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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM EUTZY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Eutzy v. State, 458 So.2d 755 (Fla. 1984) is set forth in Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(3). The judgment below was entered on September 20, 1984, and petitioner's timely motion for rehearing was denied on December 3, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), which is set forth in Appendix D. This case involves the Eighth and Fourteenth Amendments to the United States Constitution; see e.g. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

STATEMENT OF THE CASE

Petitioner, along with his sister-in-law, Laura Eutzy, was indicted for first degree murder in the death of Herman Hughley. The murder charge against Laura was subsequently dropped when the state failed to traverse her motion to dismiss. The state then filed an information charging Laura with possession of a concealed weapon. In petitioner's murder trial, Laura testified against petitioner with the understanding that the state would recommend that she receive probation on the concealed weapon charge.

On July 7, 1983, the jury returned a verdict finding petitioner guilty of first degree murder with premeditation. The same afternoon, following the penalty phase of the trial, the jury recommended that petitioner be sentenced to life imprisonment without possibility of parole for twenty-five years. The next morning, the trial court rejected the jury's recommendation and sentenced petitioner to death.

The Supreme Court of Florida, on September 20, 1984, affirmed petitioner's conviction and death sentence. Justice McDonald dissented, without written opinion, from the affirmance of the death

sentence. Petitioner's timely motion for rehearing was denied on December 3, 1984. Justice McDonald, joined this time by Justice Overton (who was in the majority in the original decision), dissented from the denial of rehearing, again without written opinion.

The facts material to the questions presented in this petition require some discussion.[1] The most critical is the fact that the shooting death of Herman Hughley occurred at the end of an inexplicable (or, at any rate, unexplained) four hour taxicab ride from Pensacola to Panama City and back, taken for no apparent reason. The three individuals present during this ride were the slain cab driver, Herman Hughley; petitioner, William Eutzy, who did not testify at trial; and his sister-in-law, Laura Eutzy, who claimed not to have been present when the murder occurred, and who claimed to have been asleep during most of the four hour ride. As the Florida Supreme Court appeared to recognize at one point in its opinion, there is an "utter void in the record that payment [for the ride] was not made or that any robbery occurred."[2] Eutzy v. State, supra, at 758. The state produced no evidence that any money was taken from Hughley, no evidence as to whether he had any cash prior to picking up petitioner 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

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1 A more detailed summary of the evidence in this case is contained in petitioner's brief on appeal. See Appendix G 2-19.

2 The only evidence which even remotely supports the state's theory of motive in this case is Laura's testimony that petitioner had said he would take care of the fare; that when he returned to the hotel she asked him if he had taken care of it; and petitioner told her that "he hit the cab driver and knocked him out, but he didn't hurt him." But, as petitioner contended in his initial brief [Appendix G 29-30], and as the Florida Supreme Court appears to have recognized [see Eutzy v. State, supra, at 758 and 759], there was a strong likelihood that the jury had doubts about the veracity of Laura's testimony. Such doubts would not be inconsistent with the jury's guilt phase verdict finding petitioner guilty of first-degree premeditated murder since they could have disbelieved Laura entirely and still convicted appellant based on the testimony of Jackie Humel and the firearms examiner. The circumstances of the premeditated murder, however, were not established by the skeletal evidence presented by the state, and whatever minimal evidence there was as to what actually occurred was totally dependent on the testimony of Laura Eutzy. As the Florida Supreme Court observed, there is an evidentiary void as to whether a robbery occurred and as to whether payment was made for the cab ride.

in the cab. Laura Eutzy "believed" that petitioner had only five dollars, but she admitted that she did not know for a fact how much money he had, or whether he had any. The state produced no evidence as to whether petitioner had any money when he was arrested. There was evidence that the round-trip to Panama City would probably cost about $135.00, and that cab drivers are supposed to collect the money up front, before leaving town on such a long trip. There was no evidence of any discussion between Hughley and petitioner about the fare.

The evidence at trial established that petitioner and Laura were stopped in the Pensacola airport shortly after midnight on Saturday, February 26, 1983, by a security guard, who asked them for identification. Petitioner showed him a government vehicle card in the name of Raymond Sanders, and Laura went into her purse[3] and produced a Louisiana driver's license in her correct name. At about 5:30 the following evening, the couple was seen getting into a taxicab driven by Herman Hughley. From that point, the evidence (as stated in the Florida Supreme Court's opinion), revealed the following:

> A dispatcher for the cab company for which Hughley drove testified that Hughley reported picking up a fare at the airport with a destination on Pensacola Beach. Forty-five minutes later, Hughley reported that the destination had been changed to Fort Walton; ten or twenty minutes later he notified the dispatcher that they were going to Panama City. Three-and-a-half hours after the last report, Hughley notified the dispatcher of his return. When the dispatcher asked him to repeat his message she got no response. Repeated attempts to reach Hughley were unsuccessful.
>
> Hughley's body was discovered in the front seat of his cab by a driver for the same cab company, Mary Beasley. She had seen Hughley with the Eutzy couple at the airport the evening before. Her curiosity was aroused when she drove past Hughley's cab, apparently deserted, on the edge of the Pensacola

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[3] The fact that the security guard testified that Laura went into her purse to produce her ID assumes importance in light of her denial, on cross-examination, that she ever had occasion to look in her purse during the entire weekend from Friday night through Monday morning. The pistol which was proven to be the murder weapon belonged to Laura and was found in her purse when she and petitioner were arrested. It was Laura's testimony that she believed that the gun was in her purse when they arrived in Pensacola; that she believed the gun was in her purse when they entered Herman Hughley's taxicab; and that she never noticed that it was missing until petitioner gave it back to her on Monday morning.

> Junior College campus. Other witnesses were able to testify it had been there since approximately the time of Hughley's last contact with his dispatcher.
>
> William and Laura Eutzy were picked up while trying to hitchhike out of town the day after Hughley's body was discovered. They had been spotted by Jackie Humel who was at that time on her way to the police department to make a statement in the Hughley case. She had seen Hughley and appellant at the spot where Hughley was later discovered dead at about the time Hughley radioed in his last report.
>
> Laura Eutzy had a pistol, later proven to be the murder weapon, in her purse at the time of her arrest. She testified before the grand jury and at Eutzy's trial that she had ridden in the back seat of the cab, sleeping off and on. Eutzy had sat in the front with Hughley. To the best of her knowledge, Eutzy had had only five dollars when they hired the cab; she had had no money. She did not know how they were going to pay the cab fare. Appellant said he would take care of it. When they returned to Pensacola, Eutzy had the cab driver drop Laura off at a Holiday Inn. He then rode off with Hughley. When appellant returned, Laura asked him if he had taken care of the fare. He answered in the negative and he told Laura he had hit the driver on the head with the gun but had not hurt him. Laura testified that she had not been aware that he had taken the gun until he returned it to her at that time. On the morning they were arrested, Laura read a story about Hughley's murder in the local newspaper and realized for the first time what had happened, according to her testimony.

