SUPREME COURT OF FLORIDA

NO. 67,450

JEFFREY JOSEPH DAUGHERTY,

Defendant-Appellant,

v.

STATE OF FLORIDA,

Plaintiff-Appellee.

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

INITIAL BRIEF FOR APPELLANT

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SUPREME COURT OF FLORIDA

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JEFFREY JOSEPH DAUGHERTY, Defendant-Appellant, v. STATE OF FLORIDA, Plaintiff-Appellee.	INITIAL BRIEF FOR APPELLANT JEFFREY JOSEPH DAUGHERTY

STATEMENT OF THE CASE

This is an appeal from an order of the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, the Honorable John Antoon, II, Circuit Judge, presiding, denying defendant-appellant Jeffrey Joseph Daugherty's post-conviction motion, pursuant to Fla. R. Crim. P. 3.850, to vacate the death sentence imposed upon him by that Court on April 27, 1981. Mr. Daugherty's motion, filed March 15, 1985, (R. 153-97) */ asserted that the imposition of the death sentence upon him was contrary to the Constitution of the United States and to the Constitution and laws of the State

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*/ The record filed with the Court will be cited as "R.," followed by the appropriate page numbers. The transcript of the November, 1980 sentencing hearing will be cited as "Trial Transcript," followed by the appropriate page numbers. For the convenience of the Court, portions of the record have been copied in an Appendix filed with this brief, which will be cited as "App. __."

of Florida. The Circuit Court did not order the State's Attorney to answer the motion. Instead, it set a hearing for May 29, 1985 (R. 198). Approximately five weeks after the hearing, the Circuit Court issued an order denying relief. (R. 265-267, App. 1-3.) Notice of Appeal was timely filed on August 1, 1985 (R. 268).

STATEMENT OF FACTS

A. The Original Sentencing Proceedings

On November 18, 1980, Jeffrey Daugherty, represented by Mr. A.J. Kutsche, an Assistant Public Defender, pleaded guilty to the murder of Lavonne Sailer, and related crimes. */ The Circuit Court then held a sentencing hearing pursuant to F.S. § 921.141. Notwithstanding the guilty plea, the State introduced detailed evidence concerning the commission of the crime and presented extensive evidence of other crimes committed by Mr. Daugherty during a span of twenty days in 1980. **/

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*/ Mr. Daugherty pleaded guilty to five charges at that time: first degree murder from a premeditated design, felony murder during the commission of a robbery, felony murder during the commission of a kidnapping, robbery and kidnapping.

**/ Included in this evidence was extensive testimony concerning Mr. Daugherty's conviction in Pennsylvania for the killing and robbery of George Karnes. See Trial Transcript at 128-30, 148-55, 246-51. Those convictions were reversed by the Pennsylvania Supreme Court before the Circuit Court sentenced Mr. Daugherty. Commonwealth v. Daugherty, 493 Pa. 273, 426 A.2d 104 (1981). Defense counsel, however, never brought this to the Court's attention.

Defense counsel presented only two witnesses: Mr. Daugherty himself and Father Albert J. Anselmi, Chaplain of the Pennsylvania State Prison, where Mr. Daugherty had been incarcerated from September 1976 until shortly before the trial. Defense counsel questioned Mr. Daugherty about the crimes he had committed, his childhood and adolescence, his religious conversion and his remorse for the crimes he had committed. Father Anselmi, an experienced prison chaplain, confirmed the sincerity of Mr. Daugherty's religious beliefs.

Defense counsel, however, presented no testimony from any psychiatric or psychological experts, testimony that was absolutely critical to the statutory mitigating circumstances that he sought to establish, namely, that Mr. Daugherty had committed the crime while under the substantial domination of Bonnie Heath (a woman more than twice his age, who was his lover and traveling companion), that the crime was committed under extreme mental or emotional disturbance, that his capacity to appreciate his actions was substantially impaired and that he was relatively young at the time of the crime (20 years old). Nor did defense counsel call any family or friends of Mr. Daugherty who could have testified as to the relationship between him and Bonnie Heath and her influence on him.

The jury returned an advisory sentence of death on November 20, 1980 and the Circuit Court adopted that recommendation on April 27, 1981. (R. 145-50) Because the jury returned a general verdict, it is impossible to determine which of the aggravating and mitigating circumstances specified in F.S. § 921.141(b) it found. The Circuit Court, however, found that two aggravating circumstances were established: that the murder was committed for pecuniary gain and that Mr. Daugherty had previously been convicted of other capital felonies and felonies involving the use or threat of violence. (R. 147-48) It found no mitigating circumstances, rejecting the evidence that he was under the influence of Bonnie Heath on the ground that "she was a small woman," (R. 149) and rejecting the mitigating factor of age simply because Mr. Daugherty "was in his majority." (R. 150) The Court's order did not discuss the evidence of Mr. Daugherty's remorse for his crimes or his religious conversion.

Mr. Daugherty, still represented by Mr. Kutsche, appealed his conviction, and this Court affirmed. Daugherty v. State, 419 So.2d 1067 (1982), cert. denied, 459 U.S. 1228 (1983). A clemency hearing before the Governor and the Cabinet has been conducted, but no decision has been announced as of this date. Consequently, no date of execution has been set.

B. Post Conviction Proceedings

On March 15, 1985, present counsel filed a motion pursuant to Fla. R. Crim. P. 3.850 seeking to vacate the death sentence (R. 153-97). */ The petition alleged five grounds for relief: 1) ineffective assistance of counsel during the sentencing hearing; 2) failure of the sentencing court to consider non-statutory mitigating factors established by the evidence; 3) failure of the sentencing court to find the mitigating factor of substantial domination; 4) failure of the sentencing court to consider age as a mitigating factor; 5) the State's decision to seek the death penalty in this case was an arbitrary exercise of prosecutorial discretion.

