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

REPLY BRIEF OF APPELLANT WILLIAM EUTZY

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The State casts about in a variety of directions trying to defend the adequacy of the performance of William Eutzy's trial counsel in the sentencing phase of his capital trial. It first admits, but then tries to deny, counsel's failure to conduct any investigation into the availability of mitigating evidence. (Compare Br. 10-12 with Br. 16.) It offers empty speculation that trial counsel had independent knowledge of something of which, by his own account, he had none (Br. 31), and an unhelpful lecture on the relative responsibilities of client and lawyer under the Model Code of Professional Responsibility (Br. 14-15). In the end, the failings in trial counsel's performance stand admitted and unexcused.

I. TRIAL COUNSEL DID NOT EFFECTIVELY REPRESENT MR. EUTZY AT SENTENCING, AND HIS FAILURE PREJUDICED MR. EUTZY.

Nothing in the State's brief alters the facts that trial counsel did nothing to prepare himself to present evidence in mitigation at the sentencing hearing and presented no such evidence. He did not advise Mr. Eutzy of what would be at stake in the sentencing hearing and what counsel needed to know to prepare for it. Those facts, which rendered trial counsel's performance constitutionally ineffective, stand unrefuted.

A. Trial Counsel Made No Effort to Find Mitigating Evidence.

William Eutzy's trial counsel did not contact a single person in preparation for the sentencing phase of trial. He did not contact any family members, employers, prison officials, or anyone else to learn what they could say on Mr. Eutzy's behalf. He made no attempt to obtain copies of Mr. Eutzy's school, prison, or medical records. The State admits those facts or does not deny them. (Br. 11-12, 25.) Furthermore, trial counsel failed to take any steps to develop psychiatric testimony that could be presented in mitigation at sentencing. (App. 404.) Though the State at one point asserts that trial counsel made some sort of "exploration" of what could be done to develop mitigating evidence (Br. 30), the fact is that by his own testimony trial counsel made no exploration or investigation of mitigating evidence -- not even a casual request for records.

B. Trial Counsel Had No Excuse for Not Looking for Mitigating Evidence.

Unable to counter the hard facts of trial counsel's inaction, the State argues that Mr. Eutzy failed to furnish

mitigating evidence to trial counsel and instructed him not to involve any family members in the case. These arguments fail both factually and as a matter of law.

1. Trial Counsel Did Not Ask Mr. Eutzy About His Background and Did Not Explain the Importance of Contacting Family Members.

The State argues that because Mr. Eutzy did not supply trial counsel with information about family members or former employers, he cannot be faulted for failing to contact such people. (Br. 11-12.) But trial counsel did not ask Mr. Eutzy any of the questions that would have led him to family members, employers, and custodians of pertinent records. (App. 401-06.) The affidavits of prospective witnesses and Mr. Eutzy's documentary records show the very helpful evidence that a reasonable investigation would have yielded. (Op. Br. 21-26.) Moreover, trial counsel had received a letter from Mr. Eutzy's mother expressing her interest in the case (App. 564), but he never asked her for any information that could have led to mitigating evidence (App. 447) -- even though he could have done so without involving her in the case (as the State claims Mr. Eutzy instructed him not to do).

The State's other defense of trial counsel's inaction at sentencing is that Mr. Eutzy supposedly instructed trial counsel not to contact his family. (Br. 14, 17.) As we discuss at page 7 below, Mr. Eutzy's alleged statement that he did not want his family involved was not an instruction -- even if he made the statement (and a fair reading of the record indicates he did not (see Op. Br. 16 n.7)). But even a flat instruction not to contact family members could

not have excused trial counsel's utter failure to develop a case in mitigation at sentencing, because trial counsel never explained to Mr. Eutzy the importance of developing mitigating evidence. Trial counsel therefore could not properly accept Mr. Eutzy's supposed statement as barring all inquiry into the information that family members could present at sentencing. A "failure [by counsel] to advise [the defendant] of the importance of . . . suggesting witnesses [who could testify in mitigation] evidences blatant ineffectiveness." Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983), vacated on other grounds, 468 U.S. 1206, reinstated, 739 F.2d 531 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).[1/]

