IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,

Appellant,

v. CASE NO. 68,548

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE.	:	
Appellant,	:	
v.	:	CASE NO. 68,548
STATE OF FLORIDA,	:	
Appellee.	:	
_____	:	

INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, GREGORY SCOTT ENGLE, 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 (from the original appeal, case no. 57,708) will be referred to by use of the symbol "R". The transcript of the trial, the penalty proceeding before the jury, and the original sentencing hearing will be referred to by use of the symbol "T". The record on appeal with reference to resentencing (case no. 68,548) will be referred to by use of the symbol "SR". The transcript of the resentencing proceedings will be referred to by use of the symbol "ST". All emphasis is supplied unless the contrary is indicated.

II STATEMENT OF THE CASE

Gregory Scott Engle, along with Rufus Stevens, was charged by indictment returned April 5, 1979 with first degree murder of Eleanor Kathy Tolin (R 6-7). Appellant moved to sever his trial from that of Stevens (R 25). This motion was granted (R 36).

Appellant's case proceeded to trial before Circuit Judge John E. Santora, Jr. and a jury. The jury was selected and sworn on May 29, 1979. The evidentiary phase of the trial commenced on May 30, 1979 and continued through the following day. On June 1, 1979, the jury heard the closing arguments of counsel and the court's instructions on the law, and then retired to deliberate at 4:53 p.m. (T 968). At 7:00 p.m. the jury returned with three questions, phrased as follows:

> No. 1 - Testimony of Nathan - We would like to see his testimony in which he said to the effect: "I know he (or they) killed her."
>
> No. 2 - In order to prove first degree murder, must we be convinced that the defendant killed the victim?
>
> No. 3 - We do not now need Nathan's testimony. We do need the judge's definition previously requested.

(T 972, see SR 73).

The trial court reinstructed the jury on the degrees of murder and on principals (T 972-76). He asked the foreman of the jury whether that answered their question; the foreman replied "Can we confer on it, Your Honor?" (T 976). Five minutes later, the jury buzzed again (T 976). The trial court said to counsel:

> Apparently, we didn't -- I didn't answer their question because this question reads: Do we have to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree? That is the same question they asked before.

(T 976, see SR 73).

The trial court again referred the jury to the written instructions which they had in the jury room (T 979).

At 8:51 p.m., the jury buzzed again and informed the trial court that they were not close to a verdict, and needed to get something to eat (T 981). With the assent of counsel, the trial court permitted the jury to recess for the night (T 983). At 8:30 the following morning, the jury reconvened (T 984). After an hour, the jury asked to be provided with an easel and chalk, and this was done (T 984, see SR 73). Finally, at 10:58 a.m., after nearly six hours of deliberations, the jury

returned a verdict finding appellant guilty as charged of first degree murder (R 91, T 984-86).

The penalty phase of the trial commenced within minutes after the guilty verdict was announced (T 986-87). No additional evidence was presented by either the state or the defense. Rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was specifically instructed that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented to you in the proceedings" (T 1023). After 25 minutes of deliberation, the jury returned a recommendation that appellant be sentenced to life imprisonment (R 91A, T 1028, 1031).

On August 17, 1979, the trial court rejected the jury's life recommendation, and sentenced appellant to death (R 113, T 1091). The trial court's findings in support of the death penalty were read in open court and filed (R 114-19, 1083-92). Included in the sentencing order is a recitation of the trial court's view of the facts of the crime (R 114-15, 116-17). Many of the purported facts referred to by the trial court, however, were not based on any evidence presented in appellant's trial. Rather, their source was statements made by Rufus Stevens which were admitted into evidence at Stevens' trial, in which Judge Santora had also presided (see SR 82-83). [Defense counsel had objected unsuccessfully to the trial court's consideration of Stevens' statements, on the ground that it would deprive appellant of his constitutional right to confront and cross-examine witnesses against him]. In the sentencing order, the trial court found four aggravating circumstances, found no mitigating circumstances, and made no reference to the jury's recommendation of life imprisonment (R 114-119, T 1083-92).

On appeal, appellant raised five issues with respect to the guilt or innocence phase of the trial. With regard to penalty, appellant contended that the trial court's

decision to reject the jury's life recommendation and to impose a death sentence in its stead was improper [see Initial Brief of Appellant, case no. 57,708, p. 49-61], and that the trial court, in so sentencing appellant, improperly considered "evidence" derived from the un-cross-examined statements of Rufus Stevens [see Initial Brief of Appellant, p. 62-67]. The state, in its answer brief, conceded that the trial court considered Stevens' statements in deciding to override the jury's life recommendation [see Brief of Appellee, p.32], but took the position that there was nothing improper about doing so. With regard to appellant's argument that there was a reasonable basis for the jury's recommendation of life, the state asserted that it was "rather clear that the jury recommended life because they had no evidence that appellant participated in the acutal homicide" [Brief of Appellee, p.29]. The state then argued, specifically referring to Issue VII (concerning Rufus Stevens' statements) that "[t]he trial judge, however, did have such evidence ... and relied upon that evidence in imposing the sentence of death" [Brief of Appellee, p.29]. Therefore, the state submitted "if this Court finds the trial judge could properly consider the evidence which proved that appellant was a coparticipant in the homicide", then the life recommendation would be unreasonable and the death sentence should be affirmed. [Brief of Appellee p. 29].

The state further argued that Stevens' un-cross-examined statements were reliable, because they contained admissions against his penal interest [Brief of Appellee, p. 35], while appellant, citing Bruton v. United States, 391 U.S. 123 (1968), countered that the statements were inherently unreliable, because of the "recognized motivation [of an accomplice] to shift blame onto others", and that the unreliability of such evidence is compounded when it cannot be tested by cross-examination [Reply Brief of Appellant, p.17].

On September 15, 1983, this Court affirmed appellant's conviction, but agreed with his contention that, in imposing the death sentence, the trial court improperly considered Rufus Stevens' statements, in violation of appellant's sixth amendment

right of confrontation. Engle v. State, 438 So.2d 803 (Fla. 1983). Consequently, this Court vacated appellant's death sentence, and remanded with instructions to the trial court to conduct another sentencing hearing. Engle v. State, supra, at 814.

The resentencing hearing was held on October 4, 1984. At the outset, Judge Santora denied appellant's request that he recuse himself (SR 60-61, ST 10-15). Appellant presented additional evidence in mitigation, consisting of the testimony of his mother, Florence Engle; his sister, Peggy Jo Pugh; and (upon the state's stipulation to its admissibility) a written psychological evaluation by Dr. James Vallely (ST 16-32, SR 75-78). Also before the court, from the original sentencing proceeding in 1979, were the pre-sentence investigation report, and psychological evaluations by Drs. Ernest Miller and Lauren Yates (SR 42-59). After hearing the arguments of counsel (ST 33-69), the trial court deferred imposition of sentence (ST 69-71).

Appellant submitted a memorandum of law (followed by four supplemental memoranda) in support of his position that there was a reasonable basis for the jury's life recommendation, and that (especially now, in the absence of the contrary "evidence" derived from Rufus Stevens' statements) it should be followed (SR 66-74, 180-191). Included in the memorandum was a brief biographical sketch of each juror, and a summary of his or her responses when asked under oath whether he or she could recommend the death penalty if the circumstances warranted it (SR 69-72). Defense counsel emphasized the questions submitted by the jury during their lengthy guilt-phase deliberations concerning whether, in order to return a verdict of first-degree murder, they had to be convinced that appellant personally killed the victim (SR 73). Defense counsel also focused on the testimony of the key state witness at trial, Nathan Hamilton (SR 73-74), and on the defense's closing argument in the penalty phase (SR 73).

The state also filed a memorandum of law, in which it argued for re-imposition of the death penalty (SR 81-103). It was the state's position that there were four aggravating and no mitigating circumstances, that the jury's recommendation was

unreasonable, and that death was the only appropriate sentence (SR 83-103). At the beginning of its memorandum, the state set forth those portions of the factual recitation in the trial court's original sentencing order which "must have emanated from Stevens' confession" and which therefore could no longer be considered (SR 82-83). The state conceded in its memorandum that appellant was entitled to present, and the court was obliged to consider, additional evidence in mitigation at the resentencing hearing (SR 83). Appended to the state's memorandum was a transcript of the testimony of Nathan Hamilton (SR 86, 105-178).

On March 28, 1986, the trial court again sentenced appellant to death (SR 204, 206-208, ST 74-78). The court prefaced his sentencing order with the following comment:

> Pursuant to the order by the Florida Supreme Court this court held an evidentiary hearing and both the State and the defendant were allowed to present evidence. In resentencing this defendant the court has reassessed all aggravating and mitigating circumstances without taking into consideration inadmissible statements made by Rufus Stevens. Additionally, the court has thoroughly studied the record in this case and considered all arguments by counsel for both the State and the defense.
>
> Evidence produced at trial established that the victim, Kathy Tolin, a young mother of two children, was working as a clerk in a convenience store. Tolin was robbed, abducted, raped, mutilated, and then murdered. This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used and finds that the only appropriate sentence is death...

(SR 206).

