IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

vs. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont'd)

TABLE OF CITATIONS
(cont'd)

TABLE OF CITATIONS
(cont'd)

IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,	:	
Appellant,	:	
vs.	:	CASE NO. 64,212
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, WILLIAM EUTZY, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal will be referred to by use of the symbol "R". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

William Eutzy and Laura Denise Eutzy were charged by indictment returned March 15, 1983 with the first degree murder of Herman Hughley (R.344). Laura Denise Eutzy was charged in a second count with carrying a concealed firearm (R.344). Following jury selection on July 5, 1983 (R.3-91), William Eutzy's case proceeded to trial on July 6-7, 1983, before Circuit Judge William S. Rowley and a jury. The jury returned a verdict finding William Eutzy guilty as charged of first degree murder with premeditation (R.304-05,375). After the penalty phase of the trial, the jury recommended that Eutzy by sentenced to life imprisonment without possibility of parole for 25 years (R.335,378).

The trial court declined to follow the jury's recommendation and imposed the death penalty (R.341,376-77,382). Notice of appeal was filed on July 22, 1983 (R.386). On September 6, 1983, the First District Court of Appeal (in which the appeal had been mistakenly filed) transferred the appeal to the Supreme Court of Florida.

III STATEMENT OF THE FACTS

The following is a summary of the evidence presented at trial:

Paul Ferguson, a police officer employed at the regional airport in Pensacola, observed a white male and a white female walking around inside the terminal at about 12:30 a.m. on February 26, 1983 (R.105-06). The man had glasses, a mustache, and a stubble of beard, was wearing a brown cowboy hat, and was carrying a brown briefcase (R.111). Ferguson approached them to ascertain whether they were waiting for a flight or a cab, and the man said he was going back to Missouri (R.106). Ferguson asked for identification, and the man showed him a government vehicle card in the name of Raymond Sanders (R.106-07). The woman showed him a Louisiana driver's license (R.107). Ferguson wrote down the information on a piece of paper (R.107). He then went back to making his rounds, during which time he occasionally saw the man and woman (R.109). When he got off work at 8:00 a.m., Ferguson did not see them, and they did not come through the screening area, which they would have done to board a flight (R.109). He did not see them again that day (R.110). [Ferguson identified appellant, William Eutzy, as the man he approached at the airport (R.108)].

The following night, at about 11:50 p.m., Ferguson was driving back to work and he passed the intersection of College Boulevard and Tippen Avenue, where he saw a Dodge Aspen or Volare station wagon (R.110-11). The vehicle

was a West Hill cab (R.110). Ferguson later passed the same cab at that location four or five more times; he assumed it was broken down (R.111). The next day, after the body was discovered, there were police cars around the cab (R.111-12).

On cross-examination, Ferguson testified that the woman at the airport had a blue handbag or purse, which she went into to get her identification (R.115).

Mary Louise Kirkland, a cab driver with West Hill Taxi Company, was working the airport on Saturday, February 26, 1983 (R.116-17). On Friday night, another cab driver had pointed out to her a tall, slender man wearing a hat and a brown plaid shirt-jacket (R.117). She saw him again on Saturday afternoon around 6:30 or 7:00 p.m. in the company of a fat, long-haired woman (R.118). They were getting into the cab in front of Ms. Kirkland's cab, which was driven by Herman Hughley (R.118). Ms. Kirkland identified appellant as the man she saw getting into the cab (R.119).

Rosemary Kirkland, a dispatcher with West Hill Taxi Company, received a dispatch from Herman Hughley at about 6:30 p.m. on February 26, 1983 that he had picked up a fare at the airport and they were going to Pensacola Beach (R.121). At about 7:15 p.m. Hughley informed Ms. Kirkland that they were going to Fort Walton, and ten or twenty minutes later he reported back that they had changed their minds and were going to Panama City (R.121). At about 11:00 p.m., Hughley reported that he had just gotten back (R.122). Ms. Kirkland asked him to repeat what he had said, but she got no response (R.122). She kept calling him by his number, and continued to receive no response (R. 122).

Soliver Ernest Dolby, a security supervisor with Burns Security, was supervising the main campus of Pensacola Junior College (R.124). At around

11:00 p.m. on February 26, 1983, he was making rounds in the vicinity of College and Tippen (R.125). He did not at that time see a West Hill taxicab parked at that intersection (R.125). If one had been parked there, he did not think he would have noticed it, because there were always cars parked around the handball courts (R.125-26). At about 4:20 a.m., Dolby saw flashing police car lights, and went over and saw a cab (R.125).

Roy Duggan and his wife were returning from a Boy Scout banquet, when they observed a white cab parellel parked on the street near the intersection of College and Tippen (R.128). This was unusual, since cars usually park there at a 90 degree angle, there were no lights on the tennis or racquetball courts, and there was no one around the cab (R.128). Duggan discussed this with his wife (R.128).

Mary Beasley, a cab driver with West Hill, saw Herman Hughley at the airport between 6:00 and 6:30 p.m. on February 26, 1983 (R.130-31). She did not see anyone get into Hughley's cab, since he was behind her (R.131). The following day, Ms. Beasley had to be back at the airport at 4:00 a.m., and on her way there she saw Hughley's cab parked alongside Tippen Avenue (R.131). She backed up and looked in the window (R.131). She could see that somebody was lying across the seat (R.131). She opened the door, and saw that it was Herman Hughley (R.132). Ms. Beasley then called the dispatcher and told them to send somebody over, while she tried to determine what was wrong with Hughley (R.132).

Ms. Beasley further testified that it was ninety-eight miles from Pensacola to Panama City (R.134). As a taxi driver, if you were to drive somebody to Panama City and back, you would collect your money before you leave town (R.134). Ms. Beasley testified that the fare would be at least ninety dollars to Panama City, and the driver could take half fare, an additional

forty-five dollars, coming back, for a total of one hundred thirty-five dollars round trip (R.134-35).

On cross-examination, Ms. Beasley testified that you don't run the meter out of county. She reiterated that if a couple wanted to go to Pensacola Beach, then changed their minds and wanted to go to Fort Walton, and then decided they wanted to go to Panama City, "I would definitely collect the money first, or I don't go" (R.136). Ms. Beasley stated that it is about a two hour trip to Panama City, or about four hours round trip (R.136-37).

Larry Giles of the Pensacola Police Department observed a taxi parked in an unusual location near the racquetball courts at Pensacola Junior College (R.139-40). He shined his light into the vehicle and didn't see anyone (R.140). He would have stopped, but he was on his way to the scene of an accident (R.140). At the accident scene, another officer, Deputy Robinson, mentioned something about a report of an abandoned vehicle, and Giles told him about the cab near the racquetball courts (R.140). Robinson said he'd check (R.141). Giles finished his accident report and was heading toward the abandoned cab when he received a dispatch that a dead person had been found in the cab (R.141). This was confirmed by Deputy Robinson when Giles arrived there (R.141). Giles secured the crime scene, completed an initial report, and turned the investigation over to other officers (R.141-43).

Gary Meisen, an investigator with the Pensacola Police Department, received a dispatch at his home on the morning of February 27, 1983 that a cab driver had been found shot to death inside his cab (R.146). Meisen went to the scene, where he spoke with Officer Giles, and subsequently interviewed several cab drivers, dispatchers, and witnesses at the airport (R.147-48). On Monday morning, he interviewed an individual named Jackie Humel at the police department (R.148). During this interview, it was brought out that the people Ms. Humel saw at the airport, and "quite possibly" the same people that were seen with the cab driver,

were seen on Interstate 10 hitchhiking out of town (R.147). Officers Duck and Williams were sent out to the Interstate, and they returned with a man and woman identified as Ray Sanders and Laura Eutzy (R.149). [Meisen identified appellant as the person who gave the name of Ray Sanders (R.149-50)]. Meisen read them their constitutional rights, and they signed waiver forms (R.150). Appellant signed his form "Ray Sanders" (R.150). Laura Eutzy subsequently gave some statements (R.150). It had been ascertained at the Interstate that Laura Eutzy was in possession of a pistol (R.150). At the police department, she signed a consent to search her purse, and a warrant was obtained as well (R.150-51). Inside the purse was a .25 automatic pistol (R.151). Arrangements were made to send the pistol to Tallahassee for testing (R.151). Later that afternoon, David Williams of the F.D.L.E. called back and informed them that the pistol taken from Laura Eutzy's purse was positively identified as the murder weapon (R.152). Meisen and Sergeant Burns confronted Laura Eutzy with this information, at which time she gave another statement (R.152).

On cross-examination, Officer Meisen testified that when he first talked to Laura Eutzy, she said she didn't arrive in Pensacola until a time which was after the murder of Herman Hughley had occurred (R.153). When she was informed that the gun found in her purse was the murder weapon, she changed her story in some respects (R.153-54).

Jacqueline Humel was an employee with the cleaning crew at Pensacola Airport (R.156). On February 26, 1983, between 6:30 and 7:00 p.m., a person named Mark Miller pointed out to her a man in a cowboy hat with black hair, glasses, and a mustache, and a stout lady with long black hair (R.156-57). The man was wearing jeans and a flannel shirt (R.156-57). Later that night, after she got off work at 11:00 p.m., Ms. Humel saw Herman Hughley parked on Tippen Avenue

facing back toward College Boulevard (R.157). She thought his cab might have broken down or something, but he said no, that he was just waiting on this guy (R.157). Hughley kept looking back over the passenger's door toward a man who was leaning on the door (R.157,160-61). The man then walked over by a tree and stood there, and was still there when she left (R.157). He had a cowboy hat, glasses, and a mustache, and "from what [she] saw" he was the same person she had seen at the airport (R.158).

