IN THE

SUPREME COURT OF FLORIDA

CASE NO. 72,462

CIRCUIT COURT CASE NO. 81-9310 CF

DANIEL LEE DOYLE,

Defendant/Appellant/Petitioner,

v.

STATE OF FLORIDA,

Plaintiff/Appellee/Respondent.

APPEAL AND PETITION FOR WRIT OF HABEAS CORPUS
FROM THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY

REPLY BRIEF/REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS OF DANIEL LEE DOYLE

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I. DOYLE'S CALDWELL V. MISSISSIPPI CLAIM IS VALID AND IS NOT PROCEDURALLY BARRED.

The State urges rejection of Doyle's Caldwell[1/] claim on three grounds: (1) it is procedurally barred under prior decisions of this Court; (2) even if not procedurally barred, Caldwell could never apply to Florida's capital sentencing process; and (3) even if not procedurally barred, and even if it Caldwell applied, the jurors were properly advised of their role. Doyle urges the Court to: (1) reconsider its position on procedural bar of Caldwell claims; (2) recognize the applicability of Caldwell to Florida's capital sentencing process; and (3) upon application of Caldwell, hold the jurors in this case were unlawfully mislead as to their role, and remand for resentencing. Alternatively, this Court should stay disposition of this case and stay Doyle's execution pending resolution of the Caldwell claim in Adams v. Wainwright[2/].

A. If Caldwell Applies, Doyle Must Be Resentenced.

This Court cannot blind itself to the record on the Caldwell claim, and the simple truth is if Caldwell applies, Doyle must be resentenced. The State, recognizing the risk in relying on procedural bar and a per se rule of non-

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1/ Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

2/ 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted sub nom. Adams v. Dugger, ___ U.S. ___, 108 S.Ct. 1106 (1988).

applicability, says the pervasive statements from the trial judge and prosecutor misleading the jurors as to their role were cured by two statements - one by Doyle's trial counsel saying the jury's recommendation was "very important", and one by the trial judge saying "a human life is at stake". The State says these statements - and these statements alone - neutralized the repeated statements by the judge and prosecutor when they told the jurors:

- there is nothing difficult about sitting in a criminal case, as if a capital case were an ordinary criminal case
- they might even be bored, the case was so ordinary
- their role was "only" a recommendation (not even an "important" one, because the trial judge, considering Doyle's "entire background" and "entire history", would make the final decision)
- they were "not responsible in any way" for the sentence

The State, creating (or as the State would say, "premiering") a new category of harmless error, calls this series of false and misleading statements mere "juror flippancy", wholly corrected by Doyle's counsel saying their job was "very important" and by the trial judge saying "a human life is at stake." Surely if Caldwell applies, resentencing must be ordered.

Indeed, while this Court has approved instructions informing the jury its role is "advisory" subject to a "final" or "ultimate" decision by the court, such instructions are

acceptable only "as long as the significance of its [the jury's] recommendation is adequately stressed." Pope v. State, 496 So.2d 798, 805 (Fla. 1986) (emphasis added). In Pope, "[i]n his final instructions to the jury, the trial judge stressed the significance of the jury's recommendation and the seriousness of the decision they were being asked to make." Pope, 496 So.2d at 805.

This crucial stressing of the jury's integral responsibility was absent in Doyle's case. The instructions in the guilt/innocence phase and sentencing phase are erroneous and represent precisely the diminution condemned in Caldwell, without ameliorative instructions present in Pope. See also, Teffeteller v. State, 439 So.2d 840, 845 n.2 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984), appeal after remand, 495 So.2d 744 (1986) ("Although a jury's sentencing recommendation is only advisory, it is an integral part of the death sentencing process and cannot properly be ignored.") It simply cannot be said that the improper instructions and comments made by the court before the jury in this case "had no effect on the sentencing decision" as demanded by Caldwell. Caldwell, 105 S.Ct at 2646.

B. This Court Should Reconsider Its Holdings Regarding The Applicability Of Caldwell To Florida And The Procedural Bar Of Such Claims, Or Alternatively Stay All Proceedings Pending Resolution Of Those Issues In The United States Supreme Court.

