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SID J. WHITE

IN THE SUPREME COURT OF FLORIDA OCT 31 1988

CLERK, SUPREME COURT
By
Deputy Clerk

JEFFERY JOSEPH DAUGHERTY,

Appellant/Petitioner

vs.

STATE OF FLORIDA,

Appellee/Respondent.
_____/

CASE NO. _____

EMERGENCY: DEATH WARRANT ACTIVE BEGINNING AT 12:00 NOON ON NOVEMBER 3, 1988 AND ENDING AT 12:00 NOON ON NOVEMBER 10, 1988. EXECUTION SCHEDULED FOR 7:00 A.M. ON FRIDAY, NOVEMBER 4, 1988.

RESPONSE TO APPLICATION FOR STAY OF EXECUTION AND APPEAL FROM SUMMARY DENIAL OF POST-CONVICTION MOTION

COMES NOW the State of Florida and hereby files this response to Daugherty's application for stay of execution, and the appeal from the summary denial of Daugherty's second motion for post-conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850, and respectfully requests that all relief be denied and the circuit court's order be affirmed in all respects.

## I. PRELIMINARY STATEMENT

This pleading largely represents a "re-working" of the state's response filed in the circuit court. This pleading, however, contains some discussion of the circuit court's order of October 27, 1988, denying relief. Due to the exigencies of time, the state, with this court's leave, files the instant response in lieu of a formal answer brief.

## II. STATEMENT OF FACTS

### A. THE INSTANT HOMICIDE.

On March 1, 1976, at twilight, Lavonne Patricia Sailer stood on U.S. 1 in Melbourne, Florida in the drizzling rain, hitchhiking (R 44, 234).[1] Ms. Sailer carried two green suitcases with her (R 34, 46). She was from Tacoma, Washington.

Jeffery Daugherty, his uncle Raymond Daugherty and Bonnie Jean Heath passed Ms. Sailer as she stood hitchhiking (R 44). Jeffery was driving a 1964

[1] (R) refers to the record on appeal from the direct appeal.

white Thunderbird with Michigan license plates (R 43). He asked Raymond if he wanted a traveling companion (R 43). He dropped off Raymond at the Hurricane Bar, and said that he and Bonnie would ask the hitchhiker if she wanted to travel with them (R 45).

Approximately one hour later, Jeffery and Bonnie returned for Raymond (R 46). Although the hitchhiker was not in the car, Raymond noticed a woman's wristwatch on the dashboard that had not been there before, and also saw Bonnie in the back seat rifling through the two green suitcases that the hitchhiker had carried (R 46). Raymond asked what had become of the woman and Jeffery replied, "That will be one hitchhiker that won't make it home" (R 47). He said that they had taken the woman to a remote area, robbed her of $15 or $20 she carried in her shoe, told her to lie down, and that then he shot her in the head (R 47-48). The gun was a .22 caliber handgun that Jeffery kept in his possession (R 49).

The defendant testified on his own behalf, and admitted murdering Ms. Sailer (R 167). He said that Bonnie had urged him to shoot Ms. Sailer again after the first shots did not immediately kill her (R 167-168). He also added the fact that after the murder, Bonnie changed into a red satin pants suit she found in Ms. Sailer's belongings (R 167). On cross-examination, Daugherty admitted that he committed this and other murders for the money received during the robberies (R 231). The total proceeds from the twenty day robbery spree amounted to over eight hundred dollars (R 201).

In his confession given August 5, 1980, to investigators Wayne Porter and Robert Schmader, Daugherty added additional facts. This tape was admitted during the sentencing proceeding as state's exhibit 16 (R 43). In this statement, Daugherty said after picking up Ms. Sailer, he pulled over to the side of the road to look at a map. He pulled out a pistol and said, "OK this is it as far as you go." He ordered Ms. Sailer out of the car at gunpoint and forced her to walk some distance down a dirt road. Daugherty asked her if she had any money, she took one shoe off and handed him either a ten or twenty dollar bill. Ms. Sailer looked back and forth between Daugherty and Heath, and she looked "scared to death." Daugherty said that Ms. Sailer stumbled and lost her balance, and when she fell, he shot her several times in the head. He said he shot her because "I had it in my mind, you know, no witnesses. A dead person can tell no tales."

The Brevard County Medical Examiner, Dr. Nanooch Dunn, testified that she

performed the autopsy of Lavonne P. Sailer, a 48 year old white female, on March 2, 1976 (R 6-9). Dr. Dunn went to the scene of the crime to view the body upon its discovery. She described the area as secluded, and down a dirt road near Interstate 95 (R 10-11). The body was lying face down, fully clothed (R 10). Ms. Sailer was pronounced dead at 9:55 a.m. (R 11). Dr. Dunn opined that she had been dead for at least twelve hours (R 12).

Ms. Sailer was shot five times in the right side of her head. Two bullets entered the right temple in front of the ear, three more bullets entered behind the right ear (R 13). All bullets passed through the brain, were recovered during the autopsy, and introduced into evidence (R 26-27). Dr. Dunn had no opinion on the order the shots were fired (R 16). Only one bullet could have caused instant death, that which entered the brain stem (R 29). Powder burns around the wounds indicated the muzzle of the gun was between a few inches to no more than one foot from her head when the wounds were inflicted.

This murder was committed during the course of a multi-state crime spree over several weeks. The decision of the Supreme Court of Florida relates these facts as follows:

> Daugherty, along with his girlfriend Bonnie Heath and his uncle, left Michigan in January, 1976 and traveled to Florida purportedly to look for jobs and to visit Heath's children. On February 23, 1976, he robbed an Easy Way food store and shot and killed Carmen Abrams and seriously wounded her husband. Continuing on a killing and robbing spree, on March 1, 1976, Daugherty and Heath picked up Lavonne Sailer who was hitchhiking in Melbourne, Florida. They took her to an isolated area near the Brevard County dump where Daugherty told her to get out of the car and robbed her. He then shot her five times at close range with a .22 caliber pistol. They then returned to the nearby bar to pick up Daugherty's uncle. Thereafter for a twenty-day period, Daugherty, along with Heath, continued on a course of robberies and murders, several of which he was convicted and for which he was sentenced prior to being convicted and sentenced for the Sailer murder.

Daugherty v. State, 419 So.2d 1067, 1068 (Fla. 1982).

B. DAUGHERTY'S PRIOR CONVICTIONS.

At the sentencing proceeding, the state adduced evidence as to Daugherty's prior convictions. On July 31, 1980, Daugherty entered a plea of guilty in Flagler County, Florida, to the first-degree murder of Carmen Abrams, and on that date received a life sentence, consecutive with all previous sentences. Five days after murdering Ms. Abrams, Daugherty killed

Ms. Sailer at about 8 p.m. on March 1, 1976. Later that same night, Daugherty committed another murder in Volusia County, twelve miles north of the Brevard County line (R 98). At about 9:30 p.m., Daugherty entered Betty's Pizza Parlor and stabbed Betty Campbell, the owner, to death. He described his actions during testimony as follows:

> I went in there to rob her because there was very little money off of Miss Sailer to proceed on our travels to look for work, and that's when I robbed Betty's Pizza. . .

(R 169).

He told Ms. Campbell to give him all the money in the cash register, and she complied (R 169). Then, according to Daugherty, Bonnie Heath asked her if she had money in her purse. When Ms. Campbell reached in her purse, Daugherty "heard a little clicking noise" and saw a .25 caliber gun in her hand (R 169). Daugherty knocked her out, and picked up the .25 caliber weapon (which was used in later homicides). He claims he then stabbed Ms. Campbell at Heath's instance. When Heath was unsatisfied that the wounds were fatal, she too allegedly stabbed the victim with a butcher knife found nearby (R 170). This is the only murder in which Heath actively participated (R 203).

Daugherty entered a plea of guilty to this first-degree murder on July 14, 1980, and was sentenced that date to life imprisonment.

Three days later, on March 4, 1976, the trio was in Pennsylvania (R 174). Two separate offenses were committed on March 4, 1976, in Altoona, Blair County, Pennsylvania. Upon arrival in Altoona, Daugherty decided to rob a music store because "we were again almost broke, no money, and so my own experience with music shops I know that music stores generally have a good sum of money on the premises and I thought that I would rob the music (store) . . ." (R 175). This robbery netted between four and five hundred dollars (R 201). Daugherty severely beat the seventy-one year old clerk, Ruth Montgomery, such that she was hospitalized for five days (R 133). Next, Daugherty robbed Mary Mock at Carrie's Cafe and beat her so severely that she was hospitalized for three weeks, but did not kill her (R 134). Daugherty did not recall this incident. These two crime scenes are about ten minutes apart by car (R 134).

