IN THE

SUPREME COURT OF FLORIDA

No. 69,004

WILLIAM EUTZY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On Appeal from a Judgment of the
Circuit Court in and for Escambia County

BRIEF OF APPELLANT WILLIAM EUTZY

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William Eutzy was convicted of first-degree murder in the Escambia County Circuit Court on July 7, 1983. He was sentenced to death after Judge William S. Rowley overrode the jury's recommendation of a life sentence. Mr. Eutzy appeals from an order of Judge Rowley denying his motion under Florida Rule of Criminal Procedure 3.850 to vacate or set aside his death sentence and underlying murder conviction.

STATEMENT OF THE CASE

Proceedings

This Court affirmed Mr. Eutzy's death sentence and first-degree murder conviction on September 20, 1984. 458 So. 2d 755. The United States Supreme Court denied certiorari on April 15, 1985. 471 U.S. 1045.

Mr. Eutzy filed a pro se Rule 3.850 motion to vacate conviction and sentence on September 13, 1985, which was denied by the Escambia County Circuit Court on April 9, 1986. After Mr. Eutzy, still acting pro se, noticed an appeal, he secured counsel to represent him on a pro bono publico basis. Counsel moved this Court on July 25, 1986 to relinquish jurisdiction to permit additional claims to be raised. That motion was granted on October 17, 1986.[1/]

Through counsel, Mr. Eutzy filed on December 30, 1986 an augmented motion to vacate or set aside his judgment and sentence pursuant to Fla. R. Crim. P. 3.850. (App. 429-602.)[2/] The Escambia County Circuit Court, per Judge Rowley, held an evidentiary hearing on May 22, 1987, and issued an order on September 18, 1987 denying the motion. (App. 1-7.)[3/]

1/ Separately, on December 4, 1986, this Court denied an original petition for habeas corpus that had been filed by Mr. Eutzy, through counsel. That petition challenged the constitutional adequacy of the representation that Mr. Eutzy had received on direct appeal.

2/ Citations to the Appendix filed with this brief are designated by "App." followed by the page reference.

3/ On December 14, 1987, Mr. Eutzy filed with the Circuit Court for Escambia County a motion for reconsideration of its denial of Mr. Eutzy's Rule 3.850 motion. (App. 612-26.) That reconsideration motion is pending. Its basis is that counsel for Mr. Eutzy recently learned of significant facts not known to the Circuit Court when it denied Mr. Eutzy's Rule 3.850 motion. Mr. Eutzy does not seek any deferral of this appeal pending disposition of the motion for reconsideration. We will keep this Court apprised of any actions taken by the Circuit Court.

The Evidence at the Guilt/Innocence Phase of Trial

Mr. Eutzy was convicted of murder and sentenced to death for the homicide of a taxicab driver, Herman Hughley, in Pensacola, Florida.

Jacqueline Humel, an employee at the Pensacola airport, testified that she finished her work at about 11 p.m. on Saturday evening, February 26, 1983. While driving home, she stopped her van and spoke through the window to Mr. Hughley, who was sitting in his parked taxicab. (App. 169.) She testified that she saw a man, whom she later identified as Mr. Eutzy, standing outside the cab and that the man walked over to a nearby tree, where he was standing when she drove away. (App. 169.) She also testified that when she spoke to Mr. Hughley, he looked nervously over his right shoulder. (App. 172.) She did not testify that she looked inside the cab.

Mr. Hughley was found dead at the same location in the front seat of his cab shortly after 4 a.m. the next morning, Sunday, February 27, 1983. (App. 151-53.) He had been killed by a single gunshot to the back of his head. (App. 254.) There were no witnesses to the killing and the State offered no proof of fingerprints or any other physical evidence tying Mr. Eutzy to the crime.

Oscar Meadows, a security officer at a Holiday Inn in Pensacola, testified that he saw Laura Eutzy at the Holiday Inn on Saturday evening between 11 p.m. and midnight. (App. 193.) Cross-examination revealed, however, that

Mr. Meadows had stated previously that he had not seen Laura Eutzy before 2 a.m. on Sunday morning. (App. 194-97.)

It was the testimony of Laura Eutzy that exonerated herself and implicated Mr. Eutzy in the killing. She testified that she and Mr. Eutzy took a cab from the Pensacola airport at roughly 7 p.m. on Saturday. (App. 212.) She said she sat in the back seat while Mr. Eutzy sat next to the driver, Herman Hughley. (App. 213.) She testified that during the cab ride she believed her handgun was in her purse, which she had with her. (App. 214.) She testified that she and Mr. Eutzy rode in the cab for several hours, ultimately returning to Pensacola where, she claimed, she got out of the cab at about 11:30 p.m. to go to the bathroom. (App. 215-16.) She further testified that, when she returned, the cab and Mr. Eutzy were gone, and that she did not see Mr. Eutzy until roughly half an hour later. (App. 215-16.) She testified that he told her he had hit the driver and knocked him out but had not hurt him. (App. 217.) She claimed not to have learned of Herman Hughley's killing until Monday morning, when she saw a story about it in the local newspaper. (App. 218.)

When Laura Eutzy and Mr. Eutzy were arrested in Pensacola on Monday, February 28, 1983, police found her handgun, which proved to be the murder weapon, in her purse. (App. 260-62.) She testified that Mr. Eutzy had placed the gun in her purse on Monday morning. (App. 219-20.) She asserted that, even though her purse contained her hairbrush and other necessaries, she had not opened it at any time

between Saturday night and Monday morning. (App. 185-89, 220.) She claimed she had believed, between Saturday evening and Monday morning, that the gun was in her purse, and she said the weight of the purse "was no different" with or without the gun. (App. 220.)

When Laura Eutzy was first interviewed by the police following her arrest, she did not implicate Mr. Eutzy. (App. 237-41.) It was not until she was told by the police that the gun found in her purse was the murder weapon that she asserted that Mr. Eutzy had killed Herman Hughley. (App. 241.)

The defense presented no evidence at the guilt/innocence phase of trial. Even so, the jury requested reinstruction on the elements of second- and third-degree murder before returning its guilty verdict. (App. 308.)

The Evidence at Sentencing

The only substantive evidence introduced by the State at sentencing was a 1958 judgment in State of Nebraska v. William Eutzy, No. 61-546 (District Court, Douglas County, Nebraska), convicting Mr. Eutzy of robbery. (App. 334-35.)

The defense presented no evidence at the sentencing phase of trial. Trial counsel later admitted he had made no effort whatever to investigate facts that could be presented in mitigation at sentencing.

The Sentence Imposed Upon Mr. Eutzy

At the sentencing phase, the jury recommended that Mr. Eutzy receive life imprisonment with no possibility of

parole for twenty-five years. (App. 348.) Notwithstanding that recommendation, Judge Rowley sentenced Mr. Eutzy to death. He made four findings to support his sentence: that the murder of Herman Hughley was committed in the course of a robbery; that Mr. Eutzy had previously been convicted of a crime of violence; that the crime was "committed in a cold, calculated and premeditated manner"; and that no mitigating circumstances had been presented. (App. 352-54.) Concluding that there were three aggravating factors and no mitigating factors, Judge Rowley overrode the jury and sentenced Mr. Eutzy to death.

On direct appeal, this Court reversed Judge Rowley's finding that the murder had occurred during the commission of a robbery. 458 So. 2d at 758. Nonetheless, the Court affirmed Mr. Eutzy's death sentence on the basis of the two remaining aggravating factors found by Judge Rowley and the absence of any mitigating circumstances. Id. at 760.

The Circuit Court Order Denying the Rule 3.850 Motion

In his order denying Mr. Eutzy's Rule 3.850 motion, Judge Rowley held, first, that Mr. Eutzy had not been denied his constitutionally guaranteed right to the effective assistance of counsel by trial counsel's failure to investigate and present any evidence in mitigation at sentencing. (App. 1-2.) Second, Judge Rowley held that Mr. Eutzy had not been denied the effective assistance of counsel by the failure of his trial lawyer to object under Miranda v. Arizona, 384 U.S. 436 (1966), to the introduction at sentencing of a statement made by Mr. Eutzy to a corrections officer

that provided the sole basis for the receipt into evidence of Mr. Eutzy's 1958 robbery conviction. (App. 2-3.) Judge Rowley further held that he could not consider in a Rule 3.850 motion Mr. Eutzy's claims based on this Court's application of the Florida death penalty statute, and Mr. Eutzy's challenge to basing his death sentence on an aggravating factor not supported by the evidence. (App. 6-7.)

SUMMARY OF ARGUMENT

William Eutzy was deprived of his constitutionally guaranteed right to the effective assistance of counsel by the utter failure of his trial counsel to investigate mitigating evidence for use at sentencing or to present any such evidence. Had trial counsel made even the most minimal investigation of potential mitigating evidence, he would have been able to present a powerful affirmative case at sentencing based on the testimony of Mr. Eutzy's family and his associates from his years as a newspaper reporter and editor. Psychiatric testimony and readily accessible documentary evidence would have buttressed and affirmed the many positive attributes of Mr. Eutzy's personality and background. Such evidence would have provided essential support for the jury's recommendation of a life sentence and would have precluded an override of that recommendation.

Counsel's failure to develop mitigating evidence of this sort cannot be excused by an asserted statement by Mr. Eutzy that he preferred not to have his family members involved. Even if Mr. Eutzy made such a remark (and the Circuit Court erred in so finding), it did not constitute an

instruction to counsel not to contact Mr. Eutzy's family, much less a prohibition on developing other mitigating evidence. It did not free counsel from his duty to act in the best interests of his client by investigating the relevant facts.

There is likewise no basis for the suggestion that a desire to avoid references to Mr. Eutzy's prison record could have justified a failure to present any case in mitigation. The State had already introduced evidence of Mr. Eutzy's prison record. Counsel could have presented carefully tailored testimony that avoided any further references. Moreover, evidence of Mr. Eutzy's imprisonment could have been readily rebutted, since his criminal convictions were for non-violent offenses (except for the 1958 robbery conviction, which itself was not characterized by violence) and his prison record was exemplary.

Mr. Eutzy was also deprived of his right to minimally competent representation by trial counsel's failure to object, on the basis of Miranda v. Arizona, 384 U.S. 436 (1966), to the introduction of Mr. Eutzy's statement to a corrections officer, which was the sole means by which the State introduced evidence of Mr. Eutzy's 1958 robbery conviction at sentencing. That statement would have been clearly inadmissible under Miranda had counsel raised this critical and fundamental objection. There was no conceivable reasonable tactical basis for failing to make this objection.

This Court's application of the Florida death penalty statute to this case on direct appeal contravened

Mr. Eutzy's federal constitutional rights as well as his rights guaranteed by Florida law. This Court's decision improperly limited the categories of mitigating evidence upon which a jury may rely in recommending a sentence of life over death. The Court applied an unconstitutional construction of the "clear, calculated, and premeditated" aggravating factor that was contrary to the record and this Court's own authority. And the Court applied the Tedder jury-override standard to this case in an arbitrary and capricious manner that was a marked departure from its prior precedent and, unlike prior cases, excluded consideration of the facts of the crime from the factors that, under Tedder, might justify and support a jury's recommendation of a life sentence.

Finally, on direct appeal, this Court held that there was no evidentiary support for one of the three aggravating factors on which the trial court relied in overriding the jury's recommendation and sentencing Mr. Eutzy to death. As a matter of constitutional law, a sentence cannot stand where, as here, the trial judge relied at sentencing on a material fact not supported by the evidence.

