IN THE SUPREME COURT OF FLORIDA

WILLIAM M. WHITE,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 88,686
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

CORRECTED REPLY BRIEF OF APPELLANT

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ORIGINAL

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ARGUMENT

Appellant relies on the initial brief, except to note the following:

> I. WHETHER HITCHCOCK ERROR OCCURRED AT SENTENCING AND WHETHER SUCH ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

Pages 17-18 of the state's brief argues that trial counsel, despite his action at trial[1] and the unrebutted testimony on post conviction, did not feel constrained in the presentation of mitigation because counsel filed a memorandum making the legal claim that mitigation was not limited to statutory circumstances. The state overlooks that the judge's order, as set out at pages 16-17 of the state's brief, apparently accepts that the defense felt that they were limited as to mitigation.

Without disputing that there was Hitchcock error in the jury instructions, the state argues at pages 19-22 that the judge considered nonstatutory mitigation, so that there was no error affecting the sentence. The state's argument is contrary to the record and is contrary to law.

Page 20 of the state's brief says the judge did not limit himself to statutory mitigation because the sentencing order states

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[1] As set out in the initial brief, counsel did not object to the state's argument and the judge's instructions limiting consideration of mitigation, and pointed only to the statutory mitigators in final argument.

that he considered "such mitigating circumstances as are applicable to this case". The state overlooks that the sentencing order's discussion of mitigation is limited to the seven statutory aggravating circumstances (denominated a-g). R 1649-50. Further, in pronouncing sentence, the court specifically stated: "... there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances." TR 831. The order entered by the judge at sentencing said the same. TR 1638-39. It could not be clearer that the judge considered only statutory mitigating circumstances.[2]

Page 20 of the state's brief also says: "Reversible error is not present where the final word of the ultimate sentencer does not reflect restricted consideration of mitigating circumstances. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987)." In this regard, the state apparently relies on Part III of the Eleventh Circuit's panel decision (823 F.2d at 1448-49), in which the court denied Elledge's Hitchcock claim. In making this statement, the state has neglected to mention that the court WITHDREW Part III of the opinion on in banc rehearing. Elledge v. Dugger, 833 F.2d 250

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[2] Page 21 of the state's brief, citing to TR 1649, seems to suggest that the judge considered alcoholism as nonstatutory mitigating because the judge wrote: "he knew what he was doing" at the time of the murder. In fact, the judge wrote this in the context of consideration of the statutory mitigating circumstance of extreme disturbance.

(11th Cir. 1987) (in banc) ("Part III of our original opinion (823 F.2d 1439) is, hereby, withdrawn.").

Further, a trial court's consideration of nonstatutory mitigation does not render harmless a Hitchcock error in the jury instructions. In Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989), the court rejected an identical argument from the state. There, the state had argued that the trial judge's consideration of nonstatutory mitigation rendered harmless Hitchcock error in the jury instructions. The court wrote: "we conclude that, because the jury recommendation resulted from an unconstitutional procedure, the entire sentencing process has necessarily been tainted. [Fn. omitted.] The trial judge's consideration of nonstatutory mitigating evidence, therefore, did not render harmless the Lockett error." Hence, the court wrote in Demps v. Dugger, 874 F.2d 1385, 1389 (11th Cir. 1989):

> In Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), this court held that no Hitchcock error occurred despite improper jury instructions, since the judge clearly had the proper view of the law and considered the nonstatutory mitigating circumstances in carrying out his role as primary sentencer. That portion of the opinion was later withdrawn and thus, has no precedential value. Elledge v. Dugger, 823 F.2d 1439 (1987), opinion withdrawn in part, 833 F.2d 250 (11th Cir. 1988), cert. denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988). However, the issue was reconsidered and determined by this court in Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989). Our court in Jones v. Dugger held that where there is Lockett error in the court's instructions to the advisory jury, the sentencing judge's consideration of

> nonstatutory factors in reaching his sentencing decision will not render the erroneous instruction harmless. Hence, in this case, the judge's consideration of the nonstatutory mitigating evidence does not render the Lockett error harmless. Instead, we consider whether the alleged nonstatutory mitigating evidence, if considered by the jury would have affected its sentencing decision.