The Circuit Court held an evidentiary hearing on May 29, 1985. Two witnesses testified on Mr. Daugherty's behalf. Larry G. Turner, Esq., a member of the Florida Bar since 1970 and an experienced criminal defense attorney, **/

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*/ Prior to filing the Rule 3.850 motion, counsel filed a habeas corpus petition in this Court on November 8, 1983. This Court denied the petition without opinion on November 15, 1983, and the Supreme Court of the United States denied certiorari. Daugherty v. Wainwright, No. 64,489, cert. denied, 466 U.S. 945 (1984).

**/ Mr. Turner had testified as an expert on the duties and responsibilities of defense counsel on three or four separate occasions. He has been an expert witness for both the State and the defense in his previous appearances. (R. 287-88, App. 10-11.)

testified that Mr. Daugherty did not receive effective assistance of counsel at his sentencing hearing for two separate reasons: defense counsel's failure to arrange for a psychiatric or psychological evaluation in order to evaluate the possibility of presenting mitigating evidence (R. 289-291, App. 12-14) and defense counsel's failure to object to a jury instruction that defined the "heinous, atrocious or cruel" aggravating circumstance, F. S. § 921.141(5)(h) in a manner contrary to both Florida law and the United States Constitution. (R. 291-94, App. 14-17.)

Doctor Robert Weitz, an eminent psychologist with vast experience in the criminal justice field (R. 303-305, App. 26-28) testified concerning the results of a psychological examination of Mr. Daugherty conducted several months earlier. Dr. Weitz noted the overwhelming influence of Mr. Daugherty's companion, Bonnie Heath, in the commission of the crime at issue, along with the negative influence of a severely deprived childhood and adolescence that included abandonment by both parents at age two, being raised by an abusive and alcoholic grandfather, a cruel hoax perpetrated by his uncle, William Daugherty, who pretended to be Mr. Daugherty's father for most of his life while adopting an attitude of total rejection toward him, his marriage at an early age, the rape of his wife by William Daugherty and many other emotional traumas. (R. 310-19, 326, 330-31, 339-40, 201-04, App. 33-42, 49, 53-54, 62-63, 91-94.) That evidence was relevant to at least four of the mitigating circumstances specified in F. S. § 921.141(6) -- substantial domination by another person, extreme emotional disturbance, substantial impairment of capacity and age. Dr. Weitz' testimony demonstrated that a psychiatric or psychological evaluation prior to the original sentencing hearing would have produced significant mitigating evidence.

The State presented only one witness -- Mr. Kutsche, who had been Mr. Daugherty's attorney. He did not discuss his failure to object to the instruction defining "heinous, atrocious or cruel." Mr. Turner's testimony on that point, therefore, is unrebutted. Mr. Kutsche's testimony focused exclusively upon his failure to arrange for a psychiatric or psychological evaluation of Mr. Daugherty (R. 343-64, App. 66-87.) Mr. Kutsche admitted several times that he had no more than a "vague recollection" about his reasons for not arranging for an evaluation. (R. 348, 355, 362, 363, App. 71, 78, 85, 86.) He thought that he had discussed the case with two psychiatrists, although he could not locate his notes concerning those conversations. (R. 355-56, App. 78-19.) Based on those conversations, Mr. Kutsche believed that he could obtain favorable psychiatric evaluations, but that any witness would be asked to explain the differences between Mr. Daugherty's initial statements about the crimes, in which he attempted to cover up Bonnie Heath's involvement, and his later statements admitting that she had been the dominant force in this crime and others. (R. 357, App. 80.) Mr. Kutsche conceded, however, that the defense he presented focused upon Mr. Daugherty's present state of mind and that such impeachment was inevitable, even if no psychiatrist or psychologist testified. (R. 357-58, App. 80-81.)

C. The Circuit Court's Ruling

On July 3, 1985, the Circuit Court issued an order denying all relief. The Court found that Mr. Kutsche considered the use of psychiatric or psychological testimony but believed that such testimony would have disadvantaged Mr. Daugherty. (R. 265-66, App. 1-2.) The Court's only finding with respect to Mr. Kutsche's failure to object to the "heinous, atrocious or cruel" instruction was that it was the standard jury instruction used at the time of trial. (R. 266, App. 2.) The Court also ruled that there was no evidence presented concerning the sentencing court's failure to consider non-statutory mitigating circumstances, the court's failure to find the mitigating circumstances of age and substantial domination or the claim that the state's decision to seek the death penalty was an arbitrary exercise of prosecutorial discretion. (R. 266, App. 2.)

SUMMARY OF ARGUMENT

The Circuit Court's ruling was contrary to both the record evidence and settled principles of law. In rejecting Mr. Daugherty's claim that counsel's failure to object to the "heinous, atrocious or cruel" instruction constituted ineffective assistance of counsel, the Circuit Court ignored decisions of both this Court and the United States Supreme Court that demonstrate the insufficiency of that instruction under Florida law and the Eighth Amendment. The Circuit Court's implicit holding that failure to object to a standard jury instruction never can be ineffective assistance of counsel is inconsistent with numerous statements of this Court that standard instructions should not necessarily be regarded as correct in all circumstances.

The Circuit Court's findings concerning Mr. Kutsche's consideration of the use of psychiatric or psychological testimony are unsupported by the evidence. Mr. Kutsche's vague recollections are contradicted by the record of the sentencing hearing and are an insufficient basis for any findings of fact. Even if his recollections are credited, however, they do not furnish a constitutionally adequate explanation for his actions.

The Circuit Court's disposition of the remaining claims is similarly flawed. The evidentiary record clearly demonstrates that the prosecutor's decision to seek the death penalty in this case was arbitrary, because prosecutors in two other Florida counties, faced with virtually identical cases, did not seek the death penalty. Furthermore, the trial record itself evidences the sentencing court's unlawful failure to consider non-statutory mitigating circumstances and to find the statutory mitigating factors of substantial domination and age.