ARGUMENT

I. MR. EUTZY WAS DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

The Sixth Amendment to the United States Constitution and Article I, Section 16, of the Florida Constitution guarantee all criminal defendants the right "to the effective assistance of competent counsel." McMann v. Richardson, 397 U.S. 759, 771 (1970). This fundamental constitutional

entitlement preserves "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656 (1984).

A claim of ineffective assistance of counsel must receive special scrutiny when a sentence of death is at issue. E.g., Magill v. Dugger, 824 F.2d 879, 886 (11th Cir. 1987). Because "there is a significant constitutional difference between the death penalty and lesser punishments," Beck v. Alabama, 447 U.S. 625, 637 (1980), there must be a heightened sensitivity to deficiencies in counsel's performance in capital cases.

A defendant establishes a deprivation of his constitutional right to the effective assistance of counsel where (1) counsel's performance is not "the result of reasonable professional judgment" and (2) there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 690, 694 (1984). While counsel must be afforded appropriate latitude in making tactical decisions, certain strategies or omissions fall outside "an objective standard of reasonableness" and thus abridge a defendant's constitutional rights. Id. at 688.

A. Mr. Eutzy Was Deprived of His Right to the Effective Assistance of Counsel by the Failure of Trial Counsel to Develop or Present Evidence in Mitigation at Sentencing.

The failure of trial counsel to undertake any investigation to determine what evidence could be presented on Mr. Eutzy's behalf at sentencing, and his consequent failure to present any mitigating evidence during the penalty phase of trial, deprived Mr. Eutzy of his right to the effective assistance of counsel.

1. Trial Counsel Failed to Undertake Any Investigation of Facts that Could Be Presented in Mitigation.

The record of trial counsel's performance at sentencing is stark. Trial counsel took no steps whatever to investigate or develop evidence that could be used in mitigation at sentencing. The record shows that, had he undertaken even the most minimal investigation, he would have developed positive, manifestly beneficial evidence in mitigation. (See pp. 21-26, infra.) Such evidence would have depicted the positive attributes of Mr. Eutzy's personality, talents, and background -- attributes that simply did not appear on the meager and one-sided record at sentencing.

At the evidentiary hearing on the Rule 3.850 motion, trial counsel admitted that he had never contacted a single person -- family members, former employers, prison officials, or anyone else -- to determine whether there were positive facts about Mr. Eutzy that could be presented at sentencing. (App. 407-08.) He did not ask Mr. Eutzy or anyone else about Mr. Eutzy's family background, his marriages,

his children, or his employment history. (App. 401-03, 405.) He did not request copies of Mr. Eutzy's school, medical, or prison records. (App. 406.) He never contacted any of Mr. Eutzy's associates from his days as a newspaper reporter (App. 393) -- nor was he ever even aware that Mr. Eutzy had been a newspaper reporter and editor in Nebraska (App. 405). He did not make any effort to arrange for a psychiatrist to prepare evidence that could be presented at sentencing. (App. 404.)

Furthermore, the evidence established that trial counsel never even discussed the question of potential mitigating evidence with Mr. Eutzy. (App. 407-08.) He never asked Mr. Eutzy whether there were positive attributes of his past that might be presented at sentencing. (App. 407.) In fact, he never mentioned the sentencing phase of trial to Mr. Eutzy during any of their meetings. (App. 446-47.)[4/]

2. Trial Counsel's Failure to Investigate Fell Below an Objective Standard of Reasonableness.

a. Trial Counsel Was Under a Duty to Investigate Facts for Presentation at Sentencing.

A criminal defense lawyer "has a duty to investigate" facts relevant to his client's case. Thompson v. Wainwright,

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4/ The record shows that trial counsel met with Mr. Eutzy on only four occasions prior to trial. (App. 445-46.) He submitted an affidavit for costs reflecting that none of those meetings consumed more than a total of two hours, including travel time. (App. 445-46.)

787 F.2d 1447, 1450 (11th Cir. 1986). The adversarial "testing process generally will not function properly unless trial counsel has done some investigation into the prosecution's case and into various defense strategies." Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986). Accordingly, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. 668, 691 (1984). "Such an investigation includes at a minimum an independent examination of the relevant facts." Foster v. Dugger, 823 F.2d 402, 405 n.9 (11th Cir. 1987).

A number of recent decisions have held explicitly that counsel's failure to conduct any investigation of potential mitigating evidence for presentation at sentencing falls below an objective standard of reasonable representation in a capital case. In Thompson v. Wainwright, supra, the court held that trial counsel's "failure to conduct any investigation of [the defendant's] background fell outside the scope of reasonably professional assistance." 787 F.2d at 1452. Accord, Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986). Similarly, in Baldwin v. Maggio, 704 F.2d 1325, 1332-23 (5th Cir. 1983), cert. denied, 467 U.S. 1220 (1984), the court held that the Sixth Amendment "requires trial counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment, and to ground the strategic selection among those potential defenses on an informed, professional evaluation of their relative prospects for success."

b. Florida Procedure Makes Counsel's Duty to Investigate Even More Acute.

Florida's procedure for imposition of the death penalty, which permits a sentencing judge to override a jury's recommendation of a life sentence, makes it particularly critical that counsel take reasonable steps to investigate and present potential mitigating evidence. As this case exemplifies, counsel cannot reasonably limit his efforts to securing a jury recommendation of a life sentence. Rather, minimally competent counsel must develop and present evidence that will support a jury's recommendation and will preclude an override of that recommendation under Tedder v. State, 322 So. 2d 908 (Fla. 1975). The failure to develop and present mitigating evidence at sentencing creates the very real risk -- as demonstrated in this case -- that the trial judge will override the jury's recommendation based on a perception that it was not supported by the balance of mitigating and aggravating factors.5/

Trial counsel thus was obliged to anticipate the possibility that the sentencing judge would override the jury's recommendation if he did not develop a case in mitigation at sentencing.6/ The jury's recommendation of a life

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5/ Nonetheless, for the reasons discussed below (pp. 40-50, infra), we believe that here -- even on the record at trial -- an override of the jury's recommendation was improper under Tedder.

6/ Trial counsel here was in fact specifically forewarned that Judge Rowley would likely override a jury's life-sentence recommendation unless mitigating evidence was

(footnote cont'd)

sentence does not end or foreclose the inquiry into trial counsel's performance. See Porter v. Wainwright, 805 F.2d 930, 935-36 (11th Cir. 1986) (upholding a claim challenging counsel's failure to investigate and present mitigating evidence in a case where the trial judge had overridden the jury's recommendation of a life sentence).

3. Counsel's Failure to Investigate Cannot Be Excused by the Claim that Mr. Eutzy Said He "Didn't Want Any Family Members Involved."

During the evidentiary hearing on the Rule 3.850 motion, trial counsel asserted that he had not contacted Mr. Eutzy's family concerning the sentencing phase of trial because Mr. Eutzy had said he "didn't want any family members involved." (App. 380.) Trial counsel claimed he perceived Mr. Eutzy as a man who "just wanted to get the thing [d]one." (App. 374.) And he said Mr. Eutzy made "no mention of any positive aspect of his prior background." (App. 380.) This was the primary evidence upon which the Circuit Court relied (App. 1-2) in rejecting Mr. Eutzy's argument that trial counsel had acted unreasonably in completely failing to investigate and present potential mitigating evidence.

(footnote cont'd)

adduced at sentencing. During a pretrial hearing, Judge Rowley made clear that, based on the "newspaper reports" of the murder, he believed at least one aggravating factor could be proven and that, "if you don't have any kind of counter-vailing mitigating circumstances, that's all it takes for the death penalty, and that's what you are faced with. And I can't make it any simpler." (App. 636-37.)

The Circuit Court's reasoning was in error as a matter of law.7/

a. Trial Counsel Never Explained the Importance of Developing a Case in Mitigation.

Trial counsel acknowledged that he "doubt[ed]" that he told Mr. Eutzy that it would be important to contact his family members. (App. 411.) He did not recall even suggesting to Mr. Eutzy that he wanted to contact Mr. Eutzy's family.

7/ The Circuit Court erred not only for the reasons discussed below, but also because its factual findings -- which uniformly favored trial counsel -- were plainly erroneous.

First, trial counsel's testimony was belied by the documentary evidence. Trial counsel testified that the reason Mr. Eutzy supposedly did not want his mother "involved in it" was that he did not want her to know about the case. (App. 375-76.) But that testimony was contradicted by several letters -- two written by Mr. Eutzy to his mother, and one written by his mother to trial counsel (App. 564) -- that made it plain that Mr. Eutzy was advising his mother of his plight and that she was taking an active interest in the case.

Trial counsel's testimony was also contradicted by Mr. Eutzy's sworn account of their various conversations, as set forth in the Rule 3.850 motion. Mr. Eutzy testified that he did not tell trial counsel he did not want his family members involved in the case, nor did he ever suggest to counsel that he should not contact family members. (App. 446-47.)

Finally, trial counsel's testimony during the evidentiary hearing was inconsistent with a statement that he made in August 1986. At that time, before his representation had been challenged, he told Mr. Eutzy's present counsel that the reason he had not presented any witnesses at sentencing was that he had not known of anything good that he could present on Mr. Eutzy's behalf. (App. 412-13.) It was only later that trial counsel asserted that Mr. Eutzy had said he did not want any family members involved.

(App. 411.) Indeed, trial counsel never even discussed the question of potential mitigating evidence with Mr. Eutzy. (App. 411.)

In light of counsel's failure to explain to Mr. Eutzy the crucial importance of contacting family members, and of developing mitigating evidence generally, the Circuit Court's reliance on Mr. Eutzy's supposed statement that he "didn't want any family members involved" is utterly misplaced. For trial counsel did absolutely nothing to apprise Mr. Eutzy that it was important to investigate or develop evidence that could be presented at sentencing.

Mr. Eutzy was beyond question a client with whom counsel could readily communicate on such important questions of trial strategy.[8/] Thus, even crediting trial counsel's testimony in full, it was incumbent upon him to explain to Mr. Eutzy the significance of developing evidence in mitigation, and to persuade Mr. Eutzy of the importance of contacting family members and others who could present beneficial evidence on his behalf at sentencing. Trial counsel could not, consistent with his duty to investigate (pp. 12-13, supra), reasonably accept the statement he ascribes to Mr. Eutzy as ending the matter and barring him from investigating possible mitigating evidence from family members.

8/ Trial counsel described Mr. Eutzy as "a very intelligent individual and very easy to communicate" with. (App. 403-04.) "Bill was not uncooperative from the standpoint of conversing with me." (App. 411.) "He was very friendly, very cordial." (App. 372.) "[I]t wasn't that Bill was irrational or anything like that." (App. 374.)

See, e.g., Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983) ("counsel's failure to advise [the defendant] of the importance of . . . suggesting witnesses [who could testify in mitigation] evidences blatant ineffectiveness"), vacated on other grounds, 468 U.S. 1206, reinstated, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985); Mulligan v. Kemp, 771 F.2d 1436, 1442 (11th Cir. 1985) (a lawyer must "thoroughly explain the potential problems with the [client's] suggested approach" before it could conceivably be proper to defer to the client's instructions), cert. denied, 107 S. Ct. 1915 (1987).

b. Mr. Eutzy Did Not Bar Trial Counsel From Undertaking an Investigation of Evidence in Mitigation.