Eutzy v. State, supra, at 756-57.

Several additional facts deserve mention. According to Officer Gary Meisen, Laura Eutzy initially told him that she did not arrive in Pensacola until a time which was after the murder of Herman Hughley had occurred. Later that afternoon, after a firearms examiner had positively identified the pistol taken from Laura's purse as the murder weapon, Officers Meisen and Burns confronted her with this information, at which time she changed her story "in some respects".

Officer James Richbourg testified that the gun which was removed from Laura Eutzy's purse, along with the single bullet removed from the body of Herman Hughley and an expended cartridge case recovered from the floorboard of the taxicab, were sent to Tallahassee for testing. Seven more rounds of ammunition were removed from the weapon, and there were twelve additional rounds in Laura Eutzy's purse. Eleven of these rounds were wrapped in tissue paper and there was one loose round. 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 on the name of John Eutzy, another gold ring, and a pamphlet on the RG-26 automatic pistol. Officer Richbourg testified that he could see the pistol in the center of the purse as he opened it, without any difficulty.

Laura Eutzy testified that she and her brother-in-law arrived in Pensacola on Friday night, February 25, 1983, on their way to Missouri. Earlier that month she had bought a gun in Slidell, Louisiana, because petitioner had recommended that she buy one for protection. She believed that the gun was in her purse when they arrived in Pensacola. On cross-examination, Laura gave the following testimony:

> MR. LANG [defense counsel]: When was the last time you looked in your purse?
>
> LAURA: Before we ever got to Pensacola.
>
> MR. LANG: When was the first time, a week before you got to Pensacola?
>
> LAURA: 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: No.
>
> MR. LANGE: 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: 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: No.

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

LAURA: 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: Yes.

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

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

MR. LANGE: 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: No; I did not.

Laura testified that she had her purse with her during the entire time she was in the back seat of the cab. She stated that a couple of times at the airport on Saturday morning she gave the purse to petitioner to hold while she went to the restroom. However, she acknowledged having told the police that the purse had never left her possession. Laura further admitted that in her initial statements to the police she did not mention anything about going to Panama City, and did not mention petitioner's remark about hitting and knocking out the cab driver. She <u>did</u>, however, tell the police that she had seen the gun in petitioner's waistband <u>on Saturday night</u>, (contrary to her testimony that she never knew that the gun was missing from her purse until petitioner returned it on Monday morning). She testified 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 petitioner had the gun in his waistband on Saturday night.[4]

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[4] This last statement is particularly hard to fathom in light of Laura's insistence that she was lying to the officers <u>in order to protect petitioner.</u>

On redirect examination, Laura testified that she did not tell the truth to the police in her first two statements because she was trying to protect petitioner, and also to protect herself. She testified that she told the truth in her third statement to police, in her Grand Jury testimony, and now at trial. On re-cross, Laura acknowledged that after she testified before the Grand Jury, the Grand Jury returned an indictment charging her with first-degree murder.[5]

The trial court, in rejecting the jury's life recommendation and imposing a sentence of death, made the following oral 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.
>
> Based on the evidence in this case and the cicumstances, 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 cab-driver 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 weapon , 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,

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[5] As previously mentioned, the murder charge against Laura was dropped when the state failed to traverse her motion to dismiss. Laura testified against petitioner with the understanding that the state would recommend that she receive probation on the charge of carrying a concealed weapon.

> 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 missile 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. [Emphasis supplied].

In affirming petitioner's death sentence, the Florida Supreme Court concluded that the aggravating circumstance based on the trial court's finding that the killing occurred in the course of a robbery could not be supported by the record. In reaching this conclusion, the court emphasized "the utter void in the record that payment was not made or that any robbery occurred." The court "noted in passing" that the evidence would have been sufficient to support a finding that the murder was committed for pecuniary gain. [The court's observations are clearly self-contradictory, since the only conceivable basis for a finding of "pecuniary gain" would be if petitioner killed the cab driver to avoid paying for the ride, and as the court recognized, not only did the evidence fail to show that this was the motive for the murder, it failed even to show that payment for the ride was not made]. However, since the trial court did not make such a finding, the court purported to ignore it in reviewing the propriety of the override of the jury's life recommendation. The Florida Supreme Court approved the two remaining aggravating circumstances found by the trial court; the finding that the murder was committed in a cold, calculated, and premeditated manner (which petitioner strenuously contested), and that petitioner had previously been convicted of a violent felony

(a 1958 Nebraska robbery conviction, which petitioner did not contest). The court "rejected as unreasonable those considerations which may have influenced the jury's recommendation of life." Eutzy v. State, supra, at 760. Among the factors which were argued by petitioner as reasonable bases for the jury's life recommendation were (1) the jury might reasonably have found only one aggravating circumstance - the 1958 robbery conviction - and concluded that the aggravating factors in this case were insufficient to set this crime apart from the norm of capital felonies or to warrant imposition of the death penalty, regardless of the presence or absence of mitigating circumstances [see Appendix G 21-24,28,31-32, 32-36]; (2) the jury might reasonably have been influenced toward a life recommendation by the absence of the "especially heinous, atrocious, or cruel" aggravating circumstance [see Appendix G 25-28]; (3) the jury may have considered petitioner's age (43 at the time of trial) as a mitigating circumstance, in light of defense counsel's argument that a life sentence would guarantee that he would not even be eligible for consideration for parole until he was nearly seventy years old [see Appendix G 28-29]; (4) the jury could reasonably have had serious doubts about the credibility of Laura Eutzy's testimony, and while there was other evidence (notably the testimony of Jackie Humel coupled with that of the firearms examiner) which could support a guilty verdict, there was no evidence as to the circumstances of the crime other than the thoroughly impeached testimony of Laura [see Appendix G 29-30]; and (5) the jury could have been influenced toward a life recommendation by the extremely lenient treatment which the state accorded Laura in exchange for her testimony against petitioner [see Appendix G 30].[6] Petitioner further argued that the trial court's sentencing order was not based on any information which was unavailable to the jury, that there was no indication that the jury was misled or unduly influenced by emotion, and that the trial court expressed no compelling reasons for deviating from

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[6] Each of the aforementioned considerations was brought to the jury's attention by defense counsel in his closing argument in the penalty phase.

the jury's recommendation[7] [see Appendix G 30].