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY REJECTED MR. DAUGHERTY'S CLAIM THAT COUNSEL'S FAILURE TO OBJECT TO AN UNLAWFUL AND UNCONSTITUTIONAL JURY INSTRUCTION WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court announced a two-part test for adjudicating a claim of ineffective assistance of counsel. A defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," id. at 688, and that counsel's failures were prejudicial to the defense, id. at 692. The undisputed evidentiary record concerning Mr. Kutsche's failure to object to the instruction defining "heinous, atrocious or cruel" demonstrates that the Strickland test has been satisfied. The Circuit Court's contrary ruling, therefore, should be reversed.

A. The Jury Instruction Was Improper.

At the sentencing hearing, the trial judge instructed the jury to consider each of the aggravating circumstances specified in F. S. § 921.141(5), even though there was no evidence to support many of them. (R. 47-48.) */ Particularly damaging was the Court's instruction on the eighth aggravating circumstance -- that the crime was "especially heinous, atrocious or cruel." F.S. § 921.141(5)(h). The Court's entire instruction on this issue was:

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

(R. 48).

Defense counsel's failure to object to this instruction constituted ineffective assistance of counsel. As Mr. Turner testified, a reasonably competent attorney at the time of Mr. Daugherty's trial should have known that

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*/ For example, Mr. Daugherty was not under sentence of imprisonment when the crime was committed, he did not create a great risk of death to many persons in committing this crime, and he did not commit this crime to disrupt or hinder the exercise of any governmental function.

the invalidity of the instruction was clearly established, under both Florida law and the Eighth Amendment. (R. 291-92, App. 14-15.)

This Court has adopted a limiting interpretation of the "heinous, atrocious or cruel" language. That aggravating circumstance applies only when the "horror of the murder [is] accompanied by such additional acts as to set the crime apart from the norm." Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). Those additional acts must be "conscienceless or pitiless" in that they are "unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). In short, "[t]he numerous cases in which the Florida Supreme Court has considered challenges to the application of this aggravating factor support the interpretation requiring acts of physical harm or torture to the murder victim prior to or accompanying the act resulting in death." Proffitt v. Wainwright, 685 F.2d 1227, 1263 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983).

The instruction did not inform the jury that they could find that the murder of Lavonne Sailer was "heinous, atrocious, or cruel" only if she had been tortured or severely harmed before she was killed. By failing to do so, it impermissibly allowed the jury to find the existence of the aggravating circumstance based upon a belief that "all killings are atrocious." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975).

A properly instructed jury could not have found that this crime was "heinous, atrocious or cruel." The medical examiner testified that the first shot fired by Mr. Daugherty either killed the victim instantly or rendered her unconscious, and that at least one of the shots caused instant death. Trial Transcript at 29-30. Numerous decisions of this Court prior to the sentencing hearing in this case held the "heinous, atrocious or cruel" circumstance inapplicable to similar cases. E.g., Williams v. State, 386 So.2d 538, 542-43 (Fla. 1980) (victim died almost instantaneously from her wounds); Fleming v. State, 374 So.2d 954, 958-59 (Fla. 1979) (victim shot three times); Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979) (victim shot twice); Riley v. State, 366 So.2d 19, 21 (Fla. 1978), cert. denied, 459 U.S. 981 (1982). A reasonably competent attorney should have been aware of these cases and objected to the Court's instruction.

Moreover, defense counsel should have been aware that the instruction was invalid on federal constitutional grounds. In Godfrey v. Georgia, 446 U.S. 420 (1980), decided approximately six months before Mr. Daugherty's trial, the Supreme Court reversed a death sentence imposed on the basis of a similar aggravating circumstance. In *Godfrey*, the jury had based its death sentence upon the aggravating circumstance specified in Ga. Code § 27-2534.1(b)(7), *i.e.*, that the murder was "outrageously or wantonly vile, horrible or inhuman" in that it involved "torture, depravity of mind, or an aggravated battery to the victim." The plurality opinion recognized that the Georgia Supreme Court had adopted a limiting construction of the statute similar to the construction of "heinous, atrocious or cruel" adopted by the Florida Supreme Court, *i.e.*, that the statute requires "evidence of serious physical abuse of the victim before death." 446 U.S. at 431. There was no such evidence in *Godfrey*, however, because both victims were killed instantly. *Id*. at 433. The Court concluded that by affirming the death sentence, the Georgia Supreme Court had "adopted such a broad and vague construction of the § (b)(7) aggravating circumstance as to violate the Eighth and Fourteenth Amendments to the United States Constitution." *Id*. at 423. *See also id*. at 432.

The plurality's explanation of its holding on the Georgia aggravating circumstance is equally applicable to Florida's "heinous, atrocious or cruel" standard:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensitivity could fairly characterize almost every murder as "outrageously or wantonly vile,

> horrible, and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation.

Id. at 428-29.

Like the jury in Godfrey, the jury in this case was given no guidance concerning the meaning of "heinous, atrocious and cruel." The instruction, using terms like "shockingly evil," "outrageously wicked" and "foul," used terms that persons of "ordinary sensibility" could apply to almost any murder. As in Godfrey, the jury's actual interpretation of the aggravating circumstance "can only be the subject of sheer speculation." 446 U.S. at 429. Thus, the instruction was unconstitutional because it failed to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" 446 U.S. at 428 (footnotes omitted).

Defense counsel should have been aware that the instruction was invalid under Godfrey. Indeed, in upholding the Florida death penalty statute in 1976, the Supreme Court relied upon the narrow construction that the Florida Supreme Court had given to the "heinous, atrocious or cruel" language.

Proffitt v. Florida, 428 U.S. 242, 255-56 (1976). See also Gregg v. Georgia, 428 U.S. 153, 201 (1976). This foreshadowed the decision in Godfrey that overly broad interpretations of such language are unconstitutional. Reasonably competent counsel, therefore, should have objected to the instruction on both statutory and constitutional grounds.