Even according to trial counsel's own testimony, Mr. Eutzy at most expressed his preference that his family members not be involved in the case. Counsel concededly was not forbidden to contact Mr. Eutzy's family. Mr. Eutzy's expression of mere preference could not conceivably discharge counsel's "degree of independent responsibility to act in the best interests of a client" by speaking with Mr. Eutzy's family members to determine whether they could provide facts that could be presented at sentencing. Blanco v. Wainwright, 507 So. 2d 1377, 1382 (Fla. 1987).

Moreover, entirely apart from Mr. Eutzy's family, there were numerous other avenues of investigation that trial counsel was obliged to pursue, even assuming he acceded to Mr. Eutzy's supposed preference that his family not be involved. First, counsel was obliged to investigate

Mr. Eutzy's employment background. Had he done so, he would have learned of Mr. Eutzy's highly successful three-year employment as a newspaper editor and reporter in Nebraska (pp. 22-23, infra) -- a vital fact of which he was not even aware at the time of trial (App. 405).[9/] Furthermore, a minimally reasonable preparation for sentencing would have included counsel's arranging for a psychiatrist to present mitigating evidence at sentencing. Trial counsel was fully aware of Mr. Eutzy's history of psychiatric difficulties. (See p. 24, infra.) Counsel was also obliged to obtain Mr. Eutzy's documentary records, which would have revealed powerful facts for use at sentencing. (See pp. 25-26, infra.) Nothing that Mr. Eutzy told trial counsel can conceivably explain counsel's failure to undertake these fundamental steps to prepare for sentencing.

c. The Supposed Statement by Mr. Eutzy Could Not Discharge Trial Counsel's Duty to Investigate.

In a variety of contexts, courts have rejected the suggestion that statements such as Mr. Eutzy's purported expression of a preference that his family not be involved could excuse the failure to develop an adequate case in mitigation at sentencing. For instance, in Thompson v.

9/ In its Rule 3.850 ruling, the Circuit Court said that trial counsel was never told about this employment. (App. 2.) But that is no answer. Counsel never asked Mr. Eutzy about his employment history. (App. 405.) Nor did he obtain the records that would have revealed that employment. (App. 406.) Nor did he ask the more general question whether there were positive attributes of Mr. Eutzy's past that could be presented at sentencing. (App. 407.)

Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S. Ct. 1986 (1987), the defendant had directed counsel not to investigate his past for potential mitigating evidence -- a statement far more restrictive than what Mr. Eutzy supposedly said to counsel here. Despite that express prohibition, the court emphasized that a lawyer may not "blindly follow" such instructions, id. at 1451, and held that counsel's failure to investigate potential evidence in mitigation had violated the Sixth Amendment. The defendant "had not suggested that investigation would be fruitless or harmful; rather, [counsel's] testimony indicates that he decided not to investigate [the defendant's] background only as a matter of deference to [the defendant's] wish." Id. While the court acknowledged that a defendant's expressed desires may limit the scope of the lawyer's duty to investigate, "they cannot excuse [the] failure to conduct any investigation of [the defendant's] background for possible mitigating evidence." Id.

Similarly, in Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986), counsel's failure to obtain possible mitigation testimony from family members or others was held to be unreasonable and outside the bounds of minimally effective representation even though the defendant had said expressly that he did not "want anyone to cry for him." And in Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986), cert. denied, 107 S. Ct. 3277 (1987), the court made clear that, even if a defendant seeks to limit the lawyer's investigation of mitigating evidence, the lawyer "must first evaluate the potential avenues of investigation and then

advise the client of their merit. . . . A strategy of silence may be adopted only after a reasonable investigation for mitigating evidence or a reasonable decision that an investigation would be fruitless."

These cases make apparent that trial counsel was obliged -- whatever preferences Mr. Eutzy purportedly expressed -- to undertake a reasonable investigation of potential mitigating evidence.10/

4. Minimal Investigation Would Have Developed Invaluable Mitigating Evidence that Should Have Been Presented at Sentencing.

Through the most rudimentary investigation of mitigating evidence, trial counsel would have discovered numerous witnesses who would have furnished affirmative, beneficial evidence that would have formed a powerful presentation in mitigation at sentencing. Counsel could have presented affirmative testimony concerning Mr. Eutzy's continued important role as a loving father to his daughter, his intellectual abilities, his successes as a newspaper reporter and editor, and his warm and affectionate relationships with family and friends. Reasonable investigation

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10/ Even without any cooperation from Mr. Eutzy, counsel had more than enough information to proceed with a reasonable investigation of Mr. Eutzy's past. Trial counsel received a letter from Mr. Eutzy's mother in early May 1983 -- two full months prior to sentencing -- advising of her interest in the case and her desire to provide whatever assistance she could. (App. 564.) Mr. Eutzy's mother could readily have furnished the information necessary to develop and present a full case in mitigation at sentencing. (App. 448-49.) Mr. Eutzy's prison records were also readily available. (Pp. 25-26, infra.)

would also have unearthed clear documentary evidence of Mr. Eutzy's ability to live a successful, positive life within the prison environment. Psychiatric testimony would have affirmed the positive aspects of Mr. Eutzy's personality and talents, expanded on the absence of violence in Mr. Eutzy's past, explained difficulties in his past in a sympathetic light, and emphasized his ability to function admirably within a prison.

a. Family Members and Former Employers

In illustration of the mitigating evidence that trial counsel could and should have developed, the Rule 3.850 motion included affidavits from a number of family members and former employers. (App. 566-82.) None of these individuals was contacted by trial counsel, and all would have been willing to offer testimony or a statement on Mr. Eutzy's behalf had they been requested to do so.

Walter Switzer, the news editor for the Lincoln Star in Lincoln, Nebraska, would have testified to his professional relationship and friendship with Mr. Eutzy during the time they both worked for the newspaper in the early 1970s. (App. 576-79.) He would have described Mr. Eutzy as an intelligent, talented, and promising reporter and editor for the Lincoln Star. (App. 576-77.) He would have testified that Mr. Eutzy handled a heavy load of writing and editing assignments with great skill and willingness. (App. 578.) He would have testified that it was a pleasure to work with Mr. Eutzy, and that Mr. Eutzy worked well with everyone

at the newspaper, often writing or rewriting stories for other, less skilled reporters. (App. 577.)

Earl Dyer, the Executive Editor of the Lincoln Star, would also have testified concerning Mr. Eutzy's extraordinary abilities and excellent performance as a journalist. (App. 580-81.) Mr. Dyer would have testified that Mr. Eutzy was a very hard and reliable worker who contributed a great deal during his years with the newspaper. (App. 580.) He would also have testified that Mr. Eutzy was a congenial worker, "very likeable," who succeeded through hard work in a job for which he lacked the usual formal education. (App. 580.)

Shirley Ogaard, Mr. Eutzy's mother, would have described her warm and loving relationship with her son. She would have testified that he continued to express affection and devotion for her, that he is a decent and loving man, and that he has never been a violent person. (App. 567.) She would have testified to his creativity and successes in school. (App. 567.) And she would have testified concerning the "perfect" years of the early 1970s when Mr. Eutzy was working in Lincoln, Nebraska, as a newspaper reporter and editor and had a happy home life and family. (App. 568.)[11/]

11/ In its order denying the Rule 3.850 motion, the Circuit Court stated that Mr. Eutzy "had not seen [his mother] for 10 or 15 years." (App. 2.) That is wrong. Mrs. Ogaard's affidavit says that after 1973 and until the time Mr. Eutzy was arrested in 1983 she "saw William occasionally and heard from him in letters." (App. 569.)

Ann Williams, Mr. Eutzy's first wife, would have testified to her abiding affection for Mr. Eutzy, his gentle character, and his wit and sensitivity. (App. 573.) Her testimony would have focused on the continuing importance of Mr. Eutzy as a father figure to his daughter, Shirley, to whom he continues to offer advice, support, and encouragement. (App. 574-75.)

Shirley Comer, Mr. Eutzy's daughter, would have testified to her affectionate relationship with her father, her ongoing correspondence with him, the cherished fatherly advice that he continues to offer, and the emotional sustenance that she receives from him. (App. 571-72.) Her testimony would have reflected the fact that she continues to look to Mr. Eutzy for guidance and support. (App. 571-72.)

b. Psychiatric Evidence

In conjunction with the evidence from Mr. Eutzy's friends and family members, minimally competent counsel would also have arranged for a psychiatrist to develop a professional opinion that could be offered in mitigation at sentencing. Trial counsel knew that Mr. Eutzy had been placed in a Federal psychiatric institution and thus had experienced mental difficulties. In fact, trial counsel had moved for a determination of Mr. Eutzy's mental condition. (App. 583.)

Having had reasonable grounds to question Mr. Eutzy's mental state, minimally competent counsel should also have recognized the central importance of investigating and developing psychiatric testimony for presentation at

sentencing. But trial counsel never undertook any preparation of psychiatric testimony in mitigation. (App. 404.)

Mr. Eutzy submitted with the Rule 3.850 motion an affidavit of Dr. Alan B. Zients, a clinical psychiatrist who reviewed Mr. Eutzy's personality and background. (App. 584-97.) Dr. Zients's affidavit illustrates the type of affirmative, beneficial psychiatric testimony that trial counsel could and should have presented at sentencing concerning the positive aspects of Mr. Eutzy's personality, his intellectual talents, his capacity to function as a model citizen in the prison environment, his ability to sustain warm, supportive interpersonal relationships with his family and friends, the absence of violence in his background or nature, and the substantial likelihood that he could make a positive contribution to the prison environment if spared from execution. (App. 584-97.)

c. Documentary Evidence

Trial counsel did not attempt to obtain any of Mr. Eutzy's records from prison, school, or medical authorities. (App. 406.) Had he taken this fundamental step in investigation of Mr. Eutzy's background, he would have obtained powerful documentary evidence that Mr. Eutzy would make a positive contribution to the prison environment if spared from execution.12/

12/ Samples of these documents were submitted to the Circuit Court in support of the Rule 3.850 motion on January 15, 1987. The Circuit Court did not address these documents in denying the Rule 3.850 motion.

For example, a report on Mr. Eutzy's conduct at the Federal Corrections Institute in Tallahassee stated:

> "Inmate Eutzy cheerfully accepts all work assignments and completes same to the best of his ability. Also performs in an efficient and dependable manner and maintains a good rapport with his co-workers."

(App. 607.) A report from the Medical Center for Federal Prisoners stated:

> "Eutzy has done an excellent job as an accounting clerk. He has been responsible for the operation of the NCR 33 posting machine and has been very accurate in his work. This has saved time for all employees. Eutzy does all tasks willingly and has always maintained a good attitude."

(App. 608.) A progress report stated:

> "[Mr. Eutzy's] detail supervisor indicates that he is very professional in his job assignments and performs then in an outstanding manner. His attitude toward staff and inmates has been very satisfactory."

(App. 609.) A letter from the warden of the Medical Center for Federal Prisoners to Mr. Eutzy's mother advised that he was

> "selected as our Inmate of the Month for February, 1982. . . . Bill is a congenial individual who relates very well with staff members and inmates alike. He is highly thought of and is certainly well deserving of this award."

(App. 610.)

