IN THE SUPREME COURT OF FLORIDA

JEFFREY JOSEPH DAUGHERTY,

Appellant,

v.

CASE NO. 67,450

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

JOSEPH N. D'ACHILLE, JR.
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

On August 11, 1980, the appellant, JEFFREY JOSEPH DAUGHERTY, was indicted for the March 1, 1976, murder, robbery and kidnapping of Lavonne Patricia Sailer. (See Appendix 1). On November 18, 1980, the appellant pleaded guilty to the charges alleged in the indictment, to wit: first degree premeditated murder, first degree felony (robbery) murder, first degree felony (kidnapping) murder, robbery with a firearm and kidnapping. (See Appendix 2).

Also on November 18, 1980, the Brevard County Circuit Court conducted separate proceedings pursuant to section 921.141, Florida Statutes to determine if the appellant should be sentenced to death or to life imprisonment. On November 20, 1980, the jury, by unanimous vote, recommended that the appellant receive a death sentence with regard to the three murder charges. (See Appendix 3).

On April 27, 1981, the circuit court conducted a sentencing hearing. (See Appendix 4). After the circuit court again inquired as to aggravating and mitigating circumstances, the circuit court imposed a sentence of death against appellant on the charge of first degree premeditated murder; the two felony murder charges were merged into the premeditated murder charge for sentencing purposes. (See Appendix 5). The circuit court entered a separate written order on the judgment and sentence of death making specific findings as to aggravating and mitigating circumstances. (See Appendix 6).

Thereafter, the appellant carried his direct appeal to this

court. In his initial brief, the appellant cited as error:

1) The circuit court's ruling admitting evidence of prior convictions for offenses which were committed subsequent to the instant offense;

2) The circuit court's finding of the existence of the aggravating circumstance of prior convictions for capital felonies or felonies involving violence;

3) The circuit court's finding that no statutory mitigating circumstances existed; and

4) The circuit court's finding that no non-statutory mitigating circumstances existed.

(See Appendix 7). This court affirmed the appellant's conviction and sentence of death per curiam. Daugherty v. State, 419 So.2d 1067 (Fla. 1982). The United States Supreme Court denied certiorari. Daugherty v. Florida, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983).

The appellant then filed a petition for writ of habeas corpus in this court. The petition sought relief in the form of a de novo direct appeal; the bases for relief argued therein were:

1) This court's failure to consider the entire trial transcript in affirming the appellant's judgment and sentence;

2) This court's failure to determine independently that the appellant's sentence of death was warranted; and

3) This court's failure to conduct a proportionality review of the appellant's sentence of death.

(See Appendix 8). This court denied the petition. Daugherty v. Wainwright, 443 So.2d 979 (Fla. 1983). The United States Supreme Court again denied certiorari. id, 446 U.S. 945, 104 S.Ct.

1931, ___ L..Ed.2d ___ (1984).

On March 15, 1985, the appellant filed a motion for post-conviction relief in Brevard County Circuit Court (R 153-197). Pursuant to Florida Rule of Criminal Procedure 3.850, the circuit court conducted an evidentiary hearing on the motion on May 29, 1985 (R 55-144, 281-406). On July 3, 1985, the circuit court denied the appellant's motion for post-conviction relief (R 265-267). This appeal is from the denial of that motion.

STATEMENT OF THE FACTS

In his Rule 3.850 motion, the appellant sought to have his death sentence vacated and a life sentence imposed or to obtain a new sentencing hearing. The stated grounds for relief were:

I. Ineffective assistance of trial counsel in that:

   A. Trial counsel did not obtain and present expert medical/psychiatric testimony regarding certain mitigating circumstances; and
   B. Trial counsel did not object to the circuit court's reading of the standard jury instruction regarding the aggravating circumstance of a "heinous, atrocious or cruel" murder;

II. The trial court's failure to consider non-statutory mitigating circumstances;

III. The trial court's failure to find the existance of two statutory mitigating circumstances:

   A. Substantial domination of the appellant by Bonnie Heath; and
   B. Age of appellant at time of crime;

IV. The decision to seek the death penalty was an arbitrary exercise of prosecutorial discretion.

In support of his motion, the appellant presented two witnesses, Larry Turner and Dr. Robert Weitz.