The following Monday morning, as Ms. Humel was driving to the police station, she saw the same man and woman she had seen at the airport on the Interstate, standing underneath the exit for the bypass (R.158). The man was the same one she had seen at Mr. Hughley's cab (R.158-59). When she got to the police station, she made a composite of the person she saw (R.159-60). Ms. Humel identified appellant as the man she saw at the airport, by the taxicab, and on the Interstate (R.159).

James Richbourg, a crime scene investigator with the Pensacola Police Department, was dispatched to College Boulevard and Tippen in the early morning of February 27, 1983 (R.162). He saw a Plymouth Volare station wagon taxicab at the side of the road with a man slumped over the front seat (R.163). Richbourg processed the crime scene, taking photographs and collecting evidence (R.163). He collected an expended cartridge from the left rear floorboard of the cab (R.163).

Later that morning, Richbourg was present at the autopsy of Herman Hughley, where he observed and photographed a gunshot wound to the right side of Hughley's head (R.164-65). The pathologist, Dr. Potter, removed the bullet (R.165,167-68).

Officer Richbourg further testified that the gun which was removed from Laura Eutzy's purse, along with the bullet and cartridge case, were sent to

Tallahassee for testing (R.169). Seven more rounds of ammunition were removed from the weapon, and there were twelve additional rounds in Laura Eutzy's purse (R.169-70). Eleven of these rounds were wrapped in tissue paper and there was one loose round (R.170). In addition to the pistol and the live cartridges, Laura Eutzy's purse contained the following items: one brush, four ink pens, one piece of paper with writing on it, five earrings, one bottle of perfume, two lipsticks, one bottle of nail glaze, one powdered eyeshadow, one mascara, four lighters, one nail clipper, two nail files, a pair of tweezers, a bottle of skin lotion, a coupon, a key, a box of No-Doz with two tablets, a case of Demulen with eight tablets, a fuse, five barrettes, an eyeglass repair kit, a jewelry case, a pack of gum, two necklaces, a razor case and razor, a St. Christopher medal, a high school medal, two Eastern luggage tags, a travel pamphlet, two gold rings and a silver band, an address case, a calendar, an envelope containing two letters from the Division of Motor Vehicles, seven pictures, a birth certificate, a marriage certificate, a letter from Harmon and Cats (sic), a receipt, a wallet with miscellaneous papers, a driver's license in the name of John Carl Eutzy, two social security cards in the name of Laura Eutzy and one in the name of John Eutzy, another gold ring, and a pamphlet on the RG-26 automatic pistol (R.172-76). Richbourg testified that he could see the pistol in the center of the purse as he opened the purse (R.176-77). There was no problem seeing it (R.177).

Oscar Charles Meadows, a security officer with the Holiday Inn, testified that between 11:00 p.m. and midnight on February 26, 1983 he saw a person who was later identified to him as Laura Eutzy (R.179-80). The following night, Sunday, he saw a person who was identified to him as Raymond Sanders (R.180). Meadows testified that "Sanders" was appellant, William Eutzy (R.180).

On cross-examination, Meadows acknowledged that in deposition he had

stated that the first time he saw either Laura Eutzy or Raymond Sanders was at about 2:00 a.m. on Sunday morning sitting on a loveseat outside Chap's Restaurant (R.181-84). Meadows testified that he could swear to having seen them together outside of Chap's at 2:00 a.m.; he thought he also had seen Laura Eutzy alone around 11:00 p.m. but he could not swear to it (R.183-84, 188). Later on, around 3:00 a.m., Meadows asked them both why they were sitting there, and "Sanders" replied that he was waiting for relatives to pick him up in the morning (R.185).

Meadows stated that appellant, or "Sanders", was wearing jeans and a shirt; the jeans were "possibly" very tight fitting (R.185). Meadows testified that if appellant had a weapon on his person, or in a pocket or in his waistband, he [Meadows] would have seen it (R.185-86). Meadows stated that he did not see a weapon on appellant's person, or in his pockets or waistband (R.186).

On re-direct, Meadows stated that he did not have occasion to see the back of appellant's waistband (R.187).

James Duck, a Pensacola police officer, drove out to the intersection of I-10 and I-110 on February 28, 1983 to check on a person who was supposed to be hitchhiking there (R.189-90). Duck and another officer observed a white male and a white female standing on the concrete embankment under the overpass (R.190). Duck identified appellant as the male (R.190). The officers advised them that they were suspects in a crime which had occurred in the city, patted them down for weapons, and brought them to the police station for questioning (R.191). Duck asked the woman if she had any knives or guns in her purse, and she answered "yes" (R.191). She said she had a weapon in the zipper section of the purse; Dick looked inside and found a gun, which he subsequently turned over to Officer Gary Meisen (R.192). Ap-

pellant did not have a weapon on him (R.192).

Laura Denise Eutzy testified that she and her brother-in-law, William Eutzy, arrived in Pensacola on Friday night, February 25, 1983, having last been in Orlando (R.193-95). They went to the Holiday Inn at University Mall and stayed for about an hour and then walked to the airport (R.195-97). They sat around at the airport all night and all day Saturday (R.197-98). Ms. Eutzy testified that they were on their way to Missouri, where her mother lives, and had no particular purpose in coming to Pensacola (R.196).

Laura Eutzy testified that she bought a gun earlier that month in Slidell, Louisiana, because appellant had recommended that she buy one for protection (R.198). Appellant helped pick it out; he said it was a woman's gun (R.198-99). Ms. Eutzy believed that the gun was in her purse when they arrived in Pensacola (R.199).

Laura Eutzy and appellant remained at the airport until about 7:00 p.m. on Saturday, when they caught a cab in front of the airport (R.199). They were going to go to the Holiday Inn on Pensacola Beach, but then they headed to Fort Walton instead (R.200). Appellant was in the front of the cab and Ms. Eutzy was in the back (R.200). She did not know for a fact whether they ever went to Fort Walton, but she heard appellant mention Panama City (R.200-01). She was asleep in the back seat "off and on" (R.201). She believed the gun was in her possession at that time (R.201). Ms. Eutzy estimated that they were in the cab on the way to Panama City for at least two hours (R.201-02). She also did not know for a fact if they ever actually got to Panama City, but she recalled appellant saying he would like to go back to Pensacola (R.201). When they got back to Pensacola around 11:30 p.m. they went back to the Holiday Inn at University Mall (R.202-03). Appellant told Ms. Eutzy to go on inside, that he would be in in a few minutes (R.202). She went into the rest room,

and when she came back out appellant and the cab driver were gone (R.202-03).

Ms. Eutzy testified that she had no money on her and she believed that appellant had five dollars (R.203). She had no idea how they were going to pay the cab fare; appellant had said he would take care of it (R.203-04). When appellant returned to the hotel about half an hour later, she asked him if he had taken care of it (R.203-04). Appellant said "No", that he had hit the cab driver and knocked him out, but didn't hurt him (R.204). They spent Saturday night at the Holiday Inn, Sunday afternoon at the mall, Sunday night at the Holiday Inn again, and on Monday morning began hitchhiking out of town (R.204). On Monday morning, Ms. Eutzy started to read a Pensacola newspaper (R.204). Appellant tried to take it away from her, and she asked him if there was anything in it he didn't want her to read (R.205). He said "No." (R.205). She got the paper back and saw a headline about the cab driver who was killed (R.205). Appellant said he didn't want to talk about it (R.205). He said he didn't tell her because he didn't want her to worry about it, and he thought she might turn him in (R.205). Ms. Eutzy testified that she would have turned appellant in except he wouldn't let her out of his sight all day until they were picked up by the police officer (R.205-06).

Ms. Eutzy testified that she never saw appellant in possession of her pistol until he gave it back to her on Monday morning (R.206). He told her to come into the arcade in the hotel and open up her purse (R.206). He had her gun tucked into the waistband of his pants, and he put it back into her purse (R.207). Ms. Eutzy testified that she never noticed that the gun was missing, and that she never once opened her purse any time from Saturday night until Monday morning (R.207).

After appellant returned the gun, they went out on the Interstate and started hitchhiking (R.207). About an hour later, the police came and picked

them up (R.207). Ms. Eutzy identified herself as Laura Eutzy and appellant identified himself as Raymond Sanders (R.208). Appellant had previously told Ms. Eutzy that that was the name he was traveling under (R.208). When the police first questioned her, Ms. Eutzy told them her brother-in-law was named Raymond Sanders, because she was afraid of him (R.209). She acknowledged that she told the police officers stories to protect appellant, again attributing this to being scared of him (R.209-10). She later had occasion to change some of the facts she told the police officers (R.210).

Ms. Eutzy testified that she voluntarily testified before the Grand Jury as to her participation in the investigation (R.210). She testified that she did not have anything to do with the murder of Herman Hughley (R.210).

On cross-examination, Laura Eutzy stated that she testified before the Grand Jury on March 15, 1983, wherein she gave basically the same testimony as she had just given at appellant's trial (R.212). On that same date, she was indicted by the Grand Jury for first degree murder (R.212). The murder charge against her was subsequently dropped (apparently because the state did not traverse her motion to dismiss)(R.212-13). Ms. Eutzy was testifying with the understanding that the state would recommend probation on the concealed weapon charge if she did so (R.213).

Ms. Eutzy testified that she believed appellant had five dollars, but did not know for a fact how much money he had, or whether he had any (R.219).

