INITIAL BRIEF OF APPELLANT

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

ELIZABETH STEWART
Staff Attorney
Florida Bar No. 87450

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL-SOUTH
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Dwight "Tommy" Eaglin's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Florida Rule of Criminal Procedure 3.851. The following symbols will be used to designate references to the record in this appeal:

"R." - record on direct appeal to this Court;

"P." - record on appeal following the postconviction denial;

"S-P." - supplemental appeal following the postconviction denial;

"EX." - exhibits entered into evidence at the evidentiary hearing.

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Tommy Eaglin has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Eaglin, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

INTRODUCTION

In *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) and its companion cases, the United States Supreme Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant" in a capital trial. *Id*. at 206. This did not happen at Tommy Eaglin's trial. Instead of learning of "events that result in a person succumbing to the passions or frailties inherent in the human condition" the jury was presented with only detailed information about the failings of the Florida Department of Corrections. *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)).

The trial court rejected this theory of prison negligence and found that the nonstatutory mitigators presented by Eaglin were "repugnant to order in a society which strives to live by the law." On direct appeal this Court agreed and determined that even within the wide parameters of *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) the evidence presented at Eaglin's penalty phase was unreasonable and could not be considered as mitigating. *Eaglin v. State*, 19 So.3d 935, 944 (2009).

There was a plethora of compelling mitigation available to Mr. Eaglin's sentencer had his attorneys sought it out. In postconviction numerous witnesses testified to Mr. Eaglin's truly "horrific childhood," of severe abuse and neglect, which was followed by multiple placements in foster care and institutions. As a

damaged child, Eaglin was moved from various foster homes to institutions that were not equipped to deal with his emotional and emerging psychiatric problems, and as a teen and young adult Eaglin survived on fear and abandonment and sabotaged anything good that happened to him. Had trial counsel properly investigated and counseled Eaglin, and presented this evidence, the jury and judge would have had a greater appreciation for the aspects of Eaglin's conduct and character and there is a reasonable probability that two or more other jurors would have voted for life.

PROCEDURAL HISTORY

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

in a mop closet in the renovated dorm and Charles Fuston was found in a cell in the same dorm. At the time of his arrest, Eaglin was attempting to climb the outside fence of the prison. His behavior was erratic and suicidal.

On August 21, 2003, Assistant Public Defenders Douglas Withee and Neil McLoughlin, were appointed as trial counsel to represent Eaglin. (R.1-2) On December 14, 2005 the court conducted a suppression hearing regarding Eaglin's statements to FDLE Agent Ubelacker on June 12, 2003 at CCI following his arrest. These alleged comments included "references to the electric chair" and the comment that "I'll make it easy on you; I tried to kill those three people." (R. 1065) The motion to suppress was subsequently denied by the Honorable William Blackwell and Agent Ubelacker later testified at trial regarding the statements.

The trial commenced on February 20, 2006 before Judge Blackwell. During the trial the State presented the testimony of two CCI inmates and a number of correctional officers working at the time of the escape attempt who found the bodies of the two victims and who observed Eaglin attempting to jump the outer-perimeter of the prison fence. In addition to the testimony of the medical examiner regarding the cause of deaths, the State also presented two FDLE agents responsible for the investigation, collection and testing of blood samples at the crime scene and on Eaglin and the other codefendants. The defense presented no witnesses.

On February 24, 2006, the jury found Eaglin guilty as charged. (R. 1192-1195) The court conducted a penalty phase proceeding on February 27, 2006. The defense team limited its penalty phase presentation to Florida Department of Corrections personnel and a prison systems expert regarding the lack of security at CCI at the time the offense occurred. The defense did not present any friends or family members, social workers, or mental health experts to testify on Eaglin's behalf. Eaglin also testified at the penalty phase.

Prior to Eaglin's testimony Withee notified the court that they would not be presenting mental mitigation or background mitigation despite prior notice to the contrary. The court conducted a brief inquiry of Eaglin regarding both his alleged decision to waive as mitigation his background as well as his attorney's decision to not present mental health mitigation. (R. 1341) The jury recommended that Eaglin be sentenced to death for both murders by a vote of eight-to-four on each murder. (R. 1379)

A *Spencer*[1] hearing was held on March 10, 2006, at which the defense presented only one witness: Tommy Eaglin. Following the *Spencer* hearing, the court entered its sentencing order.[2] The trial court rejected the proposed mitigators

[1]*Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993).

[2]The court found the following aggravators regarding the murder of Darla 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

stemming from the defense's allegations of prison negligence. After reviewing a presentence investigation (PSI) report the court gave "some weight" to the fact that "Eaglin suffered from a severely abusive childhood with a severely dysfunctional family." On March 31, 2006 the trial court sentenced Eaglin to death. (R. 1387-1410)

Eaglin timely appealed his conviction and sentence to this Court. *Eaglin v. State*, 19 So. 3d 935 (Fla. 2009). This Court affirmed his conviction and sentence on direct appeal. *Id.* This Court found that the presentation of prison negligence as mitigation was unreasonable in light of the current case law and that the trial court had properly rejected the mitigation presentation. *Eaglin v. State*, 19 So. 3d at 944, 950 (Fla. 2009).

On January 5, 2011 Eaglin filed his initial Motion to Vacate Judgments of Conviction and Sentence and on May 26, 2011 Mr. Eaglin amended his motion. The Honorable Christine Greider was reassigned to the case on June 21, 2011. After conducting a case management conference, Judge Greider granted an

---

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. The court found the following aggravators regarding the murder of Charlie Fuston: 1) 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.

evidentiary hearing on the following claims: Ground III(a) regarding trial counsel's failure to argue in the motion to suppress that Eaglin was incapable of understanding his *Miranda*[3] rights and did not knowingly waive those rights; Ground IV as to whether trial counsel was ineffective for failing to adequately counsel Eaglin waiving penalty phase mitigation, and for failing to advise the trial court of Eaglin's history of a major mental illness and Eaglin's noncompliance with necessary medication before the colloquy between the trial court and Eaglin; and Ground V as to whether trial counsel was ineffective for failing to investigate and prepare mitigation evidence. Judge Greider summarily denied Eaglin's remaining claims. Prior to the evidentiary hearing, the circuit court granted the State's motion to perpetuate testimony of trial counsel Douglas Withee, who represented Eaglin from his first appearance to trial. Withee's perpetuation occurred on October 20, 2011, at the Charlotte County Jail. (P.5175)

An evidentiary hearing was conducted February 6, 2012 through February 10, 2012. Eaglin presented Neil McLoughlin; Withee's co-counsel who was responsible for the guilt phase of the trial, and Dr. Harry Krop who was retained by Withee as an expert in Eaglin's case. (P.3843) Eaglin planned to present Cheryl Pettry, the mitigation specialist utilized in Eaglin's first trial in Pinellas County who was also retained by Withee in the 2006 Charlotte County case. However,

[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

Pettry, was unable to attend the hearing due to serious illness and the trial court denied Eaglin's request to bifurcate the evidentiary hearing to accommodate her testimony. In lieu of her testimony the court permitted Ms. Pettry to submit an affidavit.

Several lay witnesses also testified on behalf of Eaglin at the evidentiary hearing: Eaglin's brother Donnal Eaglin; Eaglin's father Kenneth Eaglin, foster parent Tim Winge; family friends Barbara and Brad Hussung; three social workers who worked with Eaglin as a child: Jill Hussung, Tom Schwamberger, and Richard Winkler; Eaglin's boxing coach John Vincenguerra; and Eaglin's boxing teammate Mike Middleton.

Eaglin also presented three medical experts at the evidentiary hearing who testified about his history of mental illness and neurological damage.

The State presented two witnesses at the evidentiary hearing: Dennis Wible, an investigator with the Public Defender's Office and Dr. Michael Gamache, a psychologist, called by the State to rebut the testimony of neurologist Dr. Thomas Hyde and psychiatrist Dr. David Pickar.

On July 20, 2012 the circuit court issued its order denying Tommy. Eaglin's motion for postconviction relief. This appeal follows.

STATEMENT OF FACTS

Pre-Trial Investigation

At the time of his appointment Assistant Public Defender Douglas Withee had worked on "four or five" death penalty cases. (P.5166, 5171) Withee was primarily responsible for the penalty phase. Withee's co-counsel, Neil McLoughlin, was brought into the case as a second chair by Withee and was responsible for the guilt phase of the trial. (P.3843) Eaglin's trial was McLoughlin's first death penalty trial. (P.3843, 4845)

Dennis Wible, an investigator from the public defender's office was "the only one who did anything as far as investigations go." (P.4175) Wible was formally asked to assist on the case on July 16, 2003, a month after the crime occurred at the prison. Withee's initial request was for the collection of "newspaper articles, video surveillance footage from the Charlotte Correctional Institution … and detailed information concerning personnel at Charlotte Correctional." (P.4135)

As of July 2003 Withee had already determined to pursue "gross prison negligence" as the defense's theory for the penalty phase of Eaglin's trial. (P.4135, 5172, 5230) Withee believed that the negligence theory, which he referred to as a "monster mitigator," should be pursued exclusively instead of also presenting evidence of Eaglin's "touchy feely," "social work" background mitigation.(P.5230) Withee believed "(t)he two defenses, the two mitigators, social work versus prison

negligence are mutually exclusive" and could not be presented together. (P.5220) In presenting DOC negligence at the penalty phase Withee's claimed strategy was "to have the mitigation be pure mitigation to mitigate the penalty, not mitigate the seriousness of the crime." (P.5257, 5259) Withee believed that by presenting Eaglin's childhood to the jury that they would think he was trying "to minimize the offense." (P.5257)

All members of the defense team were aware that Withee had decided on his "DOC negligence" theory early on in the case. (P.3856) According to McLoughlin, the negligence theory was "don't kill Tommy because they can't control him." (P.3865) The team agreed with Withee that they did not want to "muddy the waters" at the penalty phase and present "other little stuff" that "Tommy really didn't want." (P.3866) McLoughlin recalled Withee as saying specifically, "[l]et's not water down the prison negligence issue by bringing in these other things." (P.3868)

On July 23, 2003, Wible and Withee interviewed Eaglin for the first time at Florida State Prison. (P.4142) During this visit Eaglin expressed to Withee that he did not want his mother involved in the case. (P.5218) Although Withee met with Eaglin several times after the July 2003 meeting, he never discussed again with Eaglin his wishes regarding his mother or whether he wanted to present other information about his background during the trial. (P.5193) Withee claimed it was

not necessary to discuss the matter further with his client. (P.5196) Wible met with Eaglin on only one other occasion, interviewing him about the details of the crime. (P.4142) Other than these two visits, Wible had no further contact with Eaglin. (P.4171) During both interviews Wible did not ask about any medical or psychiatric history, nor did he ask if Eaglin was on any medications. (P.4208-9)

In February, 2004 Wible and Withee traveled to Indiana to visit with Anita Luckett, Eaglin's mother, and learned that she had virtually no contact with her son. (P.4158, 4163) They also attempted to speak with Eaglin's paternal grandfather but were not successful in doing so. (P.5186) Withee did not produce notes from the meeting with Anita Luckett. (P.5242) According to Withee "the other people wouldn't talk to us," although he could not recall who those people were. (P.5212)

Although Wible reviewed some records from the Pinellas County Sheriff's Office regarding Eaglin's first murder case and provided a synopsis of those records to Withee, including information regarding Eaglin's friends, foster homes, mental health history, and Pinellas County Jail medical records, Withee never mentioned reviewing the information or the report to Wible. (P.4152-4154, 419, 4153) Withee did not review any foster home records or school records, nor did Withee investigate Eaglin's boxing career. (P.5212-3)

On March 22, 2004 Withee filed an Ex Parte Motion For Expert Regarding

Sanity and Competency Pursuant to FRCP 3.216(a) requesting the appointment of Dr. Harry Krop, Ph.D. (R. 45) The court granted the motion. (R. 44) On May 4, 2004 Wible sent an e-mail to Withee containing a list of 20 family members and foster parents who were potential penalty phase witnesses. (P.4194-5) However, neither Withee nor McLoughlin interviewed any of the potential witnesses. (P.5189-5190) While Withee understood that Eaglin's father was in prison in Illinois, he did not speak with Kenneth Eaglin and only remembered that he was in prison for "violent type situations." (P.5194, 5213) According to Withee no one from the team actually met with his father. (P.5241) After a jumbled attempt at contacting Donnal Eaglin, Eaglin's brother, Wible advised Withee that Donnal was willing to help in his brother's case. However, Withee never spoke with Donnal. (P.4156-7, 5190-1)

On May 6, 2004, Dr. Krop sent his assistant Roseanne Rutledge, a licensed mental health counselor, to do an initial interview with Eaglin. The next day Dr. Krop did a follow-up interview with Eaglin. (P.3504-5) Trial counsel did not instruct Dr. Krop to not talk about the offenses at Charlotte Correctional with Eaglin. Withee "felt that it would be helpful for us to have an account in case there was some type of psychological defense that might be able to be utilized in this case." (P.3507) Rutledge also spoke to Eaglin's mother and his brother, "Kevin" Eaglin over the phone. (P.3501-1)

On May 18, 2004, Rutledge administered testing ordered by Dr. Krop. Dr. Krop explained that he recommended a neuropsychological evaluation based on Eaglin's boxing history, history of other head injuries, and Eaglin's reported use of various types of drugs over the years (P.3504). The testing ordered by Dr. Krop included a short form intelligence test, the Wechsler Abbreviated Scale of Intelligence (the WASI), which Dr. Krop stated may have been a short form of the Wechsler Adult Intelligence test then in use. Dr. Krop did not "feel a need to do a full IQ." (P.3513) Dr. Krop testified that his notes recorded that Eaglin had obtained a full scale IQ score of 126 on Dr. Pearson's 1989 WISC-R intelligence testing. (P.3513-4, Ex. N) Dr. Krop's WASI results indicated a full scale IQ of 117.[4](P.3524) Eaglin had a below average T score of 40 on the Booklet Categories Test administered by Dr. Krop and also had a T score above 80 on the Wisconsin Card Sort Test. (P.3518) According to Dr. Krop, "if a person does poorly on one of those two tests, I would likely suggest going ahead and doing more complex testing, and even making a referral for a neuropsychological evaluation." (P.3518)

Dr. Krop conducted additional testing including the Finger Tapping Test, the Bender Gestalt, the Aphasia Screening Evaluation, and a Measure of Malingering called the Rey Digit Symbol Test, and finally the Weschler Memory Scale III,

[4]He noted that the full scale IQ score he obtained on the WASI was "remarkably similar" to postconviction expert Dr. Philip Harvey's obtained scores on his testing of Eaglin with the WAIS-IV, a full scale IQ of 118. (P.3524)

Abbreviated form. (P.3518-23) Krop found significant impairment on the Finger Tapping Test but attributed Eaglin's "very, very low" score to possible injuries to the defendant's hands from boxing. (P.3519, 3526) There were at least three testing areas in which Eaglin's scores were problematic: Trail Making, the Categories Test, and the Finger Tapping Test. Given these three scores Dr. Krop would "normally" have recommended a neurological evaluation and further testing but failed to do so in Eaglin's case.