On June 28, 1977, Daugherty was found guilty after a jury trial of robbery, aggravated assault and a firearms charge for the offenses involving Mary Mock. On January 4, 1980, he was sentenced to ten to twenty years incarceration. On April 7, 1977, a jury found Daugherty guilty of several

offenses emanating from his attack upon Ruth Montgomery: aggravated assault, burglary, robbery, and a firearms charge. The sentence imposed was eight to sixteen years incarceration plus a $5,000 fine.

Between March 5 and 9, 1976, Daugherty and Heath went to Michigan to renew their expired license plates (R 177). Returning to the Altoona area, Daugherty decided "we were once again low on money" (R 178). On March 9, 1976, Daugherty robbed Jack's Quick Mart, and murdered Elizabeth Shank, the cashier. In this robbery he received about $200 and took her handbag (R 178). During direct examination, Daugherty concluded ". . . so again it was a senseless murder on my part " (R 178). Ms. Shank was shot six times in the head with the .25 caliber gun stolen from Betty Campbell (R 115). Daugherty told Pennsylvania State Trooper Barry Bidelspach that after getting all of the money out of the cash register, he walked around the counter, got her handbag, and shot her six times in the head (R 127-128). He said he shot this and every victim many times to insure death (R 128).

On March 11, 1976, Daugherty robbed and murdered eighteen year old George Karnes by shooting him five times, once with the barrel of the gun stuck in his nose (R 149). Karnes was working as a gas station attendant at a 76 Station in Duncansville, Blair County, Pennsylvania. The jury found Daugherty guilty on January 31, 1977, and he was sentenced to death. However, the Supreme Court of Pennsylvania, on March 13, 1981, reversed and remanded for a new trial due to extensive pretrial publicity attendant to this and the Shank trial. Commonwealth v. Daugherty, 426 A.2d 104 (Pa. 1981).

The next day, March 12, 1976, Daugherty and Heath went to Virginia. At about 6:30 p.m., Daugherty entered Whorley's Market in Dillwyn, Virginia, to rob the proprietor, Doris Whorley (R 189). When Daugherty pulled the gun, the woman fainted, but he thought she had had a heart attack, so he did not shoot her (R 160). When he returned to the car, Heath asked why she hadn't heard gunshots, and Daugherty laughed and said she was already dead from a heart attack (R 160). Less than ten minutes later, they were arrested by the Virginia State Police (R 160, 185). The arrest of Daugherty and Heath on March 12, 1976, ended their multi-state crime wave. A letter Daugherty wrote while in jail was introduced into evidence, where he admitted "I've killed seven people and robbed about twenty places all across the United States . . . anyhow they can't prove nothing anywhere except Pennsylvania and Florida" (R 352).

C. EVIDENCE PRESENTED IN MITIGATION.

Additionally, at the sentencing hearing, much testimony had been adduced in an attempt to establish statutory and nonstatutory mitigating factors. In the Statement of the Facts in appellant's initial brief, filed September 14, 1981, these facts were related as follows:

> Jeff was leaving a Michigan childhood and memories of a father and a grandfather who were alcoholics; (R-66) a mother and father who abandoned him and ignored him from the age of four or five years; (R-64) a father who used to kick him in the head and take his fist and knock him out of his highchair; (R-62;63,78) of a father who was sent to prison for abusing his (stepchild).
>
> Ever since Jeff had been severely injured when his bike was struck by an auto when he was eight years old, he had experienced a continuous and often devastating headache. (R-61,66) Treatment had never been provided for him. (R-66) Jeff resorted eventually to taking methaqualudes to dull the effect of the headaches and obtained a large quantity before leaving Michigan for Florida. (R-66,73,189)
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> * * * *
>
> During the sentencing phase at the trial of the instant case, Jeff related his history of a broken homelife with no parental love or influence from his mother or abusive and alcoholic father, his father's broken promises to visit him (R-163,164), his father's abuse (R-190,191), the continual uprooting and changing of schools he experienced until he finally left school in the tenth grade. (R-191,195) Jeff told of his meeting with and the development of his relationship with Bonnie Heath (R-192,193,194). . .
>
> Jeff told of his remorse for his crimes (R-195,262,263) leading up to an attempt to take his own life while in prison in 1977. (R-196)
>
> Father Albert J. Anselmi, the Pennsylvania State Prison Chaplain and Catholic priest, confirmed Jeff's suicide attempt and subsequent conversion to Catholicism, Baptism and Confirmation by the Catholic Bishop. (R-277,278)

On cross-examination, the state elicited the fact that Daugherty's grandmother, who raised him from age two, was kind and loving towards him (R 79). The remorse that petitioner expressed arose long after the deeds described above and only after his jailhouse conversion to Catholicism, and the evidence offered to support this was his cooperation with law enforcement officers by pleading guilty, but again, only after two unsuccessful trials in Pennsylvania.

As to his relationship with Bonnie Heath, Daugherty described her on

direct examination as a mother, friend and lover, and stated that she had more influence over him than he cared to admit (R 194). However, Heath was physically unimposing, less than five feet tall and one hundred ten pounds. (R 218). Daugherty was one foot taller and seventy pounds heavier than Heath (R 218). Moreover, Daugherty was active in the martial arts, and made the statement that his hands and feet were lethal weapons (R 218-219). He described himself as a tiger (R 223). He admitted that Bonnie never instructed him to do anything (R 225). Daugherty was unable to describe with specificity exactly what influence she exerted, and would say only that he felt she may have been a factor in his commission of the murders (R 225, 229).

Additional facts from the record were provided in the state's answer brief regarding Daugherty's headaches. After the bicycle accident, he was kept in the hospital only twenty-four hours for observation after the accident to see if he had a concussion (R 76-77). He was seen by school doctors for periodic check-ups, and could read, write, drive, and understand everything around him (R 77). Raymond testified that he observed no behavior consistent with a headache on the day Lavonne Sailer was murdered (R 70-73, 80). Daugherty does not drink alcohol, according to his uncle (R 49). Daugherty's own testimony concerning the use of drugs was contradictory (R 197, 199, 205). Most importantly, Daugherty himself testified that his headaches were unrelated to the murders (R 203, 228). He neither claimed to have a headache the day of the Sailer murder, nor did he state he had taken any drugs on that date.

## III. PROCEDURAL HISTORY

Daugherty is in the lawful custody of the State of Florida pursuant to a valid judgment and sentence imposed by the Circuit Court of the Eighteenth Judicial Circuit, in and for Brevard County, Florida.

On November 18, 1980, Daugherty pled guilty to the first- degree murder, robbery and kidnapping of Lavonne Patricia Sailer. Before accepting the guilty plea, the trial judge conducted a full colloquy explaining the rights waived by a plea and assuring that the plea was made voluntarily, knowingly, and intelligently. Daugherty provided an in-court confession as part of the factual basis for the plea. This conviction remains unchallenged, as do Daugherty's convictions for robbery and kidnapping.

Immediately after the guilty plea was entered, an advisory jury was

convened pursuant to section 921.141, Florida Statutes (1979). The jury heard evidence in aggravation and mitigation from several witnesses over three days. Daugherty's taped confession given August 5, 1980, to investigators Wayne Porter and Robert Schmader was introduced into evidence and played for the jury. On November 20, 1980, the jury returned a unanimous recommendation of death.

On April 27, 1981, the trial court sentenced Daugherty to death. The written findings in support of the sentence were filed that date. The court found two aggravating circumstances, that Daugherty had prior convictions for violent felonies and that the murder was committed for pecuniary gain. §§ 921.141(5)(b) & (f), Fla. Stat. (1975). No statutory or nonstatutory mitigating factors were found.

Notice of Appeal was timely filed on May 28, 1981. The initial brief was filed on September 16, 1981. Two points were raised on appeal concerning the sentence: that error was committed by admitting into evidence details of felonies as prior record which occurred subsequent to the offense, and that the court failed to find certain statutory and nonstatutory mitigating factors. The state's answer brief was filed on October 30, 1981.