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal, petitioner raised five points. First, he asserted that the death sentence imposed notwithstanding the jury's recommendation of life, under the circumstances of this case, violated the Eighth and Fourteenth Amendments to the United States Constitution, as well as the principles established in Tedder v. State, 322 So.2d 908 (Fla. 1975). Petitioner suggested at least five considerations submitted to the jury by defense counsel which, individually and in combination, provided a reasonable basis for the jury's decision to recommend life (App. G 19-30]. The Florida Supreme Court, applying the amorphous standard of review which it has apparently adopted in the wake of this Court's decision in Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340 (1984), rejected each of these considerations as "unreasonable". [In the instant petition, petitioner contends, inter alia, that the standard of review employed by the Florida Supreme Court in cases in which death sentences were imposed notwithstanding jury life recommendations, particularly in the seven months since Spaziano was decided, is arbitrary, capricious, and violative of the Eighth and Fourteenth Amendments].

In his second and third points on appeal, petitioner challenged the trial court's findings of the aggravating circumstances that the murder was committed in a "cold, calculated, and premeditated manner" [Appendix G 31-32] and that the murder ws committed in the course of a robbery [Appendix G 32-36]. The Florida Supreme Court held that the evidence failed to support the finding that a robbery was committed. However, the court upheld the finding of the "cold, calculated, and premeditated" circumstance, based on its conclusion that the circumstantial evidence was sufficient to prove simple premeditation, and that the court could "find no reasonable hypothesis inconsistent with the heightened premeditaion required by

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[7] Interestingly, the only area of disagreement with the jury mentioned in the trial court's order was that he believed, "even though the jury did not so find", that a robbery was committed [see Appendix F]. The trial court's conclusion on this point was expressly rejected by the Florida Supreme Court as unsupported by the evidence.

this factor." Eutzy v. State, supra, at 758. On rehearing, petitioner contended that the Florida Supreme Court had unconstitutionally shifted the burden to petitiioner to disprove the heightened level of premeditation required to establish this aggravating circumstance [Appendix B 2-4]. Petitioner further contended that, under established precedent, the Florida Supreme Court's disapproval of an aggravating circumstance (i.e. the "course of a robbery" finding) relied on by the trial judge in overriding the jury's life recommendation required at minimum that the case be remanded for reconsideration of the death sentence by the trial court so that the remaining aggravating circumstances could be weighed against the recommendation of the jury. Lewis v. State, 398 So.2d 432 (Fla. 1981); see also Williams v. State, 386 So.2d 538, 543 (Fla. 1980) [Appendix B 4-5]. Rehearing was denied by the Florida Supreme Court, with two justices dissenting.

The fourth issue raised on appeal was that the trial court's instructions to the jury in the penalty phase were constitutionally deficient, in that (inter alia) they failed to inform the jury of the nature and function of mitigating circumstances [Appendix G 37-40]. Anticipating that the Court might consider the errors to have been rendered "harmless" by the jury's life recommendation, petitioner pointed out that this would be true only if the jury's life recommendation were given effect; otherwise a "harmless error" finding would be tantamount to saying that the jury does not need to be properly instructed because its recommendation is meaningless anyway [Appendix G 39-40]. To the contrary, the Florida Supreme Court has held that a capital defendant has a right to a jury advisory opinion; that the jury's recommendation is entitled to great weight; that the trial judge may not frustrate this important jury function; and that "a proceeding which, even subtly, detracts from comprehensive consideration of the aggravating and mitigating factors" cannot be condoned. Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). Nevertheless, in the instant case, the Florida Supreme Court refused to consider the merits of the issue, holding only that since the jury recommended life, any defect in the instructions were harmless. Eutzy v. State, supra, at 757.

Finally, petitioner argued that the provision in Florida's death penalty statute which authorizes the trial court to override the jury's recommendation of life is unconstitutional [Appendix G 40-48]. The state, in its answer brief, chose not to address this argument on the merits, but instead argued only that petitioner had waived the issue by failing to raise it prior to trial [Appendix I 23-24]. In his reply brief, appellant responded, inter alia, that the Florida Supreme Court had in previous decisions addressed on direct appeal the merits of constitutional objections to imposition of the death penalty notwithstanding the jury's life recommendation, and had not applied a "contemporaneous objection" rule to avoid consideration of this fundamental issue. Thus, petitioner continued, if the Florida Supreme Court were to now decline to consider the merits of his constitutional argument based on the state's claim of procedural default, this would amount to a novel application of the contemporaneous objection rule and would not preclude federal review in any event. See e.g. NAACP v. Alabama ex rel Flowers, 337 U.S. 288, 301, 84 S.Ct. 1302, 12 L.Ed.2d 325 (1964) [Appendix H 5]. Nevertheless, the Florida Supreme Court accepted the state's invitation, and held that the unconstitutionality of the life override provision was not timely raised in the trial court and thus was not preserved for appeal. Eutzy v. State, supra, at 757.

REASONS FOR GRANTING WRIT
QUESTIONS PRESENTED

QUESTION I

THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S FINDING OF THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE, AND IN AFFIRMING PETITIONER'S DEATH SENTENCE WHICH WAS PREDICATED LARGELY ON THE FINDING OF THAT AGGRAVATING CIRCUMSTANCE, UNCONSTITUTIONALLY SHIFTED THE BURDEN TO PETITIONER TO DISPROVE THE HEIGHTENED LEVEL OF PREMEDITATION REQUIRED TO ESTABLISH THE AGGRAVATING CIRCUMSTANCE.

In Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981), the Florida Supreme Court rejected a constitutional challenge to subsection (5)(i) of the state's death penalty statute, which establishes the "cold, calculated, and premeditated" aggravating circumstance:

> Regarding Jent's second sentencing claim, he alleges that every person convicted of premeditated murder will start the sentencing proceeding with one aggravating circumstance already established. This, Jent

> argues, will violate due process by forcing the defendant to prove lack of premeditation in the sentencing phase of the trial. We do not agree that this will occur. As we stated in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), the aggravating circumstances set out in section 921.141 must be proved beyond a reasonable doubt. The level of premeditation needed to convict in the [guilt] phase of a first-degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor - "cold, calculated ... and without any pretense of moral or legal justification."

As Justice Ehrlich observed in his separate opinion (concurring in part and dissenting in part) in Herring v. State, 446 So.2d 1049, 1058 (Fla. 1984), loss of the "very significant distinction between simple premeditation and the heightened premeditation contemplated in section 921.141(5)(i) ... would bring into question the constitutionality of that aggravating factor, and, perhaps, the constitutionality, as applied, of Florida's death penalty statute" [Emphasis in opinion].