Laura Eutzy further stated that when she arrived in Pensacola, she believed the gun was in her purse (R.220). She gave the following testimony:

> MR. LANG: When was the last time you looked in your purse?
>
> LAURA EUTZY: Before we ever got to Pensacola.
>
> MR. LANG: When was the first time, a week before you got to Pensacola?
>
> LAURA EUTZY: I really couldn't say.

MR. LANG: Now, you have got quite a number of things in your purse, cosmetics, lipstick and all that sort of stuff. You are saying you never went in your purse from before you got to Pensacola until the time you left and got arrested.

LAURA EUTZY: No.

MR. LANG: When was the last time, if you can recall, when you went into your purse? Do you go into your purse when you go into the bathroom?

LAURA EUTZY: No; there is nothing in it for me to really, you know, get into my purse...

MR. LANG: In your purse you had a bottle of perfume, lipstick, nail glaze, eyeshadow, mascara, nail clippers, fingernail file, skin lotion, gun and all these things. You never went into your purse a single time that you recall?

LAURA EUTZY: No.

MR. LANG: You never go into your purse when you go into the bathroom?

LAURA EUTZY: No.

MR. LANG: The gun that has been shown to you as being the gun that you purchased and was in your purse that you carried with you, with the shells, have you had an occasion to hold it and feel it?

LAURA EUTZY: Yes.

MR. LANG: You can tell us that you don't know if that gun was in your purse or not?

LAURA EUTZY: No. The weight, with everything in my purse...there are a lot of weight to my purse.

MR. LANG: And you never, one time, to the best of your knowledge, from Friday or Saturday, all day Saturday, all day Sunday, Sunday night or Monday ever looked in your purse?

LAURA EUTZY: No; I did not.

(R.220-22)

Ms. Eutzy testified that she had her purse with her during the entire time she was in the back seat of the cab (R.222). A couple of times at the airport on Saturday morning, she gave the purse to appellant to hold while she went to the rest room (R.222-23). Ms. Eutzy acknowledged having told the police that the purse had never left her possession (R.223-24).

When she first spoke to the police, Ms. Eutzy did not mention anything about going to Panama City (R.224). In her statement to the police she did not mention appellant's remark about hitting and knocking out the cab driver (R.227). She also told the police that she had seen the gun in appellant's waistband on Saturday night (R.230-31). She said that all the officers coming in and out of the room had her confused, and she had no idea why she would have said that appellant had the gun in his waistband on Saturday night (R. 231).

On re-direct, Laura Eutzy testified that she did not tell the truth to the police in her first two statements because she was trying to protect appellant and to protect herself (R.236). She testified that she told the truth in her third statement to police, in her Grand Jury testimony, and in appellant's trial (R.236). On re-cross, Ms. Eutzy acknowledged that after she testified before the Grand Jury, the Grand Jury returned an indictment against her for first degree murder (R.237).

Dr. James Potter, a pathologist, performed an autopsy on Herman Hughley on February 27, 1983, and concluded that the cause of death was a gunshot wound to the head (R.241).

David Williams, a firearms identification specialist with the F.D.L.E., test fired the firearm recovered from Laura Eutzy's purse, and concluded that the bullet removed from the body of Herman Hughley was fired from that weapon (R.242-43,245-48). He further concluded that the empty cartridge case collected from the floorboard of the taxicab was fired from the same weapon (R.249).

Williams expressed the opinion that the gun was fired from a distance of three to six inches (R.250-51).

After the state rested its case (R.251), the defense moved for judgment of acquittal as to felony murder, on the ground that there was no evidence that the murder was committed in the course of a robbery or an attempted robbery (R.257). The following discussion occurred:

> MR. BERRIGAN [prosecutor]: Your Honor, I think there is sufficient evidence to show there was at least a cab fare of a certain value...
>
> THE COURT: Ninety dollars ($90.00) worth.
>
> MR. BERRIGAN: At least ninety dollars ($90.00) that was due and owing to Mr. Hughley, and that ...I think...
>
> THE COURT: He was found dead, there was nothing on him.
>
> MR. LANG [defense counsel]: Your Honor, there has been no evidence of any robbery or any taking of any money.
>
> THE COURT: Well, let's see; a certain person has been shown to be in the vicinity on or about or near the time of the offense, not too long thereafter, a cabdriver that they had seen alive and taken a trip was...persons described as probably being the same person that was seen at the time where the cabdriver was. The cabdriver was, not too long after that, found dead, and the testimony was that the cabdriver was taking the persons that were described allegedly to Pensacola Beach, Ft. Walton or maybe Panama City or maybe didn't get to Panama City, on a trip that would have been some ninety dollars ($90.00). The cabdriver was found dead with a bullet in the back of his head with absolutely no money from driving the cab, nothing on him, circumstantially robbery.
>
> MR. LANG: Excuse me for interrupting. I don't recall testimony that he didn't have anything on him, nor do I recall any testimony whatsoever that he wasn't paid.
>
> THE COURT: He was found dead, no monies.
>
> MR. LANG: Your Honor, I don't...Do you recall

the testimony...

THE COURT: I overruled the objection.

MR. LANG: Your Honor, I'm saying I don't believe there was any testimony that he did not have any money on his person, nor any evidence that he was robbed of anything, nor any evidence that he did not get paid for taking the trip.

THE COURT: All it takes, according to the law enforcement officers there was no money.

MR. BERRIGAN: There was also testimony that ...Laura Eutzy testified that Mr. Eutzy said he took care of him by knocking him out, and said he only had five dollars ($5.00). And she didn't have any money to pay him. It's at least a question for the Jury.

THE COURT: It's a question for the Jury, I think. Goes to the motive, too. Anything else?

MR. BERRIGAN: No, sir.

(R.257-59)

Following closing arguments of counsel and the trial court's instructions on the law, the jury retired to deliberate (R.269-294). In the midst of its deliberations, the jury submitted the following question to the trial court, "Explain what second degree and third degree murder are?" (R.294-95,374). The court informed the jury that they would recess for the night, and in the morning he would re-instruct them on all degrees of homicide (R.295-96). The next morning, the jury was re-instructed accordingly (R.297-304). The jury returned a verdict finding appellant guilty as charged of first degree murder with premeditation (R.304-05,375). The penalty phase of the proceeding was set for 2:00 o'clock that afternoon (R.309).

In the penalty phase, the state called Jack Shiver, the Escambia County corrections officer who interviewed appellant when he was booked into the jail, and introduced (over defense objection) a certified copy of a 1958 Nebraska

robbery conviction (R.311-21). Defense counsel argued to the jury that the state had established only one of the nine statutory aggravating circumstances; i.e. a previous conviction of a felony involving the use or threat of violence, specifically the 1958 robbery conviction (R.323-24,326). Defense counsel argued that appellant was forty-three years old and, if sentenced to life imprisonment with a twenty-five year mandatory, would be sixty-eight years old before even becoming eligible for parole (R.324). He further asked the jury to consider whether the testimony of Laura Eutzy, who had previously been a co-defendant in the case, would justify putting appellant to death (R.330-31). The prosecutor argued that the state had established three aggravating circumstances, and asked the jury to recommend the death penalty (R.327-29).

After the trial court instructed the jury[1] (R.331-34), the jury retired to deliberate, and returned with a verdict recommending that appellant be sentenced to life imprisonment without possibility of parole for twenty-five years (R.334-35,378). The court set sentencing for 9:00 o'clock the following morning, at which time he rejected the jury's recommendation and imposed a death sentence in its stead (R.335,341,376-77,382). After adjudicating appellant guilty of first degree murder (R.337,380), the trial court announced the following findings:

> Well, the Court finds, based upon the evidence and certified copy of the record of conviction of the Defendant for robbery, in the Defendant's statement to the Corrections' officer or booking officer that the record will substantiate he has been convicted of the crime of robbery on a prior occasion, and the Court finds that the evidence does substantiate the Defendant has been convicted of a prior offense involving use or threat of violence to a person to wit robbery. That is a felony and that is an aggravating circumstance.

---

[1] The penalty phase jury instructions will be set forth in the argument section of this brief under Issue IV.

Based on the evidence in this case and the circumstances, the Court finds the Defendant was, at the time of the homicide, even though the Jury did not so find, was committed while in the course of a robbery. The evidence reflecting that the Defendant and his associate or friend had between them only five dollars ($5.00), and that they took the cab from the [Municipal] Airport to a trip to Pensacola Beach, Ft. Walton, and possibility...possibility of Panama City. The testimony being the cost of the trip, one-way, to Panama City could be as much as ninety dollars ($90.00). Though it could be a negotiable...to a degree, and the Defendant's actions in having the cabdriver return his associate or friend to the University Mall Holiday Inn, and going away with the driver and having at some time taken the death with a .25 caliber pistol from the handbag of the associate or friend was at least manifesting an attempt at that time or formulating the idea of robbery, and which appears to be the [motivating] factor. Of course, in this offense and, in fact, a robbery was committed.

Another aggravating circumstance. The crime for which the Defendant should be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Again, the circumstances in the case bear out the Defendant, at some time prior to the instance, took from his associate or friend a .25 caliber automatic pistol, which was the death weapon, and left his friend or associate at the Holiday Inn at University Mall, and proceeded with the victim to the murder spot, which was some few miles from the Holiday Inn. That the victim was seen by one of the witnesses, a female, the Court can't remember distinctly her name. Seems to me like it was Hamel or Humel or something to that extent. I don't remember the exact name, but it was a female, a young girl. Which based on the evidence was a short time before the victim was killed. The evidence will show that the way in which the victim was killed will indicate no altercation or struggle.