The decision below does not address the overwhelming weight of authority demonstrating that the instruction was invalid, nor does it address Mr. Turner's unrebutted expert testimony that reasonably competent counsel should have objected. Instead, the Circuit Court simply noted that the instruction was a standard jury instruction. (R. 266, App. 2.) While it did not expressly say so, the clear implication of the Circuit Court's ruling is that, as a matter of law, failure to object to a standard jury instruction cannot constitute ineffective assistance of counsel. That ruling misconceives the function of the standard jury instructions.

In promulgating the standard instructions, this Court cautioned the Bench and the Bar that its action should not be interpreted as a holding that they were correct statements of Florida law. This Court stated that its approval was "without prejudice to the rights of any litigant objecting to the use of one or more of such approved forms of instructions," and that it would be "inappropriate for the Court at this time to consider the recommended instructions with a view to adjudging that the legal principles in the recommended instructions correctly state the law of Florida." In the Matter of the Use by the Trial Court of the Standard Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976). This Court made similar statements when it promulgated the 1970 and 1981 instructions. */ In addition, Fla. R. Crim. P. 3.985 imposes upon the trial judge the responsibility of determining whether a standard jury instruction is "erroneous or inadequate." Case law also demonstrates that the standard jury instructions are not always correct or complete statements of the law. *See, e.g.*, Harvey v. State, 448 So.2d 578 (Fla. 5th DCA 1984) (reversing conviction for keeping a gambling house because standard instruction erroneous). It is clear, therefore, that the use of the standard instructions at Mr. Daugherty's trial did not relieve Mr. Kutsche of the responsibility to scrutinize those instructions carefully, and to object if any of them was erroneous. The Circuit Court's order, which apparently adopts a contrary view, must be reversed. The unrebutted evidence in the record demonstrates that reasonably competent counsel would have been aware that the

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*/ In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, 598 (Fla. 1981); In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 240 So.2d 472, 473 (Fla. 1970).

instruction was invalid and would have objected, even though the instruction at issue was a standard instruction. (R. 294-95, App. 17-18.) */

B. The Failure To Object Was Prejudical.

Strickland v. Washington, supra requires a showing that the failure to object to the erroneous instruction was prejudicial. 466 U.S. at 691-96. Mr. Daugherty "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id. at 693. Rather, he bears the lesser burden of showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The Court defined a "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." Id.

The prejudice to Mr. Daugherty from the erroneous instruction is clear. Because the jury returned only a general verdict recommending the death sentence, this Court cannot be confident that the jury properly understood that this crime was not "heinous, atrocious or cruel" as a matter of law. As in Godfrey, the jury's interpretation of the

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*/ Of course, there is no evidence whatsoever as to why Mr. Kutsche failed to object, because the State's Attorney never asked him why he failed to do so.

aggravating circumstance in this case "can only be the subject of sheer speculation." 446 U.S. at 429. In weighing the aggravating and mitigating circumstances in this case, the jury may well have decided to impose the death penalty because it believed that the murder was "heinous, atrocious or cruel" and that the various mitigating circumstances presented by Mr. Daugherty were not sufficient to outweigh that finding. If it were properly instructed, however, it might have concluded that the mitigating circumstances did outweigh the aggravating ones. */ Because there is no way to determine how the jury would have balanced the aggravating and mitigating circumstances, a new sentencing hearing is required. See, e.g., Williams v. State, 621 S.W.2d 686, 687 (Ark. 1981), cert. denied, 459 U.S. 1042 (1982); State v. Irwin, 282 S.E.2d 439, 448-49 (N.C. 1981); State v. Moore, 614 S.W.2d 348, 351-52 (Tenn.), cert. denied, 454 U.S. 970 (1981); Hopkinson v. State, 632 P.2d 79, 171-72 (Wyo. 1981), cert. denied, 455 U.S. 922 (1982).

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*/ The prejudicial effect of the erroneous instruction was enhanced by the admission into evidence of photographs of the scene of the crime, including close-ups of the victim's wounds, which were irrelevant to any of the statutory aggravating circumstances. The admission of this inflammatory material made a proper instruction on the meaning of "heinous, atrocious or cruel" absolutely essential. Like the jury in Godfrey, the jury in this case may have been unduly influenced by the gruesome scene portrayed in the State's evidence.

The prejudice to Mr. Daugherty from the erroneous instruction was not cured by the sentencing Court's subsequent written findings in support of the death sentence. The Court correctly ruled that the evidence did not support a "heinous, atrocious or cruel" finding, but went on to hold that two other aggravating circumstances had been established and that there were no mitigating circumstances. (R. 147-50). */ A properly instructed jury, however, might have returned a verdict of life imprisonment. **/ If it had done so, the Court could have imposed a death sentence only if "the facts suggesting a sentence of death [were] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). It is far from certain that every reasonable person would agree with the sentencing judge's conclusion that there were no mitigating circumstances. For example, in Herzog v. State, 439 So.2d 1372 (Fla. 1983), this Court relied upon the Tedder principle to reverse a death sentence even though the trial judge found no mitigating circumstances. Justice

*/ The Court found the murder was committed for pecuniary gain and that Mr. Daugherty had previously been convicted of other capital felonies.

**/ As noted above, the evidence could support a finding of at least four statutory mitigating circumstances specified in F.S. § 921.141(6), and several non-statutory mitigating circumstances.

Adkins, writing for the Court, held that it was sufficient that the jury _could_ have found non-statutory mitigating circumstances, even though, as in this case, the sentencing judge found none. _Id_. at 1381.

In enacting the Florida death penalty statute, the legislature "sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part." _Messer v. State_, 330 So.2d 137, 142 (Fla. 1976). _See also_ _Adams v. Wainwright_, 764 F.2d 1356, 1364 (11th Cir. 1985), _cert_. _denied_, 106 S. Ct. 834 (1986) (due to jury's critical role under Florida law, erroneous instructions may require reversal of a death sentence. The erroneous and unconstitutional instruction in this case undermines confidence in the jury's verdict, and, therefore, in the death sentence based upon that verdict. _Strickland v. Washington_, _supra_, establishes that this is sufficient to vacate the death sentence.