Pages 23-24 of the state's brief argues that appellant's claim is procedurally barred under Alvord v. State, 694 So. 2d 704 (Fla. 1997). As this Court explained in Alvord, Alvord's out-of-the-record mitigation was essentially identical to his in-the-record mitigation heard by the jury. At bar, the opposite is the case. Appellant's jury heard no evidence of his abused childhood (including at the hands of the state) and background, of the mental health effects of his drinking, of his charitable and humanitarian deeds, or of the other mitigation disclosed on post-conviction. The trial court's application of a procedural bar was improper.

Page 25 of the state's brief says the remedy for a Hitchcock error is to remand for an evidentiary hearing to determine if the error was harmless. Needless to say, the remedy is to order new sentencing proceedings. E.g. Maxwell v. State, 603 So. 2d 490 (Fla. 1992).

The state next argues that, given the facts of the case, appellant's mitigation could not have affected the sentence. As an initial matter, it should be noted that, upon a showing of substantial mitigation not considered by the jury, the reviewing

court should grant relief. Booker v. Singletary, 90 F.3d 440, 443 (11th Cir. 1996) (referring to, and re-adopting, prior opinion: "Because we were unable to speculate as to the effect the mitigating evidence would have had on the judge or jury, we could not find the error to be harmless. [Cit.] We therefore affirmed the district court's grant of habeas relief.").

Further, others who have committed more aggravated crimes have received Hitchcock relief on similar mitigation. Compare the facts at bar with those in the case of William Lee Thompson. Thompson v. State, 389 So. 2d 197 (Fla. 1980) (setting out facts of murder) and Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (granting Hitchcock relief). Similar is the case of Freddie Lee Hall. Hall v. State, 420 So. 2d 872 (Fla. 1982) (setting out facts of murder) and Hall v. State, 541 So. 2d 1125 (Fla. 1989) (setting out mitigation). See also Booker v. State, 397 So. 2d 910 (Fla. 1981) (setting out facts of murder) and Booker v. Singletary, (setting out mitigation).

As for the state's pooh-poohing of the mitigation (e.g. "White's childhood of abuse and years of alcoholism do not remotely mitigate the circumstances of this brutal murder"), the following discussion from Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994) (a case involving a triple homicide) is instructive:

... For example, we have held that a jury is entitled to reasonably rely on the fact that an accomplice was the one who actually killed the victims. See, e.g., Christmas v. State, 632 So. 2d 1368, 1371 (Fla. 1994); Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979). Jurors could have found disparate treatment in that accomplices who were equally or more culpable were not sentenced to death. See, e.g., Jackson v. State, 599 So. 2d 103, 110 (Fla.), cert. denied, 506 U.S. 1004, 113 S.Ct. 612, 121 L.Ed.2d 546 (1992); Fuente v. State, 549 So. 2d 652, 658-59 (Fla. 1989); McCampbell v. State, 421 So. 2d 1072, 1076 (Fla. 1982); Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979). Jurors may reasonably have considered evidence that the defendant was intoxicated the day the murder was committed, see, e.g., Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992); Cheshire v. State, 568 So. 2d 908, 911 (Fla. 1990); Norris v. State, 429 So. 2d 688, 690 (Fla. 1983); Buckrem v. State, 355 So. 2d 111, 113-14 (Fla. 1978), or that he suffered from long-term drug or alcohol abuse, see, e.g., Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992). A defendant's capacity to form loving relationships with his family and friends is worthy of a jury's consideration in recommending punishment for capital murder. See, e.g., Scott v. State, 603 So. 2d 1275, 1277 (Fla. 1992); Bedford v. State, 589 So. 2d 245, 253 (Fla. 1991), cert. denied, 503 U.S. 1009, 112 S.Ct. 1773, 118 L.Ed.2d 432 (1992). A difficult childhood is valid nonstatutory mitigating evidence upon which a jury is entitled to rely. See, e.g., Scott, 603 So. 2d at 1277. Jurors also may consider remorse or repentance. See Stevens v. State, 613 So. 2d 402, 403 (Fla. 1992).

