SUPREME COURT OF FLORIDA

NO. 67,450

JEFFERY JOSEPH DAUGHERTY,

Defendant-Appellant,

v.

STATE OF FLORIDA,

Plaintiff-Appellee.

On Appeal From The Circuit Court
Of The Eighteenth Judicial Circuit
In And For Brevard County

REPLY BRIEF FOR APPELLANT

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I. THE STATE HAS FAILED TO REFUTE APPELLANT'S SHOWING THAT THE FAILURE TO OBJECT TO THE JURY INSTRUCTION WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Daugherty's initial brief demonstrates that trial counsel's failure to object to the jury instruction defining the "heinous, atrocious or cruel" aggravating circumstance, Fla. Stat. § 921.141(5)(h), satisfied both the "performance" and "prejudice" tests established in Strickland v. Washington, 466 U.S. 668 (1984). (Appellant's Initial Brief at 10-21.) That failure, therefore, constituted ineffective assistance of counsel. In response, the State claims that the instruction was a correct statement of the law and that, in any event, the result in this case would not have been different even if a proper instruction had been given. Neither argument withstands analysis.

The State's argument that the instruction in this case "is virtually a verbatim recitation" of the interpretation of "heinous, atrocious or cruel" announced by this Court in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), (See Appellee's Brief at 21) is simply wrong. The instruction given in this case omits the following critical language from Dixon:

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

283 So.2d at 9. Significantly, when the Supreme Court upheld the facial validity of the "heinous, atrocious or cruel" language, it did not rely upon the imprecise and inflammatory terms used in the jury instruction (e.g., "extremely wicked," "shockingly evil," "foul"); instead the Court found the language survived a constitutional challenge because this Court had limited the aggravating circumstance only to "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Proffitt v. Florida, 428 U.S. 242, 255 (1976), quoting State v. Dixon, supra, 283 So.2d at 9. The instruction in this case, however, did not inform the jury of that important limitation. Like the instruction in Godfrey v.

Georgia, 446 U.S. 420 (1980), it provided no guidance to the jury concerning the meaning of "heinous, atrocious or cruel." See 446 U.S. at 429. As a result, the State's argument that the instruction was proper must fail. */

The State's alternative argument that the failure to object was not prejudicial also is flawed. The State contends that the jury could have returned a recommendation of death even if the "heinous, atrocious or cruel" instruction had not been given, because the evidence supported the existence of two other aggravating circumstances. (Appellee's Brief at 21.) The State, however, has no response to the argument in Mr. Daugherty's initial brief that it is impossible to determine what aggravating circumstances were relied upon by the jury and what influence the erroneous instruction had upon their deliberations. (See Appellant's Initial Brief at 18-19.)

This Court has long followed the rule that an erroneous jury instruction is presumptively prejudicial and that a judgment must be reversed whenever an erroneous

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*/ The State makes the puzzling argument that Godfrey is inapplicable because the Supreme Court did not invalidate the language of the Georgia statute at issue in that case. (Appellee's Brief at 21). Mr. Daugherty's initial brief, however, never argued that the language of either the Georgia or Florida statutes is invalid on its face. This case, like Godfrey, involves a jury instruction that incorrectly interpreted a facially valid statute.

instruction is given, unless it affirmatively and clearly appears that the presumptive harm caused by the instruction has been entirely removed. See, e.g., Bibb v. United Grocery Co., 73 Fla. 589, 593, 74 So. 880, 881 (1917); Pensacola Electric Co. v. Bissett, 59 Fla. 360, 370, 52 So. 367, 370 (1910). See also Henning v. Thompson, 45 So.2d 755, 756 (Fla. 1950) (noting the "necessarily strict rule that error in a charge must be presumed to have been acted upon by a jury.") */ Indeed, due process requires reversal in a criminal case if a jury instruction permits the jury to convict on any of several grounds, one of which is constitutionally invalid. Stromberg v. California, 283 U.S. 359, 368 (1931); Adams v. Wainwright, 764 F.2d 1356, 1361-62 (11th Cir. 1985), cert. denied, 106 S.Ct. 834 (1986). Because the imposition of the death penalty requires a careful balancing of aggravating and mitigating factors, the presumption that the jury relied upon the erroneous "heinous, atrocious or cruel" instruction in this case cannot be overcome. There is no way to determine whether the jury gave controlling weight to an instruction that failed to narrow its discretion in a manner consistent with