This Court should reconsider its holdings regarding the applicability of Caldwell and the procedural bar of such claims, and hold Caldwell does apply to Florida's sentencing process, and is not procedurally barred in cases such as this, where Caldwell was decided subsequent to resolution of Doyle's direct appeal. See, e.g., Combs v. State, 13 F.L.W. 142, 145 (February 18, 1988) (Barkett, J., concurring specially) (see authorities cited). Alternatively, this Court should stay Doyle's execution and all proceedings before this Court pending resolution of such issues by the United States Supreme Court in Adams, supra. While it is true this Court has refused to apply Caldwell to Florida's sentencing procedures, it has indicated a stay of execution pending issuance of the United States Supreme Court's decision in Adams may be warranted when the Caldwell issue is raised for the first time, as it is here. Darden v. State, 13. F.L.W. 196, 197 (March 18, 1988).[3/] In the circumstances, and especially in light of the weakness of the State's position on the merits on the Caldwell claim, the stay should be entered.

3/ The State makes no response to this point in its papers filed with this Court, perhaps because if asked, it would have to concede a stay to be appropriate in this case, where the Caldwell issue was not previously raised, and Doyle has not had a death warrant previously issued.

II. DOYLE'S TRIAL COUNSEL'S FAILURE TO CONSIDER OR OFFER COMPETENT PSYCHOLOGICAL EVIDENCE DURING THE SENTENCING PHASE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL AND VIOLATED DOYLE'S RIGHT TO DUE PROCESS.

Apparently unable to rebut the issue directly, the State chose to mischaracterize Doyle's right to relief resulting from the ineffective assistance of his trial counsel in providing him with competent psychological assistance and testimony. Thus, the State spends page after page showing how Doyle's trial counsel obtained competent assistance to address issues such as Doyle's sanity at the time of the homicide and his competence to stand trial and assist in his defense. Doyle concedes he had the assistance of competent psychological professionals for those stages. The problem, ignored by the State, is Doyle's trial counsel wholly failed to direct the attention of those professionals to the sentencing phase.[4/]

Contrary to the State's mischaracterization, Doyle's claim is: (1) the two psychologists appointed before trial to

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[4/] As might be expected, at the hearing on Doyle's Rule 3.850 motion, his trial counsel declined to admit his mistake, instead asserting he did consult with the psychologists regarding sentencing. His naked denial is contradicted, or at least unsupported, by every other portion of the record on point, from Dr. Bauer's report regarding statutory mitigating circumstances which were available but unused and unconsidered, to Dr. Krieger's affidavit, which lay unchallenged in the circuit court file for nine months. Lastly, Doyle's trial counsel never asked any questions of the psychologists at the sentencing hearing about the two statutory mitigating circumstances that were obviously applicable.

evaluate his sanity at the time of the offense and his competence to stand trial failed to conduct competent and appropriate evaluations for the sentencing phase of the trial; and (2) they failed to do so because Doyle's inexperienced trial counsel, in his first capital case with its unique sentencing phase, failed to ask for such assistance. The psychologists who examined Doyle did so only for the purposes of sanity and competency and not for issues of mitigation relevant at sentencing. If Doyle's jury had been provided information from competent evaluations relating to sentencing and mitigation, Doyle's life may well have been spared. Even without such testimony, the jury's vote was 8-4 for death.

The State, stressing testimony at a pretrial hearing and the quilt/innocence phase of the trial, asserts Doyle "freely availed himself" of his constitutional right of access to mental health professionals. Undeniably Doyle had psychologists available to testify in his behalf at all stages of the trial. The issue, however, is whether the psychologists testimony at the sentencing phase was so deficient because of Doyle's counsel's failure to properly focus the psychologists, that Doyle's rights to due process and equal protection as well as to effective assistance of counsel were denied.