On September 14, 1982, the Supreme Court of Florida unanimously affirmed the judgment and sentence. Daugherty v. State, 419 So.2d 1067 (Fla. 1982). In its decision, the court rejected each of Daugherty's claims, specifically finding that the sentencing court had considered all the evidence presented in mitigation. The court relied upon a long line of cases and held that the trial court did not err in allowing the state to introduce evidence of prior convictions. Daugherty conceded that the second aggravating circumstance was properly found, and that he committed the murder for pecuniary gain. The court expressly noted that Daugherty had not challenged his plea of guilty and that the record would not support any challenge as to voluntariness; the court further noted that, at oral argument, counsel had indicated that there was no question as to the plea's voluntariness. As of the composition of this pleading, no attack has ever been made in state court on the plea, underlying confession, or the conviction; the sentence of death has been the sole subject of state litigation.

Following the rendition of this opinion, new counsel for Daugherty filed a request for additional time to file a motion for rehearing in the Supreme Court of Florida. In this motion for an extension of time, counsel stated

they wished to raise an issue relating to the reversal of one of the seven prior convictions used in aggravation, and also brought to the court's attention for the first time the fact that portions of the record were not before the court. On September 30, 1982, the court denied the request for additional time. No motion for rehearing was ever filed or tendered to the court.

On December 19, 1982, Daugherty filed the first of four petitions for writ of certiorari in the United States Supreme Court. Two issues were raised in the petition as reasons why the Court should grant review: that the Supreme Court of Florida reviewed the appeal without a complete record and that his death sentence was invalidated because one of seven convictions used in aggravation had been reversed. Certiorari was denied on February 23, 1983. Daugherty v. Florida, 459 U.S. 1228 (1983).

Next, Daugherty filed a petition for writ of habeas corpus in the Supreme Court of Florida, contending that the court had conducted its review without a complete record, had failed to conduct a proportionality review, and had failed to reweigh the evidence in support of the sentence of death. The petition did not attack the effectiveness of counsel on direct appeal, even though this is the appropriate vehicle to raise such a claim in Florida. The petition was summarily denied on November 15, 1982. Daugherty v. Wainwright, 443 So.2d 979 (Fla. 1983). Again Daugherty unsuccessfully sought a petition for writ of certiorari in the Supreme Court of the United States. Daugherty v. Wainwright, 466 U.S. 945 (1984).

On March 15, 1985, Daugherty filed a motion for post-conviction relief in the Circuit Court for Brevard County (T 153-197).[2] The court conducted an evidentiary hearing on May 29, 1985.

The petition alleged several grounds for relief: 1) ineffective assistance of trial counsel for: a) failure to present expert medical or psychiatric testimony, and b) failure to object to the standard jury instruction regarding the aggravating factor of heinous, atrocious or cruel; 2) failure of the sentencing court to consider nonstatutory mitigating factors; 3) failure of the sentencing court to find the mitigating factor of substantial domination; 4) failure of the sentencing court to find age as a

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[2] (T) refers to the record on appeal of the collateral proceedings.

mitigating factor; and 5) that the state's decision to seek the death penalty was an arbitrary exercise of prosecutorial discretion. At the May 29, 1985, hearing on the motion, three witnesses testified, including Mr. Arthur Kutsche, who represented Daugherty at trial and on appeal. On July 3, 1985, Circuit Court Judge John Antoon III entered an order denying the motion for post-conviction relief.

Daugherty appealed such ruling to the Supreme Court of Florida, which affirmed on April 9, 1987 in Daugherty v. State, 505 So.2d 1323 (Fla. 1987). In such decision, the Supreme Court of Florida expressly found that all of the claims other than that relating to ineffective assistance of counsel were procedurally barred;

> Although the trial court granted an evidentiary hearing on all of these claims, points 2, 3 and 4 either were or should have been raised on direct appeal and are not cognizable in a 3.850 proceeding (citations omitted). Appellant's only cognizable basis for relief under Rule 3.850, therefore is his ineffective assistance of counsel claim. Id. at 1324.

The Florida Supreme Court then went on to note that the trial court had properly held a hearing on this claim and that, it was clear that the court had considered all of the evidence presented. The court then made the following findings:

> The state presented as its witness Mr. Kutsche, appellant's counsel at trial and on appeal. Kutsche testified that he consulted two psychologists about the case and discussed with his client a psychiatric report that had been used in a murder case in Pennsylvania in which Daugherty had been convicted. Concluding that psychiatric testimony would not be to his client's advantage, Kutsche decided instead to present only lay witnesses regarding the mitigating circumstances in order to emphasize that his client had reformed since committing the crime. Therefore, he presented the testimony of Daugherty and Father Albert J. Anselmi. Daugherty testified about his childhood and adolescence, the crimes he had committed, his remorse, and his subsequent religious conversion. Father Anselmi, an experienced prison chaplain, testified that Daugherty's religious beliefs were sincere.
>
> The record reflects that the trial court considered all the evidence presented and, after making the requisite factual findings, determined that appellant did not meet his burden of proving the performance prong of the test established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Id. at 1325.

After denial of rehearing, Daugherty then filed his third petition for

writ of certiorari on August 20, 1987, seeking review of the latest decision of the Supreme Court of Florida. The state responded on September 14, 1987. This petition assailed Florida's sentencing instruction on the aggravating circumstance that the murder was especially heinous, atrocious or cruel, even though this aggravating factor was not found in this case. The petition for writ of certiorari was denied by the United States Supreme Court on October 9, 1987. Daugherty v. Florida, ___ U.S. ___, 108 S.Ct. 221 (1987).

On September 16, 1987, Daugherty filed a motion for stay of execution in the Supreme Court of Florida, and the state's response was filed the same day. The Supreme Court of Florida denied the motion by order dated September 21, 1987. Governor Martinez signed the first death warrant in this case on August 24, 1987. This warrant was active between noon on October 14 and noon on October 21, 1987.

On October 9, 1987, Daugherty filed a petition for writ of habeas corpus in the United States District Court, a memorandum in support of the petition, and a motion for stay of execution. The same day, the state filed its response to the petition. A hearing before Judge G. Kendall Sharp was held on October 9, with both sides presenting argument. On October 10, 1987, Judge Sharp entered an order denying the petition, and declining to issue a certificate of probable cause for the appeal, finding that petitioner failed to make a colorable showing of the denial of a federal constitutional right. Notice of Appeal to the Eleventh Circuit Court of Appeals was filed immediately. After oral argument, the Eleventh Circuit issued a decision on October 13, 1987, in which two judges voted to stay execution pending a full briefing and oral argument of the case. Circuit Judge Hill dissented. Daugherty v. Dugger, 831 F.2d 231 (11th Cir. 1987).

The petition for writ of habeas corpus raised four issues: two instances of alleged ineffective assistance of trial counsel for failure to obtain and present expert medical and psychiatric testimony and for failure to object to the standard jury instruction regarding heinous, atrocious or cruel; that the sentencing court failed to consider certain nonstatutory mitigating factors; and that the state's decision to seek the death penalty in this case was an arbitrary exercise of prosecutorial discretion. The District Court's resolution of these issues were that neither prong of the Strickland performance/prejudice two-prong test had been established by petitioner's first two claims. Strickland v. Washington, 466 U.S. 668 (1984). The third

claim was found to be procedurally barred under Anderson v. Harless, 459 U.S. 4 (1982); see, Daugherty v. State, 505 So.2d 1323 (Fla. 1987). Alternatively, on the merits, the claim based upon Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987) was found to be not supported by the record. The fourth claim was also procedurally barred by Daugherty's failure to raise it on direct appeal. Daugherty's failure to provide any substantiation for the claim at the hearing on the motion for post-conviction relief caused the court to conclude that no cause or prejudice for the default had been established under Wainwright v. Sykes, 433 U.S. 72 (1977).

The United States Court of Appeals, Eleventh Circuit, affirmed the district court's decision in all respects. Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988). In addressing the claim of counsel's alleged ineffectiveness for failing to object to the instruction on the aggravating circumstance of heinous, atrocious or cruel, the court resolved the issue solely under the prejudice prong of the Strickland test. The court assumed, without deciding that the instruction was unconstitutionally vague, that reasonable counsel would have objected, that the jury did in fact find the murder especially heinous, atrocious or cruel,[3] and that without the instruction, the jury would not have found the murder especially heinous, atrocious or cruel.