As we said in Scott, "[w]hile some persons may disagree with the weight of this evidence, or may even disbelieve portions of it altogether, clearly other reasonable persons would be convinced by it." 603 So. 2d at 1277. We also note that the jury was apparently quite capable of reasonably sorting out the facts and applying the law in the guilt phase, where it distinguished the Dalton murder from the Padgett and Sheppard murders in handing down their guilty verdicts, all of which were supported by the record. See Parker v. State, 458 So. 2d at 754. There is no reason to believe that the same jury was less capable of reasonably applying the aggravating and

mitigating circumstances in the penalty phase of the trial.

Finally, at page 27, the state's brief relies on Bottoson v. State, 674 So. 2d 621 (Fla. 1996). This Court summarized the facts there: "Briefly stated, Bottoson kidnapped a postmistress[3] and stole some money orders. He held her captive for three days and at least part of the time confined her in the trunk of his car. He then stabbed her sixteen times and finally ran over her with his car." Id. 622. This Court wrote of the mitigation (id. 623 (fn. omitted)):

> Finally, the nonstatutory mitigating evidence which Bottoson presented in mitigation was not strong. A preacher and his wife testified that Bottoson had become a devout church member and assisted in counselling members of the congregation. A corrections officer testified that he had heard Bottoson counselling another prisoner. Bottoson's mother testified that he was a good son. Particularly in view of the strong aggravating circumstances, we are convinced beyond a reasonable doubt that the Hitchcock error was harmless.

Thus, Bottoson involved a much more aggravated crime and much less mitigation than the case at bar.

II. WHETHER THE COURT ERRED IN REJECTING THE CLAIM THAT COUNSEL WAS INEFFECTIVE AT PENALTY.

Pages 28-29 of the state's brief states: "The prejudice prong is not established merely by a showing that the outcome of the proceeding would have been different had counsel's performance been

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[3] The court pointed out at page 624 that the victim was 74 years old.

better. Rather, prejudice is established only with a showing that the result of the proceeding was fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988)." In Lockhart, trial counsel neglected to make an objection that, although meritorious at the time of trial, was no longer meritorious when the issue was raised in federal habeas proceedings. The authority supporting the objection had been overruled by the time Fretwell's case reached federal court. The Supreme Court found that Fretwell suffered no prejudice because counsel's failure to make the objection did not deprive Fretwell "of any substantive or procedural right to which the law entitles him." 506 U.S. at 372. Lockhart did not add a new inquiry to the standard Strickland analysis. Id. 373-75 (O'Connor, J., concurring). Instead, it merely applies the Strickland test for prejudice to the unusual and specific facts of a particular case. Graham also did not purport to alter the Strickland standard -- in fact it specifically applied the Strickland standard. The federal courts continue to apply the Strickland standard:

> We turn next to a discussion of whether Dobbs has satisfied Strickland's "prejudice" prong, which requires a showing that Bennett's deficient performance deprived him of "a trial whose result [was] reliable." Horton, 941 F.2d at 1463 (quoting Strickland, 466 U.S. at 687, 104 S.Ct. at 2064). In assessing the "prejudice" prong, this court must determine whether

> a reasonable probability [exists] that but for counsel's unprofessional errors, the result of the proceeding would have been different.... A reasonable probability is a probability sufficient to undermine confidence in the outcome ... [but] a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case.
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> Jackson, 42 F.3d at 1361 (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068) (internal citations omitted).

Dobbs v. Turpin, 11 Fla. L. Weekly Federal C1469 (11th Cir. June 9, 1998). See also Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998).

