substance of the testimony, and how the omission of that testimony prejudiced the outcome of the trial. *See Pace v. State,* 750 So.2d 57 (Fla. 2d DCA 1999). This court has recognized that the failure to investigate or call an exculpatory witness "presents a prima facie showing of entitlement to relief, subject to rebuttal by evidence from the record or testimony at an evidentiary hearing." *Prieto v. State,* 573 So.2d 398, 399 (Fla. 2d DCA 1991) (reversing summary denial of motion for postconviction relief). Furthermore, "arguing [a] defense in opening, and presenting no evidence to support the defense during the trial, constitutes ineffective assistance of counsel." *Avery v. State,* 737 So.2d 1166, 1167 (Fla. 2d DCA 1999) (reversing summary denial of motion for postconviction relief).

[5] In this case, defense counsel failed to secure the attendance of an exculpatory witness in a circumstantial evidence case. Her testimony, had it been offered, would have cast doubt on the only evidence linking Honors to the crime by explaining how he came into possession of recently stolen property. This error was exacerbated by defense counsel's opening statement when he told the jury to expect such testimony. We conclude that Honors has met the *Strickland* test by showing error and prejudice. Accordingly, we reverse the denial of the motion for postconviction relief and remand for a new trial.

Reversed and remanded for new trial.

FULMER and DAVIS, JJ., Concur.

**BOYNTON LANDSCAPE and Liberty Mutual Insurance Co.,
Appellants,**

v.

James DICKINSON, Appellee.

No. 1D98–4148.

District Court of Appeal of Florida,
First District.

Feb. 28, 2000.

Employer and carrier sought review of an order of the Judge of Compensation Claims, Howard Scheiner, directing them to recalculate claimant's social security offset and to refund all offsets taken for the past 11 years. The District Court of Appeal, Webster, J., held that the social security offset issues were non-recurring issues, and thus could not be raised at subsequent merits hearing.

Reversed.

1. Workers' Compensation ⚖1165

As a general rule, piecemeal litigation of mature claims is no more permissible in workers' compensation cases than in civil litigation.

2. Workers' Compensation ⚖1791

If a merits hearing occurs in a workers' compensation case and mature claims are not litigated, the claims are considered waived, and later litigation is precluded by application of the doctrine of res judicata.

3. Workers' Compensation ⚖1791

Issues of the amount of social security offset employer was entitled to take against workers' compensation benefits and whether claimant was entitled to a refund of offsets previously taken over an 11-year period were "non-recurring issues," and thus were barred by doctrine of res judicata from being raised at subsequent merits hearing, where there were no changes to the entitlement classification or

to the number of dependents receiving benefits, and claimant himself had equal access to the social security information from which the offset was calculated.

See publication Words and Phrases for other judicial constructions and definitions.

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Randall T. Porcher and James C. Byrd, Jr., of Rigell, Leal & Ring, P.A., West Palm Beach, for Appellants.

Richard A. Kupfer, West Palm Beach; Jerry J. Goodmark of Goodmark, Goodmark & Goldstone, P.A., West Palm Beach, for Appellee.

WEBSTER, J.

In this workers' compensation case, the employer and carrier seek review of an order directing them to calculate the social security offset in the future using a weekly social security benefit of $60.81; and to refund to the claimant all social security offsets taken between October 7, 1986, and January 8, 1998. Because we conclude that the claimant's claim seeking recalculation of the social security offset and a refund of all offsets previously taken is barred by the doctrine of res judicata, we reverse.

In 1979, the claimant sustained a work-related injury. He was accepted as permanently and totally disabled in 1982. He began receiving social security disability benefits in 1980. In 1986, the employer and carrier began taking a social security offset. The claimant filed claims for attendant care benefits in 1987, 1989 and 1994, and merits hearings were held on those claims. In 1997, for the first time, the claimant filed a claim seeking recalculation of the social security offset and a refund of all offsets taken since October 7, 1986, along with another claim seeking attendant care benefits. The employer and carrier controverted the claim seeking recalculation and reimbursement of social security offsets, asserting, among other things, that it was barred by the doctrine of res judicata. The judge of compensation claims rejected the res judicata defense and, finding that the amount of the

offset should have been based on a weekly social security benefit of $60.81 instead of the figure of $65.86 used by the employer and carrier, ordered that the employer and carrier refund to the claimant the entire amount offset between October 7, 1986, and January 8, 1998. This appeal follows.

