IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Appellant,

v. CASE NO. 64,212

STATE OF FLORIDA,

Appellee.

REPLY BRIEF OF APPELLANT

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I PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "AB". Other references will be as denoted in appellant's initial brief. This reply brief is directed to Issue V; appellant will rely on the arguments advanced in his initial brief as to Issues I through IV.

II ARGUMENT

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.

In complacently failing to address this argument, the state has put all its eggs in one basket -- that of "preservation". Rather than attempting to defend the constitutionality of the "life override" provision, the state's only concern seems to be to enlist this Court's aid in preventing the federal courts from considering this issue. [In this regard, it is worth noting that the United States Supreme Court has granted certiorari in Spaziano v. Florida, __ U.S. __ (1984)(34 Cr.L. 4159); two of the three issues presented in Spaziano are whether the trial court's override of the jury's factually based decision against the death penalty violates, in all cases, the Fifth, Sixth, and Fourteenth Amendments, and whether this Court, in affirming death sentences, has adopted such broad and vague application of standards governing the decision to override a jury's life verdict as to violate the Fifth, Sixth, Eighth, and Fourteenth Amendments].

The state blithely asserts, without citing any authority, that appellant's claim that the imposition of a death sentence notwithstanding the jury's recommendation of life imprisonment is unconstitutional "does not involve 'fundamental error'" (AB. 23). Needless to say, appellant disagrees. In Castor v. State,

365 So.2d 701, 704 n.7 (Fla. 1978) this Court noted that "for an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." If appellant is correct on the merits of his argument that a jury's recommendation of life imprisonment cannot constitutionally be overridden by the trial court, then the imposition of the death penalty under those circumstances would clearly amount to a denial of due process. When the then-existing death penalty statutes were declared unconstitutional as applied in Furman v. Georgia, 408 U.S. 238 (1972), the holding of that case applied to all persons sentenced to death under those statutes, not just those defendants who had made a contemporaneous objection at trial. Similarly, if this Court in the instant case, or the United States Supreme Court in Spaziano, should hold that the "life override" provision of Florida's death penalty statute is unconstitutional, on its face or as applied, then no defendant who has received a jury recommendation of life can constitutionally be executed, whether he objected on these grounds at trial or not.

Aside from the fundamental character of the issue, appellant also wonders at what point in the proceedings the state would have had him raise it. In its brief, the state says "[c]onsequently, since this issue could have been raised prior to trial, the issue has been waived and is not properly before the Court." (AB.23). It should be noted that appellant did file a number of pre-trial motions challenging the constitutionality of the death penalty statute and several of the aggravat-

ing circumstances enumerated therein (R.348-49, 352-53, 358-73). Among the grounds stated is that although this Court and the U. S. Supreme Court have upheld the facial constitutionality of Florida's death penalty statute as against Eighth Amendment challenges, the death penalty has, in fact, been administered and applied in a manner which is inconsistent with the Courts' decisions (R.364). The trial court denied these motions at trial (R.252-57). The state contends on appeal that appellant has waived his constitutional arguments against the trial court's rejection of the jury's life recommendation and his imposition of a death sentence in its stead by failing to raise these arguments prior to trial. Appellant submits that raising constitutional objections to the life override at that point would have been premature and speculative. It assumes in advance that 1) the defendant will be convicted of first degree murder, 2) that the jury will recommend life, and 3) that notwithstanding the "great weight" that a life recommendation is supposedly entitled to,[1] the trial court will reject it and impose a death sentence. Since, in theory, a life recommendation cannot be overridden except in the extraordinary circumstance where "virtually no reasonable person could differ" from imposition of a death sentence, defense counsel should reasonably be able to assume that if the jury recommends life imprisonment, his client will be sentenced to life imprisonment. [In reality, of course, that is not a safe assumption, because the Tedder standard is incapable of fair or consistent application]. If the jury

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[1] See e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975).

recommends life, should defense counsel at that point submit arguments challenging the trial court's authority to reject the recommendation, at the risk of goading the court into doing that very thing? (which it might otherwise not have been considering).

