IN THE SUPREME COURT OF FLORIDA

ANTHONY BERTOLOTTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 71432.

ANSWER BRIEF OF APPELLEES FROM
THE DENIAL OF POST-CONVICTION RELIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARGENE A. ROPER
SEAN DALY
ASSISTANT ATTORNEYS GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

STATMENT OF THE CASE AND FACTS

The factual history of this case is contained in this court's decision on direct appeal, Bertolotti v. State, 476 So.2d 130 (1985). The state refers the court to the argument section of his brief as to the facts and evidence presented in the course of proceedings below and is not specifically recite them herein due to time constraints.

SUMMARY OF ARGUMENT

Counsel was not ineffective in not utilizing a futile and nonexistent insanity or intoxication defense and persuasively argued for a lesser conviction of second-degree murder. Counsel adequately investigated Bertolotti's background and no persuasive mitigating evidence has been brought forward to indicate that the sentencing outcome should have been different.

I. BERTOLOTTI WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL, AND A REASONABLE DEFENSE TO FIRST-DEGREE FELONY MURDER, WAS PRESENTED.

The defendant first contends that the defense of voluntary intoxication was raised by the evidence and that defense counsel should have availed himself of such defense to negate the underlying felonies in the felony-murder charge and should have requested a jury instruction on intoxication at the guilt phase.

The state first takes issue with the statement that the defense of voluntary intoxication was raised by the evidence. In his first confession Bertolotti claimed that shortly before the murder he had met a Hawaiian friend named Clay who had previously lived next door to him. Clay supposedly gave him a quaalude which made him "high" at the time of the murder (Ex. 42). Claudio F. Garalde, a former neighbor of Bertolotti, who was Hawaiian,and known by the nickname "Clay", came forward at trial and testified in the guilt/innocence phase and the penalty phase that he had not even seen Bertolotti on the day of the murder, let alone provided him with a quaalude (R 948; 1359-1360). Defense counsel brought out on cross-examination the fact that Garalde had been convicted of two felonies, was still on probation and had been banished from seven counties in Georgia (R 949).

Bertolotti presented no independent evidence to prove that he was intoxicated at the time of the crime, aside from the self-serving statement in his confession, which did not even provide a basis for the testimony of a mental health expert. Johnson v. State, 478 So.2d 885 (Fla. 3d DCA 1985). In view of Bertolotti's two statements to the police and his criminal record he was not put on the stand to bolster his contention that he was "high" at the time of the murder nor was there any testimony that "high" equated with intoxication for purposes of supporting that defense so as to negate intent.

In retrospect there is another, even more compelling reason for his not testifying: he simply never took a quaalude at all. In the course of post-conviction proceedings he was examined by Doctor Robert Kirkland and Bertolotti admitted to him that he had never taken a quaalude on the day of the murder and was simply trying to "muddy the water" in his statement to the police. It is incredible to believe that this fact was not discovered prior to the raising of this meritless claim.

It is clear that voluntary intoxication is not a defense in law unless the ingestants cause one to be intoxicated to the extent that an intent to kill cannot be formed, Wiley v. Wainwright, 793 F.2d 1190, 1194 (11th Cir. 1986), and jury instructions need not be given when there is no evidence that a defendant was intoxicated. Gardner v. State, 480 So.2d 91, 93 (Fla. 1985).

In the present case there was no evidence of intoxication. Bertolotti's course of action on the day of the murder evidences a specific intent to kill as well as to commit the underlying felonies supporting the felony murder charge to the degree that a defense of voluntary intoxication would have been inconsistent with the facts of the case. Bertolotti subsequently told Doctor Kirkland that on the day of the murder he had become dissatisfied with the idea of temporary employment and walked about the Rosemont area, following a specific plan to rob someone, knowing exactly what he was doing. In view of the circumstances in this case, especially the detailed confessions, which amply demonstrate intentional, purposeful action by Bertolotti before, during, and after the brutal assault (to avoid detection), counsel can certainly not be deemed as having acted unreasonably in eschewing a defense of voluntary intoxication in favor of arguing that there was no evidence to support the underlying felonies, and that the killing itself was not premeditated but of a "depraved mind" (second degree murder) nature.