This does not mean, as the State would have it (Br. 18), that a lawyer must "beg . . . or otherwise brow beat a client" into accepting a particular strategy. But the lawyer is required to explain to his client the consequences of particular strategies and the importance of developing vital evidence. "Uncounselled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice." Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). Counseling the client as to possibilities and consequences is the lawyer's affirmative duty. And in this case Mr. Eutzy was uninformed and uncounselled. Trial counsel described Mr. Eutzy as "very

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1/ The State tries to distinguish Douglas, arguing that the case involved a trial lawyer who was unfamiliar with capital sentencing procedures and made adverse remarks during sentencing. (Br. 18.) Those differences from this case have nothing to do with the proposition for which Douglas is cited and quoted here.

intelligent" and "not uncooperative" (App. 403, 411), but did nothing to elicit from him the information necessary to develop a case for sentencing. He did not even discuss with Mr. Eutzy the general subject of potential mitigating evidence (App. 407-08),[2/] much less ask him any specific questions or explain to him how he might be aided by the testimony of family members or others. The State greatly overstates the law, even for a fully informed and counselled client, when it contends (Br. 10) that the issue is whether the client was "totally cooperative with his attorney or did not restrict his attorney's efforts." (Emphasis added.) But cooperation is of no relevance if the client has not even been counseled by his lawyer. Compare, e.g., Foster v. Strickland, 707 F.2d 1339, 1343-44 & n.4 (11th Cir. 1983) (cited by State at Br. 14) (defendant made a fully informed decision), cert. denied, 466 U.S. 993 (1984).

This is thoroughly supported by the United States Supreme Court's leading opinion on ineffective assistance of counsel, Strickland v. Washington, 466 U.S. 668 (1984), from which the State quotes only snippets (Br. 14, 19). When the Court spoke in Strickland about the importance of a defendant's conduct in determining the reasonableness of his counsel's actions, it was referring to an informed defendant cooperating knowledgeably in trying to advance his own defense. "Counsel's actions are usually based, quite properly, on informed

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2/ At page 17 of our opening brief, the authority for this statement was mistakenly given as App. 411. The State correctly points out (Br. 18) that this citation was in error. The correct citation is set forth above (and at page 12 of our opening brief).

strategic choices made by the defendant and on information supplied by the defendant." Id. at 691 (emphasis added).

What the Court was talking about in Strickland is a far cry from this case. Mr. Eutzy did not make an informed strategic choice -- he was utterly uninformed and uncounselled. Moreover, even crediting trial counsel's testimony in full, Mr. Eutzy gave counsel absolutely no reason to think that the lines of investigation suggested by the affidavits in this proceeding "would be fruitless or even harmful." Strickland, 466 U.S. at 691. On no view of the record was there the kind of informed give-and-take between lawyer and client that is the subject of the Strickland opinion. There was, at most, "uncounselled jailhouse bravado" -- "I want this over with," counsel quoted Mr. Eutzy as saying during their first meeting (App. 374) -- that did not in the least diminish counsel's duty to explain the nature of the sentencing hearing or his duty to investigate. The record reveals a defendant who was intelligent and not at all unwilling to cooperate, but who was never counselled on the problems and potentials of the sentencing hearing or advised of the need to contact family members and others with knowledge of his background. And it reveals a lawyer with utter ignorance of his client's background because of his client's non-answers to questions he did not ask. This is not what the United States Supreme Court had in mind in Strickland.

2. In the Circumstances of this Case, Trial Counsel Had an Independent Duty to Look for Mitigating Evidence.

As recounted by trial counsel, Mr. Eutzy said that he did not want his family members involved. (App. 375, 401,

411.) The State would convert this alleged remark into an "instruction." (Br. 14, 17.) It is emphatically not true -- even fully crediting trial counsel's testimony -- that Mr. Eutzy "directly instructed" counsel not to contact his family (Br. 19). Mr. Eutzy at most expressed a preference that his family not be involved; trial counsel never suggested that he was forbidden to contact Mr. Eutzy's family.