The trial court found four aggravating circumstances: (1) that the murder occurred in the course of a robbery, kidnapping, and sexual battery; (2) that it was committed to avoid lawful arrest; (3) that it was committed for pecuniary gain; and (4) that it was especially heinous, atrocious, or cruel (SR 206-08). The sentencing order does not discuss any specific statutory or non-statutory mitigating circumstances, but only the conclusory statement "The Court finds that there are no mitigating circumstances" (SR 208). There is no reference in the sentencing order

to the jury's life recommendation, except perhaps for the judge's statement that he had "... considered all arguments by counsel for both the State and the defense" (SR 206).

Notice of appeal was filed on April 2, 1986 (SR 216).

III STATEMENT OF THE FACTS

A. The Trial

The following is a summary of the evidence presented at trial on May 30-31, 1979:

On March 12, 1979, at 9:30 p.m., Eleanor Kathy Tolin arrived for work as a cashier at the Majik Market on Timuquana and Catoma Roads in Jacksonville (T 296-297). When Mrs. Tolin relieved the afternoon cashier, $50 was left in the cash register (T 296-299). At approximately 3:50 a.m. on March 13, 1979, Walter Glenn Thomas purchased a pack of gum from Mrs. Tolin at the Majik Market (T 300-302). David Glover, a newspaper deliveryman for the Florida Times Union, arrived at the Majik Market around 4:20 a.m. on March 13, 1979 (T 302-303). Glover found the store unlocked and unattended. He called the police and stayed until they arrived (T 304). A subsequent comparison between the cash on hand and the cash register record showed $67 was missing from the store (T 308).

On March 14, 1979, at approximately 10:00 a.m., Mrs. Tolin's body was found in a wooded area of Fouraker Road (T 316, 319-21, 327, 348-50, 352-53). An autopsy was performed at the Medical Examiner's Office by Dr. Bonifacio Floro (R 371-72). Dr. Floro determined that the cause of death was ligature strangulation and multiple stab wounds of the back, "... whether singular or in combination" (T 372). He believed that the strangulation injuries occurred first, and would have been fatal irrespective of any of the stab wounds (T 372-73, 384). Dr. Floro found a four inch laceration of the vaginal area, which he believed could have been caused by a large object, or by forcible intercourse (T 359-60, 369-70). No semen was discovered in the vaginal area (T 381). Dr. Floro testified that he could not tell whether Mrs. Tolin's injuries

were inflicted by one person or by more than one person (T 381).

Officer Raymond A. Godbee of the Jacksonville Sheriff's Office was patrolling Zone 1 during the 3:00 p.m. to 11:00 p.m. shift on March 19, 1979 (T 388-389). He had occasion to stop an automobile which had three occupants (T 389). The driver was Lanny Israel, the passenger in the right front seat was Ralph Coble and the passenger in the back seat was Nathan Hamilton (T 390). Israel told Godbee that Hamilton knew who was involved in the Timuquana Road Majik Market robbery murder case (T 393). As a result of this conversation, both Israel and Hamilton were taken down to the Sheriff's homicide office for questioning (T 393; 391).

At approximately 11:25 p.m. on March 19, 1979, Investigator J.L. Parmenter, a homicide detective, had a 45 minute talk with Nathan Hamilton in a conference room in the Police Memorial Building (T 590-91). Parmenter, Detective Zipperer, and Hamilton then went to Hamilton's trailer to get Hamilton's wife and baby and bring them to the homicide office (T 592). While at the trailer, Parmenter encountered Gordon Day, Guy Custer, and Rufus Stevens. Parmenter gave them a "cover story" (that he had arrested Nathan Hamilton for drugs) in order to conceal his actual investigation of the Majik Market homicide (T 592-93). After gaining information from Hamilton and securing his family, Parmenter and other officers arrested Rufus Stevens and appellant for murder (T 550-51, 570, 594-96, 632-33).

Subsequent to his arrest, appellant was interviewed by Detectives Zipperer and Parmenter and Lieutenant Suber (T 562-66, 597-601, 608-13, 665-67). He denied taking part in the robbery of the Majik Market (T 567-68). In response to questioning about his whereabouts on March 13 from 2:00 a.m. until daybreak, appellant stated that when he got off work at the steak house he went to his residence (he was staying with the Wemmer family) and knocked on the door. No one came to the door so he sat on the porch. Shortly thereafter Rufus Stevens and Nathan Hamilton came by and asked him if he wanted to go for a ride. He rode around Jacksonville in Stevens' car with Stevens and Hamilton until a little after 2:00 a.m. when they

took Hamilton home, and then he continued to ride around drinking beer with Stevens until just after daylight (T 565-568). He never told the officers of any particular place he went with Stevens nor did he tell them of any particular person they saw during their ride (T 567).

During the interview, Detective Parmenter showed appellant a Buck pocket knife engraved with the initials S.E. (T 611-13). Appellant told Parmenter that it looked like his knife, and that he had had his initials put on his knife at the Trophy Shop on Cassat Avenue about two months earlier (T 612-13).

Nathan Hamilton was the state's key witness at trial (T 397-471). Hamilton had known Rufus Stevens for six years; Stevens is his wife's first cousin (T 398, 425). They lived in the same trailer park (T 399). Hamilton and Stevens were good friends; they "went fishing together, drank together, whatever friends do together" (T 425). Sometimes, Hamilton acknowledged, he and Stevens did things that were against the law together (T 425). Hamilton had known appellant for about seven or eight years (T 405). Appellant had been living with Hamilton and his wife in their trailer, but about three or four weeks prior to March 12-13, 1979, they had asked him to leave (T 444).

On Monday night, March 12, 1979, beginning at about 8:00 p.m., Nathan Hamilton and Rufus Stevens were drinking together (T 398-99). They hit about five different bars (T 399-400). Stevens was driving (T 401, 404). At about 10:00 p.m., Stevens started discussing a robbery (T 427). He asked Hamilton if he wanted to come with him and rob the Best Western Motel in Orange Park (T 428, 430). Hamilton told Stevens to let him think about it for a while, it was "a little out of [his] league" (T 428, 430). After first broaching the subject, Stevens continued to talk about robbing the Best Western (T 430). Hamilton figured the drunker Stevens got, he'd forget about it (T 430).

Shortly before 12:30 a.m., Stevens and Hamilton stopped at the Majik Market

on the corner of Catoma and Timuquana for a cup of coffee (T 400, 431-32). Kay Tolin was working there at the time (T 432). As they got back in the car and were leaving, Stevens said to Hamilton that they had just left the best place to rob (T 431). Stevens asked him if he wanted to rob the Majik Market (T 430). Hamilton replied that he thought Stevens was crazy because the lady could identify both of them; they both lived in that neighborhood and everybody around there could identify them (T 432). Rufus Stevens said they would take her out of the store, to get her away from the phone (T 433, 463-64).

Nathan Hamilton testified that it was his understanding that, if he had agreed to do it, the robbery of the Majik Market was to occur immediately (T 433-34). According to Hamilton, Rufus Stevens was ready, willing, and able to commit the robbery right then, if he [Hamilton] had acquiesced to the plan (T 434, 459-60). This was true even though, as far as Hamilton knew, Stevens did not have a weapon (T 459-60).

About an hour to an hour and a half later, Stevens and Hamilton picked up appellant, who was sitting on the Wemmers' front porch (T 401, 403, 434). Appellant got in the back seat of the car; Stevens was still driving and Hamilton was on the passenger side of the front seat (T 403-04). At this point, Hamilton had had about fifteen draft beers (T 404, 428-30). Rufus Stevens asked appellant if he wanted to make some money (T 403, 427, 435). Appellant said sure, what do I have to do (T 403, 435). Stevens said rob a Majik Market, and appellant again said sure (T 403, 427, 435). There was no more conversation after that (T 403). Hamilton remained in the car for about two more minutes, before they dropped him off at his trailer (T 403, 438).

[The prosecutor showed Nathan Hamilton a knife; Hamilton recognized it, from the initials, as appellant's knife (T 405, 422). Hamilton was with appellant when he had it inscribed (T 405). Hamilton stated that he'd never seen appellant without the knife, though he also stated that he [Hamilton] had had appellant's knife in

his possession a few times, all prior to the night of the Majik Market robbery (T 405, 465). About a week after appellant and Stevens were arrested, Hamilton obtained a knife which was similar to appellant's, only bigger (T 465-66)].

During the daytime on March 13, 1979, as Hamilton was watching television with Rufus Stevens, they saw a newscast concerning the robbery at the Majik Market (T 439). Stevens said "[T]hat's the robbery that my wife thinks that I did" (T 439). Hamilton knew he had done it (T 439).

On March 17, 1979, Rufus Stevens told Hamilton that "we got to get rid of Scott's [appellant's] knife because that's what it was done with" (T 440). The next evening, according to Stevens' directions, Hamilton tried to get the knife from appellant (T 440). Hamilton and appellant were watching "Zorro" on the late movie, and smoking a couple of joints, at Hamilton's trailer (T 408-10, 420, 438, 442-43). Hamilton told appellant that Rufus Stevens had told him that appellant's knife is what it was done with (T 411, 416, 421). Appellant tossed the knife to Hamilton and asked him if he saw any blood on it (T 411, 416, 421, 441). Hamilton looked at it closely, did not see anything on it, and handed it back to appellant (T 411, 416, 421, 441). Hamilton then tried to trade knives with appellant, but appellant wouldn't trade[1] (T 411, 416, 421, 441). Hamilton testified that if he had gotten appellant's knife, he would have given it to Rufus Stevens (T 411, 441).