These documents, and others like them, could and should have formed a powerful element of trial counsel's case in mitigation at sentencing. Evidence of a defendant's ability to adapt peacefully and positively to the prison environment is clearly relevant in mitigation as a factor counseling in favor of imprisonment over a sentence of death. Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986).

5. Mr. Eutzy Was Prejudiced by the Failure of Trial Counsel to Develop or Present Evidence in Mitigation at Sentencing.

Trial counsel's failure to produce a shred of evidence in mitigation at sentencing left the trial court without any understanding of Mr. Eutzy or insight into mitigating evidence that was undeniably relevant to the sentencing determination. Mitigating evidence of the type described above would have depicted Mr. Eutzy in a positive light that simply did not appear on the skeletal record at trial and sentencing.

It is beyond question that, had counsel presented mitigating evidence of this kind, there is a "reasonable probability" that "the result of the proceeding would have been different," Strickland v. Washington, 466 U.S. at 694, because a case of this sort in mitigation would have clearly precluded an override of the jury's recommendation of a life sentence. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

6. Trial Counsel's Post-Hoc Rationalization that He Would Not Have Used Any of the Evidence Included with the Rule 3.850 Motion Cannot Excuse His Complete Failure to Present a Case in Mitigation at Sentencing.

At the evidentiary hearing on the Rule 3.850 motion, trial counsel made a strained effort to suggest that, even if he had been aware of the illustrative mitigating evidence included with the Rule 3.850 motion, he would not have presented any of it at sentencing. Counsel suggested that none of this evidence would have been useful because it might have revealed that Mr. Eutzy had previously been in

prison or had been involved with alcohol or drugs in his past.

The Circuit Court relied heavily on this testimony in denying the Rule 3.850 motion. It noted counsel's assertion that "he would not have used the [evidence from family and Mr. Eutzy's newspaper associates] because it would have revealed all of Defendant's problems." (App. 2.) Likewise, the Circuit Court discounted the psychiatric testimony because it "would reveal the Defendant was in prison most of his life." (App. 2.)[13/]

The Circuit Court's reasoning does not withstand scrutiny. Counsel's assertion in hindsight that, had he known of the available mitigating evidence, he would not have presented any of it at sentencing is plainly untenable and cannot justify or excuse his failure to develop a case in mitigation.

a. Trial Counsel's Rationalization at the Evidentiary Hearing Cannot Establish a Tactical Justification for the Failure to Develop and Present Mitigating Evidence.

Trial counsel's dismissal of the utility of the potential mitigating evidence -- evidence he first saw when he was supplied with a copy of the Rule 3.850 motion --

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13/ The Circuit Court also noted that trial counsel had been involved in 12 capital cases. (App. 1.) However, none of trial counsel's previous capital cases went to sentencing. (App. 394.)

cannot establish a tactical or strategic justification for his failure to develop and present mitigating evidence at sentencing.

First, as already noted, there can never be a tactical justification for counsel's total failure to undertake any investigation of potential mitigating evidence. E.g., Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986) (counsel has an absolute "duty to investigate" mitigating evidence), cert. denied, 107 S. Ct. 1986 (1987). "At the heart of effective representation is the independent duty to investigate and prepare." Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 1098 (1983). See also pp. 12-13, supra.

Moreover, counsel's failure to present evidence at sentencing cannot have been the result of tactical judgment when counsel was unaware of that evidence at the time of trial. His decision cannot be an informed, tactical choice if the materials for making a choice were not known to him. See, e.g., Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986), cert. denied, 107 S. Ct. 3277 (1987).

b. The Circuit Court Mischaracterized the Mitigating Evidence Included in the Rule 3.850 Motion by Stating That It Would Indicate Mr. Eutzy "Was a Drug Addict and Alcoholic."

The Circuit Court dismissed the affidavit of Ann Williams (App. 573-75; p. 24, supra), Mr. Eutzy's first wife, with the conclusory observation that "[a]n ex-wife indicated

he was a drug addict and alcoholic and was in prison the whole time they were married. They were only married one year." (App. 2.)

The Circuit Court's summary of Ann Williams's potential testimony is utterly inconsistent with her affidavit. (App. 573-75.) In her affidavit, she made no mention of drugs or alcohol. She said she had been married to Mr. Eutzy for six years. The Circuit Court not only mischaracterized these specific facts, but also mischaracterized the overall tenor of her affidavit.[14/] Her affidavit -- which makes it clear that she continues to hold the highest esteem and regard for Mr. Eutzy, and considers him a peaceful, gentle man and valued father figure -- was positive, beneficial testimony, not the negative evidence summarily dismissed by the Circuit Court.

c. The Assertion that Mitigating Evidence Would Have Disclosed Mr. Eutzy's Prison Record Cannot Justify Counsel's Failure to Present Any Evidence in Mitigation at Sentencing.

The Circuit Court discounted major portions of the illustrative mitigating evidence included with the Rule 3.850 motion because such evidence supposedly would have revealed that Mr. Eutzy had been in prison. In particular, the

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14/ The Circuit Court's misimpression of this evidence was apparently based on trial counsel's testimony during the evidentiary hearing on the Rule 3.850 motion, which also mischaracterized the affidavits submitted by Mr. Eutzy in support of the Rule 3.850 motion. Trial counsel acknowledged during the evidentiary hearing that his recollection of the affidavits "could very well be mistaken." (App. 399.)

Circuit Court brushed aside the evidence of Mr. Eutzy's highly successful employment as a newspaper reporter and editor (pp. 22-23, supra) on the basis that "[t]he newspaper he worked for had gotten him out of prison, and he had to quit because he went back to prison" (App. 2). Likewise, the Circuit Court discounted the value of any psychiatric testimony because it could have revealed that Mr. Eutzy "was in prison most of his life." (App. 2.)

These conclusions of the Circuit Court are, again, flatly in error on the facts and distort the evidence submitted with the Rule 3.850 motion.[15/] The psychiatric testimony included with the Rule 3.850 motion, while referring to Mr. Eutzy's adjustment to prison life (App. 592-93), does not indicate or suggest that Mr. Eutzy "was in prison most of his life." That is a clear error of fact. The Circuit Court also distorted the evidence of Mr. Eutzy's employment with the Lincoln Star. Although Mr. Eutzy was indeed hired by the newspaper while he was in prison (App. 576), the affidavits submitted with the Rule 3.850 motion make clear that the Circuit Court was wrong in concluding that Mr. Eutzy "had to quit because he went back to prison" (App. 578).

Moreover, the Circuit Court was in error -- as a matter of law -- in suggesting that a desire to limit the jury's knowledge of Mr. Eutzy's prison record could have

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15/ Again, the Circuit Court's erroneous views of the affidavits apparently are based on the mistaken recollections of trial counsel during the evidentiary hearing. See p. 30, note 14, supra.

justified a decision to exclude all the manifestly positive evidence in mitigation that counsel could have developed through a reasonable investigation.

First, to the extent counsel was concerned about limiting the evidence of Mr. Eutzy's prison record, he could have presented carefully tailored testimony at sentencing that would not have opened the door to examination on this issue. For this reason alone, concerns about Mr. Eutzy's prison record cannot justify a failure to present any evidence on his behalf at sentencing.

Second, evidence about Mr. Eutzy's prison record need not have been damaging -- and cannot justify a complete failure to present evidence in mitigation at sentencing. Admission of Mr. Eutzy's 1958 conviction informed the jury in any event that Mr. Eutzy had a criminal record. Although Mr. Eutzy had been imprisoned on several occasions, he had never committed or been convicted of a crime of violence (except for the 1958 conviction that had already been introduced into evidence).16/ Trial counsel knew this. (App. 405) If evidence had been introduced of Mr. Eutzy's prison record, counsel could readily have rebutted it by demonstrating the absence of violence in any of Mr. Eutzy's prior convictions. Evidence that Mr. Eutzy's only difficulties with the law (aside from the 1958 conviction) had involved

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16/ Moreover, even the 1958 robbery was not marked by violence. Mr. Eutzy did not injure anyone, nor did he intend to. (App. 468.)

property offenses such as forged checks and stolen credit cards could indeed have had a positive effect on the jury by emphasizing that Mr. Eutzy was not a violent or dangerous man, which would in turn have tended to demonstrate that Mr. Eutzy would be an exemplary, productive inmate if spared from execution. (See App. 592-93, 607-10.) Furthermore, trial counsel could have introduced documentary evidence (pp. 25-26, supra) as well as psychiatric testimony (pp. 24-25, supra) emphasizing Mr. Eutzy's demonstrated ability to live a peaceful, productive life within the prison environment.

Finally, testimony concerning Mr. Eutzy's prison record would likely have been inadmissible since its relevance would have been outweighed by its prejudicial effect. This is particularly true considering that none of Mr. Eutzy's prison terms was for a violent offense except for the 1958 conviction that the State put in evidence. (App. 405.)

For the same reasons, there is no basis for the Circuit Court's suggestion that counsel would not have used psychiatric evidence of the sort included in the Rule 3.850 motion (pp. 24-25, supra) because it would have revealed that Mr. Eutzy had spent time in prison. Counsel might well have been able to present testimony from a psychiatrist without making any reference to Mr. Eutzy's prison record, had he thought that appropriate. And if the State tried to bring out facts concerning Mr. Eutzy's prison record on cross-

examination, those would either have been inadmissible or readily made to serve a positive purpose, as noted above.

B. Mr. Eutzy Was Deprived of His Right to the Effective Assistance of Counsel by the Failure of Trial Counsel to Raise a Miranda Objection to the Introduction of the 1958 Judgment at Sentencing or to Present Evidence Concerning the Circumstances of that Judgment.

The only evidence introduced by the State at sentencing was a judgment indicating that Mr. Eutzy had been convicted 25 years earlier in Nebraska on a guilty plea to a charge of robbery. (P. 5, supra.) This judgment formed the basis for the trial court's finding that Mr. Eutzy had previously been convicted of a crime of violence, one of three aggravating factors relied on by the court in sentencing Mr. Eutzy to death. Since this Court subsequently reversed the trial court's finding that the murder had occurred during the commission of a robbery (p. 6, supra), the 1958 robbery conviction was one of only two aggravating factors that ostensibly supported Mr. Eutzy's death sentence.

The trial court ruled at sentencing that the 1958 judgment was admissible on the basis of a statement made by Mr. Eutzy to Corrections Officer Shiver that he had been convicted in Omaha of robbery in 1958. (App. 326-27, 332, 351-52.) That statement was made by Mr. Eutzy, after he had been taken into custody, in response to Officer Shiver's question whether he had previously been convicted of a crime. (App. 327.) The trial court deemed that statement to sufficiently link Mr. Eutzy to the 1958 judgment to allow its introduction into evidence. (App. 332.) The trial court made clear, however, that the 1958 judgment would have been

inadmissible without the linkage of Mr. Eutzy's response to Officer Shiver's question. (App. 329-32.)

1. Trial Counsel's Failure to Raise a Miranda Objection to the Introduction of Mr. Eutzy's Statement Deprived Mr. Eutzy of His Right to the Effective Assistance of Counsel.

The critical issue never raised by trial counsel was that Mr. Eutzy's statement to Officer Shiver was inadmissible under Miranda v. Arizona, 384 U.S. 436 (1966), and could not be used as the basis to link Mr. Eutzy with the 1958 Nebraska judgment.

