IN THE

SUPREME COURT OF FLORIDA

NO. 73256

JEFFERY JOSEPH DAUGHERTY,

Defendant-Appellant,

v.

STATE OF FLORIDA,

Plaintiff-Appellee.

NO. _____

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

APPELLANT/PETITIONER'S
EMERGENCY MOTION FOR
STAY OF EXECUTION

INTRODUCTION

Jeffery Joseph Daugherty, presently scheduled to be executed at 7 a.m. on Friday, November 4, 1988, respectfully moves this Court for an order staying his execution in order to permit full briefing and argument of the issues raised in his appeal and his petition for habeas corpus. In the short amount of time between the issuance of the Circuit Court's order of October 27, 1988 and the scheduled argument before this Court on November 1, 1988, counsel has been unable to prepare a full appellate brief. The purpose of this motion, therefore, is to persuade this Court that Mr. Daugherty's claims are meritorious enough to permit full briefing and argument in accordance with normal appellate procedure. If, however, this Court believes that the merits are capable of resolution in the short time available before Mr. Daugherty is scheduled to be put to death, we respectfully request that this Court consider this motion, together with the arguments contained in Mr. Daugherty's most recent Rule 3.850 motion, Appellant's Appendix at 11, as the equivalent of Mr. Daugherty's brief on the merits.

STATEMENT OF THE CASE

Presently before this Court are two proceedings filed by Mr. Daugherty. The first is an appeal from an October 27, 1988 order of the Circuit Court of the Eighteenth Judicial Circuit (Brevard County) denying his motion for post-conviction

relief. Appellant's Appendix at 8. The second is a petition for habeas corpus, which asserts the same grounds for relief as those asserted in the Rule 3.850 motion. The habeas corpus petition is filed as a protective measure in the event that this Court rules that any of the claims asserted in the Rule 3.850 motion are barred because they should have been raised in a habeas corpus petition.[1]

PROCEDURAL HISTORY

On November 18, 1980, Mr. Daugherty pleaded guilty to the murder, robbery and kidnapping of Lavonne Sailer. The Circuit Court then commenced a sentencing hearing before a jury, which returned an advisory verdict of death. Several months later, the Circuit Court sentenced Mr. Daugherty to death, finding two statutory aggravating factors -- prior convictions and pecuniary gain -- and no statutory mitigating circumstances. This Court affirmed the death sentence on direct appeal. Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983).

Mr. Daugherty then filed a habeas corpus petition in this Court on November 8, 1983. He argued that this Court failed to conduct a constitutionally adequate review and disregarded established procedures for appellate review that

[1] To this point, the State has not made such a claim.

had been applied in other cases. This Court denied the petition summarily. Daugherty v. Wainwright, 443 So.2d 979 (Fla. 1983), cert. denied, 466 U.S. 945 (1984).

On March 15, 1985, Mr. Daugherty filed a Rule 3.850 motion in the Circuit Court asserting four separate grounds for relief: ineffective assistance of counsel, failure of the sentencing court to consider non-statutory mitigating circumstances, failure of the sentencing court to find two statutory mitigating circumstances, and the arbitrary exercise of prosecutorial discretion. After holding an evidentiary hearing, the Circuit Court denied all relief and this Court affirmed. Daugherty v. State, 505 So.2d 1323 (Fla.), cert. denied, 56 U.S.L.W. 3287 (U.S. Oct. 9, 1987).

While Mr. Daugherty's certiorari petition was pending, the Governor signed a death warrant and an execution date of October 15, 1987 was set. Mr. Daugherty filed a habeas corpus petition in the United States District Court for the Middle District of Florida, which was dismissed on October 10, 1987. Mr. Daugherty then obtained a stay of execution from the United States Court of Appeals for the Eleventh Circuit. Daugherty v. Dugger, 831 F.2d 231 (11th Cir. 1987), application to vacate stay denied, 56 U.S.L.W. 3287 (U.S. Oct. 14, 1987). After expedited briefing and argument, that Court affirmed the judgment of the District Court. Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988), cert. denied, 57 U.S.L.W. 3235 (U.S. Oct. 3, 1988).