Since Jent, the Florida Supreme Court has repeatedly made it clear that premeditation alone is not sufficient to support a finding of the (5)(i) aggravating circumstance. See e.g. Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984) and cases cited therein. Rather, the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). In Preston v. State, supra, for example, the Florida Supreme Court affirmed the defendant's conviction of first-degree premeditated murder, holding that the circumstantial evidence, including the nature and manner of the wounds inflicted on the victim, was sufficient to support a finding of premeditation. However, the court recognized that this circumstantial evidence was not sufficient to prove the heightened form of premeditation required by the (5)(i) aggravating circumstance, and disapproved the trial court's finding of that circumstance. The court indicated that the (5)(i) aggravating circumstance had been held applicable "where the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." Preston v. State, supra, at 946.

Similarly, in the present case, the circumstantial evidence, including the fact that the victim was shot one time in the head with no sign of a struggle, was legally sufficient to support a finding of premeditation for a conviction of first degree murder [see e.g. Preston v. State, supra; Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975); Larry v. State, 104 So.2d 352, 354 (Fla. 1958)], and petitioner has never contended otherwise. But, as recognized in the earlier Florida cases, proof of something more than simple premeditation is needed to sustain a finding of the "cold, calculated, and premeditated" aggravating circumstance. In the present case there was no proof, circumstantial or otherwise, of a "particularly lengthy, methodic, or involved series of atrocious events" or a "substantial period of reflection and thought by the perpetrator" or any other kind of "heightened" premeditation. What the record does show is a four hour cab ride, taken for no apparent reason, following which (taking the evidence in the light most favorable to the verdict) petitioner shot the driver to death. At trial and on appeal, the state has advanced a rather remarkable theory as to motive - that petitioner 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 then shoot the cab driver in lieu of paying the fare. This might indeed amount to a "cold, calculated, and premeditated" homicide if this theory were based on evidence rather than speculation, but, as even the Florida Supreme Court appears to have recognized, it was not. Petitioner did not testify at trial. Herman Hughley, the victim, could not testify. The state's key witness, Laura Eutzy, claimed not to be present when the murder occurred and claimed to be asleep during most of the cab ride. Thus, for the four hour period immediately preceeding the commission of the crime, the record reveals absolutely nothing about what may have taken place among the persons involved. Moreover, the state produced no evidence that any money was taken from Hughley, no evidence as to whether he had any cash prior to picking up petitioner 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 petitioner had only five dollars, but she admitted that she did not know for a fact how much money he had, or whether he had any. The state produced no evidence as to whether petitioner had any money when he was arrested. There was evidence that the round-trip to Panama City would probably cost about $135.00, and that cab drivers are supposed to collect the money up front before leaving town on such a long trip. There was no evidence of any discussion between Hughley and petitioner about the fare. As the Florida Supreme Court's opinion correctly observes, there is "an utter void in the record that payment was not made or that any robbery occurred." Eutzy v. State, supra, at 758.

Instead of recognizing that this evidentiary void precluded a finding of the (5)(i) aggravating circumstance, however, the Florida Supreme Court appears to have equated circumstantial evidence of premeditation (for a conviction) with circumstantial evidence of heightened premeditation (for the aggravating circumstance), and shifted the burden of proof to appellant to disprove the heightened level of calculation or planning in order to avoid a finding of the aggravating circumstance. Noting "that the evidence is clear that Eutzy procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of struggle", the court went on to conclude:

> The jury convicted Eutzy of first-degree premeditated murder, and Eutzy raises no objection to the sufficiency of the evidence, albeit circumstantial, to support that verdict. Accepting the evidence of premeditation, we can find no reasonable hypothesis inconsistent with the heightened premeditation required for this factor.

Eutzy v. State, supra, at 758.

What the Florida Supreme Court has done, in so holding, is to shift the burden to the accused to disprove the element of a "heightened degree of premeditation, calculation, or planning" required to establish the aggravating circumstance, where the circumstantial evidence may be legally sufficient to show premeditation but does not reveal one way or the other whether the premeditation was "heightened" or "simple". As the court recognized, there was an utter void in the record that the cab driver was not paid or that any robbery occurred. There was also a four hour gap in the

evidence, covering the period immediately preceeding the murder - the entire period of time petitioner and Laura spent with Herman Hughley - which revealed nothing about what may have occurred. The practical effect of the Florida Supreme Court's misallocation of the burden of proof is to penalize petitioner for the gaps in the state's proof. Because the state introduced legally sufficient circumstantial evidence of premeditation to support a conviction of first degree murder, and because petitioner was unable to demonstrate to the court's satisfaction that there was not "a particularly lengthy, methodic, or involved series of atrocious events" or "a substantial period of reflection and thought by the perpetrator" [see Preston v. State, supra], the court upheld the aggravating circumstance.[8]

The Florida Supreme Court, in relying heavily on the (5)(i) aggravating circumstance to affirm petitioner's death sentence notwithstanding the jury's life recommendation, found it necessary to do what it promised not to do in Jent and what Justice Ehrlich warned against in Herring - it has blurred the distinction between the simple premeditation needed for a conviction and the heightened premeditation needed to sustain the aggravating circumstance. As so interpreted, Florida's "cold, calculated, and premeditated" aggravating circumstance is unconstitutionally overbroad and violative of the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Further, shifting the burden of proof to the accused to disprove the critical element of a heightened degree of premeditation, where the circumstantial evidence is legally sufficient to establish premeditation, but where there is no evidence, direct or circumstantial, to prove one way or the other whether the degree of premeditation was "heightened" or "simple", violates the due process clause of the Fourteenth Amendment. See Mullaney v. Wilbur, 421 U.S. 684, 95

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[8] Interestingly, the Florida Supreme Court paid absolutely no attention to the point made both in petitioner's initial brief [Appendix G 22-25,28,32] and in his motion for rehearing [Appendix B 1-2] that, under the Tedder standard used in life override cases, the issue which should be addressed is not whether the evidence was legally sufficient to support the judge's finding of the "cold, calculated, and premeditated" circumstance, but rather whether the jury could be labeled unreasonable for declining to find it. Under the evidence in this case, it is both reasonable and highly likely that the jury found nothing in aggravation except a single 1958 robbery conviction.