At page 29 of its brief, arguing that the trial court did not apply the correct standard as to prejudice, appellee misquotes Boldender v. Singletary, 16 F.3d 1547, 1561 (11th Cir. 1994).[4]

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[4] The state accurately notes that in Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995), this Court wrote: "In order to prevail on his ineffective assistance of counsel claim, Hildwin demonstrate that his trial counsel's performance was deficient and 'but for counsel's unprofessional errors, the result of the proceeding would have been different.' Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)." Again, however, the state fails to note that this Court stated the correct standard in the remainder of the same paragraph (e.s.):

> There was overwhelming evidence of Hildwin's guilt presented at the trial. Therefore, assuming without deciding that trial counsel's performance was deficient for failing to discover certain exculpatory evidence, we do not believe Hildwin has demonstrated a reasonable probability that the outcome of the trial proceedings would have been different had this evidence been presented.

Page 29 of state's brief:

In the context of the penalty phase of a capital trial, prejudice focuses on whether the "sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." [Cit. to Boldender.]

What Bolender says (pages 1560-61):

When challenging the imposition of the death penalty, "the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

(The court wrote further at page 1561: "As noted above, the proper inquiry when a defendant challenges the propriety of a death sentence is whether, absent counsel's allegedly inadequate performance, a reasonable probability exists that the balance of aggravating and mitigating circumstances did not warrant death.") Thus, contrary to the state's position, the correct standard is whether there is a "reasonable probability" that the sentencer would have concluded that the balance of circumstances did not warrant death. Both the trial court, and the state's brief, adopt the incorrect position that appellant has to show that the sentencer would actually have so concluded. In fact, the "reasonable probability" standard is lower than a standard of "more likely than not": the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Dobbs.

At page 32, the state's brief says that Kaplan "already knew" that "White was an alcoholic member of the Outlaws in Kentucky",[5] suggesting that this knowledge put an end of any duty to investigate. Contrary to the state's argument, such knowledge would be a starting point for investigation, not an end-point.

At the same page, pointing to the fact that Kaplan had been a member of the Kentucky bar since 1959, the state observes that an experience attorney receives a greater deference in examining his conduct. In this regard, it is significant that no Kentucky case even mentions Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) until 1982, and that case only cites Lockett for a jury selection issue unrelated to mitigation. Moore v. Comm., 634 S.W.2d 426, 431 (Ky. 1982). Further, discussion of mitigation in Moore indicates that the court should admit evidence only as to statutory circumstances. Id. 434.[6] Indeed, even as late as 1990, Kentucky did not clearly require consideration of non-statutory mitigation. See Sanders v. Comm., 801 S.W.2d 665, 681 (Ky. 1990) ("Assuming without conceding that the court in this case was

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[5] In fact, Kaplan only testified that he had "seen" appellant many times. R 100. The record does not even show that he had ever talked to him, much less that knew he was an alcoholic.

[6] Overruling the exclusion of testimony of minister, the court wrote that "the exclusion of this testimony specifically ruled out what the statute specifically allows", and wrote that on remand: "the testimony of the Rev. Wilson, as it applies to the statutory mitigating circumstances, shall be admitted." (E.s.)

obligated to consider non-statutory mitigating evidence, we find in the trial judge's report an act, as opposed to an omission, stating affirmatively that 'based upon all of the evidence in this trial, I have no reason to disagree with the jury's recommendation ...' (Emphasis added.)").

In any event, Kaplan was not experienced in Florida law. R 108. His mitigation investigation was minimal: "Other than talking to the members of the club and those people who were down there, that was it." R 102. Significantly, the state's case rested largely on the testimony of "members of the club", minimizing their culpability at White's expense. At the very least, their loyalties would have been divided between White and co-defendant Smith. Since they were housing Kaplan, he had little motive to scrutinize them.

At page 33 the state's brief says: "The failure to present mitigating evidence during the penalty phase of a capital trial is not ineffectiveness per se. Burger v. Kemp, 483 U.S. 776 (1987); Stevens v. Zant, 968 F.2d 1076 (11th Cir.), cert. denied, 507 U.S. 929 (1993)." In Burger, the attorney conducted a reasonably thorough investigation of the defendant's background, interviewing his mother, reviewing psychological reports obtained with his mother's help, spoke with an attorney who had befriended the defendant and his mother, and obtained the services of a

psychologist in preparation for mitigation. After doing so, he determined not to present the mitigation because he deemed it unhelpful. In Stevens, counsel was likewise "undisputedly well acquainted with Stevens' past." 968 F.2d at 1083. Unlike the attorneys in those cases, counsel at bar did not conduct a reasonable investigation, and did not reach a strategic decision not to present evidence.