On October 7, 1988, Governor Martinez signed a death warrant, authorizing Mr. Daugherty's execution between 12 noon on November 3, 1988 and 12 noon on November 10, 1988. The execution has been scheduled for Friday, November 4, 1988 at 7 a.m.

On October 24, 1988, Mr. Daugherty filed a Rule 3.850 motion seeking to overturn the death sentence. Appellant's Appendix at 11. That motion presented five grounds for relief, each of which was unavailable when his prior Rule 3.850 motion was filed, and each of which represents a fundamental change in constitutional law promulgated by the Supreme Court of the United States. The motion, therefore, satisfies the requirements for a second Rule 3.850 petition. See Witt v. State, 465 So.2d 510 (Fla. 1985).

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY HELD THAT MR. DAUGHERTY'S CHALLENGE TO THE "HEINOUS, ATROCIOUS OR CRUEL" JURY INSTRUCTION WAS PROCEDURALLY BARRED.

Mr. Daugherty's first claim for relief is that the standard jury instruction used at his sentencing hearing to define the statutory aggravating circumstance "especially heinous, atrocious or cruel" was unconstitutionally vague. That phrase was defined for the jury in the following manner:

> Heinous means extremely [wicked] or shockingly evil. Atrocious means outrageously wicked and foul. Cruel means designed to inflict a high degree of pain. Utter indifference to or [enjoyment] of the suffering of others, pitilessness.

Transcript of Closing Arguments and Jury Instructions at 48.

Mr. Daugherty's trial counsel did not object to this instruction or challenge it on direct appeal. In his first Rule 3.850 motion, Mr. Daugherty argued that this failure constituted ineffective assistance of counsel. The Circuit Court denied that claim, noting that the instruction was a standard instruction promulgated by this Court. Appellant's Appendix at 6. As a correct statement of the law, therefore, no competent attorney could be expected to challenge it. This Court affirmed, finding that the Circuit Court had made the appropriate factual findings. Daugherty v. State, 505 So.2d 1323, 1325 (Fla. 1987), cert. denied, 56 U.S.L.W. 3287 (U.S. Oct. 9, 1987). The rulings of the Circuit Court and this Court could not have been clearer -- there was no ineffective assistance of counsel because the jury instruction was a correct statement of the law, promulgated by this Court.

In its recent unanimous decision in Maynard v. Cartwright, 56 U.S.L.W. 4501 (U.S. June 6, 1988), the Supreme Court left no doubt that the instruction used at Mr. Daugherty's sentencing hearing was unconstitutional. Although

Maynard arose under Oklahoma's death penalty statute, both the statutory aggravating circumstance -- "especially heinous, atrocious or cruel" -- and the jury instruction defining it were identical in all material respects to the aggravating circumstance and the jury instruction at issue here.[2] The Supreme Court found that this instruction gave the jury "unfettered discretion" to impose the death penalty, 56 U.S.L.W. at 4503, a result plainly at odds with prevailing Eighth Amendment standards. See id. at 4502 (aggravating circumstance is open to constitutional challenge if it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).")

There can be no doubt, therefore, that Maynard represents a change in the law. A jury instruction that had been held valid in this very case now has been declared unconstitutional by the Supreme Court. The State itself has

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[2] The trial court gave the following instruction in Maynard:

> "'[H]einous' means extremely wicked or shockingly vile; 'atrocious' means outrageously wicked or vile; 'cruel' means pitiless or utter indifference to or enjoyment of, the suffering of others pitiless" [sic].

Cartwright v. Maynard, 802 F.2d 1203, 1219 (10th Cir. 1986), on rehearing, 822 F.2d 1477 (10th Cir. 1987) (en banc), aff'd, 56 U.S.L.W. 4501 (U.S. June 6, 1988).

conceded that Maynard held that the jury instruction was insufficient. See Response To Application For Stay Of Execution And Appeal From Summary Denial Of Post-Conviction Motion (hereinafter cited as "State's Response") at 21. Its continued defense of the jury instruction in Mr. Daugherty's case simply ignores the virtual identity between the Oklahoma jury instruction in Maynard and the one at issue in this case. The State has not explained how an Oklahoma instruction that has been held unconstitutional by the Supreme Court can remain constitutional in Florida.