S.Ct. 1881, 44 L.Ed.2d 508 (1975); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

QUESTION II

THE FLORIDA SUPREME COURT, IN AFFIRMING PETITIONER'S DEATH SENTENCE NOTWITHSTANDING THE JURY'S LIFE RECOMMENDATION AND THE INVALIDATION OF AN AGGRAVATING CIRCUMSTANCE EXPRESSLY RELIED ON BY THE TRIAL JUDGE IN REJECTING THE JURY'S RECOMMENDATION, HAS ADOPTED AN INTERPRETATION OF ITS ELLEDGE "HARMLESS ERROR" RULE WHICH VIRTUALLY ENSURES THAT DEATH SENTENCES WILL BE CARRIED OUT IN AN ARBITRARY AND CAPRICIOUS MANNER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Barclay v. Florida, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1134 (1983), this Court held that the "harmless error" test employed by the Florida Supreme Court in death penalty cases - known as the Elledge rule[9] - was constitutionally permissible. This Court's conclusion was based in large part on the assumption that the Florida Supreme Court observed two safeguards in applying its "harmless error" rule. First, "[i]f the trial court found that some mitigating circumstances exist, the case will generally be remanded for resentencing". Barclay v. Florida, supra, 77 L.Ed.2d at 1147. Secondly, this Court said:

> The Florida Supreme Court has placed another check on the harmless error analysis permitted by Elledge. When the jury has recommended life imprisonment, the trial judge may not impose a death sentence unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra, at 910. In Williams v. State, 386 S.2d 538, 543 (Fla. 1980), and Dobbert v. State, 375 So.2d 1069, 1071(Fla. 1979), the Florida Supreme Court reversed the trial judges' findings of several aggravating circumstances. In each case at least one valid aggravating circumstance remained, and there were no mitigating circumstances. In each case, however, the Florida Supreme Court concluded that in the absence of the improperly found aggravating circumstances the Tedder test could not be met. Therefore it reduced the sentences to life imprisonment.[10]
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> Barclay v. Florida, supra, 77 L.Ed.2d at 1147-48.

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[9] See Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977).

[10] This statement is correct as to Williams, but incorrect as to Dobbert. The Florida Supreme Court affirmed Dobbert's death sentence in the above-cited opinion, and he has since been executed. However, there are several other cases in which the court reversed death sentences where one or more (but not all) of the aggravating circumstances found by the trial court in imposing a death sentence notwithstanding the jury's life recommendation were invalidated, and where the trial court found no mitigating circumstances. See e,g. Richardson v. State, supra; Lewis v. state, infra.

The rationale of the Elledge rule, as explained by Justice Sundberg, is that the trial court's error in considering an invalid aggravating circumstance is harmful if it may have affected the weighing process as between the death penalty and a life sentence, and harmless only if it could not have affected that process:

> State v. Dixon, 283 So.2d 1 teaches that:
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> > ...[T]he procedure to be followed by the trial judges and juries 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...." 283 So.2d at 10.
>
> It this be so, then regardless of the existence of other authorized aggravating factors we must guard agaisnt any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

Elledge v. State, supra, at 1003.

In Elledge, the trial court found no specific mitigating circumstances, but he stated in his sentencing order that he had found insufficient mitigating circumstances to outweigh the aggravating circumstances. The Florida Supreme Court concluded that, in order to have weighed the mitigating factors, the trial court implicitly must have found some to exist. The appellate court then asked rhetorically:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the factor of the Gaffney murder shall not be considered. ... This result is dictated because, in order to satisfy the requirements of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied) Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913.

Elledge v. State, supra, at 1003.

Where the jury has recommended life, and where (as here) the trial court has expressly relied on one or more invalid aggravating circumstances in justifying his decision to reject the jury's recommendation and impose death, how can the Florida Supreme Court purport

to "know" that the trial court's weighing process was not affected? In his rambling sentencing order in the instant case, the trial court stated, inter alia:

> 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, was committed while in the course of a robbery, the evidence reflecting at the time, the defendant and his associate or friend had between them only $5.00, that they took the cab from the municipal airport for a trip to Pensacola Beach, Fort Walton and possibility Panama City. The testimony being that the cost of a trip one way to Panama City could be $90.00 though it could be negotiable to a degree and the defendant's actions in having the cab driver 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 weapon, the .25 caliber pistol from the handbag of the associate or friend was at least an intent at that time of formulating the idea of robbery and appears to be the motivating factor or course in this offense and in fact a robbery was committed.

[Appendix F 1] [Emphasis supplied].

As previously discussed, the Florida Supreme Court agreed with petitioner that the "course of a robbery" aggravating circumstance was improperly found, and further recognized that there was an "utter void" in the evidence that the cab driver was not paid. Yet the Florida Supreme Court, applying its mutant version of the Elledge rule, affirmed petitioner's death sentence anyway. In other words, even though the Florida Supreme Court recognized that the theory of how and why this crime occurred which the trial court relied on in rejecting the jury's life recommendation was not supported by any evidence, it still concluded that the jury (which apparently did not find the improper aggravating circumstances) was as a matter of law "unreasonable", and that the trial court, who expressly relied on the improper aggravating circumstances in explaining his disagreement with the jury, would necessarily have made the same decision to override the jury's life recommendation, even had he not considered the unproven factors at all.

Clearly, the weighing process which resulted in petitioner's death sentence was profoundly affected by the trial court's consideration of the invalid aggravating circumstance and the unproven "motive". As the Florida Supreme Court has repeatedly pronounced, the jury's recommendation of life, while not binding, is entitled to great weight. See e.g. Tedder v. State, supra, at 910; McCampbell

v. State, 421 So.2d 1072, 1075 (Fla. 1982); Richardson v. State, supra, at 1095; and even Eutzy v. State, supra, at 758. Under Florida law, where there are some aggravating circumstances and no mitigating circumstances, death is presumed to be the appropriate sentence. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). However, a "jury's recommendation of life imprisonment militates against such a presumption." Williams v. State, 386 So.2d 538, 543 (Fla. 1980). The life recommendation is in and of itself a factor weighing heavily in favor of a life sentence, which must either be given effect, or, at the very least, weighed carefully against the aggravating circumstances found by the trial court. See Lewis v. State, 398 So.2d 432 (Fla. 1981)(where several aggravating circumstances were rejected by the Florida Supreme Court and where no mitigating circumstances were found, the court remanded the case "for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury"). In order for a trial court's override of a jury's life recommendation to be sustained on appeal, the reasons for his rejection of the jury's recommendation must be compelling ones. See Burch v. State, 343 So.2d 831, 834 (Fla. 1977); Phippen v. State, 389 So.2d 991, 994 (Fla. 1980). Here, much of the reasoning expressed by the trial court for overriding the life recommendation was not only uncompelling, but also completely unsupported by the evidence, and the Florida Supreme Court held accordingly. The Florida court's application of a "harmless error" theory to affirm petitioner's death sentence, where the jury recommended life and where the trial court's decision to override was so clearly based on unproven facts and improperly considered circumstances, is arbitrary, irrational, and violative of the Eighth and Fourteenth Amendments.

