IN THE

SUPREME COURT OF FLORIDA

CASE NO. 77,645

SONNY BOY OATS, JR.,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE FIFTH JUDICIAL CIRCUIT, IN
AND FOR MARION COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Oats' motion for post-conviction relief. The circuit court denied Mr. Oats's claims following an evidentiary hearing.

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in first direct appeal;

"R2. ___" - Record on appeal to this Court in second direct appeal;

"PC-R. ___" - Record on appeal from proceedings on the Motion to Vacate Judgement and Sentence.

All other citations will be self-explanatory or will otherwise be explained.

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INTRODUCTION

Since the filing of Mr. Oats' Initial Brief, the United States Supreme Court has rendered its decisions in Stringer v. Black, 112 S. Ct. 1130 (1992), and Sochor v. Florida, 112 S. Ct. ___ (1992). These opinions overturned longstanding Florida law that Maynard v. Cartwright, 486 U.S. 356 (1988), is "inapplicable to Florida." Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990). See Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990). Brown v. State, 565 So. 2d 304 (Fla. 1990); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Hence, Mr. Oats' Argument V must now be cognizable in Rule 3.850 proceedings. Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987)("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson to defeat the claim of a procedural default").

In Mr. Oats' case, three aggravating circumstances presented to both the jury and the judge were struck on direct appeal. Oats v. State, 446 So. 2d 90 (Fla. 1984). At the resentencing, Mr. Oats was denied a new jury over his objection. The prosecutor argued for reimposition of the death penalty, specifically reminding the sentencing judge that he had to consider the original jury's death recommendation (R2. 1851). The prosecutor further explained "what the State is asking for the Court to do is consider this recommendation by the jury" (R2. 1853). The judge in reimposing death stated that he "ha[d] carefully considered and given due weight to the recommended sentence of death returned by the trial jury" (R2. 1767). Clearly then, the jury's death recommendation served as a basis for the death sentence imposed.

In Mr. Oats' second direct appeal, he asserted error in the failure to obtain a new jury's recommendation untainted by consideration of improper aggravating circumstances. This Court affirmed without considering the impact on the jury's weighing process of its consideration of invalid aggravating circumstances. This Court's failure to conduct such an analysis was error. An appellate court cannot assume that an invalid aggravating factor had no effect:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reweighing court may not assume it would have made no difference if the thumb

> had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 112 S. Ct. at 1137. In Sochor v. Florida, the Supreme Court specifically held that Stringer applied in Florida, and that this Court must conduct the Stringer analysis in determining whether Eighth Amendment error warranted a new penalty phase proceeding.

In Mr. Oats' case, great weight was given to a jury's death recommendation which was premised in part on improper aggravating circumstances. The jury had mitigating circumstances before it on which a binding life recommendation could have been returned. The State in its current Answer Brief has asserted:

> the jury was well aware of the defendant's deprived and abusive upbringing, family, turmoil, low intelligence, self-reported history of drug and alcohol abuse, and that his upbringing and childhood behavior were consistent with an impulse disorder which becomes aggravated in stressful situations.

(Answer Brief at 103). These mitigating factors could have provided a reasonable basis for a life recommendation. Hall v. State, 541 So. 2d 1125 (Fla. 1989). In addition, age was found as a statutory mitigating factor. Under the circumstances, the jury's consideration of invalid aggravating circumstances cannot be found to be harmless beyond a reasonable doubt. Had "the thumb" been removed from the death side of the scale, a different result may have occurred.[1] The State cannot show beyond a reasonable doubt that the jury would have still returned death absent the invalid aggravation.

RESPONSE TO STATE'S STATEMENT OF THE CASE

Mr. Oats generally accepts the statement of facts presented in the State's Answer Brief. He does, however, dispute much of the argument contained in the "Preliminary Statement."

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[1]As noted elsewhere in this brief, additional mitigation should have been placed on the life side of the scale but was not because of counsel's deficient performance. The State has conceded deficient performance in the investigation and presentation of mitigating evidence. Counsel failed to present expert testimony that statutory mental health mitigators were present. Where the death side of the scale had extra "thumbs," and the life side of the scale was deprived of additional "thumbs," the weighing process could not have reached a reliable balance.