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*/ The rule that an erroneous jury instruction is presumptively harmful was announced by this Court in ordinary civil cases, such as those cited above. That presumption must apply with equal, if not greater, force in this case, which is literally a matter of life and death.

both Florida law and the United States Constitution. */ This is sufficient to "undermine confidence" in the jury's verdict, and, therefore, to demonstrate that the failure to object to the instruction was prejudicial to Mr. Daugherty. Strickland v. Washington, supra, 466 U.S. at 694.

The State also contends that the judge's power to override a jury's recommendation of life imprisonment eliminates all possible prejudice from the erroneous jury instruction. (Appellee's Brief at 23.) That argument ignores the rule in Tedder v. State, 322 So.2d 908 (Fla. 1975) that the trial judge may override a jury's recommendation of life imprisonment only if "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." Id. at 910. Under the Tedder rule, the jury's recommendation is critical because a recommendation of life imprisonment significantly limits the judge's power to impose a death sentence. For

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*/ The State suggests that the erroneous instruction was not prejudicial because the "evidence regarding heinous, atrocious or cruel was not as extensive" as the evidence relevant to other aggravating circumstances. (Appellee's Brief at 22). The jury, however, never was told which evidence was relevant to a particular aggravating circumstance. The "heinous, atrocious or cruel" instruction is invalid precisely because it left the jury free to decide that almost any aspect of the crime was "shockingly evil" or "outrageously wicked." It is impossible, therefore, to tell what evidence the jury thought relevant to the "heinous, atrocious or cruel" aggravating circumstance.

that reason, the Eleventh Circuit has concluded: "There may be a case in which a substantively incorrect instruction will mislead the jury to such an extent that the parameters created by the jury's verdict are so off their proper mark that the instruction alone justifies reversal." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985), cert. denied, 106 S.Ct. 834 (1986). This is such a case. Like the instruction in Godfrey, the instruction in this case permitted the jury to impose the death penalty based upon a belief that all murders are "heinous, atrocious or cruel." Because the State has failed to overcome the presumption that the jury relied upon that instruction, the death sentence cannot stand.

II. NEITHER THE FACTS NOR THE LAW SUPPORT THE STATE'S ARGUMENT THAT TRIAL COUNSEL'S FAILURE TO OBTAIN A PSYCHIATRIC EVALUATION WAS PROPER.

The State concedes, as it must, that this Court must review the Circuit Court's factual findings in support of its ruling that Mr. Kutsche's failure to arrange a psychiatric or psychological evaluation of Mr. Daugherty constituted ineffective assistance of counsel. (Appellee's Brief at 13, noting that the trial court's findings must be overturned if clearly erroneous.) The State, however, has failed to refute Mr. Daugherty's argument that those factual findings are without any credible support in the record.

Mr. Daugherty's initial brief demonstrates that Mr. Kutsche's testimony at the Rule 3.850 hearing, the sole source for the Circuit Court's findings, is insufficient to support those findings because Mr. Kutsche's recollection was hopelessly vague and directly contradicted the record of the sentencing hearing. */ (See Appellant's Initial Brief at 22-24.) The State responds that "Kutsche denied that his memory was totally vague," (Appellee's Brief at 13). The portion of the transcript cited in support of that assertion, however, shows the unreliability of his testimony:

> Q. Is it a fair statement to say that your entire recollection of the Defense effort that you made on Jeff's behalf is a vague recollection?
>
> A. Not entirely, but a great deal of it is.