The Circuit Court, in denying the Rule 3.850 motion, rejected this claim on the basis that Mr. Eutzy had received a Miranda warning prior to making his statement to Officer Shiver. (App. 3.) The trial record does indeed indicate that Mr. Eutzy was read his Miranda rights by Officer Meisen of the Pensacola Police Department. (App. 162.) But that record is silent as to (a) whether those Miranda rights were read to Mr. Eutzy before or after he was questioned by Officer Shiver and (b) whether, even if those rights were read to Mr. Eutzy prior to his interrogation by Officer Shiver, Mr. Eutzy invoked his right to remain silent after receiving his Miranda warnings.

The trial record is silent on these questions because trial counsel never raised this obvious Miranda issue. Moreover, in its briefing and during the evidentiary hearing on the Rule 3.850 motion, the State never suggested that trial counsel's failure to raise a Miranda objection was explained by the fact that Mr. Eutzy was advised of his

rights. This notion was supplied sua sponte by the Circuit Court.

Present counsel for Mr. Eutzy have ascertained the facts on this issue that cannot be found in the trial record. Those facts are the subject of a motion for reconsideration that counsel have filed on behalf of Mr. Eutzy with the Circuit Court. (App. 612-26; see p. 2, note 3, supra.) The affidavit of Mr. Eutzy filed with that motion states that he received his Miranda warnings at roughly 10:15 a.m. on the morning of his arrest and that he twice thereafter invoked his right to remain silent, once in the early afternoon and again around 7:30 p.m. that same day. (App. 624-25.) The affidavit further indicates that Mr. Eutzy was not questioned by Officer Shiver until 9:00 p.m. that evening, many hours after he had made clear his intention to remain silent. (App. 625.) Mr. Eutzy believed that he was obliged to answer Officer Shiver's questions. He did not know he had a right to remain silent in the face of those questions and he was unaware that his responses could be used in evidence against him. (App. 625.)

On these facts, the law is clear that the Fifth Amendment bars the introduction into evidence of Mr. Eutzy's statement to Officer Shiver. In Michigan v. Mosley, 423 U.S. 96 (1975), the United States Supreme Court made clear that "'the interrogation must cease' when the person in custody indicates that 'he wishes to remain silent.'" Id. at 101 (quoting Miranda, 384 U.S. at 473-74). See also Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); Christopher v. Florida,

824 F.2d 836, 839-46 (11th Cir. 1987). Here, the questioning that led to Mr. Eutzy's incriminating statement was clear custodial interrogation after Mr. Eutzy had twice invoked his right to remain silent. Under the clear dictates of Miranda and the cases that have followed it, that statement would have been barred from introduction at sentencing had counsel raised this fundamental objection.[17]

There was no tactical or strategic justification for trial counsel's failure to raise this clear -- and critically important -- objection.[18] Moreover, the prejudice flowing from counsel's error is plain: without the 1958

17/ The Circuit Court, in disposing of the Rule 3.850 motion, also noted that trial counsel did raise an evidentiary objection -- lack of foundation -- to the introduction of the 1958 robbery conviction. (App. 2.) That is true (see App. 329) but it is wholly beside the point. Trial counsel did not argue that the rule of Miranda v. Arizona made the evidence of the prior conviction inadmissible. It is trial counsel's failure to raise the clearly meritorious Miranda objection -- and not simply any objection -- that deprived Mr. Eutzy of his right to the effective assistance of counsel.

The Circuit Court also held that trial counsel's failure to raise a Miranda objection was a matter that should have been raised on direct appeal and was not properly cognizable in a Rule 3.850 motion. (App. 2.) That misapprehended the nature of Mr. Eutzy's claim. Mr. Eutzy is not challenging the trial court's failure to uphold a Miranda objection (a matter properly raised on direct appeal), but rather is challenging trial counsel's failure to raise such an objection, a matter going to the adequacy of trial counsel's performance that is properly raised in a Rule 3.850 motion.

18/ During the evidentiary hearing, the State successfully objected to a question that sought to elicit counsel's reason for failing to raise this objection. (App. 418-19.) There is nothing on this record that could conceivably justify trial counsel's failing to make this obvious Miranda objection.

conviction, this Court on direct appeal would have been left with only a single aggravating factor that could even conceivably have justified imposition of the death sentence. With only one aggravating factor -- and itself one that cannot withstand scrutiny (pp. 50-56, infra) -- there is a "reasonable probability" that this Court would have found a reasonable basis for the jury's recommendation of a life sentence and would have reversed Mr. Eutzy's death sentence.

2. Trial Counsel's Failure to Introduce Mitigating Evidence Concerning the 1958 Conviction Denied Mr. Eutzy His Right to the Effective Assistance of Counsel.

Mr. Eutzy was also denied his constitutionally guaranteed right to the effective assistance of counsel by the failure of trial counsel to introduce evidence in mitigation or explanation of the circumstances of the 1958 conviction.

Counsel could readily have introduced evidence that Mr. Eutzy had not committed a crime of violence since 1958 and that this conviction was irrelevant to Mr. Eutzy's behavior as an adult or as a predictor of his future conduct. (App. 468-89.) He could also have shown that Mr. Eutzy did not injure anyone during the 1958 robbery -- and did not intend to. (App. 468.) And he could have emphasized that this robbery was merely a teenage aberration in Mr. Eutzy's distant past. (App. 468.) Such a presentation at sentencing would have greatly mitigated the significance of the 1958 conviction -- if not eliminating it entirely as a basis for imposing sentence 25 years after the crime had occurred.

In rejecting this argument, the Circuit Court referred to trial counsel's testimony that he supposedly did not want to open up evidence of Mr. Eutzy's past. (App. 3.) But for the reasons discussed earlier (pp. 28-29, supra), that post-hoc rationalization cannot establish a tactical justification when counsel was unaware of that potential mitigating evidence at the time of sentencing (App. 469).

The Circuit Court also noted that trial counsel tried to limit the impact of the 1958 conviction in his remarks to the jury at sentencing. (App. 3.) That is likewise no excuse. It was necessary to present evidence -- not mere argument -- to mitigate the 1958 conviction. Both this Court and the trial court relied heavily on that conviction in sentencing Mr. Eutzy to death. Without evidence to mitigate its significance, it assumed undue weight in the sentencing determination.

II. THE FLORIDA DEATH PENALTY STATUTE, AS APPLIED IN THIS CASE BY THIS COURT, IS AN UNCONSTITUTIONAL DEPRIVATION OF MR. EUTZY'S RIGHTS UNDER FLORIDA LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court's application of the Florida death penalty statute to Mr. Eutzy's case on direct appeal is fundamentally at odds with Florida law and with the constitutional guarantees of the Eighth and Fourteenth Amendments.

A. Claims Based on this Court's Application of the Death Penalty Statute on Direct Appeal Are Properly Cognizable Under Florida Rule of Criminal Procedure 3.850.

The Circuit Court, in denying Mr. Eutzy's Rule 3.850 motion, did not address his claims based on this Court's application of the death penalty to Mr. Eutzy's case

because it believed they were points that should have been raised on direct appeal and could not be raised in a Rule 3.850 motion. (App. 6.) That holding was in error.

These claims, by their very nature, could not have been raised on direct appeal. They are based not upon the conduct of the trial court or the trial but rather upon this Court's decision upholding Mr. Eutzy's death sentence and murder conviction. Because they flow from the reasoning of this Court in deciding Mr. Eutzy's direct appeal, they could not have been advanced until the Court rendered its decision on direct appeal. For example, Mr. Eutzy could not have challenged the constitutionality of the construction placed by this Court on the "cold, calculated, and premeditated" aggravating factor (pp. 50-56, infra) until this Court issued its construction. By the same token, Mr. Eutzy's argument that his due process rights were violated by the trial court's reliance on an aggravating factor that was not supported by the evidence (pp. 66-68, infra) is based on this Court's holding that there was no support for the finding that the murder of Herman Hughley occurred during the course of a robbery. The arguments thus flow from this Court's decision on direct appeal and are properly raised in Mr. Eutzy's Rule 3.850 motion. It was error for the Circuit Court to hold otherwise.

B. The Decision of the Supreme Court of Florida Improperly Disregards Valid Mitigating Circumstances that Support the Jury's Recommendation of a Life Sentence.

An overarching constitutional requirement at the sentencing phase of a capital case is that "the sentencer . . .

not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v.Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)). In Skipper v. South Carolina, 106 S. Ct. 1669 (1986), the United States Supreme Court recently reemphasized this fundamental precept and "the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Id. at 1671 (quoting Eddings, 455 U.S. at 114).

This Court's decision on direct appeal affirming Mr. Eutzy's sentence of death, and dismissing a number of potentially mitigating circumstances, cannot be squared with this basic constitutional requirement at sentencing. When these mitigating factors are taken into account, it is clear that there was essential support for the jury's recommendation that precluded an override of that recommendation. Tedder v. State, 322 So. 2d 908 (Fla. 1975).[19/]

19/ For the reasons discussed below (see pp. 42-49, infra), we also believe that, even on the present record at trial and sentencing, and even accepting this Court's finding that there are no "mitigating factors" presented on that record, an override was improper under Tedder.

1. The Court Improperly Discounted Evidence of Mr. Eutzy's Age as a Mitigating Factor.

On direct appeal, Mr. Eutzy contended that his age was a valid mitigating factor that the jury might properly have considered in returning its recommendation of a life sentence. Mr. Eutzy was 43 years old at the time of sentencing, and would be 68 years old before becoming eligible for parole if sentenced to life imprisonment. (App. 337.) This furnished proper support for the jury's recommendation, given the low probability that a 68-year-old man will be a threat to society upon release from prison and the likelihood that a man between the ages of 43 and 68 would be a successful, stable member of the prison community.

However, this Court flatly rejected the legitimacy of a jury recommendation based upon Mr. Eutzy's age:

> "[T]he crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt. For this reason, age is a mitigating circumstance when it is relevant to the defendant's mental and emotional maturity and his ability to take responsibility for his own acts and to appreciate the consequences flowing from them. . . . One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young."

458 So. 2d at 759 (emphasis added).

This reasoning and holding deny effect to the constitutional requirement -- as enunciated by the United States Supreme Court in Eddings, Lockett, and Skipper -- that any evidence relevant to a defendant's character and future behavior must be considered in mitigation. In Skipper, the

United States Supreme Court rejected the contention that only evidence relating to the defendant's culpability could be considered in mitigation at sentencing, and specifically endorsed evidence of the defendant's future dangerousness and probable future behavior as valid mitigating evidence. "Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" 106 S. Ct. at 1671 (quoting Lockett, 438 U.S. at 604) (emphasis added). "Consideration of a defendant's . . . probable future behavior is an inevitable and not undesirable element of criminal sentencing . . .." 106 S. Ct. at 1671.

This Court, however, held that mitigating factors could not properly include considerations of Mr. Eutzy's probably future behavior, and on this basis rejected Mr. Eutzy's age as a valid mitigating circumstance. It held that mitigating circumstances "must, in some way, ameliorate the enormity of the defendant's guilt." 458 So. 2d at 759. That holding was incontestably wrong as a matter of federal constitutional law.

2. The Court Improperly Discounted Laura Eutzy's Involvement as a Mitigating Factor.

In affirming Mr. Eutzy's sentence, this Court rejected "the contention that the jury may have been swayed by the state's treatment of Laura [Eutzy]" as a basis for the jury's recommendation of a life sentence. 458 So. 2d at

759.[20/] The Court's conclusion is based on an application and construction of the Florida death penalty statute that cannot be squared with federal constitutional requirements.

a. The Jury Could Have Found that Laura Eutzy Was "Equally Culpable" for the Murder.