II. THE CIRCUIT COURT'S RULING CONCERNING COUNSEL'S FAILURE TO ARRANGE A PSYCHIATRIC EVALUATION IS UNSUPPORTED BY THE EVIDENCE.

The Court below dismissed Mr. Daugherty's argument that Mr. Kutsche's failure to arrange a psychiatric or psychological evaluation constituted ineffective assistance of counsel. The Court found that defense counsel discussed the case with two psychiatrists, discussed with Mr. Daugherty a psychological or psychiatric report that had been used in a trial in Pennsylvania, and formed an opinion that the use of a psychiatric or psychological report in this case would not have been to Mr. Daugherty's advantage (R. 265-266, App. 1-2). The evidence, however, does not support these findings.

It is well settled that this Court may set aside a trial court's factual finding if "there is no substantial evidence to sustain it," or if "it is clearly against the weight of the evidence." Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956). The testimony of Mr. Kutsche, the sole source of the Court's factual findings, is insufficient to satisfy the "substantial evidence" or "weight of the evidence" standard articulated in Holland.

Mr. Kutsche conceded that a great deal of his testimony was based upon nothing more than a "vague recollection." (R. 355, App. 78; see also R. 348, 362, 363, App. 71, 85, 86.) Indeed, the Circuit Court's critical finding that the psychiatrists' opinions were unfavorable is supported by nothing more than Mr. Kutsche's "vague recollection." (R. 362, App. 85.) Mr. Kutsche also conceded that he could not be certain that he ever reviewed the Pennsylvania report mentioned by the Court. (R. 361-62, App. 84-85.) Furthermore, neither psychiatrist identified by Mr. Kutsche testified, and the State presented no evidence to corroborate Mr. Kutsche's vague recollection. */

In fact, the evidence establishes conclusively that Mr. Kutsche's recollection of the events of this case was faulty. He testified that at the original sentencing hearing, the State's evidence concerning other crimes committed by Mr. Daugherty was "very minimal," consisting of exemplified copies of the judgments of conviction, with some recollection of the circumstances of those offenses differing from Mr. Daugherty's testimony in his own defense. (R. 346, App. 69.) In fact, most of the State's direct case at the sentencing hearing consisted of extensive testimony describing the details of Mr. Daugherty's crimes and his statements concerning them. Trial Transcript at 6-161. Such a clear demonstration that Mr. Kutsche's recollection about the important details of the trial was faulty would be sufficient to cast doubt upon his entire testimony, even if he himself had not conceded that his memory was nothing more than "vague." That concession, however, coupled with the affirmative demonstration that his memory of this case is inaccurate makes it clear that his

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*/ For example, Mr. Kutsche was unable to locate any notes concerning the case, including notes of his alleged discussions with either Mr. Daugherty or the psychiatrists, even though he was certain that he would have made such notes. (R. 355-56, App. 78-79.)

testimony cannot be the "substantial evidence" necessary to sustain the Circuit Court's findings and send Mr. Daugherty to his death.

Even if Mr. Kutsche's vague recollections are to be credited, however, those recollections affirmatively establish that he did not act as a reasonably competent counsel. Mr. Kutsche admitted that his failure to obtain a psychiatric or psychological evaluation was not based on a belief that it would be unhelpful. Rather, he was concerned that a psychiatrist testifying for the defense would be confronted with Mr. Daugherty's prior statements, made when he was attempting to conceal Bonnie Heath's involvement in the crimes, and would be asked whether they demonstrated that Mr. Daugherty was lying when he spoke of her tremendous influence over him. (R. 357, App. 80; see also R. 350, App. 73.) That explanation simply makes no sense. Each of the mitigating circumstances that Mr. Kutsche sought to establish -- substantial domination, extreme emotional disturbance, impaired capacity and age -- depended in whole or in large part upon convincing the jury that Bonnie Heath was the controlling influence upon Mr. Daugherty. Mr. Kutsche recognized that, once he adopted that line of defense, Mr. Daugherty's prior inconsistent statements inevitably would be brought up by the State. (R. 357-58, App. 80-81.) Thus, failing to call a psychiatrist or psychologist could not prevent the introduction of the evidence he supposedly wanted to keep out. Mr. Kutsche's explanation, therefore, does not reveal a considered strategy decision; it is simply "a weak attempt to shift blame for inadequate preparation," demonstrating that his performance was constitutionally deficient. Kimmelman v. Morrison, 54 U.S.L.W. 4789 (June 26, 1986).

The record in this case can support only one finding -- that Mr. Kutsche failed to obtain a psychological or psychiatric evaluation without sufficient cause. As a matter of fact, and as a matter of law, that failure constituted ineffective assistance of counsel. No less than the attorney who contemplates an insanity defense at trial, the capital sentencing attorney who seeks to establish mitigating circumstances based on psychological and physiological influences has a duty to obtain professional assistance. E.g., Holmes v. State, 429 So.2d 297, 300-01 (Fla. 1983); Proffitt v. Wainwright, 685 F.2d 1227, 1249 n.34 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983). See also Valle v. State, 394 So.2d 1004, 1008 (Fla. 1981) (recognizing the need for counsel to investigate thoroughly mitigating circumstances such as extreme mental or emotional disturbance and impairment of capacity). Mr. Kutsche's testimony, even if credited, establishes that his failure to do so was not the decision of a reasonably competent attorney.

A. The Record Establishes A Reasonable Probability That Counsel's Failure To Develop Psychiatric or Psychological Evidence Altered The Outcome Of The Sentencing Hearing.