> Given these assumptions, the narrow issue becomes whether the evidence of statutory aggravating circumstances, other than of an "especially heinous, atrocious, or cruel" murder, so clearly outweighs the evidence of statutory and nonstatutory mitigating circumstances that no reasonable probability exists that the sentencing jury would not have recommended a sentence of death had it been properly instructed.

Id. at 1429. The Eleventh Circuit Court of Appeals found that the evidence presented supported four aggravating circumstances: previous conviction of another capital felony or felony involving the use of violence, the murder had been committed during the course of robbery or kidnapping, the murder had been committed for pecuniary gain, and the murder had been committed in a cold, calculated and premeditated manner. § 921.141(5)(b),(d),(f),(i), Fla. Stat. (1979). Even though the trial court's finding of two aggravating circumstances were presumed correct under 28 U.S.C. § 2254(d), the court's

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[3]The trial judge's sentencing order did not find this aggravating circumstance.

independent review of the evidence in conjunction with a prejudice analysis found that the evidence "strongly" supported additional aggravating factors as well. The mitigating factors urged by Daugherty, statutory and nonstatutory were found to have been properly rejected by the trial court.

> Balancing the aggravating against the mitigating circumstances, we determine that no reasonable probability exists that the jury would have recommended a sentence other than death had it been properly instructed. This determination is based primarily on our sense that the extraordinary violence of Daugherty's twenty-day crime spree which resulted in convictions for four murders and numerous robberies, assaults, and firearms violations must have weighed heavily in the sentencing jury's decision.
>
> Indeed, the sentencing statute authorizes the finding of an aggravating circumstance based on a single conviction for a felony involving the mere threat of violence to a person. The proof of Daugherty's conviction for a dozen felonies, including four murders, suggests the great weight which the jury probably attached to this circumstance, above all others.
>
> In addition, the evidence supporting the aggravating circumstances contains indicia of credibility not appearing in the evidence of mitigating circumstances. For example, the prior convictions are matters of public record based on judicial determinations. Daugherty's confession to the robbery and kidnapping of Sailer prior to her murder are statements against interest which Daugherty would have little motive to falsify. The credibility of Daugherty's testimony, however, as to his remorse for the killings, his religious conversion, and the domination by Bonnie Heath is somewhat tainted by Daugherty's motive to save his own life in the sentencing proceeding.
>
> Assuming, without deciding, that the court gave the jury an unconstitutional instruction to which effective counsel would have objected, we hold that no reasonable probability exists that the jury would have recommended a sentence other than death had it been properly instructed. Our confidence in the outcome of the sentencing proceeding has not been undermined by the instruction as given. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

Id. at 1430.

As to the second claim, that his attorney was ineffective for failing to obtain and present psychiatric testimony, the Eleventh Circuit agreed that neither prong of the Strickland test had been established. The court accepted the factual finding that Mr. Kutsche discussed the case with two mental health experts and the defendant himself. The court concluded that "the lawyer's decision to introduce evidence of Daugherty's mental condition through the

testimony of family members and acquaintances familiar with Daugherty, rather than through experts, was a sufficiently well-informed, strategic decision as to assure Daugherty of effective assistance of counsel under the sixth amendment. (citations omitted)" Id. at 1431. Since the state could have presented its own experts in rebuttal and since the existence of domination and headaches was presented through lay witnesses, no prejudice could be established.

The third claim was based upon the failure of the sentencing order to specifically reject nonstatutory mitigating evidence. The court noted that the order did recite that the trial judge considered "all the evidence." Moreover, the judge instructed the jury that it could consider nonstatutory mitigating evidence, Daugherty's lawyer introduced evidence hoping to establish nonstatutory mitigating factors, and both lawyers argued its existence in the court's presence. "We conclude, as reason and common sense dictate, that the state trial court did consider nonstatutory mitigating circumstances in imposing the sentence of death." Id. at 1432.

The last claim regarding alleged arbitrariness on the prosecution's decision to seek the death penalty was barred by the state court as an issue which could and should have been raised on direct appeal. Daugherty v. State, 505 So.2d 1323 (Fla. 1987). The Eleventh Circuit found no cause or prejudice to excuse the procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982).

Daugherty moved for rehearing and rehearing in banc which was denied on April 14, 1988.

On July 13, 1988, Daugherty filed his fourth petition for writ of certiorari in the United States Supreme Court, seeking review of the Eleventh Circuit's decision. Two issues were presented: the claim that the trial court failed to consider nonstatutory mitigating evidence, and the claim that counsel was ineffective for failing to object to the jury instruction regarding heinous, atrocious or cruel. The state responded on August 5, and Daugherty filed a reply on September 19, 1988. By order dated October 3, 1988, the United States Supreme Court denied certiorari. 44 Crim. L. Reptr. 4018.

On October 7, 1988, Governor Bob Martinez signed the second death warrant in this case. **THIS WARRANT IS ACTIVE BETWEEN NOON, THURSDAY, NOVEMBER 3 AND NOON, THURSDAY, NOVEMBER 10, 1988, WITH EXECUTION PRESENTLY SCHEDULED FOR 7**

**A.M. NOVEMBER 4, 1988.**

On October 24, 1988, the second motion for post-conviction relief was filed in the Circuit Court in and for Brevard County, Florida. In this pleading, Daugherty presented five (5) claims for relief: (1) that the jury instruction on "heinous, atrocious or cruel" was allegedly constitutionally invalid, under Maynard v. Cartwright, ____ U.S. ____, 108 S.Ct. 1853 (1988); (2) that certain remarks by the prosecutor and jury instructions allegedly violated Caldwell v. Mississippi, 472 U.S. 320 (1985); (3) that the vacation of one of Daugherty's prior convictions, such conviction a part of one of the aggravating circumstances found, rendered his sentence violative of Johnson v. Mississippi, ____ U.S. ____, 108 S.Ct. 1981 (1988); (4) that the sentencer in this case allegedly failed to consider nonstatutory mitigating circumstances, thus rendering the sentence violative of Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987) and (5) that certain remarks by the prosecutor in closing argument, referring to the victim and her family, allegedly violated Booth v. Maryland, ____ U.S. ____, 107 S.Ct. 2529 (1987). On October 26, 1988, the state filed a response, contending that four of the five claims were procedurally barred and that the one claim remaining, that premised upon Hitchcock, was without merit.

A short hearing was held on October 27, 1988, at which both sides presented legal argument. Judge Woodson rendered an order denying relief on October 27, 1988. The judge expressly found that Daugherty's claims based upon Maynard, Caldwell, Johnson and Booth were procedurally barred, in that, inter alia, Daugherty had failed to demonstrate that any of these cases were fundamental changes in law, entitled to retroactive application. The court noted that there had been no objection to any of these matters at the time of sentencing and Daugherty had likewise failed to present them as issues on direct appeal, as required under Florida law. The court similarly noted that, even if the Caldwell issue were properly presented on a post-conviction motion, Daugherty had failed to include it in his first motion for post-conviction relief, despite an opportunity to do so; similarly, the court noted that Daugherty had failed to present the issue prior to January 1, 1987, as required by Rule 3.850, as to those defendants whose convictions were final prior to July 1, 1985. Judge Woodson also made two specific findings as to the Johnson and Hitchcock claims. As to Johnson, in addition to the finding of procedural default, Judge Woodson found that he would still have found this

aggravating circumstance, based upon prior convictions, based upon any one of Daugherty's other unchallenged convictions; any "error", thus, was harmless. As to the Hitchcock claim, Judge Woodson found, and expressly stated during the hearing, that, despite any "silence" in the sentencing order, he had in fact considered all the evidence presented and had not regarded himself as limited by the statutory mitigating circumstances.