Page 34 of the state's brief notes that there was a 12-0 death recommendation, adding: "Therefore, at least six members of the jury would have had to change their vote to result in a recommendation of life imprisonment. Rose v. State, 425 So. 2d 521 (Fla. 1983)." Rose does not support this proposition: there, the jury, after initially announcing a 6-6 deadlock, rendered a 7-5 death recommendation.

On the same page, citing to Buenoano v. Singletary, 74 F.3d 1078 (11th Cir. 1996), the state argues that "this Court must weigh" the sentencing circumstances. This Court has never weighed sentencing circumstances. Hudson v. State, 538 So. 2d 829, 831 (Fla. 1989) ("It is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to be given it."); Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981) ("Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence

adduced to establish aggravating and mitigating circumstances."). For more recent cases, see Raleigh v. State, 705 So. 2d 1324 (Fla. 1997); Jackson v. State, 704 So. 2d 500 (Fla. 1997) (remanding to trial court to reweigh circumstances).

At pages 34 and 36, the state cites to Smith v. State, 403 So. 2d 933 (Fla. 1981) for the proposition that there is no reasonable probability that a reasonable jury would have recommended a life sentence and[7] that the judge "would have had no legally sufficient basis to reject the life recommendation." The reference to Smith is puzzling, since there White's own co-defendant, who ordered the murder, did receive a life sentence. Regardless, the question is whether there is a reasonable probability that White would have received a life sentence, regardless whether as the result of a life recommendation or a judge's decision to sentence him to life after receiving a death recommendation.

At this point, the state elects to characterize mitigation witnesses as "this collection of misfits" and "this band of rogues", perhaps forgetting that its case for aggravation depended almost entirely on the testimony of Richard DiMarino. Perhaps if the state's case rested on the word of archbishops, its ad hominem attack would make sense. In the context of this case, however, the prosecution would be poorly positioned to launch into such an

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[7] The state's brief emphasizes the word "and".

attack before the jury after relying on Mr. DiMarino's testimony. The jury already knew who was involved in the case, and it is hard to believe that the jury would be shocked by the defense witnesses. Almost every sentence at pages 36-38 of the state's brief starting "White was ..." could equally well begin: "DiMarino was ...".

At pages 40-41, the state urges that the value of the mitigation would be lost on the victim, dramatically reiterating the facts of the crime (at least according to DiMarino). The state's argument resembles the sort of argument which this Court condemned in Garron v. State, 528 So. 2d 353 (Fla. 1988) and Urbin v. State, 23 Fla. L. Weekly S257 (Fla. May 7, 1998).

The state disputes the value of the testimony of John Mahon on the interesting ground that Mahon did not turn to a life of crime (in which case, no doubt, the state would characterize his testimony as that of a "ne'er-do-well" and hence of no value for that reason). The fact that one person survives a terrible situation does not mean that a jury would or should disregard its effect on someone else. The state's real argument seems to be with the idea that such evidence has any mitigating value. To paraphrase what this Court has written concerning attacks on the insanity defense, once the Supreme Court has made the policy decision that such evidence must be considered, it is not the responsibility of the state to place it in issue in the form of

repeated criticism of such evidence in general. Cf. Garron v. State, 528 So. 2d 353, 357 (Fla. 1988); Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990).

Appellant will pass without comment the state's example of "good times" during his adolescence at page 42, note 4 of its brief.