During this conversation, Hamilton asked appellant if he thought it was worth a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her, and appellant answered no, he didn't (T 416-17, 421, 442). Hamilton asked him why they did it (T 421). Appellant said they got her out of the store away from a telephone, and Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us (T 417, 421). According to Hamilton, he and appellant

[1] It is not entirely clear what knife Hamilton proposed to trade, since he testified that he did not acquire his own knife until after appellant and Stevens were arrested (T 465-66). According to Marsha Wemmer, she had seen Nathan Hamilton with a knife that looked like appellant's, but she was not sure when (T 491).

had the exact same conversation again the next day, while they were walking down to the Lil' Champ store (T 418, 423-24, 442-43).

Nathan Hamilton testified that he did not at any time go to the police voluntarily with what he knew (T 424). He explained this by saying "Sir, in the county where I was raised, I was taught all my life that you don't turn in a relative for no reason" (T 470). Hamilton stated that his relative is Rufus Stevens (T 470).

Hamilton first came in contact with the police on the Monday a week after the robbery (March 19, 1979), when he was riding around in a car, and drinking, with a friend, Lanny Israel (T 424). Hamilton had told Israel that he knew who had done the robbery and murder, but had not told him who it was (T 424, 444-45). When they were stopped for DWI, Israel (who was driving) told the police that Hamilton knew something about the case, and "the next thing I knew, I was at homicide" (T 424, 445). At the police station, Hamilton was advised of his constitutional rights by Detective Parmenter (T 446-48). Although he had been told he was not a suspect, Hamilton was concerned about going to jail, because "... when I go to a police station, I usually go to jail, yes" (T 446,449-50).

Hamilton initially told the police what he knew about the crime by referring to the perpetrators as "A" and "B" (T 453, 455). [Hamilton claimed not to be afraid of anyone, but he was concerned for his wife and baby, and did not want to name names until the police secured them (T 451-52)]. "A" referred to appellant, and "B" referred to Stevens (T 455, 457). Hamilton drew a diagram, with the words "easy", easy", and "weapon" written next to "A" (appellant) and with the words "hard", "killing", and "car" written next to "B" (Stevens) (T 455-57, 459). Hamilton explained that he thought appellant would be easy to "break", or to get to talk, while Stevens would be more difficult (T 455-56, 459). The reference to "killing"

was because Hamilton thought Rufus Stevens might had done the killing[2] (T 457). From knowing them and having lived with them, Hamilton considered Stevens to be the tougher and more dominant one of the two (T 456).

After his wife and child were placed in a motel, Hamilton told the police the names of "A" and "B" (T 461). Appellant and Stevens were arrested that night or later that morning (T 462).

At the time the crime was committed, appellant was living with James and Marsha Wemmer at 6355 Catoma Street (T 472-74, 525-26). Marsha Wemmer testified that on Monday morning, March 12, 1979, appellant, to the best of her recollection, had no money (T 474, 477, 485). Appellant called her that night and said he wouldn't be in until 1:00 or 1:30; she told him she would leave the door unlocked, but she changed her mind and didn't (T 485). The next morning, as she was letting the dog out, she saw appellant as he came in the door (T 475). Appellant told her that he had been out from about 4:00 a.m. drinking beer with Rufus Stevens (T 475-476). About a half an hour after he got in, Mrs. Wemmer saw appellant counting out a few bills. He told her Rufus Stevens had given him $20 and that he was not to say anything to Stevens' wife because she might get upset (T 476).

Mrs. Wemmer testified that appellant owned a knife which he carried with him most of the time, but as far as she knew he left the knife at home when he went to work (T 479). After she told appellant she had heard on the news that the girl from the Majik Market had been found stabbed, appellant told her he had misplaced his knife (T 477-78, 479-80). However, at some point prior to his arrest, appellant had the knife again, and at that time made no effort to conceal or hide

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[2] Detective Parmenter testified that Hamilton told him that "B" (Stevens) had killed the woman (T 635). He also testified that he already knew the first names, Scott and Rufus, from Lanny Israel (T 641-43).

it (T 486). Mrs. Wemmer testified that State's Exhibit N for identification looked like appellant's knife (T 480). She had seen Nathan Hamilton with a knife that looked like appellant's, but she was not sure when (T 491).

After encountering police officers at Nathan Hamilton's trailer in the early afternoon of March 20, 1979, Rufus Stevens, Gordon Day (a cousin of Stevens and a brother-in-law of Hamilton), and Guy Custer (Day's roommate) went to the Wemmers' residence (T 481, 494, 497-98, 516, 527, 592-93). The Wemmers, Day, and Custer all testified to a conversation that occurred between Rufus Stevens and appellant. According to Marsha Wemmer, Stevens told appellant that Nathan Hamilton might be turning them in for the murder of the store clerk (T 481-83, 487). There seemed to be a "general understanding" that they should run (T 487-88). Appellant said he didn't have anything to hide or anything to run for, so he didn't think he should run (T 483, 488). According to Day, before they got to the Wemmers' house, Rufus Stevens had said he was going to kill the son of a bitch (Nathan Hamilton) for running his mouth (T 505-06). When they got to the Wemmers', Stevens told appellant that the police were over at Nathan's house, that Nathan was going to run his mouth, and "we got to get out of here and run" (T 499, 502, 507). Appellant replied that there was nothing to worry about, they couldn't prove a damn thing on him (T 500, 507). According to Custer, Stevens told appellant that Hamilton was "going to pin it on him", and they had to get out of town; appellant said they couldn't prove anything so he was just going to go back to sleep (T 517). According to James Wemmer, Rufus Stevens was acting like he wanted to take off (T 537). Appellant went to get his coat like he was going to leave with them; but then stopped, said he had nothing to run from and nothing to hide, and put his coat back down (T 534, 536). Gordon Day testified that appellant rode around with them for a while after that; he did not know whether appellant went back to bed after they parted company (T 508).

James Wemmer testified that about 15-20 minutes after Stevens, Day, and Custer left his house, appellant said they should hide his [appellant's] knife and their marijuana (T 526-28). The marijuana was in an opaque Tupperware container (T 527, 529). After talking with his wife, Wemmer hid the marijuana under the house (T 529). He did not hide appellant's knife (T 529). This occurred before the police arrived to arrest appellant (T 531). Later that day, Gordon Day came to Wemmer's house and asked him where appellant's knife was (T 532; 540-541). Wemmer thought that the knife might be under the house; he found it in the "stash box" and gave it to Day (T 532-533; 541-542). Wemmer did not see appellant put it there (T 535). Gordon Day testified that when he got the knife from Jim Wemmer, he didn't really know what he intended to do with it; someone had mentioned throwing it away (T 541-53). Day kept the knife for about half an hour and then turned it over to a police officer (T 509, 542-543).

In testimony similar to that of his wife, James Wemmer recalled that after the media reports of the Majik Market crime, appellant mentioned that he had lost his knife (T 533-35). However, between that time and his arrest, appellant was back in possession of the knife (T 533-35).

The physical evidence and pertinent testimony about that evidence was as follows: Mrs. Tolin had type A blood (T 735-36, 740); the codefendant, Rufus Stevens, had type O blood (T 736, 740-41); appellant had type O blood (T 737, 741); type A bloodstains were found in the trunk of Rufus Stevens' car, and on the trunk latch mechanism (T 405-08, 677-78, 681, 719-20, 737-40); type A bloodstains were found on the Buck pocket knife identified as belonging to appellant (T 404-05, 529, 541, 741-45); the pocket knife was consistent with the stab wounds in the victim's back, and could have caused those wounds (T 721-22, 726); the trunk latch mechanism from Stevens' car could have caused an injury mark on the victim's left thigh (T 718-20, 725); a kitchen knife found under Rufus Stevens' former house trailer could

have caused a mark on the victim's back below the three stab wounds (T 619-25, 716-18, 724); two dried semen stains of undetermined origin were found on the back seat of Rufus Stevens' car (T 732-34, 748); hair found on the back seat and floorboard of Stevens' car, and on certain articles of the victim's clothing, likely came from the victim (T 405-08, 677-79, 687, 701-15).

Following the closing arguments of counsel and the court's instructions on the law, the jury retired to deliberate at 4:53 p.m. (T 968). At 7:00 p.m., the jury returned with three questions:

> No. 1 - Testimony of Nathan - We would like to see his testimony in which he said to the effect: "I know he (or they) killed her."
>
> No. 2 - In order to prove first degree murder, must we be convinced that the defendant killed the victim?
>
> No. 3 - We do not now need Nathan's testimony. We do need the judge's definition previously requested.

(T 972, see SR 73).

The trial court reinstructed the jury on the degrees of murder and on principals (T 972-76). He asked the foreman of the jury whether that answered their question; the foreman replied "Can we confer on it, Your Honor?" (T 976). Five minutes later, the jury buzzed again (T 976). The trial court said to counsel:

> Apparently, we didn't -- I didn't answer their question because this question reads: Do we have to be convinced the defendant personally killed the victim to render a [verdict] of murder in the first degree? That is the same question they asked before.