Maynard, therefore, is a change in the law applicable in Florida. The Supreme Court left no doubt concerning the importance of the principle established in Maynard, describing it as a "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 56 U.S.L.W. at 4502. Thus, the Circuit Court's conclusion that Mr. Daugherty's Maynard claim is barred because Maynard is not a "fundamental change in law," Appellant's Appendix at 8, is wrong.

The State argues further that Mr. Daugherty suffered no prejudice from the unconstitutional jury instruction because the judge properly found that this crime was not "especially heinous, atrocious or cruel." The judge's proper finding, however, is no guarantee that the jury acted properly. This

Court consistently has ruled that an unconstitutional jury instruction is sufficient to taint the entire sentencing proceeding, regardless of the judge's proper findings. The clearest example of this principle is Riley v. Wainwright, 517 So.2d 656 (Fla. 1987). In Riley, this Court ruled that the jury's recommendation is "an integral part of the death sentencing process," id. at 657, because of the limits placed upon a judge's power to overrule a jury's recommendation of a life sentence. See Tedder v. State, 322 So.2d 908 (Fla. 1975). As a result, reversal is required when an unconstitutional jury instruction has been delivered: "If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley, 517 So.2d at 659. In Riley, this Court found it unnecessary to decide whether the judge's subsequent order, sentencing the defendant to death, was proper. The unconstitutional jury instruction resulted in an "infirm jury recommendation" and was sufficient cause, standing alone, for reversal, irrespective of whether the judge's sentencing order was proper.[3]

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[3] The instruction at issue in Riley told the jury to consider only statutory mitigating circumstances, in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987). This instruction resulted in reversal, even though the sentencing judge acted properly in considering nonstatutory mitigating circumstances. See Riley v. State, 413 So.2d 1173, 1175 (Fla.), cert. denied, 459 U.S. 981 (1982).

This Court reached a similar result in Mikenas v. State, 519 So.2d 601 (Fla. 1988). As in Riley, the jury had been instructed to consider only statutory mitigating circumstances. The sentencing judge, however, knew that he was free to consider non-statutory mitigating evidence and did so in sentencing the defendant to death. As in Riley, this Court ruled that the judge's proper actions could not cure the improper jury instruction.

Riley and Mikenas are far from the only examples of an erroneous jury instruction providing the basis for reversal of a death sentence. See, e.g., Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), cert. denied, 56 U.S.L.W. 3647 (U.S. Mar. 21, 1988); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); see also Simmons v. State, 419 So.2d 316 (Fla. 1982) (new sentencing hearing required because non-statutory mitigating evidence considered by judge, but not by jury). Thus far, the State has failed to mention, let alone distinguish, this unbroken line of authority.

Nor has the State challenged the undeniably prejudicial impact of this instruction. The sentencing judge correctly found that this crime did not meet the narrow construction of "heinous, atrocious or cruel" mandated by this Court, i.e., that the victim must suffer severe physical or emotional torture prior to death. See, e.g., Jackson v. State,

498 So.2d 906 (Fla. 1986); Mills v. State, 462 So.2d 1075 (Fla.), cert. denied, 473 U.S. 911 (1985); Gorham v. State, 454 So.2d 556 (Fla. 1984), cert. denied, 469 U.S. 1181 (1985); Francois v. State, 407 So.2d 885 (Fla. 1981), cert. denied, 458 U.S. 1122 (1982); Riley v. State, 366 So.2d 19 (Fla. 1978), cert. denied, 459 U.S. 981 (1982); Kampf v. State, 371 So.2d 1007 (Fla. 1979). In this case, the victim either was killed instantly or rendered unconscious by the first shot. Trial Transcript at 28-29. On numerous occasions, this Court has made it clear that the "heinous, atrocious or cruel" aggravating circumstance is inapplicable in such a case. E.g., William v. State, 386 So.2d 538, 542-43 (Fla. 1980); Fleming v. State, 374 So.2d 954, 958-59 (Fla. 1979); Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979).