## IV. NECESSITY FOR STAY OF EXECUTION

No stay of execution is warranted in this case because the claims raised at this juncture do not require extended or detailed consideration. Likewise, there is no possibility, let alone probability, of Daugherty prevailing on the merits in this, or any other, court. The circuit court was correct in finding four of the five claims raised to be procedurally barred, and such finding, especially as to those claims based upon Booth and Caldwell, is in accordance with the Florida Supreme Court's precedent. While no court has yet passed upon the retroactivity of Johnson or Maynard, Daugherty would not be entitled to relief under such cases in any event. The jury instruction which he so condemns relates to an aggravating circumstance which was not found as a basis for his sentence of death and, in rejecting Daugherty's claim in regard to the vacation of one of his prior convictions, Judge Woodson expressly found that he still would have found the requisite aggravating circumstance based upon any one of Daugherty's other unchallenged and valid prior convictions. As to the Hitchcock claim, the judge expressly found that he had, in fact, not felt that the mitigating circumstances were limited to those set forth in the statute and that he had, at the time of sentencing, considered all the evidence.

The state does not dispute this court's jurisdiction to enter a stay, but respectfully suggests that no stay is necessary to fully and fairly consider the claims presented in the motion. State ex rel. Russell v. Schaeffer, 457 So.2d 698 (Fla. 1985). The warrant has not even begun and execution is scheduled for eleven days from the date the motion was filed. The pleadings before this court demonstrate that no stay is necessary. Troedel v. State, 479 Sol.2d 736 (Fla. 1985).

The state disagrees that Daugherty need only establish that his claims "might be" entitled to relief under Rule 3.850. This is the second motion for post-conviction relief. The first motion was denied after a full and fair

evidentiary hearing. It is the petitioner who bears the burden of demonstrating not only that his claims have merit, but further, that this pleading does not constitute an abuse of procedure and that he is not barred by the two year rule. He does not even allege new facts, but relies totally on recent United States Supreme Court cases which, with the exception of Hitchcock v. Dugger, are not changes in law and are not retroactive.

Daugherty has had every opportunity to litigate his case. He has petitioned the highest court in the land four times. Nothing presented in this petition merits any relief, not even a stay.

## V. ARGUMENT

DAUGHERTY'S MOTION FOR POST-CONVICTION RELIEF WAS PROPERLY SUMMARILY DENIED; FOUR OF THE FIVE CLAIMS ARE PROCEDURALLY BARRED AND THE REMAINING CLAIM, THAT PREMISED UPON HITCHCOCK V. DUGGER, _____ U.S. ____, 107 S.CT. 1821 (1987), WHILE NOT IMPROPERLY PRESENTED, IS WITHOUT MERIT.

Because this was Daugherty's second motion for post-conviction relief, it was vulnerable to allegations of abuse of procedure, on two different grounds - that it was filed more than two years after his conviction and sentence are final and that it raised claims which were, for the most part, not presented in the first post-conviction motion filed in 1985. It is the state's position that Daugherty cannot make the requisite showings so as to save his claims from being found to be procedurally barred. Although the state would ordinarily make such allegation as to the remaining claim, that premised upon Hitchcock, it does not do so, because it appears that the Florida Supreme Court favors an address of the merits as to claims of this type. The state briefly reviews the controlling law as to successive motions for post-conviction relief.

Daugherty's conviction and sentence was affirmed by the Supreme Court of Florida on September 14, 1982. No motion for rehearing was filed. Florida Rule of Criminal Procedure 3.850 was recently amended to require any person whose judgment and sentence became final prior to January 1, 1985 to file a motion for post-conviction relief prior to January 1, 1987. The only exceptions to this rule are: (1) that the facts upon which the claim was predicated were not known to the movant, which Daugherty does not contend, or (2) that a retroactive fundamental constitutional right has been established since January 1, 1987. Daugherty has failed to make this showing, and it is worth noting, as to one of the claims, that Caldwell v. Mississippi, 472 U.S. 320 (1985), was decided after the first 3.850 was filed, but before the trial court's order denying relief was issued. Since Caldwell was decided before January 1, 1987, Daugherty has defaulted this claim under the two year rule, as well as on the bases cited above.

The two year rule has been consistently applied to bar claims, even in capital cases. Delap v. State, 513 So.2d 1050 (Fla. 1987); Demps v. State, 515 So.2d 196 (Fla. 1987). Since this amendment is a procedural charge in the rule, it can be applied retroactively. See, Christopher v. State, 489 So.2d

22 (Fla. 1986); and Stewart v. State, 495 So.2d 164 (Fla. 1986).

The state further contends, as to all claims except that based on Hitchcock, that this second or successive motion constitutes an abuse of the writ. The amendment to the rule can be applied retroactively. Stewart, supra, Christopher, supra. It is well established that a court may refuse to address those issues that were raised on appeal or could have been raised on appeal. Sireci v. State, 469 So.2d 119 (Fla. 1985). This rule applies to both initial and successive motions for post-conviction relief. Smith v. State, 453 So.2d 388 (Fla. 1984). Petitioner may not religate issues previously raised and determined on the merits. McCrae v. State, 437 So.2d 1388 (Fla. 1983).

Daugherty does not allege that the asserted grounds were not known or could not have been known at the time the initial motion was filed. Rather, he predicates each claim on a fundamental charge in law of constitutional proportions which he contends must be applied retroactively. While it is true that Daugherty relies upon United States Supreme Court decisions which could constitute a charge in law sufficient to precipitate a post-conviction challenge, see Witt v. State, 387 So.2d 922 (Fla. 1980), the cases Daugherty relies upon, except as to the Hitchcock claim, are not changes in law nor do they receive retroactive application. The specific citations and arguments to support these contentions will be addressed in conjunction with an analysis of the merits, below in the argument portion of this pleading.

DAUGHERTY'S CLAIM RELATING TO THE JURY INSTRUCTION ON HEINOUS, ATROCIOUS OR CRUEL, SUCH CLAIM ALLEGEDLY PREMISED UPON MAYNARD V. CARTWRIGHT, _____ U.S. _____, 108 S.Ct. 1853 (1988).

In this claim, Daugherty argues that the instructions given the jury at his sentencing in 1980 were impermissibly vague and constitutionally flawed, in that they did not provide a more comprehensive definition of the terms, "heinous, atrocious or cruel." In his 1985 motion for post-conviction relief Daugherty argued that his counsel had been ineffective for failing to object to these same jury instructions, on the grounds that they were allegedly constitutionally vague (Motion for Post-Conviction Relief, filed March 15, 1985 at 16-24); at such time, Daugherty premised his argument upon the United States Supreme Court's decision, Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980). Daugherty now argues that he is entitled to relitigate this

issue on the basis of Maynard v. Cartwright, ____ U.S. ___, 108 S.Ct. 1853 (1988).

The state disagrees. When the circuit court denied Daugherty's first motion for post-conviction relief, it found that ineffective assistance of counsel had not been demonstrated in this regard; this ruling was affirmed by the Supreme Court of Florida, which also noted that this aggravating circumstance had not been found as a part of Daugherty's sentence. See, Daugherty v. State, 505 So.2d 1323, 1324, n.1 (Fla. 1987). The state suggests that the constitutional validity of these jury instructions has already been litigated, albeit with a differing emphasis, and that Daugherty's re-presentation of this claim in his second motion for post-conviction relief is an abuse of procedure. See, Francois v. State, 470 So.2d 687 (Fla. 1985); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); White v. Dugger, 511 So.2d 554 (Fla. 1987); Card v. Dugger, 512 So.2d 829 (Fla. 1987); Delap v. State, 513 So.2d 1050 (Fla. 1987).

Even if one were to conclude that the claims presentation is not an abuse, it should be clear that Maynard v. Cartwright establishes no "new law" or new constitutional right, entitled to retroactive application; it certainly does not constitute "new law" since the time of the filing of Daugherty's first post-conviction motion. Maynard is simply a recent application of Godfrey v. Georgia, the case which Daugherty relied upon in 1985. Daugherty has entirely failed to demonstrate that, under Witt v. State, 387 So.2d 922 (Fla. 1980), Maynard represents a major constitutional change, entitled to retroactive application. Given the fact, as Daugherty concedes, that Godfrey had been decided at the time of his sentencing in 1980, it is clear that this claim was available at such time and that he has, in effect, triply defaulted, i.e., by lack of objection at the time of sentencing, by failure to raise the issue on direct appeal and by failure to include it, to the extent that it was not presented, in his first motion for post-conviction relief. Accordingly, this claim is procedurally barred on these grounds. See, McCrae v. State, 437 So.2d 1388 (Fla. 1983) (3.850 motion no substitute for appeal); Witt v. State, 465 So.2d 510 (Fla. 1985) (second 3.850 motion abuse of procedure where defendant fails to show jusification for failing to raise issue in prior action).