Larry Turner was accepted by the circuit court as an expert in criminal law (R 289). Turner opined that appellant's trial counsel, Arthur J. Kutsche, was ineffective because he presented an "eggs in one basket" defense (R 290). Turner stated that because of certain biographical data of the appellant, several mitigating circumstances, e.g., substantial domination, could have been more strongly presented to the jury with the aid of expert medical or psychiatric testimony; to that end, Turner concluded that Kutsche should have had the appellant examined by

such an expert (R 291). Turner could not conceive of a reason why this psychiatric defense was not presented (R 291). Turner also stated that at the time of the appellant's penalty phase proceedings there existed certain decisional law which would indicate that the standard jury instruction regarding the aggravating circumstance of a "heinous, atrocious or cruel" murder was overbroad; for that reason, Turner opined that Kutsche was ineffective for failing to lodge an objection thereto during the penalty phase (R 292-293). Turner did not testify as to how the trial court's rejection of that aggravating circumstance affected his position on this latter issue.

On cross-examination, Turner conceded that the appellant had, in fact, been examined previously in connection with cases in other states (R 295). Turner also stated that had Kutsche conferred with experts "that might change things [his opinion]" (R 298). Turner also related that the presentation of evidence regarding the appellant's religious conversion was meant to be important (R 298-299). Lastly, Turner conceded that evidence of the appellant's family history and physical/emotional problems was presented to the jury by a lay witness, the appellant's uncle, Raymond Daugherty (R 299).

Dr. Weitz was accepted by the court as an expert in psychology (R 306). Weitz had read a clemency report about the appellant and had interviewed the appellant for four hours (R 205-259, 307). Weitz concluded that Bonnie Heath had a "tremendous impact" on the appellant (R 310). Weitz testified that the appellant relied upon Bonnie Heath to satisfy his sexual

and emotional needs and that

> he would respond to any of her directions . . . out of his fear of losing this bond. (R 310).

Weitz, however, did not testify as to what Bonnie Heath might have done - what "directions" she might have given - to influence the appellant to murder Lavonne Sailer. Even though he had never met Heath, Weitz was able to conclude that she had "wiles as a very stong feminine individual" (R 311). Weitz also opined that the appellant also acted out of an emotional or mental disturbance; this opinion, however, was only related back to his earlier conclusion regarding substantial domination (R 312). Weitz later stated that this unspecified emotional disturbance affected the appellant's ability to appreciate the criminality of his actions (R 314). Weitz also concluded that the appellant was immature at the age of twenty despite being of above average intelligence, despite having been married with a family and despite having worked to support his family (R 314-319).

On cross-examination, Weitz conceded that he relied upon the information obtained from the appellant as accurate and that he did not read any testimony from the appellant's penalty phase proceeding (R 320). Weitz excluded the possibility that drugs or brain damage were mitigating circumstances (R 320-321). Weitz refused to concede that earlier statements by the appellant indicating that he acted on his own would affect his conclusions (R 322-331).

The state presented as its witness Arthur J. Kutsche, the appellant's trial attorney (R 343-345). Kutsche testified that

he discussed with the appellant the possible lines of defense (R 347). As a result,

> it was our intention to utilize as many as we could of the state's witnesses, especially his Uncle Raymond, as well as Jeffrey himself. . . .(R 347). [emphasis supplied].

Kutsche admitted that he did not have the appellant examined by a psychologist, but he stated that he discussed that possibility with the appellant (R 347). Kutsche did not pursue that possible line of defense but felt that the same statutory and non-statutory mitigating circumstances could be presented in other ways (R 347-348). Kutsche did discuss the appellant's case with two psychiatrists who he trusted, Drs. Wilder and Podnos; their opinions, Kutsche felt, were not helpful (R 348-349). Kutsche said that he believed that he could not find an expert who would "support our theory the way I wanted it supported"; that any expert opinion which was presented would be impeached by the appellant's statements that he acted on his own; that any defense expert would be countered by a state expert in rebuttal (R 349-350). Kutsche ultimately adopted the strategy to utilize lay witnesses, including the state's witnesses, to establish various mitigating circumstances; this strategy was designed to avoid serious impeachment and to present evidence which "would stand of record as unrebutted. . . ." (R 350-351).

Upon further examination, Kutsche stated that not all of his recollections were vague; his recollections of his notes and the case file were specific (R 355-356). Kutsche did review expert testimony about the appellant that had been used in other states

(R 359-361). Kutsche stated that an important factor in deciding to forego presenting expert testimony was the possibility that an expert "would just characterize him [the appellant] as simply a mean guy" (R 363).

SUMMARY OF ARGUMENT

In appealling the denial of his motion for post-conviction relief, the appellant, JEFFREY JOSEPH DAUGHERTY, fails to bring any substantial issues before this court. Although the appellant does raise an ineffective assistance of counsel claim, the rest of his arguments involve issues which were or should have been raised on direct appeal. Therefore, this court need not even reach the merits of most of the appellant's arguments. The appellant raises four issues in his initial brief and the appellee will respond as outlined below.