The jury instruction in this case did not inform the jury that the "heinous, atrocious or cruel" aggravating circumstance was limited to murders that involved torture to the victim. Instead, it permitted the jurors to return a verdict of death based upon a belief that the crime was "extremely wicked," "shockingly evil," "outrageously wicked" or "foul," without giving them any further guidance as to the meaning of those terms. The record in this case suggests numerous possible interpretations of the instruction that are flatly inconsistent with constitutional standards. For

example, persons of ordinary sensibility might believe that all murders are "shockingly evil," a result directly contrary to the Supreme Court's decision in Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980). Several gruesome photographs of the victim's wounds were introduced into evidence, Trial Transcript at 19-26, 138-40, and were displayed to the jury during the State's closing argument. Transcript of Closing Argument at 10-11. That evidence may well have persuaded the jury that the crime was "foul," even though it is unconstitutional to impose the death penalty for "all murders resulting in gruesome scenes." Godfrey, 446 U.S. at 433 n.16. Perhaps the jury was persuaded that the crime was "outrageously wicked" by the prosecutor's eloquent plea to consider the families of Mr. Daugherty's victims -- a plea, as discussed below, that is forbidden by Booth v. Maryland, 55 U.S.L.W. 4836 (U.S. June 15, 1987). The language of the jury instruction allows an infinite number of possible interpretations and, therefore, fails to channel the jury's discretion in any meaningful way.

To be sure, the jury's general verdict makes it impossible to determine whether the jury relied upon the invalid instruction in arriving at its verdict of death. But the Supreme Court unequivocally has ruled that the State must bear the consequences of that uncertainty. In Mills v. Maryland, 56 U.S.L.W. 4503, 4506 (U.S. June 6, 1988), the Court

noted the rule of Stromberg v. California, 283 U.S. 359, 367-68 (1931), that a conviction may not stand when jury instructions permit a conviction on both valid and invalid grounds, and when the jury's verdict makes it impossible to determine which of the grounds the jury relied upon. See also Sandstrom v. Montana, 442 U.S. 510, 526 (1979) (if reviewing court cannot be certain about what a properly instructed jury would have done, verdict must be set aside). In Mills, the Court held that there must be "even greater certainty that the jury's conclusion rested on proper grounds" when a jury's verdict of death is under review. 56 U.S.L.W. at 4506. Indeed, in a capital case, all doubts about the jury's reliance upon an unconstitutional instruction must be resolved in favor of the accused. Id. Thus, this Court is compelled to find that the jury did rely upon the unconstitutional instruction and, accordingly, must vacate the death sentence.[4]

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[4] The Eleventh Circuit's ruling that Mr. Daugherty failed to demonstrate prejudice from the jury instruction is not dispositive. That finding was made in response to Mr. Daugherty's ineffective assistance of counsel claim, a claim that placed the burden upon him to demonstrate prejudice by showing a reasonable probability of a different result. Indeed, the Eleventh Circuit distinguished Riley and the other jury instruction cases decided by this Court on precisely that ground. See Daugherty v. Dugger, 839 F.2d 1426, 1430-31 (11th Cir. 1988), cert. denied, 57 U.S.L.W. 3235 (U.S. Oct. 3, 1988). See also Kimmelman v. Morrison, 477 U.S. 365, 382 n.7 (1986) (distinguishing between constitutional errors that the State must show to be harmless beyond a reasonable doubt, and ineffective assistance of counsel claims, where the defendant must show prejudice).

Maynard is a fundamental change in the law and applies directly to this case. Mills v. Maryland requires this Court to assume that the jury acted in accordance with the unconstitutional jury instruction in recommending a death sentence. Riley and Mikenas, therefore, require a new sentencing hearing.

II. MR. DAUGHERTY'S CALDWELL CLAIM MANDATES A STAY OF EXECUTION, AT THE VERY LEAST.

Mr. Daugherty's motion argued that inaccurate statements by the prosecutor diminishing the importance of the jury's role in sentencing, combined with the judge's instructions that failed to correct those misstatements, violated the Eighth Amendment, as interpreted in Caldwell v. Mississippi, 472 U.S. 320 (1985).[5] Caldwell held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Id. at 328-29.