The defendant has, further, failed to demonstrate that counsel was not aware of and presented no defense to the charge of felony murder. Judge Stroker correctly found that counsel presented a difficult defense, in view of Bertolotti's statements to the police, but a clearly viable and arguable defense, that the underlying felonies had not been proven beyond a reasonable doubt. It is interesting to note that even the defendant's psychiatrist - Dr. Merikangas - well aware of the claimed quaalude ingestion, testified at the hearing that Bertolotti was aware of what he was doing and knew it was wrong when he perpetrated the alleged robbery, and likewise would have been responsible for any of the other underlying felonies (burglary, sexual battery) although he was insane during the killing itself.

The record reflects cross-examination as to burglary, with evidence adduced that the doors to the residence had not been pried open or harmed (R 778). Cross-examination further revealed that there was no evidence of traumatic sexual contact as there were no injuries to the genitalia or anal areas (R 818; 820). On cross-examination of analyst Harry Hopkins it was brought out that no sample of semen was submitted for testing by the victim's husband (R 1001). Closing argument reflects that counsel attempted to discredit the testimony of Garalde to leave in the theory of quaalude consumption, to presumably persuade the jury to return a vedict of second degree murder (R 1088). Counsel argued that Bertolotti didn't know what was happening as something snapped in his head (R 1089), and that if the murder occurred in the course of a burglary and robbery that the victim's jewelry and pistol would have been taken (R 1090). He further argued that the sexual battery, which Bertolotti denied, had not been proven based on the testimony of the victim's husband that he had blood type A, as did the defendant, and the semen found in the victim's vagina could have come from either man (R

1091), and that there was no evidence of traumatic sexual contact (R 1092).

In view of the circumstances in this case, it is clear that Judge Stroker was correct in finding no deficiency on the part of counsel under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). Counsel has no duty to utilize a futile and bogus defense. Furthermore, it is obvious that Bertolotti suffered no prejudice from counsel's actions, since he never even ingested the quaalude, nor demonstrated intoxication sufficient to justify an instruction. In evaluating counsel's conduct in this fashion it is important to remember the admonition of this court that an ineffective assistance of counsel claim is an extraordinary one and should not be brought routinely in every case, especially where, as here, the "defense" never raised is a non-existent one. Downs v. State, 453 So.2d 1102, 1107 (Fla. 1984).

II. TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE BY UNREASONABLY AND PREJUDICIALLY FAILING TO PROVIDE COMPETENT MENTAL HEALTH ASSISTANCE FOR THE DEFENDANT.

Counsel is next faulted for not conducting a proper background investigation of Bertolotti and having mental health testing done in this case, both of which actions would supposedly have provided an insanity defense at trial. This claim is supported by the report of a newly discovered psychiatrist, Dr. James R. Merikangas who recently examined Bertolotti and found that he presently suffers from schizophrenia and possible brain damage.

Dr. Merikangas opines in his report that Bertolotti was insane at the time of the offense and such mental defect caused a rage ending in the death of the victim. It is his further opinion that if Bertolotti had taken a quaalude, that, in combination with his mental defect, would have further impaired his ability to form intent and control his impulses.

Judge Stroker refused to enter an order appointing Dr. Harry Krop to examine Bertolotti during the course of the evidentiary below hearing but did not deny counsel access to Bertolotti at the jail and had no objection to counsel going ahead and having Bertolotti independently examined by another mental health expert. Counsel subsequently prepared an order for Judge Stroker granting Dr. Krop access to the jail "at any and all hours." Judge Stroker rejected this provision for unreasonable access and counsel did not present a revised order to Judge Stroker until 4:30 p.m. Thus, Bertolotti was never examined by Dr. Krop. It is clear that such examination could have been scheduled prior to the post-conviction hearing in a timely fashion and that Judge Stroker did not deny Bertolotti access to a mental expert. The defendant cannot be heard to complain of the fact that no other mental health experts appeared at trial to support the contentions of Dr. Merikangas.