The first issue which is raised relates to the alleged ineffective assistance of appellant's trial counsel, Arthur J. Kutsche. The appellant claims two specific areas of deficient performance, that trial counsel should have obtained and presented expert testimony regarding various statutory mitigating circumtances and that trial counsel should have lodged an objection to the trial court's instruction on the aggravating circumsance of a "heinous, atrocious or cruel" murder. However, the appellant does not demonstrate any deficient performance. The record clearly shows that Kutsche did have expert evaluations of the appellant available to him and that he discussed this case with two trusted psychiatrists. Kutsche made a reasoned decision that expert testimony would not benefit his client's case substantially. Kutsche's decision to use lay witnesses regarding various statutory and non-statutory mitigating circumstances was a sound decision as it avoided serious impeachment of his client's case. Regarding the latter claim of deficient

performance, Kutsche's decision not to object to the standard jury instruction was proper in that the instruction was a correct statement of the law.

The appellant's ineffectiveness claims also fail because he can not demonstrate prejudice to his case. Kutsche's decision to forego expert testimony is not prejudicial because that evidence would merely have been cumulative. Therefore, the results of the appellant's penalty phase proceeding are not rendered unreliable. Kutsche's decision not to object to the standard jury instruction regarding a "heinous, atrocious or cruel" murder also causes no prejudice. The trial court rejected that aggravating circumstance, ergo the imposition of appellant's death sentence is based on solid findings of two aggravating circumstances against no mitigating circumstances. The appellant's argument that the jury might have recommended a life sentence but for this instruction not only begs the question of whether the instruction was correct but ignores the trial judge's power to override the jury's advisory verdict.

In sum, the appellant's ineffectiveness arguments fail to prove any deficient performance or prejudice. This court's observations in Washington v. State. 397 So.2d 285, 287 (Fla. 1981), are very appropriate in this case as well.

> The record shows that trial counsel made a respectable argument on appellant's behalf at the sentencing hearing. A confession plus numerous aggravating factors limit the alternatives of the most zealous of advocates.

The remainder of the appellant's claims - prosecutorial abuse of discretion in seeking the death penalty, error by the

trial court in failing to consider non-statutory mitigating circumstances and error by the trial court in not finding the existence of the statutory mitigating circumstances of substantial domination and age - all of these claims are not cognizable on a motion for post-conviction relief.

> As [this court has] repeatedly stated, a 3.850 motion cannot be utilized for a second appeal to consider issues that either were raised or could have been raised in the initial appeal.

O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). Even if the merits of these issues were addressed, this court would find them bankrupt of value.

This court, after considering all of the appellant's arguments, will conclude that no relief is appropriate. The appellee urges this court to affirm the order of the lower court denying the appellant's motion for post-conviction relief.

POINT ONE

THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION FOR POST-COVICTION RELIEF ASSERTING INEFFECTIVE ASSISTANCE OF COUNSEL.

The appellant's primary contention in this appeal is that he received ineffective assistance from his trial counsel, Arthur J. Kutsche. His ineffectiveness claims relate specifically to two issues:

A) Kutsche's alleged failure to obtain and present expert medical/psychiatric testimony regarding various statutory mitigating circumstances; and

B) Kutsche's alleged failure to object to the standard jury instruction on the aggravating circumstance of a "heinous, atrocious or cruel" murder.

The test for determining whether the appellant received ineffective assistance of counsel is established by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Strickland establishes a two-part test which requires a convicted defendant to show:

1. That trial counsel's performance was so deficient that it fell "outside the wide range of professionally competent assistance." (id, at 104 S.Ct. 2066).

2. That prejudice resulted therefrom to the degree that the results of the trial are not reliable.

The appellee asserts that with regard to each claim asserted by the appellant, he has failed to satisfy both the "performance" and the "prejudice" requirements of Strickland. Knight v. State, 394 So.2d 997 (Fla. 1981). The appellant has failed to overcome the

strong presumption that counsel's conduct

> falls within the wide range of reasonably professional assistance.

Strickland, at 104 S.Ct. 2066.

A. Failure to obtain and present expert testimony.

Faced with the findings of fact made by the lower court, the only method by which the appellant can sustain this claim is to attack those findings as incorrect (R 265-267). The findings of the lower court are presumed to be correct unless the appellant can demonstrate that they are clearly erroneous. Demps v. State, 462 So.2d 1074 (Fla. 1984) [appellate court will not substitute its judgment for that of trial court on questions of fact]. The appellant's attempts to do so are based upon claims that the lower court could not rely upon Kutsche's recollection and upon claims that Kutsche's testimony was inconsisent with the record.

