IN THE SUPREME COURT OF FLORIDA

PERRY TAYLOR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 80,121

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The state's brief will be referred to herein by use of the symbol "SB." Other references are as denoted in appellant's initial brief.

This reply brief is directed to Issues I, II, III, and VIII. Appellant will rely on his initial brief as to the remaining issues.

ARGUMENT

ISSUE I

FLORIDA'S "FELONY MURDER" AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT MERELY REPEATS AN ELEMENT OF FIRST DEGREE MURDER, AND BECAUSE IT DOES NOT GENUINELY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

An aggravating factor is constitutionally invalid unless it genuinely narrows the class of persons eligible for the death penalty, and reasonably justifies the imposition of death on the defendant as compared to others found guilty of first degree murder.[1] In its brief, the state does not even attempt to show how Florida's felony murder aggravator does that. Instead of making an argument, it makes a prediction. The state thinks it is a "good

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[1] See Zant v. Stephens, 462 U.S. 862, 867 (1993); Lewis v. Jeffers, 497 U.S. 764, 776 (1990); Arave v. Creech, 507 U.S. ___, 113 S. Ct. ___, 123 L. Ed. 2d 188, 200 (1993); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990).

omen" for itself that Tennessee is the petitioner rather than the respondent in the pending Middlebrooks case,[2] and suggests that the U.S. Supreme Court granted certiorari in order to reverse the state Supreme Court's decision (SB9). The state also interprets the denial of habeas relief in (Larry) Johnson v. Singletary, 991 F.2d 663 (11th Cir. 1993) as a sign that it will prevail in Middlebrooks. If, as the state implies, the Court had already predecided the case in the state's favor when it granted cert, then presumably it would have summarily reversed based on Lowenfield v. Phelps, 484 U.S. 231 (1988), instead of granting plenary review. Moreover, the state's assumption that the granting of a state's petition for certiorari from a lower court decision favorable to a capital defendant always results in a reversal is false. See e.g. Maynard v. Cartwright, 486 U.S. 356 (1988); Sumner v. Shuman, 483 U.S. 66 (1987); Arizona v. Rumsey, 467 U.S. 203 (1984); Estelle v. Smith, 451 U.S. 454 (1981) (in each of which a lower court decision favorable to the defendant in a capital case was affirmed).

The state's assumption that the Larry Johnson case augurs a reversal in Middlebrooks is also unfounded. Johnson involved a successive (third) federal petition for habeas corpus after the Governor had signed a fourth death warrant. Because of the twin policies of comity and finality, the requirements for relief on

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[2] The U.S. Supreme Court in Tennessee v. Middlebrooks, ___U.S.___, 123 L. Ed. 2d 466 (1993) (53 CrL 3013) accepted jurisdiction to review the Tennessee Supreme Court's decision in State v. Middlebrooks, 840 S.W. 2d 317, 341-47 (Tenn. 1992) holding that state's felony murder aggravating factor unconstitutional. See also State v. Bane, 853 So. 2d 483, 489-90 (Tenn. 1993).

federal habeas corpus are more stringent than those applicable on direct appeal. And -- because endless or piecemeal litigation is strongly disfavored -- a successive habeas petition faces even more difficult procedural and substantive hurdles before relief can be granted. Therefore, in order to prevail, Johnson was required to show "actual innocence" of the death penalty, as defined "but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty." (Larry) Johnson v. Singletary, 991 F.2d at 668, quoting (Marvin) Johnson v. Singletary, 938 F.2d 1166, 1183 (11th Cir. 1991) (en banc) (Emphasis in opinions).

On direct appeal, any constitutional error which may have affected the sentencers' weighing process requires reversal for resentencing.[3] In contrast, on a successive habeas petition, "even if the petitioner can show that but for the constitutional error the weighing of the factors might have been different, this is not

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[3] Under Florida's hybrid capital sentencing scheme, the jury and the judge are co-sentencers. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); see Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d (1992). "If the jury's recommendation, upon which the trial judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). See Espinosa, 120 L. Ed. 2d at 859 (. . . "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances").