ARGUMENTS I AND II

MR. OATS WAS PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE AT TRIAL, AT THE PENALTY PHASE AND AT THE RESENTENCING.

The State repeatedly concedes deficient performance by trial counsel -- "The State ... will assume counsel was deficient in his investigation for and presentation at the penalty phase" (Answer Brief at 100).

> The jury did not hear that, in the opinion of Dr. Carbonell and Dr. Phillips, the defendant is mentally retarded and significantly brain damaged. They did not hear that in the opinion of Drs. Carbonell, Phillips, Carrera, Gonzalez and Natal, three statutory mitigating factors apply.

(Answer Brief 103). The State acknowledges prejudice. ("If that was the end of the story, the State would pack up and head home." Id.) The State attempts to diffuse the prejudice by claiming that its rebuttal evidence would sway a jury. What the State fails to note, and what the trial court failed to note in its order denying 3.850 relief, is one simple fact -- at the time of trial and at the time of the resentencing the State did not seek to have additional mental health experts beyond the three appointed experts. Those three experts were Drs. Carrera, Gonzalez and Natal, and they all agreed statutory mitigating circumstances applied. Yet, neither the jury nor the judge were so advised.

As Mr. Oats has previously noted, and the State has conceded, deficient performance was established. Counsel failed to adequately investigate and prepare mental health mitigation. Three mental health experts were available to evaluate for the presence of statutory mitigation. Counsel failed to reasonably pursue such an avenue. State v. Michael, 530 So. 2d 929 (Fla. 1988).

The State does not seriously address prejudice in its brief. Counsel's failures raise more than a reasonable probability of a different outcome. Strickland v. Washington, 466 U.S. 688 (1984); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989). The fact is, if trial counsel had done his job, the judge and jury would have heard that Mr. Oats is a mentally retarded, brain damaged, substance abuser, who could not possibly have formed the heightened premeditation necessary to support a finding of the cold, calculated and premeditated aggravator. See Rogers v. State, 511

So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). See also Richardson v. State, 17 F.L.W. S241 (Fla. Apr. 9, 1992); Hamblen v. State, 527 So. 2d 800 (Fla. 1988). The judge and jury would have heard from the trial competency experts that several statutory mitigating factors (beyond youthful age found by the trial court) applied to Mr. Oats:

> Dr. Carrera would have found extreme emotional distress and impaired capacity to conform conduct to law had he been asked (PC-R. 853-54).
>
> Dr. Gonzalez would have found substantial domination, extreme emotional disturbance, and substantially impaired capacity to conform conduct to law had he been asked (PC-R. 2658-64).
>
> Dr. Natal would have found substantial impairment to conform conduct to law, and extreme emotional disturbance had he been asked (PC-R. 5576-78).
>
> All three would have identified nonstatutory mitigation had they been provided the necessary background information.

The fact that trial counsel failed to investigate mitigation is prejudicial. Stevens v. State, 552 So. 2d 1082 (Fla. 1989). See State v. Lara, 581 So. 2d 1288 (Fla. 1988); State v. Michael, 530 So. 2d 929 (Fla. 1988). The fact that trial counsel presented only minimal mitigation is sufficient prejudice to warrant a new penalty phase which comports with the Sixth Amendment. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). The fact that Mr. Oats has demonstrated the availability to trial counsel of significant unused mitigation is prejudicial and warrants relief. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). (The State does not address this law in its brief.)

The State defends by trying to confuse the issue. Drs. Haber and Mutter were not available to the State at the time of trial. Nor was there a showing that the State would have asked for or been provided experts over and above the three appointed experts.[2] More importantly the issue is

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[2]In fact, Dr. Carrera was called at the penalty phase; yet, the State did not ask for the appointment of additional experts. Unfortunately, Mr. Oats' trial counsel neglected to ask Dr.

(continued...)

whether the jury hearing of the statutory mitigation that Drs. Carrera, Gonzalez, and Natal found would have voted for life. Where that question cannot be answered with certainty this Court has already held prejudice is shown. State v. Michael, 530 So. 2d at 930 ("The inability to gauge the effect of this omission undermined the court's confidence in the outcome of the penalty proceeding"). See Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992)(prejudice found where "doctors indicated that had they been asked, they could have testified to both statutory and nonstatutory mitigation").