The appellee asserts that Kutsche's recollection was reliable enough for the court. Kutsche denied that his memory was totally vague (R 355). Kutsche indicated that it had been over four years since he last reviewed this case and that he had only reviewed the file twice within the day prior to the hearing (R 355-356). Kutsche testified in detail about the extent of his discussions with the appellant and certain psychiatrists (R 346-348). Kutsche also remembered the contents of the appellant's case file and of notes Kutsche made therein (R 356, 359).

The appellant's attempts to show Kutsche's testimony as inconsistent with the record are sustained largely by misrepresenting the record. The appellant's argument that Kutsche recollected that the state's evidence of prior

convictions was "very minimal" is belied by the record; that specific reference was to the extent of the state's rebuttal evidence.

> [I] believe in rebuttal to Jeffrey's testimony having to do with the police officers and their recollection of the circumstances of the offense differing from the way Jeffrey described it. As I recall, it was very minimal. (R 346)

Kutsche also stated that he believed he reviewed a psychological report from Pennsylvania with the appellant, but that he could not find that report to refresh his recollection (R 359, 360-361). Clearly, the appellant fails in his attempt to demonstrate the lower court's findings of fact as clearly erroneous.

As it relates to the first prong of the Strickland test, the evidence clearly indicates that Kutsche's performance was not deficient in that he measured the nature and possible effect of presenting expert medical/psychiatric testimony. The evidence clearly supports the lower court's finding that Kutsche discussed the possibility of expert testimony with the appellant (R 265, 346-348, 361). The record likewise supports the lower court's findings that Kutsche consulted with two psychiatrists whose opinions he trusted; those consultations resulted in Kutsche's belief that expert testimony could be detrimental to the appellant in that it would either invite more damaging rebuttal testimony or highlight the appellant's prior statements negating substantial domination (R 265-266, 347-350, 352-353, 356-357, 362-363). The evidence in this case clearly indicates that Kutsche made a reasoned, tactical decision in choosing to present only lay witnesses regarding the various mitigating

circumstances.

As stated in Strickland,

> [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. (at 104 S.Ct. 2066).

In this case, Kutsche made a strategic decision to avoid expert testimony in an effort to minimize discussion of the way the appellant was in order to maximize the effect of other mitigating circumstances highlighting a reformed Jeffrey Daugherty, e.g., his suicide attempt, religious conversion and remorseful attitude. The decision to request an appointment of an expert witness is a tactical decision within the standard of competent assistance of counsel. Lightbourne v. State, 471 So.2d 27 (Fla. 1985). The decision of which witnesses to use to establish mitigating circumstances is likewise tactical. Quince v. State, 477 So.2d 535 (Fla. 1985). Evidence of several mitigating circumstances, including substantial domination, was presented to the jury. Inasmuch as expert testimony may be disbelieved in favor of lay testimony, the failure to call an expert witness to establish a mitigating circumstance can not be labeled as "deficient performance". Lightbourne, supra. The testimony in this case

> went beyond statutory mitigating factors to include also nonstatutory factors. The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient. It is almost always possible to

> imagine a more thorough job being done than was actually done.

Maxwell v. Wainwright, 11 F.L.W. 219 (Fla. May 15, 1986).

The appellant has also failed to prove any prejudice to his case. On this issue, it is important to note that the appellant has conceded the existence of one aggravating circumstance (crime committed for pecuniary gain) and this court has upheld a second aggravating circumstance (prior convictions for capital felonies or felonies involving violence). (See Appendix 7). Daugherty v. State, supra. Dr. Weitz's testimony indicates that only one mitigating circumstance, substantial domination, might have been more strongly supported by expert testimony. In this light, the appellee submits that the results of this trial would not have been affected as aggravating circumstances still strongly outweighed mitigating circumstances. Middleton v. State, 465 So.2d 1218 (Fla. 1985). Further, prejudice is lacking because evidence of the mitigating circumstances supposedly supported by expert testimony, i.e., substantial domination, age, emotional or mental disturbance, and inability to realize criminality of actions, was presented by other witnesses. The decision to forego presentation of cumulative testimony is not prejudicial. Lightbourne, supra; Stone v. State, 481 So.2d 478 (Fla. 1985).

