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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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Tommy Eaglin submits this Reply Brief of Appellant in response to the State's Answer Brief in SC12-1760. Mr. Eaglin will not reply to every factual assertion, issue or argument raised by the State and does not abandon nor concede any issues and/or claims not specifically addressed in the Reply Brief. Mr. Eaglin expressly relies on the arguments made in the Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

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 FLORIDA CONSTITUTION

a. Deficient Performance

i. Unreasonable trial strategy

On direct appeal, this Court relied on its prior decision in *Howell v. State,* 877 So. 2d 697 (Fla. 2000) in finding:

> 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. Thus, we conclude that the trial court did not err in rejecting the various security, systems, and supervision failures at the prison as nonstatutory mitigation.

Eaglin v. State, 19 So. 3d 935, 944 (Fla. 2009). Therefore, the assertion that trial counsels' "pure mitigation" theory of DOC negligence was viable and "clear trial strategy" is wrong as a matter of fact and law. (P. 4581, State's Answer, p. 63, 54).

At trial, the jury was asked to spare Eaglin's life based following facts:

> McCasland, a senior prison inspector, testified that he had several administrative concerns regarding the prison, including the lack of key control. Lance Henderson, a corrections officer working at Charlotte Correctional, testified that he had filed an incident report prior to the murders regarding his concerns about the limited number of officers on duty for the nighttime work detail. Henderson believed the working environment was unsafe.
>
> Greg Giddens, a corrections officer at Charlotte Correctional at the time of the murders, testified that he was also concerned about his safety. He voiced his concerns to the officer in charge. Giddens also stated that the classification of certain inmates was downgraded so they could be in the open population or assigned work detail.
>
> Finally, James Aiken, president of a prison consulting firm, testified that the incident at the prison was facilitated by a failure of systems. He also stated that the classification of Eaglin was not handled properly and that several inmates had access to tools useful for escape activity and for causing violence. The inmate accountability, security staffing, and monitoring systems also failed.
>
> . . .
>
> Eaglin then testified that he had been in prison since 2001. He stated that the guards would beat and kill

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

Eaglin v. State, 19 So. 3d at 940-941.

Thus, the sentencing body was deprived of any information regarding "events that result[ed] in [Eaglin] succumbing to the passions or frailties inherent in the human condition." *Cheshire v. State*, 568 So. 2d 908, 912 (Fla. 1990) (*citing Lockett v. Ohio*, 438 U.S. 586 (1978)). 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). This Court has also held that 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)). 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); *see also Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1354 (11th Cir. 2011).

In postconviction, trial counsel Withee's rationalizations for this penalty phase theory were based on personal bias and devoid of legal reasoning. (P. 5248)

Counsel explained that he actively sought to remove any human aspect of his client from the sentencing because he believed that this was the only way to "mitigate the penalty," and presenting information about Eaglin, his frailties, his mental illness, and his deprived childhood would merely "minimize the offense." (P. 5257-8) Withee further explained that he pursued DOC negligence in lieu of mental health mitigation about Eaglin's bipolar disorder because the disorder "is justification for bad behavior" and he did not want Eaglin to be sentenced to "life instead of death because he's bipolar."[1] (P. 5228).

Trial counsels' decision to pursue DOC negligence was not a reasonable decision, given the lack of legal authority to support a theory and the authority against it. *Merck v. State,* 763 So. 2d 295, 298 (Fla. 2000); *Howell v. State,* 877 So. 2d 697 (Fla. 2004). It is clear that counsel's reasoning was based on ignorance and a grave misunderstanding of the law. Courts have consistently found counsel ineffective when mitigation evidence is not entered under these circumstances. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir. 1998).

The State cites to *Chandler v. U.S.*, 218 F.3d 1305 (2000), to support its arguments that the penalty phase strategy was reasonable. However, in *Chandler* the Eleventh Circuit still required that the strategy selected by counsel be a "sound

[1] Withee did not claim, as the State asserts on page 54 of its Answer, that presenting evidence mental health would be a "double edged sword."

trial strategy." *Id*. at 1314. The court in *Chandle*r specified that by '"strategy," we mean no more than this concept: trial counsel's course of conduct that was neither directly prohibited by law nor directly required by law, for obtaining a favorable result for his client." *Chandler v. U.S*., 218 F.3d 1305,1314 n.14 (11th Cir.2000). (citing *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir.1995) (en banc)). In *Chandler,* the sentencer was presented with the theory of residual doubt as well as character witnesses who "presented to the jury humanizing testimony." In other words, the strategy in *Chandler* was reasonable. This is in stark contrast to Eaglin's case. As this Court noted, the evidence of "DOC negligence" does not fall within this range. *Eaglin v. State*, 19 So. 3d 935, 944 (2009). Even if, as the State claims, counsel had fully considered the other options prior to selecting this strategy, trial counsel's single minded pursuit of DOC negligence was patently unreasonable. Even within the wide range of *Lockett*, mitigation must relate back to the defendant. Third party negligence does not fall within these parameters. *Eaglin*, 19 So. 3d at 944.