In Patten v. State, ___ So.2d ___ (Fla. 1985)(case no. 61,945, opinion filed January 10, 1985),the jury had become deadlocked at six-six as to whether to recommend death or life imprisonment. Under Florida law, unless seven jurors agree to recommend death, the recommendation is life imprisonment. Rose v. State, 425 So.2d 521 (Fla. 1983). As in Rose, however, the judge in Patten erroneously gave the jury an "Allen charge"[11], informing them that they

[11] Allen v. United States, 164 U.S. 492 (1896)

should try to reach a majority verdict, and the jury ultimately returned a death recommendation. On appeal, the Florida Supreme Court reversed for a new penalty hearing, and said:

> We do not find it appropriate to treat the jury recommendation as a life recommendation and the trial judge's sentence as a jury override, as urged by the state. There was no life recommendation in this case and the trial court did not, therefore, consider this significant factor in his sentencing decision. To now treat the jury recommendation as a life recommendation and review appellant's sentence without the benefit of the trial judge's consideration and application of the Tedder doctrine would require this Court to make an assumption as to what sentence the trial judge would have imposed if the jury had actually returned a life recommendation. We decline to do so.

Where, as in the instant case, the trial court overrides the jury's life recommendation based on certain factual findings, and the appellate court determines on appeal that many of those factual findings (including the one upon which the trial court specifically expressed disagreement with the jury) are unsupported by any evidence, how can the appellate court simply assume that those findings made no difference in the judge's decision to impose death? (Especially when the appellate court is still paying lip service to the significance of the jury's recommendation and the great weight it is entitled to in the weighing process). Under the grossly overbroad interpretation of the Elledge rule which seems to have been adopted sub silentio in this and other recent "life override" decisions [see Question III, infra], it is apparent that the "safeguards" which were central to this Court's decision in Barclay have been discarded by the Florida Supreme Court.

QUESTION III

THE FLORIDA SUPREME COURT HAS ADOPTED A STANDARD OF REVIEW, IN CASES IN WHICH THE TRIAL JUDGE HAS IMPOSED THE DEATH PENALTY NOTWITHSTANDING THE JURY'S RECOMMENDATION OF LIFE, WHICH ENCOURAGES THE DENIGRATION OF MITIGATING FACTORS PROFFERRED BY THE ACCUSED, AND WHICH INEVITABLY PROMOTES THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY.

In Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340 (1984), this Court, in considering a constitutional challenge to the provision of Florida's death penalty law which authorizes the trial court to override the jury's life recommendation, made a threshhold determination that Spaziano's "fundamental premise" was that the constitution requires jury sentencing in all capital cases.

Having thus defined the issue, this Court concluded by 6-3 vote that the constitution does not require jury sentencing, and upheld the Florida procedure largely on that basis.

Petitioner's fundamental premise, in contrast, is not that the constitution requires jury sentencing, nor does petitioner's argument have anything to do with double jeopardy. Rather, petitioner's fundamental premise is that the practice whereby Florida trial judges routinely ignore jury life recommendations, and the voluminous but wildly inconsistent body of case law which the Florida Supreme Court has developed as a result thereof, not only lends itself to arbitrary, capricious, unreasonable, and unfair imposition of the death penalty, it virtually guarantees it. As Justice Marshall recognized, in dissenting from the denial of certiorari in Heiney v. Florida, (no. 83-6994, decided October 15, 1985) (in which the trial court discounted the jury's life recommendation because he believed it was motivated by residual doubt as to guilt):

> Although this legal issue might arise in a sentencing scheme that respected the finality of a jury decision against death, it is not necessarily an accident that this case came from Florida's system, where judges may override jury decisions for life. In Spaziano, which upheld the Florida system, the dissent cited data showing that judges are usually more likely to impose death than are juries. Ibid. Where fully informed and rational juries decide that death is inappropriate, a judge's override rarely if ever shows that, in spite of the jury, there was really no reasonable doubt but that death was appropriate. It is far more likely that the override decision simply fails to account for the more intangible or less traditionally "legal" elements of mitigation that informed a jury's decision. This case seems a clear illustration. Indeed, the Spaziano dissent correctly suspected that a system of death sentencing by judges - "trained to distinguish proof of guilt from questions concerning sentencing" - would be less likely to recognize this valid mitigating circumstance. Ibid.
>
> Eddings and Lockett entitle a defendant to a sentencer who can consider all mitigating circumstancs, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life - as this court did in Spaziano - not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

In the present case, defense counsel suggested five factors to the jury which it might consider in deciding whether to recommend life or death.[12] First and probably foremost, he argued that they should find only one aggravating circumstance - the 1958 Nebraska robbery conviction - and accord it relatively little weight. In other words, the jury was asked to consider whether this crime was really beyond the norm of capital felonies so as to require imposition of the death penalty. Is this an "unreasonable" consideration? The Florida Supreme Court has recognized, in McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977) 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 . . . ." See also State v. Dixon, supra, at 9: Tedder v. State, supra; Provence v. State, supra; Williams v. State, supra; Phippen v. State, supra. Can it be said that the evidence of the "cold, calculated, and premeditated" aggravating circumstance was so overwhelming that the jury could be labeled "unreasonable" for not finding it? [See Question I, infra]. In light of the absence of any evidence of what transpired during the four hours immediately preceding the shooting - and in light of the fact that even the Florida Supreme

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[12] Note also that the prosecutor never objected to any aspect of defense counsel's argument to the jury. If the factors argued by defense counsel were truly "unreasonable", shouldn't the state be under the same obligation as the defense to make its objection known, and shouldn't the state's failure to object amount to a waiver? Compare Bassett v. State, 449 So.2d 803, 808 (Fla. 1984) (defense counsel's failure to object to improper prosecutorial argument in penalty phase precludes appellate review) with Porter v. State, 400 So.2d 5, 8 (Fla. 1981)(Alderman, J. Concurring) and Porter v. State, 429 So.2d 293,296 (Fla. 1983)(jury life recommendation which may have been based on defense counsel's reading a description of an electrocution was "unreasonable", even though defense counsel acted with the permission of the trial judge and without objection by the prosecutor.) Defense counsel is not ineffective, according to the Florida Supreme Court if he chooses to forego presentation of any mitigating circumstances, in order to maintain his client's innocence and preserve the integrity of his case. Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). Unfortunately, however, if he chooses this course and is successful in convincing the jury to recommend life because the evidence does not conclusively foreclose the possibility of innocence, that life recommendation, as a matter of Florida law, is "unreasonable", so the judge is free to impose death. See Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Heiney v. Florida, supra (Justice Marshall dissenting from denial of certiorari). Florida "life override" caselaw is replete with such Catch 22s. Defense attorneys, in choosing a strategy to argue for their clients' lives, must be constantly wary of being sandbagged by an override if they argue anything beyond the traditional statutory mitigating categories.