The applicability of Caldwell to Florida's capital sentencing procedure remains unclear. This Court consistently has held that Caldwell is inapplicable due to the advisory nature of a Florida jury's sentencing recommendation. See,

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[5] The offending statements are quoted in Mr. Daugherty's motion. See Appellant's Appendix at 17-18.

e.g., Combs v. State, 525 So.2d 853 (Fla. 1988). The Eleventh Circuit, on the other hand, has granted habeas corpus relief on Caldwell grounds in Florida cases. See, e.g., Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. Mar. 7, 1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc). Adams involved instructions that affirmatively misled the jury about its sentencing role. Mann extended the Adams principle to include cases where the prosecutor made misleading comments similar to those made in Caldwell, and where the trial judge, while not endorsing those comments, failed to correct the misstatements. See 844 F.2d at 1457. Mr. Daugherty's claim is similar to the claim upheld in Mann, i.e., the trial judge's instructions in his case, while not technically inaccurate, did not correct the misunderstanding created by the prosecutor's comments. As such, the claim was unavailable until the Mann decision was announced on April 21, 1988.

The Circuit Court found, however, that the claim was procedurally barred because it was not presented in Mr. Daugherty's first Rule 3.850 motion. That motion was filed in March, 1985, three months before Caldwell was decided, and a hearing was held on May 29, 1985, approximately two weeks

before Caldwell was decided.[6] The Circuit Court's ruling that the Caldwell claim should have been raised in the first Rule 3.850 motion is contrary to well established case law that invariably looks to the filing date of an initial Rule 3.850 motion in order to determine whether claims raised in a subsequent motion should have been included therein. See, e.g., Delap v. State, 513 So.2d 1050, 1051 (Fla. 1987) (Caldwell claim barred because it should have been raised in first Rule 3.850 motion filed six months after Caldwell); Christopher v. State, 489 So.2d 22, 24 (Fla. 1986), cert. denied, 56 U.S.L.W. 3570 (U.S. Feb. 23, 1988) (successive motion may be denied unless it asserts grounds that could not have been known at the time the initial motion was filed); McCuiston v. State, 507 So.2d 1185, 1187 (Fla. 2d DCA 1987) (successive petition may be filed if it alleges change in law occurring after first petition is filed). Because Caldwell was not decided until after the first Rule 3.850 motion was filed, a Caldwell claim is available to Mr. Daugherty in his subsequent petition.

The State also argues that a Caldwell claim should have been filed by January 1, 1987, the date specified in the

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[6] Judge Antoon promised that he would decide the motion within twenty-four hours. May 29, 1985 Transcript at 125. Although counsel understandably expected an immediate decision, the Court's order was not filed until July 3, 1985.

amended version of Rule 3.850. Mr. Daugherty could not have filed a Rule 3.850 motion in the Circuit Court between August 1, 1985 and June 25, 1987, however, because the case was on appeal to this Court during that period. The filing of a notice of appeal divests the trial court of jurisdiction over the case. De La Portilla v. De La Portilla, 304 So.2d 116 (Fla. 1974); Burris Chemical Inc. v. Whitted, 485 So.2d 37 (Fla. 4th DCA 1986).[7]

The State's suggestion that a rehearing petition in the Rule 3.850 petition would have been sufficient to raise the Caldwell claim fares no better. A rehearing petition is an inappropriate vehicle for raising new arguments. See, e.g., Sag Harbour Marine, Inc. v. Fickett, 484 So.2d 1250, 1256 (Fla. 1st DCA 1985), review denied, 494 So.2d 1150 (Fla. 1986).