Furthermore, trial counsel's decision to pursue only DOC negligence mitigation was not a reasonable tactical decision because it was based on a deficient and incomplete investigation. "[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." *Stevens v. Zant*, 968 F.2d 1076, 1083 (11th Cir. 1992).

The State argues "[e]ven if an attorney or most attorneys would not have chosen to submit the DOC negligence theory exclusively as mitigation, trial counsel's determination to do so must be upheld since it was considered strategy, selected after full consideration of the other options." (State's Answer, p.64). The record is clear that Eaglin's counsel did not "ful[ly] consider other options" prior to selecting his strategy of DOC negligence. In fact, testimony from all three members of the trial team proves that Withee pursued his novel "negligence" strategy prior to *any investigation* into Eaglin's background. Indeed, counsel decided on the strategy even before meeting with Eaglin. (P. 4135, 5172, 5230)

The little effort made to obtain information about Eaglin's background and mental illness was done well after counsel's decision to pursue the DOC negligence theory. (P. 4158, 4163) 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 wrongly believed "(t)he two defenses, the two mitigators, social work versus prison negligence are mutually exclusive" and

could not be presented together. (P. 5220) All members of the defense team were aware and in agreement that Withee had decided on his "DOC negligence" theory early on in the case. (P. 3856)

The State's assertion that "defense team conducted a substantial, thorough and complete investigation" is not supported by the record. (State's Answer, p.62) As the State points out, Cheryl Pettry *did* conduct extensive investigation in preparation for Eaglin's *first trial* in 2000, which resulted in a life sentence. (State's Answer, p.61) However, despite her eagerness to assist counsel, she was prohibited from revisiting and reinvestigating any of her previous work from four years prior and delegated to summarize depositions of DOC witnesses. Counsel did not review any of the records from the first investigation Pettry provided to them. (P. 3046, 3096).

The State argues in its Answer that as part of their "substantial" investigation the trial team "interviewed" Eaglin's mother, father, brother, foster father, and had "quite a bit of contact with Jill Hussung." (State's Answer, p.62) However, this is a mischaracterization of the evidence. The little contact that was made was initiated by the witnesses themselves out of concern for Eaglin and the defense team did not seek to obtain any information from them regarding Eaglin's background.

Jill Hussung, a Nachusa TIE worker and good friend to Tommy Eaglin, attended his trial in 2006. She was in contact with Withee a couple of times (P. 3222, 3261) However, Withee never asked her about her relationship with Tommy or his history at Nachusa Lutheran Home. (P. 3261) His understanding that Hussung was merely a family friend demonstrates how little information he gathered from her as well as the fact that the team did not utilize the Cheryl Pettry records in their possession. In contrast, Hussung was a case worker who worked at the children's home where Tommy Eaglin spent a portion of his childhood between various foster placements. At the evidentiary hearing Hussung explained in depth Eaglin was "terrified" of his father and that it was only at Nachusa that he learned his father was in prison. (P. 3230-32) Hussung also had in-depth knowledge of the institution Eaglin was placed in during his formative years, as well as the lack of services available to a child like Eaglin. (P. 3284-85)

Trial counsel initiated contact with only two witnesses, Donnal Eaglin and Anita Luckett. Donnal Eaglin testified that although he was eventually contacted by Wible he never actually spoke to anyone from the team about Eaglin and his childhood. (P. 3200-3203, 4156-7) Withee affirmed that no information was obtained from the brother other than establishing his whereabouts (P. 30, 36, 91). The only person the defense team spoke with was Eaglin's mother who had little to offer due to her absence from Eaglin's life since infancy. Trial counsel would have

known that if they conducted even cursory review of Pettry's records.