Further, trial counsel's failures in both guilt/innocence and penalty phases were the result of ignorance of the law and lack of preparation. The law (which the State has not challenged) is clear that these failures prejudiced Mr. Oats' cause:

> 1) failure to seek expert mental health assistance. Ake v. Oklahoma, 470 U.S. 68 (1985); See Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); State v. Michael, 530 So. 2d 929 (Fla. 1988); Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984).
>
> 2) failure to properly present the law at the motion to suppress hearing. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).
>
> 3) failure to properly pursue Mr. Oats' competency to stand trial and to be resentenced. Pilchak v. Camper, 935 F.2d 145 (8th Cir. 1991); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Scott v. State, 420 So. 2d 595 (Fla. 1982).
>
> 4. failure to present an intoxication defense. Chambers v. Mississippi, 410 U.S. 84 (1973); Washington v. Texas, 388 U.S. 14 (1967); Gardner v. State, 480 So. 2d 91 (Fla. 1985).
>
> 5. failure to properly challenge the prejudicial effect of shackling. Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991).
>
> 6. failure to investigate and prepare for the penalty phase (at trial and resentencing), thus denying his client an individualized sentence. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1990); Stevens v. State, 552 So. 2d 1082 (Fla. 1989).

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[2](...continued)
Carrera whether statutory mitigating circumstances were present. Had counsel asked, the State had no rebuttal evidence to present.

7. numerous other failures detailed in Mr. Oats' initial brief and on the record.

The law is clear that such errors, both individually and cumulatively, were prejudicial and require relief. See Strickland v. Washington, 466 U.S. 688 (1984); United States v. Cronic, 466 U.S. 648 (1984); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

Even if trial counsel provided effective assistance in some areas, the defendant will be entitled to relief if counsel rendered ineffective assistance in other portions of the trial. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). Even a single error by counsel may be sufficient to warrant relief. See Kimmelman v. Morrison, 477 U.S. 365 (1986); Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Here, Mr. Oats was prejudiced by counsel's deficient performance. Rule 3.850 relief must issue.

ARGUMENT III

MR. OATS WAS NOT COMPETENT; TRIAL COUNSEL FAILED TO SEEK DETERMINATION OF MR. OATS' COMPETENCY TO PROCEED BECAUSE OF HIS IGNORANCE OF THE LAW. MR. OATS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Oats has presented both a procedural and substantive claim of incompetency. The State in its brief completely overlooked the procedural claim arising under Pate v. Robinson, 383 U.S. 375 (1966). Under Pate, there is a presumption of incompetency where a bona fide doubt about competency was left unexplored at trial. James v. Singletary, 957 F.2d 1562 (11th Cir. 1992).

In Mr. Oats' case, counsel sought to have a competency evaluation at the resentencing. Counsel had bona fide doubts about Mr. Oats' competency to proceed at the 1984 resentencing. However, counsel failed to cite the appropriate rule under the Florida Rules of Criminal Procedure. Nevertheless, the sentencing court was provided with the facts which raised a bona fide doubt as to competency. The sentencing court had a constitutional obligation to pursue the matter. Therefore, a presumption of competency arises and remains in effect until a nunc pro tunc

determination is made and the State proves the error harmless. James v. Singletary, 957 F.2d at 1571.

In Mr. Oats' case, the circuit court at the Rule 3.850 hearing failed to apply a presumption of incompetency. Accordingly, the court erred, and the matter must be remanded for compliance with Pate and James v. Singletary.

ARGUMENT V

THE FAILURE TO CONVENE A NEW JURY AT RESENTENCING DENIED MR. OATS HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, WHERE THE JURY'S DEATH RECOMMENDATION WHICH WAS ACCORDED GREAT WEIGHT WAS TAINTED BY CONSIDERATION OF INVALID AGGRAVATING CIRCUMSTANCES.

> MR. FOX: So, for all those reasons, I would ask you to re-empanel a jury.
>
> I probably should forget this last statement, but it just brings to mind the words of a new country song, you know, if you're going to do him wrong, do it right.

(R2.-1833).