But even if Mr. Eutzy had given an explicit instruction prohibiting trial counsel from contacting his family, this would not excuse trial counsel's doing nothing to investigate possible mitigating evidence. First, there was other important mitigating evidence that counsel was obliged to pursue. If anything, his responsibility to investigate this other mitigating evidence would have been even more acute had he truly believed that he was barred from contacting Mr. Eutzy's family. Yet he made no attempt to contact former employers, secure Mr. Eutzy's documentary records, or develop psychiatric evidence for presentation at sentencing.

Moreover, the decided cases flatly reject the notion that statements of the sort supposedly made by Mr. Eutzy -- or even stronger, more restrictive statements -- can justify a lawyer's complete failure to investigate facts that could be presented in mitigation at sentencing. Especially in a capital case, and even more especially where the client has not been fully apprised of the consequences, counsel cannot "blindly follow" even a client's express direction not to investigate his past for potential mitigating evidence. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986),

cert. denied, 107 S. Ct. 1986 (1987). See also, e.g., Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986).

C. Trial Counsel Made No Strategic Decision Not To Use Mitigating Evidence.

The State goes as far as it dares in trying to suggest that trial counsel made a strategic decision not to use the sort of mitigating evidence that appears in the record of this proceeding. (Br. 13, 15, 29-30.) He did not. He could not have. He did not know about the evidence at the time of trial. (App. 393-94, 401-06.) Perhaps trial counsel's failure to present mitigating evidence avoided references to Mr. Eutzy's prison record (but see pages 12-13, below); but that was not a strategic choice because counsel had no idea of the mitigating evidence he could have presented. Counsel did not weigh -- and could not have weighed -- the approach of "focusing on the particularized characteristics of the individual" at sentencing. Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir. 1987). He made no strategic choice to discard that approach because he knew nothing of the facts that would support it.

D. The Failure to Look for, Find, and Use the Mitigating Evidence that Was Available Prejudiced Mr. Eutzy.

Since, therefore, no argument can be made that trial counsel made a reasoned strategic decision not to present evidence in mitigation, the State's argument must be that counsel's failure to look for such evidence did not prejudice Mr. Eutzy.

1. One branch of that argument is quickly disposed of. The suggestion is made by the State that, since the jury returned a life recommendation, there is no basis to question

counsel's tactics at sentencing. (Br. 15-16.) This suggestion has no merit. In a number of cases, as here, the question whether to override the jury's recommendation and impose a sentence of death has been heavily dependent on the absence of mitigating evidence in the record. E.g., Thomas v. State, 456 So. 2d 454, 460 (Fla. 1984). Trial counsel was bound to recognize the substantial risk that, if he did not develop mitigating evidence, the trial judge would override the jury's recommendation as not supported on the record. Indeed, the trial judge had told counsel this was more than a possibility. In a pretrial hearing, the judge had said he believed at least one aggravating factor could be proven so that, if he accepted a guilty plea and there were no "countervailing mitigating circumstances, that's all it takes for the death penalty, and that's what you are faced with." (App. 636-37.) It is ineffective assistance of counsel to fail to counter the risk that the trial judge will override a jury's life recommendation because he finds no "countervailing mitigating circumstances." Porter v. Wainwright, 805 F.2d 930, 935-36 (11th Cir. 1986), cert. denied, 107 S. Ct. 3195 (1987).3/

3/ Contrary to the State's contention (Br. 16), it is immaterial that the court in Porter remanded the case for an evidentiary hearing. The court held unequivocally that inadequate performance by counsel at sentencing in an override case violates the Sixth Amendment even though the jury has recommended a life sentence. The decisions of this Court in Lewis v. State, 398 So. 2d 432 (Fla. 1981), and Douglas v. State, 373 So. 2d 895 (Fla. 1979), are not opposed to this holding. In those cases this Court rejected on the specific facts -- and not merely because of the jury's life recommendation -- challenges to counsel's representation at sentencing.