Further, Daugherty's claim is entirely without merit. His argument focuses upon a jury instruction which has never been invalidated by any

court. See, Lemon v. State, 456 So.2d 885 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985); Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985), cert. denied, 475 U.S. 1031 (1986). Additionally, the jury instruction focuses upon an aggravating circumstance not found as part of Daugherty's sentence of death; such sentence is premised upon a finding that the instant homicide was committed for pecuniary gain, section 921.141(5)(f), and that it was committed by one with prior convictions for violent felonies, section 921.141(5)(b), with nothing having been found in mitigation. The sentences of death in Godfrey and Maynard were vacated because the United States Supreme Court found: (1) that the instructions given the jury were insufficient as to this aggravating circumstance and (2) that the state courts, in affirming the sentence of death at issue and approving the finding of the aggravating circumstance, had failed to adopt a limiting construction of this factor. Obviously, inasmuch as this aggravating circumstance was never found, no "error" was committed by the Supreme Court of Florida; no court has ever invalidated Florida's construction of this aggravating circumstance, see, Dobbert v. State, 409 So.2d 1053 (Fla. 1982), Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 3196 (1987), Proffitt v. Florida, 428 U.S. 242 (1976), and the state contends, in any event, that this aggravating circumstance could properly have been found under state law. See, e.g., Mills v. State, 462 So.2d 1075 (Fla.), cert. denied, 473 U.S. 911 (1985); White v. Wainwright, 809 F.2d 1478 (11th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 20 (1987). Maynard v. Cartwright is totally irrelevant to Daugherty's sentence of death, and no relief is warranted as to this claim. Judge Woodson was correct in summarily denying relief as to this claim.

DAUGHERTY'S CLAIM RELATING TO CERTAIN ARGUMENT AND JURY INSTRUCTIONS WHICH ALLEGEDLY DILUTED THE JURY'S SENSE OF RESPONSIBILITY, SUCH CLAIM ALLEGEDLY PROMISED UPON CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

The second claim for relief is based upon Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim is subject to dismissal under the two year rule, as stated previously. Florida courts have repeatedly held that Caldwell is not a change in law sufficient to overcome the procedural bar. Cave v. State, 529 So.2d 293 (Fla. 1988); Doyle v. State, 526 So.2d 909 (Fla. 1988); Demps v. State, 515 So.2d 196 (Fla. 1987); Copeland v. State, 505 So.2d 425 (Fla.

1987).

Daugherty has several additional layers of default on this claim. There was no objection to these comments at trial, nor was the issue raised on direct appeal. The first motion for post-conviction relief was filed before Caldwell was decided, however, the decision issued June 11, 1985, before the trial court's order denying post-conviction relief was issued. Daugherty could have cited Caldwell as supplemental authority or at the very least, brought it to the court's attention on motion for rehearing, which is expressly authorized under Rule 3.850 itself. Daugherty's failure to avail himself of this procedural opportunity, as well as his failure to present this claim to any state court prior to January 1, 1987, procedurally bars this claim under Witt v. State, 465 So.2d 510 (Fla. 1985) and Delap, supra. "In view of this chronology, Caldwell does not represent new law to this case whatever its applicability may be otherwise." Cave v. State, 529 So.2d at 296.

The Caldwell decision is distinguishable from Florida's capital sentencing procedure because unlike Mississippi, the judge is the sentencer. Advising the jury that its sentencing recommendation is advisory only is an accurate statement of Florida law. Cave, supra; Combs v. State, 525 So.2d 853 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988). The comments cited by Daugherty are nothing more than recognition of the fact that the jury's recommendation is advisory. The standard jury instructions "fully advise the jury of the importance of its role and correctly state the law" such that no Caldwell violation is demonstrated. Grossman, 525 So.2d at 840; Aldridge v. State, 503 So.2d 1257 (Fla. 1987).

Daugherty fails to note that the jury was repeatedly advised that its recommendation was entitled to great weight. Defense counsel argued that although it was "true, strictly speaking" that the jury's role was advisory,

> But why do you think that you feel so serious about it? Why do you think the lawyers and the judge are serious about it? Because your vote, whatever it may be, in all likelihood and all probability will be conformed to by the judge, because it is your decision, hopefully organized decision, by vote, as to the future of Jeff, which means each and every one of you must search through-out your heart and your mind as to whether you're willing to impose the ultimate penalty on another human being. . . (Supplemental Transcript at 29).

The instructions to the jury further emphasized the jury's duty. Given these circumstances, even the Eleventh Circuit's reading of Florida law recognizes

that the jury has not been misled or its sense of responsibility diminished. Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988); Harich v. Dugger, 844 F.2d 464 (11th Cir 1988). Although Adams v. Dugger, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert granted, ___ U.S. ___, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988) is pending before the United States Supreme Court, Daugherty is still unentitled to a stay. Cave v. State, 529 So.2d at 296-297; Clark v. State, 13 F.L.W. 548 (Fla. September 8, 1988). Adams is distinghishable from this case on the basis of Harich; there is nothing impermissible in telling a Florida jury that they were making a recommendation and that the judge is the ultimate sentencer, especially when, as here, the defendant has pled guilty, and the only purpose for which the jury has been convened is sentencing. Judge Woodson was correct in summarily denying relief as to this claim and his findings, especially as to the numerous procedural bars should be approved.

DAUGHERTY'S CLAIM RELATING TO THE REVERSAL OF ONE OF HIS PRIOR CONVICTIONS, SUCH CLAIM ALLEGEDLY PREMISED UPON JOHNSON V. MISSISSIPPI, ____ U.S. ____, 108 S.Ct. 1981 (1988).

In the instant motion for post-conviction relief, Daugherty argues that his sentence of death must be vacated because one of the prior convictions, which made up a part of that aggravating circumstance relating to prior convictions for crimes of violence, has been reversed. In March of 1981, Daugherty's conviction for the murder of George Karnes was reversed by the Pennsylvania Supreme Court, due to its finding that a change of venue should have been granted. See, Commonwealth v. Daugherty, 426 A.2d 104 (Pa. 1981). Daugherty has never litigated this claim before, despite obviously being aware of its existence for the last seven and one-half years, and now contends that the recent decision of Johnson v. Mississippi, ___ U.S. ___, 108 S.Ct. 1981 (1988) provides a basis for relief.

The state disagrees. Because Daugherty obviously knew the facts supporting this claim at the time of his appeal, if not at the time that the actual sentence was imposed in state court, this represents a claim which could and should have been raised on direct appeal; on September 23, 1982, Daugherty's present counsel filed a pleading in the Supreme Court of Florida which indicated knowledge of the vacation of this conviction. Under Florida law, claims of this nature, relating to allegedly invalid prior convictions

used in aggravation, must be raised on direct appeal. See, Adams v. State, 449 So.2d 819 (Fla. 1984); Mann v. State, 482 So.2d 1360 (Fla. 1986); James v. State, 489 So.2d 737 (Fla. 1986); Henderson v. Dugger, 522 So.2d 835 (Fla. 1988). Additionally, assuming that one wished to give Daugherty the benefit of the doubt, he most certainly knew of the factual basis for this claim at the time of his first post-conviction motion in 1985, inasmuch as he made specific reference to the vacation of this conviction in that pleading (see, Motion for Post-Conviction Relief, filed March 15, 1985, at 4). Because this claim could have been raised as an independent claim of error in that proceeding, Daugherty's failure to do so renders this motion for post-conviction relief an abuse of procedure. See, Witt v. State, 465 So.2d 510 (Fla. 1985); Christopher v. State, 489 So.2d 22 (Fla. 1986).

Daugherty's only possible justification for being allowed to present this claim is if Johnson v. Mississippi constitutes a fundamental change in law, entitled to retroactive application under Witt v. State, 387 So.2d 922 (Fla. 1980); Daugherty, of course, must make the showing not only to be able to raise this claim on post-conviction motion, but also to be able to raise such in his second post-conviction motion. Daugherty has failed to demonstrate that Johnson stands for such proposition. The Johnson decision itself contains no express statement that it represents a "development of fundamental significance"; the premise that one should not use an invalid conviction as a potential basis for a sentence of death hardly seems to be a novel one, or one upon which the law has been unclear until 1988. In 1984, the Florida Supreme Court expressly held, in Oats v. State, 446 So.2d 90 (Fla. 1984), that a vacated conviction cannot be used in aggravation. Accordingly, because this claim was plainly available prior to 1988, Johnson cannot be considered a "change in law".