R. 355, Appellant's Appendix at 78 (emphasis added). Indeed, Mr. Kutsche conceded that he had only a "vague recollection" that the psychiatrists he supposedly consulted had rendered unfavorable opinions. (R. 362, Appellant's Appendix at 85).

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*/ The State contends Mr. Turner conceded that Mr. Daugherty had been examined previously by psychiatrists in other states. (Brief for Appellee at 5.) Mr. Turner made no such concession. He simply testified that Mr. Kutsche had made such a claim when they spoke immediately before the hearing. (R. 295.) Mr. Turner, however, did not know whether Mr. Kutsche's statement was true. (R. 296.)

The State also alleges that Mr. Daugherty's initial brief misrepresents the record in arguing that Mr. Kutsche's vague recollections are inconsistent with the transcript of the sentencing hearing. (Appellee's Brief at 13-14.) On the contrary, it is the State that has misrepresented the record. The very page of the record cited by the State contains Mr. Kutsche's testimony that the only evidence of Mr. Daugherty's other crimes presented in the State's direct case consisted of exemplified copies of the judgments of conviction, and that the State produced "very minimal" rebuttal evidence concerning the details of those crimes in an effort to contradict Mr. Daugherty's testimony concerning them. (R. 346, Appellant's Appendix at 69.) As noted in Mr. Daugherty's initial brief, however, most of the testimony during the State's direct case concerned the details of those other crimes. (Appellant's Initial Brief at 23. */ Mr. Kutche's contrary testimony, therefore, is clear proof that his self-described vague recollections are unreliable.

Even assuming that Mr. Kutsche's recollection was totally accurate, however, Mr. Daugherty's initial brief demonstrates that Mr. Kutsche's stated reason for not

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*/ Six of the State's nine witnesses at the sentencing hearing testified about those crimes. Trial Transcript at 97-158.

arranging a psychiatric or psycholol gical evaluation makes no sense. (Appellant's Initial Brief at 24-25.) The State has not responded to that argument. It is now established that courts need not defer to an attorney's implausible explanation for his conduct when that conduct is challenged as ineffective assistance. See Kimmelman v. Morrison, 54 U.S.L.W. 4789, 4795 (U.S., June 26, 1985). Therefore, this Court should not accept Mr. Kutsche's explanation. Instead, it should hold that the State has failed to produce any evidence that supports a rational explanation for Mr. Kutsche's failure to arrange a professional evaluation of Mr. Daugherty.

Contrary to the State's argument, (see Appellee's Brief at 14-15), the failure to investigate the possibility of expert testimony relevant to Mr. Daugherty's mental and emotional condition is not an acceptable tactical choice. Rather, it constitutes ineffective assistance of counsel. Holmes v. State, 429 So.2d 297, 300-01 (1983). See Valle v. State, 394 So.2d 1004, 1008 (Fla. 1981) (recognizing the need for counsel to investigate mitigating circumstances such as extreme mental or emotional disturbance and impairment of capacity); see also Profitt v. Wainwright, 685 F.2d 1227, 1249 n.34 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983). No less than the attorney who contemplates an insanity defense at trial, the capital sentencing attorney who seeks to establish mitigating circumstances based on

psychological and physiological influences has a duty to obtain professional assistance. Holmes, 429 So.2d at 300-01; Proffitt, 685 F.2d at 1249 n.34. See United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976). */ The record reveals no tactical advantage achieved by counsel's failure to do so in this case.