On direct appeal, the Court held that a jury's recommendation of life is reasonable -- and not susceptible to an override -- if possibly based, to some extent, "on the treatment accorded one equally culpable of murder." Id. But the Court concluded that this mitigating circumstance did not apply here, since, in its view, the jury could not possibly have inferred that Laura Eutzy was "equally culpable" for the murder of Herman Hughley:

> "Had it disbelieved Laura's testimony entirely, the jury could have inferred from the facts before it that Laura knew the defendant had taken the gun from her purse. This does not suffice to make her a principal in the first degree, equally as culpable of the homicide as the defendant. She was not at the scene of the crime; there was testimony in evidence that she was seen at the Holiday Inn at the approximate time the murder occurred and that she was not at the scene of the crime when Jackie Humel saw Eutzy and the victim there. Nor is there anything in the record which would support a reasonable inference that she was constructively present. There is no evidence which would show that she aided, abetted, counseled, hired or otherwise procured the offense."

458 So. 2d at 759-60 (emphasis added).

20/ First-degree murder charges against Laura Eutzy were dismissed when the State did not traverse her motion to dismiss. (App. 225-26.) The State agreed to recommend probation for her on a concealed-weapons charge if she agreed to testify at Mr. Eutzy's trial. (App. 226.)

That was a flat misreading of the record that denied Mr. Eutzy his constitutional rights and his rights under Florida law to meaningful appellate review of his sentence.

Contrary to this Court's assertions, the circumstantial evidence at trial did not preclude a jury inference that Laura Eutzy was at the scene of the crime and committed or participated in the murder of Herman Hughley. It was in fact consistent with substantial evidence at trial for the jury to conclude that Laura Eutzy was sitting or hiding in the rear seat of the taxicab before Herman Hughley was killed, and indeed that she fired the fatal shot. Had the jury disbelieved Laura Eutzy's testimony, there was nothing in the trial record that foreclosed this inference. Indeed, trial counsel emphasized this very possibility to the jury during his closing argument at the guilt phase of trial. (App. 291-92.)[21/]

Specifically, Jacqueline Humel, who testified that she saw Mr. Eutzy standing outside the cab, did not testify

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21/ The prosecutor, responding to this point in his closing argument, also acknowledged the possibility that Laura Eutzy might have participated in the murder: "if two or more persons each help to commit a crime, and the Defendant is one of them, the Defendant must be treated as if he had done all the things the other person did." (App. 287.)

The jury inference that Laura Eutzy killed Herman Hughley would not have been inconsistent with the guilty verdict on first-degree murder. The jury was not instructed that a guilty verdict on first-degree murder required a finding that William Eutzy was the person who actually killed Herman Hughley. (App. 295.)

that there was no one else at the scene. She did not testify that she looked into the taxicab. Indeed, she could not have seen from her van into the back seat of the cab. (App. 481.) Her testimony -- which was the only evidence aside from Laura Eutzy's self-exonerating testimony that even placed Mr. Eutzy at the murder scene -- was consistent with a jury inference that Laura Eutzy was in the taxicab or elsewhere in the vicinity.

In fact, the inference that Laura Eutzy was hiding in the rear set of the taxicab was suggested by the circumstantial evidence. Ms. Humel testified that Herman Hughley looked "nervously over his shoulder" while she spoke to him, suggesting that he was in fear for his safety. (P. 3, supra.) But she also testified that Mr. Eutzy was standing away from the cab by a tree as she drove away from the scene. (P. 3, supra.) The jury might reasonably have inferred that, since Herman Hughley was "nervous" about the situation, he would have attempted to drive away while Mr. Eutzy stood by the tree -- except that Laura Eutzy was in the rear seat, perhaps with a gun trained on him.

The inference that Laura Eutzy shot Herman Hughley was further buttressed by the fact that her testimony at trial was implausible to the point of being unbelievable.[22/]

22/ Laura Eutzy claimed that a taxicab driver had willingly driven her and Mr. Eutzy -- who had been hitchhiking for days, had been sleeping at the airport, had not washed or eaten for several days, and had only $5 between them (App. 474-75) -- to Panama City and back, a trip of 100 miles (App.

(footnote cont'd)

Moreover, Herman Hughley was killed by Laura Eutzy's gun, which was recovered from her purse. (P. 4, supra.) In addition, her statements to the police after arrest varied wildly -- and it was only after she learned that the police had evidence that her gun was the murder weapon that she implicated Mr. Eutzy. (P. 5, supra.)

This inference also found support in the trajectory of the bullet that killed Herman Hughley. The testimony at trial indicated that he was shot from behind at close range, almost certainly from the back seat of the cab. (P. 3, supra.) But Mr. Eutzy was last seen standing outside the cab, some distance away. (P. 3, supra.) Furthermore, no evidence of fingerprints was introduced at trial (p. 3, supra), and the jury might reasonably have inferred that Laura Eutzy's fingerprints were on the gun while Mr. Eutzy's were not.

The inference that Laura Eutzy killed Herman Hughley was not, as this Court thought, foreclosed by the testimony of Officer Meadows, the security officer at the Holiday Inn. He testified that he had seen Laura Eutzy at

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(footnote cont'd)

416), without asking for any cab fare in advance or any assurance that he would be paid. (P. 4, supra.) There was, however, uncontradicted testimony in the record that a taxicab driver would invariably ask for payment in advance for a trip of such a distance. (App. 146.) Laura Eutzy also claimed that she had not looked in her purse -- where she carried her gun along with her comb and all her toiletries and other supplies -- at any time between Saturday and Monday. (Pp. 4-5, supra.) She further claimed that she perceived no difference in the weight of her purse with or without the gun. (P. 5, supra.)

the Holiday Inn some time between 11:00 p.m. and midnight, although on cross-examination he acknowledged that he might not have seen her until 2:00 a.m. on Sunday. The evidence indicated that Laura Eutzy could have walked from the airport to the Holiday Inn in roughly 30 to 45 minutes, time enough to have committed the murder and then been seen by Officer Meadows before midnight.[23/] And if Officer Meadows did not, in fact, see Laura Eutzy until 2:00 a.m. on Sunday, as he testified at his deposition before trial, she would have had even more time to walk from the murder scene to the hotel.

A jury finding that Laura Eutzy committed the murder or participated in it was thus fully consistent with the circumstantial evidence adduced at trial. This Court's contrary conclusion rested upon a fundamentally mistaken view of the trial record. It was thus improper and a violation of Mr. Eutzy's rights for this Court to discount the leniency accorded Laura Eutzy as a reasonable, legitimate factor supporting the jury's recommendation of a life sentence.

b. The Jury Could Have Considered the Leniency Afforded Laura Eutzy Even if She Was Not "Equally Culpable".

In rejecting the contention that the leniency extended to Laura Eutzy could support the jury's recommendation, the Court held that, as a matter of law, a jury may properly consider the treatment accorded an accomplice as a

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23/ Laura Eutzy testified on direct examination that she had walked between the Holiday Inn and the airport in roughly 30 minutes on the day before the murder. (App. 209-10.)

mitigating factor only if that accomplice is "equally culpable of the murder." 458 So. 2d at 759.

This limitation of comparisons of the treatment of co-defendants to those "equally culpable" is inconsistent with constitutional standards. The sentencer may not be precluded from considering "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper, 106 S. Ct. at 1670-71 (emphasis added). One such "circumstance" is undoubtedly the treatment accorded another implicated in the crime for which the defendant is subject to the death penalty.

c. The Jury May Have Harbored Lingering Doubts About Laura Eutzy's Involvement.

As already made clear, Laura Eutzy's testimony was marred by inconsistency and by statements nearly incredible on their face. (P. 46 & note 22, supra.) But even had the jury credited her story, at least in part, at the guilt/innocence phase of trial, it might nonetheless have had lingering doubts about Mr. Eutzy's guilt and about the extent of her involvement in the crime. This might have been weighed in the balance by the jury at sentencing as yet another factor counseling in favor of life imprisonment.

This Court has rejected the proposition that lingering doubts about guilt can properly be relied on as a mitigating circumstance to support a jury's recommendation of a life sentence. E.g., Buford v. State, 403 So. 2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163 (1982). But again, this is inconsistent with the constitutional requirement that

a sentencer must be permitted to consider all aspects of the circumstances of the crime and the defendant in determining the appropriate sentence. E.g., Skipper v. South Carolina, 106 S. Ct. 1669 (1986). A lingering doubt about guilt -- while not sufficient to prevent a guilty verdict -- might reasonably affect the sentencer's willingness to incur the risk that an irrevocable mistake might be made through a sentence of death. There is a very real "possibility that, at least in some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." Lockhart v. McCree, 106 S. Ct. 1758, 1769 (1986). See also, e.g., Magill v. Dugger, 824 F.2d 879, 889 (11th Cir. 1987); Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), cert. denied, 470 U.S. 1087 (1985). This is a further factor that supports the jury's recommendation of a life sentence.

C. This Court's Decision on Direct Appeal Applied an Unconstitutional Construction of the "Cold, Calculated, and Premeditated" Aggravating Factor.

On direct appeal, this Court upheld the trial court's determination that the murder of Herman Hughley was "committed in a cold, calculated, and premeditated manner." The Court observed that "the evidence is clear that Eutzy procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of struggle." 458 So. 2d at 757. As for the question of premeditation, the Court stated: "The jury convicted Eutzy of first-degree premeditated murder, and Eutzy raises no

objection to the sufficiency of the evidence, albeit circumstantial, to support that verdict. Accepting the evidence of premeditation, we can find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor." Id. at 758.

This application of the "cold, calculated, and premeditated" aggravating factor to this case contravenes Mr. Eutzy's rights under the United States Constitution and Florida law. It cannot stand.

1. The Court's Construction of this Aggravating Factor Is at Odds With Its Own Precedent.

This Court's prior decisions make it clear that "[t]he cold, calculated and premeditated factor applies to a manner of killing characterized by a heightened premeditation beyond that required to establish premeditated murder." Caruthers v. State, 465 So. 2d 496, 498 (Fla. 1985). "The factor places a limitation on the use of premeditation as an aggravating circumstance in the absence of some quality setting the crime apart from mere ordinary premeditated murder." Brown v. State, 473 So. 2d 1260, 1268 (Fla.), cert. denied, 474 U.S. 1038 (1985). See also Peede v. State, 474 So. 2d 808, 817 (Fla. 1985), cert. denied, 106 S. Ct. 3286 (1986). Moreover, this heightened premeditation -- like the evidence necessary to support any statutory aggravating factor -- must be proven beyond a reasonable doubt. Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1981).

To establish the requisite "heightened premeditation" in this case, the Court concluded: "Eutzy raises no

objection to the sufficiency of the evidence" to support the verdict of premeditated murder; and "[a]ccepting" that evidence of premeditation, "we can find no reasonable hypothesis inconsistent with" heightened premeditation. 458 So. 2d at 758.

This logic does not satisfy the requirement of proof beyond a reasonable doubt. In fact, the necessary "heightened premeditation" cannot, despite the Court's suggestion, be inferred beyond a reasonable doubt merely from the premeditation that was an element of the jury verdict on first-degree murder.