The "prejudice" requirement under Strickland v. Washington is easily satisfied where, as here, defense counsel's errors dramatically altered the sentencing profile which was presented to the sentencing judge, the jury, and this Court on mandatory review. The trial judge found two aggravating circumstances and no mitigating circumstances, a view of the record that was affirmed on appellate review. See Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983). It is well established that, where the sentencing authority is confronted with such a record in a capital case, "death is presumed to be the appropriate punishment." Simms v. State, 444 So.2d 922, 926 (Fla. 1983), cert. denied, 467 U.S. 1246 (1984); see also Maxwell v. State, 443 So.2d 967 (Fla. 1983); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

By contrast, the imposition of the death penalty depends upon a sensitive balancing process if the record reflects both aggravating and mitigating circumstances. See, e.g., Huckaby v. State, 343 So.2d 29, 34 (Fla.), cert. denied, 434 U.S. 920 (1977). While the process of weighing opposing considerations is not a mechanical one, see State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), it is plain that those cases in which mitigating circumstances have been established require greater scrutiny than do cases where only aggravating circumstances are present and a capital sentence is presumed. Compare Huckaby, 343 So.2d at 33-34 with Sims, 444 So.2d at 926.

There is no doubt that the introduction of expert psychiatric testimony during the sentencing hearing could have established any of the four mitigating circumstances discussed above. Dr. Weitz's testimony (R. 303-41, App. 26-64) and his report, (R. 201-04, App. 91-94), demonstrate that expert testimony at the sentencing hearing concerning Mr. Daugherty's mental state would have presented a different picture of Mr. Daugherty and his background and could have influenced the jury or the sentencing court to reach a different result.

On the issue of domination, Dr. Weitz concluded that Bonnie Heath unquestionably exerted a dominating influence. Although Bonnie may have been a small woman, Dr. Weitz explained how Mr. Daugherty's fear of losing her made him "easily subjected to her will" (R. 204, App. 94). Dr. Weitz stated that Mr. Daugherty's fear of losing someone who was "all that he sought in a woman, mother love, a sensuous sexual partner, a friend" was especially strong, undoubtedly because of the early and continued pattern of abuse and neglect by his parents, grandparents and uncle. (R. 204, App. 94.) Bonnie's domination was no less real because it was based upon emotional dependency rather than physical violence or threats (R. 311, App. 34). In fact, Dr. Weitz was convinced that "this whole array of criminality may not have occurred had he never met Bonnie Heath." (R. 327, App. 50.) Dr. Weitz's testimony and his report show that expert testimony at the sentencing hearing was crucial in order to assist the triers of fact in understanding this point and makes it clear that such testimony could have altered the outcome.

The situation with respect to the other statutory mitigating factors is the same. Regarding age, Dr. Weitz concluded: "Jeffrey is found to be grossly immature in his social and emotional development. . . . At age 20, at the time [of the crime], Jeffrey was not only chronologically young but apparently immature in his social and emotional development." (R. 203-04, App. 93-94.) This immaturity was a significant factor affecting his susceptibility to the dominating influence of Bonnie Heath. (R. 314-16, App. 37-39.) In light of these conclusions, there is a strong likelihood that expert testimony at the sentencing hearing would have given the triers of fact a better appreciation of Mr. Daugherty's immaturity, notwithstanding the fact that he was little more than two years past the age of majority at the time of the hearing. Dr. Weitz's report and testimony also demonstrate that there was a basis for expert testimony covering the mitigating factors of severe mental and emotional disturbance and diminished capacity due to Mr. Daugherty's bizarre emotional dependency upon a lover more than twice his age. (R. 201-04, 312-14, App. 91-94, 35-37.)

As already noted, Mr. Daugherty "need not show that counsel's deficient conduct more likely than not altered the outcome" in this case in order to demonstrate that Mr. Kutsche's failure to obtain expert testimony was prejudicial. Strickland v. Washington, supra, 466 U.S. at 693. Rather, he need only show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

In light of Dr. Weitz's evaluation, this Court can have no confidence that the balancing of aggravating and mitigating circumstances by both the jury and by the trial judge would have been the same if defense counsel had fulfilled his duty to present expert testimony. Because expert testimony would have revealed the role numerous psychological and emotional influences played in the commission of this crime, there is a reasonable probability that counsel's failure to procure and introduce such testimony had a "pervasive effect, . . . altering the entire evidentiary picture," Strickland v. Washington, 466 U.S. at 695-96. This is sufficient to "undermine confidence" in the jury's implied finding that the mitigating circumstances did not outweigh the aggravating circumstances, as well as the sentencing court's finding that there were no mitigating circumstances. Mr. Kutsche's failure to obtain expert testimony, therefore, prejudiced the defense effort and, accordingly, is grounds for setting aside the death sentence.

III. THE CIRCUIT COURT ERRONEOUSLY RULED THAT THERE WAS NO EVIDENCE THAT THE DECISION TO SEEK THE DEATH PENALTY IN THIS CASE WAS AN ARBITRARY EXERCISE OF PROSECUTORIAL DISCRETION.

In Gregg v. Georgia, 428 U.S. 153 (1976), Justice White discussed the possibility that "decisions made by the prosecutor -- either in negotiating a plea to some lesser offense than capital murder or in simply declining to charge capital murder -- are standardless and will inexorably result in the wanton and freakish imposition of the [death] penalty condemned by the judgment in Furman [v. Georgia, 408 U.S. 238 (1972)]." 428 U.S. at 224. He rejected that possibility because it was unsupported by the facts before the Court in that case, but noted that the exercise of prosecutorial discretion to seek the death penalty in a standardless fashion would be unconstitutional. Id. at 225.

In particular, he expected evenhanded prosecutorial treatment of similar cases: "If the cases really were 'similar' in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary." Id. Justice White's expectations were critical to the decisions upholding both the Georgia statute under consideration in Gregg and the Florida death penalty statute. See Proffitt v. Florida, 428 U.S. 242, 261 (1976) (opinion of White, J.). */

Decisions of this Court reflect a similar concern. The Court takes special care that similarly situated co-defendants in a capital case receive similar sentences, because of the constitutional requirement that the death penalty not be imposed in an arbitrary or standardless fashion. See, e.g., Slater v. State, 316 So.2d 539, 542 (Fla. 1975); Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991 (1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978).