The sentencing court refused to convene a new jury, but "carefully considered and [gave] due weight" to the previous death recommendation (R2. 1767). On direct appeal of Mr. Oats' resentencing, this Court affirmed without addressing the sentencing court's reliance on the tainted recommendation. The issue must be considered because of new law. Sochor v. Florida, 112 S. Ct. ___ (1992); Stringer v. Black, 112 S. Ct. 1130 (1992). No harmless error analysis of the jury's reliance upon invalid aggravation has been conducted in Mr. Oats' case; in light of Sochor and Stringer, this Court must now engage in that analysis.

In considering Mr. Oats' arguments in his original direct appeal, this Court remanded for resentencing after striking three (3) of six (6) aggravating factors. The trial court found as aggravators:

> Previous conviction of another capital felony or a felony involving the use or threat of violence; the murder was committed while the appellant was engaged in the commission of a robbery; the murder was committed for pecuniary gain; the murder was especially heinous, atrocious or cruel; the murder was committed for the

> purpose of avoiding a lawful arrest; and the murder was committed in a cold, calculated and premeditated manner.

This Court found error in the consideration of three of the aggravators, and remanded the cause because the trial judge found a mitigating circumstance. Oats v. State, 446 So. 2d 90 (Fla. 1984).

As to the previous-conviction-of-another-violent-felony aggravating circumstance, the Court noted the conviction used had been reversed, but a reconviction subsequently obtained. Thus, it was error to have previously considered it, but on remand it could be again considered.[3] However, the other two aggravating factors stricken by this Court could not be considered on remand. The Court found pecuniary gain merged with the commission of a robbery aggravator, and thus improper doubling of aggravating circumstances had occurred. In addition, the Court found that the application of heinous, atrocious or cruel to Mr. Oats' case was in violation of the narrowing constructions adopted by this Court. However, this Court failed to address the improper consideration of these aggravators by the jury.

Mr. Oats' jury was repeatedly told to consider and weigh these invalid aggravating circumstances. The prosecutor insisted in his closing remarks

> There is absolutely, positively no question that those [six] aggravating circumstances weigh against the defendant.

(R. 1237).

He went through the list of six, giving the jury the only guidance they were to receive:

1) On pecuniary gain -- "I disagree with one thing [defense counsel] said this morning: 'That's double counting.' It's not. So those are two distinct aggravating circumstances" (R. 1238).

2) On heinousness -- "The next one: That the crime for which the Defendant is to be sentenced was especially heinous, atrocious, or cruel. The Judge will go ahead and define under Florida law what that means. 'Heinous' means extremely wicked or shockingly evil. It's for you to determine, when he shot this woman in the face at close range, was that extremely wicked or shockingly evil. You'll probably hear some arguments -- I know Mr. Fox alluded to it earlier -- that a single shot does not constitute heinous. Well,

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[3]The Court made no mention of the fact that the reconviction was for a lesser included offense, arguably reducing the weight of the aggravating circumstance.

you know, that's for you to decide. It's your decision as to whether or not this shooting in the face was cruel, heinous.

"'Atrocious' means outrageously wicked and vile. Once again, you establish that definition and see if it fits these circumstances. 'Cruel' means designed to inflict a high degree of pain; -- I mean, she was shot in the face right through the eye -- utter indifference to, or enjoyment of, the suffering of others; pitiless. Once again, take into consideration the type of shooting, especially given the Williams' Rule that we talked to you about on Friday, that you can consider what happened the day before in finding the intent for premeditated murder."

"Mr. Fox talked about, and I'm sure Mr. Burke will elaborate on a bad murder versus a normal murder. Well, I must confess that I do not know the difference between a bad murder and a normal murder. He may be able to explain that to you more. I think they're all bad. But the Judge -- But the Court will tell you that if you find that this one was heinous, atrocious, and cruel, on that definition which I gave you, which will be the definition that he gives you, then that, I submit to you, will be another aggravating circumstance that you should weigh in coming to your decision."

3) On cold, calculated, premeditation -- "I think you've found that, to some extent, in your verdict last Friday" (R. 1240).

And,

MR. GILL: All I'm doing is just telling them how to pull the trigger. There are two ways: One, held very loosely in the hand, with the tip of the finger and pull it without it cocked. Try it. And the other one, cock it, touch it with your fingertip. You know what it shows you? If that accident happened, quote, unquote, that gun was cocked when he went in there. That's why it went off so easy. It was cocked; it was ready to shoot. That, once again, shows a premeditated design, an intent to effect the death of this lady that he's on trial for killing today. Now, that you can judge for yourself.