Because of the compelling nature of the issues raised by the report of

Dr. Merikangas and the allegations raised in the motion for post-conviction relief, the court felt it prudent to have Bertolotti examined as to these claims by a court appointed expert and by a clinical psychologist who had previously examined Bertolotti while he was incarcerated in jail and awaiting trial on the offense. Doctor Robert Kirkland, a physician and psychiatrist testified at the hearing below as an expert in forensic psychiatry. He examined Bertolotti on November 10, 1987 for a period of one and a half hours in the presence of collateral counsel Nick Trentacosta, who sat outside the door of the open room during the examination. Doctor Kirkland found Bertolotti to be pleasant, cooperative, bright and articulate. He spoke in a candid fashion about his predicament, the charges, and his recent life.

Doctor Kirkland found no evidence of organic brain impairment and found Bertolotti to have a high level of intellect, to be oriented as to time and place, with adequate formal judgment and no disturbed affect or thought disorder. He found Bertolotti to suffer from no major psychological mental disorder or brain damage disorder at the time of his exam or at any time in the past. Bertolotti, himself, brought up the issue of quaalude ingestion to Dr. Kirkland and told him that he had, indeed, not taken a quaalude, although he had informed the police that he had taken a quaalude and been drinking in an effort to muddy the waters.

Bertolotti felt that his father had given him too many whippings but that his parents, although strict, had not disciplined him in a manner out of the ordinary, and he specifically denied being abused as a child. His Aunt Nellie, who had signed an affidavit indicating that his parents had abused,him never appeared at the hearing to testify in support of the affidavit. Bertolotti's mother signed a later affidavit on November 4, 1987 indicating that she had never abused him, hit him in the head with a frying pan, threatened, or put

him in hot water, tied him to a bed or violently whipped him.

Bertolotti further discussed the factual basis of the crime with Dr. Kirkland and took the position that he knew exactly what he was doing at the time of the murder and had actually followed a plan, as he was dissatisfied with the idea of temporary employment and walked around the Rosemont area with the idea of robbing someone. Doctor Kirkland testified, in essence, that Dr. Merikangas' theory that Bertolotti had a catastrophic reaction to stress when the victim screamed was "hogwash." His view is supported by the fact that during the course of the examination Bertolotti stated to him that he had killed the victim in an attempt to avoid detection and to silence her.

Doctor Kirkland examined Bertolotti and was provided with all the same materials that had been utilized by Dr. Merikangas and concluded that Bertolotti was neither schizophrenic nor brain damaged and absolutely knew the difference between right and wrong on the day of the murder and was legally sane and responsible for his actions.

A clinical psychologist, John L. Cassidy, Jr., also testified that he first examined Bertolotti on October 5, 1983 in the Orange County jail at a time when Bertolotti talked of suicide. During his brief visit, Bertolotti exhibited no unusual or bizarre behavior. The visit was prompted by the fact that he had simply related to a nurse that on a previous occasion he had talked of suicide. Cassidy placed him on screening and Bertolotti was observed by a nurse four times a day. No bizarre behavior was reported as a result of the screening. Cassidy visited Bertolotti the next day for a follow up and found nothing unusual or bizarre.

Cassidy again examined Bertolotti during the course of the post-conviction proceedings below, on November 10, 1987 and Bertolotti again denied that he was abused as a child and stated that he had misbehaved and was

spanked sometimes, he felt too hard, but there was no resulting hospitalization or bleeding, although there were welts on his bottom. He had no recollection of being struck in the head by a frying pan. Cassidy testified, without objection, that Bertolotti had "no indications of schizophrenia."

Doctor James Upson, an expert in clinical psychology also testified for the state at the hearing below. He performed a psychological autopsy of Bertolotti and found that Bertolotti had two themes of interaction: at times, he was both overtly aggressive and deeply emotional. He concluded on the basis of the autopsy that Bertolotti was not delusionally schizophrenic but exhibited the characteristics of anti-social behavior and depression.