Even if Johnson were applicable to this case, it is clear that Daugherty would merit no relief. Daugherty's sentence of death is premised upon the finding of two (2) valid aggravating circumstances and nothing in mitigation. Even if the aggravating circumstance relating to prior convictions were struck entirely, that relating to the homicide being committed for pecuniary gain would still remain; Daugherty has never attacked the finding of this aggravating circumstance. Under Florida law, in the absence of anything found in mitigation, one aggravating circumstance is sufficient for a sentence of death. See, White v. State, 446 So.2d 1031 (Fla.

1984); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418 (1983). Thus, at most, Daugherty has demonstrated harmless error; the decision of the Eleventh Circuit in this case, Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988), illustrates the additional aggravating circumstances which could have been found. Johnson contained no harmless error analysis and, thus, is not controlling.

Further, there is harmless error "within" this aggravating circumstance as well. Under Florida law, only one conviction is required to justify the finding of this factor in aggravation. In this case, Daugherty had at least six other convictions, including those relating to three other murders - those of Carmen Abrams, Betty Campbell and Elizabeth Shank; additionally, there were convictions for robbery and other violent offenses in regard to Daugherty's beating and robbery of Ruth Montgomery, beating and robbery of Mary Mock and robbery of Doris Whorley. Any improper consideration of Daugherty's subsequently-reversed conviction, in regard to the murder of George Karnes, is simply not of constitutional significance, given the fact that it can be said that this aggravating circumstance would still have been found. Indeed, at the hearing on October 27, 1988, Judge Woodson, the sentencer in this case, expressly stated that any one of Daugherty's prior convictions would have sufficed to support this aggravating circumstance; the order of denial similarly indicates such finding. In Johnson, the subsequently-reversed conviction was the sole basis for the finding of an aggravating circumstance relating to prior convictions.

Finally, it must be noted that, despite the vacation of the conviction, Daugherty has never denied committing the offense, and, indeed, at sentencing testified at length as to how and why he had murdered George Karnes (Transcript of Proceeding of November 18, 1980 at 181-4, 187, 202, 236-8, 240-3, 245-251, 253-4, 255, 262-3); indeed, Daugherty stated that he began to feel remorse for the terrible deeds which he had done when he saw Karnes' father at the trial and realized how much he had hurt the man (R 262). Daugherty's conviction was not reversed due to any insufficiency of evidence or major constitutional violation casting doubt upon its validity, but rather simply because a motion for change of venue should have been granted. There was no error in the admission of evidence relating to the offense, inasmuch as such evidence would be relevant to rebut the mitigating circumstance of no significant criminal history, a conviction not being required for such

purpose. See, Washington v. State, 362 So.2d 68 (Fla. 1976). Because this evidence was properly admitted, it cannot be said that Daugherty has been "penalized" for any consitutionally protected conduct, and it is clear that under the United States Supreme Court's opinion in Zant v. Stephens, 462 U.S 862, 103 S.Ct. 2733 (1983), no reason exists to vacate Daugherty's sentence of death; Johnson v. Mississippi expressly cited to Zant, noting that in the case before it, in contrast to Zant, there had been no evidence introduced regarding the underlying criminal conduct, as opposed to the mere fact of conviction. Given the fact that Johnson is inapplicable to this case, no relief is warranted as to this claim. Judge Woodson's disposition of this claim, especially his finding of harmless error, should be approved.

DAUGHERTY'S CLAIM RELATING TO THE SENTENCER'S ALLEGED FAILURE TO CONSIDER NONSTATUTORY EVIDENCE IN MITIGATION, SUCH CLAIM ALLEGEDLY PREMISED UPON HITCHCOCK V. DUGGER, U.S. ___, 107 S.CT. 1821 (1987).

In this claim, Daugherty argues that his sentence of death must be vacated because the sentencer failed to consider nonstatutory evidence in mitigation, in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). Given Judge Woodson's express statement and finding below that he did in fact consider all the evidence presented, including non-statutory mitigating circumstances, it is unclear at this juncture just how much, if at all, Daugherty will seek to relitigate this claim. The state would simply re-present its earlier response and draw this court's attention to the findings in the order of October 27, 1988.

This claim has been litigated before. On direct appeal in 1981, Daugherty argued that the sentencer had erred in "not considering the existence of several nonstatutory factors in mitigation." (Brief of Appellant at 10, Daugherty v. State, FSC Case No. 60,709, filed September 14, 1981). In its opinion of September 14, 1982, the Supreme Court of Florida held as follows:

> Daugherty finally contends that the court erred in failing to find certain non-statutory mitigating factors, i.e., his alleged remorse, his suicide attempt, his conversion to Christianity, his unstable family life, and the fact that at the time of sentencing, because of prior convictions, he would not be elligible for parole for 107 1/2 years. Daugherty does not argue that the court failed to consider these circumstances or that it prevented him from introducing any relevant evidence of mitigation, nor would such an

> assertion be supported by the record. The court expressly stated that it considered and weighed all the testimony and evidence. Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982) (emphasis supplied).

In addition, Daugherty raised this claim in his first motion for post-conviction relief filed in 1985, arguing that his sentence violated Lockett, because the sentencing order did not expressly discuss nonstatutory mitigating circumstances (Motion for Post-Conviction Relief, filed March 15, 1985, at 24-5). On appeal, the Supreme Court of Florida found this claim to be procedurally barred. See, Daugherty v. State, 505 So.2d at 1324. Daugherty additionally raised this claim, now premised upon Hitchcock v. Dugger, in his petition for writ of habeas corpus in the federal courts. The Eleventh Circuit Court of Appeals found that Daugherty was entitled to no relief, holding,

> In this case, however, both lawyers argued nonstatutory mitigating circumstances to the jury, and the court's instruction to the sentencing jury specified it could consider nonstatutory mitigating circumstances. These factors indicate the court's awareness of the rule in Lockett and persuade us that when the judge stated in his order that in imposing the sentence of death he had considered "all the evidence," he considered evidence of nonstatutory mitigating circumstances, as well as of statutory mitigating circumstances.
>
> Although the sentencing judge in this case did not state that he found no nonstatutory mitigating circumstances, he instructed the jury to consider nonstatutory mitigating circumstances. Daugherty's lawyer introduced evidence of several nonstatutory mitigating circumstances and both lawyers argued that evidence, all in the court's presence. We conclude, as reason and common sense dictate, that the state trial court did consider nonstatutory mitigating circumstances in imposing the sentence of death.

Daugherty v. Dugger, 839 F.2d 1426, 1432 (11th Cir. 1988), cert. denied., ___ U.S. ___, (October 3, 1988).

Daugherty now argues that he is entitled to litigate this claim because the Florida Supreme Court does not enforce a procedural bar as to the claims of this type; Daugherty cites Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988) and Riley v. Wainwright, 517 So.2d 656 (Fla. 1987), in support of this proposition. The state would note that in Clark v. State, 13 F.L.W. 548 (Fla. September 8, 1988), the Supreme Court of Florida addressed the merits of Clark's Hitchcock claim, even though such had been presented in his third motion for post-conviction relief. It should be noted, however, that in

Clark, the Florida Supreme Court basically adopted the reasoning of the Eleventh Circuit, which had earlier found Clark's Hitchcock claim to be harmless error at most.

Because the state wishes to see the instant sentence of death carried out as soon as practicable, it addresses Daugherty's claims on the merits. The state further suggests that the conclusion of the Eleventh Circuit is correct, and should be adopted by this court. Looking to the record as a whole, it is clear that the sentencer considered all of the evidence presented. The jury instructions used in this case are in total contrast to those in Hitchock; Daugherty's jury was expressly advised by Judge Woodson that, in addition to the statutory mitigating circumstances, they could consider "any other mitigating circumstances which were established by the evidence." (supplemental transcript at 49) Similarly, during their arguments to the jury, both attorneys, prosecutor and defense, reminded the jury that they could consider nonstatutory evidence in mitigation. The prosecutor told the jury during closing argument,

> There are seven mitigating circumstances listed by the laws of Florida, but by additional law of the courts you are not limited to these seven as you are in the aggravating. You have to have those and no other aggravating. The mitigating you can use your own judgment on whether or not any of these circumstances are a mitigating factor (supplemental transcript at 12).