This of course does not preclude application of the harmless error exception, but it can only be invoked if the state can show beyond a reasonable doubt that the error did not contribute to the jury's penalty verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Even if the reviewing court cannot tell what part the error played in the jury's consideration of its recommended sentence, the error is reversible. Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

enough to make a colorable showing of actual innocence." (Larry) Johnson, 991 F.2d at 668. The Eleventh Circuit panel in Johnson simply held that the petitioner had not made a colorable showing of actual innocence of the death penalty, and also concluded in dicta that the U.S. Supreme Court's decision in Stringer v. Black, 503 U.S. ___, 112 S.Ct. 1130, 117 L. Ed. 2d 367 (1992) is not an intervening change in the law which would justify reconsideration of his previously litigated claim.

Appellant acknowledges that some of the dicta in Johnson suggests that (contrary to the Tennessee Supreme Court's better reasoned conclusion in Middlebrooks) the Eleventh Circuit panel believes that, notwithstanding the differences emphasized in Stringer, the rationale of Lowenfield applies not only to capital sentencing schemes like Louisiana's (i.e. "non-weighing states," and where the constitutionally required narrowing function is performed in the guilt phase), but also to those like Florida's and Tennessee's (i.e. "weighing states," and where the narrowing function occurs in the penalty phase). To the extent that the dicta in Johnson and the holding in Middlebrooks are in conflict, the conflict will likely be resolved by the U.S. Supreme Court's upcoming decision. That decision will probably be dispositive of the federal constitutional question in the instant case; however, this Court should also consider whether the felony murder aggravator, by failing to perform any genuine narrowing function, violates the Florida Constitution. See the discussion of federalist principles, and the distinct but complementary purposes served by federal and

state bills of rights, in Traylor v. State, 596 So. 2d 957, 961-64 (Fla. 1992).

Regarding the sufficiency of appellant's objection below, the state acknowledges that he moved to declare the felony murder aggravating factor enumerated in Fla. Stat. § 921.141(5)(d) invalid on the same constitutional ground he now asserts on appeal (SB9, see R722-29; and appellant's initial brief, p.18). The state does not make a "procedural default" argument in its brief, but obliquely suggests one by pointing out in a footnote that appellant did not object to the jury instruction which was given (SB9,n.1). The state fails to point out that, just before closing arguments and jury instructions, defense counsel renewed his pre-trial motions and the judge adhered to her prior rulings (R537,539). More importantly, the constitutional error here involves the invalidity of the aggravating factor itself; not the inadequacy of a standard jury instruction to explain it. Cf. Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989). In the cases involving challenges to the HAC and CCP aggravating circumstances the problem has been that, while this Court has adopted narrowing constructions (such as the intent to inflict physical or emotional torture [HAC], and a homicide committed upon a careful plan or pre-arranged design [CCP]) arguably sufficient to cure vague or overbroad statutory language, the instructions which were given failed to inform the jury of the narrowed definitions; thus the instructions were unconstitutionally vague. In that situation, there is at least an arguable justification for requiring the defendant not only to challenge the consti-

tutionality of the aggravating factor itself, but also to object to the jury instruction as given, and/or request a more explicit one. See Espinosa v. State, ___So. 2d ___ (Fla. 1993)[18 FLW S470]; Beltran-Lopez v. State, ___So. 2d___ (Fla. 1993) [18 FLW S469]. [But see the separate opinions of Justice Shaw (concurring in the result in Espinosa; dissenting in Beltran-Lopez, stating the view that, once the motion to declare the HAC aggravating factor unconstitutionally vague was denied, defense counsel could reasonably have concluded that further objection would be futile].

In the instant case, the problem with the felony murder aggravator is not that it is too vague; in fact, it is very clear and specific. The problem is that it does not genuinely narrow the class of persons eligible for the death penalty. This is a defect in the aggravating factor itself, and it cannot be remedied by a better jury instruction. Appellant properly raised the constitutional issue below, and that is all that is required.

