IN THE

SUPREME COURT OF FLORIDA

No. 73,894

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

WILLIAM H. ALLEN
ARVID E. ROACH II
JAMES R. MURRAY
TIMOTHY C. HESTER
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for William Eutzy

March 23, 1989

TABLE OF CONTENTS

CASES

STATUTES

IN THE

SUPREME COURT OF FLORIDA

No. _____

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

William Eutzy is scheduled to be executed by the State of Florida on April 5, 1989. This appeal is taken from an order issued by the Escambia County Circuit Court on March 17, 1989, denying a motion to vacate conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850.

STATEMENT OF THE CASE

Death Warrant

On December 8, 1988, this Court affirmed an order of the Escambia County Circuit Court that denied a Rule 3.850 motion to set aside conviction and sentence that had been filed by Mr. Eutzy, through counsel, in December 1986. Mr. Eutzy filed a timely motion for reconsideration. While that

reconsideration motion was pending, the Governor of Florida signed a death warrant on January 31, 1989, providing for Mr. Eutzy's execution during the week of April 4-11, 1989. Pursuant to that warrant, the Florida State Prison has scheduled April 5, 1989, as the date for Mr. Eutzy's execution. Mr. Eutzy has moved this Court to stay that execution pending consideration of this appeal. Mr. Eutzy has also moved the Court for a stay of execution pending its consideration of an original petition for writ of habeas corpus filed by Mr. Eutzy on March 2, 1989.

Prior Proceedings

Mr. Eutzy was sentenced to death by the Circuit Court of Escambia County, per Judge William S. Rowley, on July 8, 1983, following the jury's recommendation that he receive a life sentence. The sentence was imposed after judgment was entered on July 7, 1983, on a jury verdict of guilty on a charge of first-degree premeditated murder.

This Court affirmed Mr. Eutzy's conviction and sentence on direct appeal on September 20, 1984. 458 So. 2d 755. The United States Supreme Court denied Mr. Eutzy's petition for writ of certiorari on April 15, 1985. 471 U.S. 1045.

Mr. Eutzy filed a pro se motion to vacate conviction and sentence, pursuant to Fla. R. Crim. P. 3.850, on September 13, 1985, which was denied by the Circuit Court on April 9, 1986. Mr. Eutzy, still acting pro se, noticed an appeal from the denial of the motion to vacate conviction and sentence on April 17, 1986.

In July 1986, Mr. Eutzy secured the undersigned counsel to represent him in seeking relief from his conviction and sentence of death. Through his newly-retained counsel, on July 25, 1986, Mr. Eutzy moved this Court to relinquish jurisdiction over the pending appeal to permit additional claims to be raised. That motion was granted on October 17, 1986.

On August 26, 1986, Mr. Eutzy filed, through counsel, an original petition for habeas corpus that challenged the constitutional adequacy of the representation he had received on direct appeal. This Court denied that petition on December 4, 1986.

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. The Circuit Court held an evidentiary hearing on that motion on May 22, 1987, and issued an order on September 18, 1987 denying the motion.

Mr. Eutzy noticed a timely appeal to this Court from the order denying the Rule 3.850 motion. This Court heard oral argument on April 26, 1988, and affirmed the Circuit Court on December 8, 1988. 536 So. 2d 1014. The Court denied Mr. Eutzy's motion for reconsideration on February 6, 1989.

Other Pending Proceedings

In addition to this appeal, Mr. Eutzy presently has pending before the Court an original petition for writ of habeas corpus based on a change in this Court's law governing the "cold, calculated, and premeditated" aggravating factor.

Mr. Eutzy has moved the Court for a stay of execution pending consideration of the petition for writ of habeas corpus.

On March 23, 1989, Mr. Eutzy filed a first petition for writ of habeas corpus with the United States District Court for the Northern District of Florida. The filing of that petition, before a final disposition of Mr. Eutzy's pending claims in state court, is necessitated by the imminency of Mr. Eutzy's execution date. The petition includes claims that have been fully exhausted in the Florida courts, as well as the claims involved in this appeal and in the petition for writ of habeas corpus that is pending in this Court. A stay of execution has been sought pending consideration of the petition for writ of federal habeas corpus. Mr. Eutzy has advised the United States District Court of the matters before this Court.