In State v. Sireci, 502 So.2d 1221 (Fla. 1987) this Court ruled that pretrial psychiatric evaluations may be incompetent for purposes of sentencing, without bearing on the prior determination of guilt. Id. at 1224. In Sireci,

this Court also held that a claim of incompetent psychiatric evaluations is cognizable under a second motion for post-conviction relief. Due process and equal protection claims, as well as ineffective assistance of counsel claims, are cognizable in post-conviction proceedings. Sireci, 502 So.2d 1221 (Fla. 1987); Smith v. State, 400 So.2d 956 (Fla. 1981).

In urging the Court to reject Doyle's claim for resentencing on this ground, the State inadvertently confirms Doyle's argument, by correctly and repeatedly pointing out that the psychologists who examined Doyle addressed any number of issues except the ones addressed by Dr. Bauer after Doyle's trial counsel was replaced. The State does not point out that the psychologists concluded anything about the statutory mitigating circumstances, yet the heart of Doyle's claim is that the psychologists failed to address the two critical statutory mitigating circumstances. Dr. Bauer found: (a) the capital felony was committed while the defendant was under the influence of extreme mental and emotional disturbance; and (b) the capacity of Doyle to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. See Section 921.141(6)(b) & (f), Florida Statutes. These issues of mitigation were examined for the first time by Dr. Bauer after the direct appeal.

The State points out that Doyle's "purported stupidity and impulsiveness" was considered and rejected by the trial court in sentencing, which was affirmed by this Court. See

Answer Brief at 17. Such may be the case, but the issue of whether Doyle's psychological evaluations were incompetent and the effect of that on the jury's recommendation and thereafter on the sentence by the court has never been raised before.[5/] This issue involves whether the jury heard competent psychological testimony on which to recommend the death penalty, not whether the trial court had appropriate, albeit insufficient, evidence on which to base the sentence.

There is no doubt that some evidence was given at the sentencing phase regarding Doyle's retardation, organic brain damage and emotional disturbance. However, as all three psychologists testified, including the psychologist for the State, they evaluated Doyle only for competency and sanity. Their reports do not mention mitigation. Dr. Kreiger's affidavit, which the State so desperately wants to exclude from the record,[6/] makes it clear he did not examine Doyle for mitigating circumstances. For the first time, Doyle has had a complete evaluation by a neuropsychologist to determine if he met two critical mitigating circumstances. As in Sireci,

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[5/] Thus, had these mitigating factors been considered, and just two of the jurors changed their minds, the trial judge's sentence might have been substantially affected.

[6/] The State objected to this affidavit at the hearing on May 16, 1988. However, the court never struck it from the record. Appellate Record at 110. Ironically, the State is seeking to supplement the record with a report from a psychiatrist it likes. Having left Dr. Krieger's affidavit unchallenged in the circuit court for nine months, and unsuccessfully sought its exclusion at the last moment, the State cannot at this late date prevent its consideration.

none of this evidence was available until after the direct appeal.

The State goes to great lengths to establish the confusing testimony regarding Doyle's retardation during all stages of the trial. The State even points out testimony that Doyle was not mentally ill in concluding that this argument must fail. Doyle has never asserted he is mentally ill, an issue directly related to the questions of competency and sanity.[7/] The State's confusion only reflects the fact that the testimony presented at the sentencing phase was not directed towards the statutory mitigating circumstances, but instead reflects only what the psychologist were appointed for-consideration on a pretrial basis of competency and sanity. Doyle has a right to have competent and appropriate medical evaluations for mitigation presented to the jury in their determination of whether to impose the death penalty.

The State claims Doyle's trial counsel was not ineffective for failing to instruct Doyle's psychologists about available statutory mitigating circumstances and for failing to directly ask them about these statutory mitigating circumstances, because trial counsel testified that he "presented as pathetic a picture of appellant's mental state

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[7/] The State also incorrectly states that Dr. Bauer concluded Doyle is not brain damaged. See Answer Brief at 18. Dr. Bauer's actual testimony was that he could not identify a particular type or location of the organic damage with the tests a psychologist administers. Hearing Tr. 25-26. Dr. Bauer did conclude Doyle suffered from brain damage. Bauer Evaluation at 9.