Sergeant Randy Scoggins testified as a non-expert witness who had observed Bertolotti's manner, speech, and conduct at the time of his confessions, shortly after the commission of the murder. Scoggins testified that Bertolotti at that time was remorseful and lucid, was able to recall with detail the events of the crime, knew where he was, knew who Scoggins was, was oriented as to date and time and had a very good memory of recent events. He was able to describe in graphic detail the events of the day, conversed in an intelligent manner; behaved normally; was not hallucinating; and never indicated that he heard voices or was being controlled by anyone. In the second interview Bertolotti was cold and calculated and there was a detailed conversation. Scoggins concluded that Bertolotti knew the difference between right and wrong, knew exactly what he had done, and was simply a classic case of someone who was remorseful.

Bertolotti's defense attorneys at the time of the trial also testified at the hearing below to the fact that in his contact with them he displayed no inappropriate behavior and conversed in an intelligent manner and was oriented

as to time and place, acted in a reasonable manner and never indicated that he heard voices or was controlled by someone else. Judge Stroker also indicated in his order that at the time of trial Bertolotti never gave any indication of any condition other than sanity and there was no indication of an inability to assist his attorney. He also noted that during the course of several days during the 3.850 hearing, Bertolotti displayed no inappropriate behavior and did not appear irrational.

At the conclusion of the 3.850 hearing Judge Stroker denied Bertolotti relief on this claim, specifically finding that defense counsel was not required to maintain a futile or bogus defense, and that counsel had realistically argued for a lesser conviction of second degree murder. Under the peculiar facts of this case, where counsel's zealousness is necessarily limited by the existence of two contradictory, inculpatory statements, the lack of a history of mental illness and strong psychological support for the same, a lawyer could strategically and tactically forego an insanity defense and seek a lesser offense conviction by trying to convey a depraved mind theory in terms of diminished capacity to the jury. This strategy could tactically become a refuge. In this particular case, it was a necessary refuge, as the evidence reflects no insanity on the part of Bertolotti either presently or at the time of the crime and confessions.

In reaching this decision, the court correctly gave little weight to the testimony of defense legal expert Chan Muller, who, while qualified by experience and training to testify as an expert in capital cases, had not read the trial transcript or talked to the defendant or defense counsel as to strategy and in his opinions seemed to express the idea that the intervention of mental health experts is always required whether it is merited by the facts of the case or not. See, Downs v. State, 453 So.2d 1102, 1105 (Fla. 1984).

The court also correctly found that in judging their own performance the defense attorneys employed the distorting effects of hindsight forbidden by Strickland v. Washington, 466 U.S. 668 (1984) and measured their own performance, to a large extent, not from their perspective at the time of trial or based on reasonable practices at the time, but from their present perspective of reasonable assistance, imparted to them largely from the allegations of the 3.850 motion itself and sophisticated seminar strategies which they now glean as mandatory practice.

The court correctly gave little weight to the testimony of Dr. Merikangas and specifically found that his opinion was "preposterous" and that a reasonable jury would have found so, as well. Although Dr. Merikangas purports not to be opposed to the death penalty, he believes that capital punishment is only appropriate in cases of treason and murder for hire. He appeared only days before the scheduled execution and has appeared in several such cases. His testimony should be viewed with suspicion. See, Card v. State, 497 So.2d 1169, 1175 (Fla. 1986). It is clear that Merikangas' diagnosis was as erroneously fact-bound and premised as that of the expert in Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987). Doctor Merikangas, being from New Haven, Connecticut, is also an affiliate of Dr. Dorothy Otnow Lewis, the mental health expert involved in the Elledge case.

Doctor Merikangas' report is first incorrectly premised upon the fact of child abuse. The defendant and his mother, however, deny the same and Bertolotti has no specific recollection of ever being hit in the head with a frying pan by his mother. His aunt, who provided an affidavit to C.C.R. reflecting such child abuse did not get along with Bertolotti's parents and never appeared to testify at the hearing below to support the alleged claim. Defense counsel specifically determined after proper investigation that no

significant child abuse had, in fact, occurred.