Now, the ballistics expert, having testified that based on the powder residues on the victim's cap band that the death missle was fired from the weapon just a few inches from the point of entry. And the pathologist's report was that the victim was shot in the back of the head on the right side.

The Court's finding bears out a term for which the Defendant is to be sentenced. Was committed in a

> cold, calculated and premeditated manner without any pretense of moral or legal justification. The Court therefore finds there are three aggravating circumstances in this case, while there were not mitigating circumstances at the penalty phase nor any evidence of circumstances during the trial of the substantive phase of this case of any mitigating circumstances.
>
> Based upon these findings, the Court feels this Defendant has committed First Degree Capital Murder, and it's the sentence of the Court, in the judgment of the law, that this Defendant shall be handed the capital punishment sentence. He should be taken to [Raiford] and be executed at a time to be determined by the Governor of the State of Florida by electrocution.
>
> (R.338-41, see R.376-77)

IV ARGUMENT

ISSUE I

> THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT TO DEATH, OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT, IN VIOLATION OF THE PRINCIPLES ESTABLISHED IN TEDDER V. STATE, 322 So.2d 908 (Fla. 1975) AND SUBSEQUENT DECISIONS, AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has repeatedly held that a jury's recommendation as to the appropriate penalty reflects the conscience of the community and is entitled to great weight. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Provence v. State, 337 So.2d 783, 787 (Fla. 1976); McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). In order for a trial court's override of a jury's recommendation of life imprisonment to be sustained on appeal, the reasons for his rejection of the jury's recommendation must be compelling ones. Burch v. State, 343 So.2d 831, 834 (Fla. 1977); Phippen v. State, 389 So.2d 991, 994 (Fla. 1980). See Thompson v. State, 328 So.2d 1, 5 (Fla. 1976)(trial court must express more concise

and particular reasons to overrule jury life recommendation and impose death sentence than to overrule death recommendation and impose life sentence); Smith v. State, 403 So.2d 933, 935 (Fla. 1981)(trial court failed to articulate any reason for rejecting jury's life recommendation, and failed to demonstrate how reasonable men would not differ on matter of sentencing). The trial court may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that virtually no reasonable person could differ". Tedder v. State, supra, at 910; Provence v. State, supra, at 787; McCampbell v. State, supra, at 1076; Herzog v. State, __So.2d__ (Fla. 1983)(case no. 61,513, opinion filed September 22, 1983)(1983 FLW 383, 386). Conversely, where reasonable persons can differ over the fate of a capital defendant, it is the jury's determination, and not the judge's, which must be given effect. Provence v. State, supra, at 787. This is true even if the judge's findings as to the aggravating and mitigating circumstances are also reasonable or supported by the evidence; where there is any view of the evidence from which the jury could reasonably have recommended life, the trial court is not free to substitute his own judgment to override it. See Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Chambers v. State, 339 So.2d 204, 208 (Fla. 1976)(England, J., concurring). "When there is disagreement between the jury and judge after both have evaluated the same data,...the jury's recommendation should generally prevail". Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977); see Gilvin v. State, supra; Cannady v. State, supra; Chambers v. State, supra (England, J. concurring).

> Where a jury and a trial judge reach contrary conclusions because the facts derive from conflicting evidence, or where they have struck a different balance between aggravating and mitigating circumstances which both have been given an opportunity to evaluate, the jury recommendation should be fol-

> lowed because that body has been assigned by history and statute the responsibility to discern truth and mete out justice.
>
> Chambers v. State, supra, at 208-09 (England, J. concurring)

Florida's capital sentencing procedure "is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973); Alvord v. State, 322 So.2d 533, 540 (Fla. 1975); McCaskill v. State, 344 So.2d 1276 (Fla. 1977). While a sentence of death is normally presumed in the situation where there are aggravating circumstances and no mitigating circumstances [State v. Dixon, supra, at 9], a jury's recommendation of life militates against such a presumption. Williams v. State, 386 So.2d 538, 543 (Fla. 1980). This Court has recognized that juries, under Florida's death penalty statute, "have been reluctant to recommend the imposition of the death penalty in all but the most aggravated cases...". McCaskill v. State, supra, at 1280. Thus, a jury's recommendation of life imprisonment is reasonable if it may have been based on statutory or non-statutory mitigating circumstances (even if the trial court may not have been compelled as a matter of law to find them) [see e.g. Welty v. State, 402 So.2d 1159, 1164-65 (Fla. 1981); Gilvin v. State, supra, at 999; Cannady v. State, supra, at 731; Washington v. State, 432 So.2d 44 (Fla. 1983)]; and a jury's recommendation of life imprisonment is also reasonable if it may have been based on a determination that the aggravating circumstances are not of such an overwhelming nature as to set the crime apart from the norm of capital murders and as to require imposition of the death penalty [see e.g. Tedder v. State, supra; Provence v. State, supra; Williams v. State, supra; Phippen

v. State, supra; Webb v. State, 433 So.2d 496 (Fla. 1983); Richardson v. State, supra.

The jury's decision to recommend life imprisonment rather than the death penalty for William Eutzy in the instant case was a reasonable one. The trial court found three aggravating circumstances, two of which appellant contends were invalid as a matter of law [see Issues II and III, infra.] But even assuming arguendo that the evidence was legally sufficient to sustain the trial court's findings that the crime was committed in the course of a robbery and in a cold, calculated, and premeditated manner, the fact remains that the jury could easily and reasonably have concluded that these aggravating circumstances were not proven beyond a reasonable doubt. The state's highly speculative theory was that appellant killed Herman Hughley to avoid paying for the cab ride, and that this constituted a "robbery." There was no evidence as to whether or not Hughley habitually carried cash with him, and no evidence as to whether Hughley had any money on him when he was found dead on the seat of the cab. Laura Eutzy testified that she believed appellant had five dollars (R.203,219), but she conceded that she didn't know for a fact how much money he had, or whether he had any (R.219). There was no evidence as to whether appellant had any money on him at the time he was arrested. The state called a witness, Mary Beasley, a cabdriver with the same company as Herman Hughley, who testified emphatically, both on re-direct and re-cross, that for an out-of-county ride as far as Panama City, you would definitely collect your money up front, or you wouldn't go (R.134, 136). Yet, if one believes Laura Eutzy's testimony that she didn't think appellant had more than five dollars, and since she certainly did not testify that the cab driver was paid, or even that there was any discussion about the fare, then it appears that Herman Hughley, inexplicably, drove these people on a pointless four-hour cab ride to nowhere and back, after appellant twice changed his

mind about where he wanted to go, without asking to be paid in advance. Since Laura Eutzy testified that she had her purse (which was filled with cosmetics and grooming utensils, medicine tablets, identification papers, and other standard equipment, and which she claimed never to have occasion to open) in her possession the entire time she was in the back seat of the cab, but that she had given the purse to appellant to hold a couple of times at the airport when she went to the bathroom, then it would appear, according to the state's scenario, that appellant snuck the gun out of the purse at the airport, before they ever got into Herman Hughley's taxi. So the "cold, calculated, and premeditated" plan which appellant devised, in the state's view, would run something like this -- "I am going to sneak this gun out of my sister-in-law's purse, which she will not notice because she never opens it. We will then spend four hours in a taxicab riding to Panama City and back for no apparent reason. Then, since I know (even before getting into the cab in the first place) that I don't have anywhere near enough money to pay for the ride, I will have to kill the cab driver with the gun, and then I will give it back to my sister-in-law." The only evidence which would even tend to support the state's theory that the motive for the murder was to avoid paying the cab driver was Laura Eutzy's testimony (which she neglected to mention in her recorded statement to the police) that appellant had said he would "take care of" the fare, and that he told her when he returned that he had hit the driver and knocked him out; along with her "belief", which she admittedly did not know for a fact, that he only had five dollars. Laura Eutzy's testimony was thoroughly impeached in many respects; there were numerous inconsistencies between her various statements and her trial testimony, including several outright lies, which she attributed to being "scared" or "confused"; much of her testimony, particularly as to her claim of being unaware that the gun was missing from her purse, might have been considered by the

jury as highly implausible; and perhaps most significantly, her testimony could easily have been viewed as self-serving. She had originally been indicted for first-degree murder by the Grand Jury which had heard essentially the same testimony she gave at trial; the murder charge was dropped when the state apparently declined to traverse her motion to dismiss (see R.212-13); and she was testifying with the understanding that the state would recommend probation on the concealed weapon charge. It is entirely possible, and would be entirely reasonable, that the jury may have taken Laura Eutzy's testimony with a grain of salt, and still convicted appellant of first degree premeditated murder based primarily on David Williams' (of the F.D.L.E) testimony that the gun taken from Laura Eutzy's purse was the murder weapon, combined with Jackie Humel's testimony about having seen appellant and Herman Hughley at the cab near College and Tippen shortly before the murder would have taken place. The jury may or may not have believed Laura Eutzy's testimony, which was supported to some extent by that of the Holiday Inn security supervisor Meadows, that she was not present at the time of the actual shooting. The jury may well have believed that Laura Eutzy was far more deeply involved in the murder than she was willing to admit, and this would not have been inconsistent with their verdict finding appellant guilty of first degree murder. The main point is that between 1) the many gaps in the state's circumstantial evidence as to motive, 2) the various inconsistencies, implausibilities, and self-serving aspects of Laura Eutzy's testimony, 3) the illogic of the scenario suggested by the state, and 4) the fact that killing someone to avoid paying a debt (even assuming arguendo that such a motive were proven) is not a robbery [see Issue III, infra], the jury could very reasonably have concluded that the aggravating circumstances of "in the course of a robbery" and "in a cold, calculated, and premeditated manner" were not proven beyond a reasonable doubt. Under Florida law, any aggra-

vating circumstance must be established beyond a reasonable doubt before it can even be considered by the jury in weighing its penalty verdict [see State v. Dixon, supra; Phippen v. State, supra, Demps v. State, 395 So.2d 501 (Fla. 1981)], and the jury was properly so instructed (R.332). Thus, the jury could reasonably have found (as defense counsel argued) that the state had proven only one aggravating circumstance, i.e., a prior conviction involving the use or threat of violence. Moreover, the jury might reasonably have attached relatively little weight to this aggravating circumstance, in view of the fact that the Nebraska robbery conviction took place twenty-five years earlier, in 1958, when appellant was only eighteen years old. Further, the jury might reasonably have looked at the aggravating circumstances about which they were instructed which were clearly not present -- notably the aggravating factor of a crime committed in an especially heinous, atrocious, or cruel manner -- and concluded that the crime in the present case was not outside the norm of capital murders, and that, under the totality of the circumstances, imposition of the death penalty was not required. See State v. Dixon, supra; Provence v. State, supra; McCaskill v. State, supra.