On May 11, 2004, the court granted Withee's request for the appointment of mitigation specialist Cheryl Pettry. (R.68) Pettry had been appointed to provide mitigation services to Eaglin in his prior first degree murder case in 2000, during which she conducted numerous interviews with penalty phase witnesses, as well as social history investigations to assist the Pinellas County Public Defender's Office. (P.3046)

Once appointed, Pettry provided Withee with updated timelines of Eaglin's life as well as a detailed chart of his medical diagnoses and history of medication. (P.3096) Pettry expected to re-interview many of the individuals she previously interviewed as well as additional people involved in Eaglin's life since his incarceration. However, Withee instructed her that she was not to contact anyone from her previous investigation nor was she to discuss with Eaglin involving his family at the penalty phase. (P.3046, 3096) Pettry strongly disagreed with Withee's

instruction and wanted Withee to present Eaglin's social background, information about his time in institutions and foster care, and his childhood history of mental health problems at the penalty phase. (P.3881) She disagreed with Withee's decision to present DOC negligence in lieu of Eaglin's social history mitigation, and considered it "risky." (P.5194)

Despite Pettry's objections Withee prepared for the penalty phase by conducting interviews of prison guards and personnel as well as prisoners who had knowledge about the prison and the crime at CCI. (P.5232) Withee also retained Dr. Aiken, a prison systems expert, who also testified in the civil lawsuit Darla Lathrem's family filed against DOC in connection with her death. (P.3853, 5231) Pettry was tasked with summarizing these interviews of prison guards and personnel in preparation for trial.

On February 3, 2005 Pettry met with Dr. Krop and spent three hours discussing Eaglin's history with him. (P.3498) Dr. Krop also received records and background materials from Withee and Pettry including a prior 1989 psychological evaluation of Eaglin by consulting psychologist Dr. Donald Pearson that was done at Nachusa Children's home when Eaglin was thirteen years old. (P.3502-3). On March 22, 2005 Withee instructed Pettry to cease all work on the case. (P.3097)

On October 20, 2005 Dr. Krop provided a letter to Withee regarding two areas of potential mitigation in Eaglin's case: (1) a dysfunctional family with a

history of emotional abuse, negative role modeling and domestic violence; (2) a serious psychiatric disorder – Bipolar Disorder – and the fact that Eaglin was not on medication at the time of the alleged offense. (P.3528-9). The second factor was "partly based on the records, which reflected his unstable mood states, his periods of depression, his periods of what likely have been hypomanic episodes. His tendency to self-medicate I indicate, to a degree, by using illicit drugs and prescription drugs." (P.3530)

Dr. Krop's diagnostic impressions of Eaglin also included Polysubstance Abuse Disorder and "rule out impulse control disorder" (P.3545, 3550) He also diagnosed anti-social personality disorder (ASPD) as a personality disorder on Axis II which he did not include in his letter of October 20, 2005 concerning potential mitigation because he did not consider that diagnosis to be mitigating. (P.3550).

After his abbreviated deposition on January 26, 2006, Withee and McLoughlin held a final consult with Dr. Krop about the pros and cons of his potential testimony. (P.3538-9) Withee believed Bipolar Disorder was "grossly oversold as causation, if not justification, more likely justification for bad behavior," and decided against the presentation of the mental health mitigation in favor of his DOC negligence theory. (P.5228-9) Although McLoughlin agreed that Eaglin's treatment for Bipolar Disorder could be considered important in the

"negligence" theory, Withee believed that they could not present both DOC negligence as well mental health mitigation because the two different mitigation approaches were mutually exclusive. (P.3878, 3882, 5220)

Pre-trial Motions

Prior to his trial, Eaglin's counsel filed a motion to suppress statements by Eaglin made to FDLE Agent Ubelacker on June 12, 2003 at CCI following his arrest. The statements included statements Eaglin made allegedly prior to the *Miranda* warnings and after *Miranda* was given. The alleged comments included "references to the electric chair" and the comment that "I'll make it easy on you; I tried to kill those three people." (R.1065) After making these statements Eaglin was advised of his *Miranda* rights and he repeated them back to the agents on the tape. (R.1070-71) On the tape transcript, Eaglin admits trying "to jump the fence" but advises that he does not want to talk about the correction officer right now. Then Eaglin says that he wants to get the death penalty and that "he wants the chair." (R.1072-76)

On December 14, 2005 the court conducted a suppression hearing regarding Eaglin's statements to FDLE Agent Ubelacker on June 12, 2003 at CCI following his arrest. Eaglin argued that he was subject to extreme duress and ill treatment at the time of his detention between the fences and thereafter prior to the interview. The impact on Eaglin's physical body and his will included lacerations on his body

from concertina wire, mistreatment and kicking by arresting officers, use of chemical agents including pepper spray to subdue him, sleep deprivation, minimal medical attention, sensory deprivation including near nakedness and lack of sanitary items in detention, all of which made him incapable of exercising his free will. (R.3345-3391) Judge Blackwell denied the motion to suppress..

Trial

At trial, the State argued that Eaglin was the ringleader of the escape attempt and directly responsible for the murders of both victims. (R.331-333) The State relied on the testimony of FDLE Agent Roshale Gaytmenn, regarding the presence of the victims' DNA on Eaglin. (R.1037-1137) The State also relied on the blood pattern analysis of FDLE Agent Parker to connect Eaglin to the murder of Darla Lathrem. Agent Parker testified that the blood pattern on Eaglin's pants was caused by the Eaglin striking the victim and that there was no possibility that the blood pattern was caused from cross-contamination or secondary transfer. (R.858) In closing the State relied heavily on Agent Parker's testimony to establish premeditation in the case against Eaglin. (R.1135-6)

The State also presented the testimony from correctional officers working at the time of the escape attempt. A number of officers described Eaglin's unusual and erratic behavior during the time of the escape attempt and its aftermath. Sgt. Belfield witnessed Eaglin getting off the wire and screaming at the officers and

asking for them to shoot him and threatening to kill them, clearly irrational and suicidal behavior. (R.390-91) He testified that when chemical agents were applied to Eaglin they had no effect. (R.395-96; 404)

Inmates Kenneth Lykins and Jessie Baker also testified at trial that they overheard Eaglin planning the murders and escape with the other codefendants. Both Lykins and Baker also testified against codefendant Stephen Smith at his trial describing Eaglin's demented state of mind prior to the offense. *See Stephen Smith v. State*, FSC Case No. 06-1903, Lower Tribunal No. 03-1526-F (Charlotte Co.)

The defense presented no witnesses. On February 24, 2006, the jury found Eaglin guilty of the murders of Darla Lathrem and Charles Fuston. (R.1192-1195) At the penalty phase on February 27, 2006 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. DOC personnel McCasland, Henderson, and Giddens testified to the significant security problems at CCI at the time of the murders. James Aiken testified that the crime 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." *Eaglin v. State*, 19 So. 3d 935, 940-41 (Fla. 2009). Eaglin was the last witness to testify at the penalty phase. Prior to

Eaglin's testimony Withee notified the court that they would not be presenting mental mitigation or background mitigation:

> WITHEE: [Y]our Honor. Tommy Eaglin stands before you here today and as to mitigation, he and I have had discussions about putting on a lot of social work things, issues regarding childhood and things of that nature. And it was his opinion 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 Tim Wiggy who was a foster parent of his in the early years. And we have gone ahead without preparation on the basis of his wishes along those lines.
>
> THE COURT: All right. Tommy Eaglin, is that your wish –
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: -- your lawyer just expressed to the Court.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Do you understand that this could be your last opportunity to put on that kind of evidence?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And you understand that usually in these kinds of cases a great deal is made of that kind of evidence like unfortunate early years of life and poor family circumstances?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: You understand all that, and you want to waive or give up the right to present that?
>
> THE DEFENDANT: I instructed my counsel not to even do that.
>
> THE COURT: Okay.
>
> WITHEE: On the issues of mental mitigation, we've had various discussions on that and much of that I feel would be on the dangerous side as far as the jury is concerned. So I have made the decision on the mental mitigation not to go ahead.
>
> THE COURT: All right. And you're in agreement with your lawyer's decision on that issue?
>
> THE DEFENDANT: Yeah. He told me why he did that and I agree with him.

(R.1341-1343)

After the inquiry Eaglin testified that he had been in prison since 2001, that the guards would beat and kill inmates, 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. He told the jury that he "[didn't] expect people to feel sorry for me. Don't expect you to like me," and that he was "smiling because no matter what I say, I'm wrong. No matter whether it's the truth or not, I'm wrong. I'm not asking for forgiveness. I don't want nothing from you people." He then asked the jury "[w]hy is everyone mad at me when I try to fight my own battles? When I try to escape an unlawful imprisonment." Eaglin concluded by telling the jury that he loved them and forgave them because "you don't know what you've done." (R.1345-51) The jury recommended that Eaglin be sentenced to death for both murders by a vote of eight-to-four on each murder. (R. 1379)

At the *Spencer* hearing on March 10, 2006 the defense presented only Tommy Eaglin. His testimony consisted of the following:

> I just want to know what it is we expected to achieve here this afternoon. I understand everybody talking about how good a person Darla Lathrem is and Charlie Fuston is. I don't discredit none of that, but we seem – everybody seems to want some power like they're sitting up there in another world somewhere making sure that's justice done. Well, that's all fine and good. When you called eight police officers –
>
> ***

> They're not going to have shackles and chains and guns and it's just going to be me and Danny Boy, or me and you. If that's what's going on and if that's what they're worried about revenge, killing me, then what's going to happen when I get there? That's all I want to say.

(R. Volume 7, *Spencer* Hearing, 19-20)

The trial court sentenced Eaglin to death on March 31, 2006. (R.1387-1410) The court rejected the proposed mitigators stemming from the allegations of prison negligence, finding that the nine proposed nonstatutory mitigators presented by Eaglin were "repugnant to order in a society which strives to live by the law." (R.1406-07) After reviewing a presentence investigation (PSI) report the trial court gave "some weight" to the fact that "Eaglin suffered from a severely abusive childhood with a severely dysfunctional family," finding no statutory mitigation.

Direct Appeal and Postconviction

On direct appeal this Court found that the trial court properly rejected the "negligence" mitigation presentation by Eaglin. In doing so this Court determined that "[a]ny negligence on the part of the prison does not reduce the moral culpability of Eaglin for the murders of Lathrem and Fuston. Eaglin has presented no case law recognizing third-party negligence as a factor in lessening the fault of a defendant." *Eaglin v. State*, 19 So. 3d 935 (Fla. 2009).

Substantial mitigation was available regarding the abuse and neglect suffered by Eaglin at the hands of his father, Kenneth Eaglin. Although Donnal Eaglin and Kenneth Eaglin were interviewed by Cheryl Pettry in the 2000 Pinellas

County case, they were not interviewed or asked to assist by McLoughlin or Withee. Both Donnal Eaglin and his father were available at the time of the trial and were willing to testify about Tommy Eaglin's childhood if they had been asked. (P.3185)

Donnal Eaglin would have testified that he was raised with Eaglin, "Tommy," from the time Tommy was born until they were removed from their father's care by the State of Illinois. Tommy's biological mother, Anita Boling, met Kenneth Eaglin, his father, as a 12 year old when Kenneth moved in with her mother. During the time he lived with the family he had abusive sexual relationships with young Anita, Anita's mother, and Anita's two sisters. (P.3120) Anita gave birth to Donnal Eaglin when she was fifteen years old. Kenneth was thirty years old at the time. (P.3120) After Donnal's birth Anita and married and Tommy was born two years later.

Anita and Kenneth separated when Tommy was still an infant and Kenneth took the two boys and placed them in the care of Alex Carlisle and his wife, who were strangers to the children. (P.3125) The children remained with the Carlisle's for six months before their father retrieved them and moved them to Kentucky. At the time of the move Tommy was still in diapers and drinking out of a bottle. (P.3126) In Kentucky, Kenneth again left Tommy in the care of his four year old brother while he went to work. (P.3127) Donnal was responsible for changing

Tommy's diapers and feeding the both of them during their father's absences. They were left in a sparsely furnished house with a mattress on the floor to sleep on. (P.3127)

Upon moving out of the house the children watched their father burn the house down for insurance purposes. (P.3129) Kenneth then left the boys with an older couple they did not know. The children lived with this couple while their father attended college. (P.3129) Eventually Kenneth moved the children into his dorm room at Pikeville College, Pikeville, Kentucky. (P.3130) Tommy was about two years old at the time. (P.3130) Kenneth again left the two children alone in the dorm to care for themselves while he attended classes during the day. (P.3130) The children where also left in the family car during Kenneth's eight hour shifts in the evenings. (P.3157) During this time the children witnessed their father beat his girlfriend, strip her naked and throw her out of the dorm room into the dorm hallway. (P.3132)

Upon graduating from Pikeville College Kenneth moved the children back to Indiana to live with their elderly paternal grandparents, Kenneth Sr. and Wyoma Eaglin. Tommy was about three years old at the time and Donnal was around five years old. (P.3133) The two boys were left in the care of their elderly grandmother who was suffering from skin cancer, bowel disease and weak bones. (P.3135) Wyoma was not good about keeping track of her medications and would

sometimes take twice the dosage, leaving her "just a vegetable." (P.3135) The children's grandfather had limited involvement with the children during this period. As the family breadwinner he worked from 11:00am to 11:00pm at International Harvester five days a week and spent the weekends maintaining the farm that they lived on. (P.3137-8)

Donnal Eaglin described his grandmother as verbally demanding because she was frail and physically limited. (P.3139) Wyoma was also "hurting all the time." (P.3139) Wyoma and her husband would verbally fight in the presence of the boys. P.3139) Kenneth Eaglin periodically lived with his parents and children and was violent towards his boys on a daily basis. (P.3140) On Tommy's third birthday his father broke Tommy's femur while holding him upside-down by his feet and punching him. (P.3140) Donnal testified that it was common for his father to hold the children this way while he beat them. (P.3141) The children were hit with belts, switches, yardsticks "whatever was close by." (P.3141) Kenneth would hit the boys on their legs, backs, heads and faces, causing the boys to bruise and bleed. (P.3141) He hit the children against the floors and furniture in the house and he would also tell the children that they were "worthless" and "just like their mother." (P.3143)

Kenneth eventually moved to Alaska and left the children in New Washington with his parents. (P.3143) However, during his visits home he

continued to physically and verbally abuse his children "once or twice a day." (P.3144) According to Donnal "the violence progressed over time. The older we got, the harder we got it." (P.3142) The children did not have any contact with their mother. They were left to understand that their mother was "a whore and a dope addict." (P.3145) When she was upset with the boys Wyoma would tell them they were just like their mother. (P.3145, 3146) At one point Donnal sought out his mother and took Tommy over to their maternal grandmother's house in New Washington to see her. (P.3147) Upon their arrival their mother sent them home afraid that they would be punished and the children were in fact beaten upon their return home. (P.3148)

When Donnal was in the first grade his father returned and took the boys to Illinois to live with him and his third wife, Gloria, and her three children.(P.3150) Kenneth continued to abuse the children, including Gloria's three children.(P.3151) While Donnal stayed with his father for "half of a school year," before returning to live with his grandparents in New Washington, Tommy, who was not school age, remained in his father's care for about eight months after Kenneth left his third wife. (P.3152) When Tommy returned to his grandparent's home Wyoma Eaglin's health had declined significantly. (P.3153) She suffered from a broken hip, her bowel disease was much worse, and she had developed dementia and was heavily medicated. (P.3153) Tommy's grandfather continued to work full time and the

children took care of Wyoma. (P.3154) The brothers were responsible for feeding her, cutting her toenails, helping her go to the restroom, cooking her meals, as well as administering her medication. (P.3154) Wyoma continued to punish the children by hitting them with switches, throwing household objects at them and locking them out of the house at night. (P.3155) Kenneth continued to visit his children and during these visits the violence escalated. (P.3158) Donnal recalled one incident where his father "punched me in the stomach so hard I urinated myself." (P.3159) During the beatings Kenneth hit his children with closed fists, sticks, belts "whatever he could get his hands on" and grabbed his children by their necks and stomachs while he beat them. (P.3159-61)