(T 976, see Sr 73).

The trial court referred the jury to the written instructions which they had in the jury room (T 979).

At 8:51 p.m., the jury buzzed again and informed the trial court that they were not close to a verdict, and needed to get something to eat (T 981). With the assent of counsel, the trial court permitted the jury to recess for the night (T 983).

At 8:30 the following morning, the jury reconvened (T 984). After an hour, the jury asked to be provided with an easel and chalk, and this was done (T 984, see SR 73). Finally, at 10:58 a.m., after nearly six hours of deliberations, the jury returned a verdict finding appellant guilty as charged of first degree murder (R 91, T 984-86).

The penalty phase of the trial commenced within minutes after the guilty verdict was announced (T 986-87). No additional evidence was presented by either the state or the defense. Rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was specifically instructed that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented to you in the proceedings" (T 1023). After 25 minutes of deliberation, the jury returned a recommendation that appellant be sentenced to life imprisonment (R 91A, T 1028, 1031).

On August 17, 1979, the trial court, after consideration of statements made by Rufus Stevens (which were admitted into evidence at Stevens' trial, but not at appellant's) [see Statement of the Case, infra, P. 3-5], rejected the jury's life recommendation and sentenced appellant to death (R 113, T 1091).

B. The Resentencing Proceeding

In addition to the evidence presented at trial in May 1979, and the jury's recommendation of life, the matters before the trial court upon resentencing included the testimony, introduced at the hearing of October 4, 1984, of appellant's mother, Florence Engle, and his sister, Peggy Jo Pugh (ST 19-32). Also introduced into evidence at that time, upon the state's stipulation to its admissibility, was a psychiatric evaluation of appellant conducted by Dr. James Vallely (SR 75-78, ST 16-18). The presentence investigation report submitted prior to the original sentencing proceeding, and psychological evaluations performed at that time by Drs. Ernest Miller and Lauren Yates, were also available to the court (SR 42-59).

Florence Engle testified that she is the mother of five children; Scott (appellant) is the middle child (ST 19-20). When Scott was born, he had trouble breathing and was placed in an incubator (ST 20). He was sickly as a child, and "it seemed as he grew older his playmates that he chose were younger than him" (ST 20). Although he was older than the other kids, he was always a follower, rather than a leader (ST 25).

Mrs. Engle's husband was "shell shocked" in World War II, and was hospitalized for a year after the service, undergoing insulin shock treatments (ST 21). Thereafter, he suffered poor health, and mental and emotional problems (ST 21-23). He began having heart attacks when Scott was about 10 or 12, and his mental condition deteriorated from there (ST 21). That was about the time, Mrs. Engle testified, that she started having trouble with Scott (ST 21). Her husband "spent most of his time in the hospital or going back and forth to the hospital", while she had to work from three to eleven, and had nobody else to help her take care of the children (ST 22). Mrs. Engle testified:

> Well, after he started having heart attacks, of course, the mental problems got worse, and one of his heart attacks he had to have his leg amputated. My husband was a handsome, vain man and a lady's man, and he knew that his time, you know, wasn't long and he couldn't accept his condition, and by that time I had the two smaller children and he panicked and moved us out of our nice home into a cement block house with no furnace, cold running water and no bathroom. We like to froze to death that first winter.
>
> That's when -- well, that's when he lost his leg, and I lost another baby and my mother had her stroke, you know. It was just a series of things like that, and that's when the work back in those days in the hospital was very hard, you know, and I hadn't worked in 15 years and I tried to work, cook and clean for seven people and maybe two or three times a week I would run him to the hospital, you know, and then there was that leg off and I knew that he was making it hard on the older children.
>
> See, the two little [ones] were in diapers, and I knew he was making it hard on them, but I didn't realize how hard until they came to me and told me some of the things, you know, how mean he was to them.

* * *

> So the three older children came to me. By this time my older son had a job outside the home. He was still in school, but he stayed away as much as possible, and Peggy came to me and Gary told me some of the things that the -- the meaness of their father, and so I went to the hospital and spoke to the head of the nursing association and I explained the situation.
>
> I said you know me, what I can do. I need my job and she said, well, put you on midnights immediately. That will have you at home at -- all the time except during the night, except when he is asleep, and that's what they did, and I stayed on midnights until my husband expired.

(ST 23-24).

Asked what kinds of trouble she began to have with Scott, Mrs. Engle replied:

> Well, so much as happened that I am not clear, you know. I blocked things out. I have had to in order, you know, to stand a lot of things. I remember he ran away once and then later on when we moved back up on Ohio Avenue he and another friend set fire to a -- some [hay?] outside a grocery store, you know, things like that.

(ST 22).

After that incident, "theylet him off to join the service, and he was in Korea and then he came, you know, came back from Korea (T 22).

Mrs. Engle testified that while Scott was living at home he was very mild; his sister Peggy "always had to fight his fights" (T 24). Mrs. Engle testified that she loves her son (T 25).

On cross-examination, Mrs. Engle stated that she held Scott back in the first grade because he was so immature and sickly (T 26). He went to school through the 10th grade, as far as Mrs. Engle could recall, and then went into the Army (T 26).

Peggy Jo Pugh testified that she is 14 months older than her brother Scott Engle (ST 28). Their family was not a close one; their father was always sick, and their mother tried to cope with five children, and her husband's illness (ST 29). Their father "was always screaming and hollering, and if we got out of the way,

anything, turn the T.V. up too loud, go through a room too much, we always got beat for it. I mean, he always punished us" (ST 29). Peggy got married at age 16 in order to get away from home (ST 30). After her father died she wanted to come back, but she couldn't (ST 30). She testified that Scott "always ran with younger boys, but if -- I always protected him. I felt that if anything came up then I would stand up for him" (ST 30).

According to the psychiatric evaluation report prepared by Dr. Yates, appellant stated that he was raised in Middletown, Ohio (SR 47).

> The elder Mr. Engle is described as a disabled war veteran with a leg amputation. He is asserted to have been alcoholic, with psychiatric problems, and who frequently beat his son. Mr. Engle [appellant] asserts that he could never measure up to his father's expectations of him, and that his father has lowered an automobile hood upon his neck, and beat him while asleep with canes, bricks, and scalding coffee. The elder Mr. Engle was deceased December 31, 1969, and according to [appellant], "I don't celebrate Christmas because of it." His mother is described as "nice" because she did not beat her son....

(SR 47).

Based on her interview with appellant, Dr. Yates reported that appellant began setting fires at pre-school age, when he used his teddy bear to ignite his home (SR 48). Appellant "state[d] that he was accused of arson in 54 instances over some period of time" (SR 48). He would call the fire department after each incident and watch them attempt to put the fire out (SR 48). According to appellant, no person was injured, except for one sprain to a fireman (SR 48). Appellant told Dr. Yates that he ran away from home on three occasions, and was finally permitted to reside periodically with friends (SR 48). Appellant "report[ed] that he quit school in the tenth grade and joined the army as a missile expert" (SR 48). Appellant's "earliest stated recollection of involvement with drugs dates back to seven years of age for marijuana and beer" (SR 48). He claimed to have been hospitalized for drug addiction two or three times while in the service (SR 48). According to Dr. Yates report,

"[d]rug and alcohol use is reported to the extent of maximal intoxication when available" (SR 48).

According to Dr. Miller, appellant "does not suggest a psychotic state of mind" (SR 45). Dr. Miller saw no psychiatric evidence that appellant suffered any significant impairment of his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law (SR 45). Nor, in Dr. Miller's opinion, did appellant appear to be "particularly vulnerable to the dominations or duresses which might be imposed by other persons, particularly as it reflects on his actions in the alleged crime" (SR 45).

According to Dr. Vallely's evaluation, appellant reported having been "knocked unconscious for an unstated period of time at 9 years when hit in the head with a brick" (SR 76). Subsequently, appellant "was involved in numerous car wrecks and reports instances of being unconscious" (SR 76). Appellant reported drug and alcohol related blackouts, and chronic headaches over the last ten years (SR 76). However, there was no report of any seizures or convulsions, and no head trauma since his imprisonment (SR 76). After administering a battery of psychological and neuropsychological tests (see Sr 75), Dr. Vallely concluded that appellant "clearly has a diminished capacity for controlling impulses, anticipating consequences, and utilizing past experience to guide ongoing behavior" (SR 78). Dr. Vallely further stated "This pattern is consistent with the findings of Frontal Lobe dysfunction which appears to represent a chronic condition of life long duration" (SR 78).

The pre-sentence investigation revealed only one prior criminal conviction as an adult. Appellant pled guilty to a charge of arson in Middletown, Ohio in 1974, and received a 1-5 year prison sentence (SR 56). After three months, the sentence was suspended, and appellant was placed on five years "shock" probation (SR 56). The charge involved a warehouse fire; investigation by the Middletown police indicated that the fire was started by appellant (then age 20) and three juveniles (SR 56).