The importance of the presence or absence of the "especially heinous, atrocious, or cruel" circumstance to the question of whether the jury's life recommendation, or the trial court's override and death sentence, will be sustained by this Court cannot be overstated. Contrast Buford v. State, 403 So.2d 943,954 (Fla. 1981)(recognizing that the trial court in that case, and in previous "life override" cases in which imposition of the death penalty was affirmed by this Court, was "unquestionably...swayed by the extreme heinousness and atrociousness of the crimes") with Tedder v. State, supra, at 910; Williams v. State, supra, at 543; Odom v. State, 403 So.2d 936,942 (Fla. 1981); McCray v. State, 416 So.2d 804,807 (Fla. 1982); and Herzog v. State, supra, (in each of which this Court

held that the trial court's finding of "especially heinous, atrocious, or cruel" was invalid, and in each of which the death penalty was reversed and the case remanded with instructions to impose a life sentence in accordance with the jury's recommendation). The significance of the "especially heinous, atrocious, or cruel" circumstance to the propriety of a trial court's "life override" is even more clearly illustrated by the following: of the 57 life override cases which have been decided to date by this Court, the death sentence has been approved in 19 of them.[2] Of those 19 cases, the "especially heinous, atrocious, or cruel" circumstance was found by the trial court in 18 of them. Of the latter 18 cases, this Court upheld the finding of "especially heinous, atrocious, or cruel" in 17 of them, and possibly all 18. [In Ziegler v. State, supra, in which four people were murdered, the trial court found the murders of Eunice Ziegler and Charles Mays to be especially heinous, atrocious, and evil; this Court determined that under the totality of the circumstances of this mass murder it was "immaterial" whether this finding was applicable to the murder of

---

2 The cases in which this Court has affirmed the death penalty after the trial court's rejection of the jury's life recommendation are:

1. Sawyer v. State, 313 So.2d 680 (Fla. 1975)(February 19, 1975)
2. Gardner v. State, 313 So.2d 675 (Fla. 1975)(February 26, 1975)
3. Douglas v. State, 328 So.2d 18 (Fla. 1976)
4. Barclay v. State (Barclay), 343 So.2d 1266 (Fla. 1977)
5. Barclay v. State (Dougan), 343 So.2d 1266 (Fla. 1977)
6. Hoy v. State, 353 So.2d 826 (Fla. 1977)
7. Dobbert v. State, 375 So.2d 1069 (Fla. 1979)
8. Johnson v. State, 393 So.2d 1069 (Fla. 1980)
9. McCrae v. State, 395 So.2d 1145 (Fla. 1980)
10. Ziegler v. State, 402 So.2d 365 (Fla. 1981)
11. White v. State, 403 So.2d 331 (Fla. 1981)
12. Buford v. State, 403 So.2d 943 (Fla. 1981)
13. Miller v. State, 415 So.2d 1262 (Fla. 1982)
14. Stevens v. State, 419 So.2d 1058 (Fla. 1982)
15. Bolender v. State, 422 So.2d 833 (Fla. 1982)
16. Porter v. State, 429 So.2d 293 (Fla. 1983)
17. Spaziano v. State, 433 So.2d 508 (Fla. 1983)
18. Engle v. State, __So.2d__ (Fla. 1983)(case no. 57,708)(life override approved but remanded on other grounds)
19. Routly v. State, __So.2d__ (Fla. 1983)(case no. 60,066)

Eunice Ziegler, and expressed no opinion as to its applicability to the murder of Mays]. The only "life override" case which has been affirmed by this Court in the absence of a finding that the murder was especially heinous, atrocious, or cruel was Sawyer v. State, supra. Sawyer was the earliest life override case in which this Court affirmed the death penalty. Anthony Sawyer's sentence was subsequently mitigated to life imprisonment by the trial judge. And in his concurring opinion in Witt v. State, 387 So.2d 922,931 (Fla. 1980), Justice England observed that if Sawyer's case were reviewed under the standards subseqeuntly developed, his death sentence would in all probability be vacated. All 18 subsequent decisions (with the possible exception of Ziegler) in which this Court approved a life override involved murders which were especially heinous, atrocious, or cruel -- murders "accompanied by such additional acts as to set the crimes apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, supra, at 9; Lewis v. State, 398 So.2d 432,438 (Fla. 1981). The cases in which the death penalty was affirmed notwithstanding the jury's recommendation of life virtually always contained one or more of the following factors which go into the "heinous, atrocious, or cruel" equation -- sexual assault [see Gardner, Douglas, Hoy, McCrae, Miller, Buford, Stevens, and Engle]; children or elderly people as victims [see Dobbert, McCrae, Buford, and Porter]; extreme physical brutality or torture [see Gardner, Dobbert, McCrae, Miller, Stevens. Bolender, Spaziano, and Engle]; and extreme mental anguish in anticipation of death [see Barclay, Hoy, White, Buford, and Routly]. Several of the cases involved multiple murders [see Hoy, Ziegler, White, Bolender, and Porter].

In the present case, the state did not even attempt to argue to the jury or the trial court the applicability of the "especially heinous, atrocious, or cruel" circumstance, nor could it have. Herman Hughley died from a single gun-

shot wound to the head, entering slightly behind and above the ear, fired from close range (R.241,250-51). There was no evidence that death was anything other than instantaneous. There was no evidence of any altercation or struggle. The victim was not bound. There was no evidence that he was aware that he was going to be killed, nor was there any evidence that he even knew that appellant was armed. In short, and as reprehensible as any premeditated murder is [see Williams v. State, supra, at 543], the state presentented nothing to set this crime apart from the norm of capital felonies. See State v. Dixon, supra; Williams v. State, supra; Lewis v. State, supra. This Court has held that an instantaneous death caused by a gunshot is not ordinarily an "especially heinous, atrocious, or cruel" killing. Cooper v. State, 336 So.2d 1133 (Fla. 1976); Williams v. State, supra, at 543, Lewis v. State, supra, at 438; Odom v. State, 403 So.2d 936,942 (Fla. 1981); McCray v. State, 416 So.2d 840,807 (Fla. 1982). See also Simmons v. State, 419 So.2d 316,318-19 (Fla. 1982) (instantaneous or nearly instantaneous death caused by hatchet blows was not "especially heinous, atrocious, or cruel," in absence of proof that victim was aware he was going to be struck). While it is true that an instantaneous death can nevertheless be especially heinous, atrocious, or cruel where the victim is subjected to prolonged agony over the prospect of his impending death [see e.g. White v. State, supra; Routly v. State, supra,] there was no evidence in the instant case to support a conclusion that Herman Hughley was aware that he was going to be shot (even if the trial court had made such a finding, which he did not).

In addition to the reasonable likelihood that the jury may have found only one aggravating circumstance (prior violent felony conviction), and may have determined that this crime was not outside the norm of capital murders so as to require imposition of the death penalty, the jury may also have taken into

consideration appellant's age (forty-three, which, as defense counsel pointed out, would mean that he would not even become eligible for parole until he was nearly seventy if a life sentence were imposed), and the fact that Laura Eutzy, appellant's sister-in-law, former co-defendant on the first degree murder charge, and chief accuser, was unlikely to receive anything more than probation. In State v. Dixon, supra, at 10, this Court recognized that any age, "whether youthful, middle aged, or aged" may be considered by the jury in mitigation in the penalty phase of a capital trial. This recognition comports with the United States Supreme Court's holding in Lockett v. Ohio, 438 U. S. 586 (1978) that any aspect of the character of the defendant or the circumstances of the offense must be available for consideration as a possible mitigating factor. The jury in present case obviously believed that a life sentence which ensures that appellant will remain incarcerated at least until age sixty-eight is, under the totality of the circumstances, the appropriate sentence, and in view of the fact that this murder was not accompanied by additional acts to set it beyond the norm of first-degree murders, it cannot be said that the jury's view of the evidence was "unreasonable". With regard to Laura Eutzy, as previously discussed, the jury could quite reasonably have believed that her role in the murder of Herman Hughley was far more culpable than her self-serving testimony would indicate. If the jury believed the state's other witnesses, notably David Williams and Jackie Humel, it could without inconsistency have convicted appellant of first degree premeditated murder even without giving much credence to Laura Eutzy's testimony about appellant's "motive" of avoiding the cab fare and about her blissful unawareness that the gun had been removed from her purse. [The jury's request during its deliberations for reinstructions on second and third degree murder would also tend to indicate that they were not swallowing Laura Eutzy's testimony whole]. The jury was aware that Laura Eutzy

had been indicted by the Grand Jury for first degree murder, and that the state had apparently allowed the charge against her to be dropped. The jury was aware that she was testifying with the understanding that the state would recommend probation on the charge of carrying a concealed weapon; the murder weapon which she had in her purse when she and appellant were arrested. It is likely that the jury had problems with her testimony that she went for days without ever opening her purse,* with the fact that she told the police in her recorded statement that she had seen the gun in appellant's waistband on Saturday night, and with numerous other aspects of her testimony. The jury could reasonably have been reluctant to recommend the death penalty when the evidence regarding the circumstances of the murder was so heavily dependent on the word of someone like Laura Eutzy. See also McCampbell v. State, supra, Herzog v. State, supra (recognizing that the disposition of co-defendants' cases may be a consideration supporting a jury's life recommendation).