Mr. Daugherty recognizes that this Court is likely to adhere to its present views concerning the applicability of Caldwell, at least until the Supreme Court decides otherwise. That Court will rule on the issue in a matter of months, however. Argument in Dugger v. Adams, which raises this

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[7] Indeed, filing a new Rule 3.850 motion after the Circuit court's July 3, 1985 order would have created a dilemma. If the Court did not decide the subsequent motion within the thirty day deadline for appealing, Mr. Daugherty would have been forced to choose between appealing (thereby depriving the Circuit Court of jurisdiction to decide the Caldwell claim) or allowing the subsequent motion to proceed (thereby forfeiting his right to appeal the July 3 order).

precise issue, will take place on November 1, 1988. Should the Supreme Court adopt the Eleventh Circuit's approach, it will represent a fundamental change in the law entitling Mr. Daugherty to relief. See Combs v. State, 525 So.2d 853 (Fla. 1988) (holding that applying Caldwell in accordance with Adams and Mann would require resentencing virtually every person sentenced to death in Florida since 1976). If Mr. Daugherty is put to death before the Supreme Court's decision in Adams the risk of a miscarriage of justice will be intolerably high, because an affirmance of the Eleventh Circuit's decision in Adams by the Supreme Court would result in a new sentencing hearing for him. Therefore, it is unjust to execute Mr. Daugherty before knowing whether that result will occur. Accordingly, a stay of execution should be issued so that this Court may decide Mr. Daugherty's Caldwell claim in light of Dugger v. Adams.

III. THE CIRCUIT COURT'S RESOLUTION OF THE JOHNSON v. MISSISSIPPI CLAIM IS FUNDAMENTALLY FLAWED.

Mr. Daugherty's third claim in his rule 3.850 motion was that his death sentence must be overturned on the authority of Johnson v. Mississippi, 56 U.S.L.W. 4561 (U.S. June 14, 1988), which holds that a death sentence cannot be based, even in part, upon a conviction that subsequently has been reversed. At Mr. Daugherty's sentencing hearing, the jury heard extensive

evidence about the murder of George Karnes, for which Mr. Daugherty had been convicted in Pennsylvania. During closing argument, the prosecutor emphasized the Karnes murder as one of the aggravating circumstances. Transcript of Closing Argument at 6-7. See Appellant's Appendix at 21. That conviction later was reversed by the Pennsylvania Supreme Court. Commonwealth v. Daugherty, 493 Pa. 273, 426 A.2d 104 (1981). The Circuit Court found that this claim was procedurally barred because it was not a fundamental change in the law and, alternatively, that it would have reached the same result even if evidence of the Karnes murder had not been introduced. Neither holding is persuasive.

Johnson held for the first time that use of an overturned conviction as an aggravating factor violates the Eighth Amendment.[8] The Court based its holding on the "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment." 56 U.S.L.W. at 4563. Any claim that Johnson does not represent a "fundamental" change in the law is difficult to reconcile with the quoted language.

Even if the trial judge's statement that reversal of the Karnes conviction would not have made a difference to him

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[8] Oats v. State, 446 So.2d 90 (Fla. 1984), cert. denied, 474 U.S. 865 (1985), relied upon by the State, see State's Response at 24, is based upon Florida law, not the Eighth Amendment.

is credited, the judge obviously is in no position to determine the effect of evidence of that killing upon the jury. Johnson holds that the "possibility" that a jury would have viewed the reversed conviction as decisive was sufficient to reverse the death sentence. 56 U.S.L.W. at 4563. The record in this case suggests a significant possibility that one additional conviction was sufficient to tip the balance of aggravating and mitigating factors in favor of a death sentence. Prior to the sentencing hearing in this case, prosecutors in Flagler and Volusia counties were faced with crimes committed by Mr. Daugherty that were identical to the one at issue here. Each was a robbery-murder to which Mr. Daugherty had confessed. In those cases, the prosecutors declined even to seek the death penalty, even with Mr. Daugherty's record of prior convictions. The substantial mitigating evidence may well have played a part in those prosecutorial decisions.[9] It may be, therefore, that the decision was as close for the jury as it was for the prosecutors in Flagler and Volusia counties. Johnson holds that such a possibility is sufficient to reverse the death sentence.

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[9] That evidence is summarized in Appellant's Appendix at 12-14.

IV. THE CIRCUIT COURT'S AFTER-THE-FACT STATEMENTS ABOUT NON-STATUTORY MITIGATING EVIDENCE ARE INSUFFICIENT TO OVERCOME ITS PREVIOUS FAILURE TO CONSIDER SUCH EVIDENCE.