Respecting the testimony of Dr. Caddy, the state argues at pages 44-46 that, because Dr. Caddy could not testify that appellant had a mental health defense to the murder charge, his testimony could not be helpful at penalty. It is improper to contend that the lack of a mental health defense to the crime charged negates mental health mitigation. "The rejection of [a defendant's] insanity and voluntary intoxication defenses does not preclude consideration of statutory and nonstatutory mental mitigation." Morgan v. State, 639 So. 2d 6, 13 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993). The state argues at pages 44-45 that White's serious memory impairment is not a mitigating circumstance. To the contrary, serious memory impairment is a mitigating circumstance which must be considered at sentencing. Larkins v. State, 655 So. 2d 95, 100-101 (Fla. 1995); Knowles.

Pages 46-47 of the state's brief claims that this case is like Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990). The facts at bar

are very different from Buenoano as set out at page 1119 of that case:

> Among the evidence presented to the jury was that Buenoano systematically and methodically administered arsenic poison to her husband and later, to a live-in boyfriend, which eventually resulted in their deaths. She administered paraformaldehyde poison to yet a third man, which caused him to be hospitalized. This man testified that after he refused to ingest the vitamin capsules discovered to contain the poison, he suspected Buenoano was responsible for arranging to have a bomb explode in his car. The jury was told that Buenoano had been convicted in the drowning death of her disabled son. Following the deaths of her victims, Buenoano collected proceeds from the various life insurance policies she owned on them. Additionally, one witness testified that Buenoano never discussed ending her marriage by divorce, but only discussed solving her marital problems by poisoning her husband. Still another witness testified that Buenoano advised her not to divorce her husband but to take out a life insurance policy on him and then poison him with arsenic. Two witnesses testified that Buenoano admitted she killed James Goodyear.

Buenoano was an intelligent person who went about poisoning those closest to her in order to obtain insurance proceeds. Her case has nothing in common with the case at bar. Similarly inapposite are the other cases cited at pages 47-48 of the state's brief. The original opinion in Mendyk v. State, 545 So. 2d 846 (Fla. 1989) makes clear that Mendyk was the instigator of an incident involving prolonged sexual torture, and that the murder was entirely his idea. The post-conviction opinion, Mendyk v. State, 592 So. 2d 1076 (Fla. 1992) shows no history of physical abuse as a child and no significant childhood trauma. Further, the evidence was that

Mendyk made independent, clear-headed, purposeful decisions first to sexually torture the victim and then to murder her. There was no evidence of good acts performed by Mendyk. Routly v. State, 590 So. 2d 397 (Fla. 1991), Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), and Daugherty v. Dugger, 839 F.2d 1426 (11th Cir. 1988) involved clear-headed, sober, independent actions by the defendant. Routly robbed a man, abducted him in the trunk of his car, then stopped the car and shot him. Provenzano smuggled guns into the courthouse and began firing when a bailiff approached to search him. Daugherty committed a series of murders during a cross-country trip, including the abduction, robbery and murder of a hitchhiker.

Respecting parole eligibility, the state's reliance on King v. Dugger, 555 So. 2d 355 (Fla. 1990) is misplaced. There, the judge refused to allow testimony concerned parole eligibility. This court wrote that such testimony does not constitute mitigation, and specifically noted: "The standard instruction on the possible sentences for first-degree murder adequately inform the jury of the minimum mandatory portion of a life sentence." Id. 359. At bar, on the other hand, the judge did not instruct the jury on the mandatory minimum. Parole eligibility is a valid sentencing consideration. Subsequent to King, this Court held in Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) that it was error to prevent

argument in mitigation that the defendant would not be parole eligible for 50 years. In Turner v. State, 645 So. 2d 444, 448 (Fla. 1994), the court reversed a death sentence, noting that there was ample mitigation, including that "the alternative to the death penalty was two life sentences, which the jury knew would have required Turner to serve a minimum of fifty years in prison before he could be considered for parole."

In contrast to the foregoing cases, this case has quite a lot in common with Sager v. State, 699 So. 2d 619 (Fla. 1997) and Voorhees v. State, 699 So. 2d 602 (Fla. 1997). This Court wrote at page 620 of Sager:

> The facts of this murder are more fully set out in Voorhees v. State, 699 So. 2d 602 (Fla. 1997). Briefly, Sager and Donald Voorhees were drinking with Audrey Steven Bostic on January 3, 1992, in Bostic's residence. After Sager and Bostic started to fight, Voorhees and Sager tied Bostic to a chair with telephone cords and searched the residence for things to steal. Bostic was making noise, and Sager and Voorhees continued beating Bostic while he was tied in an attempt to keep him quiet. Next, Bostic was dragged into the bedroom by his feet and was stabbed in the throat. Bostic died as a result of these injuries.