Appellant's juvenile record consisted of charges of breaking and entering, attempted uttering and passing stolen checks, larceny, and arson (SR 56). The PSI, quoting from the records of Ohio authorities, states "Pertaining to the Arson charge of 5-28-71, it should be noted that the defendant did not set the fire but had been with the person who did and eventually left prior to the fire being set" (SR 56).

The PSI contains a narrative account of the circumstances of the Majik Market robbery-murder, as derived from the files of the Jacksonville Sheriff's Office (SR 51-55). According to this account, after the police had secured Nathaniel [Nathan] Hamilton's wife and baby, Hamilton gave Detective Parmenter the names of the suspects. "Nathaniel Hamilton stated that the suspects' names were Scott Engle and Rufus Stevens and that Rufus Stevens was a first cousin to his wife and that Rufus Stevens had done the killing with Scott's knife" (SR 54).

IV SUMMARY OF ARGUMENT

The jury recommended that appellant be sentenced to life imprisonment because it believed from the evidence that appellant's degree of participation in the crime was significantly less than that of Rufus Stevens. The jury could reasonably have determined from the evidence - and particularly from the testimony of the state's key witness Nathan Hamilton - that Stevens was the leader and appellant the follower; that Stevens planned the robbery of the Majik Market and the abduction of the clerk over an hour before he recruited appellant to assist him; that when appellant agreed to help Stevens rob the store, he did not know that Stevens intended to abduct the clerk; that after the robbery Stevens "went crazy" and killed the victim to avoid identification; and that appellant's role was essentially that of an aider and abetter. The jury's life recommendation was reasonable and should be given effect. See Barclay v. State, 470 So.2d 691, 695 (Fla. 1985); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Woods v. State, ___ So.2d ___ (Fla. 1986) (case no. 64,509, opinion filed April 24, 1986) (11 F.L.W. 191, 192).

V ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY REJECTING THE JURY'S RECOMMENDATION OF LIFE IMPRISONMENT AND BY IMPOSING THE DEATH PENALTY UPON APPELLANT.

The main issue in this appeal is whether there existed a reasonable basis for the jury's recommendation of life - if there was, Florida law requires that the jury's recommendation be given effect. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731-32 (Fla. 1983); Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); Barclay v. State, 470 So.2d 691, 694-95 (Fla. 1985); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Amazon v. State, 487 So.2d 8, 12-13 (Fla. 1986).

In the trial court, in urging Judge Santora to re-impose a sentence of death, the prosecutor took the position that this Court had already approved the override in the original appeal (ST 49-51). In effect, then, the state was asking the trial court merely to go through the motions of deleting any consideration of Rufus Stevens' confession from the sentencing order - the sentencing decision, in the prosecutor's view, was preordained. In anticipation that the state may contend on appeal that the propriety of the "life override" in this case has already been decided, or is "law of the case", appellant will show, before getting into the merits of his argument, that that is not so.

In the original appeal, this Court held that the trial court's consideration of the un-cross-examined statements of Rufus Stevens violated appellant's right of confrontation, vacated the death sentence, and "remanded with instructions to conduct another sentence hearing" Engle v. State, 438 So.2d 803, 814 (Fla. 1983). Where this Court's remand "direct[s] a new sentencing proceeding, not just a reweighing ... both sides may, if they choose, present additional evidence." Mann v. State, 453 So.2d 784, 786 (Fla. 1984). The state conceded, prior to resentencing, that "... the

Court is obliged to consider evidence offered by the defendant at this resentencing hearing in mitigation" (SR 83). Accordingly, appellant presented the testimony of his mother and sister with respect to his childhood and family life (particularly in relationship to his physically disabled and emotionally disturbed father); as well as his trait of being a follower, who needed to be protected by his sister, notwithstanding that he tended to associate with younger boys (ST 19-31). Appellant also presented the psychological evaluation of Dr. Vallely, who found that appellant clearly has a diminished capacity for controlling impulses, anticipating consequences, and utilizing past experience to guide his behavior, as a result of Frontal Lobe dysfunction, "which appears to represent a chronic condition of life long duration" (SR 75-78). Consequently, there was more evidence available to the trial court on resentencing than could have been considered at the time of the original sentencing, or the original appeal.

But more importantly (in light of the reason for the jury's life recommendation, and the reason for the original override), there was also less evidence this time around. The evidence which was no longer before the trial court was, of course, the statements made by Rufus Stevens. That improperly considered evidence was the foundation of the trial court's decision to override the jury's life recommendation in the first instance.

In its brief in the original appeal, counsel for the state wrote:

> The only mitigating circumstances offered to the jury in this case was the non-enumerated mitigating circumstance that Appellant was not the actual perpetrator of the homicide-- that Stevens was the actual murderer (TT 1009).
>
> In fact, counsel for this Appellant told the jurv that all the aggravating factors applied to Stevens (TT 1011). It is rather clear that the jury recommended life because they had no evidence that Appellant participated in the actual homicide.[3] The trial judge, however, did have such evidence (See: Issue VII)[3] and relied upon that evidence in imposing the sentence of death.

[Brief of Apellee, Case No. 57,708; p.29].

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[3] Issue VII in the original brief is the one involving Rufus Stevens' statements.

The state further argued:

> Tedder v. State, supra, and its progney (sic) upon which Appellant relies so heavily are clearly distinguishable for in those cases the trial judge overruled the jury's recommendation of life on the same evidence that was presented to and considered by the jury. This judge, however, had highly relevant information and evidence that the jury did not have, to-wit: that the Appellant was a participant in the actual homicide. (R 116)[4] (See: Dr. Miller's report in Stevens v. State, Case No. 57,738 at R 37). Therefore, his refusal to follow the jury's recommendation was proper, rational and constitutional. Douglas v. State, 328 So.2d 18 (Fla. 1976); Dobbert v. State, 328 So.2d 433 (Fla. 1976); Barclay v. State, 343 So.2d 1266 (Fla. 1977) and Hoy v. State, supra. This Court in Barclay, supra, said:
>
> > ... When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail.... 343 So.2d at 1266.
>
> Obviously where the trial judge has obtained additional information than that possessed by the jury, the Tedder principle is inapplicable.[5] See also: Sawyer v. State, 313 So.2d 680 (Fla. 1975) and Hoy v. State, supra.

[Brief of Appellee, Case No. 57,708; p. 30].

In its argument pertaining to the right of confrontation issue, the state said:

> Appellee concedes, as it must, that the trial judge considered this evidence [Stevens' statements] in deciding to override the jury's recommendation of life imprisonment; however, appellee respectfully submits that there was nothing improper in doing so.

[Brief of Appellee, case no. 57,708; p. 32] [emphasis supplied by appellant].

In view of the foregoing, it is clear that we are dealing with a different override than the one that was at issue in the original appeal. Rufus Stevens' statements - the primary evidence relied on by the state to support the original override - are no longer before the Court, while additional mitigating evidence is before the

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[4] Page 116 in the original record is the trial court's original sentencing order, in which he sets forth the "facts" of the crime as derived from Rufus Stevens statements.

[5] Appellant, needless to say, does not agree that the Tedder principle is rendered inapplicable merely because the trial court has obtained additional information. See Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

Court. The basis for the jury's life recommendation, however, remains the same; they recommended life because (as the state put it) they "had no evidence that Appellant participated in the actual homicide." The jury had heard uncontradicted testimony from the state's key witness, Nathan Hamilton, that it was Rufus Stevens who brought up the subject of a robbery; it was Stevens who (accompanied only by Hamilton) went into the Majik Market for a cup of coffee while Mrs. Tolin was working there; it was Stevens who thereupon decided that that would be the best place to rob; it was Stevens who (when Hamilton raised the objection that Mrs. Tolin could identify them) said they would abduct her from the store to get her away from a telephone (T 427-28, 430-34, 459-60, 463-64). All of this was formulated by Stevens before appellant ever came into the picture.

The medical examiner testified that he could not tell whether Mrs. Tolin's injuries were caused by one person or by more than one person (T 381). When Nathan Hamilton was questioned by the police, however, he told them that Rufus Stevens did the killing (T 635, see SR 54) or might have done the killing (T 457), with appellant's knife. The jury heard Nathan Hamilton testify that he and Rufus Stevens were relatives by marriage and close friends (T 398-99, 425), and that Hamilton had been taught where he comes from that you don't turn in a relative for no reason (T 470); however, he was willing to make an exception for killing a woman (T 471). The jury learned that, after the crime, Rufus Stevens had told Nathan Hamilton that they had to get rid of appellant's knife "because that's what it was done with" (T 440). Stevens dispatched Hamilton to get the knife from appellant, who was unwilling to trade (T 411, 416, 421, 440-42). Hamilton testified that if he had gotten appellant's knife he would have given it to Stevens (T 441).

The jury heard that Nathan Hamilton, who had known appellant for seven or eight years, and who had been good friends with Rufus Stevens for six years (T 405, 425), considered Stevens to be tougher, and to be the dominant one of the

two (T 456). While the jury did not hear the testimony, in the resentencing hearing, of appellant's mother and sister, that testimony was consistent with Nathan Hamilton's observation, and indicated that appellant has been, by nature, a "follower" all of his life (ST 24-25, 30). Appellant's personality trait of being a follower is also consistent with the previously discussed testimony (which the jury did hear) of Hamilton, to the effect that the robbery and the abduction of Mrs. Tolin were planned by Rufus Stevens at least an hour and a half before they ever stopped to pick appellant up. According to Hamilton, when appellant got in the car with them, "Rufus Stevens asked him if he wanted to make some money and Scott said sure, what do I have to do. Rufus Stevens said rob a Majik Market. Scott said sure" (T 403). Hamilton heard no more conversation after that (T 403). The evidence shows, therefore, that at the time he agreed to accompany Stevens in robbing the Majik Market, appellant did not know that abducting the clerk was part of Stevens' already formulated plan.