Court recognized that there was no evidence to support either the robbery theory or the "avoid paying the fare" theory advanced by the state and relied on by the trial court - obviously not.

Defense counsel also suggested to the jury that it consider that if petitioner were sentenced to life imprisonment, he would be nearly seventy years old before even becoming eligible for parole (with no guarantee of it even then). The Florida Supreme Court gave this consideration short shrift. In addition to concluding as a matter of law that it is unreasonable "for the jury to consider in mitigation the probability that the defendant would no longer be a threat to society when he reentered it", the court also commented that ". . . the crucial flaw in appellant's argument is that he mistakes the nature of mitigation. Mitigating circumstances must, in some way, ameliorate the enormity of the defendant's guilt." Petitioner submits that it is the Florida Supreme Court which mistakes the nature of mitigating circumstances. A state is constitutionally required to structure its capital sentencing procedure to permit consideration of the individual characteristics of the offender and his crime. California v. Ramos, ___ U.S. ___, 103 S.Ct. ___, 77 L.Ed.2d 1171 (1983); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). It has been recognized that predictions regarding the defendant's potential future dangerousness, and predictions regarding the defendant's potential for rehabilitation, are relevant and constitutionally permissible considerations in capital sentencing. California v. Ramos, supra; Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Simmons v. State, 419 So.2d 316, 320 (Fla. 1982). In California v. Ramos, supra, this Court held that California's "Briggs Instruction", which informed the jury of the governor's power to commute a life sentence without possibility of parole to a lesser sentence which would include the possibility of parole, was both constitutionally permissible and relevant to the sentencing decision:

> By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior

> makes it undesirable that he be permitted to return to society.

California v. Ramos, supra, 77 L.Ed.2d at 1182.

Finally, it should be pointed out that Fla.Stat. 921.141(6)(g) establishes consideration of the age of the defendant as a statutory mitigating circumstance. In State v. Dixon, supra, at 10 (Fla. 1973) the Florida Supreme Court recognized that any age, "whether youthful, middle aged, or aged", may be considered by the jury in mitigation, and further observed that the judge and jury may consider "the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life". [In the present case, the only prior offense established by the state was a Nebraska robbery conviction dated 1958]. It can be seen that these mitigating considerations which the Florida Supreme Court has now discarded as a matter of law - on the ground that they fail to"ameliorate the enormity of the defendant's guilt" - were not exactly novel claims by petitioner. Rather, this aspect of the case again demonstrates the truth of Justice Marshall's observation:

> Eddings and Lockett entitle a defendant to a sentencer who can consider all mitigating circumstances, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life - as this Court did in Spaziano - not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

Heiney v. Florida, supra (Justice Marshall dissenting from denial of certiorari].

Two more non-statutory mitigating circumstances - related ones - which were denigrated by the trial court and the Florida Supreme Court, arise from the likelihood that the jury's life recommendation may have been motivated in whole or in part by their having serious doubts as to the credibility of Laura Eutzy's blatantly self-serving and thoroughly impeached testimony,[13] and by the extremely

[13] While there was other testimony which circumstantially supported a finding that petitioner committed the murder, there was no testimony other than Laura's which even remotely bore upon the circumstances of the crime.

lenient treatment[14] which the state accorded Laura in exchange for her testimony against petitioner. The Florida Supreme Court, characteristically, misconstrued petitioner's credibility argument, and said:

> Had it disbelieved Laura's testimony entirely, the jury could have inferred from the facts before it that Laura knew the defendant had taken the gun from her purse. This does not suffice to make her a principal in the first degree, equally as culpable of the homicide as the defendant.

Eutzy v. State, supra, at 759.

Petitioner's argument that the lenient treatment given to Laura could reasonably have been considered in mitigation by the jury was rejected as a matter of law:

> For a jury recommendation of life to be reasonable, based on lenient treatment accorded an accomplice, the jury must have been presented with evidence tending to prove the accomplice's equal culpability. Otherwise, the state, which often must rely on testimony of a defendant's unsavory companions in presenting evidence of a crime, would bear the burden of rehabilitating those witnesses and defending the legal propriety of treatment the jury might perceive as too lenient. The jury may reasonably compare the treatment of those equally guilty of a crime; it may not compare treatment of those guilty of a different, lesser crime in weighing the propriety of the death penalty. Because the record is devoid of any evidence which would show that Laura was a principal in the first degree in the murder, we must reject the argument that the jury's recommendation of life could reasonably have been based on the disparate treatment of Laura and William.
>
> No evidence of mitigating circumstances was presented for the jury to consider. We have rejected as unreasonable those considerations which may have influenced the jury's recommendation of life. . . .

Eutzy v. State, supra, at 760.

The Florida Supreme Court also stated that, in prior decisions in which it had upheld jury life recommendations, "[i]n every case, the jury has had before it, in either the guilt or the sentencing phase, direct evidence of the accomplice's equal culpability for the murder itself." Eutzy v. State, supra, at 759. This statement sheds some interesting light on the quality and consistency of the appellate review afforded in capital cases by the Florida Supreme Court, in that two weeks before the instant opinion was issued, the Court reversed a death sentence imposed over a life recommendation in Thompson v. State, 456 So.2d 444, 448 (Fla. 1984) and said:

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[14] By not traversing her motion to dismiss, the state allowed the first degree murder indictment against Laura to be dropped, and agreed to recommend that she receive probation on the concealed weapon charge.

> Finally, we note that the state's case relied heavily on the testimony of six witnesses, all of whom had some part in discussing, planning, or carrying out the attempted robbery, and that all either pled to reduced charges or received promises of assistance on other charges in return for their testimony. We do not suggest that these witnesses could be characterized as accomplices or that they coerced or dominated appellant. Neither do we suggest that this circumstance alone would necessarily overcome the two valid aggravating circumstances. However, we believe there were in this instance sufficient mitigating factors for the jury to reasonably conclude that the aggravating circumstances were overcome and that life imprisonment was a proper sentence.

Has it gotten arbitrary and capricious enough yet to implicate the Eighth and Fourteenth Amendments? In Spaziano v. Florida supra, 82 L.Ed.2d at 356, this Court said:

> We are satisfied that the Florida Supreme Court takes [the Tedder] standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. . . . Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.
>
> We see nothing that suggests that the application of the jury-override procedure has resulted in arbitrary or discriminatory application of the death penalty, either in general or in this particular case.