State also asserts Wible conducted "supplemental mitigation research into Eaglin's case." (State's Answer p. 61). However, this too is misleading. What Wible "supplemented" was a jumbled[2] attempt to contact Eaglin's brother, Donnal Eaglin and a very limited attempt to obtain records. (P. 30, 36, 91) It is clear from Wible's testimony counsel's attempts to obtain Eaglin's records were sporadic and incomplete, despite the plethora of records that were 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. Wible testified that he did not have any contact with Cheryl Pettry and was unaware of her involvement in the case. At the same time that Pettry was retained and provided records from the 2000 case, Wible was attempting to locate Eaglin's foster parents and Department of Children and Family's employees (P. 4171, 4175) Wible testified that he did not get very far in locating individuals and recalled that he had "very limited information." despite the fact that Pettry had all of the information in her records. (P. 4189, 4194, 4195)

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[2] Donnal Eaglin was never contacted by either Withee or Neal McLoughlin directly. (P. 3184) He did recall a "kind of unusual" situation involving an investigator Dennis Wible whereby Wible sent a letter "via the JAG investigator that I was wanted for a murder case." (P. 3199, 3202) Donnal was called back from leave to clarify to his commanding officer that he was not in fact the defendant in the case. (P. 3201-2) After a brief initial conversation with Wible, Donnal called Wible back multiple times and did not get a response. (P. 3203)

It is also clear from the record that Withee neither reviewed nor considered the information and records that Cheryl Pettry and Denis Wible gave to him (P. 4152-4) 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. (P. 4152-4) As a result, Withee's understanding of Eaglin's childhood was extremely limited. 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)

Testimony confirmed that although the defense team had valuable information about Eaglin in their possession, as well as willing experts, they had little knowledge of Eaglin's psychiatric disorders and "**admittedly horrific childhood**." (P. 4563) Eaglin's social history was simply dismissed by the defense team in lieu of a novel theory and the personal biases of the lead attorney. It is obvious that Withee pursued his own personal interest at the expense of his client by disregarding clear guidelines and science, and ignoring the recommendations of his seasoned experts.

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 v. Smith*, 539 U.S. 510, 527 (2003). Furthermore, regardless of his own personal bias, 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)).

ii. Failure to adequately advise client regarding waiver

Counsel has a duty to investigate 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. *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir. 1986); *Grim v. State*, 971 So. 2d 85 (Fla. 2007); *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). Tommy Eaglin was never apprised by counsel of all that was available for mitigation prior to his only alleged "waiver" of mitigation because trial counsel failed to conduct any mitigation investigation prior to the "waiver." Hence, Eaglin was never even informed of what might have been presented in his defense for penalty considerations.

In its Answer the State relies on the lower court's erroneous finding that Eaglin '"unequivocally instructed" the defense team not to involve his family[.]"

(State's Answer, P. 43, 58) As noted in the Initial Brief, that finding was not supported by competent substantial evidence. What Eaglin "unequivocally instructed" his attorney to do was to keep his mother - only his mother - out of the proceedings. Eaglin was not opposed to the presentation of mitigation (P. 5218, 3586-8). Withee testified that Eaglin only asked him "'don't bring my mother into this,'" and "[h]e did not encompass all of the family members." (P. 5218, S-P. 147).

Furthermore, the State, like lower court, misses the point in arguing that the waiver was valid because Eaglin was 'in "complete agreement" with trial counsel's decision to forgo presenting mental health and social history mitigation." (State's Answer, p. 58, 59). Regardless of Eaglin's compliance with Withee's decision "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. Even if Eaglin fully agreed to counsel's decision, his decision was not fully informed because counsel was not informed.

Furthermore, the State and lower court's argument that Eaglin failed to establish prejudice because he did not testify at the evidentiary hearing that he would have presented the mitigation evidence had counsel investigated and informed him of the mitigation available is erroneous.[3] (State's Answer, p.60) To

[3] Eaglin argued in his Initial Brief that "[t]he 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." The State alleges that Mr. Eaglin failed to raise this issue in his 3.851 motion and is therefore barred. (State's Answer, p. 41).