The State also has failed to rebut Mr. Daugherty's showing that the failure to obtain an evaluation was prejudicial, i.e., that there is a "reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, 466 U.S. at 694. The state denigrates the testimony of Dr. Weitz as mere "sideshow evidence," (Brief for Appellee at 17). Apart from its disparaging characterization, however, the State completely fails to

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*/ At the time of the trial in this case, every decision of this Court overturning a trial court's failure to find mitigating circumstances (b) (extreme mental or emotional disturbance) and (f) (inability to appreciate criminality or conform conduct) involved a record containing medical or psychiatric testimony in support of such circumstances. See Mines v. State, 390 So.2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916 (1981); Huckaby v. State, 343 So.2d 29, 33 (Fla.), cert. denied, 434 U.S. 920 (1977); Jones v. State, 332 So.2d 615 (Fla. 1976). Reported decisions available to trial counsel also highlighted the importance of psychiatric evidence on the issues of domination and age. See Witt v. State, 342 So.2d 497, 500-01 (Fla.), cert. denied, 434 U.S. 935 (1977); Meeks v. State, 339 So.2d 186, 191 (Fla. 1976), cert. denied, 439 U.S. 991 (1978); cf. Hargrave v. State, 366 So.2d 1, 6 (Fla. 1978), cert. denied, 444 U.S. 919 (1979).

refute Mr. Daugherty's showing that Dr. Weitz's testimony presented substantial grounds for finding at least four statutory mitigating circumstances -- substantial domination, diminished capacity, severe mental and emotional disturbance, and age. */ (Appellant's Initial Brief at 27-29.) In particular, Dr. Weitz explained that the lengthy statement quoted in the State's brief (pp. 17-18) was entirely consistent with his findings. See R. 327, Appellant's Appendix at 50: "[T]he part where [Mr. Daugherty says] 'I felt we both had a finger on the trigger,' . . . I pretty much used that statement before without knowing what was in that summary. I believe that in essence, it really corroborates what my findings have indicated." **/

The State also contends that testimony from a professional such as Dr. Weitz would have been merely cumulative. (Appellee's Brief at 19.) As noted above, however, courts consistently have recognized the critical role of expert testimony in establishing the very mitigating

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*/ The State erroneously asserts that Dr. Weitz's testimony was limited to the issue of substantial domination. Appellee's Brief at 16.

**/ The State contends that Bonnie Heath "did not even suggest that the appellant murder Lavonne Sailer." Appellee's Brief at 17. The evidence, however, is to the contrary. See Trial Transcript at 167. The lengthy statement quoted on page 17-18 of the State's brief constitutes only selective excerpts from a statement given by Mr. Daugherty that was read into the record by the State's Attorney at the Rule 3.850 hearing. See R. 323-26.

circumstances that Mr. Kutsche sought to establish here. For example, the sentencing judge did not find the mitigating circumstances of substantial domination by Bonnie Heath because Ms. Heath was a small woman. (R. 149.) Dr. Weitz explained in detail how Ms. Heath was able to exert her dominance, notwithstanding her small size. (R. 310-311.) Far from being cumulative, testimony from a psychiatrist or psychologist was essential in providing both the jury and the judge with the information necessary for a proper decision under the law. The absence of such testimony is "sufficient to undermine confidence in the outcome" of this case. Strickland v. Washington, supra, 466 U.S. at 694. Mr. Kutsche's failure to obtain such testimony, therefore, requires reversal of the death sentence.

III. MR. DAUGHERTY'S CLAIM OF ARBITRARY PROSECUTORIAL DISCRETION IS PROPERLY BEFORE THIS COURT AND IS MERITORIOUS.

Mr. Daugherty's Rule 3.850 motion asserted that the decision to seek the death penalty in this case was an arbitrary exercise of prosecutorial discretion in violation of the Eighth Amendment. In the Circuit Court, the State never argued that this claim was not cognizable in a Rule 3.850 proceeding. Instead, the State was satisfied to have the Circuit Court rule on the merits of this claim. Having obtained the ruling it sought, the State should not

now be permitted to argue that the claim was not properly before the Circuit Court. */

