

IN THE SUPREME COURT OF FLORIDA

GREGORY SCOTT ENGLE,

Appellant,

v.

CASE NO. 68,548

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

STEVEN L. BOLOTIN  
ASSISTANT PUBLIC DEFENDER  
POST OFFICE BOX 671  
TALLAHASSEE, FLORIDA 32302  
(904) 488-2458

ATTORNEY FOR APPELLANT

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_____	:	

REPLY BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

The state's brief will be referred to herein as "AB". Other references will be as denoted in appellant's initial brief. This reply brief is directed to Issue I on appeal; appellant will rely on his initial brief with regard to Issue II.

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 state, in its answer brief, completely fails to demonstrate - in fact, does not even make any real attempt to demonstrate - that the jury's recommendation of life imprisonment was "unreasonable". Contrary to the well-established Tedder standard (to which it pays lip service, AB 4), the state seems to be suggesting that since nobody knows for certain in this case (or, for that matter, in any other case) exactly what findings the jury made, this Court may not consider whether there was any reasonable basis for the jury to recommend life,

but must look only to the four corners of the trial court's sentencing order. What the state is doing is asking this Court to review this death sentence, imposed pursuant to the trial court's override of the jury's life recommendation, exactly the same as if the jury had recommended death. That, needless to say, is not the law. This Court has on many occasions reversed a death sentence for imposition of a life sentence without parole for 25 years, in accordance with the jury's life recommendation, where there existed a reasonable basis for the jury's recommendation. See Taylor v. State, 294 So.2d 648 (Fla. 1974); Slater v. State, 316 So.2d 539 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Tedder v. State, 322 So.2d 906 (Fla. 1975); Thompson v. State, 328 So.2d 1 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Buckrem v. State, 355 So.2d 111 (Fla. 1978); Brown v. State, 367 So.2d 616 (Fla. 1979); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Neary v. State, 384 So.2d 881 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Phippen v. State, 389 So.2d 991

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<sup>1</sup>The fact that the trial court, in his sentencing order, may have found aggravating circumstances and no 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, *supra*, at 1164; Gilvin v. State, *supra*, at 999; Richardson v. State, *supra*, at 1094; Herzog v. State, *supra*, at 1380; Thompson v. State, *supra*, at 447; Barclay v. State, *supra*, at 695; Amazon v. State, *supra*, at 13. Cf. Cannady v. State, *supra*, at 731 (override was improper where jury could reasonably have found mitigating circumstances from the testimony of psychologist, even though trial court was not necessarily compelled to reach same conclusions); Rivers v. State, *supra*, at 765 ("Here, it appears that the judge merely disagreed with the jury's recommendation. In this case, there was substantial evidence offered in mitigation which the jury could reasonably have relied on in reaching its advisory verdict. We therefore conclude that the recommendation of life imprisonment should have been followed.")

(Fla. 1980); Barfield v. State, 402 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981); McKennon v. State, 403 So.2d 389 (Fla. 1981); Goodwin v. State, 405 So.2d 170 (Fla. 1981); McCray v. State, 416 So.2d 804 (Fla. 1982); Gilvin v. State, 418 So.2d 996 (Fla. 1982); Walsh v. State, 418 So.2d 1000 (Fla. 1982); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Cannady v. State, 427 So.2d 723 (Fla. 1983); Norris v. State, 429 So.2d 688 (Fla. 1983); Washington v. State, 432 So.2d 44 (Fla. 1983); Webb v. State, 433 So.2d 496 (Fla. 1983); Hawkins v. State, 436 So.2d 44 (Fla. 1983); Richardson v. State, 437 So.2d 1091 (Fla. 1983); Herzog v. State, 439 So.2d 1372 (Fla. 1983); Thompson v. State, 456 So.2d 444 (Fla. 1984); Rivers v. State, 458 So.2d 762 (Fla. 1984); Barclay v. State, 470 So.2d 691 (Fla. 1985); Huddleston v. State, 475 So.2d 204 (Fla. 1985); Amazon v. State, 487 So.2d 8 (Fla. 1986); Brookings v. State, \_\_ So.2d \_\_ (Fla. 1986) (case no. 64,221, opinion filed August 28, 1986) (11 FLW 445)

In Thompson v. State, 456 So.2d 444, 447 (Fla. 1984), 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." See also Rivers v. State, supra; Barclay v. State, supra; Huddleston v. State, supra; Amazon v. State, supra; Brookings v. State, supra, all of which were decided within the last two years, and subsequent to Thompson. In the present case, because it has nothing else to hang its hat on, the state is essentially asking this Court to overrule the Tedder principle sub silentio, by looking

only to what the trial court set forth in his order, and ignoring what the jury reasonably could have found. The latter inquiry, which has always been the critical question on review of a death sentence imposed pursuant to a trial judge's override of a jury life recommendation, the state dismisses as "speculation" (AB 3A,5,6,7,8). The state complains, "For this Court to speculatively flyspeck the record in search of any possible circumstance which could possibly have supported the recommendation of life completely obfuscates the statutory function of the sentencing judge" (AB 7). First of all, nobody is asking this Court or the trial court to flyspeck anything, and the only one doing any obfuscating is the state. Contrary to the state's disingenuous pose, this appeal does not involve any needle in a haystack search for "any possible circumstance" to support the jury's life recommendation. The basis for the jury's life recommendation is patently obvious from the record, as counsel for the state themselves recognized when they thought it was to their advantage to do so. In its brief in the original appeal, through Attorney General Smith and Assistant Attorney General Markey, the state had no difficulty discerning the basis for the jury's life recommendation; in fact, they thought it was "rather clear". 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 jury 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. The trial judge, however, did have such evidence (See: Issue VII) - and relied upon that evidence in imposing the sentence of death.