(R. 1242-43).

The trial court did not cure these errors; in fact, the judge adopted the errors himself. The instructions indicated pecuniary gain could be weighed as an aggravating factor. The jury received none of the Court's limiting constrictions regarding heinous, atrocious or cruel. The instructions were erroneous, and the jury considered invalid aggravating circumstances. Shell v. Mississippi, 111 S. Ct. 313 (1990). Under these circumstances, it must be presumed that the jury's recommendation was tainted. Stringer v. Black; Sochor v. Florida.

At the resentencing held before the Honorable William T. Swigert, Jr., Mr. Oats was again sentenced to death. The judge specifically gave "due weight to the recommendation sentence of

death" (R2. 1767). The judge identified four aggravators (prior conviction of a violent felony, the homicide occurred during the commission of a robbery, the homicide was committed to avoid lawful arrest, and the homicide was cold, calculated and premeditated) and one mitigating factor. He, thereupon, concluded "the advisory sentence of the jury should be followed" (R2. 1769).

Prior to resentencing, counsel had filed a motion to impanel jury for advisory recommendation prior to resentencing (R2-1756-58). The motion was grounded upon the fact that the trial jury, over defense objection, heard evidence, instruction and argument upon erroneous and inapplicable aggravating factors. The prosecutor in arguing for a death sentence specifically reminded the judge that he had to consider and defer to the previous jury's recommendation (R2. 1851). After argument, the trial court ore tenus denied the motion for a new jury at the resentencing hearing and instead gave "due weight" to previously returned death recommendation (R2. 1855).

On direct appeal, counsel argued:

> A. Pursuant to Section 921.141(1), The Impaneling Of A Jury For A Capital Sentencing Proceeding Is Mandatory.
>
> B. The Function Of The Jury In The Factfinding Process On The Question Of Life Or Death Is Critical And The Failure To Provide A Jury For This Purpose Injects Unreliability Into The Sentencing Process And Renders Any Ensuing Death Penalty Violative Of the Eighth Amendment Proscription Against Cruel And Unusual Punishment And The Fourteenth Amendment Proscription Against Deprivation Of Life Without Due Process Of Law.
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> C. The Failure To Provide Oats With A Jury On Resentencing Deprives Him Of An Important Ingredient In The Imposition Of The Death Sentence And In The Review Of That Sentence.

Stating that no error existed because "the trial court correctly interpreted and applied our instructions [concerning resentencing]," this Court denied Mr. Oats' claim. Oats II, 472 So. 2d at 1145. The rationale for not empaneling a new jury was that "essentially the same evidence" would be heard. Oats I, 446 So. 2d at 95. This reasoning cannot withstand constitutional scrutiny.

Recently, Judge Tjoflat stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error

> that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J. specially concurring).

The Florida Supreme Court's action was pre-Hitchcock and consistent with the then prevailing view that a Florida trial court's resentencing cured jury instructional error. The trial judge relied upon the previously rendered death recommendation and adopted the state's findings which simply omitted from the sentencing order the aggravating factor found to be erroneous and resentenced Mr. Oats to death.

The legislature intended the sentencing jury's recommendation to be an integral part of the determination of whether a capital defendant lives or dies. The validity of the jury's recommendation is directly related to the reliability of the information it receives to form a basis for such recommendation. Messer v. State, 330 So. 2d 137, 142 (Fla. 1976). In Hall v. State, this Court found sentencing error which infected the proceedings before both the jury and the judge. According to the Court's reasoning in Hall, the all important factor in determining whether the error was harmless is the effect the error may have had upon the jury, not the trial judge. Here, it cannot be said that the improperly admitted evidence, instruction and argument had no effect upon the jury. Moreover, it cannot be contested that mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation. The State's Answer Brief concedes that a wealth of mitigation was before the judge (Answer Brief at 103). The mitigation identified by the State has repeatedly served as a reasonable basis for a life recommendation. Under Stringer and Sochor it is clear that Mr. Oats should have had a new jury untainted by the error which occurred at the first proceeding.

