IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1823

LOWER COURT CASE NO. 08-2244-CFMA

MATTHEW L. CAYLOR

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This appeal arises from the denial of Appellant's motion for postconviction relief by Circuit Court Judge James B. Fensom, Fourteenth Judicial Circuit, Bay County, Florida, following an evidentiary hearing. This proceeding challenges both Appellant's convictions and his death sentence.

The following abbreviations are used to cite the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R"—record on direct appeal to this Court;

"PCR"—postconviction record on appeal in this proceeding;

"EX"—Exhibits/Evidence

STATEMENT OF THE CASE

Mr. Caylor was tried in Bay County, Florida. After a jury trial, the Defendant was convicted of first-degree murder, sexual battery involving great physical force, and aggravated child abuse in connection with the 2008 murder of 13-year-old Melinda Hinson. At the end of the penalty phase of his trial, the jury recommended the death penalty by a vote of eight to four, and the Court followed the jury's recommendation. The Court also imposed prison sentences of life for sexual battery involving great

physical force and thirty years for aggravated child abuse. The Defendant appealed to the Florida Supreme Court, which affirmed in *Caylor v. State,* 78 So.3d 482 (Fla. 2011), *cert. denied,* 132 S.Ct. 2405 (2012).

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[1](1) Trial counsel was ineffective during voir dire by failing to challenge jurors, properly inquire, and to move to strike the entire panel in violation of the Defendant's Fourth, Fifth, Sixth, and Fourteenth Amendment rights; (2) Counsel was ineffective during the penalty phase of the trial by failing to investigate and present substantial mitigation in violation of Caylor's Fourth, Fifth, Sixth, Eighth, and Fourteen Amendment rights; (3) Mr. Caylor was denied his rights under *Ake v. Oklahoma* at the guilt and penalty phases of his capital trial when counsel failed to obtain an adequate mental health evaluation and failed to provide the necessary background information to the mental health consultant in violation of Mr. Caylor's rights to due process and equal protection under the Fourteenth Amendment to the U.S. Constitution, as well as his rights under the Fifth, Sixth, and Eighth Amendments; (4) Mr. Caylor was denied his rights under the First, Sixth, Eights, and Fourteenth Amendments to the U.S. Constitution and the corresponding provisions of the Florida Constitution and was denied effective assistance of counsel in pursuing his postconviction remedies because of the rules prohibiting Mr. Caylor's lawyers from interviewing jurors to determine if constitutional error was present; (5) Mr. Caylor was denied his rights under the Eight and Fourteenth Amendments of the U.S. Constitution and under the corresponding provisions of the Florida Constitution because execution by electrocution and lethal injection are cruel and/or unusual punishments; and (6) Mr. Caylor's trial court proceedings were fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole, since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

Caylor raised the following claims on appeal: (1) the trial court erred in denying his motion for judgment of acquittal on the offense of aggravated child abuse (denied at page 492); (2) the trial court erred in denying his motion for judgment of acquittal on the offense of sexual battery involving great force (denied at page 495); (3) the trial court erred in finding as an aggravating circumstance that he committed the murder while on felony probation (denied at page 497); (4) the trial court erred in assigning "little weight" to the "dysfunctional family" and "remorse" mitigating circumstances (denied at page 498); (5) death is a disproportionate punishment (denied at page 500); and (6) Florida's death penalty is unconstitutional under the holding of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)(denied at page 500).

After the United States Supreme Court denied certiorari on May 14, 2012, *Caylor v. Florida,* 132 S.Ct. 2405 (2012), the Defendant timely filed his Motion pursuant to Rule 3.851 on May 2, 2013.

The Motion asserts six main claims[1]. The State filed its Response on June 7, 2013. The Court conducted a *Huff* hearing on August 7, 2013, and entered its Order granting an evidentiary hearing on claim I(1)(B) (regarding juror Marianne Moore), claim II (trial counsel's failure to investigate and present mitigation evidence during the penalty phase), and claim III(2) (trial counsel's failure

to have a mental health professional testify with respect to the Defendant's mental state during the penalty phase), with the Court reserving ruling on whether claim VI required further evidentiary consideration. *See* August 13, 2013, Order. The remaining claims were DENIED without an evidentiary hearing. An evidentiary hearing was conducted on June 1 and 2, 2015. Caylor and the State filed respective closing arguments regarding the issues. The Court entered its order denying Caylor's 3.851 Motion on September 9, 2015.

STATEMENT OF THE FACTS

Abuse and Addiction were prevalent in Matthew's family. When Kerry Caylor (Matthew's father) was growing up, he was abused by his stepfather (PC V23 1385) When Kerry used drugs, he would become violent (PC V23 1388). Kimberly Caylor's (Matthew's mother) father was an alcoholic and beat his children on a regular basis (PC V22 1333-34). Kimberly's father sexually abused her sister, Connie Rushman (PC V22 1335). Kimberly herself was sexually abused by her stepfather (PC V22 1335, 1345). Kimberly was diagnosed with bipolar disorder (PC V22 1345). She was addicted to drugs for seven years (PC V22 1346). Her sister, Connie Rushman, was addicted to heroin for many years and spent time in prison (PC V22 1335). Ms. Rushman has been diagnosed with depression (PC V22 1338). Kimberly's brother was an alcoholic, a schizophrenic, and died at an early age (PC V22 1331, 1345).

Matthew Caylor was born on May 25, 1975, to Kimberly Caylor (mother) and Kerry Caylor (father). They were both teenagers at the time (PC V22 1348, V23 1386). The pregnancy was not planned nor wanted (PC V22 1348). Matthew's parents wanted him aborted (PC V23 1387). However, they were living with the paternal parents who would not allow the abortion (PC V22 1341, V23 1386-1387). Since Matthew's father and mother did not want Matthew to be born, they let him know it every day of his life.

Matthew's parents were very young when he was born. They had no jobs and lived in poverty. There were times when the kids went without food (PC V23 1395), although they always found enough money to buy drugs. Matthew's parents were addicted to drugs until Matthew was about fifteen years old. Kerry was the first person to supply Matthew with drugs; he was 12 years old (PC V22 1356, V23 1394). By the time Matthew's parents quit drugs, Matthew was using cocaine, amphetamines, and crack.

During Matthew's formative years, Kerry was verbally and physically abusive to Matthew (PC V22 1351) and Kimberly. Matthew's brother, Christopher, was born seven years later (PC V22 1357, V23 1401). However, Christopher received better care; he was neither verbally nor physically abused by his parents (PC V22 1358, V23 1401-02). Christopher was treated so differently, that at the time of the evidentiary hearing he was thirty-one-years old, lived at home, unemployed, and played video games all

day. In addition, Christopher was never diagnosed with any mental disorders (PC V22 1370-71).

When Matthew was an infant, Kerry got angry because Matthew would not stop crying. Kerry would stop Matthew from breathing (PC V22 1351). He testified at the evidentiary hearing as follows: "I could have killed that poor boy by doing that. And I think I, I think, nobody knows why he's damaged, I think I did that, because I held his breath off until he passed out and he was listless and his arms was shaking around and he couldn't do anything to me about it." (PC V23 1390) Kerry Caylor testified he did that to Matthew on three occasions (PC V23 1390).

As Matthew grew up, Kerry screamed at his son constantly and called him foul names (PC V23 1390-91). Kerry also beat Matthew in the head (PC V22 1351). Matthew was present when Kerry and Kimberly fought (PC V22 1369, V23 1391). Kerry slapped Matthew's body for defecating in and hiding his underwear (PC V22 1352, V23 1392-93). When Matthew was 15, Kerry punched him in the jaw for using foul language (PC V23 1392). The injury caused the right side of Matthew's face to swell (PC V23 1392). Kerry indicated that every time he beat his son, Matthew remained silent and never asked his father to stop the abuse (PC V23 1393).

When Matthew got older, Kerry kicked Matthew hard enough to cause bruising (PC V23 1934). Timothy Hilberger, a police

officer, moved into the Caylor residence when Matthew was in his early teens. Subsequently, Kerry discovered that Hilberger was sexually abusing his son (PC V23 1396, but since Kerry liked the man and still considered Hilberger to be a part of the family, Kerry let him stay regardless of what he did to Matthew (PC V23 1398). Kerry also found out that Sherri Miller, his sister, sexually abused Matthew (PC V23 1401).

When Matthew was in elementary school, his parents were informed that he had mental issues (PC V23 1402). Because Matthew was deemed emotionally handicapped, he was put in a special class (PC V22 1353). On a number of occasions, Matthew attempted suicide and was admitted to a hospital (PC V23 1402-03). The first time Matthew tried to commit suicide he was about 15 (PC V22 1353). However, because of financial difficulties, he never received any mental health care (PC V23 1403). When Matthew broke up with his girlfriend, he tried to cut her name into his leg (PC V22 1355).

At various times during his formative years, Matthew sustained several head injuries. As a baby in a walker, he fell down the stairs (PC V22 1351). When Matthew was approximately three years old, he tripped and hit his head on the sharp edge of a coffee table. The injury required stitches (PC V22 1351). When Matthew was approximately five years old, he was hit in the head with a tire iron, causing his head to bleed (PC V22 1351).

When Matthew was around two years old, Kerry was angry because he couldn't find any marijuana to buy; Matthew was crying. So, Kerry "popped that kid in the head so hard right between the eyes in the forehead…" (PC V23 1404). Although Matthew sustained a large bruise, the child was not taken to the hospital (PC V23 1405).

When Matthew was 16, his parents kicked him out of their house (PC V22 1354). Shortly thereafter, Matthew got married to Denise (PC V23 1399). They had two children together, and when Matthew was not on drugs, he was a good father. However, he an Denise often resorted to eating food out of garbage cans (PC V22 1355, V23 1399). They could not afford to pay water or electric bills (EH 221). During this period, Matthew became so strung out on drugs he foamed at the mouth and could not speak (PC V23 1400). After his marriage ended with Denise, he started dating another girl, and they had a child together.