2. Alternatively, the State argues that, even had trial counsel taken reasonable steps to develop mitigating evidence, this would not have mattered because counsel would not have used any of that evidence. This is what trial counsel asserted after the fact. That testimony, however, is a mere post hoc rationalization that cannot be controlling. This Court, not self-interested trial counsel, must judge whether it can be determined conclusively that no mitigating evidence would have been presented even if trial counsel had secured Mr. Eutzy's background records and the witnesses whose affidavits are in the record. (See Op. Br. 21-26.)

The State argues (Br. 20-25) that counsel would not have used any of the available witnesses and other evidence, principally because they would have shown that Mr. Eutzy had spent a number of years in prison. There are, as we pointed out in our opening brief (pp. 30-34), two clear answers.

One is that trial counsel could have tailored the evidence he presented so as to eliminate or minimize the chance that supposedly prejudicial facts would come out. The State's only response is to label this suggestion "patently absurd" (Br. 33) because we proffered some of Mr. Eutzy's prison documents as evidence that trial counsel would have found if he had looked. That response deserves the characterization that the State has used. Obviously, if the decision had been made to exclude or minimize any reference to Mr. Eutzy's prison record, the prison documents would not have been offered in evidence.

The other answer, though, is that a presentation of Mr. Eutzy's full life history, including his prison experiences, would in fact have been highly mitigating, and thus very likely would have been the preferred course at sentencing. The jury knew (thanks to trial counsel's error) that Mr. Eutzy had been convicted of robbery in 1958. Further evidence of Mr. Eutzy's prison record would only have revealed positive facts -- that he had never since been convicted or imprisoned for a crime of violence, and that he had been a model prisoner. His only subsequent difficulties with the law had involved property offenses such as auto theft or the forging of a check. (App. 327-28.) His prison documents (Op. Br. 25-26) and the psychiatric testimony (Op. Br. 24-25) would have shown Mr. Eutzy's unquestioned ability to adapt peacefully and constructively to the prison environment, which is powerful mitigating evidence under Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986). This would have demonstrated that Mr. Eutzy is not violent or dangerous and would contribute positively to life within the prison community. Add the testimony of Mr. Eutzy's family members and newspaper colleagues, and psychiatric testimony of the sort illustrated by Dr. Zients' affidavit, and the jury, already plagued with lingering doubt as a result of Laura Eutzy's unlikely story (Op. Br. 43-50), would have been confirmed in its view that Mr. Eutzy's life should be spared -- and the trial court and this Court would not possibly have been able to cite the absence of mitigating

evidence as a reason for imposing and sustaining Mr. Eutzy's death sentence.[4]

II. IN TWO ADDITIONAL SPECIFIC RESPECTS, TRIAL COUNSEL'S PERFORMANCE AT SENTENCING WAS INADEQUATE.

Two separate, particular defaults of trial counsel also deprived Mr. Eutzy of his constitutional right to the effective assistance of counsel at sentencing.

A. Counsel Failed to Make a Substantial Miranda Objection to Damaging Testimony.

The State has no effective answer to our argument (Op. Br. 34-39) that Mr. Eutzy was deprived of his Sixth Amendment rights by the failure of trial counsel to object on the basis of Miranda v. Arizona, 384 U.S. 436 (1966), to the introduction into evidence of a statement made by Mr. Eutzy to Corrections Officer Shiver. It first says that Officer Shiver gave Mr. Eutzy the required Miranda warnings. (Br. 35.) That is wrong. A different officer, Officer Meisen of the Pensacola Police Department (App. 162), informed Mr. Eutzy of his Miranda rights, and Officer Meisen's warning had no relationship to the much later questioning by Officer Shiver that elicited the inculpatory statement.