The employer and carrier argue that the claim seeking recalculation of the social security offset and a refund of all offsets previously taken is barred by the doctrine of res judicata because it was ripe for adjudication at three prior merits hearings, and should have been raised then. We agree.

[1, 2] As a general rule, piecemeal litigation of mature claims is no more permissible in workers' compensation cases than in civil litigation. If a merits hearing occurs and mature claims are not litigated, the claims are considered waived, and later litigation is precluded by application of the doctrine of res judicata. *E.g., Artigas v. Winn Dixie Stores, Inc.,* 622 So.2d 1346 (Fla. 1st DCA 1993); *Department of Transportation v. Greene,* 599 So.2d 1368 (Fla. 1st DCA 1992); *Florida Power & Light Co. v. Haycraft,* 421 So.2d 674 (Fla. 1st DCA 1982). Here, the claimant did not file his claim that he was entitled to recalculation of the social security offset and a refund of all offsets previously taken because the employer and carrier did not have sufficient information from the Social Security Administration when it began taking an offset in 1986 until 1997, more than ten years after the fact. Notwithstanding the long delay in filing his claim and the three intervening merits hearings, the claimant maintains that the claim is not barred because the social security offset is, like a wage-loss claim, a recurring issue which may be relitigated; and because barring him from raising the claim would result in an injustice.

[3] In *Nelson & Co. v. Holtzclaw,* 566 So.2d 307, 309 (Fla. 1st DCA 1990), we noted that, because of the "periodic nature of wage loss, elements which might change

from period to period ... can be relitigated on successive claims." However, we also reaffirmed the general principle that "non-recurring issue[s]" which were mature at the time of a prior merits hearing but not litigated may not be raised at a subsequent merits hearing because of the doctrine of res judicata. *Id.* The claimant argues that, because changes in one's entitlement classification or the number of dependents receiving benefits might require a recalculation of the social security offset, the social security offset issue should be treated as a recurring one, like the issue of wage-loss benefits. We find it unnecessary to resolve this question, however, because it is undisputed that no such event occurred in this case. Accordingly, we conclude that, for purposes of this case, the social security offset issue was a non-recurring one.

The claimant next argues that, because there is no way that he could have known whether the employer and carrier were correctly calculating the amount of the offset, barring him from raising the claim when he did would result in an injustice. However, there can be no question but that the claimant (who the record reflects has been represented by the same attorney since at least 1980) has always had at least equal access to the social security information from which the offset was calculated. Accordingly, we fail to see how barring him from raising the claim more than ten years after the fact would result in any injustice to him. On the contrary, to permit him to raise the claim at this point would, in our opinion, result in a manifest injustice to the employer and carrier.

There has never been any dispute about whether the employer and carrier have been entitled to the offset. The only issue raised by the claimant is with regard to the amount. Here, because of the many years that had passed, nobody could testify regarding the original offset calculations, and the records originally relied on could not be found. As the attorney for the employer and carrier noted at the merits hearing, over an 11–year period,

"memories fade, documents get lost, adjusters change" and litigants change law firms. To permit a claim of this type to be raised after so many years have passed would encourage claimants to refrain from pointing out a perceived factual or computational error in the hope that, after several years had passed, the employer and carrier would no longer be in a position to defend the basis for the offset taken. It would also encourage meritless claims. Finally, it would be contrary to the legislature's expressed intent to create "an efficient and self-executing system" that "ensur[es] a prompt and cost-effective delivery of payments." § 440.015, Fla. Stat. (1997).

Based upon the foregoing analysis, we hold that the claim seeking recalculation of the social security offset and a refund of all offsets taken between October 7, 1986, and January 8, 1998, is barred by the doctrine of res judicata. The order of the judge of compensation claims to the contrary is, therefore, reversed.

REVERSED.

KAHN and PADOVANO, JJ.,
CONCUR.

Manuel CREME, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D98–0968.

District Court of Appeal of Florida,
Third District.

March 1, 2000.

Defendant was convicted in the Circuit Court, Miami-Dade County, Thomas