The Instant Proceeding

On March 2, 1989, Mr. Eutzy filed with the Escambia County Circuit Court a second Rule 3.850 motion, which raised new claims based on developments of law and fact that had intervened since the filing of his first Rule 3.850 motion. motion. The State responded to the Rule 3.850 motion solely on the basis that the claims should be deemed procedurally barred. Mr. Eutzy did not have an opportunity to submit a reply memorandum in support of the Rule 3.850 motion before the Circuit Court issued its order of March 17, 1989 (Exhibit A hereto) denying the motion in its entirety, and also denying

the application for stay. Mr. Eutzy noticed a timely appeal on March 21, 1989.

SUMMARY OF ARGUMENT

Defendant William Eutzy was convicted of first-degree murder, and sentenced to death, in violation of fundamental constitutional guarantees. Recent developments in the case law have established five separate bases on which Mr. Eutzy is entitled to relief from his death sentence and underling conviction. First, the involvement of the victim's family in the decision whether Mr. Eutzy could plead guilty to second-degree murder, and thereby avoid the death sentence, violated the constitutional standards recently announced in Booth v. Maryland, 107 S. Ct. 2529 (1987). Second, Mr. Eutzy was deprived of his right to an effective psychiatric evaluation of his competency to stand trial and his criminal responsibility, in violation of the constitutional protections set forth by this Court in State v. Sireci, 502 So. 2d 1221 (Fla. 1987). Third, Florida law unlawfully imposes a presumption in favor of the death sentence if aggravating factors outweigh the mitigating circumstances at sentencing, contrary to the constitutional principles recently declared in Adamson v. Ricketts, 856 F.2d 1011 (9th Cir.) 1988, (en banc). Fourth, Mr. Eutzy was sentenced to death in heavy reliance on a prior robbery conviction that was unconstitutional, and under the recent decision of the United States Supreme Court in Johnson v. Mississippi, 108 S. Ct. 1981 (1988), the sentence accordingly cannot stand. Finally, Mr. Eutzy was denied his

constitutionally guaranteed right to have a jury determination as to the essential elements of the offense of capital murder, again in violation of constitutional principles recently made clear in Adamson v. Ricketts, supra.

The Circuit Court, in denying the Rule 3.850 motion, rejected these claims out of hand, concluding they were procedurally barred. That determination was fundamentally in error. It disregarded the significant legal developments that have occurred since Mr. Eutzy filed his first Rule 3.850 motion, which excuse his failure not to have included these claims in that earlier motion to vacate conviction and sentence.

In this brief, we first set out Mr. Eutzy's claims and show that they are clearly valid on the merits (pp. 6-20). Then, we show that they are not procedurally barred (pp. 20-27).

ARGUMENT

I. THE INVOLVEMENT OF THE VICTIM'S FAMILY IN PRETRIAL PLEA NEGOTIATIONS DENIED MR. EUTZY HIS CONSTITUTIONALLY-GUARANTEED RIGHT TO BE FREE FROM THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH SENTENCE

During an evidentiary hearing held on May 22, 1987, before the Escambia County Circuit Court with respect to the claims advanced in Mr. Eutzy's Rule 3.850 motion of December 1986, E. Brian Lang, Esq., Mr. Eutzy's trial counsel, described a series of steps he had followed before trial in an effort to settle the charges against Mr. Eutzy. In particular, Mr. Lang testified that he and the prosecutor had reached an understanding, before trial, that Mr. Eutzy would plead guilty to second degree murder. That plea would have carried with it a

maximum sentence of life -- and therefore would have precluded the imposition of the death sentence. (H.T. 30-31.)[1/]

Mr. Lang further testified that, when the plea was offered, the trial judge "inquired of the State as to whether the victim's family, Mr. Hug[h]ley's family, had been contacted and given their approval, and we later determined that they did object to a plea of second." (H.T. 30.) As a result, "with the objection of the family, either the State withdrew the plea offer or the Court refused to take it." (H.T. 31.) The victim's family was thereby permitted to exercise an effective veto power over the proffered plea to second-degree murder, since, as Mr. Lang testified, the plea arrangement was aborted because the victim's family would not give its consent.