When Tommy was nine years old Kenneth moved the boys to Canton, Illinois, to live with his fourth wife, Raelene Hand, and their five children. (P.3164) The youngest of the children, Lawrence and Jonathan, were Kenneth Eaglin's biological children. (P.3165) The children lived with Raelene and her family for about two years. (P.3165) During this period Donnal and Tommy were left to care for the five younger children for extended periods of time. (P.3165) The brothers changed and bathed the baby, cooked for and fed the children, and cleaned the house. (P.3166) If the house was not clean upon their father's return all the children were beaten. (P.3166)

Kenneth continued to abuse his children in the same manner as before. He

would also line up all of the children in order of age and hit them with his belt on their backs, legs and "wherever the belt hit you." (P.3167) During one incident Kenneth punched Tommy in the back of his head with closed-fists and then picked him up and threw him. Donnal "could name a hundred" of these types of incidents. (P.3169) Kenneth used to make the children fight each other and he would punish the child who lost each fight. (P.3171) He would use wrestling moves on the children as "discipline." (P.3172) He taught the children hand-to-hand combat and would choke the children "until they became unconscious." (P.3173) Kenneth continued to throw the children against furniture, walls and floors. (P.3173)

Donnal and Tommy were beaten daily for not cleaning their rooms (P.3170) Kenneth would come home late when the boys were sleeping, pull them out of bed and beat them. (P.3170) These beatings would "last a long time." (P.3170) According to Donnal, Tommy was beaten more frequently than any of the other children because Tommy would take responsibility for what the other children did in the house. (P.3170) Although younger than his brother, Tommy "thought he could take it better than me." (P.3171)

On several occasions Kenneth took the boys out of school forcing them to work with him on different work sites. (P.3175) The work included manual labor, lifting, and hauling (P.3175) The boys would assist their father hauling and loading hunks of scrap metal onto trailers. (P.3175)

The last time Kenneth beat Donnal, he wrapped his belt buckle around his fist and punched Donnal repeatedly in the head. During the incident "Tommy went upstairs to … to shoot my father. And he couldn't do it because my little brother Lawrence walked in front of him …" (P.3177) The children were removed from the home the following day by the Illinois Department of Children and Families after Donnal reported his father to school officials. (P.3177-78) Tommy was eleven years old when he was removed from his father's care and placed in the custody of the State of Illinois.

Kenneth Eaglin testified at the evidentiary hearing. Kenneth is currently serving a 22 year sentence in Illinois for "solicitation of murder against the State's Attorney" and two counts of cruelty to his children, Tommy and Donnal Eaglin (P.3894)

Kenneth was married to Anita Boling at the time of Tommy's birth, however, he removed Tommy from his mother's care when he was two months old. (P.3896) Kenneth admitted that broke Tommy's leg when he was a young child when he was "correcting him." As a child Tommy was treated by a doctor for mental illness. (P.3898) Kenneth has been married four times and has ten biological children. The last time Kenneth saw his son was at a juvenile hearing in Whiteside County, Illinois. (P.3897) Although Eaglin was contacted by his son's legal team in 2004; neither Withee nor McLoughlin spoke to him in preparation for Tommy's trial.

(P.3900)

History Of Institutionalization and Emerging Mental Illness

Richard Winkler was also available and willing to testify at Tommy's trial in 2006. (P.4061-64) However, he was not contacted by anyone from Eaglin's defense team. Winkler, a licensed clinical professional counselor and school psychologist, is a Public Administrator with the Illinois Department of Children and Families (DCF) and has worked for DCF for twenty-seven years. (P.4051-2) Winkler was Tommy's DCF case manager upon his placement in residential treatment at Nachusa Lutheran Home. (P.4052) Tommy went through five foster care placements consisting of traditional and specialized foster care, prior to entering residential care. (P.4053) According to Winkler, Tommy was placed in residential treatment "[d]ue to the multitude of foster care placement, all of which were fairly short lived. I think his longest placement was ten months. I believe he was – his first home was about a six-month duration placement, then maybe a four-month, a three-month, a ten-month, a three month." (P.4054)

At Nachusa Lutheran Home he was given a "diagnostic" to determine if residential care would be appropriate. (P. 4053, 4055) During this diagnostic period Dr. Ronald Pearson conducted a psychological evaluation and diagnosed him with "Cyclothamic disorder." (P.4071) Winkler explained that the Cyclothamic Disorder is "a rapid cycling mood, … from almost a manic state to … depressed mood," and

is a consistent with a later adult diagnosis of Bipolar Disorder. (P.4071)

In November 1989 Tommy was admitted into the residential program at Nachusa a month after his initial assessment (P.4055) At the time he was identified by DCF as having emotional problems, specifically "adjustment disorder" with "disturbance of conduct and emotion." (P.4055) In January 1991 Tommy successfully completed the Nachusa program and was placed in traditional foster care with the Winge family. (P.4056) Winkler explained that it was significant that Tommy graduated into traditional care from Nachusa. (P.4057) Tommy had to achieve various goals involving social interaction, behavior, school achievement and anger management before he could leave Nachusa and he successfully completed all the requirements. (P.4057) He was highly motivated to live with the Winge family and very close to Lori Winge. (P.4058) Winkler observed that "Mrs. Winge was probably the mother that Tom never had." (P.4058) However, Tommy "relapsed" while he was with the Winge family and was sent to Dixon Group Home. (P.4065) Tommy eventually returned to the Winge's home prior to his discharge from the DCF. (P.4065)

Winker testified that at Nachusa Tommy "tended to cycle in and out of depressive moods quite often. And it was a very rapid kind of cycling. An insignificant event could happen, he might get discipline for not doing a chore improperly, and he would immediately go into like a depressed mood." (P.4059) In

his twenty five years of working with children in DCF care, Tommy's case was exceptional given that it was one of the "more severe cases of physical abuse, and looking back on it, emotional abuse, … given the physical abuse, given how he was essentially terrorized, I think, by his biological father." (P.4060)

Tom Schwamberger was also available to testify at Tommy's 2006 trial; however he was also not contacted by Eaglin's defense team. (P.4101) Tom Schwamberger worked with Tommy as a TIE worker at Nachusa. The Nachusa campus contained a school which was referred to as "Nachusa Diagnostic Center." (P.4076) According to Schwamberger most of the children at Nachusa had emotional problems but Tommy's emotional problems were "different from a lot of the kids." (P. 4080, 4092) Tommy's emotional outbursts reminded Schwamberger of the meltdowns he witnessed in his autistic son. (P.4094) During these periods Tommy was inconsolable. (P.4094) He also suffered from depression while he was a Nachusa and that depression manifested in "anger" and "rage." (P.4099) During Tommy's time at Nachusa his emotional needs were not truly addressed. (P.4091) The Nachusa staff "put out fires," but were not equip to deal with the children's real underlying problems. (P.4082, 4087) The social workers that were available were primarily responsible for completing paperwork and did not provide any therapy to the children. (P.4085)

Jill Hussung, a Nachusa TIE worker and good friend to Tommy Eaglin,

attended his trial in 2006 and was in contact with Withee a couple of times (P.3222, 3261) However, Withee did not ask her about her relationship with Tommy or his history at Nachusa Lutheran Home. (P.3261) Hussung did inform Withee about Tommy's history of medication. She was willing to testify on Tommy's behalf in 2006, but was not asked to do so. Children were placed in Nachusa either because they were taken away from their families by the State or they were in trouble with the law. (P.3223) Tommy was a 'likeable kid" who got along well with other staff members at Nachusa as well as the other children. He did not like bullies and stood up for the children who were bullied and he was also very hyper and always making people laugh. (P.3227-8) Tommy was "terrified" of his father and it was only at Nachusa that he learned his father was in prison.(P.3230-32) For the first time he was provided with his mother's address and he asked Hussung to help him mail a letter to her. (P.3226)

Although there was an initial assessment to determine if the child should be placed a Nachusa, the children were not provided with any type of therapy for their emotional problems. (P.3286) The only program that was available to the children was an Alcoholics Anonymous Program held in town that the children were taken to which was also attended by other adult community members. (P.3284-85)

Hussung learned that Tommy was looking for a family and she introduced him to her friends, the Winge family. (P.3229) The Lori and Tim Winge became

foster parents so that they could foster Tommy. (P.3238) Tommy considered Lori Winge his mother and was also very close with Tim Winge and his foster brothers. (P.3239, 3240-1) The Winges never stopped fostering Tommy, however, at a certain point Tommy was sent to live at the Dixon Boys School. (P.3230)

Hussung confirmed that even after he was fostered, Tommy's behavioral problems never really stopped. (P.3279) He had a history of sabotaging a good thing and "pushes people away because he figures they're going to leave him anyhow, so why get real attached …" (P.3243)

At age 18 Tommy moved to Florida to live with her because he was starting to get into trouble in Illinois and she wanted to give him a fresh start. (P.3244) Hussung got Tommy involved in boxing at the Fourth Street Gym in Florida, and found him a job working for her brother who owned his own construction business. (P.3244-45) Hussung attended all but one of his local boxing fights and explained that Tommy had a "rough" boxing style. (P.3244) Whether he was boxing in the gym or during a fight Tommy would take hits before he would start fighting back. (P.3247) Tommy was a dedicated boxer who trained regularly before and after a full day of work. (P.3252)

After moving to Florida, Tommy continued to experience emotional problems. On one occasion he called Hussung because he was upset and scared. He was crying and the told her that he was "afraid I might hurt somebody." He told her

he needed to "get on some kind of medication." (P.3253) After the incident Hussung took Tommy to see a physician assistant she was working with and he put him on Prozac. (P.3254) "He said that since Tommy was a boxer, he wanted to give something that would allow Tommy to keep his edge as far as boxing." (P.3254) Tommy had another emotional setback while competing in Albuquerque, New Mexico. (P.3254) His coach called Hussung because "Tommy was acting really strange." He told her that Tommy was off his medication and that he needed his medication." Hussung had the prescription faxed over to a drugstore in Albuquerque. (P.3254)

After Tommy's first trial in Pinellas County she visited him at the Charlotte County Prison every other weekend. (P.3255) Lori Winge also visited him a couple of times at the prison. (P.3256) Tommy was on and off of Prozac while he was at the prison and this scared Jill. (P.3256) When Tommy first started taking Prozac he was "even more hyper than what he usually was." (P.3256) However his behavior on Prozac changed and the last time he was on it "he just got real paranoid." (P.3257) Hussung was the one who told Tommy that Lori Winge had cancer. (P.3257) Tommy cried when he heard the news and told Jill "Why does it have to be her? Why can't it be my [real] mother?" (P.3257) Several weeks later Tommy "was destroyed" when Hussung told Tommy that Lori Winge had died. (P.3258, 3260)

Barbara Hussung, Jill Hussung's mother, and her brother, Brad Hussung, also testified at the evidentiary hearing. Tommy was very close with the Hussung family as he "never really had a family life." (P.3379) He worked with Barbara's husband for Brad's construction company and Brad saw himself as a mentor to Tommy. He trusted Tommy and Tommy was a "great asset" to his construction business. (P.3381)

After moving to Florida, Tommy traveled with Barbara and Jill Hussung to Sterling, Illinois. While driving through Pekin and Peoria Tommy talked about several of the foster families he had lived with. Most of the foster families were on welfare and they would foster children as a way of earning an income. Tommy was always hungry as a foster child. Some nights he would just eat macaroni and if they were lucky they would get tomatoes in it. For breakfast they would `get about six soda crackers with sugar. (P.3357) Barbara and Brad were not contacted by Tommy's legal team in the Charlotte County case. Both would have been willing and able to testify on Tommy's behalf in 2006 if asked. (P.3366, 3393)

Mental Illness and Neurological Damage

Tommy's assistant boxing coach, John Vincenguerra, and boxing team mate, Mike Middleton also testified at the evidentiary hearing about Tommy's boxing career and particular boxing style. Both witnesses also had experienced Tommy's struggle with his mental illness. Mike Middleton, a professional boxer, described

Tommy's boxing style as "take two to give you one type of fighter, where he would absorb punishment and keep coming at you and impose his will upon you… his style was to just to keep coming." (P.3411) Middleton frequently observed Tommy put his hands down during a fight as well as during training sessions (P.3414) This technique would cause Tommy to be hit in the head without defense. (P.3414)

Vincenguerra explained that Tommy had a specific type of boxing style where he "didn't really worry about defense. He just depended on his offense." (P.3440) Tommy was the type of boxer who "does not care if he gets hit, you know. And they just go straight forward and they don't care if they get hit." (P.3440-1) Tommy put his hands down during fights and was hit in the head more often than the other boxers he worked with. This type of boxing style was "not sustainable." (P.3443-4) Vincenguerra also shared a room with Tommy on several occasions while on the road. He testified that Tommy would have severe nightmares every other night. (P.3451-2)

Brad Hussung also testified about Tommy's boxing style during matches. Brad attended most of Tommy's local boxing fights and described Tommy's boxing style as "the type of fighter that was more than willing to take five punches to get one." (P.3388) According to Brad, Tommy would take an unusual amount of punches during these matches. The referees at the matches were aware of his style, "[t]hey knew he could take a lot of punches, so they would allow Tommy to take

the beating, the punches … knowing that he could withstand that and come back." (P.3389)

Thomas Hyde, M.D., Ph.D is a behavioral neurologist, who currently works as Chief Operating Officer of the Lieber Institute for Brain Development, a private nonprofit research organization associated with Johns Hopkins in Baltimore. (P.3760-1) A behavioral neurologist is a neurologist who studies the diseases of the brain that affect behavior. Neurology is a medical subspecialty that studies brain diseases and a behavioral neurologist focuses on those aspects of diseases that affect the brain and manifest themselves as abnormal behavior. (P.3761)

In June 2010 Dr. Hyde conducted a neurological examination of Eaglin, including a neuropsychiatric history, to reach some general conclusion about his neuropsychiatric status. In addition to obtaining a detailed history, Dr. Hyde also performed a detailed neurological examination that included a Mini Mental State Examination, as well as cranial nerve, motor, gate and sensory examinations and a limited general physical examination. (P.3764) Dr. Hyde diagnosed Eaglin with Bipolar Disorder, Not Otherwise Specified, as well as Post-traumatic Stress Disorder. (P.3768) Dr. Hyde also found that Eaglin had a history of repeated closed-head injury and was at risk for post-concussive syndrome; also know as chronic traumatic encephalopathy "CTE". Dr. Hyde found no indication of antisocial personality disorder noting that Eaglin's history of Bipolar Disorder, as

well as rapid mood fluctuations, would make it very difficult to diagnose such a disorder. (P.3770) Although Eaglin was diagnosed with conduct disorder as a child in 1993, many children diagnosed with a conduct disorder do not later develop antisocial personality disorder. (P.3804)

Dr. Hyde met with Eaglin for a second time in 2012 given the complexity of his case; that he has two major psychiatric disorders as well as a complicated neurological history including: a single seizure as an adult while on Wellbutrin, chronic traumatic encephalopathy, closed head injury, and an extensive history of football and boxing injuries. (P.3781) Dr. Hyde's diagnosed Eaglin with Post-Traumatic Stress Disorder (PTSD) primarily based on the extensive verbal and physical abuse Eaglin suffered as a child. (P.3773) He reviewed medical records, school records, social services records, Department of Corrections records and records prepared by Cheryl Pettry. He also spoke with Eaglin. All of these records described a childhood of abuse and deprivation starting at a very early age. (P.3774) Dr. Hyde observed, "[i]n all my years of studying cases, including working at an inner city hospital, St. Elizabeth's Hospital in Washington, D.C., this is one of the most dysfunctional families that I have ever encountered." (P.3775) Eaglin suffered from a severe individual trauma as well as repeated trauma during his early childhood and suffered from symptoms related to this trauma. The symptoms included frequent nightmares, flashbacks and possible fugue states.