In any event, the State's argument is meritless. In Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984), this Court distinguished between "ordinary procedural errors," which are not grounds for relief in a Rule 3.850 proceeding, and errors that call into question "the fundamental fairness of the trial, the reliability of the determination of guilt, or the propriety of the sentence of death," which may be redressed under Rule 3.850. Id. at 365. Mr. Daugherty's claim of arbitrary prosecutorial discretion challenges the fundamental fairness of the sentencing hearing and the propriety of the death sentence. Moreover, the reasons for the prosecutor's decision to seek the death penalty are not relevant to the balancing of aggravating and mitigating circumstances required by Fla. Stat. § 921.41. Evidence concerning the prosecutor's motivation, therefore, would not have been admissible at the sentencing hearing in this case. **/ Because evidence

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*/ For the same reason, this Court should reject the State's argument that Mr. Daugherty's claims concerning statutory and non-statutory mitigating circumstances are not cognizable in a Rule 3.850 hearing.

**/ The State effectively concedes this point by contending that the Brevard County prosecutors who prosecuted Mr. Daugherty are necessary witnesses for this claim. Of course, it would have been improper for them to testify at a hearing at which they were acting as counsel. Fla. Bar Code Prof. Resp., D.R. 5-102.

concerning the reasons for seeking the death penalty in this case was inadmissible at the sentencing hearing, Mr. Daugherty's claim of arbitrary prosecutorial discretion could not have been asserted on appeal. Therefore, it was properly asserted in his Rule 3.850 petition.

On this point, this case is indistinguishable from Meeks v. State, 382 So.2d 673 (Fla. 1980), which held that an allegation that a pattern and practice of racial discrimination exists in capital sentencing is cognizable in a Rule 3.850 proceeding. Like the claim in Meeks, Mr. Daugherty's claim involves consideration of the records of other capital cases. Such a claim, therefore, is appropriate for a Rule 3.850 proceeding. */

On the merits of this claim, the State ignores the evidence summarized in Mr. Daugherty's brief demonstrating no difference between the Flagler and Volusia County crimes, for which a life sentence was imposed, and the Brevard County crime at issue here. (See Appellant's Initial Brief at 32-33.) That evidence demonstrates a prima facie case of arbitrary prosecutorial action. By failing to present any explanation for the disparate treatment, the State failed to rebut that prima facie

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*/ Groover v. State, 489 So.2d 15 (1986), is not to the contrary. The claim in Groover was that the prosecutor sought the death penalty in retaliation for the defendant's withdrawal from a plea agreement. Mr. Daugherty's claim is that the Brevard County prosecutors were arbitrary, not vindictive. Moreover, the claim in Groover did not require reference to the record of any other case.

case. The record establishes, therefore, that the death sentence in this case was unconstitutional. */ Gregg v. Georgia, 428 U.S. 153, 224-25 (1976) (opinion of White, J.); Proffitt v. Florida, 428 U.S. 242, 261 (opinion of White, J.).

CONCLUSION

For the reasons stated herein, as well as those in Mr. Daugherty's Initial Brief, the Order of the Circuit Court should be reversed, and the case remanded to the Circuit Court with instructions to vacate the death sentence.

Respectfully submitted,

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*/ The State's claim that the unavailability of the only eyewitness to the Flagler County murder is sufficient to explain the disparate treatement (Appellee's Brief at 25-26) is unpersuasive for two reasons. First, the State provides no explanation for the failure to seek the death penalty in the Volusia County case. Second, there were no eyewitnesses in this case, yet the Brevard County prosecutor was not deterred from seeking the death penalty.

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached brief to be served this 25th day of August, 1986, by first class mail on the following:

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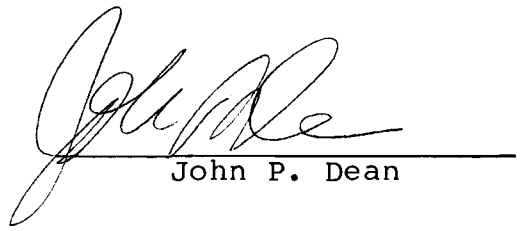

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