There were times when he tried to commit suicide by hanging, cutting himself, and drinking antifreeze. His drug usage got worse. In the 1990s, he worked with a mechanic for four years (PC V22 1316). His boss, Shawn Cato, also had drug problems (PC V22 1317). Shawn and his wife, Stephanie Putnam, frequently did drugs together with Matthew (PC V22 1317). Their choice of drugs ranged from crystal meth, cocaine, and ecstasy, as well as other drugs (PC V22 1318). When high on drugs,

Matthew, Shawn, and Stephanie would not sleep for three to seven days; sometimes the stretch was longer (PC V22 1318). Their drug use continued all day long for multiple days (PC V22 1319). Matthew confided to Ms. Putnam that he was sad while sober; however, when he was on drugs he felt normal (PC V22 1319). Their drug habit easily cost approximately $200 to $300 per day (PC V22 1319-20).

In Ms. Putnam's opinion, Matthew was highly energized while high: Matthew moved constantly and exhibited erratic behavior (PC V22 1321). Matthew told Ms. Putnam that he was upset about having to be registered as a sex offender because he denied he was guilty (PC V11 1321).

In Georgia, Matthew was convicted of child molestation and placed on "first offender" probation. He did not successfully complete the probation requirements, which meant he had to register as a sex offender. But Matthew knew he could not handle that, so he asked that his probation be violated.

In June 2008, Matthew moved from Georgia to Panama City, Florida. He rented a room at the Value Lodge Motel, and by July 8 had been there for about two weeks. The motel residents formed a community that included outdoor barbeques. Melinda Hinson (victim), age 13, and her brother stayed in one of the motel rooms with her mother, her mother's boyfriend, and another male. Melinda's limited activities included: swimming in the pool,

playing in the game room, stealing food from someone else's grill, and walking the dog of one of the male residents whom she had a crush on. She also smoked cigarettes and sold marijuana to other residents.

Matthew became involved with two Russian girls, while working at a bar. The girls stole his cocaine. Although he confronted them about the theft, he decided to go back to the Value Lodge motel before the situation turned violent.

On July 8, Matthew was in his room and still feeling the effects of the cocaine he had used. Then Melinda knocked on his door and asked for a cigarette. She came inside, sat next to him on his bed, and put her arm around him. She said he was hot, and they began to kiss. He thought she was 16, but when asked, she admitted she was only 14. She made some sexual advances toward him, and shortly thereafter, they were naked. At first, Matthew did not want to have sexual intercourse, but she did, so they had sex. When he realized how much trouble he was in by having sex with a minor, especially since he was registered as a sex offender, Matthew snapped and began to strangle Melinda with one of his hands. After struggling for a few seconds, Melinda became unconscious. The defendant strangled the girl with a telephone cord then pushed her naked body under the bed. He returned the cord to the phone and left. He drove to Chipley where he stayed for a couple of days. He was arrested and soon confessed to

killing Melinda. Her body and clothes were discovered two days after the homicide by a cleaning woman.

SUMMARY OF ARGUMENT

Caylor's counsel made the decision not to present available mitigation evidence at the penalty phase before he completed a through investigation, which deprived the jury from hearing the complete and true background of Mr. Caylor.

Caylor was not evaluated for mitigation by any mental health expert even though counsel was well aware that Caylor had mental health issues, as well as addiction issues.

Caylor should have been granted an evidentiary hearing on the question of whether juror Weaver was biased against Caylor. She indicated she wasn't sure whether she could be fair and her children were a relative of one of the witnessed. Smith failed to challenge her for cause of utilize a preemptory challenge.

Caylor should have been granted an evidentiary hearing to determine if trial counsel was ineffective by failing to inquire of jurors about their thoughts about mental health issues, addiction issues, and other mitigation.

ISSUE I

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF THE TRIAL BY FAILING TO INVESTIGATE AND PRESENT SUBSTANTIAL MITIGATION IN VIOLATION OF CAYLOR'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

The standard of review for Ineffective Assistance of Counsel is de novo, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

DEFICIENT PERFORMANCE:

Failure to Properly Conduct Mental Health Investigation -

The trial court found that Caylor's trial counsel, Walter Smith, was not ineffective. In so finding, the trial court stated:

> In the instant case, the Court finds that the Defendant's trial counsel Smith made a reasonable strategic decision not to use testimony from a mental health expert such as Dr. Crown during the penalty phase, and that his decision was well within "the great latitude" afforded to counsel "in decisions regarding the use of expert witnesses." Franqui, 965 So.2d at 31. **The Court also finds that Smith made his decision only after he first carefully weighted the pros and cons of using a mental health expert during the penalty phase** (Order 23). (Emphasis added).
>
> Notably, Smith took into account his conversations with the Defendant; his consultation with Dr. Rowan, who had evaluated the Defendant before trial; and his investigator of the Defendant's background before trial (PC V4 610).

The trial court projected a strategy upon Mr. Smith that does not comport with current law. Mr. Smith's decision came before and not after investigation. Mr. Smith's mitigation investigation was minimal at best. First, Mr. Smith's evaluation of the pros and cons was based on a complete

and utter lack of competent information. The mental health expert he utilized, Dr. Jill Rowan, only saw the defendant on one occasion to evaluate Mr. Caylor for competency[2] (EX V7 1317), not mitigation. She was not asked to perform any testing whatsoever.

> Q. She didn't perform any tests that you are aware of, do you know?
>
> A. You know, I don't know. I think she just talked to him and I guess just touched the various factors for competency, can you display appropriate courtroom decorum; and do you understand the adversarial nature of the legal system. I assume that's the kind of conversation she had with him. (PC V24 1552)
>
> * * *
>
> Q. Okay, as of October 30th, just before the penalty phase, you had not hired any mental health expert to evaluate Mr. Caylor for mitigation, is that correct?
>
> A. That's correct. (PC V24 1556).

During the evidentiary hearing, Mr. Smith agreed that he had already made the decision not to seek either one of the two statutory mental health mitigators, or to introduce any mental health experts before completing any investigation.

> Q. So you made that determination without a psychological report, without a psychological evaluation, without medical records, without school records, without other than Department of Correction records, without any work records of any kind?

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[2] Mr. Smith's letter to Dr. Rowan on September 17, 2008, requests the following service only:"…whether the defendant is competent to proceed and if determinable, if the defendant was competent at the time of the alleged crime."

A. Right. (PC V24 1562)

The only records that Mr. Smith had was the psychological report provided by Assistant State Attorney Basford on October 30, 2009, the day the penalty phase began:

> BASFORD: While looking through these certified copies this morning I have one that came in with the probation officer's report, and then I had some others from the actual counties where he had been convicted. I came across a psychological evaluation in that file. I provided that to Mr. Smith. I had not seen it before this morning and, you know, whether or not it had been given in discovery, I don't know. I can't represent that to the court. But I have provided that to Mr. Smith this morning.
>
> THE COURT: Mr. Smith, any problems?
>
> MR. SMITH: Well, I did receive it. I had not seen it before. I was expressing my frustration over obtaining records from other states. This is a case where we request them, we don't necessarily get them and we don't really know who to ask for them. This apparently was in another court file up in Georgia where he was evaluated on a drug charge. And it came back with some possible psychological diagnosis that could potentially be helpful in a penalty phase. I was generally aware of these things from other documents. I didn't have this actual report so I haven't been able to give it to a psychologist here. **But I had sort of made the determination sometime ago that I would not pursue those two mitigating factors, you know, extreme emotional disturbance, and I forget the verbiage on the other one, because it was sort of a -- I might be able to get something good out, but also some bad may come out.** So that was sort of the tact. I don't think it changes the complexion here. We're ready to proceed and I will be offering sane testimony, along the general lines of substance abuse and anger control issues and possible psychological issues when he was younger. And I'll get that through his parents, just sort of a social history on him, that will come up.
>
> But -
>
> THE COURT: But you've chosen not to use any sort of defense of-
>
> MR. SMITH: Right, right. Because it would cancel it out, I

think, the good and the bad probably would have cancelled out. **In my opinion jurors don't put a whole lot of credence in psychological evaluations anyway.** So that was sort of the tact that I took sometime ago. And the revelation of this actual **psychological evaluation that I didn't have,** apparently Mr. Basford didn't know that he had, doesn't really change much. I was generally aware that these issues existed throughout his life but -

THE COURT: Have you had him evaluated?

MR. SMITH: Yeah, he's been evaluated. And what record they did have **have been reviewed** and we have a general idea of what his history is, what his psychological problems have been and I tend, it is my intent to go about it through lay testimony as opposed to having an expert come in and testify about it.

THE COURT: But you have reviewed it with an expert and made this choice -

MR. SMITH: Right.

THE COURT: -- as a strategy?

MR. SMITH: Right.(R V22 784-786)(Emphasis added).

Smith's answer to the court regarding evaluation of the defendant for mitigation was disingenuous at best because no mitigation evaluation had been conducted and no records had been provided.

Mr. Smith testified at the evidentiary hearing that he requested records, but obtained few, in any.

Q. Okay. Were you aware prior to trial that the Defendant had some mental health problems or issues, sir?

A. He told us about, you know, being in rehab, being treated. We sent away for records. As far as I recall we didn't get any. We sent away for them and never got any. I knew he had a troubled childhood, troubled adolescence, been in and out of the criminal justice system, so I assumed there were records out there but

> as I recall we got very few by requesting them. (PC V24 1513-1514).

Although Mr. Smith testified that his office had requested records, there was no evidentiary support for that assertion. At the evidentiary hearing, Mr. Smith acknowledged that Dr. Rowan (Smith's mental health expert for competency) did not submit a report, and he was not sure what her findings were regarding competency (PC V24 1552). Mr. Smith testified at the evidentiary hearing that if he had records he would have submitted them to a psychologist (PC V24 1590). He had the psychological report provided to him from the state, but he failed to provide that document to any psychologist.