(P.3784) Dr. Hyde explained that fugue states are symptomatic of PTSD and dissociative episodes, whereby the individual is "conscious but not aware of everything that's going on in their surroundings or their behavior during that period of time." (P.3784)

During Dr. Hyde's second interview with Eaglin in 2012, Eaglin described PTSD-related symptoms, including: nightmares and disturbing dreams since childhood, specifically dreams where he is punching and talking in his sleep, blanking out when angry or frustrated, flashbacks, and blackouts known as fugue states. (P.3777, 3784) Eaglin also experienced self-destructive behavior related to PTSD, including head butting and burning himself. (P.3777) Dr. Hyde opined that Eaglin's escape attempt at Charlotte Correctional was directly related to his Bipolar Disorder.

Dr. Hyde confirmed the pretrial diagnosis of Bipolar Disorder and explained the relationship between Eaglin's Bipolar Disorder and post-traumatic stress disorder. This relationship is typical in individuals who experience high levels of stress in early childhood. The extensive abuse Eaglin suffered from early childhood in addition to abandonment by his mother at infancy is related to this finding. (P.3777, 3748) Dr. Hyde opined that Eaglin's Bipolar Disorder is a chronic condition which he should be medicated for. As a result of his condition Eaglin suffers from mood swings and depressive episodes. In patients with a history of

Bipolar Disorder the use of Prozac can make them manic. "Thirty percent of patients with Bipolar Disorder have serious substance abuse problems that often are either self-medication for the depressive episodes or fueling their bipolar manic feelings." (P.3829) "He was feeling manic on the day of the murders of the guard. He had racing thoughts. He was feeling high. On top of the world. He had been suffering from insomnia. He was getting Prozac from the other inmates because it made him feel high. And he had been taking it, plus week and crystal meth in the days before the murder." (P.3812) "[W]ithin a reasonable degree of medical certainty … he had a manic episode that was either coming on by itself or was precipitated or exacerbated by these drugs." (P.3829) Dr. Hyde believes that if Eaglin was properly medicated at Charlotte County Correctional the offense would have been prevented.

Dr. Hyde testified that Eaglin is at an extremely high risk for chronic traumatic encephalopathy given his childhood history of head trauma and his boxing career as well as his certain boxing style. The medical profession "has a much better understanding that chronic blows to the head, even without loss of consciousness, can cause cumulative brain damage which can result in changes in cognition, behavior, balance and other neurological functions." (P.3770) Eaglin's high school football was likely the start of his chronic traumatic encephalopathy given his tendency to lead with his head on many tackles and it certainly amplified

the condition. This technique is now illegal in high school, college and professional football given its relationship with chronic brain injuries. (P.3779) Dr. Hyde spoke to Eaglin's former boxing coach, Jimmy McLoughlin, about Tommy's boxing career. McLoughlin described witnessing a number of symptoms related to concussions. (P.3770, 3785) Eaglin was never knocked-out; however, he was a "brawler" and took an abnormal number of punches to the head. (P.3770-1) Eaglin also had a practice during training of removing his headgear, protective gear used by boxers during training. (P.3799) His boxing style was extremely detrimental to his neurological wellbeing. (P.3771) "Chronic punches to the head, taking those punches to the head repeatedly, lead to brain damage in vulnerable individuals." (P.3786)

In post-concussive syndrome there are physical changes to the brain. However, an autopsy of the brain is the only way to uncover the neuronal loss, or white matter change that occurs. The physical changes cannot be seen on an MRI, CT or PET or SPECT scan. (P.3777) As a boxer Eaglin experienced many of the symptoms associated with Post-concussive syndrome such as: nausea, headaches, vomiting, memory problems, and fogginess. (P.3779) Even more troubling, Eaglin developed stuttering during adulthood, which is very unusual. Stuttering in adulthood is most commonly seen in Parkinson disease but has also been reported in individuals who have experienced closed-head trauma. (P.3780)

Eaglin suffered from a single seizure, an event corroborated by a October 21, 2007 Department of Corrections medical request. (P.3768, 3788) Eaglin reported the seizure while taking a generic form of Wellbutrin, also known as Buproprion Hydrochloride, during September and October 2007. Wellbutrin is a dopamine as well as a norepinephrine reuptake inhibitor which is typically used to treat depression and at high dosages it has been associated with seizures. It is well established in the medical community that Wellbutrin causes seizures at much lower doses among individuals with preexisting brain damage. (P.3789, 3790)

Dr Hyde recommended detailed neuropsychological testing by a neuropsychologist. After reviewing the data from the neuropsychological testing, it was significant to him that Eaglin's IQ score had dropped from a 1989 childhood score of 126 down to a current score of 118. Dr. Hyde opined that the significant decrement in the IQ scores was related to "brain damage from chronic trauma to the brain from boxing and/or related to his bipolar disorder." (P.640)

Dr. Hyde would have been available at the time of Eaglin's trial and in addition to full neurological testing; he would have recommended psychiatric and neuropsychological testing with an emphasis on frontal lobe function. (P.3783)

David Pickar, M.D., a psychiatrist with expertise in mental illnesses who specializes in schizophrenia, psychosis and neuropharmacology, also testified at Eaglin's evidentiary hearing. As a practicing psychiatrist, Dr. Pickar prescribes

medications including psychotropic medication. (P.3644) Dr. Pickar conducted a psychiatric evaluation of Eaglin in 2010 in Starke, Florida. He also reviewed background materials including school records, employment records and previous doctors' reports, reviewed a TV interview of Eaglin taken at the time of his trial, depositions from guards and inmates at Charlotte Correctional Institution at the time of the offense, reviewed raw data from Dr. Hyde, Dr. Krop and Dr. Harvey and conducted an interview of Eaglin. (P.3646-7)

As part of his evaluation Dr. Pickar performed a Mental Status Exam, typical in a normal psychiatric interview. The purpose of the exam was to asses Tommy's clinical state at the time of the interview. (P.524) Specifically Dr. Pickar wanted to assess whether Eaglin was psychotic. (P.524)) Eaglin was found by Dr. Pickar to be fully oriented and he did not demonstrate any psychotic symptoms during the interview. Dr. Pickar found that Eaglin was paranoid above a median level, that his speech was somewhat pressured, his mind was active and he was highly communicative. (P.3653)

Dr. Pickar found that Eaglin is "somebody with a lot of impulsivity." (P.3664) Clinically, impulsivity means "brain-related behaviors that result in poor modulation." Eaglin consistently exhibited these types of behaviors starting from early childhood. (P.3665) As a twelve year old he had neuropsychological testing. The testing established that Eaglin had a very high IQ and at the time of the testing

he did not have cognitive deficits in any particular areas. (P.3666) Dr. Pickar distinguished between "antisocial tendencies and "impulsivity." According to Dr. Pickar's assessment he did not exhibit antisocial acts as a child.

Dr. Pickar diagnosed Eaglin with Bipolar Not Otherwise Specified, a major mental illness (P.3658 & 3672) He found Eaglin "has bipolar manic-depressive illness, with histories of impulsivity, highs, manic or hypomanic, and periods of depression." (P.3658) Bipolar Disorder was historically referred to as "manic depression illness," a fundamental diagnosis in psychiatry. (P.3657) Bipolar Disorder is characterized by changes in mood and behavior, one mood bring "euphoria" and the other "a low sense of depression." (P.3657) The two moods alternate and a person can "present with depression multiple times before they experience a mania." (P.3657) Manias and hypomania manifest in pressured speech, intense goal-oriented activity, grandiosity, poor sleep and very active activity that may be harmful to oneself. (P.3657) Eaglin historically exhibited these characteristics and this was well documented in the records reviewed by Dr. Pickar. (P.3658)

In addition to Bipolar Disorder Dr. Pickar found that Eaglin's history of concussions contributed to his behavior and to his mental illness. (P.3727) Dr. Pickar also made a provisional diagnosis of Post Traumatic Stress Disorder. (P.3731) Dr. Pickar was struck by the extent of abuse Eaglin suffered as a child as

well how well his history of mental illness was documented. (P.3659 & 3672) As a child Eaglin went through periods of crying and a lot of depression. He engaged in head banging and irritability. (P.3660) As early as age ten Eaglin was identified as having mental health issues. (P.3659)

In addition to his developing mental illness Eaglin suffered from head trauma as a high school football player and to a great extent as a golden glove boxer. "[H]ead trauma that one receives in boxing is not a trivial matter towards – for anybody, but particularly if the individual has an underlying psychiatric problem." (P.3661) Modern medicine has recognized that concussions to the brain can occur without loss of consciousness. (P.3662) Closed head trauma and the resulting concussion to the brain exacerbates manic episodes in individuals who suffer from manic depressive illnesses. (P.3661) The head trauma creates its own level of impulsivity in these individuals. (P.3661) Drugs such as Prozac are also used to treat impulsivity in individuals who suffer from brain damage as a result of concussions to the brain. (P.3660-1)

Dr. Pickar reviewed Dr. Harvey's neuropsychological testing. The testing showed that Tommy's IQ has dropped which is indicative of "focal damage in processing speed" as a result of head trauma. (P.3667) Dr. Pickar also reviewed Dr. Hyde's finding. Both experts solidified Dr. Pickar's diagnoses. (P.3670)

Eaglin was incarcerated for most of his adulthood and Dr. Pickar was

impressed with the level of care and organization by the Pinellas County Jail and DOC to identify his diagnosis, follow his diagnosis and manage his condition. As an inmate, Eaglin was treated with appropriate medications of his Bipolar Disorder.

From 1998 through 2000 Eaglin's Bipolar Disorder was treated with Depakote, Prozac and Elavil while he was incarcerated at the Pinellas County Jail. (P.3689) Pinellas County Jail's Initial psychiatric assessment of Eaglin documents his extensive history mental illness. Jail records again document that as early as age ten Eaglin was treated for depression, impulsivity and for anger and that this treatment included medication. (P.3678) As a young adult Eaglin was prescribed Prozac for manic episodes. Eaglin further reported that at the time of the Pinellas County offense he was on Prozac, alcohol and "coke." (P.3686)

At the time of the assessment the jail personnel considered Bipolar Disorder, post-traumatic stress disorder and history of substance abuse as possible diagnoses. (P.3682) The jail prescribed Depakote and Elavil as part of his treatment plan. (P.3680) However, the next month Eaglin asked to be placed in segregation because his "head isn't right" and he was afraid he would hurt another inmate. (P.3680) He was also considered by the jail to be a suicide risk. Eaglin was referred to a mental health professional at the jail for treatment and he was prescribed Valproic Acid, a generic form of Depakote. The jail monitored his medication level through a series of blood tests. (P.3681) According to the jail records, the jail took

Eaglin's mental condition "very seriously and they very assertively treated him with medication." (P.3681) However, as of May 1998 Eaglin reported that the Depakote is causing him to shake and stutter. (P.3683) Eaglin was again diagnosed with Bipolar Disorder and in October that same year he again request medical attention. (P.3683) "I need to speak with you about my anger management. I am angry for hardly anything. I snap into bad moods. My moods swing a lot again." (P.3684) The request is indicative of the seriousness of his medical condition, however, it is also an indication that Eaglin does not suffer from antisocial personality disorder. The jail continued to prescribe Depakote and monitor Eaglin's blood levels through February 2000. (P.3685-9)

After his conviction and sentence in Pinellas County, Eaglin was evaluated by DOC on January 23, 2001. (P.3698) As part of the evaluation Eaglin was again diagnosed with Bipolar Disorder, Not Otherwise Specified, as well as 304.8 polysubstance abuse. From February 2001 through April 2003 DOC prescribed a variation of medication to Eaglin in an effort to treat and manage his Bipolar Disorder including: Depakote, Tegretol, Lithium, Sertraline, a cousin of Prozac, and Fluoxetine or Prozac. (P.3695, 3698, 3702)

However, as of March 2003 Eaglin was not receiving any medication for his illness. (P.3703) Prior to stopping his medication Eaglin had not engaged in any violent episodes for quite some time. (P.3676) In April he was placed in special

confinement for fighting in the prison. (P.3703) In June 2003 Eaglin tried to escape from prison. (P.3703) The stopping of psychotropic medication severely "changes the chemistry in the brain landscapes." (P.3704)

Dr. Pickar opined that prison escape was "a manic suicide attempt" by Eaglin. (P.3674) Within a matter of weeks prior to the escape attempt Eaglin lost his foster mother, had reported that he wanted to die, and stopped taking his Bipolar medication. (P.3675, 3706) At the time of the crime Eaglin was in a mixed state of mania and depression. (P.3674-5) Eaglin's escape attempt was grandiose not well-organized and did not correspond with Eagln's level of intelligence. (P.3674, 3706) While the other two prisoners ran back inside during the offense, Eaglin continued running towards the fence. (P.3706) Dr. Pickar concluded that Eaglin suffers from a major mental illness and the history and development of his mental illness is "surprisingly well-documented." (P.3672) "So from a point of view of mitigation, and his behavior, tragic behavior and dangerous behavior, it's – it's the real thing." (P.3672) Dr. Pickar recommended a neurological evaluation. (P.3705)

Phillip Harvey Ph.D., Professor of Psychiatry and Director of the Division of Psychology at the University of Miami School of Medicine, and clinical psychologist and neuropsychologist, conducted extensive neuropsychological testing of Eaglin. He also reviewed background materials including school records,

employment records and previous doctors' reports, conducted an interview, and consulted with Dr. Pickar and Dr. Hyde. (P.3928-3930) Dr. Harvey focused on the performance-based assessment tests and deferred the exploration of Eaglin's Bipolar Disorder to a psychiatrist or neurologist, which he recommended in this case. (P.3930, 3961) Dr. Harvey administered the Wechsler Adult Intelligence Scale, 4th Edition, and the RBANS.

On the WAIS IV "[T]here [was] a big discrepancy between scores like Vocabulary and scores like Coding. So we're talking about the difference between the 98th and the -- around the 17th or 15th percentile, which is a very big discrepancy." (P.3941) Dr. Harvey explained that Eagln's scoring is unusual because his high verbal comprehension [98th percentile] is not consistent with his comparatively low processing speed. (P.3946) Eagln's scoring on the RBANS demonstrated the same inconsistencies as the scoring on the WAIS IV. Dr. Harvey concluded that the discrepancy between the episodic memory and the global intelligence, and particularly verbal comprehension, reflect an acquired deficit, suggesting that Eaglin acquired an impairment between his initial childhood score and his later assessments by Dr. Krop. (P.3956)

Dr. Harvey did not agree with Dr. Krop's previous diagnosis of antisocial disorder given "the presence of bipolar affective disorder is a rule out for an act being considered to be consistent with antisocial personality disorder." The

diagnosis of antisocial personality disorder is inconsistent with the historical evidence of Eagln's remorse. (P.3771) Furthermore, Eaglin's history of childhood conduct disorder may have been actually a misdiagnosis of early Bipolar Disorder given the convergence between both diagnoses. (P.3972)

All of the experts presented by Eaglin at the evidentiary hearing would have been available to testify in 2006 at Eaglin's trial.