The State overlooks that this Court should consider the requirements of *Koon/Muhammad* when reviewing the performance of counsel pursuant to *Strickland* where, as here, there was both a failure to advise the client of the consequences of his waiver and a failure to place the trial court on notice of the known mental status of the client. Mr. Eaglin specifically made this argument in his 3.851 motion:

> Due to counsel's errors, the trial court failed to take into account that Mr. Eaglin's decision was made in conjunction with of a significant history of mental illness, failure to take prescribed medication, and inability to understand the harsh realities of death row. Mr. Eaglin's limited waiver of mitigation was not knowing, intelligent, or voluntary. It was entirely based on his fear of public release of his interview with Dr. Krop and his associate, and anger and mistrust directed at trial counsel for misleading him about the confidentiality of his conversations with the defense expert. Nothing prevented trial counsel from seeking out other experts, for example a psychiatrist and a neurologist as has been done in postconviction, to interpret and explain the mental health and family mitigation in Mr. Eaglin's case. (P. 405-406)

Furthermore, the existing federal authorities cited to in the 3.851 motion speak directly to this issue, although they may not specifically reference this Court's holdings in *Koon/Muhammad.* For example, Mr. Eaglin cited to *Penry v. Lynaugh*, 109 S. Ct. 2934, 2952 (1989) in arguing "[t]he [sentencer] must be able to consider and give effect to *any mitigating evidence* relevant to a defendant's background, character, or the circumstances of the crime." (P. 406)

The State also claims that Eaglin was not entitled to "*any*" inquiry by the trial court because Eaglin's waiver was a partial waiver. (State's Answer, p. 42) However, Eaglin's limited waiver was essentially a total wavier. The actual mitigation presentation was limited to the theory of DOC negligence, a theory that both the trial court and this Court have found to be devoid of non-statutory and statutory mitigation. The operational truth is that Mr. Eaglin's "waiver" operated to eliminate everything that was mitigating. Therefore 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

establish prejudice Eaglin must only prove: 1) that counsel failed to conduct a reasonable investigation into mitigation such that Eaglin could not make a knowing and intelligent waiver; and 2) that Eaglin was prejudiced by counsel's failure to present mitigation. *See Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). "[T]his Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.' " ' *Henry* [*v. State*,] 937 So. 2d [563] at 569 [(Fla.2006)] (quoting *Asay v. State*, 769 So. 2d 974, 985 (Fla. 2000) (quoting *Rutherford v. State*, 727 So. 2d 216, 223 (Fla.1998))). *Ferrell*

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searching interrogation of Eaglin. *Koon v. Dugger*, 619 So. 2d 246 (1993), *Arthur v. State*, 374 S.E. 2d 291 (S.C. 1988).

Muhammad should have operated to require trial counsel to proffer into the court record the existing evidence in mitigation that had been developed for the Pinellas County case by Cheryl Pettry and the mental health, substance abuse and family violence and abuse opinions of Dr. Krop that were allegedly being waived by Mr. Eaglin. The lower court utterly failed to require or to instruct counsel to proffer the mitigation into the court record pursuant to *Muhammad*. *See Wiggins v. Smith,* 123 S. Ct. 2527, 2538 (2003). Furthermore the State's Answer ignores the fact that neither trial counsel nor Eaglin objected to the sentencing court's consideration and finding of mitigation concerning abuse based on the PSI done by the Department of Corrections.

Finally, as noted in this Reply the State's reliance on *Gilreath v Head* in requiring Eaglin's testimony is improper. *Gilreath v. Head*, 234 F.3d 547, 549 (11th Cir. 2000) (State's Answer, p. 444-5) *Gilreath* does not require a defendant to testify in postconviction regarding such issues. *Id*. 551. Rather Eaglin must only prove: 1) whether counsel failed to conduct a reasonable investigation into mitigation such that Eaglin could not make a knowing and intelligent waiver; and 2) whether Eaglin was prejudiced by counsel's failure to present mitigation. *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). This Court in *Ferrell* found deficient performance where counsel failed to properly advise his client regarding his waiver of mitigation and this Court made its ruling without requiring Ferrell to testify in postconviction.

at 981. This Court concluded "that the penalty phase in [Ferrell's] case was not reliable without counsel having performed any investigation into mitigation and without a knowing and voluntary waiver of mental mitigation." *Ferrell* at 986. Importantly, there was no requirement that *Ferrell* show or testify he would have agreed to the presentation of mitigating evidence had trial counsel investigated and informed him of that which was available.

The State and lower court improperly relied on *Gilreath v. Head*, 234 F.3d 547, 549 (11th Cir. 2000) in finding that Eaglin is required to show: 1) had counsel done a reasonable investigation he would have discovered the mitigation; 2) if Eaglin had been advised of the mitigation evidence he would have permitted counsel to present it (State's Answer, p.45, 60, 66). The Eleventh Circuit Court of Appeals in *Gilreath* stated:

> In the circumstances of this case, we think that-to establish prejudice-Petitioner actually must make two showings. First, Petitioner must show a reasonable probability that-if Petitioner had been advised more fully about character evidence or if trial counsel had requested a continuance-Petitioner would have authorized trial counsel to permit such evidence at sentencing.

Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000). The Court's analysis turned on the specific facts of Gilreath's case. Gilreath did not claim that trial counsel failed to investigate and inform him about available mitigation evidence. Instead, Gilreath's complaints involved counsel's failure to advise him more fully on good

character evidence and for failing to ask for a continuance of the sentencing hearing overnight so that he could think more about his decision.

Eaglin was not properly advised about his "waiver" before the penalty phase. Indeed it was more than a year after counsel spoke with Eaglin that counsel conducted any investigation at all. The investigation that was done was haphazard and incomplete. Counsel uncovered "red flags" that should have lead to further investigation, yet failed to pursue any of them. Instead counsel 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. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

b. Prejudice

The State's argument that the nature of Eaglin's offense is "beyond absolution" of any mitigating factor evinces a misunderstanding of *Furman. Furman v. Georgia*, 408 U.S. 238 (1972). (State's Answer, p.68). Eaglin is not asking for "absolution." The issue at the penalty phase of any capital case is one of life imprisonment versus death, not absolution. Moreover given the fact the jury's death recommendation was eight to four the State's assertion that there could be no mitigation in the case is clearly unfounded. Four of the eight jurors found that the mitigation in the case outweighed the aggravators presented by the State even

without the presentation of any evidence of Eaglin's troubled life and mental illness.

The Eighth Amendment requires consideration of the "character and record of the individual offender and the circumstances of the particular offense as constitutionally indispensible part of the process of inflicting the penalty of death." *Lockett v Ohio*, 438 U.S. 586, 601 (1978) (citing *Woodson v North Carolina*, 428 U.S. at 304)). Thus, the circumstances of the defendant's background and family history are directly relevant and must be considered for mitigation. *See e.g. Spaziano v. Florida*, 468 U.S. 447, 460 (1984); *Zant v. Stephens*, 462 U.S. 862, 879 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1984).

As the Eleventh Circuit Court of Appeals recently 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).

The State, like the lower court, relies exclusively on the State's expert Dr.

Gamache, a psychologist, to rebut the testimony of two medical doctors who testified on behalf of Eaglin. All three of Eaglin's experts, Eaglin's trial expert, and even the State of Florida's own Department of Corrections diagnosed Eaglin with bipolar disorder, and yet State concludes that evidence of Eaglin's extensive history of bipolar disorder and PTSD is simply "not compelling." Like the lower court, the State disregarded completely the testimony of Eaglin's three experts and relied on Dr. Gamache's opinion that Eaglin merely suffers from antisocial personality disorder, ignoring that Dr. Gamache neither interviewed nor assessed Eaglin and in reviewing his medical records ignored the State of Florida's own diagnosis and treatment of Eaglin since 1998. The State and lower 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, it fails to address the heart of the issue: whether the presentation of the additional evidence *would have affected the jury's recommendation.*

The State further asserts that the mitigating value of Eaglin's childhood and mental illness is "diminished" by his history of childhood violent behavior and his own father's criminal history and incarceration. (State's Answer, p. 70). In *Sears v. Upton*, the U.S. Supreme Court noted that "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive-perhaps in support of a

cognitive deficiency theory." 130 S. Ct. 3259, 3264 (2010). Eaglin's father was initially convicted for the abuse he inflicted eleven year old Tommy Eaglin. As a result of his father's abuse Mr. Eaglin was a severely depressed and after being removed from his father's care remained "terrorized" by him. In the context of the full picture of Eaglin's bleak childhood of abuse and neglect it is likely the jury would have come to a different conclusion.

> Had the judge and jury been able to place [Mr. Eaglin's] life history 'on the mitigating side of the scale,' and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury-and the sentencing judge-'would have struck a different balance,' *Wiggins*, 539 U.S., at 537, 123 S. Ct. 2527, and it is unreasonable to conclude otherwise.

Porter v. McCollum, 130 S. Ct. 447, 454 (2009).

The jury in Eaglin's case was completely deprived of the nature of his childhood, his challenges with chronic violence and disruption, his struggle with success and ultimate defeat to his mental illness. Had trial counsel properly investigated and presented this evidence, the jury and judge would have had a greater appreciation for the aspects of Mr. Eaglin's conduct and character and there is a reasonable probability that the result of the penalty phase would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1988).

CONCLUSION AND RELIEF SOUGHT

For the reasons stated herein and in his Initial Brief, 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,

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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
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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 19th day of February, 2014.

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