The Court referred to three "facts" in its discussion of this aggravating factor: that Mr. Eutzy had (according to Laura Eutzy's testimony) procured the murder weapon "in advance"; that Herman Hughley "was shot once in the head, execution style"; and "that there was no sign of struggle." These "facts," however, taken alone or collectively, do not establish beyond a reasonable doubt the "heightened premeditation" required to support this aggravating factor. At the very most, they might admit of the possibility of a "cold, calculated, and premeditated" killing. But they are also consistent with an inference that Mr. Eutzy (assuming he committed the murder) had carried the handgun for hours with no intention of using it but had panicked and killed Herman Hughley as a momentary impulse, with no forethought whatever. The mode of the killing, as reflected in the skeletal facts recited by this Court, tells nothing about whether Mr. Eutzy possessed the necessary "heightened premeditation" that

underlies this aggravating factor. As the Court has emphasized, the relevant inquiry is focused "more on the perpetrator's state of mind than on the method of killing." Johnson v. State, 465 So. 2d 499, 507 (Fla.), cert. denied, 106 S. Ct. 186 (1985).

This Court's finding on the trial record of the "cold, calculated, and premeditated" aggravating factor accordingly does not comport with the exacting standards enunciated in the its own precedents. The Court's departure from those precedents denied Mr. Eutzy his rights under Florida law and the Eighth and Fourteenth Amendments.

2. The Court's Application of this Aggravating Factor Was Inconsistent with the Record.

In addressing itself to the "cold, calculated, and premeditated" aggravating factor, this Court observed that proof beyond a reasonable doubt -- required to support the aggravating factor -- could be satisfied through circumstantial evidence "so long as that circumstantial evidence is inconsistent with any reasonable hypothesis which negates the aggravating factor." 458 So. 2d at 758 (emphasis added). In this case, where there was no direct evidence that would establish "heightened premeditation," the Court concluded from the circumstantial evidence and inferences from the trial testimony that there was "no reasonable hypothesis inconsistent with" heightened premeditation. Id. at 758.

That conclusion, however, rests on a misreading or misconception of the record that is so fundamental as to deny Mr. Eutzy his constitutional right to due process of law.

One hypothesis inconsistent with the finding of heightened premeditation is that Laura Eutzy, rather than Mr. Eutzy, committed the murder. (See pp. 45-48, supra.) And even crediting Laura Eutzy's self-serving and nearly incredible testimony in full, there are other reasonable hypotheses to be drawn from the record that are inconsistent with a finding of heightened premeditation. Laura Eutzy's testimony offered no details of the killing itself, and the circumstantial evidence sheds little if any light on the question of "heightened premeditation." As only one example, it would be entirely consistent with the record -- both the circumstantial evidence and Laura Eutzy's testimony -- to conclude that Mr. Eutzy fired the gun in a moment of fear or confusion. Nothing in the record precludes such an inference -- or makes it any less likely than the contrary inference drawn by this Court. Such distinct possibilities bar a finding beyond a reasonable doubt of the "cold, calculated, or premeditated" statutory aggravating factor[24/]; there is plainly a "reasonable hypothesis" -- indeed, there is more than one -- "which negates the aggravating factor." 458 So. 2d at 758.

3. The Court's Construction of this Aggravating Factor Is Unconstitutionally Vague and Broad.

A state court's construction of its aggravating factors must "genuinely narrow the class of persons eligible

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24/ See, e.g., Caruthers v. State, 465 So. 2d 496, 498-99 (Fla. 1985).

for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983). Thus, in Godfrey v. Georgia, 446 U.S. 420 (1980), the United States Supreme Court held that a death sentence based on a vague or overinclusive construction of a statutory aggravating factor could not stand because "[t]he petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id. at 433 (plurality opinion). The Court concluded that "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id.

This Court here adopted an unconstitutionally vague and overbroad construction of the "cold, calculated, and premeditated" statutory aggravating factor. The evidence as to the circumstances of the murder cannot, as a matter of constitutional law, adequately distinguish this murder from the many in which the death penalty is not imposed. This murder, even if committed by Mr. Eutzy, "cannot be said to have reflected a consciousness materially more [cold, calculated, and premeditated] than that of any person" found guilty of a premeditated murder. Godfrey, 446 U.S. at 433 (plurality opinion). The facts -- such as they are, and indulging every appropriate presumption in favor of the State -- cannot constitutionally distinguish this murder from any premeditated killing.

D. This Court's Decision Applies the Tedder Jury-Override Standard in an Arbitrary and Discriminatory Manner, and Improperly Narrows the Considerations that a Jury May Rely Upon in Recommending a Life Sentence.

"In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (emphasis added).[25/] An override of a jury's recommendation of a life sentence cannot be sustained if there is "information in evidence providing an arguable basis upon which the jury might have grounded such a recommendation." Shue v. Florida, 366 So. 2d 387, 390 (Fla. 1978) (emphasis added).

This jury-override standard is a "crucial protection" under the Florida statutory scheme governing imposition of the death penalty. Dobbert v. Florida, 432 U.S. 282, 295 (1977). A death sentence cannot stand, as a matter of federal constitutional law, if the application of the Tedder override standard -- either in general or in a specific case -- is "arbitrary or discriminatory." Spaziano v. Florida, 468 U.S 447, 465 (1984). See also Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). Moreover, under general constitutional principles barring the arbitrary and capricious

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25/ Accord, e.g., Barclay v. State, 470 So. 2d 691, 694 (Fla. 1985); Lemon v. State, 456 So. 2d 885, 888 (Fla. 1984), cert. denied, 469 U.S. 1230 (1985); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985).

imposition of the death sentence, a defendant is entitled to reasoned, consistent application of the jury-override standard.

This Court's application of the Tedder standard to this case does not satisfy these constitutional requirements.

1. The Court's Decision Applies the Tedder Standard in an Arbitrary, Discriminatory, and Capricious Manner.

The evidence at trial showed that Herman Hughley was killed by a single gunshot to the head. Death was instantaneous. There was no sign of a struggle of any sort, nor was there any suggestion that the victim was aware of his impending death. There was not, in fact, any evidence concerning the precise circumstances of the killing. Moreover, there was even uncertainty as to whether Laura Eutzy, rather than William Eutzy, might have fired the fatal shot. And there was no evidence that Mr. Eutzy planned the murder (even assuming he committed it). (See pp. 45-48, 52, 54, supra.)

At sentencing, the State introduced only a single piece of evidence in aggravation: a 1958 robbery conviction, secured 25 years before when Mr. Eutzy was 18 years old. (P. 5, supra.) Aside from that meager evidence, the State offered no evidence to support its request for a death sentence (although it argued to the jury that the murder occurred during the course of a robbery and that the murder was "cold, calculated, and premeditated"). Moreover, as the trial court recognized (App. 352), the jury did not accept the State's theory that the murder occurred during a robbery; and there was no evidentiary basis for the "cold, calculated, and premeditated" aggravating factor (see pp. 53-54, supra).

In short, without denigrating the significance of this or any other murder, the circumstances of the crime were not unusual. There was nothing in particular to distinguish this from any first-degree premeditated murder. Therefore, even assuming -- and we believe the assumption to be unfounded (see pp. 40-50, supra) -- that there were no mitigating factors to support the jury's recommendation, reasonable persons could doubtless conclude that a life sentence was appropriate on this record. It was arbitrary for the Court to hold otherwise.

a. Illustrative Cases in which this Court Has Reversed an Override of the Jury's Recommendation of a Life Sentence.

The arbitrary, discriminatory application of the Tedder standard in this case is made manifest by a comparison of these facts with illustrative cases in which the Court has reversed a trial court's sentence of death following a jury recommendation of life:

In Williams v. State, 386 So. 2d 538 (Fla. 1980), the defendant had shot and killed a woman without any apparent reason. Although there was one aggravating factor and there were no mitigating factors, the Court, applying Tedder, held that "the facts suggesting a sentence of death in this case are not sufficiently clear and convincing to override the jury's recommendation." Id. at 543.

In Swan v. State, 322 So. 2d 485 (Fla. 1975), the victim was found gagged, bruised, and beaten. Aggravating factors were shown by the circumstances of the crime, while

the defendant's age (19 years) was the only mitigating evidence. Under Tedder, this Court reversed the defendant's death sentence and entered a life sentence on the basis of the jury's recommendation.

In Webb v. State, 433 So. 2d 496 (Fla. 1983), the the victim was shot three times during a robbery. Without discussing the balance of aggravating and mitigating circumstances, the Court held that "[t]he facts of this case do not justify an over-ride of the jury recommendation." Id. at 499.

In Barclay v. State, 470 So. 2d 691 (Fla. 1985), the defendant and his two accomplices picked up a hitchhiker and drove him to an isolated area where the defendant stabbed the victim repeatedly. There were two aggravating factors and no mitigating factors. Nonetheless, the Court concluded that "[t]he facts of this case do not meet the Tedder test for overriding the jury's recommendation." Id. at 694.

In Phippen v. State, 389 So. 2d 991 (Fla. 1980), the defendant had shot his mother four times, his stepfather six. The Court found at least one aggravating factor, and no mitigating factors, but held that "the facts suggesting a sentence of death in this case were not so compelling as to justify overriding the jury's recommendation of life imprisonment." Id. at 994.

In Brown v. State, 367 So. 2d 616 (Fla. 1979), the victim was kidnapped, beaten, shot, and drowned by the defendant. This Court, applying Tedder, reversed the defendant's death sentence on appeal: "The jurors in this case

had all the information appropriate to their 'weighing' responsibilities under the statute, and they found that it favored life imprisonment. The more severe penalty is not so clearly directed by the sentencing evidence that it should override the considered judgment of Brown's jury." Id. at 625.

In Richardson v. State, 437 So. 2d 1091, 1093 (Fla. 1983), the victim died from "massive head injuries with multiple fractures caused by a large instrument wielded with great force." This Court struck down the defendant's death sentence on the basis of Tedder, even though there were four aggravating factors and no mitigating circumstances: "It is well-settled that a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the [jury's] opinion." Id. at 1095.

b. Illustrative Cases in which this Court Has Affirmed an Override of the Jury's Recommendation of a Life Sentence.

The arbitrary and discriminatory application of the Tedder standard is reflected as well by a comparison of this case with those in which this Court has upheld a death sentence imposed in the face of a jury recommendation of life imprisonment. As of the end of 1984, roughly the time frame in which this Court disposed of Mr. Eutzy's direct appeal, this Court had affirmed some 21 such death sentences under Tedder. In all but two of those cases, the trial court had specifically found that the murder was "especially heinous, atrocious, or cruel" and had placed heavy emphasis on that

aggravating factor in reaching its sentencing determination.[26]

The following are illustrative:

-- Thomas v. State, 456 So. 2d 454 (Fla. 1984) (defendant beat, kicked, or bludgeoned the victim).

-- Heiney v. State, 447 So. 2d 210 (Fla. 1984) (victim was beaten on the head with a claw hammer and suffered at least seven blows on each side of his skull).

-- Spaziano v. State, 433 So. 2d 508 (Fla. 1983) (defendant tortured his victims with a knife before killing them), aff'd, 468 U.S. 447 (1984).

-- Bolender v. State, 422 So. 2d 833 (Fla. 1982) (victims were tortured and terrorized, then put in car which was set on fire), cert. denied, 461 U.S. 939 (1983).