In Booth v. Maryland, 107 S. Ct. 2529 (1987), the United States Supreme Court held that it is unconstitutional for the jury in a death penalty case to consider evidence at sentencing relating to the impact of the murder on the victim's family. Such evidence "may be wholly unrelated to the blameworthiness" of the defendant and thus "irrelevant" to the sentencing determination. Id. at 2534. For these reasons, reliance on such evidence "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary

---

1/ References to the transcript of the May 22, 1987, evidentiary hearing are designated as "H.T." A copy of the hearing transcript was submitted as an attachment to Mr. Eutzy's Rule 3.850 motion and thus is included in the record on appeal.

manner," in violation of Eighth and Fourteenth Amendment standards. Id.

The power exercised in this case by the victim's family at the plea-bargaining stage implicates the same constitutional concerns that underlie the decision in Booth. Here the views of the victim's family were given controlling weight on the question whether Mr. Eutzy could plead to second degree murder. Since second degree murder cannot be punished by death, the victim's family exercised control over whether Mr. Eutzy could be subject to the death penalty. By opposing the plea, the victim's family barred Mr. Eutzy from avoiding a sentence of death.

Even though this input from the victim's family arose at the pretrial stage -- rather than at sentencing, as in Booth -- it injects the same arbitrariness into the system that the United States Supreme Court condemned in Booth. To make a defendant's eligibility for the death sentence turn on the consent, or opposition, of the victim's family is to rely on a factor "wholly unrelated" to the purposes of sentencing. Booth, 107 S. Ct. at 2534. Giving controlling weight to the views of the victim's family in this fashion violates the constitutional requirement that the "decision to impose the death sentence must be, and appear to be, based on reason rather than caprice or emotion." Booth, 107 S. Ct. at 2536 (quoting Gardner v. Florida, 430 U.S. 349, 358 (1977) (Stevens, J.)). Mr. Eutzy's death sentence therefore was imposed in

violation of the Eighth and Fourteenth Amendments and cannot stand.

II. MR. EUTZY WAS DENIED HIS CONSTITUTIONALLY-GUARANTEED RIGHT TO A COMPETENT PSYCHIATRIC EVALUATION OF HIS SANITY

In State v. Sireci, 502 So. 2d 1221 (Fla. 1987), this Court held for the first time that a claim may properly be raised on state collateral review that a capital defendant was denied his constitutionally-guaranteed rights to due process and equal protection by the failure of court-appointed psychiatrists to conduct a competent evaluation of his criminal responsibility and his capacity to stand trial. In particular, this Court held that a psychiatric examination may be "grossly insufficient" and would entitle a defendant to relief if it "ignore[s] clear indications of . . . organic brain damage." Id. at 1224. The Court thus permitted collateral challenges to psychiatric evaluations based on the decision of the United States Supreme Court in Ake v. Oklahoma, 470 U.S. 68 (1985), which made clear, as a matter of federal constitutional law, that a defendant in a capital case must be given a "competent" psychiatric evaluation when his sanity is put at issue.

In support of his Rule 3.850 motion, Mr. Eutzy submitted a psychiatric evaluation (Exhibit B hereto) that was prepared recently by James M. Merikangas, M.D., a psychiatrist who has determined that Mr. Eutzy exhibits symptoms of significant organic brain damage and may also suffer from hypoglycemia, and that competent psychiatric testing at the time of Mr. Eutzy's trial would have produced clear evidence of organic brain

damage and other serious physical and psychiatric problems. In particular, with respect to the events surrounding the murder of Herman Hughley, Dr. Merikangas concludes that Mr. Eutzy was suffering from "starvation, the effects of stimulants, and chronic substance and alcohol abuse." (Page 9.) He further concludes that Mr. Eutzy was suffering from a "neurological condition associated with altered states of consciousness and changes in cerebral blood flow." (Page 9.) All of this suggests that "it is most unlikely that [Mr. Eutzy] was able to think rationally, logically or normally at that time." (Pages 9-10.)

These factors, and others reflected in the report of Dr. Merikangas that bear centrally on questions of organic brain damage and other brain dysfunctions, should have been a central aspect of the competency evaluation conducted on Mr. Eutzy prior to trial. But the court-appointed psychiatrists who undertook that evaluation failed in any way to consider issues relating to organic brain disorders, chronic alcoholism, and other neurological issues. This violated Mr. Eutzy's constitutionally-guaranteed rights, as enunciated in Ake, to a competent psychiatric evaluation with respect to his defenses at trial. As this Court emphasized in Sireci, the failure to take account of such clear indications of "organic brain damage" demonstrates a "grossly insufficient" psychiatric examination. 502 So. 2d at 1224.