At page 21 in the Court's order, the Court mentions Mr. Smith's substantial experience, and that Smith has explained that in two cases he previously represented, mental health ultimately worked against the defendant (PC V4 608). One of those cases was *Orme v. State*, 896 So.2d 725 (Fla. 2005). This Court found Mr. Smith ineffective and sent the case back for a new sentencing phase because:

> Also important in this analysis is the fact that Smith did not inform his trial experts that Orme had been diagnosed with bipolar disorder and the fact that he did not provide the experts with the prison medical records that would have shown the medications prescribed to Orme indicating such a diagnosis. Orme's experts never knew that such a diagnosis had been made. Id. at 734.

* * *

> We conclude that under these circumstances, counsel's decision to conduct no further investigation of Orme's bipolar diagnosis and subsequent decision to forego presenting this defense amounted to deficient performance. Counsel knew his client had been diagnosed with a major mental illness and he admitted such a defense would have been significant, yet he offered no reasonable explanation for not pursuing that lead. Id at. 735.

Notwithstanding all the experience Mr. Smith may possess, he committed a fundamental error by not conducting a thorough investigation before making strategic decisions. In essence, he made the exact same error in both cases. At least in *Orme* Mr. Smith hired mitigation experts who, in fact, testified. Mr. Smith opined at the evidentiary hearing that this Court sent the *Orme* case back only because of a seven to five vote.

> MR. REITER:
>
> Q. Even if I am wrong, you do know bipolar was an issue in *Orme*, correct?
>
> A. It was purported to be an issue. I did not think it was an issue but –
>
> Q. Well, I understand that but you still subject to what they decide, right?
>
> A. Yeah, but –
>
> Q. That's what the law is?
>
> **A. Yeah. Well, if you read the Supreme Court, they find a reason to reverse all of the seven to five votes and send them back.**
>
> Q. I understand that, but that becomes the law on their part, correct?

> **A. Yeah, yeah, and I, I understand why they did it, they had to find a reason to send it back because it was such a close vote so they pegged their decision on that.**
>
> Q. And yet you are saying you know about his bipolar diagnosis from his family and you didn't do anything to at least have him examined and then decide what you want to go forward with?
>
> A. It wouldn't have helped in front of the jury. If he said he was manic, if he said he was depressed, if he said he was bouncing off the walls, he thought the victim was the bride of Satan, yeah, I would have said it was probably important but that's not what he said in his statement. (Emphasis added.)
> (PC V24 1597).

Even after the Florida Supreme Court's decision, Mr. Smith would not acknowledge that a bipolar diagnosis was an issue in the case (PC V24 1596). Mr. Smith, as well as the trial attorney in *Rompilla v. Beard*, 545 U.S. 374 391, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), relied only upon the defendant's statements and family member statements.

> The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts. With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case. Further effort would presumably have unearthed much of the material postconviction counsel found, including testimony from several members of Rompilla's family, whom trial counsel did not interview. Judge Sloviter summarized this evidence:

"Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags." 355 F.3d, at 279 (dissenting opinion) (citations omitted).

The jury never heard any of this and neither did the mental health experts who examined Rompilla before trial. While they found "nothing helpful to [Rompilla's] case," *Rompilla*, 554 Pa., at 385, 721 A.2d, at 790, **their postconviction counterparts, alerted by information from school, medical, and prison records that trial counsel never saw, found plenty of " 'red flags' " pointing up a need to test further.** 355 F.3d, at 279 (Sloviter, J., dissenting). When they tested, they found that Rompilla "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions." *Ibid.* They also said that "Rompilla's problems relate back to his childhood, and were likely caused by fetal alcohol syndrome [and that] Rompilla's capacity to appreciate the criminality of his conduct or to conform his conduct

> to the law was substantially impaired at the time of the offense." *Id.*, at 280 (Sloviter, J., dissenting). These findings in turn would probably have prompted a look at school and juvenile records, all of them easy to get, showing, for example, that when Rompilla was 16 his mother "was missing from home frequently for a period of one or several weeks at a time." Lodging 44. The same report noted that his mother "has been reported ... frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times." *Ibid.* School records showed Rompilla's IQ was in the mentally retarded range. *Id.*, at 11, 13, 15. **This evidence adds up to a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury, and although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test.** It goes without saying that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," Id. at 391. (emphasis added).

At least Rompilla had the benefit of being evaluated by a mental health expert for mitigation purposes. Much of the historical mitigation found in *Rompilla* parallels Mr. Caylor's background; Most of these mitigating facts were not presented to his jury.

Mr. Smith's investigator, Mr. Jordan, did not begin to take notes regarding his investigation until August 2009 (EX V8 1453-1470). The trial began on October 26, 2009. Mr. Jordan first testified that his policy is to take notes for all of his work. He testified that he is unaware of any other notes in this case

(PC V23 1481). Mr. Jordan testified he had no notes from August 2008 through May 2009 (PC V23 1488-1489). However, when pressed about the first time he spoke with potential witnesses he changed his testimony that he did not always take notes (PC V23 1486). On cross-examination, Mr. Jordan testified his caseload at that time was heavy and that may have contributed to his performance concerning the investigation, as well as his failure to obtain records (PC V23 1490).

Mr. Jordan did not personally visit Caylor's family; he felt it was a waste of time since he could barely converse with them on the phone (PC V23 1483). Mr. Jordan agreed, however, that sometimes more information can be obtained while conducting a face-to-face discussion, rather than talking on the telephone (PC V23 1483, 1489). Mr. Jordan testified that if Mr. Smith had requested him to go in person, he would have done so (PC V23 1489).

Mr. Jordan first testified that it was his responsibility to obtain records (PC V23 1484). Mr. Jordan had not previously seen the numerous records obtained by postconviction investigation (PC V23 1484). Mr. Jordan acknowledged that if the records were available in 2013, they would also be available in 2008 and 2009 (PC V23 1484). However, when questioned further, he indicated that Mr. Smith may have asked his legal assistant to request records (PC V23 1491). No documentation was

introduced at the evidentiary hearing that the Public Defender's office actually requested any records.

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). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background. See *O'Callaghan v. State*, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a *professional and professionally-conducted* mental health evaluation. See *Fessel; Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Mason v. State,* 489 So.2d 734 (Fla. 1986); *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984). The mental health expert must also protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. *State v. Sireci*, 502 So.2d 1221, 1224 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. *Mason,* 489 So.2d at 736-37. The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases.

Under Florida law, an indigent defendant is entitled to a mental health expert to assist in the preparation of a defense. *Garron v. Bergstrom,* 453 So.2d 405 (Fla. 1984); *Hall*

v. Haddock, 573 So.2d 149 (Fla. 1st DCA 1991). See also, *Perri v. State,* 441 So.2d 606, 609 (Fla. 1983). Mr. Caylor was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence, violating Mr. Caylor's constitutional rights. See *Penry v. Lynaugh,* 109 S.Ct. 2934 (1989); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978). Counsel's failure to explore, develop, and present readily available mitigating material was unreasonable and deprived Mr. Caylor of his constitutional right to effective assistance of counsel and a reliable proceeding.

Appellant contends that Mr. Smith made up his mind before concluding a complete investigation as to how he intended to proceed with mitigation in this case. Smith had no intention of obtaining records, hiring a mitigation expert, having Appellant examined for mitigation, presenting any expert testimony, nor seeking the two powerful mental health mitigators. His minimal investigation was done solely to get past a potential ineffective assistance claim.

Failure to Properly Conduct Investigation of Family Background –

At pages 26 through 29 of its order (PC V4 613-616), the court describes in detail the additional information presented at the evidentiary hearing that was not presented at the trial:

> At the evidentiary hearing, the Defendant first presented the testimony of his parents, Kimberly Caylor and Kerry Caylor. Kimberly Caylor testified that no one from the

Public Defender's Office contacted her in person in Georgia. (EH. 164). Smith spoke with her for less than a half hour before trial. (EH. 165). Smith did not ask questions about her son, the Defendant, but only told her about the questions he would ask. (EH. 165). Kimberly Caylor then testified with respect to what the Defendant characterizes as additional information that was not elicited during the penalty phase at trial. She was diagnosed as bipolar. (EH. 167). As a child, she was sexually abused by her stepfather. (EH. 167). Her brother was an alcoholic and a schizophrenic. (EH. 167). She and her husband had used meth for seven years. (EH. 168). The Defendant suffered several head injuries when he was a child. (EH. 172). When the Defendant was an infant she observed her husband Kerry hold his mouth and nose closed until he passed out in order to stop him from crying. (EH. 173). She witnessed Kerry verbally and physically abuse the Defendant. (EH. 173). She once witnessed Kerry physically abuse the Defendant for soiling his underwear and then hiding the underwear. (EH. 174). When the Defendant was 17 he was thrown out of the house, and he later got married. The Defendant and his then-wife often had to resort to eating out of dumpsters. (EH. 176). The Defendant was 12 when he first started using drugs with his father. (EH. 178). Chris, her younger son, was never verbally or physically abused by her or her husband. (EH. 180). She indicated that she waiving a "little bit more information at the evidentiary hearing than she had during the penalty phase but when she was asked if she agreed that her testimony at the evidentiary hearing was "substantially more broad" than what she had provided at the penalty phase, she replied, "Urn, no." (EH. 180). On cross-examination, she acknowledged that Smith had specifically told her just to answer his questions and not elaborate on her answers because he was trying to keep out bad information about the Defendant. (EH. 181-82). Also on cross-examination, she acknowledged that the Defendant had affairs with his uncle's wife, and with Jean Shelton, the mother of his ex-girlfriend. (EH. 189-90).