In Mr. Oats' case, this Court assumed that a new jury, hearing "essentially the same evidence" would reach the same results as the original jury. This was error as the United States Court explicitly held:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Stringer v. Black, 112 S. Ct. 1131, 1137 (1992).

On direct appeal, three aggravating circumstances were found to be invalid, two of which could not be considered on remand. These two factors -- pecuniary gain and heinous, atrocious or cruel -- were struck because they had been misapplied as a matter of law. Just as the trial judge had misapplied them, so to the jury misapplied them because the jury instructions and prosecutorial argument directed the jury to apply the invalid aggravating factors.

Although the Court stated that the evidence at resentencing would be "essentially the same," there was no mention that the jury had been misinformed on the law. "[A] jury is unlikely to disregard a theory flawed in law." Sochor v. Florida, 112 S. Ct. at ___, 51 Cr.L. at 2132 (citing Griffin v. United States, 502 U.S. ___ (1991)). The Sochor/Griffin due process standard is that the combination of good evidence and bad instructions requires resentencing by a new jury, untainted by the unconstitutionally ambiguous combination. Sochor.

The Sochor/Griffin standard rests upon Fourteenth Amendment due process analysis. Specifically, Griffin, a non-capital case, held that:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence, see *Duncan v. Louisiana*, 391 U.S. 145, 157, 88 S.Ct. 1444, 1451, 20 L.Ed.2d 491 (1968). As the Seventh Circuit has put it:
>
> > "It is one thing to negate a verdict that, while supported by evidence, may have been based on an erroneous view of the law; it is another to do so merely on the chance--remote, it seems to us--that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient." *United States v. Townsend*, 924 F.2d 1385, 1414 (1991).

Griffin v. United States, 110 S. Ct. 466, 474 (1991).

Here, Mr. Oats' jury was given legally invalid circumstances to apply and weigh. They were told that pecuniary gain and during the course of a robbery could be considered as separate aggravating circumstances.[4] They were told in the instructions and by the prosecutor that heinous, atrocious or cruel could be established by a pistol shot to the head. No limiting constructions adopted by this Court were given to the jury. The jury's death recommendation was clearly tainted by the invalid aggravating circumstances. See Maynard v. Cartwright; Shell v. Mississippi; Stringer v. Black; Sochor v. Florida. In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court explained "it would require a detailed explanation based upon the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." This Court has failed to comply with Eighth Amendment jurisprudence.

As to the third aggravating circumstance struck on direct appeal, this Court originally vacated Mr. Oats' sentence because the judge and jury had heard evidence -- and found as aggravating -- a prior conviction of attempted first degree murder during a robbery with a firearm. Subsequent to trial, and prior to Oats I, that prior conviction was overturned. Oats v. State, 407 So. 2d 1004 (Fla. 5th DCA 1981). Prior to Oats II and resentencing, Mr. Oats was retried and convicted of attempted second degree murder; that sentence was affirmed. Oats v. State, 434 So. 2d 905 (Fla. 5th DCA 1983). This Court, in denying jury resentencing, held the second conviction was "essentially the same" as the overturned conviction.

Common law and the statutes of Florida make abundantly clear the difference between second degree murder and first degree murder. See sec. 777.04; 782.02, Fla. Stat. Perhaps, this is so absurd it isn't worth commenting. The elements are different:

> Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without a premeditated design to effect the death of any particular individual. Marasa v. State, 394 So.2d 544, 545 (Fla. 1981).

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[4]This double counting "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer, 112 S. Ct. at 1139.

The punishment is different. See sec. 775.082, Fla. Stat. No reasonable, properly instructed person could fail to grasp the difference. The point is that the difference goes to the weight of the aggravating circumstance. Second degree murder is of less weight than first degree murder.

Clearly, then the jury's death recommendation is tainted by Eighth Amendment error. Two invalid aggravating circumstances were considered by the jury. As to a third aggravating circumstance, the jury had misinformation which may have affected the weight accorded that circumstance. Under Sochor and Stringer, this Court must revisit the issue and conduct the appropriate analysis. In light of the State's recitation of all the mitigation before the jury, the error cannot be harmless beyond a reasonable doubt.

CONCLUSION

For each of the foregoing reasons and those stated in his initial brief, the Appellant asks this Court to vacate his unconstitutional capital conviction and sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 23, 1992.

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