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

In this appeal on resentencing, we have the same jury life recommendation, and essentially the same evidentiary background, except that it has gotten stronger for the defense and weaker for the state. In other words, the trial evidence is the same as it was; some additional mitigating evidence has been introduced which tends to further demonstrate that the jury's life recommendation was reasonable, and Rufus Stevens' statements are gone. It was Stevens' statements which the state had relied upon in the earlier appeal to argue that the trial court, unlike the jury, had evidence that appellant "was a coparticipant in the homicide" [Brief of Appellee, case no. 57,708, p.29, see p.30,32]. However, this Court held that Stevens' statements were improperly considered by the trial court, in violation of appellant's constitutional right to confront and cross-examine adverse witnesses.<sup>2</sup> Engle v. State, 438 So.2d 803, 813-14 (1983).

In the present appeal, therefore, the state finds itself on the horns of a dilemma. Since it cannot demonstrate from the record that the jury's life recommendation was "unreasonable",<sup>3</sup> and since it can no longer raise the spectre of Rufus Stevens' statements, the state (through Attorney General Smith and Assistant Attorney General Hillyer) now pretends that it can't figure out why in tarnation the jury recommended life. What was once "rather clear" to the state has now become "flyspecking", because without Rufus Stevens' statements to rely on, it is no longer expedient

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<sup>2</sup>In reaching this conclusion, this Court relied in part on Bruton v. United States, 391 U.S. 123 (1968). Bruton recognizes the extreme unreliability of accomplice testimony which cannot be tested by cross-examination, and the "recognized motivation [of an accomplice] to shift blame onto others". (391 U.S. at 136).

<sup>3</sup>The state has not disputed the evidence set forth and discussed in appellant's initial brief (p. 7-22,25,27-28,32-33,36-37). In fact, the state (consistent with its current position of relying on the trial court's sentencing order in a vacuum) does not bother addressing the evidence at all.

for the state to adhere to its former position.

The state does not dispute the facts set forth in appellant's brief at p. 7-22 (and discussed in relation to how they support the jury's life recommendation at p. 25,27-29,32-33,36-37); nor does the state make any attempt to show that those facts could not reasonably allow the jury to conclude that Stevens was the dominant actor in the crime and appellant a passive follower; that Stevens (in the company of the state's star witness Nathan Hamilton) had already formulated his plan to rob this particular Majik Market and abduct Mrs. Tolin before appellant ever came on the scene; that (after being turned down by Hamilton) Stevens enlisted appellant's assistance in the robbery without mentioning that he intended also to kidnap the clerk; 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 reached these conclusions from the testimony of the state's own witnesses, and particularly that of Nathan Hamilton. The medical examiner was unable to tell whether the injuries to the victim were inflicted by one person or more than one person. Nathan Hamilton told Detective Parmenter that Stevens (his cousin) was the tougher and more dominant of the two, and that Stevens had done the killing with appellant's knife.

The state would have this Court ignore the evidence, the arguments of counsel, and the jury's questions (submitted during its almost six hours of guilt phase deliberations) which clearly reveal the jury's serious concern as to the degree of appellant's participation in the murder. The state does not wish to discuss the evidence or the evidentiary basis for the jury's recommendation, and it does not much approve of appellant's

discussing these matters either [see AB 8,n.1]. Instead, the state now assumes the posture that the basis for the jury's life recommendation is some kind of cosmic secret which can never be ascertained, so why bother trying? Not only does the state's argument fly in the face of more than a decade of well-reasoned and well-established Florida precedent (see the string cite on pages 2-3 of this brief), it also is blatantly inconsistent with the position taken by the state in the original appeal. "It is axiomatic that a party will not be allowed to maintain inconsistent positions in the course of litigation. McKee v. State, 450 So.2d 563, 564 (Fla. 3d DCA 1984); see also McPhee v. State, 254 So.2d 406, 409-10 (Fla. 1st DCA 1971); Irby v. State, 450 So.2d 1133, 1136 (Fla. 1st DCA 1984). This is a basic legal principle, from which the state is not exempt. See Steagald v. United States, 451 U.S. 204, 208-11 (1981); Finney v. State, 420 So.2d 639, 643-44 (Fla. 3d DCA 1982) (en banc) (Daniel Pearson, J., concurring); Vaprin v. State, 437 So.2d 177, 178 n.2 (Fla. 3d DCA 1983).

For the reasons discussed in appellant's initial brief, 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); Cf. Woods v. State, 490 So.2d 24, 27 (Fla. 1986). From the evidence before it, the jury could reasonably have concluded that Rufus Stevens, not appellant, was the planner and the dominant participant in the crime, and the active perpetrator of the homicide. Appellant's death sentence should be reversed, and the case remanded for imposition of a life sentence without possibility of parole for 25 years, in accordance with the jury's recommendation.

VI CONCLUSION

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



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STEVEN L. BOLOTIN  
Assistant Public Defender  
Post Office Box 671  
Tallahassee, Florida 32302  
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand delivery to Ms. Andrea Hillyer, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Appellee; and a copy has been mailed to appellant, Mr. Gregory Scott Engle, #069240, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, this 6 day of October, 1986.

  
\_\_\_\_\_  
STEVEN L. BOLOTIN