The deficiencies in the pretrial psychiatric evaluation require reversal of Mr. Eutzy's conviction. For without

competent psychiatric assistance, Mr. Eutzy was unable to formulate an effective insanity defense or a defense that would controvert the State's effort to prove premeditation beyond a reasonable doubt.

III. ON ITS FACE AND AS APPLIED, FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE IT IMPOSES AN UNLAWFUL PRESUMPTION THAT DEATH IS THE APPROPRIATE PENALTY

In Adamson v. Ricketts, 856 F.2d 1011 (9th Cir. 1988) (en banc), the United States Court of Appeals for the Ninth Circuit held Arizona's death penalty statute unconstitutional, as a matter of law, insofar as it provides that a court shall not impose a life sentence absent a determination that mitigating circumstances outweigh the aggravating factors on the record. This was found to impose a presumption that death is the appropriate penalty -- in that the defendant must introduce sufficient mitigating evidence to outweigh the aggravating factors adduced by the prosecution at sentencing. Id. at 1039-40. By presuming that death is the appropriate penalty where the defendant fails to establish that mitigating circumstances outweigh the aggravating, the statute "precludes the individualized sentencing required by the Constitution" and "removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard." Id. at 1042-43.

The reasoning of this aspect of the Adamson decision is directly applicable to Florida's death penalty statute and

the sentence imposed on Mr. Eutzy. On its face, Florida's statute provides that a jury at sentencing shall consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Fla. Stat. Ann. § 921.141(2)(b) (West 1985). Furthermore, the trial judge is permitted to impose a sentence of death if "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. § 921.141(3)(b). This requirement that the mitigating circumstances must outweigh the aggravating factors at sentencing suffers from the precise constitutional infirmity that the court identified in Adamson: it imposes a presumption that death is the appropriate penalty, and prevents the individualized inquiry at sentencing that the United States Supreme Court has made clear is a constitutional imperative. See Adamson, 865 F.2d at 1039-42. For the very same reasons developed in the Adamson decision, and in Jackson v. Dugger, this is an unconstitutional presumption in favor of death.

Furthermore, this Court has consistently applied Florida's death penalty statute in a way that explicitly relies on such a presumption in favor of death where there are no mitigating circumstances found on the record. The Court has stated time and again that "death is presumed to be the appropriate penalty" in cases "[w]here there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating factors." White v. State, 446 So. 2d 1031, 1037 (Fla. 1984) (emphasis added). Accord, e.g.,

Stone v. State, 378 So. 2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980). For the reasons set forth in the Adamson decision, such a presumption in favor of death cannot withstand constitutional scrutiny. Similarly, the United States Court of Appeals for the Eleventh Circuit has recently held that a presumption favoring the death sentence, "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir.), cert. denied, 108 S. Ct. 2005 (1988).

This Court should adopt the reasoning of the courts in Adamson, and Jackson v. Dugger, and on that basis vacate Mr. Eutzy's death sentence, since it is founded on a statutory scheme that unconstitutionally imposes a presumption -- in violation of the Eighth and Fourteenth Amendments -- that death is the appropriate penalty where the defendant fails to adduce sufficient mitigating evidence to outweigh the aggravating factors on the record.[2/]

IV. MR. EUTZY'S 1958 NEBRASKA CONVICTION WAS SECURED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS AND CANNOT SERVE AS A BASIS FOR HIS DEATH SENTENCE

The only substantive evidence introduced by the State at sentencing was a 1958 Nebraska judgment indicating

---

2/ However, for the reasons detailed in Mr. Eutzy's first Rule 3.850 motion, Mr. Eutzy submits that there was adequate mitigating evidence on this record to outweigh the aggravating circumstances.

that Mr. Eutzy had previously been convicted of robbery, on a plea of guilty. This formed the basis for one of the three aggravating factors found by the trial as a basis for overriding the jury's recommendation of a life sentence. And it supported one of only two aggravating factors on which this Court relied in upholding Mr. Eutzy's death sentence on direct appeal. 458 So. 2d at 760.