It should also be emphasized that the trial court's sentencing order was not based on any information which was not available to the jury [see Brown v. State, 367 So.2d 616,625 (Fla. 1979); Smith v. State, supra; Herzog v. State, supra, 1983 FLW at 386], nor is there any indication that the jury was misled or unduly influenced by emotion [see McKennon v. State, 403 So.2d 389, 391 (Fla. 1981); Cannady v. State, supra; Herzog v. State, supra, 1983 FLW at 386]. Contrast White v. State, supra; Porter v. State, supra; Spaziano v. State, supra. The trial court expressed no compelling reasons for deviating from the jury's recommendation, nor were there any. Appellant's death sentence should be reversed and the case remanded with instructions to impose a life sentence without possibility of parole for twenty-five years, in accordance with the jury's recommendation.

---

* Particularly in light of the testimony of the airport police officer Ferguson that Laura Eutzy produced a Louisiana drivers license from her purse (see R. 107, 115).

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

The aggravating circumstance set forth in Fla.Stat. §921.141(5)(i), that "[t]he capital felony was a homicide and was committed in a cold, calculated, and premediatated manner without any pretense of moral or legal justification", requires proof by the state of a heightened degree of deliberation, above and beyond what is necessary to prove the element of premeditation for a conviction of first degree murder. Jent v. State, 408 So.2d 1024,1032 (Fla. 1981); Cannady v. State, supra, Washington v. State, 432 So.2d 44,48 (Fla. 1983); Richardson v. State, supra; Herzog v. State, supra. In Issue I, supra, appellant argued, inter alia, that the jury could reasonably have concluded that this circumstance was not proven beyond a reasonable doubt. For the reasons previously expressed, appellant further submits that the evidence was insufficient to support the trial court's finding that the murder was committed in a "cold, calculated, and premeditated manner." There are simply too many gaps in the circumstantial evidence as to motive to demonstrate beyond a reasonable doubt why this murder was committed, mush less when appellant decided to commit it. The location of the single bullet wound is circumstantial proof of premeditation, but it is not sufficient to prove the "premeditation-plus" required to establish the "cold, calculated, and premeditated" aggravating circumstance. See Cannady v. State, supra; Washington v. State, supra. The state's hypothesis that appellant had formulated a plan as early as Saturday afternoon in the airport to secretly remove his sister-in-law's gun from her purse, take a pointless four-hour cab ride to Panama City and back, and shoot the cab driver in lieu of paying the fare, would be such bizarre behavior that some solid proof

should be required before assuming that that was appellant's motive.

Appellant wishes to reiterate, however, that even assuming arguendo that this Court concludes that the trial court's finding of the "cold, calculated, and premeditated" circumstance was supported by the evidence, that is a far cry from saying that the jury was compelled, as a matter of law or at the risk of being labeled "unreasonable", to find it. Possibly the judge and jury assessed Laura Eutzy's credibility differently, and reached differing conclusions as to the weight to be given her version of the circumstances of the crime. If so, it is the jury's determination which should prevail. See Gilvin v. State, supra, Cannady v. State, supra, at 731; Chambers v. State, supra (England, J. concurring).

ISSUE III

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED IN THE COURSE OF A ROBBERY.

Appellant would again emphasize that, this being a "life override" case, that the crucial question here is whether the jury was required as a matter of law or as a matter of reason to find that this murder was committed in the course of a robbery. The trial court in his findings of fact stated, "That based upon the evidence in this case and the circumstances the Court finds the defendant was at the time of the homicide, even though the jury did not so find[3], was committed while in the course of a robbery..." (R.376). As

[3] The verdict form given to the jury included the options of first degree murder with premeditation and first degree felony murder, as well as lesser degrees of homicide and not guilty (R.375). The jury was instructed to check only one blank (R.294). Thus the jury's guilty verdict of premeditated murder apparently does not conclusively establish that they found that the murder was not committed in the course of a robbery. However, in view of their life recommendation, in view of the weakness of the evidence as to motive and the implausibility of the state's hypothesis, and especially since (as will be argued infra) a killing to avoid a debt is not a robbery, it is both likely and reasonable that the jury found neither felony murder nor this aggravating circumstance.

previously discussed, when there is disagreement between the judge and jury after both have evaluated the same data, it is the jury's recommendation which should generally prevail. Barclay v. State, supra; Gilvin v. State, supra; Cannady v. State, supra; Chambers v. State, supra (England, J. concurring).

Appellant further submits that the evidence was legally insufficient to support the trial court's finding that the murder was committed in the course of a robbery. First, the state failed to prove beyond a reasonable doubt that appellant's motive for committing this murder was to avoid payment of the cab fare [see Issue I and II, supra]. But even assuming arguendo that such motivation were proven, the facts would not fall within the definition of a robbery. "[Robbery] means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear." Fla.Stat. §812.13. In order to constitute a robbery, there must be a taking or asportation. Johnson v. State, supra. The force, violence, or intimidation must precede or be contemporaneous with the taking of the property. Monstdoca v. State, 84 Fla. 82,86,93 So. 157 (1922); McCloud v. State, 335 So.2d 257,258 (Fla. 1976). In Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983), the majority of the Third District Court of Appeal panel concluded that, under §812.13(3), force or threat of force is considered to be contemporaneous with the taking if that force or threat of force is used to overcome a victim's resistance to an attempted asportation. The court said:

> We hold that where an offender gains possession of property of another without force and with intent to deprive the true owner of its use, but the victim gives instant and uninterrupted protest or pursuit in an effort to thwart a taking, and the offender then assaults the victim in order to complete a taking of the property and make good an escape, the offense is robbery.
>
> Stufflebean v. State, supra, at 246.

In Stufflebean, the victim was painting in a park with a cassette radio beside him. The defendant and a companion took the radio and fled, with the victim in pursuit. When the victim caught up with him, the defendant brandished a knife. The victim backed away, and demanded the return of the radio, which the defendant refused. Judge Baskin, dissenting, took the position that the threat of force used to retain the property in the face of the victim's resistance does not constitute a robbery under Florida's statute, and noted that subsection (3), relied on by the majority, relates only to the sentencing portion of the robbery statute and not to the definition of the crime.

Regardless of whether the majority or dissenting view in Stufflebean ultimately prevails, the state's hypothesis in the instant case (even if it had been proven) would not support a finding that Herman Hughley was killed in the course of a robbery. Obviously the state did not prove that any money was taken from Hughley, since there was no evidence as to whether he had any cash prior to picking up appellant and Laura Eutzy, no evidence as to whether he habitually carried any cash, and no evidence as to whether there was any money on his person when he was found dead in the cab. Laura Eutzy believed that appellant had only five dollars, but she did not know for a fact whether he had any money, or how much. There was no evidence as to whether appellant had any money when he was arrested. So, if there was a "taking" of property in this case, it must have been the taking of a service provided by Herman Hughley, i.e., the cab ride to Panama City and back. The state would first have needed to prove that appellant intended to deprive Hughley of his property by not paying him for the ride. There was no proof of such intent. Laura Eutzy admitted that she did not know how much money appellant might have had. Mary Beasley testified that the round-trip to Panana City would probably cost about $135, but she also testified that the cab drivers are supposed to collect

the money before leaving town on such a long trip. Yet Herman Hughley evidently did not do so. There was no evidence that there was any discussion between Hughley and appellant about the fare. Thus, the state's assumption that appellant intended from the beginning to deprive Herman Hughley of the cab fare, like the state's assumption that that is why he shot him, is based on speculation rather than proof.