Another basis for demonstrating the lack of prejudice can be found in the nature of the expert testimony which was supposedly omitted, at least according to Dr. Weitz. Dr. Weitz was obviously presented by the appellant to prove that his claim of substantial domination was meritorious. In that regard, Weitz failed to prove anything. According to Weitz, Bonnie Heath had a

tremendous impact on the appellant and the appellant relied upon her and responded to her directions. Reliance by the appellant on Bonnie Heath is the exact opposite of substantial domination by Heath on the appellant; the distinction is whether Heath was actively asserting her influence over the appellant. Therefore, the expert testimony which is supposedly conclusive proof of substantial domination is, at best, sideshow evidence. The decision not to present such evidence is not prejudicial. Stone, supra [remoteness of omitted psychological testimony insubstantial in proving prejudice].

The evidence which was presented at the appellant's penalty phase proceedings confirm the foregoing conclusion of the appellee. The appellant made numerous prior statements to the effect that Bonnie Heath was not involved. Her involvement in the Lavonne Sailer murder is, at best, complicity with the appellant's actions. She did not even suggest that the appellant murder Lavonne Sailer; she merely encouraged the appellant to finish the job he had already started. Only when the appellant was returned to Florida and was facing a second death sentence did he realize that he should try to implicate Bonnie Heath in an effort to trade testimony for leniency.

> [I] think [the victim] was starting to get back up, something similar to that, you know, and I believe that's when I shot at her, I shot at her twice and the woman, I think she was breathing hoarse or something like that, I could hear her breathing and Bonnie, Bonnie says, she's not dead, I still hear her breathing. . . . I figured, you know, what I had done was already enough . . .and Bonnie said shoot her again, you know. I looked at Bonnie 'cause I mean, up until right around that time,

she never wanted to hurt anything. I couldn't understand, you know, the things that was going around her head, you know. So, then I went ahead and shot her again, you know. There may have been a total of four or five shots. I don't really remember . . . .

The only statement that I really can make is plain and simple is this, I'm guilty of the crime, I don't deny doing it 'cause I did, ah, but it wasn't that I actually set out to do it, you know, I didn't set out to kill the woman, it just, it just happened. Possibly, you know, a weakness on my part, you know, I just went ahead on, I had it on my mind, you know, no witness, you know. A dead person can tell no tales. . . . I didn't feel that she could give an identification of us, and I figured, you know, my intention was just to knock her out and leave her there. I figured we would be well gone by the time, you know, anybody ever find her if she come to. But, ah, encouragement of Bonnie, she said no, like I say, I don't know if these are her exact words, you have to shoot her but, that's what I did. I did shoot the woman, I did kill her, but ah, I don't feel I should be the one, you know to take all the weight. . . .

I'm not going to cover for her, if y'all got a case sure enough against her and you believe that you can jam her up, then jam her as much, as you know, as I'm going to get, 'cause, hey, she was there, I was there, she had a whole heck of a lot to do with it, and I pulled the trigger but there was a whole lot of influence there you know, between her and I, and I just more or less went on and complied with it, and you know, I had the attitude well, to hell with it, you know, bam, but we was both there, and as far as I am concerned, she had, she had, her finger on the trigger right along with me, and I'm not I don't want to take the weight, you know I may not, you know, I may not you know, offer to take the stand against her. (R 323-326).

(See also, Appendix 9, trans. p. 234-238).

The bottom line of this issue is that attorney Kutsche made

a valid, informed, well-reasoned, tactical decision to forego expert testimony in lieu of emphasizing the appellant's present personality while presenting lay testimony of several statutory and non-statutory mitigating circumstances. The omitted testimony is at best cumulative and tangential and at worse detrimental to other defense strategies. Since defense theories can be inconsisent, it is not ineffective assistance of counsel to forego presentation of a possible line of defense. Magill v. State, 457 So.2d 1367 (Fla. 1984). Even an "ill-advised choice of [a] theory of defense" does not necessitate a finding of ineffectiveness. Stewart v. State, 481 So.2d 1210, 1212 (Fla. 1985).

B. Failure to object to standard jury instruction.

The appellant's argument on this issue is entirely based on a misconception of the law. As to the "performance" portion of the Strickland test, it cannot be said that the failure to object to the instruction on the definition of "heinous, atrocious or cruel" was deficient performance. This is so not merely because the instruction was the standard jury instruction, but also because it was a correct statement of law.