Doctor Merikangas' diagnosis is also premised upon statements from Bertolotti's parents, contained in defense counsel's notes, that he had admitted to things that he did not do as a child and lived in a "fantasy world". After proper investigation, however, the attorneys were able to determine that this unassertive child had graduated into a defendant whose "fantasy world" consisted largely of lying for purposes of self-promotion and blaming others. Trial testimony reflects that far from being socially crippled, as Dr. Merikangas opined, the defendant actually courted Sharon Griest while incarcerated in prison (R 1380) and previously had a girlfriend, Deborah Burns whom he had also stabbed with a butcher knife (R 1310). Bertolotti's poor grades and use of an alias reflect nothing more than the inattentiveness of a student and the common practice of a felon. The taped confession itself and all the testimony directed toward it reflected only a temporary remorse not a temporary insanity on the part of Bertolotti.

It is clear, and it was argued at trial by defense counsel, that his differing versions of the crime were based on revenge toward Sharon Griest for turning him in. It is clear, as well, from the testimony of clinical psychologist John Cassidy, that Bertolotti's threatened suicide attempt amounted to little more than an attention-seeking device and that any observation of him as a result of this was a precautionary measure. Not only did Dr. Merikangas not talk to Bertolotti's parents, although defense counsel is criticized for failure to properly investigate, it is also clear that Dr. Merikangas' diagnosis rests upon false factual premises, in the first instance.

Inmate records from Georgia reflect that Bertolotti is someone with very little ambition, who got along well with his family. There were no

psychological evaluations in this file. The included Board of Pardons and Parole investigation done in 1973, referred to some earlier data indicating only the "likelihood of crazy, irrational behavior," which was utilized in determining the feasibility of parole. There was certainly no psychological determination that Bertolotti himself was "crazy". The psychological evaluation from Baker Correctional Institution, relied on by the defendant, reflects only that he is a sociopathic personality. The psychological screening report contained in Florida correctional records reflects no signs of psychopathology.

Doctor Merikangas' most glaring diagnostic error is reflected in his opinion that Bertolotti became temporarily insane when the victim began screaming and he felt trapped. In contrast to the testimony of Doctor Merikangas, Doctor James Upson could not find or identify a "catastrophic stressor" that would have resulted in a mental break in Bertolotti, as a victim who "screams" is an expected event in such a situation. Bertolotti himself related to Doctor Robert Kirkland that he killed the victim in an attempt to avoid detection and to silence her. Thus, the theory that multiple stab wounds indicate a "frenzy" which is an indicator of lack of premeditation and insanity finds no basis in fact or in law in this case. See, Perry v. State, 143 So.2d 528 (Fla. 2d DCA 1962); 21 Am. Jur. 2d, Crim. Law § 37.

Doctor Merikangas' postulation that had Bertolotti taken a quaalude, in combination with his mental defect, it would have further impaired his ability to form intent and control his impulses, is specifically refuted by the evidence which reflects no ingestion of intoxicants at all. Doctor Merikangas was further forced to admit under cross-examination that an insane person would not have the presence of mind to rob a victim contemporaneously. The remainder of Dr. Merikangas' ruminations are specifically refuted by the

record and deserve no further attention other than to note his testimony, upon court examination, that while Bertolotti was allegedly insane at the moment of the killing he miraculously would have suffered no such mental problems when contemporaneously perpetrating the other felonies alleged - robbery, sexual battery and burglary - which served as the underlying basis for felony murder. Is it reasonable to believe that Bertolotti's mental health was so quickly switched on and off? Judge Stroker correctly rejected that incredible contention based upon the surrounding circumstances of this case; the testimony of these experts and non-experts who had encountered Bertolotti both contemporaneous to and after the offense and perceived no insanity or other mental problems; and his own personal evaluation of the defendant.

Based on the evidence presented at the 3.850 hearing it is clear that Judge Stroker was correct in determining that defense counsel was not required to maintain a futile and bogus insanity defense when he could realistically argue for a lesser degree conviction. Because Bertolotti is neither presently insane nor was he insane at the time of the murder, it is clear that no prejudice can enure to Bertolotti by virtue of his attorney not having raised an insanity defense. Thus, Bertolotti has not met the second prong of Strickland and inquiry is not even needed as to whether his attorney was acting as reasonable competent counsel in seeking a lesser conviction for second degree murder. Going one step farther and making such analysis for the sake of argument, however, reveals no deficiency in the performance of counsel under the facts available to them at the time of trial, and, indeed, defense counsel testified that under the particular facts of this case an insanity defense would have been inconsistent.

