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IN THE SUPREME COURT OF FLORIDA

MICHAEL G. P. REILLY, :

Appellant, :

v. :

CASE NO. 76,764

STATE OF FLORIDA, :

Appellee. :

_____ /

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	i
PRELIMINARY STATEMENT	1
ARGUMENT	1
<u>ISSUE II</u>	
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE AND IN IMPOSING A DEATH SENTENCE UPON MICHAEL REILLY.	1
CONCLUSION	5
CERTIFICATE OF SERVICE	5

TABLE OF CITATIONS

<u>CASE</u>	
<u>Eutzy v. State</u> , 458 So.2d 755 (Fla. 1984)	3
<u>Johnson v. State</u> , 393 So.2d 1069 (Fla. 1980)	3
<u>Lusk v. State</u> , 446 So.2d 1038 (Fla. 1984)	3
<u>Spaziano v. State</u> , 433 So.2d 508 (Fla. 1983)	3
<u>Thompson v. State</u> , 553 So.2d 153 (Fla. 1989)	3
<u>Zeigler v. State</u> , 16 FLW 257 (Fla. 1991)	4

PRELIMINARY STATEMENT

Michael Reilly relies upon his initial brief to respond to the arguments presented in the state's answer brief, except for the following additions concerning Issue II:

ARGUMENT

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN OVERRIDING THE JURY'S RECOMMENDATION OF A SENTENCE OF LIFE AND IN IMPOSING A DEATH SENTENCE UPON MICHAEL REILLY.

The State first asserts that the record does not support the jury's conclusion that the homicide was an unintentional killing during the course of a sexual battery. (State's brief, pages 12-14) This argument is without merit. The jury acquitted Reilly of premeditated murder. (R 1998, 2575) The indictment specifically charged premeditated murder in one count and felony murder in two additional counts. (R 2230) The jury returned a verdict of not guilty on the premeditated count. (R 1998, 2575) This was not a case of a single count of murder going to the jury on two separate theories of prosecution -- premeditation and felony murder. This is not a case where specific verdict forms were submitted to the jury allowing them to select one or both theories as the basis for the verdict. Here, the jury was specifically presented with three distinct charges. Consequently, there is no ambiguity in the jury's finding that Reilly did not premeditate the murder. The

comments in footnote 1 of the State's brief appearing on page 12, that specific verdict forms are not required, are irrelevant to this case.

Even if it were appropriate to go behind the jury's verdict, the evidence supports the jury's findings and verdict. The statements Reilly allegedly made to jail inmates were that he became excited during the sexual battery and killed the victim. (R 981-984, 1156-1157) The medical examiner concluded that the victim was first strangled, which was the cause of death. (R 837-838) The cut to the neck probably occurred after death. (R 837-838, 840-842) This is consistent with Reilly's alleged statement to jail inmate Kenny Peck that he cut the victim's throat to make it look as if someone else committed the crime. (R 1156-1157) Such evidence could easily have led the jury to the conclusion that Reilly accidentally strangled the victim during the course of the sexual battery.

The State also make the claim that Reilly suffers no mental illness. (State's brief, pages 12, 14-18) This argument ignores the findings appearing in the trial judge's written order. (See, Reilly's initial brief at pages 23-24) The trial judge concluded with the statement, "The court is well satisfied that the defendant's mental and physical disabilities are real, rather than feigned in order to gain sympathy." (R 2708)

An additional State claim is that Reilly's only impairment was a learning disability. (State's brief, at page 14) This ignores the evidence presented during the guilt and penalty phases of the trial. Michael had a long history of both

learning disabilities and emotional adjustment problems. (R 2070-2072) Michael's IQ was in the dull-normal range. (R 2074) The schools Michael attended were for retarded and emotionally disturbed children. (R 2072-2075) His disabilities were not limited to a problem with his eyes as the State suggests in its brief. (State's brief at page 15)

The cases the state relies upon to justify the trial court's override of the jury's recommendation are distinguishable. In Spaziano v. State, 433 So.2d 508 (Fla. 1983), the defendant slowly tortured and mutilated his victim while she was still alive. There was no evidence of such torture in this case. In Eutzy v. State, 458 So.2d 755 (Fla. 1984), the only basis for the life recommendation was disparate treatment given a co-defendant. However, Eutzy was the prime perpetrator in the crime, and no other mitigation existed. Here, there was significant mitigating evidence of Reilly's lack of intent to kill and mental impairments. In Lusk v. State, 446 So.2d 1038 (Fla. 1984), this Court upheld the override because there was no mitigation discernible from the record at all. Again, Reilly's case establishes mitigating circumstances of lack of intent and mental impairment. In Thompson v. State, 553 So.2d 153 (Fla. 1989), the trial court rejected the mental mitigating evidence offered as incredible. In this case, the trial court specifically found the mental mitigating evidence credible. Furthermore, Thompson's activities in running a drug enterprise is certainly not comparable to Reilly's being a failing junior college student with an IQ of 80. In Johnson v. State, 393

So.2d 1069 (Fla. 1980), the defendant clearly committed a premeditated murder and no mitigation was found to exist. Finally, in Zeigler v. State, 16 FLW 257 (Fla. 1991), the defendant committed a planned murder of his wife for insurance money and killed three others in order to cover up that offense. This is hardly comparable to the unintentional killing which occurred in this case. These cases offer no support for the State's position that the override of the jury's recommendation was proper in this case.

CONCLUSION

For the reasons presented in his initial brief, and in this reply brief, Michael Reilly asks this court to reverse his judgements and sentences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Michael Reilly, #092729, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 13 day of November, 1991.



W. C. McLAIN