The 1958 conviction was secured in violation of Mr. Eutzy's constitutional rights. Mr. Eutzy's plea of guilty to the Nebraska robbery charges was not knowing and voluntary, and for that reason the conviction must be set aside as a matter of federal constitutional law. E.g., Kercheval v. United States, 274 U.S. 220 (1927). On March 15, 1989, Mr. Eutzy filed a complaint in the United States District Court for the District of Nebraska, pursuant to 42 U.S.C. § 1983, seeking a mandatory injunction that would direct the clerk of the Douglas County, Nebraska, District Court to expunge the record of the 1958 conviction from the court's records. On March 21, 1989, Mr. Eutzy moved for summary judgment on the complaint.[3/]

A recent development in the case law makes it clear that, if the 1958 Nebraska judgment is set aside, it cannot constitutionally be relied on as grounds for sentencing Mr.

3/ We will advise the Court of any developments that may occur with respect to the action pending in the United States District Court for the District of Nebraska.

Eutzy to death. In Johnson v. Mississippi, 108 S. Ct. 1981 (1988), the U.S. Supreme Court held that a death sentence cannot stand, as a matter of federal constitutional law, where it is based on a prior conviction that is subsequently set aside on constitutional grounds. Id. at 1986. Accordingly, under Johnson v. Mississippi, it would be necessary to eliminate any consideration of the 1958 Nebraska conviction as a basis for imposing a sentence of death. Mr. Eutzy submits that, under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975), his death sentence must be vacated in favor of life imprisonment (without possibility of parole for 25 years) if the 1958 judgment is overturned as the basis for a statutory aggravating factor.

V. MR. EUTZY'S DEATH SENTENCE MUST BE VACATED AS AN UNCONSTITUTIONAL DEPRIVATION OF HIS SIXTH AMENDMENT RIGHT TO A JURY TRIAL ON THE ELEMENTS OF CAPITAL MURDER

In late December 1988, the United States Court of Appeals for the Ninth Circuit, sitting en banc, held that Arizona's death penalty statute is unconstitutional as a deprivation of a defendant's Sixth Amendment rights to a jury determination on the elements of the crime of capital murder. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). Under Arizona law, the trial judge determines whether to impose a death sentence, based on his findings as to statutorily-defined aggravating circumstances and his evaluation of any mitigating evidence in the record. Since a death sentence cannot be imposed unless the trial judge finds at least one

aggravating circumstance, the court in Adamson held that these aggravating circumstances "are additional elements necessary for a finding that a defendant is guilty of the distinctive offense of capital murder." Id. at 1026. Because the United States Constitution requires a jury determination on the facts necessary to establish guilt or innocence of a given crime, and because capital murder under Arizona law is a distinct crime that can be established only through proof beyond a reasonable doubt of one or more aggravating circumstances, the court held that "Arizona's aggravating circumstances function as elements of the crime of capital murder requiring a jury's determination." Id. at 1027.

The holding in Adamson is directly applicable to Florida's death penalty statute, and to the death sentence imposed on Mr. Eutzy. In Florida, as in Arizona, a death sentence cannot be imposed unless one or more aggravating factors have been established beyond a reasonable doubt. E.g., Johnson v. State, 438 So. 2d 774, 779 (Fla. 1983), cert. denied, 455 U.S. 1051 (1984). As with the Arizona statute at issue in Adamson (865 F.2d at 1023), a jury verdict of guilt does not by itself qualify a Florida defendant for the imposition of the death sentence. Rather, there must be additional findings made at sentencing of one or more aggravating factors before the defendant can even be eligible for the death penalty. Aggravating factors thus serve as the functional equivalent of elements of the offense, for they define a distinctive offense subject to a distinctive punishment, the death penalty, which

may not otherwise be imposed for the crime of murder. See id. at 1023-29; cf. McMillan v. Pennsylvania, 477 U.S. 79, 87-88 (1986) (a separate element of the offense might be found if a particular factor "alters the maximum penalty for the crime committed [or] creates a separate offense calling for a separate penalty"); Mullaney v. Wilbur, 421 U.S. 684, 698 (1975) (states may not "redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment").

Given the dramatic differences in the "consequences resulting from a verdict of [capital] murder, as compared with a verdict" of first degree murder, id. at 698, these aggravating factors must be viewed as elements of the offense of capital murder. As such, and as the court held in Adamson, the must be proven beyond a reasonable doubt, and must be determined by a jury. 865 F.2d at 1028 (the Sixth Amendment guarantees the "right to have a jury determine whether the State has proven every element of the charged offense"). See also Mullaney v. Wilbur, 421 U.S. at 697-704; In re Winship, 397 U.S. 358, 364 (1970); Duncan v. Louisiana, 391 U.S. 145, 153-58 (1968).