as respect for the truth would allow" in his one-minute presentation to the jury. See Answer Brief at 19. Doyle's trial counsel never testified to this. See Hearing Transcript. His testimony was contradictory and evasive regarding whether or not he asked the psychologists to examine Doyle for mitigating circumstances. He testified that he directed both psychologists to examine Doyle for mitigating circumstances, yet he admits that neither of their reports mentions anything about mitigation and that both reports which were prepared before trial and never amended, updated, or supplemented, list reasons other than mitigation for the examinations. Hearing Tr. 65-70, His testimony at one point is that he gave each of the two psychologists Doyle's school and medical records before the examination. Hearing Tr. at 40-42. He then testifies that he may have given these reports to the psychologists after their examinations. One psychologist testified he did not see these records until right before his testimony at a suppression hearing. R. at 224. Trial counsel admits he did not dwell upon the penalty phase "to any great extent", Hearing Tr. 48, and admits he is not even sure he discussed certain statutory circumstances with the psychologists. Hearing Tr. at 56-57. Dr. Kreiger was sure- there was no such discussion. This representation can only be called ineffective for purposes of the sentencing phase and the case should be remanded for resentencing. See Francis v. State, 13 F.L.W. 369 (June 10, 1988).

III. DOYLE'S RIGHT TO COUNSEL WAS VIOLATED DURING THE FIRST, PREARREST INTERROGATION.

Essentially ignoring the decisions cited by Doyle, the State urges rejection of Doyle's claim under Miranda v. Arizona[8/] and Smith v. Illinois[9/] essentially on the ground this Court's ruling on this issue on direct appeal is the law of the case. A court, however, cannot incorrectly apply constitutional standards set in prior Supreme Court cases, and then have the State argue all are bound by the "law of the case." In Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987) the Supreme Court ruled a trial court's refusal to hear nonstatutory mitigating evidence did not comport with prior Supreme Court rulings, and set aside the judgment of death. Id. at 1824 (citing Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Hitchcock had presented this claim on direct appeal and in post conviction proceedings, both times being rejected by this Court. See Hitchcock v. State, 432 So.2d 42 (Fla. 1983); Hitchcock v. State, 413 So.2d 741 (Fla. 1982). Significantly, the Supreme Court did not rule that Hitchcock's claim was barred because, although the incorrect constitutional standards were applied, the law of the case had been established on his

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8/ 384 U.S. 436, 86 S.Ct. 1062, 16 L.Ed.2d 694 (1966)

9/ 469 U.S. 91, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)

direct appeal.[10] The Supreme Court's decision in Hitchcock was not a change or refinement in constitutional law, but a direct application of a prior holding. Smith v.Illinois also does not represent a change or refinement in constitutional law, but is a application of the constitutional dictates of Miranda that all interrogation of a defendant must cease if he "indicates in any manner" his wish to consult with an attorney before speaking.[11] This Court, under Miranda, incorrectly determined Doyle did not invoke his right to counsel by looking at his subsequent remarks, which is prohibited by the Sixth Amendment under Miranda.

The three detailed confessions given by Doyle formed the backbone of the State's case. The State now contends that admission of these confessions would be harmless error based on a voluntary "confession" by Doyle to another officer and to his girlfriend, Karen Wentnick. A police officer testified that on September 6, 1981, while he was transporting Doyle to another prison facility, Doyle told him he "was happy that he confessed to the murder". R. 1068. After a defendant has invoked his right to counsel under the Sixth Amendment he is

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[10] Generally all points of law become the law of the case but a court can correct erroneous rulings in exceptional circumstances where reliance on a previous decision would result in manifest injustice. Preston v. State, 444 So.2d 939 (Fla. 1984). To execute an individual by insisting the law of the case has been established although by applying an incorrect constitutional standard is the epitome of manifest injustice.