ISSUE II

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY VOTE OF THE JURORS VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state confuses the jury unanimity issue with a life override issue. While it is true that, under Florida law held constitutional in Spaziano v. Florida, 468 U.S. 447 (1984), the trial judge may under certain carefully limited circumstances impose a death sentence notwithstanding a jury life recommendation, he or she may only do so when the crime is so aggravated and unmitigated that no reasonable person could differ from the conclusion that death is the appropriate sentence. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Conversely, "[u]nder well-settled Florida law, . . . life imprisonment is the only proper and lawful sentence in a death case when the jury reasonably chooses not to recommend a death sentence," and a jury life recommendation (unless deemed "unreasonable" under the Tedder standard) amounts to an acquittal of the death penalty for double jeopardy purposes. Wright v. State, 586 So. 2d 1025, 1032 (Fla. 1991).[4]

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[4] Even if the judge finds no mitigating circumstances, he cannot override a jury life recommendation if there is evidence in the record from which the jury could have found significant mitigation. Where the judge and jury simply disagree on the credibility of the testimony, or the weight to be given the aggravating and mitigating circumstances, it is the jury's recommendation which controls, and the judge cannot legally override it. See e.g. Gilvin v. State, 418 So. 2d 996, 999 (Fla. 1982); Cannady v. State, 427 So. 2d 723, 731 (Fla. 1983); Amazon v. State, 487 So. 2d 8, 13 (continued...)

The Eighth Amendment demands heightened standards of reliability in capital sentencing. Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987); see State v. Daniels, 542 A.2d 306, 314-15 (Conn. 1988). When a Florida jury recommends life, the Tedder standard requires that a life sentence be imposed, unless the recommendation is demonstrably unreasonable. This protection is arguably sufficient to satisfy the constitutional requirement of reliability in life override cases. However, a switch of one or two votes changes a 6-6 life recommendation to a bare majority (7-5 or 8-4) death recommendation. In that situation, the Tedder standard does not apply; instead, the judge must give the jury's death recommendation great weight. Grossman v. State, 525 So. 2d 833, 839 n.1 and 845 (Fla. 1988). A non-unanimous vote, and especially one by a margin of less than a substantial majority,[5] simply fails to provide the requisite assurance of reliability. See State v. Daniels, supra, 542 A.2d at 314-15.

While a state may constitutionally be permitted to place its capital sentencing authority in the trial judge alone, Spaziano, later decisions make it abundantly clear that Florida has not done so. Rather, Florida employs a hybrid procedure in which (1) the

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[4](...continued)
(Fla. 1986). Only when there are substantial aggravating circumstances and virtually no evidence in mitigation can a jury life recommendation be categorized as "unreasonable" under the Tedder standard. See e.g. Williams v. State, 622 So. 2d 456, 463-65 (Fla. 1993).

[5] See the concurring opinions of Justices Blackmun and Powell in Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972).

jury is a co-sentencer;[6](2) the jury's recommendation, whether it be for life or death, must be given great weight;[7] (3) because the penalty phase under Florida's procedure is comparable to a trial for double jeopardy purposes, a reasonable jury life recommendation amounts to an acquittal of the death penalty;[8] and (4) the jury's recommendation, in the vast majority of capital trials in this state, determines the sentence which is actually imposed.[9] Although no state is constitutionally compelled by the Sixth Amendment or otherwise to provide a jury as part of its capital sentencing procedure, when a state chooses to utilize a penalty jury, it cannot dispense with the constitutional protections applicable to jury proceedings. See Morgan v. Illinois, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 492, 500 (1992). To the extent that Florida's death penalty scheme allows a death recommendation, which has a crucial and often dispositive impact on the resulting death sentence, to be returned by a less than unanimous jury (in fact, less than a substantial majority of the jury), it violates the

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[6] Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); see Espinosa v. Florida, 505 U.S. ___, 112 S. Ct. ___, 120 L. Ed. 2d 845 (1992).

[7] Grossman, 525 So. 2d at 839 n.1 and 845.