This Court further noted that Sager was the first to strike Bostic, but it appear that Voorhees directed most of the subsequent actions of ransacking the house and trying to cover up the crime. Id. 623 This Court found disproportionate the sentences of both Voorhees and Sager.

III. WHETHER APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AS TO GUILT.

The footnote at pages 55-56 of the state's brief manufactures a strategy for defense counsel which counsel himself never claimed. After-the-fact strategic explanations for counsel's omissions cannot be manufactured on post-conviction. Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990) ("Just as a reviewing court should not second guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer."); Washington v. Murray, 4 F.3d 1285, 1289 (4th Cir. 1993) ("Trial counsel's post hoc hypothesis of what he might have done had the situation been different has a dubious bearing on what he actually did. His conduct should have been evaluated from his perspective at the time of trial, Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, and the district court should not have constructed a tactical decision counsel might have made, but obviously did not. See Griffin v. Warden, Maryland Correc. Adjus. Ctr., 970 F.2d 1355, 1358 (4th Cir. 1992).")

As to the state's reliance at page 57 of its brief on Lockhart and Rose, appellant relies on his discussion of those cases in the Point II above.

Contrary to the state's argument at pages 59-60 of its brief, there is a reasonable probability that the result would have been different had counsel objected to the state's untimely amendment of its bill of particulars. Instructive in this regard is Mars v. Mounts, 895 F.2d 1348 (11th Cir. 1990). There, the evidence tended to show that the murder occurred outside the time period set out in the state's bill of particulars. Id. 1349-50. Apparently relying on this statement of particulars, the jury acquitted the defendant.[8]

As at the time of Mars' trial, the standard practice at the time at trial was to instruct the jury that the state had to prove the case under the terms set out in the bill of particulars. Had counsel opposed the amendment to the bill at bar, there is a reasonable probability that the jury would have acquitted appellant, just as Mars' jury acquitted him.

In discussing the evidence respecting intoxication at pages 61-62 of its brief, the state overlooks that the evidentiary picture was the product of counsel's failure to investigate and present evidence on this issue. The post-conviction record shows that, with even minimal investigation, counsel could have developed

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[8] Subsequently, the state refiled charges against Mars, arguing that, as the jury had relied on the bill of particulars, it acquitted him only of any murder committed during the time period contained in the bill.

a substantial defense of intoxication. The abandonment of the defense was not the product of a strategic decision made after a reasonably thorough investigation.

The state is certainly correct in writing at page 62 that "mere" evidence of alcohol consumption is not alone sufficient to justify an instruction on the defense. However, this does not lead to the state's conclusion that evidence of appellant's prolonged substance abuse "would not have been relevant" to such a defense. To the contrary, evidence of prolonged alcoholism, coupled with evidence of alcohol consumption at the time of the crime will justify the defense. Further, prolonged use of intoxicants itself can establish a defense. Cirack v. State, 201 So. 2d 706 (Fla. 1967).

While it is true, as the state says at page 63 of its brief (citing to Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989), that the use of expert testimony is not required, any decision whether to use an expert must be the result of reasonably thorough investigation.

At pages 63-64 of its brief, the state relies on Harich v. Dugger, 844 F.2d 1464, 1470 (11th Cir. 1988) in saying that appellant must show that the approach taken by Kaplan would not have been used by professionally competent counsel. In Harich, the defendant himself testified that he was only "mildly drunk" and was

not involved in the murder. Hence, counsel determined that an intoxication defense would have contradicted his client's testimony. The defendant's own testimony foreclosed an intoxication defense. See also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) (explaining Harich).