When the present statutory scheme, i.e., section 921.141, Florida Statutes, was adopted, the aggravating circumstance of a "heinous, atrocious or cruel" murder was established. In reviewing this statute to determine its constitutionality, the Florida Supreme Court stated

> The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony

> constitutes an aggravated capital felony. Fla. Stat. §921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. 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.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Dixon also held that Florida's statutory provisions for the imposition of the death penalty sufficient limited and directed discretion in the imposition of captial punishment to be constitutional under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The facial validity of section 921.141, Florida Statutes was upheld by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In Proffitt, the United States Supreme Court made particular note of the language in Dixon stating

> We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. (id, at 96 S.Ct. 2968).

This standard still holds true. Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1984).

This court should note that the instruction given in this

case is virtually a verbatim recitation of the interpretative definitions found in Dixon. As held in Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied , 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977),

> a proper instruction defining the terms "especially heinous, atrocious and cruel", . . .must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required.

Therefore, the standard jury instruction was a correct statement of the law; it provided constitutionally sufficient guidance for the judge and jury.

The appellant's argument to the contrary is incorrect because his interpretation of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), is patently erroneous. In Godfrey, the United States Supreme Court reaffirmed its prior ruling in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Gregg upheld the Georgia statutory scheme which established an "outrageously or wantonly vile, horrible or inhuman" murder as an aggravating circumstance. Godfrey also noted that the Georgia Supreme Court had adopted case law which further defined those terms (as Proffitt had so recognized Dixon). In Godfrey, however, the United States Supreme Court vacated a sentence of death because the Georgia Supreme Court had not applied its decisional law in that case. The appellant's interpretation that Godfrey invalidated the language of that statute is patently incorrect. Ergo, his conclusion that Kutsche should have lodged an objection to the standard jury instruction is also incorrect. In the case at bar, it was not deficient

performance to accede to the standard jury instruction because Godfrey's holding is not applicable to this case.

Further, failure to object to a valid standard jury instruction regarding an aggravating circumstance is not deficient performance. Adams v. State, 456 So.2d 888 (Fla. 1984) [failure to object to instruction on aggravating circumstances for which there was no evidence is not deficient performance].

The appellant's "prejudice" arguments on this issue miss the point entirely. He speculates that had the unobjected to instruction not been read to the jury they might have returned a recommendation of life imprisonment; he concludes that his sentence of death is now unreliable. This argument ignores the obvious facts in this case and ignores the law as well. The appellant's argument is not supported by the facts because of the three aggravating circumstances presented to the jury, i.e., prior convictions, crime committed for pecuniary gain and a heinous, et al murder, most of the evidence centered on the appellant's other convictions. Also, the aggravating circumstance of pecuniary gain was conceded by the appellant in his testimony. (See Appendix 9, trans. p. 231). The evidence regarding heinous, atrocious or cruel was not as extensive. As a result, the appellee posits that there was still an adequate basis for a recommendation of a death sentence, ergo the verdict was not unreliable per Strickland. Moreover, the appellant's arguments overlook the fact that the sentencing judge found that the murder was not heinous, etc.. This fact conclusively demonstrates that this aggravating circumstance did not become

involved in the sentencing process. This is another reason why the death sentence in this case is reliable enough to support a finding of no prejudice. Maxwell, supra [where reviewing court finds that sufficient aggravating circumstances still exist after a finding that murder was not heinous, etc., failure to object to instruction not ineffective assistance of counsel].

The appellant's arguments also ignore other aspects of the law. Even if the jury had recommended a life sentence, the sentencing judge would still have had the discretion to override that recommendation. Spaziano v. Florida, ____ U.S. ____, 104 S.Ct. 3154, ___ L.Ed.2d ___ (1984). The appellant's convictions for four other murders, plus convictions for numerous robberies, plus a second aggravating circumstance makes this case very similar to Spaziano, supra, wherein the United States Supreme Court upheld a jury-override death sentence. In Spaziano, the aggravating mitigating ratio was also 2-0. Therefore, the appellee posits that the death sentence in this case is not unreliable.

* * * * *

The appellant's ineffectiveness arguments fail both portions of the Strickland test. The lower court's conclusions that Arthur Kutsche, an attorney experienced in criminal law, adequately represented the appellant should be upheld. The lower court's findings of fact are correct. There is ample other evidence in the record to demonstrate that not only has the appellant failed to prove his ineffectiveness claim, but rather that the appellant received proper legal representation.

POINT TWO

THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ASSERTING PROSECUTORIAL ABUSE OF DISCRETION IN SEEKING THE DEATH PENALTY.