In this case, the evidence shows that the prosecutor's conduct fell far short of Justice White's expectations. That evidence is contained in the transcript of the sentencing

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*/ In both Gregg and Proffitt, Justice White's opinion was joined by the Chief Justice and Justice Rehnquist, providing the necessary votes to uphold the statutes in each case.

hearing, of which the Circuit Court in this proceeding took judicial notice. See R. 364-66, App. 87-89. That evidence indicates that when Mr. Daugherty was returned to Florida, prosecutors in Flagler, Volusia and Brevard Counties each faced a decision whether to seek the death penalty for a murder committed by Mr. Daugherty in those counties in the course of a robbery. For each prosecutor, the relevant factors were precisely the same. On the aggravating side of the ledger was Mr. Daugherty's criminal record, compiled during a short, twenty-day crime spree. He arrived in Florida already convicted of several crimes in Pennsylvania and Virginia. */ He confessed to at least two of the Florida murders, see Trial Transcript at 96, 102, and ultimately pleaded guilty to all three. On the mitigating side was the substantial evidence summarized above -- constant abuse during childhood, substantial domination by Bonnie Heath, genuine remorse accompanied by a sincere religious conversion, and the certainty that, due to his guilty pleas in Florida alone, Mr. Daugherty would spend the rest of his life in

*/ One conviction was reversed after the sentencing hearing in this case but before the imposition of sentence by this Court. Commonwealth v. Daugherty, 493 Pa. 273, 426 A.2d 104 (1981). Defense counsel did not bring this to the court's attention prior to sentencing or on appeal.

prison. */ Faced with these facts, prosecutors in Flagler and Volusia Counties were satisfied with sentences of life imprisonment. Faced with the identical facts, the Brevard County prosecutor insisted on the death penalty. Such an arbitrary and standardless exercise of discretion is contrary to the explicit rationale of Justice White's opinion upholding the Florida death penalty statute. As this Court has said: "When the facts are the same, the law should be the same." Slater v. State, 316 So.2d 539, 542 (Fla. 1975). See also Meeks v. State, 339 So.2d at 192: "Our reading of Furman . . . convinces us that identical crimes committed by people with similar criminal histories require identical sentences." The Circuit Court ignored these principles and disregarded the undisputed record evidence demonstrating the arbitrariness of the prosecutor's decision to seek the death penalty.

IV. THE CIRCUIT COURT ERRONEOUSLY RULED THAT THERE WAS NO EVIDENCE ESTABLISHING THE FAILURE TO CONSIDER ALL NON-STATUTORY MITIGATING FACTORS.

The Eighth Amendment requires that the sentencing authority must consider "any aspect of a defendant's character or record . . . as a basis for a sentence less than death,"

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*/ Consecutive sentences of life imprisonment for the three Florida murders would require Mr. Daugherty to serve 75 years before being eligible for parole.

Lockett v. Ohio, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.). It is not sufficient that the court allow evidence of non-statutory mitigating circumstances to be admitted; the court also must consider that evidence in reaching its decision. Eddings v. Oklahoma, 455 U.S. 104, 114-16 (1982). The Circuit Court failed to follow the rule of Lockett and Eddings in this case because it did not consider the evidence of non-statutory mitigating circumstances introduced at the sentencing hearing. As with Mr. Daugherty's claim of arbitrary prosecutorial discretion, the evidence supporting this claim is contained in the record to the sentencing hearing. The Circuit Court erred in ignoring that evidence.

Mr. Daugherty introduced substantial evidence of his deprived and unstable childhood, his abandonment by both parents, his upbringing in the home of a violent and abusive grandfather, and an early head injury (for which he never received proper care) resulting in continual severe headaches for which quaaludes and other illegal drugs were the only relief. E.g., Trial Transcript at 171, 188-192. This testimony was corroborated by his uncle, Raymond Daugherty, who was one of the State's chief witnesses. Trial Transcript at 61-67. Moreover, Mr. Daugherty testified to his deep remorse for his actions that led to an attempt to take his own life in prison, and his conversion to Christianity demonstrated by his baptism and confirmation in the Catholic faith while in prison. Trial Transcript at 196-97, 212-13, 260-65. Father Albert Anselmi, chaplain at the Pennsylvania State Prison, corroborated this testimony. Trial Transcript at 275-85. An experienced prison chaplain, Father Anselmi had witnessed a number of so-called "jail-house conversions," by inmates who claimed to have "gotten religion" in order to obtain some benefit from prison authorities. Based upon this experience, he concluded that Mr. Daugherty's conversion was sincere. Trial Transcript at 278-79.

In sentencing Mr. Daugherty to death, this Court discussed the mitigating factors specified in F.S. § 921.141(6), but did not mention the non-statutory factors described above. In particular, the evidence of Mr. Daugherty's remorse and religious conversion was ignored. Imposition of the death sentence, therefore, was improper under Lockett and Eddings.

V. THE CIRCUIT COURT ERRONEOUSLY RULED THAT THERE WAS NO EVIDENCE ESTABLISHING THE FAILURE TO FIND THE MITIGATING FACTORS OF SUBSTANTIAL DOMINATION AND AGE.

In pronouncing the death sentence, the Circuit Court refused to find as a mitigating circumstance that Mr. Daugherty "acted . . . under the substantial domination" of Bonnie Heath, F.S. § 921.141(6)(e), solely because Bonnie Heath "was a small woman in comparison to the defendant." That finding reflects a legal conclusion that the statutory mitigating circumstance requires physical domination, which a "small woman" could not exert over Mr. Daugherty. That conclusion is erroneous.

In Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977), this Court held that evidence of a "severe mental or emotional disturbance" was sufficient to establish the aggravating circumstance of substantial domination. Id. at 501. The decision in Witt is based upon a common sense understanding that "domination" can be accomplished in subtle ways without threats or physical violence. The death sentence was imposed upon Mr. Daugherty without consideration of the obvious influence and control exerted upon him by Bonnie Heath, even though she was a "small woman." */ Because the sentence was based upon an erroneous legal premise, it must be vacated.

The age of the defendant at the time of the crime also is a statutory mitigating circumstance. F.S. § 921.141(6)(g). In rejecting that factor in this case, the sentencing court simply held that Mr. Daugherty was in his majority at the time of the crime. That finding is not a proper consideration of Mr. Daugherty's age, as contemplated

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*/ As noted above, due to counsel's ineffectiveness, all the evidence necessary to support the mitigating factor of substantial domination was not before this Court. Nevertheless, the court's legal error in considering only physical domination led it to ignore the evidence on this issue that was introduced.

by the statute, but rather an improper summary dismissal of age as a mitigating factor.

This factor "allows the judge and jury to consider the effect . . . [of] the inexperience of the defendant . . . in determining whether or not one explosion of total criminality warrants the extinction of life." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). In finding merely that Mr. Daugherty was in his majority at the time of the crime, the sentencing court did not weigh the factor of age in view of the facts of this case or consider the inexperience of the defendant, as mandated by the statute and this Court.

In Peek v. State, 395 So.2d 492, 498 (Fla. 1980), cert. denied, 451 U.S. 964 (1981), this Court stated that "[t]here is no per se rule which pinpoints a particular age as an automatic factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing." In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), the Court stated that "the Legislature has chosen to provide for consideration of the age of the defendant - whether youthful, middle aged, or aged - in mitigation of the commission of an aggravated capital crime." A finding of age of majority as the determinative factor would preclude the consideration of the effect of age as a mitigating circumstance, as Dixon has mandated. Therefore, the sentencing court should have considered Mr. Daugherty's age with reference to the facts of the case.

The per se rule adopted by the Circuit Court finds no support in the decisions of this Court, which considered the facts of each case before deciding whether age is a mitigating factor. This Court has found age to be a mitigating circumstance for many defendants who were past the age of majority including some, like Mr. Daugherty, who were 20 years old. */ Jackson v. State, 366 So.2d 752 (Fla. 1978), cert. denied, 444 U.S. 885 (1979) (18 years old); Witt v. State, 342 So.2d 497 (Fla.), cert. denied, 434 U.S. 935 (1977) (18 years old); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983) (19 years old); Gafford v. State, 387 So.2d 333 (Fla. 1980) (19 years

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*/ There is some authority supporting rejecting age as a mitigating circumstance because the defendant was in his majority when he committed the crime. In those cases, however, the defendants were substantially older than Mr. Daugherty, who was 20 years old at the time of the crime. See Booker v. State, 397 So.2d 910, 916 (Fla.), cert. denied, 454 U.S. 957 (1981) (24 years old); Fleming v. State, 374 So.2d 954, 957 n.3 (Fla. 1979) (defendant reached age of majority many years prior to crime); Washington v. State, 362 So.2d 658, 667 (Fla. 1978), cert. denied, 441 U.S. 937 (1979) (26 years old); Raulerson v. State, 358 So.2d 826, 833 (Fla.), cert. denied, 439 U.S. 959 (1978) (25 years old); Gibson v. State, 351 So.2d 948, 953 n.6 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978) (28 years old); Alford v. State, 307 So.2d 433, 445 (Fla. 1975), cert. denied, 428 U.S. 912 (1976) (27 years old).

old); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919 (1979) (19 years old); Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982) (20 years old); Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982) (20 years old); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982) (20 years old); Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert. denied, 428 U.S. 911 (1976) (20 years old); Cannady v. State, 427 So.2d 723 (Fla. 1983) (21 years old); Meeks v. State, 339 So.2d 186 (Fla. 1976), cert. denied, 439 U.S. 991 (1978) (21 years old); Mikenas v. State, 407 So.2d 892 (Fla. 1981), cert. denied, 456 U.S. 1011 (1982) (22 years old); Brown v. State, 381 So.2d 690 (Fla. 1980), cert. denied, 449 U.S. 1118 (1981) (22 years old); Hoy v. State, 353 So.2d 826 Fla. 1977), cert. denied, 439 U.S. 920 (1978) (22 years old); King v. State, 390 So.2d 315 (Fla. 1980) (23 years old); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978) (23 years old); Thompson v. State, 389 So.2d 197 (Fla. 1980) (26 years old).

Had the court properly considered the factor of age in light of the specific facts of this case, it would have found age to be a mitigating factor. When he committed the crime, Mr. Daugherty was only twenty years old. The evidence showed that he had been abandoned and abused as a child; that he had suffered from severe headaches, caused by a head injury he suffered when hit by a car at age nine and aggravated by a subsequent automobile accident in 1974; that he resorted to abusing methaquaaludes after prescribed medication proved ineffective to relieve his headaches; that his crime resulted from emotionally disturbing circumstances; and finally that as a result of this complex of factors, he allowed himself to be controlled by his companion, Bonnie Heath, a woman more than twice his age. If this Court had considered these circumstances, it undoubtedly would have found his age to be a mitigating factor. By failing to do so, it violated Florida law, and unconstitutionally deprived Mr. Daugherty of a right granted to all other defendants in capital cases -- the right to consideration of all the surrounding circumstances in deciding whether age was a mitigating circumstance.

CONCLUSION

For the reasons stated herein, the Order of the Circuit Court should be reversed, and the case remanded to the Circuit Court with instructions to vacate the death sentence.

Respectfully submitted,

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I hereby certify that I caused a copy of the attached brief, along with a copy of the accompanying appendix, to be served this 7th day of July 1986, by first class mail on the following:

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