SUMMARY OF THE ARGUMENTS

Argument I: The trial court erred in denying Eaglin a new trial and/or penalty phase where trial counsel rendered constitutionally ineffective assistance in penalty phase proceedings

Argument II: Eaglin's waiver of his *Miranda* rights was not knowing, voluntary or intelligent due to his existing mental disorder and condition at the time of the waiver. Eaglin received ineffective assistance of counsel when trial counsel failed to properly raise and litigate the voluntariness of his waiver in his Motion to Suppress.

Argument III: The trial court erred in summarily denying several of Eaglin's claims. The record and files do not conclusively show that Eaglin is not entitled to relief. Eaglin has plead facts which, at the very least, entitle him to an evidentiary hearing on these claims.

STANDARD OF REVIEW

Ineffective assistance of counsel claims present mixed questions of law and fact subject to plenary review. *Occhicone v. State,* 768 So. 2d 1037, 1045 (Fla. 2000). This Court independently reviews the trial court's legal conclusions and defers to the trial court's findings of fact.

A postconviction court's decision whether to grant an evidentiary hearing is subject to *de novo* review. *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003).

ARGUMENT I

TOMMY EAGLIN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORDIA CONSTITUTION

a. Introduction

An analysis of an ineffective assistance of counsel claim proceeds under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a showing of both deficient attorney performance and prejudice to the defendant. In order to properly determine whether a new trial is warranted, counsels' errors must be "considered collectively, not item-by-item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). While it is clear that "strategic choices [by trial counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *id.* at 690, it is equally clear that "'strategic choices made after

less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith*, 539 U.S. 510, 532 (2003).

Where a capital defendant instructs his counsel not to present mitigation in the penalty phase, counsel may not blindly follow the client's demands without first investigating potential mitigation and advising the client of evidence with potential merit. *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986), *See also Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991). In *Wiggins* the United States Supreme Court turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, in analyzing what constitutes effective assistance of counsel,. *See id*. at 2536-7. Under the ABA Guidelines, there are specific requirements which should be met from the initial appointment on a case through its conclusion. Guideline 11.4.1(c) provides that "the investigation for preparation of the sentencing phase should be conducted **regardless of any initial assertion by the client that mitigation is not to be offered**." In order to comply with this standard, counsel is obliged to begin investigating both phases of a capital case from the beginning. *See id*. at 11.8.3(A), *See also Hamblin v. Mitchell,* 354 F.3d 482, 492 (6th Cir. 2003).

Prejudice is shown, and relief is necessary, when the defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceedings would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

b. Deficient Performance

Trial counsels' performance at the penalty phase of Eaglin's trial was deficient. Counsel simply failed to conduct a reasonable investigation into Eaglin's background, including his mental health. As a result, Eaglin was not adequately advised of his "waiver" of mitigation and trial counsels' decision, to pursue "DOC negligence" in lieu of background mitigation, was not informed and therefore unreasonable.

i. Mr. Eaglin's Waiver Of Mitigation Was Not Knowing And Voluntary

A. Inadequate *Koon*[5] Inquiry

The trial court's colloquy of Eaglin upon his refusal to permit the presentation of mitigation did not comply with the requirements established by this Court in *Koon v. Dugger*, nor was it a searching interrogation of Eaglin. *Koon v. Dugger*, 619 So.2d 246 (1993), *Arthur v. State*, 374 S.E. 2d 291 (S.C. 1988). In *Koon*, this Court explained the required procedure under these circumstances:

> [w]hen a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase; counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably

[5]*Koon v. Dugger*, 619 So.2d 246(1993).

> believes there to be mitigating evidence that could be presented and what that evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Koon, at 250. In *Muhammad v, State*, 782 So. 2d 343 (2001), this Court expounded on the obligations of the court in situations where a defendant waives mitigation. In doing so, it required the preparation and presentation of a PSI in waiver situations and also discharged a duty to the court to identify and explore the "probability of significant mitigation" raised during that process. *Id*. 364. This Court did so because of its continual recognition that when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence, "that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted." *Farr v. State*, 621 So. 2d 1368, 1369 (1993) (citing *Santos v. State*, 591 So.2d 160 (Fla.1991)).

The lower court's brief inquiry of Eaglin during the penalty phase of his trial did not meet the requirements of *Koon* and its predecessors. The questions asked of Eaglin were all leading questions that merely required a "yes" or "no" response from Eaglin. The trial court never asked Eaglin any non-leading questions that affirmatively demonstrated his knowledge of the penalty phase proceedings, the evidence in mitigation that was available to be presented, or his understanding of

the consequences of his waiver. (R.1341-1343) Counsel failed to present and the court failed to obtain a proffer from counsel of what the mitigation was that Eaglin was waiving and "what that evidence would be." *Koon*, at 250. Instead, the court relied on the PSI report prepared by DOC from an interview with one former foster parent, Tim Winge. While the PSI alerted the court to the "probability of significant mitigation" it begged for further inquiry. *Muhammad v. State*, 782 So. 2d 343 at 364. At the very least expert depositions and reports should have been proffered in support of the penalty phase claims. *Muhammad* at 363.

Trial counsel, the State and the court (but not the jury) were on notice that Eaglin suffers from Bipolar Disorder based on the defense's Notice of Intent to Present Mental Health Mitigation at the Penalty Phase, which incorporated the substance of Dr. Krop's letter report of November 23, 2005. However, Eaglin was never asked about his Bipolar Disorder or the fact that he was not being properly medicated for it. The lower court should have required a proffer from counsel as to the substance and depth of the mitigation found including a proffer of all of Dr. Krop's findings, the limited telephonic interviews of Eaglin's mother and brother undertaken by Dr. Krop and his associates, and the material supplied to him by mitigation specialist Cheryl Pettry[6] that Dr. Krop relied on in forming his opinions.

[6]The trial court's refusal to grant a continuance to hear the testimony of Cheryl Pettry was an abuse of discretion and resulted in the deprivation of a full and fair hearing. Ms. Pettry, a critical witness regarding both the alleged waiver of

Furthermore, the State was on notice as to the existence of mitigation in this case based on Eaglin's prison and jail medical records and the record in the prior case. The trial court should have ordered the State to place into evidence any mitigating evidence in its possession pursuant to *Muhammad.*

B. Failure To Advise The Court Of Tommy Eaglin's Major Mental Illness And Lack Of Medication Before The Colloquy

Tommy Eaglin was not competent to waive the presentation of penalty phase mitigation and trial counsel was ineffective for failing to advise the court of his condition prior to the colloquy at the penalty phase of the trial. While this Court has repeatedly recognized the right of a defendant to waive presentation of mitigating evidence, this right has always been contingent on the competence of the defendant. *Koon v. Dugger*, 619 So. 2d at 249.

At the time of the colloquy, trial counsel was aware that Eaglin suffers from

---

mitigation by Eaglin and the case in mitigation, was unable to travel or communicate with counsel due to unforeseeable illness. The lower court's actions were an abuse of discretion that deprived Eaglin of his protected constitutional rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, and comparable provisions of applicable Florida law. *Wickham v. State*, 998 So. 2d 593 (Fla. 2008) and *Steinhorst v. State*, 636 So. 2d 498 (Fla. 1994). In *Arbelaez v. Butterworth*, 738 So. 2d 326, 331 (Fla. 1999), this Court emphasized why our courts should be "especially sensitive" to fairness in capital cases, as "our adversarial system of criminal justice depends entirely upon the procedural fairness and integrity of the process. This Court and the United States Supreme Court have held that the integrity of the process is of unique and special concern in cases where the state seeks to take the life of the defendant." The promise of a full and fair evidentiary hearing on the issues granted by the lower court's order was not fulfilled.

Bipolar Disorder for which he had not been medicated since before his arrest. On October 20, 2005, Dr. Krop advised Withee of Eaglin's condition after conducting a full evaluation of Eaglin and reviewing his childhood records and prison records.[7] Mitigation specialist Cheryl Pettry also informed Withee that Eaglin suffers from Bipolar Disorder, providing him with a summary of Eaglin's mental illness, diagnosis by various physicians and State agencies, was well as a lengthy history of medication for his disorder. (P. 3097) In addition, Pettry notified Withee that there were "various issues around his medication" prior to trial. (P.3096, 3046-51)

Despite the advice of both experts regarding Eaglin's "serious psychiatric disorder," Withee dismissed them claiming "everyone is bipolar." (P.5248) In unreasonably dismissing Eaglin's condition Withee failed to also consider, and failed to advise the court, of how Eaglin's unmedicated condition impacted his client's "present ability to consult with his lawyer with a reasonable degree of

[7]On August 17, 2006, Dr. Harry Krop was also appointed as a confidential expert in the case of one of Mr. Eaglin's codefendants, Jones. Eaglin had no appellate counsel until a week after Dr. Krop was appointed as an expert in the Jones case. Krop was burdened by an actual conflict of interest adversely affecting trial and appellate counsel's representation of Eaglin, in violation of the sixth, eighth, and fourteenth amendments and the corresponding provisions of the Florida constitution. Eaglin's right to confrontation, due process and to an individualized and reliable hearing were violated where trial counsel failed to investigate, preserve or raise this claim. See *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). See also Case No. SC13-1785, Mr. Eaglin's pending state habeas, at pages 6-28.

rational understanding" and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L.Ed.2d 824 (per curiam).

As demonstrated at the evidentiary hearing, Eaglin suffers from "bipolar manic-depressive illness, with histories of impulsivity, highs, manic or hypomanic, and periods of depression." (P.3658) Manias and hypomania manifest in pressured speech, intense goal-oriented activity, grandiosity, poor sleep and very active activity that may be harmful to oneself. (P.3657) While Eaglin's bipolar condition had been closely monitored and medicated by DOC throughout most of his incarceration, he was not medicated at the time of the crime or during the trial. (P.3681, 3695, 3698, 3702-3). As a result of not being medicated Eaglin was a greater risk of manic episodes as well as severe depression, often experience both in a "mixed state." (P.3704). Mixed states result in "grandiose not well-organized" thought processes that do "not correspond with Tommy's level of intelligence." (P.3674, 3706).

It is clear from the trial record of the penalty phase proceedings that Eaglin did not have a "reasonable degree of rational understanding" and that he did not have "rational" understanding of the proceedings against him and was not competent to waive mitigation. (P.1345-51) During both the penalty phase and S*pencer* hearing Eaglin was paranoid and suicidal. During his penalty phase

testimony he informed the court and jury that "No matter whether it's the truth or not, I'm wrong," and "[w]hy is everyone mad at me when I try to fight my own battles?" (R.1345-51) His *Spencer* hearing testimony was even more nonsensical and irrational. (R. Volume 7, Spencer Hearing, 19-20)

Trial counsel unreasonably discounted Eaglin's mental illness and failed to investigate and consider its implications. As a result counsel failed to advise the court of his client's incompetence. Had Withee properly investigated he would have learned that his client did not have the ability to rationally understand the proceedings as well as the impact of his irrational decision on the outcome of the trial.

C. Trial Counsel Failed to Adequately Advise Mr. Eaglin Regarding His Purported Waiver Of Mitigation

The trial court erred in denying relief as to Eaglin's claim that trial counsel was ineffective for failing to adequately advise him regarding his waiver of mitigation. (P.4577-79) The court based its decision on the fact that Judge Blackwell conducted colloquy at Eaglin's trial regarding his waiver. (P.4579) However, Judge Blackwell's inquiry of Eaglin at his trial does not negate trial counsel's initial obligations to prepare for trial, and specifically prepare and advise his client regarding a waiver of mitigation.

In *Thompson v. Wainwright*, the Eleventh Circuit Court of Appeals specified regarding the scope of mitigation investigation required where the client expresses

a desire not to present mitigation: "The reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence in court is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering possible merit." 787 F.2d 1447, 1451 (11th Cir. 1986) (internal citations omitted). In other words, counsel has a duty to investigate possible mitigation prior to advising the client regarding any waiver, and counsel must advise the client of evidence with potential merit so that the client can then make an informed decision regarding whether to use that information.

In *Grim v. State*, 971 So. 2d 85 (Fla. 2007), this Court made a similar finding regarding trial counsel's obligations in the event of a client's wavier of mitigation. This Court "recognized that a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed." *Grim*, 971 So. 2d at 100. In *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010), this Court relied on the precedent set forth in *Grim* in granting relief. In *Ferrell*, as in Eaglin's case, the trial court did conduct an inquiry of the defendant regarding the waiver. Counsel for Ferrell advised the court that he conferred with his client and advised him of his right to present evidence. Ferrell then advised the court that it was his decision to waive the evidence.

However, in determining that Ferrell's wavier of mitigation was not knowing and voluntary this Court looked **beyond** the colloquy at trial, to the performance of

the trial attorney in investigating and preparing for the penalty phase and in preparation for this client's wavier. The court found that "[t]here is simply no indication in record that trial counsel performed any investigation into the penalty phase so that a knowing and voluntary waiver could take place" *Ferrell* at 984. This Court looked at the postconviction record as far as what was available to counsel if counsel had investigated. It determined that, "in this case there is no indication that Ferrell or his family was uncooperative or refused to participate in an investigation into mitigation; in fact, the opposite is established. Nor is this a case where there is any indication that Ferrell refused to participate in mental health examinations." *Id*.

In *Ferrell*, as in Eaglin's case, there were numerous witnesses who were available to testify regarding Eaglin's childhood who were simply not contacted. Those witnesses who did attempt to contact counsel, such as Eaglin's brother and Jill Hussung, were never responded to.

Family members, foster parents, and social workers, with compelling mitigation were available to testify at Eaglin's penalty phase. However, in pursuit of his "monster mitigation" trial counsel failed to speak with any of them and chose to exclude their testimony before initiating any investigation. Therefore, Eaglin was never apprised by counsel of all that was available for mitigation. His trial counsel failed to conduct any mitigation investigation prior to his decision to

waive, hence, Eaglin was never even informed of what might have been presented in his defense for penalty considerations.

In denying relief the trial court also held Eaglin failed to present evidence at the evidentiary hearing regarding "counsel's alleged failure to advise Defendant regarding his waiver of penalty phase mitigation." (P.4578) As a result the court determined that this portion of the claim was waived by Eaglin. Competent substantial evidence does not support the trial court's conclusions. Evidence was presented in postconviction regarding Withee's failure to adequately counsel Eaglin regarding his "waiver." The State's questioning of their witness on direct brought out the following:

> Q: Did the defendant want you to present information about his background and his childhood?
> A: We didn't discuss that specifically.
> Q: Okay. Did he ever ask you not to - - to present or not to present anything about his upbringing?
> A: We didn't discuss that. I - - I - - we didn't discuss that as in any kind of detail. And for the reason that I didn't bring it up is there were too many things in there that could become a double-edged sword and hurt him rather than help him.

(S-P. 145). Withee's testimony indicates that it was his decision not to discuss with Eaglin the presentation of family and personal background as part of a penalty phase. Withee also testified that he and Eaglin never discussed calling any of Eaglin's friends as witnesses at the penalty phase. (S-P. 143).