The next issue which the appellant brings before this court is whether the prosecutor in this case abused his discretion in seeking the death penalty. He argues that such an abuse renders the imposition of the death penalty against him arbitrary and capricious, thereby violating constitutional protections established in Furman v. Georgia, supra, and Gregg v. Georgia, supra. Simply stated, the appellant claims that the death penalty in this case is unconstitutional as applied.

The law is well settled in Florida that any issue which was or could have been raised on direct appeal is not cognizable by way of a motion for post-conviction relief. Foster v. State, 400 So.2d 1 (Fla. 1981).

> Collateral relief proceedings may not be used as a vehicle to raise, for the first time, issues that the petitioner could have raised during the initial appeal on the merits, nor may they be used to retry issues previously litigated on direct appeal.

Thompson v. State, 410 So.2d 500, 501 (Fla. 1982). See also, Raulerson v. State, 462 So.2d 1085 (Fla. 1985) and Straight v. State, 11 F.L.W. 227 (Fla. May 19, 1986).

Specifically with regard to arguments asserting the unconstitutionality of the death penalty as applied, such claims have been held to be properly raised on direct appeal. Mikenas v.. State, 460 So.2d 359 (Fla. 1984) and Christopher v. State, 416 So.2d. 450 (Fla. 1982) [excessiveness and disproportionality

of death sentences properly raised on direct appeal]. In Groover v. State, 11 F.L.W. 239 (Fla. June 3, 1986), this court specifically rejected a defendant's claim that the death penalty was sought out of "prosecutorial vindictiveness", ruling that such a claim should have been raised on direct appeal. The appellee urges this court to recognize the appellant's procedural default on this issue. Zeigler v. State, 452 So.2d 537 (Fla. 1984); Bundy v. State, 11 F.L.W. 294 (Fla. June 30, 1986).

Even if this court were to reach the merits of this issue, it would affirm the ruling of the lower court nonetheless. It would find that the lower court correctly concluded that the appellant failed to present any evidence on this issue (R 266). The appellant did not present any evidence on this issue; instead, he relied on the allegations he made in his Rule 3.850 motion and argument (R 155, 182-184, 376-378). The appellee claims that such a lack of evidence does not merit any relief. If indeed there were a factual basis for this claim, the appellant could have subpoenaed either of the two Brevard County prosecutors or Volusia or Flagler County prosecutors to substantiate it.

The appellant argues in his brief that there is "record evidence" to support this claim (Appellant's Initial Brief, p. 32). While the record does indicate that in the Volusia and Flagler County cases, the prosecutors waived the death penalty in return for a plea of guilty, this disparity, without more, does not prove abuse of prosecutorial discretion. The "record evidence" actually proves there was no abuse of discretion. At

the penalty phase proceeding, Larry Moody, a Flagler County Deputy Sheriff/State Attorney's Office Investigator, testified that the only eyewitness to the murder of Carmen Abrams was unable to testify at trial. (See Appendix 10, trans. p. 103-111). That testimony alone explains plea negotiations in that case. The appellee denounces the conspicuous absence of this "record evidence" from the appellant's arguments on this issue.

POINT THREE

THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ASSERTING THE TRIAL COURT'S FAILURE TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

The appellant's argument on this issue is utterly without legal merit and misrepresents the facts and procedural history of this case. He claims that the trial court failed to consider non-statutory mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). He does not cite to any specific error on the part of the lower court in ruling on his Rule 3.850 motion except generally to dispute the lower court's ruling that there was no evidence presented on the issue.

First, the appellee urges this court to note that the appellant raised this issue on direct appeal. (See Appendix 7). Issues which are litigated and resolved on direct appeal are not cognizable on a Rule 3.850 motion. Foster, supra; Thompson, supra; Straight, supra; Thomas v. State, 486 So.2d 577 (Fla. 1986). Alleged improper consideration of non-statutory mitigating circumstances by the trial court must be raised on direct appeal. State v. Zeigler, 11 F.L.W. 233 (Fla. May 19, 1986); Buford v. State, 11 F.L.W. 257 (Fla. June 5, 1986); Smith v. State, 457 So.2d 1380 (Fla. 1984).

Furthermore, this court has already ruled on direct appeal that the trial court properly considered non-statutory mitigating circumstances.

> 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 his previous convictions, he would not be eligible for parole for 107 1/2 years. Daugherty does not argue that the court failed to consider these cicumstances 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. [emphasis supplied.]

Daugherty v. State, supra at 1071. The appellee posits that the lower court has no authority to reconsider this issue once the Florida Supreme Court has considered and ruled on it.