Further, there was no evidence that the "taking" of the cab ride was accomplished by force, violence, assault, or putting in fear. The only force or intimidation established by the evidence was the shooting of Hughley, which occurred after the drive to Panama City and back, and after (asssuming the jury believed her testimony on this point) Laura Eutzy was dropped off at the Holiday Inn. So the only conceivable theory under which a robbery could have occurred on this case would be under the analysis employed by the majority in Stufflebean, if the force was used in an effort to retain the property (i.e., the unpaid-for cab ride) as against the victim's effort to get it back. However, even assuming that the state had proven that appellant had formulated the intent not to pay for the ride, there is no evidence that Herman Hughley was aware that he was not going to be paid. In People v. Clark, 317 NW2d 664 (Mich.App.1982), the following facts were held not to constitute a robbery. While the victim, a truck driver, was inside a store being paid for a delivery, the defendant entered his truck and took $400 from a safe. The truck driver came back to the parking lot and saw the defendant walking away from his truck. The driver continued walking toward his truck, whereupon the defendant brandished a crowbar and said "Come any closer and I'll bash your brains out". The defendant turned and ran, and was chased by the driver. At that point in time, the driver was unaware that anything had been taken from his truck. The Michigan Court of Appeals concluded that, while there may have been

a burglary of a vehicle, a theft of money, and a felonious assault against the truck driver, these acts did not amount to a robbery:

> In this case it does not appear that the victim was in such a situation where, but for violence or fear, he could have prevented his loss, because he did not have knowledge of the loss until after the defendant had escaped. What the defendant's assault on the complainant did in this case was to prevent complainant's opportunity to discover the loss before the defendant escaped.
>
> People v. Clark, supra, at 666

Since there was no evidence that Herman Hughley was aware that he was not going to be paid for the cab ride, there is also no evidence that Hughley made any attempt to thwart any effort by appellant to "retain" the benefit of the ride without paying for it. See Stufflebean v. State, supra. There is no evidence that Hughley ever demanded payment from appellant, no evidence that there were even any discussions or negotiations about payment. Therefore, even assuming arguendo that the state were correct in hypothesizing that appellant's subjective motivation for shooting Herman Hughley was to avoid having to pay for the cab ride, that is not a robbery. The evidence does not establish that the force preceded or was contemporaneous with the "taking", that the force was used to overcome any resistance by the victim to an attempted asportation, or that the victim even knew that his property had been taken. Montsdoca v. State, supra; Stufflebean v. State, supra; People v. Clark, supra. Not only could the jury have reasonably declined to find that this murder was committed in the course of a robbery [see Issue I, supra], but the trial court's contrary finding that it was committed in the course of a robbery is unsupported by the evidence and invalid as a matter of law.

ISSUE IV

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY IN THE PENALTY PHASE WERE CONSTITUTIONALLY INADEQUATE.

The trial court's instructions to the jury in the penalty phase of this trial read as follows:

> Ladies and gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for this crime of First Degree Murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist, to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence that you have heard and that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to the following that are established by the evidence. The Defendant has previously been convicted of another offense or a felony involving the use or threat of violence to some other person. The crime of robbery is a felony involving the use or threat of violence to another person. The crime for which the Defendant is to be sentenced was committed while he was engaged in the crime of robbery. And the crime for which the Defendant is to be sentenced was committed in the cold, calculated and premeditated manner, without any pretense or moral or legal justification.
>
> Each aggravating circumstance must be established beyond a reasonable doubt before it can be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider

all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. Mitigating circumstances need not be proved beyond a reasonable doubt by the Defendant if you are reasonably convinced that mitigating circumstances exist; you may consider it as established.

The sentence you recommend to the Court must be based upon the facts, as you find them, from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations. In these proceedings it is not necessary that the advisory sentence of the Jury be unanimous. Your decision may be made by a majority of the Jury.

The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment, in this case, can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is a stake, and bring to bear your best judgment in reaching your advisory sentence. If a majority of the Jury determines that the Defendant should be sentenced to death, your advisory sentence will be a majority of the Jury by a vote of whatever number advise and recommend to the Court that it imposed the death penalty upon the Defendant. On the other hand, if by six or more votes the Jury determines that the Defendant should not be sentenced to death, your advisory sentence will be...the Jury advises and recommends to the Court that it imposes a sentence of life imprisonment upon the Defendant without possibility of parole for twenty-five years.

You will now be able to retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to this Court, that form of recommendation should be signed by your foreman and returned to the Court.

As you will note, I have used mitigating circumstances and have eluded there have been no mitigating cir-

> cumstances in these proceedings. I want to make one word of caution. You are to take into consideration the entire proceedings into your deliberation, and in those deliberations, if you find any mitigating circumstances you may consider them also. That's why I used it in this phase of the proceedings.

In these instructions, the trial court essentially instructed the jury that three aggravating circumstances were established by the evidence, and told them what they were. [Two of these circumstances, "in the course of a robbery" and "cold, calculated, and premeditated", are questionable at best -- see Issues I, II, and III, supra]. He then, for all intents and purposes, instructed them that there were no mitigating circumstances. The judge told the jury they could consider any mitigating circumstances which may have been established in the guilt phase, but he did not tell them what a mitigating circumstance is, and did not mention any of the seven mitigating circumstances enumerated in Fla.Stat.§921.141(6). Among the statutory mitigating circumstances of which the jury was not instructed is the age of the defendant. This circumstance was argued by defense counsel as a consideration in support of a life sentence, i.e. that appellant would be nearly seventy years old before even becoming eligible for parole.

Notwithstanding the apparent lack of an objection, the trial court's instructions in the penalty phase were wholly inadequate to inform the jury about the nature and function of mitigating circumstances, and were therefore constitutionally deficient. See Chenault v. Stynchcombe, 581 F.2d 444 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983).

The state may contend that any error in the penalty phase jury instructions is rendered harmless by the fact that the jury recommended life imprisonment, and appellant would agree, but only if the jury's life recommendation is given

effect by this Court. If, on the other hand, the trial court's override is sustained, then to say that the inadequate jury instructions were "harmless" would be tantamount to saying that the jury doesn't need to be properly instructed, because its recommendation is meaningless anyway. That is not the case. As this Court observed in Richardson v. State, supra:

> It is a defendant's right to have a jury advisory opinion, and absent a voluntary and intelligent waiver of that right, a judge may not frustrate this important jury function. Lamadline v. State, 303 So.2d 17 (Fla. 1974). We cannot condone a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors after all parties have agreed on the appropriate evidence to be considered.

ISSUE V

TO THE EXTENT THAT IT AUTHORIZES THE TRIAL JUDGE TO OVERRIDE A JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND IMPOSE A DEATH SENTENCE IN ITS STEAD, FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL AS APPLIED.

This Court, relying on the United States Supreme Court's approval of Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242 (1976), has rejected constitutional challenges to the trial court's statutory authority to override a jury's life recommendation. See e.g. Douglas v. State, 373 So.2d 895 (Fla. 1979); Johnson v. State, supra; Porter v. State, supra, Routly v. State, supra. It is appellant's position that the assumption which underlies all of the decisions upholding the constitutionality of the override procedure -- i.e. that the override is designed as a safeguard against unreasoned imposition of the death penalty -- has proven to be faulty. The override option, in practice, is not a safeguard but a gauntlet; a "fall-back" opportunity for the state to persuade the judge to impose the death penalty, in the event that it fails to persuade the jury. For this reason, appellant

submits that the trial court's authority to override a jury's life recommendation is, as applied, violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

In Dobbert v. Florida, 432 U.S. 282 (1977) the defendant contended that application of Florida's post-Furman death penalty statute in his case violated the prohibition against ex post facto laws, since the crimes of which he was convicted occurred before the enactment of the statute. He claimed, inter alia, that at the time the offenses were committed, the trial court was without authority to override the jury's recommendation of mercy, while under the new statute a life recommendation could be (and in his case, was) overridden. The Supreme Court held that the ex post facto clause was inapplicable, characterizing the changes in the law as procedural and "on the whole ameliorative". Dobbert v. Florida, supra, 432 U.S. at 292. Referring to the Tedder standard, the Court said:

> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic, absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of Tedder. Hence, defendants are not significantly disadvantaged vis-a-vis the recommendation of life by the jury; on the other hand, unlike the old statute, a jury determination of death is not binding. Under the new statute, defendants have a second chance for life with the trial judge and a third, if necessary, with the Florida Supreme Court. No such protection was afforded by the old statute.
>
> Dobbert v. Florida, supra, 432 U.S. at 295-96

In State v. Dixon, supra, the case in which this Court upheld the constitutionality of Florida's death penalty statute, it said:

> It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found

> guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty -- each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

Specifically addressing the third of these safeguards, the trial court's authority to reject the jury's recommendation, the Court said:

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.
>
> State v. Dixon, supra, at 8.

In Thompson v. State, supra, the Court wrote:

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment.

Even before the Furman decision, the possibility of a two-step jury determination of guilt and punishment in capital cases was suggested by Chief Justice Ervin, concurring in Perkins v. State, 228 So.2d 382,394 (Fla. 1969). He further suggested:

> Possibly a jury's decision to recommend or not to recommend mercy in a capital case should not be held to preclude the trial judge from determining

> in his sound discretion the punishment to be imposed upon the defendant in a capital case, provided the defendant timely requests an allocutionary hearing and a final determination by the trial judge of the sentence to be imposed. If such a hearing is requested the jury's nonrecommendation of mercy could be deemed as advisory only. The allocutionary hearing could be held by the trial court as a part of the jury's determination concerning a recommendation, or afterwards, in the discretion of the trial judge.

The only other states which permit a trial judge to impose a sentence of death notwithstanding the jury's recommendation of life are Indiana and Alabama. See Judy v. State, 416 NE2d 95 (Ind.1981); Brewer v. State, 417 NE2d 889,898 (Ind.1981); Bush v. State, 431 So.2d 555,559 (Ala.Cr.App.1982). [Each of these cases refers to the override procedure in their respective statutes, but none of them is a "life override" case. As far as appellant has been able to determine, neither the Indiana nor the Alabama appellate courts have yet had occasion to decide a case in which a trial court overrode a jury's life recommendation and imposed a death sentence. In contrast, the Florida Supreme Court has decided 57 such cases and many more are pending]. The Indiana Supreme Court first had occasion to review a death sentence imposed under its present statute in Judy v. State, supra at 108, and stated:

> Our review of these various constitutional and statutory requirements and our rules satifies us that our sentencing scheme passes constitutional muster. Under our procedure, the sentencing authority's discretion, as exercised by the jury and the trial court, "is guided and channeled by requiring examination of specific factors that argue infavor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, supra, 428 U.S. at 258, 96 S. Ct. at 2969, 49 L.Ed.2d at 926. Significantly, in cases tried to a jury, the trial court may not simply rely solely on the jury's advice; rather, he must conduct this analysis independent of the evaluation and recommendation made by the jury. In this fashion, the trial court, as the actual sentencing authority, provides an additional safeguard against a death penalty recommendation

> which may have been prompted by improper factors. Of course, the trial court must analyze the case in the same independent manner if it is tried only to him.