The Defendant's father, Kerry Caylor, also testified with respect to what the Defendant characterizes as additional information that was not elicited during the penalty phase at trial. Kerry stated that no one from the Public Defender's Office came in person to Georgia to speak with him or his wife. (EH. 202). He met the

Defendant's trial counsel Smith in person for the first time at trial. Smith spent a total of 30 to 40 minutes preparing him and his wife for trial. (EH. 203). According to Kerry, Smith allegedly stated that he "didn't understand why people want to come to Florida to kill people or commit murders." (EH. 204). According to Kerry, Smith was one of the rudest people he had ever met. (EH. 204). Kerry and his wife noticed that neither Smith nor Ernest Jordan, Smith's investigator, checked into the Defendant's background as thoroughly as the postconviction investigator Daniel Ashton. (EH. 205-206). Smith told Kerry that he could not find any records. (ER 206).

Kerry's first stepfather was verbally and physically abusive to him. (EH. 207). Kerry's mother was verbally and physically abusive as well. (EH. 211). When the Defendant was an infant, Kerry admitted that he smothered the Defendant to stop him from crying, using his hands to cover the Defendant's mouth and nose until the Defendant passed out. (ER 211-12). When the Defendant disobeyed, Kerry verbally abused him by using foul language. (EH. 212-13). Kerry often abused his wife in front of the Defendant. (EH. 213). Drugs made Kerry violent. (EH, 210).

After the Defendant turned six, he started defecating in his pants daily, so Kerry spanked him; and when the Defendant then started hiding his soiled underwear, Kerry spanked him for that as well. (EH. 214-15). One time, during the Christmas holidays, the Defendant cursed at his mother; Kerry punched him in the jaw, which left a goose egg under his eye. (EH. 214). As the Defendant got older, the beatings got worse, and instead of using just his fists, Kerry often kicked his son. (EH. 216). Kerry recounted the family's dire financial circumstances when he was unemployed for two years. (EH. 217). There was no money for power or food, and the Defendant and his brother Chris were so hungry they were eating toothpaste. (EH. 217). Kerry also recounted the incident when the Defendant was sexually molested by a police officer who was living with them at the time. (ER 218-20). After the Defendant left home and got married, he and his wife often had to resort to eating out of garbage cans. (EH. 221). When the Defendant was on crack, he frothed at the mouth and had trouble speaking. (ER 222). The Defendant was sexually abused by Kerry's stepsister. (EH. 223). The Defendant tried to commit suicide "a lot of times." (EH. 224). Kerry

and Kimberly knew the Defendant had mental health issues, but they could not afford treatment. (EH. 225).

Keisha Bulger testified at the evidentiary hearing, but not during the penalty phase at trial. Before the instant offenses took place, Bulger arranged the Defendant's drug supply. (EH 130). The police later questioned Bulger about her relationship with the Defendant. (ER 130). Her recorded statement was received by the Defendant's trial counsel Smith during discovery. She testified that right before the time of the instant offenses, the Defendant was spending anywhere from $200 to $1,000 a day for drugs. (EH. 131). She also testified that, according to the police, the Defendant's phone number appeared on her phone on three occasions; these calls were placed just before the offenses took place. (EH. 131). She stated that he called to ask her to get him crack cocaine. (EH. 132). The Public Defender's Office never contacted her. (EH. 133). On cross-examination she acknowledged that the Defendant had told her he was sexually frustrated and had asked her to find him a woman he could have sex with. (EH. 135-36).

Stephanie Putnam testified at the evidentiary hearing, but not during the penalty phase at trial. Putnam knew the Defendant because her ex-husband was friends with him (EH. 138). She knew the Defendant from 1998 to 1999, and last saw him in 2003. (EH. 138-39). She, her ex-husband, the Defendant's wife, and the Defendant did drugs together, generally meth and cocaine. During their drug binges, the two couples rarely slept for three to seven days at a time. (EH. 140). They used drugs all day long for multiple days at a time. (EH. 141). When Putnam spoke to the Defendant, he complained about his unhappy life and said that using drugs made him feel normal. (EH. 141). She testified that the Defendant's mood would change very quickly, and his behavior was erratic. (EH. 142-143). He was extremely upset about being convicted for the sexual charge because he believed that he was not guilty of it. (EH. 143). Putnam had no recollection of anyone contacting her from the Public Defender's Office. (ER 144). Putnam testified that she would have appeared at trial if she had been asked. (EH. 146).

Connie Rushman, the Defendant's aunt, testified at the evidentiary hearing, but not during the penalty

phase at trial. Kimberly Caylor (the Defendant's mother) is her sister. (EH 154). Rushman's father was an alcoholic, and he beat her and her siblings. (EH. 155-56). Rushman was also sexually abused by her father. (EH. 157). Rushman is a recovering heroin addict. (EH. 157). After her father left the family, her mother's boyfriend sexually and emotionally abused Kimberly Caylor. (EH. 157). Rushman confirmed that Kimberly Caylor is addicted to meth. (EH. 157). The Public Defender's Office did not contact Rushman, but she would have testified at trial if she had been asked to do so. (EH. 161).

Chris Caylor, the Defendant's brother, testified at the evidentiary hearing, but not at the penalty phase at trial. The Public Defender's Office did not request him to testify during the penalty phase, but he acknowledged that he would not have testified then even if he had been asked. (EH. 249). Chris is 32 years old and has lived with his parents for his entire life. (EH. 242-43). Chris observed his parents physically and verbally abuse the Defendant. (EH. 243). His parents did not treat him the same way they treated the Defendant. (EH. 243). Chris also observed his father physically abuse his mother and saw both parents using drugs. (EH. 244-45). Chris also observed the Defendant doing drugs with his parents. (EH. 246). Chris observed on many occasions the Defendant's severe mood swings and impulsiveness. (EH. 247).

The testimony of Jack Jarrett, the Defendant's step-grandfather, was perpetuated in a deposition taken on April 2, 2014, and the parties stipulated to the admission of his deposition at the evidentiary hearing." (EH. 195). Jarrett stated that he did not remember being contacted by the defense in 2009, but did remember them talking to his wife Jean Jarrett." (D. at 15). He admitted that he was "not really sure" that he would have come down to Florida to testify at the penalty phase, stating, "I kind of have a fear of flying." (D. 16). According to Jarrett, the Defendant's mother, Kimberly Caylor, wanted to abort the Defendant and resented him from birth. (D. 6-7). The Defendant's parents stated that they were not going to treat their son Chris the same as they did the Defendant, and indicated that they would treat Chris better. (D. 7). Jarrett knew about Kerry

> Caylor's temper. (D. 14). One Christmas, when the Defendant was about nine or ten, Kerry got angry and hit him in the face, leaving a goose egg. (D. 8). The Defendant once revealed he was contemplating suicide during the holidays. (D. 21). When Jarrett admonished the Defendant's parents that marijuana would lead to hard drugs, they scoffed at the suggestion. (D. 9). When Kerry Caylor was on drugs, he did not care if he worked or not. (D. 10). It was Jarrett's understanding that Kerry gave the Defendant his first marijuana cigarette when he was 12 years old. (D. 12). When the Defendant attended a youth program, he prayed that his parents would have something to eat and that the electricity would be turned on. (D. 13). The Defendant believed he turned out the way he did because of the way his parents had raised him, and Jarrett agreed. (D. 14-15).

At page 32 of the trial court's order (PC V4 619), it acknowledges that much of the additional testimony strengthened the mitigation. However, the court discounted the testimony because Smith's investigator Jordan testified that the parents were reluctant and because Caylor's father was hostile to Smith. However, the court failed to acknowledge that Smith and Jordan created that hostility and reluctance. Jordan testified that had he met the witnesses in person he may have been received in a better light. That fact was proven in postconviction: After the postconviction investigator spoke with the witnesses face to face, he was he able to obtain additional information, as well as foster a cooperative demeanor with the witnesses. As for Smith, Caylor's father testified as to how hostile Smith was toward him.

Q. When you spoke with him on the phone, you said you remember twice?

A. About twice.

Q. What were the things you talked about?

A. Well, we talked about what had happened and that he was appointed as his attorney, as Matthew's attorney, and he immediately said **he didn't understand why people want to come to Florida to kill people or commit murders.** He said -- that's what he said.

Q. How did that make you feel?

A. Oh, God, I got angry, I just never expected him to talk like that to me.

Q. Was he -- did you find him to be amicable to you, or was he rude or nasty or anything of that nature?

A. Yes, every bit of that. He was one of the rudest people I have ever talked to.

Q. Was there a period of time based upon his attitude to you, you told him you didn't want to come down?

A. Yeah, I think one time I may have said something like that I just don't even want to go down there.

Q. And did he threaten to fight with you or something?

A. Walter?

Q. Yeah.

A. Yeah. Well, I will be honest with you, he had me so upset the way he was talking to me, I just told him if I ever get down there and get in front of you, I am going to kick your ass and he just said bring it on, I've had a lot of threats about that. (Emphasis added).

(PC V23 1381-1382), Smith did not deny any of Kerry Caylor's testimony. Smith's hostile and unfriendly demeanor resulted in creating uncooperative witnesses.

At page 33 of the trial court's order (PC V4 620), it held that Putnam's and Bulger's testimonies were merely cumulative concerning Caylor's drug use. However, their testimony about Caylor's drug usage was not cumulative. Putnam was a corroborating witness that Caylor would stay up for days while using drugs. Putnam described how Caylor felt normal when doing drugs, that his behavior was erratic and that he could not sit still. Bulger corroborated the amount of drugs Caylor was using just before the offense and that on the day of the offense he was seeking more drugs.

The trial court's perception that trial counsel's decisions were strategic and the cumulative nature of the additional witnesses would not have made a difference does not coincide with the holding in *Cooper v. Secretary, Dept. of Corrections*, 646 F.3d 1328 (11th Cir. 2011). That court stated:

> Like the defendant in Johnson, "[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. Id. There was a wealth mitigating evidence that was not presented to Cooper's jury.