The jury also heard Nathan Hamilton's testimony that several days after the crime, during the conversation in which he [Hamilton] tried to get appellant's knife in order to give it to Rufus Stevens to dispose of, he asked appellant whether he thought it was worth a lousy fifty or sixty dollar robbery to take a girl out of a store and kill her (T 421). Appellant said no, he didn't think it was worth it (T 421). According to Hamilton, "Then, I asked him why they did it. He said that they got her out of the store, away from a telephone, got her out into the country, Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us" (T 421).

The jury deliberated for nearly six hours before returning a guilty verdict. Twice during the deliberations the jury submitted questions to the effect of "Do we have to be convinced that the defendant personally killed the victim to render a [verdict] of murder in the first degree?" (T 976, see T 972). In the penalty pahse,

no additional evidence was presented by either side; rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was instructed, inter alia, that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented in the proceedings" (T 1023). After 25 minutes of deliberation, the jury returned a life recommendation. See McCampbell v. State, 421 So.2d 1072 (Fla. 1982), in which the trial court rejected a jury's life recommendation, and gave as one of his reasons the brevity of the jury's penalty deliberations. This Court, in vacating the death sentence and remanding for imposition of a sentence of life imprisonment, observed that the jury spent about six hours deliberating in the guilt phase, and approximately six minutes in the penalty phase. "They were instructed to base their verdict on the evidence presented at both proceedings. It cannot be concluded that the jury did not have sufficient time within which to consider its penalty verdict." McCampbell v. State, supra, at 1075.

In his original sentencing order in the instant case, the trial court did not even mention the jury's life recommendation, much less accord it the weight to which it was entitled. See e.g. Tedder v. State, supra, at 910; Thompson v. State, 456 So.2d 444, 447 (1984) (a jury recommendation under Florida's trifurcated death penalty statute is entitled to great weight). Nor did the court articulate any reason for rejecting the jury's life recommendation. See Burch v. State, 343 So.2d 831, 834 (Fla. 1977) (for override to be sustained on appeal, the reasons for trial court's rejection ofjury's life recommendation must be compelling ones); 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). The trial court did, however, include in his sentencing order

a narrative account of the supposed circumstances of the crime, as gleaned from Rufus Stevens' statements (R 114, 116-17). As the state conceded (or, more accurately, insisted) in the original appeal, this was the trial court's justification for overriding the jury's life recommendation; he had "evidence", which they did not, from which to conclude that appellant was a co-participant with Stevens in the actual homicide [see Brief of Appellee, case no. 57,708, p. 29, 30, 32].

In his second sentencing order, the trial court again failed to mention the jury's life recommendation (SR 206-08). The order states, "This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used..." (T 206) (emphasis supplied). There is no discussion of whether the jury (which heard the same evidence) could reasonably have found otherwise. With regard to mitigating circumstances, the order contains only the conclusory statement that "This Court finds there exists no mitigating circumstances" (T 208) (emphasis supplied). Again, there is no discussion as to whether the jury, from the evidence it heard at trial, could reasonably have found otherwise. [Nor is there any discussion of the evidence in mitigation presented at the resentencing hearing of October 4, 1984]. In the original sentencing proceeding, the trial court was relying on additional evidence (albeit inadmissible and unreliable additional evidence) than what was before the jury. In the second sentencing proceeding, on the other hand, with regard to the crucial question of appellant's degree of paticipation in the crime as compared with that of Rufus Stevens, the trial court and the jury were presented with essentially the same evidence.

It should be clear, therefore, that the death sentence, and the "life override", which are presently before this court are an entirely different sentence, and an entirely different override, from the ones which were before this Court in 1983. Compare Barclay v. State, 343 So.2d 1266 (Fla. 1977) [Barclay I] with Barclay v. State, 470 So.2d 691 (Fla. 1985) [Barclay V].

In the above case, Barclay, Dougan, and three others, all members of a group that termed itself the Black Liberation Army, decided to kill a randomly chosen white "devil", apparently for the purpose of starting a racial war. The leader of the group, Dougan, wrote a note announcing their intentions. The five men picked up a hitchhiker and drove him to an isolated trash dump. Barclay stabbed the victim repeatedly with a knife, and then Dougan shot him twice in the head. The previously written note was stuck to the victim's body with the knife. After being brought to trial and convicted of the murder, Dougan and Barclay were both sentenced to death, notwithstanding the jury's life recommendation as to Barclay. In the original appeal, this Court affirmed both death sentences, concluding that "Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted." Barclay I, supra, at 1271. "This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations". Barclay I, supra, at 1271.

The next year, this Court remanded for the trial court to conduct a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So.2d 657 (Fla. 1978) [Barclay II]. At the Gardner hearing, one additional witness was called "principally to portray Barclay's lesser role in the events surrounding the murder, and to comment on a second murder in which he was not involved" Barclay v. State, 411 So.2d 1310 (Fla. 1981) [Barclay III]. The trial court again imposed a death sentence, and this Court affirmed, declining to abrogate the "law of the case."[6] Barclay III,

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[6] In the present case, for the reasons previously discussed, and particularly because the main source of "evidence" (Stevens' statements) relied on by the trial court in support of the original override was no longer before the court at the time of resentencing, appellant submits that the dicta in the original opinion [Engle v. State, 438 So.2d 803, 812 (Fla. 1983)] plainly cannot be considered "law of the case". Moreover, this Court has the power to reconsider and correct an erroneous ruling that has become "law of the case", where manifest injustice will result from a strict and regid adherence to that doctrine. Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965); Harris v. Lewis State Bank, 482 So.2d 1378, 1383 (Fla. 1st DCA 1986). If appellant is correct in his assertion that the jury acted reasonably in recommending that he be sentenced to life, it will certainly be a manifest injustice if he is allowed to be executed on the basis of dicta to the contrary in the earlier opinion.

supra, at 1310. After the governor signed a death warrant, Barclay filed a petition for habeas corpus. This Court determined that Barclay's original appellate counsel had a conflict of interest and had rendered ineffective assistance; therefore Barclay was granted a new appeal. Barclay v. Wainwright, 444 So.2d 956 (Fla. 1984) [Barclay IV]. In the new appeal, this Court reversed Barclay's death sentence, finding that "[t]he jury apparently distinguished between Barclay and his main co-defendant, Jacob John Dougan, as evidenced by its recommendations of life imprisonment for Barclay (the follower) and death for Dougan (the leader). We hold that there was a rational basis for the jury's distinction between these co-defendants and that the trial court erred in overriding the jury's recommendation." Barclay v. State, 470 So.2d 691, 695 (Fla. 1985) [Barclay V]. See also Woods v. State, supra.

In Barclay, there was a reasonable basis for the jury's life recommendation, i.e. Barclay's lesser culpability as compared with that of Dougan, even though the evidence clearly showed (1) that Barclay was one of the individuals who had planned to commit the murder even before the victim was selected, and (2) that Barclay personally inflicted repeated stab wounds on the victim before Dougan shot him. In the present case, in contrast, the state's own evidence showed that Rufus Stevens planned to rob the Majik Market and to abduct Mrs. Tolin from the store an hour and a half before Stevens and Nathan Hamilton picked up appellant at the Wemmers' house. The state's evidence futher showed that when Stevens was recruiting appellant to assist him, he told him about the robbery, but not about the planned abduction. The medical examiner could not tell whether Mrs. Tolin's injuries were inflicted by one person or two persons. The state's main witness, Nathan Hamilton, believed that Rufus Stevens did the killing with appellant's knife. Hamilton tried unsuccessfully to get the knife from appellant, for Stevens to dispose of. When Hamilton asked appellant why they had killed the girl, appellant replied that Rufus Stevens "went crazy" because he thought she was going to identify them. [As Hamilton had pre-

viously testified, it was Hamilton's own concern about identification that had prompted Stevens' decision - in appellant's absence - to take the woman out of the store]. Hamilton, who was a relative by marriage and a close friend of Stevens, was of the opinion that Stevens was a stronger, more dominant personality than appellant. That opinion appears to have been corroborated by Stevens' undisputed role as the planner of, and the recruiter for, the crime. Appellant's responses that "sure" he would like to make some money and "sure" he would help Stevens rob a Majik Market are consistent with the behavior of a "follower" [see also the testimony of appellant's mother and sister], and a person with a "diminished capacity for controlling impulses, anticipating consequences, and utilizing past experiences to guide ongoing behavior" [psychological evaluation of Dr. James Vallely, SR 78].