The fact that Florida trial courts, in practice, make liberal use of the override option to impose a death sentence despite a life recommendation is instantly revealed by a glance at Walsh v. State, 418 So.2d 1000,1003-04 (Fla. 1982). In its July 29, 1982 opinion in Walsh, this Court listed 8 cases in which it had affirmed a death sentence imposed after a life recommendation override, and 23 cases in which it had reversed a death sentence imposed after a life recommendation override, with directions to impose a life sentence. Walsh itself falls into the latter category. Nine "life override" cases decided up to that point were not listed in Walsh.[4] Fourteen "life override"cases have been decided in the sixteen months since Walsh.[5] Two

---

[4] Taylor v. State, 294 So.2d 648 (Fla. 1974)(death sentence reversed); Gardner v. State, 313 So.2d 675 (Fla. 1975)(death sentence affirmed); Sawyer v. State, 313 So.2d 680 (Fla. 1975)(death sentence affirmed); McCrae v. State, 395 So.2d 1145 (Fla. 1980)(death sentence affirmed); Jacobs v. State, 396 So.2d 713 (Fla. 1981)(death sentence reversed); Lewis v. State, 398 So.2d 432 (Fla. 1981)(remanded for resentencing); Miller v. State, 415 So.2d 1262 (Fla. 1982)(death sentence affirmed); McCray v. State, 416 So.2d 804 (Fla. 1982)(death sentence reversed); and Gilvin v. State, 418 So.2d 996 (Fla. 1982)(death sentenced reversed).

[5] Stevens v. State, 419 So.2d 1058 (Fla. 1982)(death sentence affirmed); Bolender v. State, 422 So.2d 833 (Fla. 1982)(death sentence affirmed); McCampbell v. State, 421 So.2d 1072 (Fla. 1982)(death sentence reversed); Porter v. State, 429 So.2d 293 (Fla. 1983)(death sentence affirmed); Norris v. State, 429 So.2d 688 (Fla. 1983)(death sentence reversed); Cannady v. State, 427 So.2d 723 (Fla. 1983)(death sentence reversed); Webb v. State, 433 So.2d 496 (Fla. 1983)(death sentence reversed); Washington v. State, 432 So.2d 44 (Fla. 1983)(death sentence reversed); Spaziano v. State, 433 So.2d 508 (Fla. 1983)(death sentence affirmed); Hawkins v. State, 436 So.2d 44 (Fla. 1983)(death sentence reversed); Richardson v. State, 437 So.2d 1091 (Fla. 1983)(death sentence reversed); Engle v. State, __So.2d__ (Fla. 1983)(remanded but life override approved); Herzog v. State, __So.2d__ (Fla. 1983)(death sentence reversed); Routly v. State, __So.2d__ (Fla. 1983)(death sentence affirmed).

decisions involved co-defendants who were both sentenced to death after each received a life recommendation.[6] Altogether, this Court has reviewed 57 death sentences imposed under the present statute after a jury recommended life. Treating Engle v. State as an affirmance and Lewis v. State as a reversal, there have been 19 occasions in which this Court has affirmed a death sentence following the trial court's override of the jury's life recommendation.

In stark contrast, the occasions in which a trial judge has utilized the "safeguard" of the override procedure to reject a jury recommendation of death -- the original and primary justification for the availability of the override option -- are few and far between. It is not possible to say exactly how rare a creature is the "death recommendation override" for the reason pointed out by Justice England, dissenting as to penalty in Alvord v. State, 322 So.2d 533, 542 n.2 (Fla. 1975):

> Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases.

If this Court believes that appellant's contention that the override option is used almost exclusively by trial courts to override jury life recommendations and to impose death sentences is insufficiently documented (and he concedes that it is), appellant requests that the Court direct the Circuit Courts of the state to compile a list of cases in which death recommendations have been overridden and life sentences imposed. See State v.Dixon, supra, at 8, in which this Court, under its constitutional power to regulate practice and procedure, required written findings in support of a decision to impose life imprisonment rather than

---

[6] Barclay v. State, 343 So.2d 1266 (Fla. 1977)(Barclay and Dougan, death sentences affirmed); McCaskill v. State, 344 So.2d 1276 (Fla. 1977)(McCaskill and Williams, death sentences reversed).

death, in order to afford "an additional safeguard for the defendant sentenced to death, [providing] a standard for life imprisonment against which to measure the standard for death established in the defendant's case...".

The glaring imbalance between the use of the override to nullify jury life recommendations and its non-use for its primary intended purpose as a safeguard against unreasonable death recommendations is indicative of a serious malfunction in the operation of the Florida death penalty statute. Either this state has a severe problem with unreasonably lenient jurors (a possibility which appellant submits is remote, especially in light of the fact that death penalty juries do not include those citizens of the state who would never impose the death penalty regardless of the circumstances)[7] or else there is a clear pattern of abuse of the override option on the part of trial judges. This Court's review under the Tedder standard does not cure the problem. As the Fifth Circuit Court of Appeals observed in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978), "reasonable persons can differ over the fate of every criminal defendant in every death penalty case." If a death sentence following a jury recommendation of life can be sustained only where no reasonable person would differ, does this mean that Justices McDonald and Overton were unreasonable to dissent in Stevens v. State, supra, Miller v. State, supra, and Johnson v. State, supra? Was Justice England unreasonable to dissent in Hoy v. State, 353 So.2d 826 (Fla. 1977), and was Governor Graham unreasonable to grant clemency in Hoy's case? Was Justice Boyd unreasonable to dissent as to one of the co-defendants in Barclay v. State, 343 So.2d 1266 (Fla. 1977)?

The impossibility of proper review under the Tedder standard as presently applied is further demonstrated by the fact that the jury makes no express

---

[7] See e.g. Witt v. State, 342 So.2d 497, 499 (Fla. 1977); Downs v. State, 386 So.2d 788, 790-01 (Fla.1980), upholding the practice of "death-qualifying" jurors in capital cases.

findings in support of its recommendation of life or death. Thus, while the result on appeal of a life recommendation override turns on whether the jury's recommendation was "reasonable" or "unreasonable", the absence of specific findings makes it impossible for the reviewing court even to know what the basis for the jury's recommendations was. As a result, the parties and the Court must speculate about the reason for the recommendation [see Gilvin v. State, supra, (Boyd, J. dissenting from reduction of sentence)] before reaching a conclusion as to its validity. When applied in this manner, the Tedder standard is simply too amorphous to pass constitutional muster.

As asserted in the beginning of this Point on Appeal, the trial court's override power has proven not to be a safeguard against unreasonable jury recommendations of death. Assuming arguendo that the state has a valid interest in ensuring against "unreasonable" recommendations of life, that interest is already more than adequately protected by the state's ability to weed out prospective jurors who adamantly oppose the death penalty, and by the fact that a Florida penalty jury's recommendation need not be unanimous (thus preventing one or two or even five "unreasonable" jurors from blocking a reasonable death recommendation). Only in the event that six to all twelve members of the jury, all of whom have stated under oath that they will follow the law and can impose the death penalty under appropriate circumstances, conclude that under the circumstances of the particular case the death penalty is not appropriate, is a life recommendation returned.

In determining whether a penal sanction comports with the Eighth Amendment ban against cruel and unusual punishment, assessment of contemporary values is required. Trop v. Dulles, 357 U.S. 86, 100-01 (1958); Gregg v. Georgia, 428 U.S. 153, 175 (1976). The critical function performed by capital

sentencing juries in assessing Eighth Amendment values was aptly described in Witherspoon v. Illinois, 391 U.S. 510, 519-20 and n.15 (1968):

> [A] jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death.
>
> * * *
>
> And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that marks the progress of a maturing society.'

A jury's life recommendation reflects the determination that, in the individual case before it, imposition of the death penalty does not accord with contemporary values. Only three states, Florida, Indiana, and Alabama, have death penalty statutes which permit a jury's recommendation of life to be nullified. Only in Florida does it appear that jury life recommendations are commonly, perhaps even routinely, ignored. [See Burch v. Louisiana, 441 U.S. 130, 138 (1979), recognizing that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not"]. Florida's override procedure has been approved by the United States Supreme Court and this Court on the assumption that it serves as a safeguard against unreasoned jury death verdicts. It is becoming more and more apparent that the override does not serve this function, and that in fact it operates in many cases, as in the present case, to deprive a capital defendant of an entirely reasonable life verdict. For this reason, the constitutionality of a trial judge's authority to override a jury's life recommendation can no longer be upheld.

V CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, appellant respectfully requests that this Court reverse his sentence of death and remand this case to the trial court with directions it impose a sentence of life imprisonment without possibility of parole for twenty-five years in accordance with the jury's recommendation.

Respectfully submitted,

Steven L Bolotin

STEVEN L. BOLOTIN
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Larry Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and a copy mailed to appellant, William Eutzy, #090408, Florida State Prison, Post Office Box 747, Starke, Florida 32091 on this 28th day of November, 1983.

Steven L Bolotin

STEVEN L. BOLOTIN