As the court concluded in Adamson, a defendant's right, under the Sixth Amendment, to a jury determination on the aggravating circumstances that define the distinct offense of capital murder is not foreclosed by the decision of the United States Supreme Court in Spaziano v. Florida, 468 U.S. 447 (1984). See Adamson, 865 F.2d at 1028 (Spaziano "never reached the particular contention Adamson has raised: that

Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment"). Spaziano did not reach this issue, but addressed instead "the role of a jury in the ultimate determination of appropriate punishment." Id. at 1028 n.32. The holding and rationale of Adamson applies to the threshold question -- prior to the sentencing decision that was the focus of Spaziano -- of whether the judge may properly find a defendant guilty of the distinct offense of capital murder through factual findings as to aggravating factors. "Spaziano is not controlling in this case, as it left untouched the question of the right to a jury trial where the aggravating circumstances of a state's death penalty statute are elements of a capital offense." Id. at 1029.

On the authority of the Adamson decision, Mr. Eutzy was deprived of his constitutionally-guaranteed right to a jury determination on the aggravating factors necessary to establish the offense of capital murder. The jury recommended a life sentence, and therefore did not necessarily find that any aggravating factors had been proven beyond a reasonable doubt. In particular, the jury may well have rejected the prosecution's effort to show that the murder was committed in

a "cold, calculated, and premeditated" fashion.[4/] And the jury did reject the prosecution's argument that the murder was committed during the course of a robbery, as the trial judge acknowledged in his sentencing order (R. 339).

For these reasons, the trial judge -- not the jury -- found that Mr. Eutzy "ha[d] committed First Degree capital Murder." (R. 341.) Under the reasoning and holding of the court in Adamson, this was an unconstitutional deprivation of Mr. Eutzy's Sixth Amendment rights to a jury determination on the existence of these aggravating factors. This Court should adopt the analysis set forth in Adamson, and under that analysis, vacate Mr. Eutzy's death sentence in favor of a life sentence.[5/]

VI. THESE CLAIMS ARE NOT PROCEDURALLY BARRED

In summarily denying Mr. Eutzy's Rule 3.850 motion, the Circuit Court focused its attention solely on procedural grounds and did not reach or even allude to the merits of the claims. It concluded that Mr. Eutzy's five claims were an "abuse of the process" and therefore procedurally barred, since Mr. Eutzy had "failed to demonstrate that the claims

---

4/ This issue is addressed in detail in Mr. Eutzy's brief of December 21, 1987, to this Court, on appeal from the denial of his first Rule 3.850 motion (No. 69,004).

5/ Double jeopardy principles would bar the impanelling of a new advisory jury at sentencing. E.g., Arizona v. Rumsey, 467 U.S. 203, 211 (1984); Magill v. Dugger, 824 F.2d 879, 894 n.17 (11th Cir. 1987).

were not known or could not have been known to him at trial or at the time his initial motion for post-conviction relief was filed." (Exhibit A, p. 1.)

This holding, entered before Mr. Eutzy was even given an opportunity to reply to the State's contentions concerning procedural bar, was erroneous. The Circuit Court misapprehended the controlling standards that govern the question of when new or different claims may properly be raised in a second or successive Rule 3.850 motion.

A. Mr. Eutzy Was Not Given Adequate Opportunity to Respond to the State's Allegations of Procedural Bar

As noted earlier, Mr. Eutzy filed his second Rule 3.850 motion with the Escambia County Circuit Court -- asserting the claims discussed in the foregoing sections -- on March 2, 1989. Counsel for the State filed a response in opposition to the Rule 3.850 motion on March 13, 1989, which was served by mail. This response asserted at some length that the Circuit Court should dismiss Mr. Eutzy's claims as "successive" or "abusive" and not properly raised on a second Rule 3.850 motion, and the response detailed the precise findings the State desired to have entered in this regard in order to preclude federal review of the matter. Counsel for Mr. Eutzy received the State's response on March 15, 1989, and fully intended to file a reply memorandum in support of the Rule 3.850 motion -- only to learn that the motion had been denied by the Circuit Court on the morning of March 17, with substantially the findings sought by the State.