What is also clear from the record is that Eaglin was not opposed to the

presentation of mitigation (P.5218, 3586-8). During Withee's testimony the State asked him about "Eaglin's decision to not involve his family members." In response, Withee corrected the State, and clarified that Eaglin specifically told him "'don't bring my mother into this,'" and "[h]e did not encompass all of the family members." (P.5218). He testified that he couldn't answer the question as to whether "we discussed the brother" as a potential witness. (S- P.144). He testified that "[a]s far as talking it over with Dwight, we limited it to the statement he didn't want his mother involved and perhaps his brother." (S- P. 147). Had counsel done the job he was constitutionally required to do, a wealth of mitigation was available that Eaglin would not have opposed.

Postconviction testimony by both trial counsel and their investigator establish that even before meeting with Eaglin on July 23, 2003 Withee had already decided not to present "traditional" mitigation at Eaglin's penalty phase. McLoughlin and Wible both testified that Withee had formulated his mitigation theory very early on in the case (P.3856, 984). Investigator Wible stated that as early as on July 16, 2003, a month after the crime, when he was formally asked to assist on the case, he was aware that Withee's theory for the case would blaming the DOC for the murders. (P.3865)

On July 23, 2003 Wible and Withee had their first meeting with Eaglin. (P.4142) The meeting lasted about an hour and half of the meeting was spent

"let[ing] him know who we were and what we were about." (P.4181) During that interview Eaglin provided them with some preliminary information about his family, that he had not seen his mother since he was very young, his father was abusive and that he was placed into foster care as a child (P.4142, 4145) During the meeting Eaglin expressed concern that he did not want his mother involved in the case because of "all that she had been through with him." (P.5192, 5196) Withee explained that Eaglin's request only pertained to his mother and did not encompass his other family members. (P.5218)

The first meeting was the only time the defense team discussed Eaglin's "waiver" with him. (P.4181) Withee did not discuss the matter further with Eaglin because he believed "[t]here was no sense in belaboring it." (P.5191-3) Withee never discussed with Eaglin the possibility of his friends or other family members testifying at his penalty phase and he never discussed with Eaglin whether or not he wanted his childhood presented at trial. (P.5191-3)

In contrast, the efforts by mitigation specialist Cheryl Pettry in Eaglin's first trial underscore the deficiencies in Withee's performance:

> It has been my experience from my mitigation work on more than 160 death penalty cases, that most capital defendants initially do not want their family involved in the penalty phase proceedings. In 2000, the first time I met Tommy Eaglin he informed me that he did not want to involve his family in his trial proceedings. However, after my initial conversation with Tommy Eaglin I spoke to him on numerous other occasions, at the request of his attorneys.

> During these visits I was able to explain to Tommy Eaglin the purpose of presenting mitigation at a penalty phase as well as the purpose of his family's involvement during the penalty phase proceedings. As a result of our conversations Tommy eventually agreed to our mitigation investigation and to the presentation of his family as witnesses at the first trial.

(P.3096, 3046-51)

1. Failure To Investigate Background

Counsels' failure to properly advise Eaglin concerning the waiver is evident in the fact that on July 23, 2003 neither Withee nor McLoughlin were aware of the details of Eaglin's background. The meeting occurred within two months after Eaglin's arrest on June 11, 2003.

The little effort they did make to obtain information about Eaglin's background was done too late and was insufficient. Wible and Withee testified that they made an initial attempt to meet with Eaglin's mother, Anita Luckett in March 2004, **almost a year after their discussion with Eaglin regarding his "waiver**." (P.1854, Ex. 21) While Wible wrote to Luckett and asked her to contact other family members for them, no additional contact was made with Luckett or other family members after this meeting. In fact, a preliminary investigation into the case, or a call to Pettry, would have discovered that Luckett was estranged from the Eaglin family and would not have been any help to the investigation. Furthermore, counsel's decision to interview Luckett regarding Eaglin's childhood is again indicative of how uninformed he was regarding his childhood. A review of Pettry's

records or a call to Pettry would have informed him that Luckett was absent from her son's life since he was an infant. (P.3125)

The trial court misrepresented the record in determining that "the record reflects that the defense team visited Defendant's mother, grandfather, and other family members." (P.4579) While Wible **planned** on meeting with Eaglin's father, Kenneth Eaglin, there is no evidence that the meeting actually occurred. (P.5241) Similarly, although Wible contacted Eaglin's brother, Donnal, around the same time to arrange a telephonic meeting between Withee and Donnal, Withee never spoke to Donnal despite Donnal's repeated attempts to contact Withee. (P.3200-3203, 4156-7)

These abortive attempts to contact Eaglin's parents and brother constitute the extent of the defense team's investigation into their client's history. Withee's skewed understanding of his client's childhood and illustrates how little information he had regarding his client's past. According to Withee, as a child Eaglin was given "a lot of opportunities." (P.5194) His grandparents cared for him and took care of him "rather well." (P.5195) "So his home situation, although not super-duper, not all – American boy, he had help. And at times he did a pretty good job of toughing it out." (P.5195) Evidence presented in postconviction demonstrates that in fact Mr. Eaglin's childhood was in stark contrast to this description. Indeed, even in denying postconviction relief the trial court

acknowledged Mr. Eaglin's "**admittedly horrific childhood." (P.4563)**

Trial counsel's attempts to obtain Eaglin's records were similarly sporadic and incomplete, despite the plethora of records that where actually available to them. The records that were retained by various members of the team were not distributed to and reviewed by the other team members.

Cheryl Pettry was retained to work on the case almost a year after Eaglin's initial and only "waiver." Pettry provided Withee with her mitigation notes from the Pinellas County case; however, she was instructed by Withee to not discuss Eaglin's "wavier" with him. (P.3097, 3046, 3053, 3055) Pettry was concerned about the decision because Eaglin had initially resisted the presentation of mitigation during the Pinellas trial. She felt strongly that given an opportunity to discuss the issue with Eaglin "he would have agreed to the presentation of his family history and mental illness as he had previously."(P.3096, 3046)

Although Pettry provided Withee with her reports from Eaglin's first trial, including the names and contact information for witnesses it is apparent that Withee did nothing with the information. (P.5246) He did not ask Pettry to revisit her work that she did four years prior nor did he ask her to conduct additional interviews. Instead, as early as March 22, 2005 Pettry was instructed to cease all work on the case. (P.3096, 3046, 3053, 3055) And yet Withee did not review Pettry's materials and certainly did not provide the information to his investigator

either. Pettry did not have any contact with Wible and was not even aware that there was an investigator assigned to the case.

At the same time Pettry was retained to work on the case, Wible was attempting to locate Eaglin's foster parents and Department of Children and Family's employees. (P.4171, 4175) Wible did not get very far in locating individuals and recalled that he had "very limited information." (P.4189, 4194, 4195) Although Wible obtained school records, Withee did not review them. (P.5213-4) Nor did Withee review the records Wible obtained from the Pinellas County Public Defender's Office regarding Eaglin's first trial which included information regarding Eaglin's friends, foster homes, mental health history, and Pinellas County Jail medical records (P. 4152-4)

2. Failure To Investigate Mental Illness

Trial counsel was likewise deficient in failing to adequately investigate and evaluate Eaglin's mental health. Eaglin was entitled to competent and independent expert mental health assistance when the State made his mental state relevant to guilt-innocence or sentencing. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Had counsel adequately investigated, he would have discovered a wealth of information pertaining to his client's long standing history of severe mental and physical abuse, emotional trauma and familial neglect, and boxing career and would have known that further mental health evaluation was absolutely critical.

On March 26, 2004, nine months after Eaglin told Withee that he did not want his mother involved, Dr. Harry Krop was appointed to his case as a confidential defense mental health expert. (R.46-47) The purpose for requesting Dr. Krop was to make an "insanity" determination regarding Eaglin. (R.6-47) Upon his appointment Dr. Krop reviewed records provided by the defense team, his assistant **conducted a phone interview with Eaglin's mother** and brother, met with mitigation specialist, Cheryl Pettry, and conducted a neuropsychological evaluation of Eaglin. (P.5224, 3491-3504)

On October 20, 2005, over two years after Eaglin advised his counsel not to talk to his mother; Dr. Krop submitted his findings to trial counsel in the form of a letter. In the letter Dr. Krop advised counsel that Eaglin derives from a dysfunctional family and abusive background; and that he also suffers from Bipolar Disorder, a serious psychiatric disorder which has often been untreated. (P.3527, Ex.X) Dr. Krop's diagnosis of Bipolar Disorder was "partly based on the records, which reflected his unstable mood states, his periods of depression, his periods of what likely have been hypomanic episodes." (P.3530)

Competent and substantial evidence demonstrates that Withee never seriously considered Eaglin's diagnoses. According to Withee "both diagnoses were too broadly used" and that Bipolar Disorder was "grossly oversold as causation, if not justification, more likely justification for bad behavior." (P.5229)

Withee explained that he did not pursue Eaglin's diagnosis of Bipolar Disorder at the penalty phase of his trial because he falsely believed "everybody's Bipolar" and the diagnosis "would not fly before this jury, therefore, I didn't use it." (P.5229, 5248-9) Withee dismissed Eaglin's diagnosis and struggle with mental illness despite objections from his mitigation specialist, Cheryl Pettry, as well as concerns from Dr. Krop. As soon as Pettry was retained to work on the case she recommended to Withee that the team focus on Eaglin's disorder as part of the penalty phase presentation. She provided Withee with a history of Eaglin's diagnoses and medication, including dates he stopped taking his medication. She also "wrote a memo to Withee regarding the various issues around his medication that I believed should be explored for penalty phase purposes."(P.3097, 3065-69, 3071-3093)

As an experienced mitigation specialist Pettry understood that Eaglin's mental illness was important mitigation and she expressed her concern regarding Withee's unreasonable decision to exclude it from Eaglin's trial. Pettry also understood the correlation between Eaglin's mental illness and his ability to make decisions regarding the penalty phase of his trial.

> While working on Dwight Eaglin's second trial I also had serious concerns about Withee's ability to properly communicate with Tommy regarding the very important decisions that were being made about his case. Tommy had a well documented history of mental illness for which he was not receiving medication or treatment for at the time of Withee's representation. When I discussed Tommy's diagnosis of

> Bipolar Disorder, Withee said that Bipolar disease is the "diagnosis of the day" and he "did not believe in it."

(P.3097)

Dr. Krop also disagreed with Withee's decision to exclude Eaglin's well documented history of Bipolar Disorder in favor of his "DOC negligence" strategy (P.3538-9). Even co-counsel McLoughlin agreed that the diagnosis was important and he did not know why Eaglin's suspended treatment for Bipolar Disorder was not offered at the penalty phase to support the "DOC negligence" theory. (P.35878, 3882)

Again, as with Eaglin's childhood history, Withee ignored the advice of his experts and unreasonably choose to exclude Eaglin's mental health mitigation in lieu of his unsupported theory of "monster" mitigation. He explained that, "I did not want to fall into the situation where he should be reduced – his sentence should be life instead of death because he's Bipolar." (P. 5229-30) Withee further explained that he did not have to use Eaglin's mental illness as mitigation because he "had a monster mitigator on the other half, other side, of that fence." (P.5229)

In addition to the two diagnoses Dr. Krop outlined in his letter, he also had concerns about damage to Eaglin's brain. He recommend a neuropsych evaluation based specifically on Eaglin's description of his boxing career, long term drug, as well as other incidents "where he may have suffered a head injury." (P.3504) Dr. Krop "felt that it was important to check to see whether there might be any

neuropsychological impairment." (P.3504)

This Court has consistently found deficient performance where counsel failed to investigate the defendant's background and obtain records relating to the defendant's mental illness. *Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996); *Orme v. State*, 896 So. 2d 725 (Fla. 2005). In *Rose* this court found counsel's failure to investigate and present mental health mitigation in lieu of a nonviable "far-fetched" defense was unreasonable. *Rose* at 574. In *Orme v. State* this Court determined that trial counsel's failure to investigate and consider the defendant's Bipolar Disorder, after learning of the diagnosis, constituted deficient performance in both the guilt and penalty phase of Orme's trial. *Orme* at 735. This Court concluded that "[a] diagnosis of a major mental illness would reasonably require further investigation, and counsel should have realized that pursuing this lead was necessary to make an informed choice about whether to present evidence of Orme's mental illness." *Id*. As in Eaglin's case, counsel in *Orme* knew of the diagnosis and chose to forgo investigating and presenting it and this Court found deficient performance.

The postconviction record demonstrates that Eaglin was not properly advised about his "waiver" before the penalty phase. Although an attempt to investigate was made by the defense team it was done so a year after the only discussion Eaglin had with counsel regarding mitigation and his desire to exclude

his mother. The attempt at investigation was haphazard and incomplete. While members of the defense team uncovered "red flags" that should have lead to further investigation counsel did not pursue any of them and instead blindly pursued his own "risky" DOC negligence mitigation strategy. (P. 3097) Learning only general information about Eaglin's family did not end counsels' obligation to investigate but rather established a beginning point. In assessing the reasonableness of an attorney's investigation, "a court must consider not only the quantum of evidence already known to counsel; but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*.

The postconviction record demonstrates that trial counsel did not conduct an investigation prior to his client "waiving" mitigation about his background and because of this counsel was unable to sufficiently advise his client of that "waiver". Furthermore, the little effort to obtain information about Eaglin's background after the "waiver," does not constitute a reasonable investigation. Trial counsel's failings cannot be attributed to any reasonable strategic decision. Having failed to conduct the required timely investigation into Eaglin's background and history, trial counsel was not in a position to make a reasoned strategic decision or to advise his client about any waiver of mitigation.

ii. Trial Counsel's Penalty Phase Strategy Was Unreasonable

In denying relief regarding Eaglin's waiver claim the trial court further

supported its decision by concluding that trial counsel's strategy to pursue DOC negligence 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." (P.4581) The court erred in its conclusion and misinterprets the evidence presented in postconviction.

Withee's decision to pursue his strategy of "negligence mitigation" in lieu of conventional mitigation was patently unreasonable given the status of the law and the little effort he made to investigate the mitigation that actually existed in the case. The United States Supreme Court has held that *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins*, 539 U.S. at 527. In Eaglin's case counsel chose to pursue his "negligence" strategy prior to any investigation into Eaglin's background.

It is incumbent upon the lawyer in a capital case to recognize "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant." *Brown v. State*, 526 So. 2d 903, 908 (Fla. 1988) (citing *Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987))

> We caution that attorney strategy is not a shield or panacea for failure to investigate all mitigating evidence in a capital case. "[T]he mere incantation of 'strategy' does not insulate attorney behavior from review; an attorney must have chosen not to present mitigating

> evidence after having investigated the defendant's background, and that choice must have been reasonable under the circumstances." (citations omitted)

Hardwick v. Crosby, 320 F.3d 1127, 1182-86 (11th Cir. 2003).

It is clear from the postconviction record that Withee was enamored with his novel mitigation theory, a theory he often referred to as "monster mitigation," and "pure mitigation." (P.5258) He took Eaglin's request not to involve his mother as permission to pursue his own unconventional theory and dismiss any obligation he had to pursue additional mitigation. (P.3866-68)

Withee's strategy for the penalty phase to forgo traditional mitigation in lieu of a negligence theory was not reasonable. The unreasonableness of the strategy is evident in Withee's own attempts to explain it's relevance: "I wanted the jury to focus on [DOC's negligence], not focus on Dwight's social background and think that I'm using that to minimize the offense," instead "I wanted to have the mitigation be pure mitigation to mitigate the penalty, not mitigate the seriousness of the crime." (P.5257-8) The trial court rejected this theory of prison negligence and found that the nonstatutory mitigators presented by Eaglin were "repugnant to order in a society which strives to live by the law." On direct appeal this Court agreed and determined that mitigation presented at Eaglin's penalty phase was unreasonable and could not be considered as mitigating. *Eaglin v. State*, 19 So.3d 935, 944 (2009).