[8] Wright, 586 So. 2d at 1032; see Arizona v. Rumsey, 467 U.S. 203 (1984); Bullington v. Missouri, 451 U.S. 430 (1981).

[9] See Sochor v. Florida, 504 U.S. ___, 112 S. Ct. ___, 119 L. Ed. 2d 326, 349 (1992) (Stevens, J., joined by Blackmun, J., concurring in part and dissenting in part).

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.[10]

ISSUE III

THE PROVISION OF FLORIDA'S DEATH PENALTY STATUTE, § 921.141(3), WHICH ALLOWS THE JURY'S SENTENCING RECOMMENDATION TO BE MADE BY MAJORITY VOTE, CONFLICTS WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.440, WHICH PROVIDES THAT NO VERDICT MAY BE RETURNED UNLESS ALL OF THE JURORS CONCUR IN IT; SINCE THE UNANIMITY REQUIREMENT IS PROCEDURAL, THE RULE CONTROLS AND THE STATUTE IS UNCONSTITUTIONAL TO THE EXTENT OF THE CONFLICT.

As with the preceding Point on Appeal, and for the same reasons, the state's reliance on Spaziano and other life override cases is misplaced. In addition, this issue is one of Florida constitutional law. The provision of Fla. Stat. 921.141(3) which allows the jury's penalty recommendation to be made by majority vote is invalid on its face, because it conflicts with Florida Rule of Criminal Procedure 3.440 (providing that no verdict may be

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[10] The state also questions appellant's standing to raise this issue, because his jury recommended death by an 8-4 vote (SB 11). Since appellant's contentions are (1) the constitutional guarantees of due process and reliability in capital sentencing are violated by a procedure allowing a less than unanimous (i.e., less than 12-0) death recommendation, and, alternatively, (2) that even if unanimity is not required, a death verdict returned by less than a substantial majority (i.e., less than the 9-3 and 10-2 noncapital verdict procedures involved *in* Johnson v. Louisiana and Apodaca v. Oregon) is constitutionally unacceptable, the state's standing argument is incomprehensible. Appellant was sentenced to death based on a less than substantial majority recommendation of the jury. He has standing to complain, and the issue is fully preserved for review. See R700-02,703-16,613-14, and appellant's initial brief, p. 33, n.12.

returned unless all of the jurors concur in it) on a matter of procedure. Therefore, the issue is properly before this Court. See State v. Johnson, 616 So. 2d 1 (Fla. 1993) (defendant's constitutional challenge to the 1989 amendments to the habitual felony offender statutes, on grounds that it violated the single subject requirement of the State Constitution, went to the facial validity of the statute, and could be raised for the first time on appeal even though not raised before the trial court).

The state characterizes appellant's argument as a "warmed over complaint . . . that the 'procedural' unanimous verdict rule (3.440) renders the 'substantive' statute (921.141[3]) authorizing a majority sentencing recommendation unconstitutional" (SB14). However, as appellant pointed out in his initial brief, p. 53-54, none of this Court's previous decisions[11] address the majority vote provision of the death penalty statute; none discuss the unanimity requirement of Rule 3.440; and (while each involves a claim that the statute encroaches upon this Court's rulemaking power), none involves a claim that a provision of the statute actually conflicts with a Rule of Criminal Procedure. Nor does the sate cite any prior case addressing these matters. It is easier for the state, apparently, just to label appellant's argument a "warmed over complaint," and then serve up a fast food response.

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[11] Dobbert v. State, 375 So. 2d 1069, 1071-72 (Fla. 1979); Booker v. State, 397 So. 2d 910, 918 (Fla. 1981); Smith v. State, 407 So. 2d 894, 899 (Fla. 1981); Jent v. State, 408 So. 2d 1024, 1032 (Fla 1981); Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982); Morgan v. State, 415 So. 2d 6, 11 (Fla. 1982).