This procedure denied Mr. Eutzy the opportunity to address the State's allegations of procedural bar, and prevented him from developing the factual or legal support for his entitlement to raise these claims on a second Rule 3.850 motion. This was fundamentally unfair. The Circuit Court, in denying the Rule 3.850 motion, stressed that "Eutzy has failed to demonstrate that the claims were not known or could not have been known to him" at an earlier date. (Exhibit A, p. 1 (emphasis added).) But that conclusion rings hollow where the court did not afford Mr. Eutzy any reasonable opportunity to respond to the arguments of the State with respect to the question of procedural bar.

In this connection, it bears emphasis that the propriety of a second or successive Rule 3.850 motion does not turn solely on objective facts or an abstract measure of whether the claim was "known" at some time before the filing of the successor motion. Rather, in assessing whether newly asserted claims are an "abuse of the process," the subjective understanding of the defendant, and his reasons for delaying the advancement of the claims asserted in the successor motion, are directly relevant to the ultimate issue whether the defendant has engaged in an "abuse of process" by failing to assert these claims at some earlier time.

This principle is reflected in the decision in Witt v. State, 465 So. 2d 510, 512 (Fla. 1985), where the Court observed that a second Rule 3.850 motion may be dismissed as an abuse of procedure "unless the petitioner shows justification

for the failure to raise the issues in the first petition." While two examples of such a justification would be a change or law or newly discovered facts not available at the time of the filing of the first Rule 3.850 motion, the Court noted that these are not "the exclusive means to justify a second petition." Id. Similarly, under Rule 9(b) of the Rules Governing § 2254 Cases in the United States District Courts, which are recognized as a parallel to the procedures under Rule 3.850 (see Witt, 465 F.2d at 512; Notes to 1984 Amendment to Fla. R. Crim. P. 3.850), the doctrine of "abuse of the writ" has turned on subjective indicia of "bad faith" or "deliberate withholding" of a claim. E.g., Smith v. Yeager, 393 U.S. 122, 125 (1968); Williams v. Holbrook, 691 F.2d 3, 12-13 (1st Cir. 1982). In this case, there is absolutely no indication that the claims now asserted by Mr. Eutzy were withheld in bad faith, or for purposes of delay or vexation. The Circuit Court wholly failed to acknowledge, or even address this in finding, as the State had requested, that the motion was "abusive." And Mr. Eutzy was not given an adequate opportunity to make that point to the Circuit Court.

B. These Claims Are Based on Recent Developments in the Case Law and Therefore Are Not Barred

There is a more fundamental flaw in the Circuit Court's disposition of these claims, wholly apart from its failure to give Mr. Eutzy an adequate opportunity to demonstrate the absence of procedural bar. In finding these claims to be an abuse of process, the Circuit Court failed to take into

account the recent developments in the case law that directly justify Mr. Eutzy's present assertion of these claims -- and demonstrate why he could not realistically have been expected to raise them at the time of his first Rule 3.850 motion or at the time of direct appeal. Each claim fits squarely within the principle, well-established under Florida law, that justification for a second Rule 3.850 motion can be established where "there has been a change in the law since the first petition" or there are new facts "that could not have been discovered at the time the first petition was filed." Witt, 465 F.2d at 512. See also, e.g., Aikens v. State, 488 So. 2d 543, 544 (Fla. 1st Dist. Ct. App. 1986).

Similarly, Rule 3.850 itself, which ordinarily requires all such motions to be filed within two years after a judgment becomes final, provides that motions may be filed outside that two-year period if the facts on which a new claim is predicated "were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence," or if there has been a change in law such that "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." Fla. R. Crim. P. 3.850.

Moreover, aside from these specific rules, it is clear that the Florida courts may exercise their discretion to entertain claims on the merits on a successive 3.850 motion. Such claims have been heard when they have presented "extraordinary circumstances," Darden v. State, 475 So. 2d 217, 218

(Fla. 1985), or "unique facts," Sireci, supra, 502 So. 2d at 1224. As is true under federal habeas corpus procedures (on which Rule 3.850 is modeled, see Notes to 1984 Amendment to Fla. R. Crim. P. 3.850), a "judge always has the discretion -- and sometimes the duty -- to reach the merits" of a second or successive petition. Potts v. Zant, 638 F.2d 727, 741 (5th Cir. 1981).