Thus, even more so than in Barclay, the jury had a reasonable basis to conclude that appellant (the follower) was less culpable than Rufus Stevens (the leader), since here there was no evidence that appellant was involved in the planning of the murder, or even anticipated that it was going to occur, and here there was no evidence that appellant personally participated in the actual killing. The jury's six hours of deliberations in the guilt phase, their questions as to whether they had to be convinced that appellant personally killed the victim, and their 25 minutes of deliberation in the penalty phase before returning a life recommendation, all clearly reflect the jury's reasonable concern about appellant's degree of participation in the crimes, vis-a-vis that of Stevens.

See also Hawkins v. State, 436 So.2d 44 (Fla. 1983) (finding that there was a reasonable basis for the jury's life recommendation, where jury determined that co-defendant, not Hawkins, was the triggerman; life recommendation was reasonable notwithstanding testimony of a state witness - relied upon by the trial court in imposing the death sentence - that Hawkins had stated earlier in the evening of the murders that he wanted to go out to Golden Gate and "blow away a couple of dudes").

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); Thompson v. State, 456 So.2d 444, 447 (Fla. 1984). 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; Thompson v. State, supra, at 447. 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. The trial court's failure to find any mitigating circumstances is not dispositive; an override is improper where the jury could reasonably have based its recommendation on statutory or non-statutory mitigating factors in its view of the evidence. See Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983); Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); Herzog v. State, 439 So.2d 1372, 1380 (Fla. 1983); Thompson v. State, 456 So.2d 444, 447 (Fla. 1984); Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Barclay v. State, 470 So.2d 691, 695 (Fla. 1985); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

In Spaziano v. Florida, 468 U.S. ___, 82 L.Ed.2d 340, 356 (1984), in which the U.S. Supreme Court upheld the constitutionality of the "override" provision of Florida's death penalty law, it stated, "This Court already has recognized the significant safeguard the Tedder standard affords a capital defendant in Florida [citations omitted]. We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." Several months after Spaziano was decided, this Court stated that "In the years since [Tedder was decided] we have not wavered from the Tedder test and

have consistently applied it to the facts and circumstances of cases on review where the trial judge has overridden a jury recommendation of life imprisonment and imposed the death penalty." Thompson v. State, 456 So.2d 444, 447 (Fla. 1984). See also Rivers v. State, 458 So.2d 762, 765 (Fla. 1984); Barclay v. State, 470 So.2d 691, 694-95 (Fla. 1985); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986).

One of the core purposes of Florida's trifucated death penalty procedure is to ensure that "the inflamed emotions of jurors can no longer sentence a man to die." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). Conversely, where a life recommendation appeared to have been improperly influenced by defense counsel's reading of an "extremely vivid and lurid" description of an electrocution, this Court affirmed the trial judge's override. Porter v. State, 429 So.2d 293, 296 (Fla. 1983). In the present case, it was the prosecutor who sought to play upon the jury's natural sympathy for the victim and emotional reaction to the crime. He argued:

> Let me make it perfectly clear before we get into all of this: mitigating and aggravating circumstances that we're talking about, that little fine young lady, five feet tall, 115 pounds, 24 years old with a husband and children, working at night at probably minimum wages, with two sons and I want you, you have the right now to think about that Kay Tolin, you have a right to think about it.
>
> We're in a different phase, you have a right to think about that little lady, that is, before the murderer, that is, before he got in the death car. I want you to remember, ladies and gentlemen, I want you to remember that Rufus Stevens would not go to that Majik Market unless somebody went with him. The only reason we've got the after picutre is because he got in the car and said yes, yes, I will do it. Rufus didn't have the guts to do it by himself. He told it over and over again, let's rob this store. He didn't have the guts to do it by himself but he went out and got Mr. Kool. Mr. Kool said sure. Sure.
>
> That's Kay Tolin afterwards, that's Kay Tolin after. Look at her. That's a human being in Jacksonville, Duval County, Florida, in March of 1979.
>
> Pardon me, Your Honor, I didn't mean to make that noise.

(T 989-90).

The prosecutor also sensed, correctly, that the jury had serious questions concerning appellant's degree of participation in the murder. He argued:

> You're concerned whether he had to have actually thrust the knife on her. I know you were concerned about that. You asked questions during the trial about it and we lawyers are and the Judge is concerned about it. We couldn't answer your questions because of the law and I understand the law but we did the best we could and athe Judge did the best he could. But if you believe, if you believe that Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose, that is first degree murder and then if you believe that he gave this knife to Rufus Stevens, you find he is just as guilty as Rufus Stevens.

(T 993-94).

* * *

> I don't care if Rufus did it, if Rufus Stevens did it, I don't care if he actually put his hand or whatever it was, he was there. You can't any more separate him from that death car for one split second, you can't separate him from that death car that night from 2:00 o'clock in the morning until daylight, you can't separate them from that car, you got to put Kay Tolin in it and you got to put that murderer in it and you got to put Scott Engle in it. He's there, she's there and it all happened there or right around him.

(T 955).

The prosecutor may not have cared if Rufus Stevens did it, but the jury obviously did care. The jury could reasonably have concluded from the evidence that Stevens was the leader and appellant the follower; that Stevens planned the robbery and the abduction, and enlisted appellant's aid without even telling him about the latter part of the plan; that Stevens was the one who expressed concern about being identified, and who "went crazy" once they got the victim out of the store. The jury could reasonably have believed, from the testimony of the state's own witness Nathan Hamilton, that (as the prosecutor phrased it) "Rufus Stevens killed that girl for the purpose of not being identified, that he formed the intent to kill her for that purpose...." (T 994). Then, the prosecutor continued in his argument to the jury, "if you believe that he [appellant] gave this knife to Rufus Stevens,

you find he is just as guilty as Rufus Stevens" (T 994). And that, of course, is true. Appellant, like Stevens, is guilty of first degree murder. Barclay, like Dougan, was guilty of first degree murder. Barclay v. State, supra, [Barclay V]. Hawkins, like Troedel, was guilty of first degree murder. Hawkins v. State, supra. Bean, like Woods, was guilty of first degree murder. Woods v. State, supra. But, as the jury in this case was able to recognize (and the trial court evidently was not[7]), it does not necessarily follow that appellant is equally as deserving of the death penalty as Rufus Stevens. Even more so than in Barclay (where it was undisputed that the "follower", Barclay, knew from the beginning that a murder was going to occur, and where Barclay personally inflicted the first injuries on the victim by stabbing him repeatedly), and even more so than in Hawkins (where there was at least some evidence that Hawkins had been talking with his co-defendant earlier in the evening and had expressed the desire to "blow away" the two victims), the jury in the present

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[7] At the original sentencing proceeding on August 17, 1979, in response to defense counsel's effort to persuade him to follow the jury's life recommendation, the trial court asked:

> Are you under the impression that if two men participate in a crime like this, one of them kills her and the other one sits there and aids and abets, that he is not equally guilty?
>
> MR. SHORSTEIN: Your Honor, I'm not arguing with that, I'm not arguing that he's not equally guilty of murder.
>
> THE COURT: That he should not suffer the same fate?
>
> MR. SHORSTEIN: Absolutely, Your Honor, and I have cases to cite to Your Honor that the Supreme Court finds the distinction differentiation.
>
> THE COURT: Well, then, the Supreme Court will just have to make its ruling in this case, too.
>
> MR. SHORSTEIN: Well, Your Honor, I'm just trying to argue what I think the law is to the Court.
>
> THE COURT: Well, I have to listen to you and you have, I must say, done a fantastically great job in coming up with these innovations. They're interesting.

(T 1062-63).

case had a reasonable basis to recommend life.

A final comment needs to be made about the jury whose recommendation the state is now seeking to discard as "unreasonable". 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."

In the present case, the prospective jurors were thoroughly examined by both counsel on voir dire (T 11-279). Two jurors who indicated at some point that they would not vote for the death penalty regardless of the circumstances were challenged for cause by the state, and were excused. Engle v. State, 438 So.2d 803, 807-08 (Fla. 1983); see Witherspoon v. Illinois, 391 U.S. 510 (1968); Wainwright v. Witt, 469 U.S. ___, 83 L.Ed.2d 841 (1985). Thus, the jury was comprised entirely of people who stated, under oath, that they would follow the law and the instructions of the court, and that they would recommend the death penalty if the circumstances warranted it. The prosecutor accepted the jury without exhausting his peremptory challenges (T 239, 242).

The twelve jurors who heard the evidence in this case, found appellant guilty of first degree murder, and recommended that he be sentenced to life imprisonment, are briefly described in the twelve paragraphs which follow (see SR 69-72):

1. E[redacted] W[redacted], the foreman of the jury, was a college graduate who had been a [redacted] attorney in the [redacted] He had lived in Jacksonville for three and a half years, was a general agent for [redacted] Company, was maried and had [redacted] children (T 32-34). He said this about the death penalty: "I feel that death penalty should be applied in certain cases and if the evidence leads me to believe that the death penalty is appropriate, I will so vote but if it appears to me that, you know, 25 years was more appropriate, I would so vote" (T 87-88).

2. G[redacted] S[redacted] was a lifelong resident of Jacksonville, worked as a [redacted] and a housewife, was married to a man who worked for [redacted] and had [redacted] children (T 30, 32, 64-65). In response to State Attorney Austin's questions, she stated that she could return a verdict of guilty in a death penalty case and she was not opposed to the death penalty as a matter of principle (T 53-56).