It is intersting to note that the appellant dredges up two non-statutory mitigating circumstances, i.e. the appellant's alleged head injury and use of drugs, which were not directly referred to in Daugherty v. State, supra. These references are interesting because in presenting evidence on his Rule 3.850 motion, the appellant proved that these two non-statutory mitigating circumstances were not founded. At the motion hearing, Dr. Weitz testified,

> [I] found no evidence whatsoever that there was organic injury to his brain, which would cause, in and of itself, the bizarre behavior. . . .I have no evidence that it was drugs that was doing it. But I ruled that out in my report. (R 320).

The appellee submits that this issue has been fully litigated and correctly resolved against the appellant's position. It was proper for the lower court to deny relief on this issue.

POINT FOUR

THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTION FOR POST-CONVICTION RELIEF ASSERTING THE TRIAL COURT'S FAILURE TO FIND STATUTORY MITIGATING CIRCUMSTANCES.

With regard to this final issue, the appellee would once again ask this court to note that the appellant raised this issue on direct appeal. (See Appendix 7). As before, issues which are raised on direct appeal are not cognizable on a Rule 3.850 motion. Foster, supra; Thompson, supra; Straight, supra. Alleged improper consideration of statutory mitigating circumstances is an issue which should be litigated on direct appeal. Mikenas, supra; Foster v. Wainwright, 457 So.2d 1372 (Fla. 1984); Adams v. Wainwright, 484 So.2d 1211 (Fla. 1986).

Furthermore, this court has already ruled on direct appeal that the trial court properly considered the evidence regarding various statutory mitigating circumstances. Daugherty v. State, supra at 1069-1071. Again, the appellee posits that the lower court has no authority to rehear this issue and review the decision of the Florida Supreme Court.

With regard to the two statutory mitigating circumstances which are discussed by the appellant in this appeal, this court should note that the appellant does not cite to any specific error by the lower court in ruling on his 3.850 motion. All the appellant does is generally allege that the lower court erred in ruling that the appellant failed to present any evidence on this issue. Upon proper examination of these arguments by the appellant, it should be evident that the appellant is attacking the findings of the trial court, not the lower court, in ruling

that there was no evidence to support the mitigating circumstances of substantial domination and age.

A. Substantial domination.

The record clearly demonstrates that there is no factual basis for the mitigating circumstance of substantial domination. The appellant's testimony at the penalty phase proceeding proves that Bonnie Heath had no significant involvement in the Lavonne Sailer murder until after the appellant had already shot the victim (R 323-326). (See also Appendix 9, trans. p. 202-203, 225-227). None of the evidence presented at the motion hearing could change that. All Dr. Weitz could say was that the appellant relied upon Bonnie Heath; he could not point to any actions by Bonnie Heath that would have exploited that alleged emotional reliance and converted into substantial domination. Furthermore, the trial court was required to consider the appellant's statements which demonstrated his voluntary participation in this and other crimes; those statements also exculpated Bonnie Heath. In light of these statements by appellant, the trial court was reasonable in concluding that only physical domination may have been possible. Therefore, the trial court properly found that there was no factual basis for a finding of substantial domination due to the disparity in size between the appellant and Bonnie Heath.

The appellant's citation of Witt v. State, 342 So.2d 497 (Fla. 1977), cert. denied, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 294 (1977), offers no authority for his position. Witt's discussion of subsantial domination is too limited to be of any

precedential value.

B. Age.

With regard to this statutory mitigating circumstance, the record also supports the trial court's conclusion that the appellant's age was not a mitigating circumstance because he was of majority. The record clearly shows that the appellant was married, had a family, worked to support his family and was able to provide independently for them. Being of the age of majority entails having the free will to do all of those things and responsibility for those decisions once they are made. The appellant's citation of a litany of cases where age was found to be a mitigating factor is irrelevant in light of the case-by-case approach mandated by this court in Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). As this court previously ruled

> the [trial] court did not err in rejecting the mitigating factor of age under the particular circumstances of this case.

Daugherty v. State, supra at 1070-1071.

CONCLUSION

Based upon the arguments and authorities herein, the appellee respectfully requests this court to affirm the lower court's denial of the appellant's motion for post-conviction relief.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

JOSEPH N. D'ACHILLE, JR.
ASSISTANT ATTORNEY GENERAL
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U.S. mail to Thomas R. Trowbridge, III, Esquire, and Daniel J. Thomasch, Esquire, 30 Rockefeller Plaza, New York 10112 and John P. Dean, Esquire, 1850 K Street, N. W. Suite 1200, Washington, D.C. 20006, Counsel for Appellant, this 30th day of July, 1986.

Joseph N. D'Achille, Jr.
Of Counsel