The claims described in the preceding sections fall squarely within these standards for entertaining newly-raised claims on a second Rule 3.850 motion. The Circuit Court was flatly wrong in concluding to the contrary:

(1) With respect to Mr. Eutzy's first claim, based on Booth v. Maryland, that decision, which effected a fundamental change in the constitutional law, was not rendered until June 1987, well after the Rule 3.850 motion was filed. The Circuit Court, in finding this claim procedurally barred, failed to recognize that the claim could not have been raised until Booth was decided. Moreover, the facts on which this claim is based were not known to Mr. Eutzy until the evidentiary hearing in May 1987. (The knowledge of trial counsel cannot fairly be attributed to Mr. Eutzy in the special circumstances of this case. Trial counsel ceased his representation of Mr. Eutzy immediately after trial, and did not provide any assistance in the formulation of claims either for the direct appeal or Mr. Eutzy's Rule 3.850 motion, which challenged the effectiveness of trial counsel's representation.) Accordingly, the legal and factual foundation for this claim was not available

until the summer of 1987 -- after Booth had been rendered and after the evidentiary hearing where trial counsel first disclosed the involvement of the victim's family in the process.

(2) Mr. Eutzy's second claim is based on this Court's decision in State v. Sireci, which was rendered in 1987 and reflected new law in Florida concerning the constitutional basis by which a capital defendant may attack on collateral review the adequacy of a psychiatric examination conducted prior to trial. Given this change in law, Mr. Eutzy could not reasonably have been expected to raise this issue on his first Rule 3.850 motion. This was ignored by the Circuit Court, which focused instead only on its conclusion that Mr. Eutzy knew of the salient facts pertaining to this claim at an earlier date. That simply ignores the critical significance of the Sireci decision in providing defendants with a legal basis and theory on which to challenge the constitutionality of known facts.

(3) As for Mr. Eutzy's third and fifth claims, both are based squarely on the recent decision of the United States Court of Appeals for the Ninth Circuit in Adamson v. Ricketts. That decision constitutes a fundamental new development in the law that excuses a failure to raise these claims previously. While it is true, as a general matter, that this Court will not grant retroactive relief based solely on a change in law emanating from a federal appeals court, see Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), it is a different question whether a new legal development -- including

developments from lower federal courts -- should excuse a failure to raise a claim previously. For a defendant is not obliged, and cannot reasonably be expected, to raise claims lacking any legal support; and a defendant is not proceeding in "bad faith" if he asserts a claim when precedent for it first appears. When critically important new analyses emerge in the cases, whatever the tribunal, a defendant should be entitled to present those analyses to a Florida trial judge for a decision on the merits.

(4) Mr. Eutzy's fourth claim, based on the unconstitutionality of the 1958 Nebraska robbery conviction, is also based directly on new law. In Johnson v. Mississippi, the United States Supreme Court addressed for the first time the constitutionality of a death sentence that was imposed in reliance on a prior conviction that is later set aside or vacated. That decision was rendered in 1988, well after Mr. Eutzy filed his first Rule 3.850 motion. Mr. Eutzy himself -- though not his counsel -- concededly was aware of some of the facts on which he now relies in support of this claim. Others, particularly Dr. Merikangas' organic finds, were only recently discovered. But it was the Johnson case that afforded the substantive legal basis by which this issue could be raised to attack a death sentence.

Again, there is no legitimate ground for the decision of this Circuit Court applying a procedural bar to dispose of this claim. It, and the other claims advanced in the second Rule 3.850, are based fundamentally, and properly, on new

developments in the law. They should therefore have been resolved on the merits.

CONCLUSION

For the foregoing reasons, the Court should reverse the order of the Circuit Court denying Mr. Eutzy's Rule 3.850 motion. The Court should, based on claim II above, vacate Mr. Eutzy's conviction, or, based on the other claims for relief, vacate his death sentence in favor of a life sentence without possibility of parole for 25 years.

Respectfully submitted,

WILLIAM H. ALLEN
ARVID E. ROACH II
JAMES R. MURRAY
TIMOTHY C. HESTER
Covington & Burling
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for William Eutzy

March 23, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Brief of Appellant William Eutzy by causing copies thereof to be delivered by first-class mail, postage prepaid, to:

Kurt L. Barch, Esq.
Office of the Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

James R. Murray, Esq.
State Attorney's Office
190 Governmental Center
Pensacola, Florida 32501

Timothy C. Hester

March 23, 1989