4/ The inquiry into prejudice in a case such as this, where counsel's inaction has made it necessary for others to reconstruct what he should have done, is necessarily particular to each case -- dependent for its outcome on the nature of the evidence that would have been available and the other evidence already before the judge and jury (including the heinousness of the crime and the strength of the proof of it, and the nature of the aggravating circumstances that moved the jury or judge to sentence the defendant to death). For this reason it is immaterial that no prejudice was found on the facts of the two cases cited by the State (Br. 26-29), Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), cert. denied, 107 S. Ct. 1986 (1987), and Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985).

The relationship of the Meisen warning to the Shiver interrogation was never an issue in the Rule 3.850 proceeding, because the State never suggested that Officer Meisen's Miranda warning had anything to do with whether trial counsel should have raised a Miranda objection. Nonetheless, when it issued its order denying the Rule 3.850 motion, the Circuit Court sua sponte supplied the idea that the Meisen warning validated the Shiver interrogation. (App. 3.) Thereafter, Mr. Eutzy filed a motion for reconsideration accompanied by an affidavit establishing that Officer Meisen read him the Miranda warnings on the morning of his arrest and that Officer Shiver questioned him about his record that night even though he had twice invoked his right to remain silent. (App. 612-26.) Contrary to the State's assertion (Br. 35), present counsel did not know of these facts before the hearing and did not withhold them for tactical or any other reasons. They were not material until the Circuit Court's decision made them so.

The State also says that it does not matter that trial counsel failed to raise this Miranda objection because the State could have linked Mr. Eutzy to the 1958 robbery conviction by fingerprint evidence. (Br. 36.) That contention is refuted by the trial record, which shows that fingerprint evidence was not available to link Mr. Eutzy to the 1958 conviction. (App. 332. See also App. 382.) It was the very absence of physical evidence that made Officer Shiver's testimony so critical and made counsel's failure to raise a Miranda objection to that testimony so egregious.

B. Counsel Did Nothing to Mitigate the Effect of Damaging Evidence.

Trial counsel, having objected unsuccessfully (on other than Miranda grounds) to the admission of the 1958 robbery conviction, did nothing more about it. He thereby aggravated his failure to make the Miranda objection, for he was bound to attempt to mitigate the prejudicial effect of the conviction once it was in evidence. (Op. Br. 38-39.) The State says that any mitigating evidence would have been merely an "emotional appeal" and would not have affected the judge's sentencing determination. (Br. 37.) But it is no mere "emotional appeal" to bring home to a jury (and a court) that many things go under the name "robbery," and that this instance was a teenager's escapade in which no one was hurt. (App. 468, 589.)

III. MR. EUTZY'S SECOND AND THIRD MAJOR CLAIMS ARE PROPERLY BEFORE THE COURT.

Mr. Eutzy has advanced substantial claims based on this Court's application of the Florida death penalty statute to this case. (Op. Br. 39-68.) These claims are based on this Court's decision upholding Mr. Eutzy's conviction and death sentence on direct appeal, and so could not have been raised until this Court issued that decision. (Op. Br. 39-40.) Thus, the State is wrong in its contention that they should have been raised on direct appeal and cannot be considered in this Rule 3.850 proceeding.

The State's procedural argument is also mistaken for another reason. A substantial element of discretion enters into determining what claims will be entertained as part of a Rule 3.850 motion. This Court has often addressed

on their merits claims raised in a Rule 3.850 motion that could have been raised on direct appeal.[5/] It would be particularly appropriate for the Court to address the merits of the second and third major categories of Mr. Eutzy's claims because they raise very substantial issues concerning the constitutionality of the death sentence imposed on Mr. Eutzy. The State has not argued that they lack substantive merit.

CONCLUSION

Nothing said by the State in its brief counsels against granting appellant William Eutzy the relief requested in his opening brief.

Respectfully submitted,

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5/ E.g., Riley v. State, 433 So. 2d 976, 978-79 (Fla. 1983) (challenge to jury instructions); Hall v. State, 420 So. 2d 872, 874 (Fla. 1982) (allegation that evidence did not support conviction of premeditated murder).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Reply Brief of Appellant William Eutzy by mailing a copy thereof by first-class mail, postage prepaid, to:

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March 7, 1988