Counsel's decision to forgo the presentation of mental health mitigation in lieu of DOC negligence theory was similarly unreasonable. Counsel's decision to withhold the information about Eaglin's mental illness was not informed but rather based on his own biases regarding mental illness and Bipolar Disorder. As in his attempts to investigate Eaglin's background, his efforts to investigate Eaglin's mental health were insufficient. The information he did obtain regarding Eaglin's mental health raised numerous red flags that begged for further investigation.

As with Eaglin's family background detailed testimony and evidence about Eaglin's psychiatric history needed to be heard by the judge and jury in conjunction with the evidence that was presented. A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to the proceeding. *Ake v. Oklahoma*, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." *Blake v. Kemp*, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Fessel*, 531 F.2d 1278, 1279 (5th Cir. 1979).

c. Prejudice

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would

have been different. A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of showing a reasonable probability. *See Kyles v. Whitley*, 514 U.S. 419 (1995). In searching for that reasonable probability courts must "engage with [mitigating evidence]," *Porter v. McCollum*, 130 S. Ct. 447, 453 (2009), in considering whether that evidence might have added up to something that would have mattered to the jury. Courts have a "'[] duty to search for constitutional error with painstaking care [which] is never more exacting than it is in a capital case.'" *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (citing *Burger v. Kemp*, 483 U.S. 776, 785 (1987)). In performing the duty to search with painstaking care for a constitutional violation by engaging with mitigating evidence, courts must "'speculate' as to the effect" of non presented evidence. *Sears v. Upton*, 130 S. Ct. 3266, 3266-67 (2010).

The *Porter/Kyles/Sears* conception of the *Strickland* prejudice inquiry requires courts to engage with mitigating evidence and painstakingly search for a constitutional violation by speculating as to how the mitigating evidence might have changed the outcome of the penalty phase. It is clear that the focus of a court's prejudice inquiry must be to try to find a constitutional violation. Courts must search for it carefully, not dismiss the possibility of it based on information

that suggests it isn't there. And looking for a reasonable possibility that a violation did not occur reverses the standard of the inquiry, because if a court simply focuses on all the ways the non presented evidence might reasonably have not mattered, it is not answering the question of whether it reasonably may have. If a court simply speculates as to how a constitutional violation might not have occurred, it is avoiding its duty to engage with mitigating evidence to painstakingly speculate as to how a violation might have occurred.

Mr. Eaglin was prejudiced by trial counsels' numerous failings. During the penalty phase, the jury heard nothing that humanized Eaglin. Instead, the jury was presented with evidence about the failings of the Florida Department of Corrections. In contrast, at the evidentiary hearing, Eaglin's older brother and father, as well as social workers and family friends testified to Eaglin's chaotic and violent childhood. Furthermore, Eaglin presented medical experts who contextualized Eaglin's childhood and explained the relationship between his childhood abuse, both physical and emotional, and his adult diagnoses of PTSD, Chronic Traumatic Encephalopathy and Bipolar Disorder.

i. Violence and Neglect

Raised by only their father, Tommy and Donnal Eaglin were especially vulnerable to their father's neglect and violence. Taken from his mother only months after his birth, Tommy's infancy was devoid of parental nurturing and care.

When Tommy was not cared for by strangers, Kenneth Eaglin left him alone with his young brother in abandoned homes, dorm rooms, the family car, and for extended periods of time with Kenneth's disabled and infirm mother. (P.3138-9) Kenneth was a violent and unpredictable presence in his children's lives. (P.3140) He "terrorized" his young children with physical violence on a daily basis, including Tommy's third birthday when he broke Tommy's leg while holding him by his feet and "punishing" him. (P.3140-1)

Tommy spent his childhood, like his infancy, shuttled between his grandparents and strangers, including Kenneth's various new wives and their children. At each stop the Eaglin brothers were systematically beaten by their father, with Tommy taking the brunt of the abuse. (P.3150-7, 3170-71) The last time Kenneth abused his children, Tommy held a gun to his father's head to make the violence stop. (P.3177) The following day Kenneth was arrested on two counts of cruelty to his children, Tommy and Donnal Eaglin (P.3894) Tommy was eleven years old when the State placed him into Illinois Department of Children and Families custody.

ii. Mental Illness

In addition to the volume of lay testimony that was never presented to Eaglin's jury, there was an abundance of evidence that in addition to a history of abuse and neglect Eaglin is mentally ill. At the evidentiary hearing, Eaglin

presented several lay witnesses and experts to establish that such mitigating information was available, had trial counsel adequately sought it.

Eaglin endured a multitude of short-term foster care placements because of his behavioral and emotional problems. (P.4053) When he entered residential care at age thirteen Eaglin, was diagnosed with "Cyclothamic disorder," a childhood diagnosis consistent with the later adult diagnosis of Bipolar Disorder. (P.4071) Despite his challenges, Eaglin successfully completed the Nachusa program and was placed in traditional foster care with the Winge family. (P.4056) However, Eaglin's severe emotional and behavioral problems were never adequately addressed and continued. (P.3284-5, 4191, 4082, 4087, 4092, 4094) He was eventually placed in the Dixon Boy's School, another residential facility (P.3279), continuing the cycle of sabotaging his successes. (P.3243)

As a young adult in Florida, Eaglin continued to suffer from emotional and behavioral problems and was eventually prescribed Prozac. (P.3254) His illness interfered with his emerging boxing career and his attempts at managing his illness without medication were unsuccessful. (P.3254) While incarcerated at the Charlotte County Prison, Eaglin intermittently took Prozac and his behavior was erratic. (P.3256, 3257) His condition worsened when his foster mother was diagnosed with cancer and eventually died. (P.3257, 3258, 3260)

Thomas Hyde, M.D., Ph.D., testified that Eaglin's severe individual trauma,

and repeated trauma during his early childhood, directly related to his Bipolar Disorder and Post-traumatic Stress (P.3768, 3773) The relationship between Bipolar Disorder and post-traumatic stress disorder is typical in individuals who experience high levels of stress in early childhood. (P.3777, 3748) Like Dr. Hyde, Psychiatrist Dr. Pickar was struck by the extent of abuse Eaglin suffered as a child and the extent to which Eaglin's history of mental illness was documented. (P.3659, 3672) Dr. Pickar also found that Eaglin suffers from bipolar manic-depressive illness, a fundamental diagnosis in psychiatry, which manifests in "histories of impulsivity, highs, manic or hypomanic, and periods of depression." (P.3658)

Both physicians found that Eaglin's history of concussions contributed to his behavior and to his mental illness. (P.3727) Head trauma creates its own level of impulsivity in vulnerable individuals such as Eaglin. (P.3661) Dr. Hyde testified that Eaglin has a history of repeated closed-head injury and is at risk for chronic traumatic encephalopathy (CTE), a neurological, not psychiatric, diagnoses. (P.3789, 3790, 3820) Eaglin is at an extremely high risk for chronic traumatic encephalopathy given his boxing history, particular boxing style and childhood history of head trauma. Dr. Hyde explained that neuropsychological data demonstrated a significant decrement in IQ, a symptom of brain damage from chronic trauma to the brain which may be related to his Bipolar Disorder. (P.3773)

Dr. Pickar explained that closed head trauma and the resulting concussion to the brain exacerbates manic episodes in individuals who suffer from manic depressive illnesses. (P.3661)

Both experts testified that Eaglin's escape attempt at Charlotte Correctional was directly related to his Bipolar Disorder. Dr. Pickar opined that the crime would have been prevented if Eaglin was properly medicated at Charlotte County Correctional. Dr. Hyde opined that Eaglin met the statutory mitigating factor that "he 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 horrific murders" based on the long and well documented history of Bipolar Disorder and Eaglin's report of a variety of symptoms that were consistent with a manic episode. (P.3826-7) Dr. Pickar explained that stopping psychotropic medication "changes the chemistry in the brain landscapes." (P.3704) According to Dr. Pickar Eaglin was in a mixed state of mania and depression and the escape was "a manic suicide attempt." (P.3674-5)

iii. The Trial Court Erred In Denying Relief

Despite the fact that the jury heard nothing in the way of mitigation, four jurors voted to spare Eaglin's life. Despite this, the postconviction court insists that "even if trial counsel's performance was in some way deficient, and even if all of the evidence Defendant now wishes presented had been introduced at trial, there is no reasonable probability of a different outcome." (P. 4583) The court's conclusion

is flawed in several respects.

The court reasoned that "[d]espite testimony of the **admittedly horrific childhood** Defendant and his brother endured, [Eaglin's brother], the person who spent the most time with Defendant during his formative years, presented no testimony that Defendant was negatively affected mentally by the abuse."(P.4583, 4589) Moreover, the court concluded that "[the brother] endured the same abuse as Defendant, and overcame his background." (P.4584) The court's conclusions are contrary to facts and law. The U.S. Supreme Court has made clear that mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586 (1978). Furthermore, the Eleventh Circuit Court of Appeals has explained:

> In the penalty phase of a trial, '[t]he major requirement ... is that the sentence be individualized by focusing on the particularized characteristics of the individual.'" *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987)) Therefore, "[i]t is unreasonable to discount to irrelevance the evidence of [a defendant's] abusive childhood." *Porter v. McCollum*, __ U.S. __, 130 S. Ct. 447, 455 (2009) Background and character evidence "is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse." *Johnson*, 2011 WL 2419885, at *27 (collecting cases)

Cooper v. Sec'y, Dept. of Corr., 646 F.3d 1328, 1354 (11th Cir. 2011). In *Cooper*, the Eleventh Circuit found that Cooper's case was "strikingly similar" to its

decision in *Johnson v. Sec'y, Dept. of Corr.*, 643 F.3d 907 (11th Cir. 2011), wherein "[t]he description, details, and depth of abuse in [Cooper's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told." *Cooper*, 646 F.3d at 1353. *Cooper* and *Johnson* highlight that even in cases where some mitigation is presented at trial, when the description, detail, and depth of mitigation presented in postconviction far exceeds what the jury heard, prejudice exists.

Contrary to the court's finding, Donnal Eaglin explained and described with specificity that his brother Tommy suffered significantly more abuse at the hands of his father than any of the other children in his family. (P.5229) The record is also clear that Eaglin's emerging mental illness during his childhood impacted his ability to cope with the brunt of his father's violence.

Moreover, although not required, Eaglin did establish through Dr. Hyde and Dr. Pickar the relationship between the physical and emotional abuse and Mr. Eaglin's mental illnesses. Both experts concluded that Eaglin's severe individual trauma and repeated childhood trauma during his early childhood directly related to his diagnoses of Bipolar Disorder and Post-traumatic Stress Disorder (P.3768, 3773), which is typical in individuals who experience high levels of stress in early childhood. (P.3777, 3748)

Finally, the court's reliance on Dr. Gamache, a psychologist, to rebut the

testimony of Dr. Hyde, behavioral neurologist, with Ph.D. and medical doctor degrees, as well as psychiatrist, Dr. Pickar, is misplaced. (P.4597-4602) The court relied on Dr. Gamache's conclusions exclusively, specifically his findings that Eaglin does not suffer from post concussive disorder, PTSD and Bipolar Disorder, that instead "the records indicate that Defendant shows all the signs of antisocial personality disorder, which is not a mitigating factor." (P.4601) In dismissing Eaglin's experts' diagnoses of Bipolar Disorder the court found that "[t]he defense experts merely diagnosed Defendant with Bipolar Disorder based on one prior diagnosis given without any supporting testing, and based solely on Defendant's own self reporting." (P.4602).[8]

The lower court's conclusions are refuted by the record. The court, like Dr. Gamache, turned a blind eye to the fact that the State of Florida diagnosed and has treated Eaglin for Bipolar Disorder since his incarceration in 1998. Moreoever, Dr. Pickar and Dr. Hyde examined Eaglin, and both relied on the State of Florida's medical documentation of Eaglin's preexisting condition. (P.3773, 3775, 3646-7)

In contrast, Dr. Gamache neither interviewed nor assessed Eaglin and, in any event, would be unqualified to conduct a medical, psychiatric or neurological examination because he is not a medical doctor. As Dr. Harvey explained, in a

[8]Trial counsel Withee testified that "Dr. Krop told me that everybody who commits violent acts has an antisocial personality disorder. It's not a – it's not a sensible mitigators." (S-P. 181)

forensic setting where the diagnosis and treatment of Bipolar Disorder was at issue, a psychologist would need to defer to a psychiatrist and/or a neurologist.:

> [T]he assessment of Bipolar Disorder is complicated by its pharmacology, in that there are certain treatments that are offered to people with Bipolar Disorder which unfortunately make them worse rather than better. We need someone who is an experienced pharmacologist to be able to assess the adequacy of any previous treatments and the possible deleterious effects of any treatments that, uh, were offered that might not be the right ones. And I'm not in a position to do that as a psychologist.

(P.3961-7)

The trial court's reliance on Dr. Gamache, while discounting wholesale the testimony of Eaglin's competent and credible experts, is precisely the kind of post-hoc rationalization that the Supreme Court disfavored in *Porter* and *Sears*. Moreover, the trial court fails to address the heart of the issue: whether the presentation of the additional evidence *would have affected the jury's recommendation.* Given the paucity of the mitigation presented at the penalty phase, and the fact that four jurors still voted in favor of life, it cannot be said that trial counsel's failure to present a mitigation case did not affect the outcome.

d. Conclusion

Eaglin's jury knew nothing about the man they sentenced to death. They did not know that Eaglin suffered a childhood of severe abuse and neglect, and that by the time he left his father's care at the age of eleven he was a severely damaged child. They were not aware that, as a damaged child, Eaglin was moved from

various foster homes to institutions that were not equipped to deal with his emotional and emerging psychiatric problems. Despite this, the jury voted by a mere eight-to-four that Eaglin be sentenced to death. Had trial counsel properly investigated and counseled Eaglin, and presented this evidence, the jury and judge would have had a greater appreciation for the aspects of Eaglin's conduct and character and there is a reasonable probability that two or more other jurors would have voted for life. *Strickland*, 466 U.S. 668, 694 (1988). Eaglin was denied effective assistance of counsel at his penalty phase and is entitled to a new sentencing.

ARGUMENT II

TOMMY EAGLIN'S CONVICTIONS AND SENTENCES ARE MATERIALLY UNRELIABLE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE COUNSEL FAILED TO EFFECTIVELY ARGUE THE MOTION TO SUPPRESS

Only when there has been a knowing, intelligent and voluntary waiver of the right to counsel may a custodial interrogation be conducted in the absence of counsel. Whether a voluntary, knowing and intelligent relinquishment has occurred is a matter which depends in each case "upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Miranda v. Arizona*, 384 U.S. at 475. A valid *Miranda* waiver requires voluntariness, which is

a question of state law circumscribed by the minimum requirements of the Fourteenth Amendment's Due Process Clause. *Jackson v. Denno*, 378 U.S. 368, 393, 84 S. Ct. 1774, 1789, 12 L.Ed.2d 908 (1964). Although diminished mental capacity is not *per se* grounds to render a confession inadmissible, such evidence is one of the potential factors that a court should consider in the totality of the circumstances surrounding a waiver of *Miranda* rights. *Ross v. State*, 386 So. 2d 1191, 1194 (Fla. 1980).