The trial record reflects that prior to the murder Bertolotti had been casing the neighborhood and had pretextually asked directions from a neighbor,

who later saw him headed in the opposite direction (R 847-866). Bertolotti was rationally upset because of his employment situation and was motivated by a generalized anger and desire for money and moved about looking for an opportunity. On the basis of his confession, he gained entry to the Ward residence, either pretextually or by stealth (Ex. 42, 44).

His acts at the time of the crime were not those of a madman, in view of the physical evidence, including defensive wounds of the victim (R 801). Clearly that this was a victim who was simply hard to kill. His confession demonstrates that even though he stabbed her numerous times, even breaking a knife, she was not incapacitated and was getting up off of the floor. Her strength was apparently such that he then felt it necessary to hit her over the head with a beer stein and strangle her. The alleged temporary insanity or frenzy theory is also refuted by the continuing deliberation of Bertolotti in getting a second knife and continuing his attack. See, Dawson v. State, 139 So.2d 408 (Fla. 1962); Chambers v. State, 339 So.2d 204 (Fla. 1976). The testimony of Garalde specifically refuted the intoxication theory.

Bertolotti admitted to Sharon Griest that after he had gained entry to the house he decided he was going to take her money and not only did he take money from the victim's purse but he also checked a safe to locate even more money (R 917; Ex. 42). Even his later confession, in which he tried to implicate Sharon Griest, reveals his preoccupation with getting money (Ex. 44). Moreover, his second confession specifically evidences a fear of leaving the victim alive, although he attributes such motives to Sharon Griest, rather than himself (Ex. 44). His attempts at concealment, such as hiding his bloodstained clothing, disposing of the victim's car and lying to Griest as to where he had obtained the money, also indicates, a guilty and rational mind. The day after the murder he talked to a minister, Reverend Alexander, because

the murder was bothering him (Ex. 42). That, coupled with the sobbing on his confession, indicates a rational and remorseful mind.

Mental condition is not necessarily an issue in every criminal proceeding, Blanco v. Wainwright, 507 So.2d 1377, 1383 (Fla. 1987), and defense counsel is bound to seek out expert assistance only if evidence exists calling into question a defendant's sanity pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985). Counsel in this case, based on interviews with Bertolotti and his family and the records and background information they had obtained, as well as the facts of the crime itself, had no reason to doubt Bertolotti's sanity in any respect. He had no psychiatric history and his background was clearly sociopathic/criminal, rather than delusional, as reflected in prison evaluations and attorney notes. He had no history of head trauma so as to suspect organic brain damage, had above average intelligence, and lied only for purposes of self-promotion. While his statement implicating Sharon Griest was described as bizarre, the reward scheme would be one of the few ways to implicate someone civic-minded enough to turn him in, and it is not unusual for defendants to recite unusual explanations for their actions.

Counsel moved for the appointment of an expert, as the threshhold for filing such motion was not that great and asked for an evaluation on the advice of a public defender who routinely filed them, with the intent that if it became apparent that it was needed, they would not have to ask for it later. Counsel did not suspect that the defendant was insane at the time of the offense and under the facts of this case had no reason to believe that he was insane or to go forward with an examination. No substantial deficiency in performance has been demonstrated under Strickland.

III. COUNSEL WAS EFFECTIVE AND DID NOT FAIL TO INVESTIGATE AND PRESENT STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

Counsel is next faulted for failing to present evidence in mitigation of Bertolotti's abusive childhood and mental condition. The defendant alleges that the fact that Dr. Pollack was contacted by the defense only once after the conviction and asked to see the defendant the morning of the penalty phase was error and the fact that the defendant would not see Dr. Pollack should have alerted counsel of more mental health problems and that counsel failed to advise the defendant in regard to mental health experts. The defendant concludes, therefore, that counsel failed to prepare the mental health expert to perform a timely evaluation and did not present correct background information to the judge and jury resulting in a skewed capital sentencing proceeding.