Petitioner submits that the examples set forth in this petition, and in this case, of the Florida Supreme Court's derogation of the jury's role and its cavalier rejection of a wide variety of mitigating factors; of the amorphous and arbitrary standard of review employed by that court in life override cases; of the court's chronic refusal, without explanation, to follow its own precedent as to capital sentencing issues; and of the court's application of a "harmless error" approach when the trial court bases its override of the jury's life recommendation on aggravating factors which the appellate court agrees were improperly considered, should convince this Court that Florida's "life override" practice, as interpreted by the Florida Supreme Court, does violate the Eighth and Fourteenth Amendments. And, in the seven months since Spaziano was decided, the standard of review appears to have become even looser and more capricious than before.

At the time petitioner's reply brief was filed in February, 1984, he was aware of 59 life override cases decided by the Florida Supreme Court. Twenty-one of these (36 per cent) were affirmed. Of the 21 affirmances, only one or possibly two did not include a valid

finding that the murder was "especially heinous, atrocious, or cruel". See e.g. Buford v. State, 403 So.2d 943, 954 (Fla. 1981) (recognizing that the trial court in that case, as in previous life override cases in which the Florida Supreme Court affirmed the death sentence, was "unquestionably . . . swayed by the extreme heinousness and atrocious of the crimes"). The only two exceptions were Sawyer v. State, 313 So.2d 680 (Fla. 1975), the earliest life override affirmance, and possibly Ziegler v. State, 402 So.2d 365 (Fla. 1981). [Sawyer's sentence was subsequently mitigated to life imprisonment by the trial court (which is no longer permissible under Florida law). Ziegler involved a particularly aggravated set of facts - a furniture store owner murdered his wife in order to collect a half million dollars in insurance benefits, and, in order to make the crime appear to be a robbery, also murdered his parents-in-law and a man named Mays, so as to have it appear that the killings occurred in the course of a robbery committed by Mays and others]. Only rarely was the Elledge rule applied in life override cases to that point. See Appendix G 25-28, Appendix H 5-6].

In the last seven months, in contrast, the Florida Supreme Court has affirmed five of the seven (71 per cent) life override cases it has decided. Gorham v. State, 454 So.2d 556 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984); Groover v. State, 458 So.2d 226 (Fla. 1984); Parker v. State, 458 So.2d 750 (Fla. 1984) ; Eutzy v. State, 458 So.2d 755 (Fla. 1984)(death sentence affirmed); Thompson v. State, 456 So.2d 444 (Fla. 1984); Rivers v. State, 458 So.2d 762 (Fla. 1984) (death sentence reversed). In its opinion in the instant case, the court wrote:

> First, appellant notes that in the vast majority of all cases in which this Court has affirmed the imposition of the death sentence in spite of a jury recommendation of life, there has been a finding that the murder was especially heinous, atrocious and cruel. While appellant's statistical compilation and case analysis is interesting and informative, we cannot agree that it is binding precedent for the proposition that a jury recommendation of life coupled with the absence of that particular aggravating factor destroys the trial judge's statutory authority to independently weigh the evidence in aggravation and mitigation and to impose sentence. Though always entitled to great weight, the jury's recommendation is only advisory. Under no combination of circumstances can that recommendation usurp the judge's role by limiting his discretion.

Eutzy v. State, supra, at 758-59.

Of course, petitioner never argued that the absence of the "heinous, atrocious, or cruel" circumstance was "binding precedent" or "destroys the trial judge's statutory authority". Petitioner simply argued that, perhaps in combination with other factors, the fact that the killing was not an especially heinous, atrocious, or cruel one was a reasonable thing for the jury to consider in deciding whether the crime warranted the death penalty. Unlike virtually all of the life override cases which had been affirmed previously, this case did not involve sexual assault; children or elderly people as victims; extreme physical brutality or torture, extreme mental anguish in anticipation of death,or multiple murders [see Appendix G 27]. Until July, 1984, you could virtually always distinguish the life override cases in which the death sentence was affirmed from those in which it was reversed by the presence or absence of this factor.

In the seven most recent life override decisions, however, three of the five cases in which the Florida Supreme Court affirmed the death sentence were not found to be especially heinous, atrocious, or cruel killings. In Gorham v. State, supra, the court rejected the trial court's findings of "heinous, atrocious, or cruel" and "cold, calculated, and premeditated", and affirmed the death sentence anyway on a "harmless error" theory. In Parker v. State, supra, the court rejected the trial court's findings of "heinous, atrocious, or cruel" and "course of a robbery", and affirmed the death sentence anyway on a "harmless error" theory. In the present case, Eutzy v. State, supra, the trial court did not find (nor could he have found) the "heinous, atrocious, or cruel" factor, the Florida Supreme Court rejected the "course of a robbery" finding and the theory as to motive on which the override was based, and affirmed the death sentence anyway on a "harmless error" theory. In Thomas v. State, supra (in which there was a valid finding of "heinous, atrocious, or cruel") the Florida Supreme Court struck one aggravating factor and (ignoring both safeguards in the Elledge rule) held the error "harmless" even though the jury recommended life and even though the trial court found two mitigating circumstances, that the defendant had no

significant record of criminal activity and that he was only twenty years old. Assuming arguendo that Florida's standard of review in life override cases did not appear to violate the Eighth and Fourteenth Amendments at the time Spaziano was decided, that is clearly no longer the case. It is also important to recognize that the Florida Supreme Court's decisions in Eutzy and the other recent life override cases not only fail to apply the constitutional principles established by this Court to prevent arbitrary and unreasoned imposition of the death penalty, these decisions also become precedent in Florida capital trials. Thus, on the authority of Eutzy, a Florida trial court must (for example) refuse to instruct the jury, and refuse to consider himself, any mitigating circumstance which he finds does not "ameliorate the enormity of the defendant's guilt". A clearer violation of the principles set forth in Lockett v. Ohio, supra, can hardly be imagined.

CONCLUSION

WHEREFORE, petitioner respectfully requests that this Court grant this petition for writ of certiorari, or, in the alternative, summarily reverse petitioner's death sentence on any or all of the numerous grounds discussed in this petition.

Respectfully submitted,

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SECOND JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C. 20543; Mr. William Eutzy, #090408, Florida State Prison, Post Office Box 747, Starke, Florida, 32091; and by hand delivery to the Honorable Sid White, Clerk of hte Supreme Court, State of Florida, Tallahassee, Florida, 32301; and to Lawrence Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32301 on this 1st day of February, 1985.

Steven L Bolotin

STEVEN L. BOLOTIN
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