This court in *Hannon v. State*, 941 So.2d 1109 (Fla. 2006), held that counsel was not ineffective when it appeared he did

not have Hannon evaluated for mitigation and did not present mitigating evidence. While the dissent vehemently disagreed because counsel failed to investigate, the majority seemed to hold that investigation wasn't necessary in Hannon's case because counsel was led to believe Hannon had no problems in life. This Court also found that *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) and *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) did not apply in *Hannon*. It appears that finding was based upon this Court's following statement:

> A careful reading of the Supreme Court's decisions in *Wiggins* and *Rompilla* reveals that those decisions are inapplicable to the facts of the instant matter. Unlike *Wiggins,* in the instant case there were no reports containing evidence of Hannon's life history which should have prompted trial counsel to conduct a deeper investigation into Hannon's background. In fact, trial counsel testified that during the criminal proceedings neither Hannon, his father, his mother, nor his sister Moreen ever mentioned that Hannon might suffer from some form of brain injury, that Hannon was abused or neglected, or that he had a traumatic childhood or a substantial drug problem. According to counsel, when asked if Hannon had been born with any problems, Hannon's parents stated that they had "no problem with him." Moreover, unlike *Rompilla,* there is no indication here that the State planned to rely on particular material in aggravation that was not obtained and reviewed by trial counsel prior to the penalty phase trial. Finally, and most distinguishing, unlike the defendants in *Wiggins* and *Rompilla,* Hannon adamantly expressed his wish to proceed consistent with the innocence defense during the penalty phase. *Hannon*, 841 at 1134.

The same cannot be said about Smith's knowledge in Caylor's case. Smith testified at the evidentiary hearing that he knew from speaking with Caylor that he had mental health issues, drug abuse issues, physical and mental abuse issues, etc. Smith was provided with a mental health report by the assistant state attorney in open court just prior to the beginning of the penalty phase. Smith even stated to the court that the information contained in the report could be helpful, but he had no intention of providing the report to an expert or calling an expert or seeking the two statutory mental health mitigators. Those statements were presented to the court without any mental health investigation in complete violation of *Wiggins*, supra.

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.... [A] particular decision not to investigate must be directly assessed for reasonableness in *all the circumstances, applying a heavy measure of deference to counsel's judgments.*
>
> ....
>
> [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable.* In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of

> the challenged conduct as seen "from counsel's perspective at the time."

539 U.S. at 521-23, 123 S.Ct. 2527.

Failure to obtain records -

At page 37 of the court's order (PC V4 624) denying Caylor's motion it states:

> In light of the testimony at the evidentiary hearing, the Court finds that Smith and Jordan made reasonable efforts to obtain records, but encountered unexpected difficulties that prevented them from obtaining more than they did.

The trial court blindly accepts Smith's and Jordan's testimony that they made reasonable efforts to obtain Caylor's records, but no documentation in Smith's file disclosed what efforts were actually made.

At the evidentiary hearing, Mr. Jordan testified either he or the legal assistant would collect the records (PC V24 1491). In this case, Jordan knew that he did not obtain them, and at the evidentiary hearing, Mr. Smith stated he did not obtain any records either. Smith testified it was Mr. Jordan and Melodye Prows (investigators) who were responsible for obtaining them (PC V24 1559). If Smith were as experienced and diligent as the trial court suggests, he would have be able to obtain records. They were available in postconviction without the necessity of a court order to obtain them.

PREJUDICE -

This court has previously found that not calling a mental health expert to testify at a penalty phase trial can constitute a reasonable strategy: *Kimbrough v. State*, 886 So.2d 965 (Fla. 2004)(The strategic decision Cashman and Sims made not to have Mings and Berland testify at trial was a reasonable trial tactic and did not constitute deficient performance.); *Griffin v. State,* 866 So.2d 1, 9 (Fla. 2003);*Ferguson v. State,* 593 So.2d 508 (Fla. 1992); and *Jones v. State*, 732 So.2s 313 (Fla. 1999).

However, in each of those cases, counsel had the defendant evaluated for mental health mitigation before making such a decision. That was not the case for Mr. Caylor. Smith admittedly did not obtain any records whatsoever regarding Caylor's life history.

At the evidentiary hearing, Dr. Crown testified that both mental health mitigators were present in Caylor's case (PC V22 1226; 1230). Dr. Crown diagnosed Caylor with multiple mental health issues, including bipolar disorder and brain damage (PC V22 1226-1230). Even the state's expert, Dr. McClaren, diagnosed Caylor with multiple mental health issues.

> Q. Now you did find in your report[3] that he did suffer from extreme emotional -- at the time of the offense was suffering from an emotional disturbance at the time of the offense, extreme emotional disturbance, correct?
>
> A. Right. Both historically and ramped up at the

[3] Dr. McClaren's report (EX V1 1-7).

time.

Q. In the last paragraph of your report you indicate in your opinion that his mitigating circumstances involves symptoms of mental disorder in the form of depression disorder, correct?

A. Give me a second there.

Q. Last paragraph.

A. Got it. Wrong report. Excuse me, go ahead. You are asking me the last sentence?

Q. No, no, about the mid sentence, thus his mitigating circumstances, last paragraph. Paragraph –

A. Yes. Right.

Q. So you find that he had symptoms of mental disorder in the form of depression disorder?
A. Right.

Q. Depression, right?

A. Right.

Q. Unstable mood, right?

A. Yes.

Q. Possible bipolar disorder?

A. That's right.

Q. Chronic substance abuse?

A. That's right.

Q. Disturbed interpersonal relationships?

A. Without a doubt.

Q. As well as situational distress associated with a precarious legal situation?

A. Right.

(PC V24 1630-1631). Although Dr. McClaren would not confirm bipolar disorder, he could not rule it out. Dr. McClaren acknowledged that other mental health experts had diagnosed Caylor with bipolar disorder over the years and Caylor was given medication for that diagnoses while in prison.

The jury did not hear any mental health testimony, detailed descriptions of the life and background of Caylor, nor the amount of drugs Caylor was using at the time of the offense. The jury was not presented with any statutory mitigators to consider when weighing the aggravators against the mitigators. Even without the additional nonstatutory mitigators and the two statutory mitigators, the jury voted eight to four.

At page 22 of the order (PC V4 609) denying Caylor's motion, the court relied upon Smith's assertion that he presented mental health evidence at the Spencer hearing because he did not want the jury to hear damaging evidence. The court stated the following:

> Smith went on to explain that because mental health testimony or evidence can "backfire" or otherwise be harmful if the jury hears during the penalty phase, as a strategy he generally saves it for the *Spencer* hearing before the judge: "I generally waive these two statutory mitigators and go with the 'catch-all' and I will address it in the *Spencer* hearing in front of the judge because it most of the time ends up being harmful in front of the jury." (EH. 407). On cross-examination, he similarly stated that while he argued to the Court "mental mitigation of under extreme emotional distress" in his memorandum, he "was not

> pursuing it in front of the jury. That's typically what I do if I have a lot of psychological records, I try to get that in front of the judge and try to limit it in front of the jury because if I go on to the mental mitigators and have an expert and the State gets to examine my client, usually bad things happen after that." (EH. 388-89).

However, Smith's assertion that he presents mental health records and testimony at the *Spencer* hearing is disingenuous. The only mental health evidence presented at the *Spencer* hearing was Caylor's self-serving testimony, who apparently carried no credibility with the court. Other than Caylor's minimal testimony, Smith presented absolutely zero expert testimony regarding evidence of mental health diagnoses, brain damage, or the effects of long-term drug usage. In addition, no expert testified at the *Spencer* hearing regarding the statutory mitigators, nor were any records presented to support the mental health issues. Yet, Smith testified he pursued that exact strategy in the Alford case (PC V24 1590).

Further, when a defendant is on trial for murder and the state is seeking the death penalty, that defendant, almost without exception, has damaging background information. That is precisely why experts should testify to clarify how a defendant's background and mental health issues can cause those damaging events, as well as to explain why the murder may have occurred. That is why the United States Supreme Court requires an individualized penalty phase.

Mr. Smith made a decision to forego mental health mitigation long before the trial began, without first investigating the issue. He

failed to hire a mental health mitigation expert to review records, conduct tests, and diagnose his client before deciding a strategy. Smith knew Caylor suffered from mental health issues, such as bipolar and post-traumatic stress disorder—same issues as in *Orme*—he again failed to seek further information before finalizing his strategy.

In addition, Smith and his staff failed to obtain any records, and failed to conduct face-to-face interviews with the witnesses. Investigator Jordan agreed that he may have had received more information and more cooperation had he spoke to the family in person and began his investigation earlier. It reality, Smith's and Jordan's lack of diligence, and rude and insulting comments to the Caylor family instigated their lack of cooperation.

The trial court's order, at page 37(PC V4 624), found no prejudice because the records contained no additional information. The court failed to consider what those records would mean to a jury and how an expert would have presented those records to the jury.

In *Griffin v. State*, 114 So.3d 890 (Fla. 2013), this Court affirmed the trial court's granting Griffin a new penalty phase on facts similar to those in the instant case.

In Griffin, counsel presented a mental health expert, as well as lay witnesses, to show Griffin was a good guy. However, evidence presented at Griffin's postconviction hearing established additional mitigation the trial court believed would have made a difference in the

outcome. While trial court felt differently in Caylor's case, there is a substantial similarity between the two cases.