The state next claims that appellant "fails to explain why this Court's pronouncement in Morgan[11] is inapplicable" (SB14). To the contrary, appellant's initial brief discusses this point in some detail, at p. 57-60 and n.32. To briefly recapitulate, Florida Rule of Criminal Procedure 3.780, referred to in Morgan, provides in its entirety:

> (a) **Evidence.** In all proceedings based on section 921.141, Florida Statutes, the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.
>
> (b) **Rebuttal.** The trial judge shall permit rebuttal testimony.
>
> (c) **Argument.** Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first.

Rule 3.780 deals only with the presentation of evidence and argument, and says nothing whatsoever about jury procedures such as unanimity, non-unanimity, waiver, or anything else. Therefore, the Second District Court of Appeal in State v. Ferguson, 556 So. 2d 462 (Fla. 2d DCA 1990), rev.den. 564 So. 2d 1085 (Fla. 1990), was clearly correct in determining that Rule 3.780 does not amount to a wholesale adoption of § 921.141 as a rule of procedure. Rather, the Rule simply incorporates those aspects of the statute to the extent that they deal with the same subject matter; i.e., evidence, cross-examination, rebuttal, and argument. Since Rule 3.780 does

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[11] Morgan v. State, 415 So. 2d 6, 11 (Fla. 1982).

not pertain in any way, directly or indirectly, to jury procedures, it cannot fairly be read to have overruled the existing Rules of Criminal Procedure (such as Rule 3.440) on these subjects. Ferguson; see also Williams v. State, 573 So. 2d 875, 876 (Fla. 4th DCA 1990).

Alvord v. State, 322 So. 2d 533 (Fla. 1975), quoted at length by the state (SB 15-17) has nothing to do with the state constitutional issue [based on Article V, §2(a)] presented here. Moreover, Alvord relies on the pre-Furman[13] decision in Watson v. State, 190 So. 2d 161 (Fla. 1967), which holds that a majority-vote verdict for a recommendation of mercy is not unconstitutional, and which notes that -- in that context -- the lack of a unanimity requirement is beneficial to the defendant. Florida's pre-Furman capital punishment scheme (which does not satisfy the present constitutional standards of reliable and individualized sentencing) involved a one-stage trial where the jury determined guilt and punishment in a single verdict. A sentence of death was mandatory for a conviction of first degree murder, unless the verdict included a recommendation of mercy. See Watson, 190 So. 2d at 166; Barlow v. Taylor, 249 So. 2d 437, 439 (Fla. 1971); Henninger v. State, 251 So. 2d 862, 864 (Fla. 1971); Craig v. State, 179 So. 2d 101, 104-10 (Fla. 1965) (Ervin, J., dissenting). Since it construes a statute which has not been in effect for over two decades, and which would not be constitutional if it were in effect, and since it, like

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[13] Furman v. Georgia, 408 U.S. 238 (1972).

Alvord, has nothing to do with the state constitutional separation of powers issue argued by appellant, Watson is beside the point.

ISSUE VIII

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE INTENT ELEMENT OF THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR; AND ALSO ERRED IN FINDING THIS AGGRAVATING FACTOR, AS THE REQUISITE INTENT WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

The state says appellant waived his claim regarding the jury instruction when he withdrew his requested instruction #16 (SB30-31). However, just prior to withdrawing #16, defense counsel specifically asked the judge to give requested instruction #14, and the judge refused (R528). Requested instruction #14 would have informed the jury, "A crime is unnecessarily torturous if the defendant meant the victim to suffer deliberate and extraordinary mental or physical pain" (R793). This is a correct statement of law. See e.g. Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). It is the trial judge's refusal to give #14, not #16, which appellant challenges in this Point on Appeal. (See initial brief, p.83). There is no procedural default, and the state has not even attempted to defend its position on the merits (SB31).

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that this Court grant the following relief:

> Reverse his death sentence and remand for imposition of a sentence of life imprisonment [Issues II, III, and X].
>
> Reverse his death sentence and remand for a new penalty proceeding before a newly impaneled jury [Issues I, IV, V, VI, VIII, and IX].
>
> Reverse his death sentence and remand for resentencing [Issue VII].

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 6th day of December, 1993.

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