At bar, contrary to Harich, counsel considered intoxication an important theory of defense. Abrams, the public defender, testified that the most plausible defenses would be intoxication and to point the finger at DiMarino. R 60, 61. Asked for his theory of defense prior to trial, Kaplan testified: "Um, quote, unquote, I didn't do it, or quote, unquote, if it happened, it happened in the condition I was in that I couldn't know what I was doing, i.e., intoxication." R 103. Kaplan thought that he did ask for an intoxication instruction. R 105.

Thus, this case is also unlike White (Jerry) v. Singletary, where counsel "testified at the evidentiary hearing that he rejected intoxication as a defense because it was inconsistent with the deliberateness of White's actions during the shootings." Id.

At bar, an intoxication defense would in no way be inconsistent with the defense argument to the jury. As page 65 of the state's brief notes: "During closing argument, defense counsel implored the jury to acquit if there was any reasonable doubt in their minds, arguing that White was merely guilty of assault and

battery (R 747)." Unlike Harich's defense, this was not a claim that appellant had no involvement in the assault on the deceased. And unlike Jerry White's defense, there was no conclusion that appellant's actions barred an intoxication defense.

Appellant does not dispute that it is not necessarily ineffective for counsel to argue a "reasonable doubt" theory or to fail to present inconsistent defenses, although he notes that the cases cited at page 65 of the state's brief do not particularly support this proposition. The significant point at bar is that Kaplan made no tactical decision not to present such a defense -- he thought that he had obtained an instruction on the intoxication defense. Thus, although he had an intoxication defense in mind he did not develop and present lay or expert evidence supporting it, and did not obtain an instruction on the defense.

The state's citations to Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982) and Haliburton v. State, 691 So. 2d 466, 471 (Fla. 1997) are beside the point. The discussion in Muhammad is so cursory that it is not clear that it even applies at bar. It is impossible to tell from the discussion there what the nature of the prosecutor's remarks was, except that they were not such as to require a mistrial -- that is, they were not particularly prejudicial. At bar, on the other hand, we have evidence of collateral bad acts and evidence creating sympathy for the victim

-- the sort of evidence which is presumed to be highly prejudicial. The discussion in Haliburton makes clear that counsel was pursuing a specific defense strategy in deciding not to present evidence which, in any event, would not have been particularly helpful to the defense. Id. 470-71.

IV. WHETHER THE COURT ERRED IN DENYING THE MOTION FOR TRANSCRIPTION AND REVIEW OF GRAND JURY PROCEEDINGS.

Contrary to the state's argument, appellant contends that it was error both to deny full disclosure of the grand jury proceedings prior to trial and not to grant such disclosure during post-conviction proceedings. The post-conviction motion for disclosure was filed September 26, 1989. R 814-23. Unfortunately, the court reporter has apparently lost his notes from the motion hearing of December 6, 1989, the next motion hearing after the motion was filed. R 1110. Nevertheless, it is clear that in denying the motion for post-conviction relief necessarily denied the motion for disclosure.

Appellant concedes that Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990) in very summary fashion apparently ruled that Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) does not apply retroactively. Nevertheless, the state's argument ignores the fact that this case was still pending in the trial court on post-conviction when the Court decided Ritchie, so

that it should apply to appellant's post-conviction motion. In any event, Ritchie does apply retroactively. See Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987).

CONCLUSION

Based on the foregoing argument and the authorities cited therein, appellant respectfully requests this Court reverse and remand with instructions to retry appellant or to conduct a new sentencing hearing, or reducing his sentence to life imprisonment, or grant such other relief as may be appropriate.

Respectfully submitted,

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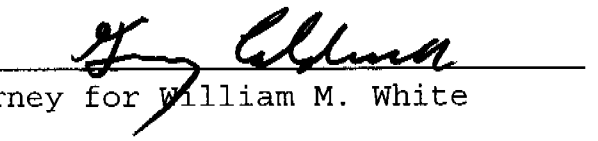
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Katherine Blanco, Assistant Attorney General, Suite 700, 2002 North Lois Avenue, Tampa, Florida 33607-2366, by mail August 11, 1998.



Attorney for William M. White