-- Stevens v. State, 419 So. 2d 1058 (Fla. 1982) (victim was robbed, abducted, raped, and murdered by strangulation and stabbing, and her body mutilated), cert. denied, 459 U.S. 1228 (1983).

-- Miller v. State, 415 So. 2d 1262 (Fla. 1982) (victim was beaten with stick, raped, doused with gasoline and set on fire), cert. denied, 459 U.S. 1158 (1983).

-- Buford v. State, 403 So. 2d 943 (Fla. 1981) (sexual assault and murder of seven-year old child; defendant repeatedly dropped a 32-pound block on child's head), cert. denied, 454 U.S. 1163 (1982).

26/ The two cases in which the trial court did not explicitly rely upon the "especially heinous, atrocious, or cruel" statutory factor involved aggravated facts that distinguish them from this case and "set [the] crimes apart from the norm of capital felonies." State v. Dixon, 283 So. 2d 1, 9 (1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943 (1974). In Parker v. State, 458 So. 2d 750 (Fla. 1984), the defendant had caused the murder of three persons in furtherance of a drug-dealing network, and his death sentence was based on at least four aggravating factors. And in Gorham v. State, 454 So. 2d 556 (Fla. 1984), the defendant was an escaped convict who effected the killing by a multiple shooting during the course of an armed robbery.

-- White v. State, 403 So. 2d 331 (Fla. 1981) (occupants of house were bound and gagged, and then shot in the head; six of the eight victims died), cert. denied, 463 U.S. 1229 (1983).

-- Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) (defendant abused, tortured, and murdered his nine-year old daughter).

-- Hoy v. State, 353 So. 2d 826 (Fla. 1977) (defendant shot one victim in the face and head, raped the other victim and shot her twice in the head, and sexually assaulted the second victim again before her death), cert. denied, 439 U.S. 920 (1978).

-- Douglas v. State, 328 So. 2d 18 (Fla. 1976) (defendant forced sexual relations between victims, beat one victim in the head with a rifle butt and fired three shots into his head, and raped the female victim), cert. denied, 429 U.S. 871 (1976).

-- Gardner v. State, 313 So. 2d 675 (Fla. 1975) (victim's body bore 100 bruises, large patches of hair had been pulled from her head, large tears inside her vagina had been caused by a broom stick, and her peritoneal cavity had been broken into small pieces by a blunt object), vacated, 430 U.S. 349 (1977).

The cases in which this Court has affirmed the imposition of the death sentence notwithstanding a jury's recommendation of a life sentence thus involve murders "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 sub nom. Hunter v. Florida, 416 U.S. 943 (1974). The circumstances of the killing of Herman Hughley do not fit this pattern -- and this Court's application of its jury-override standard was therefore arbitrary and a deprivation of Mr. Eutzy's constitutional rights.

2. As Applied by the Court in this Case, the Tedder Standard Improperly Excludes the Circumstances of the Crime as a Legitimate Consideration Supporting the Jury's Recommendation of a Life Sentence.

In numerous decisions applying the Tedder jury-override standard, this Court has made clear that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So. 2d at 10 (emphasis added). Particularly in the context of a death sentence following a jury's recommendation of life, the emphasis is upon the entire factual mosaic of the defendant and the crime. This is a constitutional requirement: the sentencer in a capital case must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 106 S. Ct. 1669, 1670-71 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 110 (1982)) (second emphasis added).

In particular applications of the Tedder jury-override standard, this Court has clearly considered the factual circumstances and severity of the murder itself -- in addition to, or sometimes wholly apart from, the aggravating and mitigating evidence on the record -- in determining whether "virtually no reasonable person could differ" as to

the propriety of the death sentence. For instance, in Webb v. State, 433 So. 2d 496, 499 (Fla. 1983), the Court held that "[t]he facts of this case do not justify an over-ride" -- without even addressing or discussing the "balance" of mitigating versus aggravating factors. (See p. 59, supra.) Likewise, in Provence v. State, 337 So. 2d 783, 786-87 (Fla. 1976), the Court applied the Tedder standard by evaluating the severity of the crime before it -- rather than the balance of aggravating and mitigating factors -- in comparison to the severity of other crimes.

This is clearly contemplated under the Tedder standard. One critical determinant of whether "virtually any person could differ" as to the appropriate sentence is the nature and severity of the crime itself. For this reason, any process that purported to exclude the nature of the crime as a factor in the sentencer's deliberations would undoubtedly be unconstitutional. See Skipper, 106 S. Ct. at 1670-71.

In this case, however, the Court applied the Tedder standard in an unconstitutionally narrow fashion that focused only on a tabulation of aggravating and mitigating factors, with no consideration given to the underlying facts of the crime or whether "virtually no reasonable person could differ" as to the appropriate sentence on these facts. The Court improperly and unconstitutionally excluded consideration of the basic facts of the murder from its application of the Tedder standard -- even though those facts are a fundamental mitigating circumstance that could reasonably support a jury's recommendation of a life sentence. On this basis alone, this

Court's application of the Tedder standard, and the death sentence thereby affirmed, cannot stand.

E. This Court's Decision Deprived Mr. Eutzy of His Right to Adequate, Reasoned Proportionality Review of His Death Sentence.

An essential element of the Florida death penalty statute "designed to assure that the death penalty will not be imposed on a capriciously selected group," Proffitt v. Florida, 428 U.S. 242, 258 (1976), is this Court's review to ensure that the death sentence imposed in a particular case is consistent with other sentences imposed in similar circumstances. "This function is crucial to the law's constitutionality." Malloy v. State, 382 So. 2d 1190, 1195 (Fla. 1979).

In this case, however, the Court simply asserted "from a comparison of past first-degree murder cases . . . [that] the sentence is consistent with that imposed for similar homicides." 458 So. 2d at 760. This mere assertion did not adequately fulfill Mr. Eutzy's right to a meaningful review of his case in comparison to other, similar cases.

Contrary to the Court's assertion, the death penalty has not been imposed in cases involving circumstances similar to those presented here. This Court has consistently reversed death sentences, following a jury recommendation of life imprisonment, in cases such as this that do not involve aggravated battery, torture, sexual assault, or any other conduct considered "especially heinous, atrocious, or cruel." (See pp. 60-62, supra.) Moreover, this Court has time and again reversed death sentences imposed by a trial judge following a jury's recommendation of a life sentence in cases

involving far more extreme, aggravated facts than those presented here. (See pp. 58-60, supra.) The Court thus did not conduct a meaningful proportionality review of Mr. Eutzy's death sentence, depriving him of his rights under the Eighth and Fourteenth Amendments.

III. THE EXECUTION OF MR. EUTZY'S DEATH SENTENCE WOULD DEPRIVE HIM OF LIFE WITHOUT DUE PROCESS OF LAW BECAUSE THE TRIAL COURT RELIED AT SENTENCING UPON AN AGGRAVATING FACTOR THAT WAS NOT SUPPORTED BY THE EVIDENCE.

This Court held on direct appeal that there was no evidence that the murder of Herman Hughley had occurred during the course of a robbery and thus invalidated one of three aggravating factors on which the trial court had relied in imposing a sentence of death. 458 So. 2d at 758. Nonetheless, the Court upheld Mr. Eutzy's death sentence, reasoning that there were "two validly applied aggravating factors and no valid mitigating circumstances." Id. at 760. That decision deprives Mr. Eutzy of his due process rights by sustaining a death sentence imposed by the trial court in reliance on an aggravating factor not supported by the evidence.27/

A defendant's due process rights are violated if a trial judge at sentencing relies on assumptions or considerations that are contrary to fact. "Misinformation or

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27/ The Circuit Court did not address the merits of this claim, which it believed was not properly cognizable on a Rule 3.850 motion. For the reasons discussed earlier (pp. 39-40, supra), the Circuit Court was in error. This claim, which flows from the decision of this Court on direct appeal, could not have been raised on direct appeal and is therefore properly presented in the Rule 3.850 motion.

misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970) (emphasis added). "Reliance upon incorrect assumptions from the evidence when passing sentence violates due process and clearly constitutes plain error." United States v. Tobias, 662 F.2d 381, 388 (5th Cir. 1981), cert. denied, 457 U.S. 1108 (1982).[28/]

This unequivocal line of authority traces back to Townsend v. Burke, 334 U.S. 736 (1948), a case in which the trial judge at sentencing had relied, in part, on erroneous evidence concerning the defendant's prior criminal record. The Supreme Court reversed the sentence: "[T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a [sentence] cannot stand." Id. at 741.

It is therefore clear that a misapprehension as to any material fact -- even if it is not the only fact relied on at sentencing -- requires a new sentencing. E.g., United States v. Stein, 544 F.2d 96, 102 (2d Cir. 1976). This is apparent from the facts of Townsend v. Burke, where the

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28/ Accord, e.g., United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982); United States v. Espinoza, 481 F.2d 553, 555 (5th Cir. 1973); United States v. Weston, 448 F.2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972).

Supreme Court reversed the sentence as a violation of due process even though the trial judge was in error concerning only three of the defendant's seven prior convictions. 334 U.S. at 739-40. Although certain of the convictions were properly relied on at sentencing, the Supreme Court was "not at liberty to assume that [factually unsupported] items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving." Id. at 740.29/

In this case, the trial court sentenced Mr. Eutzy to death in reliance on a material assumption that this Court subsequently held to be erroneous. Due process requires that that sentence be set aside.

29/ The rule of these cases is to be distinguished from the rule of Barclay v. Florida, 463 U.S. 939 (1983), and Zant v. Stephens, 462 U.S. 862 (1983). Those decisions establish that a death sentence can stand even though one of the aggravating factors relied upon is not a legally valid aggravating factor (not named in the statute in Barclay, unconstitutionally vague in Zant). In both cases, the Court indicated that the situation would be different if an aggravating factor relied on for a death sentence were not supported by record evidence. See 463 U.S. at 968 (Stevens, J., concurring) (distinguishing the situation where an aggravating factor "is supported by erroneous or misleading information"); 462 U.S. at 887 n.24 (emphasizing that a different case would be presented "if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information").

CONCLUSION

For the foregoing reasons, Mr. Eutzy respectfully submits that this Court should reduce his sentence to life imprisonment with no possibility of parole for twenty-five years.30/

Respectfully submitted,

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30/ Even if the Court orders a new sentencing, it would be improper under state law and federal constitutional requirements to impanel a new jury to hear evidence at sentencing. The jury's recommendation of a life sentence must remain intact in the event there is a new sentencing. Because the constitutional errors that infect Mr. Eutzy's sentencing "d[o] not affect the advisory jury's decision, . . . no purpose would be served by ordering that the defendant be resentenced by a jury." Magill v. Dugger, 824 F.2d 879, 894 n.17 (11th Cir. 1987). Moreover, the Double Jeopardy Clause would prohibit the impaneling of a new advisory jury at the sentencing phase of trial because the jury's recommendation of a life sentence for Mr. Eutzy is the effective equivalent of an acquittal. Cf. Arizona v. Rumsey, 467 U.S. 203, 211 (1984); Bullington v. Missouri, 451 U.S. 430, 446 (1981). "[T]he law attaches particular significance to an acquittal" and bars a second trial following an acquittal. United States v. Scott, 437 U.S. 82, 91 (1978).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief of Appellant William Eutzy, and the Appendix to that Brief, by causing a copy thereof to be delivered by overnight delivery to:

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December 19, 1987