The order sentencing Mr. Daugherty to death unequivocally states that the sentencing judge considered only statutory mitigating evidence. The Court stated:

> IT IS the finding of the Court after weighing the aggravating and mitigating circumstances that there are sufficient aggravating circumstances as specified in [Fla. Stat.] 921.141 and insufficient mitigating circumstances [as specified] therein that a sentence of death is justified.

Appellant's Appendix at 4. By finding that the aggravating circumstances specified in the statute were not outweighed by the mitigating circumstances "therein," the order demonstrates that the trial judge considered only non-statutory mitigating circumstances.

There is little difference between the sentencing order in this case and the order reviewed by the Supreme Court in Hitchcock v. Dugger, 55 U.S.L.W. 4567 (U.S. Apr. 22, 1987). The order in Hitchcock stated that "there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141 (6) to outweigh the aggravating circumstances." 55 U.S.L.W. at 4569 (emphasis added by the Supreme Court). The Court concluded that the judge's failure to consider non-statutory mitigating evidence required reversal of the death sentence.

The State attempted to avoid the effects of Hitchcock by encouraging the trial judge to decide Mr. Daugherty's Rule 3.850 motion by "finding", some seven and a half years after the sentencing hearing, that he did not mean what he said in his sentencing order. Thus, the State submitted a proposed order stating that the judge had acted in accordance with Hitchcock and Lockett v. Ohio, 438 U.S. 586 (1978), when he sentenced Mr. Daugherty. Judge Woodson signed that order, after observing on the record that he and virtually all judges take non-statutory mitigating evidence into consideration, regardless of what their sentencing orders might say. October 27, 1988 Transcript at 23-26.

The judge's statements are insufficient to defeat Mr. Daugherty's claim. This Court and the Supreme Court regularly have reversed death sentences when sentencing judges have failed to consider non-statutory mitigating circumstances. E.g., Hitchcock, supra; Foster v. State, 518 So.2d 901 (Fla. 1987), cert. denied, 56 U.S.L.W. 3895 (U.S. June 27, 1988); Ziegler v. Dugger, 524 So.2d 419 (Fla. 1988); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Harvard v. State, 486 So.2d 537 (Fla.), cert. denied, 479 U.S. 863 (1986). The notion that all sentencing judges consider non-statutory mitigating circumstances is totally inconsistent with those cases. Moreover, the remedy for a judge's failure to consider non-

statutory mitigating evidence is a new sentencing proceeding. See Harvard v. State, supra, 486 So.2d at 539; Foster v. State, supra, 518 So.2d at 902. A Hitchcock error cannot be cured by the trial judge's after-the-fact disavowal of the words of his sentencing order. Cf. Fayerweather v. Ritch, 195 U.S. 276, 307 (1904): "A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision."

Vacating the death sentence on Hitchcock grounds and remanding for a new sentencing hearing would not be an empty gesture, even if a new advisory jury would not be empaneled. With his death sentence vacated, Mr. Daugherty would be entitled to offer new mitigating evidence that was not available at the time of the sentencing hearing. In particular, evidence of his lack of disciplinary violations while imprisoned would be admissible, see Skipper v. South Carolina, 476 U.S. 1 (1986), along with evidence of the relationship with his children that he has managed to sustain while incarcerated. In short, the sentencing profile would be significantly different and could lead to a different result.[10]

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[10] Because this new evidence was unavailable to the original jury, Mr. Daugherty contends that a new jury would be required to hear it so that the sentencing judge would have the benefit of the recommendation of a jury that had heard all the evidence.

The Circuit Court's statement that any Hitchcock error would be harmless is erroneous. This Court has ruled that a failure to consider non-statutory mitigating evidence is reversible error if such evidence has been introduced. See, e.g., Foster, supra, 518 So.2d at 902. The cases relied upon by the State to demonstrate harmless error (State's Response at 30) all involve either: 1) a total failure to introduce non-statutory mitigating evidence; 2) evidence that was directly refuted by the record; or 3) defendants who asked the jury to impose the death penalty upon them. No such circumstances are present here. The evidence of Mr. Daugherty's unstable home life and upbringing, his genuine remorse for the crimes and his sincere religious conversion was, for the most part, uncontradicted. It was corroborated by the State's evidence and by witnesses such as Father Albert Anselmi, a most unlikely source of false testimony. See Appellant's Appendix at 12-14. The trial court's failure to consider this evidence hardly can be harmless beyond a reasonable doubt.