3. G[redacted] B[redacted] grew up in [redacted] graduated from the University of Florida, was employed as an [redacted] and was married with [redacted] children (T 146-147). He was death qualified by general questions of Mr. Austin (T 53-56), and he had this to say about the death penalty: "I think it's a very tough issue and I would be personally involved if there are crimes that in my opinion do deserve either the death penalty or people put away from society. I believe it would take longer for me to make a decision to send somebody to the electric chair but I feel I could do it" (T 153).

4. R[redacted] T[redacted] was a student at the University [redacted] retired after 20 years in [redacted] He was married to a [redacted] and had [redacted] children (T 33-35). He was death qualified by the general questions of Mr. Austin (T 53-56), and he had this to say about the death penalty: "I feel that there are times when death penalty is appropriate, not in every case where someone is found guilty of first degree, though. It depends on the situation" (T 88).

5. C[redacted] R[redacted] was a [redacted] married to a [redacted] working for the [redacted] and had [redacted] grown sons (T 217). She had this to say about the death penalty: "Well, I would not feel that I was at either extreme; definitely not. I do not think that every crime or every murder would require the death penalty but I do think there are some cases where the death penalty should be used" (T 235-36).

6. L[redacted] C[redacted] had lived in Jacksonville for 35 years, was a [redacted] for an [redacted], was married to a retired [redacted] employee, and had [redacted] children (T 38-40). She was death qualified by the questions of Mr. Austin (T 53-56).

7. D[redacted] T[redacted] was an unmarried [redacted] clerk for [redacted] and [redacted] who had gone all the way through school in Jacksonville and whose family still lived in town (T 40-42). In answer to the question whether she could recommend either life or death, she said: "Based on the circumstances, I could, it would just depend on the circumstances and then I could say either. I am not extremely opposed to the death penalty, and I think that it can be, you know, a deterrent in crime, you know, depending on what I hear" (T 92). In response to the question whether she could impose the death penalty, if the circumstances warranted, she stated, "Right, if I felt like it did" (T 92).

8. W[redacted] S[redacted] was a widow who had lived in Jacksonville for five years. Her husband had been a [redacted] in the [redacted] (T 115, 135). She was death qualified by the general questions of Assistant State Attorney Coxe (T 122-23) and, in response to the questions of defense counsel, she said that she could impose the death penalty, but it depended upon the circumstances (T 134).

9. M[redacted]. F[redacted] had lived in Jacksonville for 23 years. She was married, had [redacted] children, worked as a clerk at [redacted] and was married to a [redacted] (T 166-167). She had this to say about the death penalty: "Well, I don't - I think

the death penalty would meet with each case. It would depend on the circumstances and the evidence of the case" (T 174).

10. R[redacted] D[redacted] was a widower with three children who had lived in Jacksonville for 25 years. He was employed with the State [redacted] (T 170-171). He said he had the same sentiments about the death penalty as those expressed by M[redacted] F[redacted] (T 174).

11. J[redacted] M[redacted] was a [redacted] and [redacted] in a Jacksonville business operated by [redacted] She had [redacted] grown sons (T 218). She said she would have to weigh all the evidence before deciding on life or death and that she believed she had the same feelings as juror C[redacted] R[redacted] (T 235-36).

12. M[redacted] H[redacted] was a lifelong resident of Jacksonville, employed as a [redacted] married to an [redacted] and had [redacted] children. She also graduated from [redacted] (T 46-47, 82). She was death qualified by the general questions of Mr. Austin (T 53-56), and, in addition, had these comments about the death penalty: "Well, I don't have a pre-conceived feeling about it. I'd say each case on its own merit would have to be judged" (T 94).

At the time he accepted these twelve people to serve as jurors, the prosecutor ingratiatingly announced that the state would "... be pleased to try this case before this jury" (T 242). If these jurors had recommended that appellant be sentenced to death, Mr. Austin's high opinion of them would undoubtedly remain intact. However, because these jurors were not swayed by Mr. Austin's inflammatory rhetoric to disregard their legitimate concerns about appellant's degree of participation in the murder, the state now seeks to characterize them as "unreasonable".

As has previously been discussed, the trial court cannot reject a jury's life recommendation unless the facts are "so clear and convincing that no reasonable person could differ" on the propriety of the death sentence. Tedder v. State, supra, at 910; Hawkins v. State, supra, at 47; Barclay v. State, supra, at 694. This was

clearly not such a case, even when the trial court was relying on Rufus Stevens' inadmissible and unreliable statements as his basis for disagreeing with the jury's view of the evidence. Now, with Stevens' statements no longer before the court, even the purported basis for the court's rejection of the jury's recommendation is gone.

There was a rational basis for the jury's recommendation of life; and since reasonable people could differ as to the propriety of the death sentence, the trial court was not free to substitute his own view of the evidence to override the life recommendation. See Welty v. State, supra, at 1164; Gilvin v. State, supra, at 999; Cannady v. State, supra, at 731; Hawkins v. State, supra, at 47; Thompson v. State, supra, at 447-48; Rivers v. State, supra, at 765; Barclay v. State, supra, at 695; Huddleston v. State, supra, at 206; Amazon v. State, supra, at 13. Accordingly, appellant's death sentence should be reversed, and the case remanded to the trial court with directions to impose a sentence of life imprisonment, without eligibility for parole for twenty-five years, in accordance with the jury's recommendation.

ISSUE II

IMPOSITION OF THE DEATH PENALTY UPON APPELLANT IS CONSTITUTIONALLY PROHIBITED UNDER THE PRINCIPLES OF ENMUND v. FLORIDA, 458 U.S. 782 (1982), IN THE ABSENCE OF PROOF THAT APPELLANT KILLED, ATTEMPTED TO KILL, OR CONTEMPLATED THAT LIFE WOULD BE TAKEN.

In Enmund v. Florida, 458 U.S. 782, 787 (1982), the United States Supreme Court said:

> Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

The sentencing order in the present case, on resentencing, contains the following statement, "This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used..." (SR 206). Since the U.S. Supreme Court has held that the required factual findings to satisfy the Enmund principle may be made at any point in the state court proceedings - whether by the jury, the trial court, or the state appellate court [Cabana v. Bullock, 474 U.S. ___, 88 L.Ed.2d 704 (1986)], appellant is not contending here that the trial court was without authority to make a factual finding pursuant to Enmund. Whether or not there existed a reasonable basis for the jury's life recommendation - the Tedder issue - is essentially one of state law (though not without constitutional ramifications) [see Spaziano v. Florida, supra], and has been argued at length in Issue I. The Enmund question gives rise to a second issue - one of federal constitutional law - and the problem here lies not in who made the findings of fact, but, rather, in the absence of evidence to support those findings. Quite simply, the trial court's findings that appellant was "an active participant in all phases of the crime"[8] and that he "at least contemplated that lethal force be used" are not supported by the evidence presented at trial. By way of contrast, in the two decisions most prominently relied on by appellant in Issue I - Barclay v. State, 470 So.2d 691 (Fla. 1985) and Hawkins v. State, 436 So.2d 44 (Fla. 1983) - both of which were reversed for imposition of a life sentence pursuant to the Tedder principle, there was evidence which would have supported an Enmund finding. Barclay was one of the individuals who planned to kill a white "devil", and who drove around Jacksonville in search of a victim

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[8] In Cabana v. Bullock, supra, 88 L.Ed.2d at 718-19, the Supreme Court held that this Mississippi Supreme Court's findings that Bullock "was present, aiding and assisting in the assault upon, and slaying of, Dickson" and that "the evidence is overwhelming that [Bullock] was an active participant in the assault and homicide upon Mark Dickson" were not sufficient to satisfy the Enmund criteria.

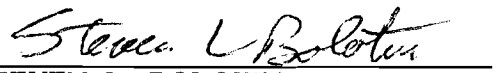
[intent that a killing take place or that lethal force be employed]. Barclay was also the individual who repeatedly stabbed the victim with a knife before Dougan shot him [killed or attempted to kill]. In Hawkins, which is factually somewhat closer to the instant case, there was at least some evidence - the testimony of a state witness that earlier in the evening of the murders, Hawkins had been at a bar talking about wanting to go out to Golden Gate and "blow away a couple of dudes" - which might have supported a finding that Hawkins intended that a killing take place or that lethal force be used. In the present case, according to the testimony of Nathan Hamilton, appellant did not even know, at the time he agreed to accompany Rufus Stevens in robbing the Majik Market, that Stevens intended to abduct the clerk. While it can reasonably be inferred from the evidence that, at some point, appellant gave his knife to Stevens, the evidence does not reveal when that occurred, nor does it demonstrate that appellant knew that Stevens was going to "go crazy" and kill Mrs. Tolin. In the absence of evidence to meet the criteria of Enmund v. Florida, supra, the Eighth Amendment prohibits the imposition of the death penalty upon appellant, and his sentence must be reduced to life imprisonment, without eligibility for parole for twenty-five years.

VI CONCLUSION

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

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



STEVEN L. BOLOTIN
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Raymond L. Marky, The Capitol, Tallahassee, Florida; and by mail to Mr. Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 9 day of July, 1986.

Steven L Bolotin

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