In Griffin, the following information was presented at the penalty phase, which was not presented in Caylor's penalty phase:

> At the penalty phase trial, counsel presented witnesses to support a "good guy" defense, that is, Griffin had led a productive and law-abiding life until he got addicted to cocaine. Family members and friends testified about Griffin's close relationship with his family and his good work ethic. These witnesses also testified about how drugs had drastically changed Griffin's behavior. Psychiatrist Dr. Michael Maher testified as a mental health expert at the penalty phase proceedings, concluding that the statutory mental health mitigating factors were not applicable. Dr. Maher also testified that Griffin expressed remorse about the victims' deaths, had used cocaine heavily in the months before the crime, suffered a head injury as a child that left him with abnormal brain functioning and made him vulnerable to other things that would interfere with his brain functioning, and that he had attempted suicide in his teens during a serious depression. Dr. Maher had conducted a general psychiatric interview and a mental status examination of Griffin a few months before the penalty phase began, but had not conducted any brain function tests, did not review medical records related to the head injury, did not review the criminal case records, did not interview Griffin's associates, and did not review Griffin's jail records. Dr. Maher stated he did not believe that further testing would change his opinions about Griffin.

Even with all the above information that was presented at Griffin's penalty phase, he was granted a new penalty phase because additional information was available and not presented. It is inconceivable that Caylor would be denied a new penalty

phase trial when his counsel failed to present equivalent and/or more substantial evidence at trial when it was available.

The primary difference is this: Griffin's counsel's strategy was that he had a hunch the trial court would give Griffin a life sentence; whereas, Smith in the instant case had a hunch that juries in Bay County gave no credence to mental health testimony. At least Griffin's counsel presented mental health evidence, while Smith presented none. In upholding the trial court's granting of a new penalty phase in Griffin, this Court stated:

> The record supports the trial court's conclusion that "counsel's penalty-phase strategy, or lack thereof, was clearly based on an unsubstantiated hunch that if the Defendant entered a straight-up plea the trial judge would sentence him to life and not death." Counsel's "hunch" was no basis for an informed strategy as it limited his investigation of possible mitigating evidence. The failure to present this available mitigating evidence undermines the confidence in the sentence imposed.

Griffin, 114 at 909. In a more recent case this Court reversed for a new penalty phase on facts similar to the instant case. *Salazar v. State*, 2016 WL 636103 (Fla. February 18, 2016).

> During the penalty phase, trial counsel called two witnesses, both were sisters of Salazar, to testify about Salazar's close relationship with his siblings and the love and support he provided to his family. However, trial counsel failed to meaningfully investigate and present at the penalty phase additional mitigating evidence. *See Ragsdale v. State,* 798 So.2d 713, 716 (Fla.2001) ("[A]n attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible

> mitigating evidence.") (quoting *State v. Riechmann*, 777 So.2d 342, 350 (Fla.2000)).
> 20Specifically, trial counsel failed to obtain any of Salazar's school records or medical records and failed to follow up with the one expert that he involved prior to the penalty phase. About a week before Salazar's trial was to begin, trial counsel consulted one expert, Dr. Harry Krop, a licensed psychologist, on only one occasion to conduct a mental health evaluation.

Even if Smith's strategic decision was a proper one, the decision to forego mental health mitigation and witness testimony should never have been made without first conducting a complete investigation. Smith's investigation was minimal at best. Mr. Caylor deserves a new penalty phase trial.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN FAILING TO ENSURE THAT CAYLOR RECEIVED A REASONABLY COMPETENT MENTAL HEALTH EVALUATION FOR MITIGATION, WHICH WAS IN VIOLATION OF MR. CAYLOR'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

The standard of review for Ineffective Assistance of Counsel is de novo, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

Caylor contends the trial court misstates the facts at page 38 of its order (PC V4 623) by finding that Smith provided Dr. Rowan with the 2001 psychological evaluation. At trial, when the State provided Smith with the evaluation, he specifically stated to the court he had not given the evaluation to an expert. "I didn't have this actual report so I haven't been able to give it to a psychologist here." (R784-786).

At the evidentiary hearing Smith acknowledged he had not hired an expert for mitigation and made his decisions without the benefit of expert consultation or records.

> Q. She didn't perform any tests that you are aware of, do you know?
>
> A. You know, I don't know. I think she just talked to him and I guess just touched the various factors for competency, can you display appropriate courtroom decorum; and do you understand the adversarial nature of the legal system. I assume that's the kind of conversation she had with him. (PC V24 1552)
>
> * * *
>
> Q. Okay, as of October 30th, just before the penalty phase, you had not hired any mental health expert to evaluate Mr. Caylor for mitigation, is that correct?
>
> A. That's correct. (PC V24 1556).
>
> * * *
>
> Q. So you made that determination without a psychological report, without a psychological evaluation, without medical records, without school records, without other than Department of Correction records, without any work records of any kind?

B. Right. (PC V24 1562).

The trial court's assessment that Rowan received the 2001 psychological report from Smith was inaccurate (EX V1 24-190). That exhibit clearly shows Dr. Rowan only received some records from the Georgia Department of Corrections. It did not include the 2001 psychological report Smith received from the State. Mr. Smith told the court specifically he had not provided it to any expert. At page 38 of its order (PC V4 625) the court stated:

> And since Smith provided the records to Dr. Rowan and Dr. Rowan was able to examine the Defendant, the Court also finds that there is no prejudice under the second prong of *Strickland* because Dr. Rowan had sufficient information to be able to advise Smith about the Defendant's mental health, particularly with respect to the existence of statutory mitigators.

The trial court completely ignored Smith's testimony (above) on this subject: (1) that Rowan examined Caylor in October 2008 for competency *only*, (2) that no expert was hired to evaluate Caylor for mitigation, (3) that Smith did not receive the 2001 psychological evaluation report until October 30, 2009, and, (4) hat he made his decision without the benefit of records or expert opinions.

The trial court relies upon *State v. Sireci*, 502 So.2d 1221 (Fla. 1987). Caylor contends that *Sireci* does not apply to the circumstances of this case. In *Sireci*, his motion was a successive motion, which required a different standard of

proof. In addition, the issue in *Sireci* was his evaluation for insanity, not mitigation.

In *Wyatt v. State*, 78 So.3d 512, 529 (Fla. 2011), Wyatt made similar claims as Caylor is now making, and this Court in *Wyatt* affirmed the trial court's denial. However, in so finding, this Court stated:

> As to the expert witnesses, none were presented at the penalty phase even though **Dr. Rifkin and Dr. MacMillan were consulted in the preparation of mitigation evidence**. At the evidentiary hearing, [defense counsel] Litty described the mitigation investigation that was conducted for the penalty phase **including the documents that were delivered to Dr. Rifkin and reviewed by Litty. Wyatt points to no specific mitigation document that defense counsel failed to obtain and deliver to Dr. Rifkin and/or Dr. MacMillan, or that counsel failed to review for the penalty phase.**
>
> Litty explained that counsel made a tactical decision to present mitigation testimony through lay witnesses who were "very cooperative, very compelling, and very effective"; thus preventing the introduction of the following unfavorable evidence that would come in if Dr. Rifkin and/or Dr. MacMillan had testified: **Wyatt displayed no evidence of brain damage**; Wyatt had a notorious and infamous reputation for being aggressive starting in middle school; in middle school and junior high school Wyatt was involved in all kinds of criminal activities; Wyatt had been physically abusive toward his wife; Wyatt beat a person for at least 30 minutes and locked him in a trunk; Wyatt demonstrated a bias toward homosexual advances; Wyatt has been locked up since he was a juvenile; Wyatt "has shown great entrepreneurship and ingenuity manipulating the system"; Wyatt's prison nickname was "Killer" for his willingness to fight; Wyatt **was**

> **diagnosed with an antisocial personality with no psychological defenses to his actions**; Wyatt's "frustration could lead to unpredictable, violent and traumatic, if not catastrophic results"; Wyatt demonstrates underlying dependency needs and a need to dominate most interpersonal situations; Wyatt is insensitive to the needs of others; relies heavily on immediate gratification; steals and deals in drugs; is irritable, aggressive, and belligerent when he does not obtain his immediate goals and desires; and Wyatt is impulsive, impetuous, demonstrates a pattern of lying, is reckless and shows a disregard for personal safety.

Caylor's case is substantially distinguishable from Wyatt. In *Wyatt,* counsel hired two mental health experts to consider mitigation. Caylor's counsel hired none. Wyatt's counsel provided records to the mental health experts. Caylor's counsel provided few. Wyatt's postconviction counsel failed to point to any records that were not provided to the mental health experts. Caylor's postconviction counsel introduced a records into evidence at the hearing, which were not obtained by Caylor's trial counsel nor provided to any mental health expert for review.

As the quote above indicates, Wyatt displayed no evidence of brain damage and was diagnosed with an antisocial personality with no defenses to his actions. Not true for Caylor. Caylor suffered from multiple and substantial mental health issues, including brain damage and bipolar disorder.

Although Caylor's unfavorable evidence contained similar

personality traits like Wyatt, Caylor's unfavorable attributes were not nearly as damaging as in Wyatt's case. In addition, Caylor's actions were explained by his mental health issues, brain damage, social and family dysfunction, and his long-term drug abuse.

Whether Smith's decision to present a mental health expert to the jury or to the judge was reasonable or not, the decision was made without proper investigation and presentation to any mental health expert who might then have been able to sufficiently explain how Caylor's personality and mental flaws contributed to the crime.

Counsel's errors were so serious as to deprive Caylor of a fair trial, a trial whose result is unreliable. *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052. "When evaluating claims that counsel was ineffective for failing to present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.' " *Asay v. State,* 769 So.2d 974, 985 (Fla.2000) (quoting *Rutherford v. State,* 727 So.2d 216, 223 (Fla.1998)).

In *Davis v. State*, 928 So.2d 1089 (Fla. 2006), Davis made a similar claim as Caylor. This Court found the following:

> *Ake,* 470 U.S. at 83, 105 S.Ct. 1087. Davis does not contend that he was denied access to a mental health professional. Rather, Davis asserts that Dr.