Additionally, the prosecutor spent much of his argument telling the jury why they should not find certain nonstatutory factors, such as Daugherty's recent religious conversion, as a mitigating circumstance (Supplemental Transcript at 20-23).

After reviewing the statutory mitigating circumstances which he found most applicable, defense counsel likewise advised the jury, "Of course, you may consider any other mitigating circumstances which you find are established and mentioned in the evidence." (Supplemental Transcript at 44). Earlier, however, defense counsel had also argued,

> Going to some of the mitigating factors, it's not going to be really clear in the instructions, although I'm sure if you'd like some clarification the Judge will provide it for you, but there are statutory mitigating factors that are set out and listed, but the mitigating factors you can consider are not limited to those that will be read to you. You may consider other things about what you've heard during the case as to Jeff, the circumstances, as mitigating factors if you decide to, each individually. (Supplemental

Transcript at 41) (emphasis supplied).

The state respectfully suggests that defense counsel would hardly have "referred" the jury to the judge in this regard, if he had any doubts as to Judge Woodson's understanding of the law.

This claim should be resolved in accordance with Card v. Dugger, 512 So.2d 829 (Fla. 1987) and Johnson v. Dugger, 520 So.2d 565 (Fla. 1988). In each case, as here, the judge's sentencing order did not expressly indicate consideration of nonstatutory mitigating circumstances. Yet, in each case, the Supreme Court of Florida held that no Hitchcock violation had occurred, looking to other portions of the record. In Card, as here, both the prosecutor and defense counsel advised the jury, during argument, that they were not limited to statutory factors in mitigation; similarly, the judge instructed the jury that they could consider "any other aspect of the defendant's character or record, or any other circumstance of the offense." The Florida Supreme Court held that there could be "no doubt" that the judge and jury had considered nonstatutory mitigating circumstances. Similarly, in Johnson, the jury had been properly instructed, as here. The Florida Supreme Court held,

> The state argues that the jury instructions constitute ample evidence that the judge knew what he was required to consider, and in fact did consider those circumstances. We agree. We must presume that the judge followed his own instructions to the jury on the consideration of nonstatutory mitigating evidence. Johnson at 566 (emphasis supplied).

The court held that the sentencing order, when read in conjunction with the jury instructions, indicated that the judge had performed his function in a constitutional matter.

Daugherty does not explain why these precedents do not control. Instead, he claims that Zeigler v. Dugger, somehow indicates otherwise. Daugherty's reliance is misplaced. Zeigler likewise recognized that it was to be presumed that a judge's perception of the law coincides with the manner in which the jury was instructed, unless there is something in the record to indicate otherwise. Here, there is nothing in the record to indicate otherwise, and, under Johnson and Card, a "silent" sentencing order obviously does not so qualify. There is no affirmative statement or action by the judge, as in Zeigler or Downs v. Dugger, 514 So.2d 1009 (Fla. 1987), which would indicate a misapprehension on the part of the judge as to the law. Daugherty merits no relief.

Finally, although Daugherty likewise does not acknowledge this, Hitchcock errors have been held to be harmless. See, e.g., Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); Booker v. Dugger, 520 So.2d 246 (Fla. 1988); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Ford v. State, 522 So.2d 345 (Fla. 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988); Smith v. Dugger, 529 So.2d 679 (Fla. 1988); Jackson v. Dugger, 529 So.2d 1081 (Fla. 1988); Hall v. Dugger, 13 F.L.W. 320 (Fla. May 12, 1988); Clark, supra. This conclusion has been reached even when the court has been confronted with a sentencing order as "silent" as that sub judice. In finding harmless error in the above cases, the court has concluded that there was simply insufficient evidence to offset the aggravating, such that any error in failure to consider the former evidence would be harmless beyond a reasonable doubt.

This case is an appropriate candidate for harmless error, because Daugherty's nonstatutory evidence in mitigation was of nebulous value, consisting largely of his own self-serving declarations of remorse, conversion to Catholicism and allegedly unhappy upbringing. This evidence had to be weighed against the bloodchilling account of Daugherty's three-week crime spree which resulted in four murders, one attempted murder, two beatings of elderly women and numerous counts of armed robbery and other violent felonies. The instant homicide was pitiless in the extreme, the "execution" of a hapless, and helpless, hitchhiker for the princely sum of fifteen dollars, the victim being shot in the head five times at close range, after having to listen to Daugherty and his confederate debate the necessity of killing her. Daugherty's "death row" repentence might have been significant, had he come before the sentencer with a relatively clean slate. Instead, it can be said, on the basis of this record, that any reasonable sentencer would have imposed the sentence of death, given the overwhelming evidence in aggravation. Any Hitchcock error was harmless, and Daugherty is entitled to no relief as to this claim. In any event, as noted, Judge Woodson stated in his order of denial below, that he did in fact consider nonstatutory mitigating circumstances.

DAUGHERTY'S CLAIM RELATING TO THE PROSECUTOR'S REFERENCE TO THE VICTIM'S FAMILY IN CLOSING ARGUMENT, SUCH CLAIM ALLEGEDLY PREMISED UPON BOOTH V. MARYLAND, ____ U.S. ____, 107 S.CT. 2529 (1987).

For the first time, Daugherty complains of comments made by the prosecutor in closing argument. There was no objection to these remarks, waiving review. Grossman v. State, 525 So.2d 833, 843 (Fla. 1988); Preston v. State, 13 F.L.W. 583, 586 (Fla. September 22, 1988).

The propriety of prosecutorial argument is an issue which could and should have been raised, if at all, on direct appeal. Francois v. State, 470 So.2d 687 (Fla. 1985). Daugherty's reliance on Booth v. Maryland, U.S. ____, 107 S.Ct. 2529 (1987) does not change this result. In Woods v. State, 13 F.L.W. 439, 440-441 (Fla. July 14, 1988), the Supreme Court of Florida held that, "(r)aising Booth. . . is a misapplication of that case to a claim which could and should have been raised on appeal." See, also, Clark v. State, 13 F.L.W. 549 (Fla. September 8, 1988).

Woods, Preston and Clark suggest that the Supreme Court of Florida does not consider Booth to be a fundamental change in law; certianly neither the Florida Supreme Court nor the United States Supreme Court have ever expressly held Booth to be retroactive. In Thompson v. Lynaugh, 821 F.2d 1080, 1082 (5th Cir. 1987), a federal court found that ". . . Booth does not create a sufficiently novel issue to excuse a procedural default, for it merely reiterates what the Supreme Court has previously held: The Eighth Amendment requires that sentencing in a capital murder case must focus on the individual character of the defendant and the particular circumstances of the crime." Even Daugherty recognized that Booth is not a change in law by citing to Gregg v. Georgia, 428 U.S. 153 (1976) and California v. Ramos, 463 U.S. 992 (1983).

Even if this claim were cognizable despite default at trial and direct appeal, the argument complained of cannot be viewed as the type of victim impact evidence condemned by Booth. Preston v. State, 13 F.L.W. 583, 586 (Fla. September 22, 1988). Booth is factually distinguishable in that Ms. Sailer was a hitchhiker with no relatives within several thousand miles; she was a woman of mystery. The victim impact statements in Booth as to the effect of the death on the family and the importance of the victim in the community are nothing like the comments complained of here. Moreover, the argument presented by the prosecutor concerning the victim's absence at the holiday dinner table has been specifically held to be permissible by both state and federal courts. Bush v. State, 461 So.2d 936 (Fla. 1984); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985). Judge Woodson was correct in summarily denying relief as to this claim.

## CONCLUSION

Based upon the argument and authority presented herein, the state respectfully requests denial of the application for stay of execution and affirmance of the order below, summarily denying Daugherty's second motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Application for Stay of Execution and Appeal from Summary Denial of Post-Conviction Motion has been furnished, by ~~telephonic transmission~~ overnight mail to John P. Dean, Counsel for Petitioner, Donovan Leisure Newton & Irvine, K Street N.W., Suite 1200, Washington D.C. 20006, or associate, this 28 day of October, 1988.

Richard B. Martell
Of Counsel