A final and compelling reason why this Court should not invoke a "contemporaneous objection" rule to preclude reaching the merits of this issue was inadvertently recognized in the state's own brief (AB.24) -- that is the fact that this Court in previous decisions has addressed on direct appeal the merits of constitutional objections to imposition of the death penalty notwithstanding the jury's life recommendation, and has not applied a "contemporaneous objection" rule to avoid consideration of this fundamental issue. Thus, if this Court were to now decline to consider the merits of appellant's constitutional argument based on the state's claim of procedural default, this would amount to a novel application of the contemporaneous objection rule to an issue of this character, and would not preclude federal review in any event. See Spencer v. Zant, 715 F.2d 1562, 1572-72 (11th Cir. 1983); see also NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 301 (1964); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958); Wright v. Georgia, 373 U.S. 284, 291 (1963); Breest v. Perrin, 655 F.2d 1, 2-3 (1st Cir. 1981).

Turning briefly to the merits, appellant would call the Court's attention to the fact that, in the past month, it has affirmed two more death sentences which were imposed notwithstanding jury life recommendations. Lusk v. State, __ So.2d __

(Fla. 1984)(case no. 59,146, opinion filed January 26, 1984); Heiney v. State, __ So.2d __ (Fla. 1984)(case no. 56,778, opinion filed February 2, 1984).[2] This brings the total to 21 post-Furman cases in which a majority of this Court determined that no reasonable person could differ from a death sentence, even though in each of those cases anywhere from six to all twelve members of a death-qualified Florida jury believed that life imprisonment was the appropriate sentence. These "unreasonable" juries are the same ones which convicted the defendants of first-degree murder, yet this Court refrains from second-guessing that verdict. See e.g., Tibbs v. State, 397 So.2d 1120 (Fla. 1981); Heiney v. State, supra. The appellate courts of this state have repeatedly stated and followed the principles that jurors are presumed to live up to the obligations of their oaths [see e.g., Burnette v. State, 157 So.2d 65 (Fla. 1963), Silvestri v. State, 332 So.2d 351 (Fla. 4th DCA 1976)] and that jurors are presumed to follow the instructions of the court [see e.g., McGee v. State, 304 So.2d 142 (Fla. 2d DCA 1974); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981)]. In Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), this Court observed that "[t]he law requires that juries be composed of persons of sound judgment and intelligence, and it will not be presumed that they are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." See also James v. State, 334 So.2d 83 (Fla. 3d DCA 1976). Only

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[2] Referring back to Issue I, it should be noted that in both Lusk and Heiney, this Court upheld the trial court's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance. See appellant's initial brief at pages 25-28.

when a jury returns a verdict recommending life imprisonment rather than a death sentence does this Court seem willing to stand these principles on their heads and assume that the jurors violated their oaths, ignored the instructions, or were led astray to an "unreasonable" verdict by impassioned eloquence and illogical pathos. [See, for example, Porter v. State, 429 So.2d 293, 296 (Fla. 1983), in which this Court, in affirming the death sentence imposed notwithstanding the jury's life recommendation, assumed that the jury "might well have been swayed by defense counsel's reading of an 'extremely vivid and lurid' description of an electrocution"[3] which "might well have been calculated to influence the recommendation of a life sentence through emotional appeal"].

For the reasons discussed in appellant's initial brief and in this reply brief, appellant submits that the provision of Florida's death penalty statute authorizing the trial court to override a jury's recommendation of life imprisonment and to impose a death sentence in its stead is violative of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution in the manner in which it has been applied by the trial courts of this state and by this Court. The original and primary justification for the override procedure was that it was to serve as a safeguard against unreasonable jury death recommendations. See Dobbert v. Florida, 432 U.S. 282, 295-96 (1977); State v. Dixon, 283 So.2d 1, 8 (Fla. 1973);

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3 This description of an electrocution was read to the jury by defense counsel with the permission of the trial court and without objection by the state. See Porter v. State, 400 So.2d 5, 8 (Fla. 1981)(Alderman, J., concurring).

Thompson v. State, 328 So.2d 1, 5 (Fla. 1976); Judy v. State, 416 N.E.2d 95, 108 (Ind. 1981). Instead, it has become starkly apparent that the real function of the override has been to give the state a second shot at a death sentence when it fails to persuade the jury. The trial court's imposition of the death penalty, in contravention of the jury's life verdict, can no longer withstand constitutional scrutiny.

III CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Lawrence 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 24th day of February, 1984.

Steven L Bolotin
STEVEN L. BOLOTIN