[11] Alternatively, Smith represents a change in constitutional law cognizable in post-conviction relief.

not subject to further interrogation unless he initiates further discussions with the police and knowingly and intelligently waives his previous request for counsel. Smith, 105 S.Ct. at 493. The State has not carried its "heavy burden of establishing an intentional relinquishment or abandonment of a known right or privilege" required by the constitution. Martin v. Wainright, 770 F.2d 918 (11th Cir. 1985). The State has failed to present any evidence that Doyle intelligently waived or abandoned his previous invocation of his right to counsel. Regarding Karen Wentnick's testimony, she also testified that Doyle was heavily drugged. Her testimony did not detail the crimes as did the three confessions actually relied upon by the State (although the details varied from confession to confession). It cannot be said that the error of admitting the three confessions was so unimportant and insignificant because of Wentnick's testimony that it was harmless error, as required by Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).

IV. DOYLE'S SIXTH AMENDMENT RIGHT TO AN ATTORNEY ATTACHED AFTER HIS FIRST CONFESSION.

By the time Doyle first confessed to the murder of Pamela Kipp on September 6, his right to counsel had already attached. The Supreme Court has ruled that the Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant." U.S. v. Gouveia, 467 U.S. 180, 104 S.Ct. 2292, 2297, 81 L.Ed.2d

146 (1984).[12/] The initiation of formal charges may be by formal charge, preliminary hearing, indictment, information or arraignment. Id. at 2297. When the government has committed itself to prosecute and the adverse positions of government and defendant have solidified, the Sixth Amendment right to counsel attaches. Gouveia, 104 S.Ct at 2298; Moran v. Burbine, __ U. S. ___, 106 S.Ct. 1135, 1147 (1986).

After Doyle's first confession and after his first appearance that occurred 24 hours after arrest, the adverse positions of the government and Doyle were established. At this point the State had decided to prosecute Doyle, and he had a right to counsel. Yet police interrogators returned to Doyle's cell on September 8 & 11 to elicit more inculpatory evidence. There can be no doubt that after Doyle's initial confession, he was the primary and only suspect. The second and third interrogations were "accusatory in nature and solely intended to produce an audible taped confession that would ensure [Doyle's] conviction at trial." DiAngelo v. Wainwright, 781 F.2d 1516, 1519-20 (11th Cir. 1986), cert. denied, 107 S.Ct. 444, 73 L.Ed.2d 397 (1986). Because of this, Doyle's interrogations on September 8 & 11, 1981, violated his Sixth Amendment right. Id.

12/ After attachment of the Sixth Amendment right to an attorney, the defendant must make an intentional relinquishment or abandonment of his privilege of counsel; merely informing the defendant of his right to counsel is not sufficient, even if he understands these rights. Brewer v. Williams, 430 U.S. 385, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977).

The State argues this claim is procedurally barred for failure to raise it on direct appeal. A defendant's Sixth Amendment right to an attorney is a fundamental matter that can be raised in post conviction proceedings. See generally, Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984) (suppression of evidence is fundamental matter cognizable in post-conviction proceeding). The admission of these two recorded confessions cannot be harmless error. The first confession was not recorded and is not admissible because of the refusal of police interrogators to honor Doyle's request for counsel. See discussion above. The statement by Doyle to officer transporting him to another location is also inadmissible, because he never knowingly and intelligently waived his right to counsel. Brewer v. Williams, 430 U.S. 385, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); See discussion above. The admission of these confession cannot be considered so unimportant and insignificant as to constitute harmless error under Chapman v. California 386 U.S. 18, 87 S.Ct. 824 (1967). Furthermore, Doyle's trial counsel was ineffective for failing to raise this issue at the trial level and his appellate counsel was ineffective for failing to raise it on direct appeal, issues the State does not contest.

V. EXECUTING THE RETARDED IS CRUEL AND UNUSUAL PUNISHMENT.

The State claims this issue is procedurally barred for failure to raise it on direct appeal. Fundamental matters,

however, may be raised in post-conviction proceedings. Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The State also argues that because Doyle was found to be competent to stand trial and sane at the time of the offense, he should be executed. This simply refutes what most Floridians believe, which is that the mentally retarded should not be retarded. In evaluating whether a punishment is cruel and unusual, it is necessary to look at contemporary values. As discussed in the Initial Brief, these values reveal that the mentally retarded should not be executed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by hand this 20th day of June, 1988 upon:

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