Diffendale did not provide competent mental health assistance because he did not perform an adequate evaluation and his investigation into Davis's background in support of his report was inadequate. Davis contends that historical data gathered for use in a mental health evaluation must be obtained not only from the patient but also from independent sources. In denying this claim, the trial court found:

A review of the report reveals that Dr. Diffendale was familiar with the defendant's social history and his medical history. In addition, the report reflects that the doctor had contact with the defendant's mother and obtained information about the defendant from her. Trial counsel testified that Dr. Diffendale knew about the defendant's upbringing. Moreover, the State's expert witness who testified at the evidentiary hearing, Dr. Sidney Merin, testified that he reviewed Dr. Diffendale's report. Dr. Merin testified that the background information contained in Dr. Diffendale's report was consistent with the background information provided by the defendant to Dr. Merin during his consultation with the defendant. Dr. Merin also testified that psychologists can get enough information from self-reporting to make a diagnosis. The defendant has not proved his allegation that either the mental health expert or trial counsel failed to secure sufficient background material. The report itself appears complete, and it mentions almost all of the information that was brought out in the evidentiary hearing—including the defendant's upbringing and chronic drug and alcohol abuse.... The defendant has not proved his allegations that he did not receive adequate mental health assistance. Dr. Merin testified that the report prepared by the defendant's mental health expert at trial, Dr. Diffendale, was sufficient. In fact he testified that it was "pretty good." Dr. Merin testified that Dr. Diffendale had adequate time to perform his evaluation; the report was based upon the appropriate type of information and testing relied upon by psychologists; and Dr. Diffendale followed the procedures normally followed by other clinical psychologists. He testified that additional tests were not needed. This Court accepts Dr. Merin's analysis and assessment of Dr. Diffendale's procedures and report. This Court finds that the defendant did

> received adequate mental health assistance from Dr. Diffendale.

The facts found in *Davis* by this Court are different than the facts existing in Caylor's case. No mental health expert was hired to evaluate Mr. Caylor for mitigation. Therefore, no mental health expert testified at the evidentiary hearing that they evaluated or reviewed records of Mr. Caylor prior to the postconviction motion. Even the State's expert revealed statutory and nonstatutory mitigation, as well as mental health issues that were unknown to Caylor's counsel at the time of trial. It is undisputed that Caylor's counsel had no intention of hiring a mental health expert before deciding not to introduce mental mitigation.

As a result of Mr. Smith's failure to obtain records and present them to a mental health expert, this prejudiced Mr. Caylor since he did not receive a proper mental health assessment for mitigation purposes.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING CAYLOR'S CLAIM THAT COUNSEL WAS INEFFECTIVE BY FAILING TO CHALLENGE JUROR WEAVER BECAUSE SHE WAS NOT IMPARTIAL BEYOND A REASONABLE DOUBT IN VIOLATION OF CAYLOR'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

A defendant is entitled to an evidentiary hearing on a postconviction motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient. *Valentine v. State,* 98 So.3d 44, 54 (Fla.2012)

At page eleven of its order (PC V4 598), the trial court stated, "The Court finds that this subsection of the Defendant's claim is conclusively refuted by the record, as he is unable to make the requisite showing that an actually biased juror sat on his jury."

The trial court correctly cites to *Carratelli v. State,* 961 So.2d 312, 324 (Fla.2007), but incorrectly applies its holding. This court stated:

> Both *Jenkins* and *Carratelli II* held that in postconviction proceedings the error must be egregious. *See Jenkins,* 824 So.2d at 982; *Carratelli II,* 915 So.2d at 1261. As the district court stated: From a practical standpoint, a jury selection error justifying postconviction relief **is so fundamental and glaring that it should have alerted a trial judge to intervene, even in the absence of a proper objection,** to prevent an actually biased juror from serving on the jury, thereby irrevocably tainting the trial. Where reasonable people could disagree about a juror's

> fitness to serve, the showing of prejudice required for postconviction relief is lacking. *Carratelli II,* 915 So.2d at 1261. Id. at 323. (Emphasis added).

The *Carratelli* standard has been cited in other cases:

Peterson v. State, 154 So.3d 175 (Fla. 2014):

> The **actual bias** standard requires a showing that the questionable **juror** was not impartial, that is, "was biased against the defendant, and the evidence of bias must be plain on the face of the record." Id.

Johnson v. State, 63 So.3d 730 (Fla. 2011):

> [W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased. A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Therefore, **actual bias** means bias-in-fact that would prevent service as an impartial **juror. Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial—i.e.**, that the **juror** was biased against the defendant, and the evidence of bias must be plain on the face of the record. (Emphasis added).

Juror Weaver, like others who were dismissed by the court for cause, indicated she was not sure she could be impartial. Her daughters were relatives of a witness in the case, and she was also a victim of a crime. Mr. Smith failed to question Juror Weaver at all. The following questions and answers occurred:

> THE COURT: No. Have you ever been a victim of a crime or the party in a lawsuit?
>
> **JUROR WEAVER: I had a wallet stolen.**

THE COURT: Okay, would that affect your ability to sit an this case?

JUROR WEAVER: This one might.

THE COURT: Pardon?

JUROR WEAVER: This might.

THE COURT: Okay. Do you think because of that, you wouldn't be able to sit on this case or other reasons?

JUROR WEAVER: I can sit.

THE COURT: Okay. Let's see. Have you had any experiences with the State Attorney's office or law enforcement that would influence your decision?

JUROR WEAVER: No, ma'am.

THE COURT: And do you feel, I mean, have ever served on a jury before?

JUROR WEAVER: No, ma'am.

THE COURT: And do you feel like you could be fair and impartial on this case?

JUROR WEAVER: I might.

THE COURT: Pardon?

JUROR WEAVER: I might.

THE COURT: You might. You're not sure?

JUROR WEAVER: No, ma'am.

(R139-140). In addition to being a victim of a crime and not being sure whether she (Bobbi Weaver) could be fair, one of the witnesses in this case-Margaret Davis-is the aunt of two of her daughters.

MR. BASFORD: All right. Thank you very much.
We've went over a number of questions about if you
know people in the courtroom, and I don't think any of you know me.
I'm from Lynn Haven, originally Jackson County. Ms. Smith also is

from the Lynn Haven area. Let me go over somee of the witnesses that may testify in this case. If you recognize any of these names, a neighbor, a friend, somebody you went to school with, just raise your hand so we can inquire into that a little bit further. Qutina Adams, Margaret Davis, Billy Lawton? Oh, I'm sorry.

JUROR WEAVER: Margaret Davis.

MR. BASFORD: Margaret Davis, yes, ma'am. You know Ms. Davis?

JUROR WEAVER: Yes.

MR. BASFORD: How do you know Ms. Davis?

JUROR WEAVER: The lady who worked at the hotel?

MR. BASFORD: Yes, ma'am.

JUROR WEAVER: **She's my two daughters' aunt.**

MR. BASFORD: Excuse me?

JUROR WEAVER: **She's my two daughters' aunt.**

MR. BASFORD: She's your two daughters' aunt?

JUROR WEAVER: Uh huh.

MR. BASFORD: Oh, okay, okay. Well, she is going to be a witness in this case. Now, my question is, usually we don't have people that are, you know, that closely related. Do you see her that often, ma'am?

JUROR WEAVER: No.

MR. BASFORD: Okay. If she testifies, and, well, there's no if, she is going to testify, Good Lord willing she's going to testify. Could you weigh and evaluate her testimony as you would that of the other witnesses in this case?

JUROR WEAVER: Yes.

MR. BASFORD: The Judge will give you some criteria to judge the witnesses' testimony. But you could do that?

JUROR WEAVER: Yes, sir.

(R187-188). Six other jurors were dismissed for cause after they responded with a similar answer of not being sure whether they could be fair and impartial. In addition, none of the other excused jurors were

acquainted with any of the witnesses or had some familial relationship with any of the witnesses like Juror Weaver did:

> THE COURT: Okay, and so you're not sure, do you believe you can be a fair and impartial juror or not?
>
> JUROR STILL: **Possibly.**
>
> THE COURT: But not for sure?
>
> JUROR STILL: **Not absolutely positive.**

(R126). Juror Still was excused for cause at page 196 of the record on appeal.

> JUROR STANSBERRY: Let's see. I haven't been a victim of a crime, I'm not related to anyone in law enforcement, I don't know anyone in the courtroom, I have no experience with the State Attorney's office or law enforcement. No prior jury service, and whether I can be a fair and impartial juror, I have done pediatric nursing in the past for about twelve years and have treated children who have been victims of sexual abuse -
>
> THE COURT: Uh huh.
>
> JUROR STANSBERRY: -- **so I have to question whether I can be fair or impartial.**

(R128). Juror Stansberry was excused for cause by the court at page 196 of the record on appeal.

> JUROR MAUND: I do not know anyone in the courtroom, I do not have any experience with the State Attorney's office or law enforcement. I've never been on a jury before, and **I don't believe that I could be fair and impartial.**

(R130). Juror Maund was excused for cause at page 196 of the record on appeal.

> JUROR HARTE: My name is Diane Harte, I do the DNA testing for Child Support Enforcement. I'm not married, I have three children age 32, 30, and 20. The thirty-two-year-old is

> working in North Carolina; he's a retired Marine and going back to school. The thirty-year-old is in Iraq, and the twenty-year-old works at Starbucks and is going to school. Never been a victim of a crime, just a divorce, not related to anyone in law enforcement, don't know anybody in the courtroom. Occasionally some of the child support cases will overlap at the State Attorney's office and I have to deal with them. No prior jury service **and I'm not so sure I can be fair and impartial.**

(R138). Juror Harte was excused for cause at page 138 of the record on appeal.

> JUROR HAND: I do not know anyone in here, no experience with the State Attorney's office, never had any prior jury service, and **I cannot be an impartial juror.**

(R132). Juror Hand was excused for cause at page 196 of the record on appeal.