Trial counsel failed to properly raise and litigate the voluntariness of his *Miranda* waiver. Eaglin's counsel filed a motion to suppress statements Eaglin made to FDLE Agent Ubelacker at CCI following his arrest. These alleged comments included "references to the electric chair" and the comment that "I'll make it easy on you; I tried to kill those three people." (R.1065) Thereafter, Eaglin was advised of his *Miranda* rights and he repeated them back to the agents on the tape. (R.1070-71) On the tape transcript, Eaglin admitted trying "to jump the fence" but advised in the same breath that he did not want to talk about the correction officer. Eaglin then stated that he wanted the death penalty and that "he want[ed] the chair." (R.1072-76)

Counsel argued that Eaglin's statements should be suppressed because he was subject to extreme duress and ill treatment at the time of his detention between the fences during the escape attempt and thereafter prior to the interview. Eaglin

suffered lacerations on his body from concertina wire, he was kicked by the arresting officers, pepper sprayed, sleep deprived, lacked medical attention, and sensory deprivation including near nakedness and lack of sanitary items in detention, all of which made him incapable of exercising his free will. (R.3345-3391).

However at the time of the hearing, a wealth of material existed relating to Eaglin's state of mind and how his mental illnesses and neurological damage rendered him incapable of knowingly and intelligently waiving his *Miranda* rights. Given this information the grounds on which the suppression was filed and argued were significantly deficient.

In denying relief the trial court held that the claim is waived because Eaglin did not question trial counsel specifically about the motion to suppress. (P.4575-76) However, the trial court ignored the evidence presented at the evidentiary hearing regarding Withee's unreasonable decision to dismiss and exclude Eaglin's Bipolar Disorder in the motion to suppress as well as the fact the Eaglin was in a manic state at the time the statements were made.

At the time of the hearing on the motion to suppress trial counsel was aware of Eaglin's serious mental illness. Dr. Harry Krop's report, filed prior to the motion to suppress, concluded that Eaglin suffered from a serious psychiatric disorder. Eaglin was "diagnosed with Bipolar Disorder which has often been untreated" and

that he was not medicated at the time of the offense. However, even though counsel were aware of the diagnosis prior to the hearing, counsel did not discuss or investigate Dr. Krop's findings in preparation of the suppression hearing. (P.3533) Had counsel investigated Dr. Krop's findings counsel would have learned that Eaglin had in fact told Dr. Krop's assistant during his evaluation that on the day of the crime he was feeling very desperate at the time and he didn't feel like he had a whole lot of other choices.(P.3622)

As demonstrated at the evidentiary hearing, despite Dr. Krop's diagnosis of a "serious psychiatric disorder" trial counsel Withee never seriously considered Eaglin's diagnoses. (P.3530, 5229, 5248-9) As a result of his own personal biases counsel unreasonably failed to investigate Eaglin's disorder and failed to raise the issue in the motion to suppress. Eaglin presented medical experts at the evidentiary hearing who testified to Eaglin's disorder, the physical and psychological manifestations of the disorder, the nature and consequences of "manic episodes" in a person who is bipolar, as well as the impact of stopping and starting of bipolar medications have on a person with the illness.

The trial court also erred in relying on the fact that evidence regarding Eaglin's erratic behavior was presented during the motion to suppress hearing. (P. 4576) Even though some evidence of his behavior was presented, his behavior was not given a context in terms of his mental illness. What was not presented was that

Eaglin's behavior was evidence of a manic episode, and that given his state of mania, a medical condition, Eaglin was not able to understand or waive his rights.

Dr. Harvey explained it was likely that Eaglin was suffering from a manic episode at the time the statements were made given that that manic episodes related to untreated Bipolar Disorder can last for hours or days. Dr. Harvey explained that "a manic episode that doesn't last for at least two full days is not a manic episode. So manic episodes, by definition, last for at least two full days. They can be persistent for extremely long periods of time." (P.3969-70) Dr. Harvey testified that it is common that persons with Bipolar Disorder can be depressed and manic at the same time. (P.3970)

Dr. Pickar, after reviewing testimony of the officers and inmates who witnessed Eaglin after the offenses and reviewing a video recording of him directly after the arrest, opined that he was suffering from "a very severe mood disorder" at the time of the offenses and was in a "mixed state of mania and depression" related to his disorder (P.3674-5) Dr. Hyde also opined that based on Eaglin's well-documented history of Bipolar Disorder as well as his self report of a variety of symptoms such as racing thoughts, feeling high or "on top of the world," insomnia, and his sporadic use of Prozac, weed and crystal meth, Eaglin had experienced a manic episode prior to and during the murders." (P.3811-2, 3824-7)

Eaglin's abrupt stopping of the medication in March 2003 had a dramatic

affect on his behavior and his disorder. (P.3703-4) Dr. Pickar opined that Eaglin's escape attempt was likely a suicide attempt as it "reflects a depression as well as a mania, and I think it was a functional equivalent not just that the outcome could have been death, but putting himself at the risk of dying is part of what this was about." (P.3706)

The fact that *Miranda* warnings were given did not cure the involuntary nature of the statements. Had trial counsel presented available evidence regarding Eaglin's significantly diminished mental state at the time of the claimed *Miranda* waiver, the totality of the circumstances analysis would have changed dramatically and the court would likely have granted the motion to suppress the statements as involuntary. Eaglin was prejudiced as a result.

ARGUMENT III

THE CIRCUIT COURT ERRED IN SUMMARILY DENYING SEVERAL MERITORIOUS CLAIMS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S CONSTITUTION

An evidentiary hearing must be held whenever the movant makes a facially sufficient claim that requires a factual determination. Fla. R. Crim. P. 3.851(f)(5)(A)(i), *see also Amendments to Fla. R. Crim*. P. 3.851, 772 So. 2d 488, 491 n.2 (Fla. 2000) (endorsing the proposition that "an evidentiary hearing is mandated on initial motions which assert . . . legally cognizable claims which allege an ultimate factual basis") *See also, Allen v. Butterworth*, 756 So. 2d 52, 66-

67 (2000); *Gonzales v. State*, 990 So. 2d 1017, 1024 (Fla. 2008) To the extent there is any question as to whether the movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required. *Booker v. State*, 969 So. 2d 186, 195 (Fla. 2007).

Eaglin's rule 3.851 motion pled facts regarding the merits of his claim which must be accepted as true. *Lightbourne v. State*, 549 So. 2d 1364, 1365 (Fla. 1989). When these facts are accepted as true, it is clear that the record does not positively refute Eaglin's claims and that an evidentiary hearing was required and relief is warranted.

a. Tommy Eaglin 's Constitutional Right To A Fair Trial And Due Process Under The Sixth, Eighth, And Fourteenth Amendments Was Violated Due To The Prosecutor's Use Of Inconsistent, Irreconcilable And Misleading Theories Used To Secure The Death Sentences In His Case

In *Strickler v. Greene*, the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). In *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), the Eleventh Circuit granted habeas relief on a capital case arising out of Georgia based upon impermissible burden shifting and improper argument. Although the prosecutor's use of inconsistent theories in securing the convictions of separately tried co-defendants did not provide the specific grounds

for relief, Judge Clark wrote separately on the due process violation, setting the stage for similar challenges in the future:

> [T]he prosecution's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice. . . The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth.

Id. at 1479 (Clark, J., concurring). In 2000, the Eighth Circuit Court of Appeals addressed the use of inconsistent statements by the same witness against separately tried co-defendants. *Smith v. Groose*, 205 F.3d 1045, 1051 (8th Cir. 2000). Finally, the United States Supreme Court recognized that the use of inconsistent theories in order to obtain a death sentence may violate due process in 2005. *Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005). Presentation of inconsistent arguments with respect to the credibility of either a witness or a defendant in two separate proceedings violates the same due process principles as presentation of known false testimony and improper argument. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor's failure to correct testimony relating to credibility was constitutional violation); *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977) (testimony could violate due process if it created a false impression, even if technically true); *United States v. Augurs*, 427 U.S. 97, 103 (1976) (convictions obtained by the knowing use of perjury are fundamentally unfair and must be set

aside if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury).

The disingenuous use of inconsistent theories by the State in the trials of Eaglin and his co-defendant Stephen Smith infected Eaglin's case, directly resulting in the death sentences. *See Stephen V. Smith v. State*, FSC Case No. 06-1903, Lower Tribunal No. 03-1526-F (Charlotte Co.). The State argued at the Smith trial that Smith planned the attempted escape for months along with co-defendant Jones and that they only brought Eaglin in later. (*Smith* T.399)

Inmate Lykins testified that Eaglin was brought in later because he was strong and fast and Smith and Jones needed him to deal with the fence crew. (*Smith* T. 605-06) On cross, Lykins testified that Eaglin told him that he wanted to escape because his mother had died that week and he did not care about life any more. He also said that Eaglin was acting strange all that week after he got the news about his mother's death. (*Smith* T. 647-48) Another inmate witness, Jessie Baker, also testified at Smith's trial that Eaglin was acting strange that week. (*Smith* T. 692)

A transcript of Smith's July 31, 2003 videotaped statement to FDLE during a walk-through of the crime scene was also introduced at Smith's trial. (Smith T. 1116-1253) In that statement Smith says that there was no plan to kill Fuston, but Eaglin wanted to "whip Fuston's ass good." (*Smith* T.1186) Likewise, he testified that the original plan was to "knock out" whichever correctional officer was

working that night and take their keys. (*Smith* T.1188-89) Smith said that he would not testify in court because he did not want to be a snitch. (Smith T. 1252) The scenario at Eaglin's trial was a total fiction created by the State and a violation of due process.

Smith's lawyer argued in closing that Eaglin went crazy because he was upset about his mother's death and killed Fuston and Lathrem. (*Smith* T. 1319-28) The State responded by arguing that Smith was the ringleader and that Eaglin was just the muscle. (*Smith* T. 1337) According to the State, Smith planned the entire escape attempt and brought Jones and Eaglin into the plan. (*Smith* T. 1353)

The trial court relied heavily on the State's contention that Eaglin was the principal actor when sentencing him to death. It is clear that Eaglin's sentencing judge and jury relied on the State's arguments that Eaglin was more culpable than Smith, despite the fact that the State argued the exact opposite at Smith's trial. The State's arguing of a diametrically opposed theories at Smith's and Eaglin's trials violated Eaglin's rights to due process and equal protection. Contrary to the lower court's conclusion, Eaglin plead specific facts that, if true, would entitle him to relief. The denial of this claim without an evidentiary hearing was error.

b. Tommy Eaglin's Convictions Are Materially Unreliable Because No Adversarial Testing Occurred Due To The Withholding Of Exculpatory Evidence Which Violated His Rights Under The Fifth, Sixth, Eighth And Fourteenth Amendments.

The prosecutor is required to disclose to the defense evidence "that is both

favorable to the accused and 'material either to guilt or punishment.'" *United States v. Bagley*, 473 U.S. 667, 674 (1985), quoting *Brady v. Maryland,* 373 U.S. 83, 87 (1963). Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [non-presented] evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 680. To determine materiality, undisclosed evidence must be considered "collectively, not item by item." *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Where there was an eight to four jury recommendation, evidence that a codefendant received a life sentence and special treatment in return for agreeing to testify against a codefendant was material.

The State's theory at trial was that out of the three defendants, Eaglin was the person who killed Fuston and Lathrem. The only witnesses to the crime were the two co-defendants and therefore, any specific assistance by either co-defendant to the State in preparation for trial was crucial to the defense. On March 31, 2006, Eaglin was sentenced to death by Judge Blackwell. (R. 1385-1411). Before, during and after the trial in 2006, the State withheld from Eaglin and his counsel information that Jones had been offered a plea agreement in exchange for his

cooperation: Jones would be allowed to plead "no contest" to the first Count on the indictment, the felony murder of Darla K. Lathrem, and would agree, if necessary, to testify in support of a 2005 proffer obtained by FDLE, and in return he would receive a life sentence and the state attorney would use "its best efforts" to encourage the DOC to place him in a correctional facility outside of Florida.. Eaglin only learned of this information on May 20, 2011, upon review of Jones' 2008 court file at the Charlotte County Clerk's Office. Neither of Eaglin's codefendants testified at his trial.

The plea agreement was signed by Jones on August 17, 2006. (P. 1507-1510). It included the "best efforts" clause concerning the State Attorney's Office. Eaglin was not appointed counsel for his direct appeal until a week later. Jones was sentenced to life on January 19, 2007 by Judge Blackwell after he had been evaluated for competency by three experts who were appointed by Judge Blackwell on August 17, 2006 when he refused to accept the plea. In the plea colloquy, in response to questioning by the state attorney concerning the plea agreement, Jones agreed that no promises had been made to him ("No, there hasn't") to enter into the life plea "other than the plea agreement." (P. 1513-15; P. 1507-1510).

On May 5, 2008 and again on June 26, 2008, well after Jones' plea and Eaglin was convicted and sentenced, Assistant State Attorney (ASA) Daniel

Feinberg wrote to DOC regarding their efforts to relocate Jones out of state. (P. 806-812) In the letters, Feinberg references Jones' cooperation in the development of the State's theory regarding Eaglin, as well as the State's conviction of Eaglin for the murder of Darla Lathrem. The letter also references the terms of Jones' plea negotiation as well as past conversations with DOC officials including Inspector Darryl McCasland, regarding the agreement. Feinberg filed the two letters in Jones' court file, and copied Jones' trial attorneys, Thomas Marryott and Jesus Hevia. The state attorney failed to inform either trial counsel or appellate counsel for Eaglin and co-defendant Smith about the plea bargain or its terms.[9] (P. 806-12).

It is incumbent upon the State to disclose any and all records that reveal that the co-defendant informant received a reduced sentence and special terms of incarceration in his own criminal case in exchange for cooperation with law enforcement. The State withheld the material evidence pertaining to their prosecution of Eaglin.

The prosecutor is required to reveal to defense counsel, including appellate counsel, any and all information that is helpful to the defense, including impeachment evidence, whether that information relates to guilt/innocence or punishment and regardless of whether defense counsel requests the specific

[9]Eaglin's appeal to the Florida Supreme Court was still pending at the time of the 2008 letters. Oral Argument was held on February 3, 2009, The State filed the *Smith* affirmance as a supplemental authority on February 4, 2009.

information. See *United States v. Bagley*, 473 U.S. 667 (1985). In particular, an agreement with a government informant for testimony in exchange for favorable treatment in the criminal justice system should be disclosed as impeachment evidence, especially where, as here, the witness's testimony is an important part of the government's case. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

c. Conclusion

This Court must consider the cumulative effect of all the evidence not presented to the jury, whether due to trial counsel's ineffectiveness, the State's misconduct or because the evidence is newly discovered. *Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Gunsby*, 670 So. 2d 920 (Fla. 1994). As the jury did not hear the evidence, confidence is undermined in the outcome of Eaglin's trial. The trial court's summary denial of these claims was error.

CONCLUSION AND RELIEF SOUGHT

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

Respectfully Submitted,

/s/ William M. Hennis III

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

ELIZABETH STEWART
Staff Attorney
Florida Bar No. 87450

CCRC-South
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to Stephen D. Ake, Office of the Attorney General, 3507 E. Frontage Road, 2nd Floor, Suite 200, Tampa, Florida 33607, *capapp@myfloridalegal.com*, by United States Mail and electronic mail this 30th day of October, 2013.

/s/ William M. Hennis III
WILLIAM M. HENNIS III
Litigation Director CCRC-South

CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

/s/ William M. Hennis III
WILLIAM M. HENNIS III
Litigation Director CCRC-South