Card v. Dugger, 512 So.2d 829 (Fla. 1987), and Johnson v. Dugger, 520 So.2d 565 (Fla. 1988), upon which the State places its principal reliance, are easily distinguishable. Both involved "silent" sentencing orders, i.e., orders that did not state whether the judge had

considered non-statutory mitigating evidence. By contrast, the order in this case affirmatively states that the judge considered only statutory mitigating circumstances.

Nor is the judge's delivery of a proper jury instruction on non-statutory mitigating circumstances sufficient to overcome the error. In Ziegler v. Dugger, 524 So.2d 419 (Fla. 1987), this Court held that courts should presume that a trial judge's view of the law is consistent with his jury instructions "[u]nless there is something in the record to suggest to the contrary." Id. at 420. In this case, there is "something in the record" demonstrating the judge's failure to consider non-statutory mitigating evidence, i.e., the sentencing order. The jury instruction, therefore, does not bear relief.

V. BOOTH v. MARYLAND IS A FUNDAMENTAL CHANGE IN THE LAW MANDATING RELIEF IN THIS CASE.

At Mr. Daugherty's sentencing hearing, the prosecutor made an emotional plea to the jury to consider the impact that Mr. Daugherty's crimes would have on the families of his victims:

> I expect Mr. Kutsche to point out the fact that if you recommend the death penalty that no matter what you recommend in that regards you will not bring any of the dead ones back. ... But he can bring, and he will bring those people back to life if he receives a recommendation of mercy, because they have heirs, they have relatives, they have mothers, fathers, brothers, and sisters. And what

> happens at Christmas time when they ask where is George, Miss Sailer, Miss Abrams, they're not with us today, and then that bang is going to hit them, yeah, but Jeff is, I wonder where he's eating turkey today, what kind of Christmas gifts did he get, and then the tears of the victims will flow again. So this man does have the ability to bring those people back, but in a very perverse way because the mental anguish, the pain, the suffering that he's caused is only caused because this case hasn't been put to rest and Jeff hasn't paid the price that he extracted from his victims, not to mention Christmas and birthdays, mothers or grandchildren.

Transcript of Closing Arguments at 25-26.

Mr. Daugherty's attorney neither objected to the prosecutor's plea nor challenged it on direct appeal. As the State points out, such arguments had been held proper by both this Court and the Eleventh Circuit. See State's Response at 31 (citing Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1986) and Brooks v. Kemp, 762 F.2d 1383 (11th Cir.), vacated on other grounds, 478 U.S. 1016 (1985)).

After the first Rule 3.850 motion was filed in this case, however, the Supreme Court decided Booth v. Maryland, 55 U.S.L.W. 4836 (U.S. June 15, 1987). Booth forbids the introduction of evidence of and argument concerning "the emotional impact of the crimes on the family" in a capital sentencing proceeding. Booth thus represents a clear and fundamental change in the law. An argument previously permitted in this State now is impermissible. While this Court

generally has held that Booth claims must have been raised during the trial, see, e.g., Grossman v. State, 525 So.2d 833 (Fla. 1988), that rule obviously is inapplicable here, because the very type of argument at issue -- the effect on victims' families at holiday time -- previously was upheld. For this reason, Mr. Daugherty should be granted relief pursuant to Rule 3.850. See Tafero v. State, 459 So.2d 1034 (Fla. 1984); Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980). Moreover, the fact that Mr. Daugherty did not object to the prosecutor's arguments or challenge them prior to this motion should not bar his claim because Booth was decided after his trial, sentencing, direct appeal, as well as the filing of his first Rule 3.850 motion. Objection to this argument on federal constitutional grounds at trial was not possible because the principle established in Booth did not exist.

CONCLUSION

Mr. Daugherty has demonstrated that his claims have sufficient merit that he should be granted a stay of execution in order to permit full briefing and argument.

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