> JUROR WHITMORE: I have been the victim of a crime in the past, domestic violence, I also have a child who was sexually abused. I'm not related to anyone in law enforcement, I don't believe I know anyone in the courtroom, no personal experience with the State Attorney's office that would influence, never been on a jury before, **I'm not sure about the fair and impartial thing.**

(R134). Juror Whitmore was excused by the court for cause at page 210 of the record on appeal.

Out of the seven jurors listed above, only Juror Hand was certain that he could not be impartial or fair. The other six were equivocal, yet all seven were excused for cause. Juror Weaver was the only juror not excused for cause, even though she indicated she wasn't sure she could be fair and impartial just like the other seven jurors. Based upon the court's statement at page 220 of the record on appeal, Juror Weaver would have been excused for cause due to her inability to be certain she could be fair, that she was a victim of a crime, and that she knew a witness who is her daughters' aunt.

When referring to Juror Still's dismissal for cause, the court stated:

> THE COURT: It's up to up to you. Do you want to leave her in here?
>
> MR. SMITH: I was going to ask her some more questions, but it's my desire to excuse her for cause.
>
> THE COURT: any Objection?
>
> MR. BASFORD: What about -
>
> THE COURT: Do you object to Still?
>
> MR. BASFORD: No, Judge, in the interest of time.
>
> THE COURT: **It's not going to stick so I'll grant it.** Whitmore? (R194) (emphasis added).
>
> * * *
>
> THE COURT: -- so maybe if you go a little faster it will work. And we don't know who the next group is going to be. **And, I would also suggest when they say in the first part that they can't be fair and impartial, we let them go.** And we could be, instead of you questioning the people that have already said that they can't sit on the case over and over.
>
> MR. BASFORD: Well, I was trying to save some of them, Your Honor.
>
> THE COURT: But that's up to you. **You can't really save them. I don't think there's any savior, any saving, available on those things, frankly.**

(R 220). (emphasis added).

Based upon the trial court's own conclusions above, the court on its own should have excused Juror Weaver. However, the postconviction trial court at page 11 of its order (PC V4 598) suggests that Juror Weaver was rehabilitated because she later indicated she can keep an open mind and base her decision on the evidence (T 187). Actually, Juror Weaver only responded yes and

no to Mr. Basford's questions. Mr. Smith *failed to ask Juror Weaver any questions* nor did he *request either a dismissal for cause or preemptory challenge*.

However, this court has ruled many times that just because a juror changes their position of bias or impartiality and later agrees to follow the law, does not make them competent to sit. *Martarranz v. State*, 133 So.3d 473, 484 (Fla. 2013):

> A trial court's determination of whether a juror can render a verdict based on the evidence presented involves an evaluation of "all of the questions and answers posed to or received from the juror." *Banks,* 46 So.3d at 995 (quoting *Parker v. State,* 641 So.2d 369, 373 (Fla.1994)); *see also Johnson v. State,* 969 So.2d 938, 946 (Fla.2007). Although a juror's assurances of impartiality may suggest to a court that the denial of a challenge for cause may be appropriate, *see Banks,* 46 So.3d at 995, such assurances are neither determinative nor definitive, *see Murphy v. Florida,* 421 U.S. 794, 800, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). *See also Overton v. State,* 801 So.2d 877, 892 (Fla.2001) (holding that a juror's assurances were insufficient to persuade this Court as to the juror's impartiality); *Singer,* 109 So.2d at 24 ("a juror's statement that he [or she] can and will return a verdict according to the evidence submitted and the law announced at trial is *not* determinative of his[or her] competence….").
> **Assurances of impartiality after a proposed juror has announced prejudice is questionable at best.** (emphasis added).

Other cases have held the same: *Hamilton v. State*, 547 So.2d 630 (Fla. 1989); *Thompson v. State*, 796 So.2d 511 (Fla. 2001). In fact, *Thompson*, as well as *Chattin v. State*, 800 So.2d 665 (Fla. 2nd DCA 2001), were postconviction cases equivalent to

Mr. Caylor's. Both the Thompson and Chattin courts sent the case back for an evidentiary hearing on voir dire claims.

Further, in *Thompson*, *Supra*, this court held the following:

> With respect to defense counsel's performance during voir dire, Thompson alleges that counsel failed to (1) inquire about possible racial prejudices despite the fact that Thompson was an African American who was accused of murdering a white man and woman; (2) question jurors about their beliefs regarding the credibility of police officers; (3) adequately question the panel about their views on the death penalty; (4) question jurors about their opinions concerning mental health experts and mental health mitigation as it related to the guilt and penalty phases; (5) excuse a juror who indicated that she would have difficulty believing that a defendant who remained silent was innocent.
>
> **Because we find that these claims are not conclusively refuted by the record, we remand for an evidentiary hearing.** We specifically focus our attention on Thompson's claim that trial counsel was ineffective in failing to challenge juror Wolcott for cause. The record in this case indicates that juror Wolcott had extreme difficulty accepting the notion that a defendant has a right to not testify. Defense counsel did not seek Ms. Wolcott's removal for cause; nor did he exercise a peremptory challenge to excuse her, even though he had not used, and never did use, any of his ten peremptory challenges. Ms. Wolcott eventually served on the jury. Thompson never took the stand. (Emphasis added).

The federal system is no different. In *Hughes v. U.S.*, 258 F.3d 453, 456 (6th Cir. 21), the court set out the type of questions and answers that were found as actual bias of a juror and counsel as ineffective:

JUROR: I have a nephew on the police force in Wyandotte, and I know a couple of detectives, and I'm quite close to `em.

THE COURT: Anything in that relationship that would prevent you from being fair in this case?

JUROR: I don't think I could be fair.

THE COURT: You don't think you could be fair?

JUROR: No.

THE COURT: Okay. Anybody else? Okay. Where did we leave off?

Neither the court in *Hughes* nor defendant's counsel followed up with the potential juror. Defense counsel made no attempt to remove the juror with a peremptory or for-cause challenge. With only this testimony, the Sixth Circuit found the potential juror actually biased against the defendant. The court in *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006), found counsel ineffective for failure to seek a cause or preemptory challenge and cited *Hughes* for support.

Notwithstanding the trial court's finding that the record disputes Caylor's claim, this court should also send Caylor's case back to the trial court for a hearing on this issue.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENING AN EVIDENTIARY HEARING ON CAYLOR'S CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING TO INQUIRE OF JURORS' FEELINGS AND OPINIONS ON THE DEATH PENALTY AND MITIGATING FACTORS IN VIOLATION OF CAYLOR'S FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS?

A defendant is entitled to an evidentiary hearing on a postconviction motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient. *Valentine v. State,* 98 So.3d 44, 54 (Fla.2012)

The postconviction trial court summarily denied a hearing on this claim "because he is unable to show that an actually biased juror sat on his jury due to trial counsel Smith's alleged failure to inquire about such matters as mental health, addiction, remorse, rehabilitation, and mercy." The court incorrectly relied upon *Davis v. State*, 928 So.2d 1089 (Fla. 2005) and *Johnson v. State*, 63 So.3d 730 (Fla. 2011) for its support. The postconviction trial court correctly cites to this Court's statements that there was no showing that an actual biased juror sat.

However, in *Davis*, the defendant had an evidentiary hearing on the issue. *Davis*, 928 So.2d 1138, footnote 3. As for *Johnson*, it cannot be determined whether he had a hearing on the issue or not. However, Johnson's initial brief indicates counsel

asked at least one question about why he didn't request individual voir dire of jurors who had seen publicity. This case is different from *Johnson* in that the jurors in Johnson were questioned about publicity and had not indicated any opinions as a result. Postconviction counsel's issue was merely individual voir dire by sequestration.

Moreover, in *Thompson*, *supra*, this Court remanded a postconviction death penalty case back for an evidentiary hearing, partly because counsel failed to adequately inquire of the panel about their views on the death penalty, question jurors about their opinions concerning mental health experts and mental health mitigation as it related to the guilt and penalty phases, and seek a cause challenge of a juror who could not be impartial. The same situations occurred in Mr. Caylor's case.

Notwithstanding the trial court's finding, this Court should remand this case for an evidentiary hearing on this issue.

ISSUE V

WHETHER MR. CAYLOR'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

At page 40 of the Trial Court's order (PC V4 627), it finds that there were no errors, therefore no cumulative errors.

However, Caylor contends otherwise. This issue is determined de novo. *United States v. Mack*, 522 Fed.Appx 900, 936 (11th Cir. 2014); *United States v. Durham*, 2015 WL 7729404 (11th Cir. 2015).

All errors together must be taken into consideration with the other errors detailed throughout review of issues. Mr. Caylor did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeel*, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. *State v. Gunsby*, 670 So.2d 920 (Fla. 1996). In *Jones v. State,* 569 So.2d 1234 (Fla. 1990), the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "**cumulative errors** affecting the penalty phase." *Id*. at 1235 (emphasis added). The flaws in the system that sentenced Mr. Caylor to death are many. They have been

reiterated throughout the appeal, as well as throughout Mr. Caylor's direct appeal. There has been no adequate harmless-error analysis. While there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against the improperly-imposed death sentence safeguards that are required by the Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court in both phases of Mr. Caylor's trial (detailed elsewhere in this brief) significantly tainted the process. These errors cannot be harmless.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authorities, the Appellant respectfully asks this Court to reverse the judgment and death sentence.

/s/Michael P. Reiter_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant State Attorney Patrick Delaney at: patrick.delaney@myfloridalegal.com, and mailed to Matthew Caylor, Q23494, Union Correctional Institution, 7819 N.W. 228th Street, Raiford, FL 32026-1000, this 6th day of March, 2016.

_/s/Michael P. Reiter_____
Michael P. Reiter

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Courier New 12-point font.

__/s/Michael P. Reiter_____
Michael P. Reiter