The state would first submit that, there being nothing in the record to indicate that Bertolotti was not competent at the time of trial, by refusing to be examined by Dr. Pollack Bertolotti effectively waived the presentation of mitigating evidence at the penalty phase. See, Alvord v. State, 396 So.2d 184, 191 (Fla. 1981); Christopher v. State, 416 So.2d 450, 452-453 (Fla. 1982).

Attorney Peter Kenny testified that he probably did talk to Bertolotti about his reasons for not seeing Dr. Pollack and, although he doesn't remember what Bertolotti told him, if Bertolotti's reasons for not seeing Pollack had caused him any concern, he would have asked Judge Stroker for a continuance. Moreover, if any prejudice was caused to Bertolotti by counsel's actions in not having him examined by Dr. Pollack, it would certainly have behooved counsel to have Bertolotti examined post-sentence by Dr. Pollack rather than by a psychiatrist from a foreign jurisdiction, who appears in such proceedings

with some regularity and who, by his testimony and background, would be inclined to reach conclusions other than those that would have been reached by Dr. Pollack. It must be remembered that Judge Stroker specifically found Dr. Merikangas' opinions to be preposterous.

The record reflects that defense counsel had several interviews with the defendant while he was awaiting trial and as a result of those was not alerted as to any mental problems in regard to either sanity or mitigating factors. Bertolotti indicated no history of mental illness and his history of headaches related, not to organic brain damage, but to eye problems. Defense counsel subsequently interviewed Bertolotti's family and was put on no notice of mental problems by them, as discussed in previous sections of this brief. The information that counsel allegedly should have discovered presents no compelling mitigating factors. Dr. Merikangas' diagnosis has been specifically repudiated by other expert testimony and is refuted by the facts of this case. The "frenzy" theory has no basis in fact. The fact that Bertolotti's mother was diagnosed as schizophrenic is without relevance unless Bertolotti himself has genetically inherited this disease. The prison records reflect that Bertolotti was simply a sociopath and should not be relieved of criminal responsibility and it is clear from his history that he is a person without ambition willing to make a livelihood through criminal means. Dr. Carey actually testified at the penalty phase as to Bertolotti's exception adjustment in prison and informed counsel of no mental problems and, indeed, Dr. Carey's report also indicates that Bertolotti is a mere sociopath. There has ben no showing that an examination by Dr. Pollack would have revealed the presence of any compelling factors that defense counsel could have used in mitigation at the penalty phase.

Judge Stroker specifically found that the only lack of thoroughness on

the part of counsel was that of not having a psychological evaluation. But he also found that Bertolotti was not prejudiced by such lack of evaluation in view of the number of aggravating and mitigating factors in this case. Judge Stroker specifically found that if there were such mitigating factors that they would not have been sufficient, in any event, to sway him to impose a life sentence upon Bertolotti.

IV & V. THE REMAINING CLAIMS RAISED BY THE DEFENDANT IN POST-CONVICTION PROCEEDINGS ARE PROCEDURALLY BARRED FROM CONSIDERATION BY THE LOWER COURT AND THIS COURT, AS WELL.

The defendant's contention that the prosecutor and trial judge under Florida's bifurcated trial procedure misinformed and impermissibly diminished the jurors' understanding of the importance of their role and responsibility in the sentencing phase in violation of the Eighth and Fourteenth Amendments to the United States Constitution is procedurally barred. See, Demps v. State, 12 F.L.W. 561 (Fla. Nov. 4, 1987). Bertolotti's remaining claim that he would be automatically sentenced to death upon conviction in violation of the Eighth and Fourteenth Amendment based on Lowenfield v. Phelps, 86-6867, 55 U.S.L.W. 3852, cert. granted, (June 22, 1987) is also a claim that was available and could have been presented on direct appeal. See, Ritter v. Thigpen, 1 F.L.W. Fed. C1394 (11th Cir. Aug. 27, 1987). For further arguments in this regard the state specifically relies on its Motion to Strike Portions of Motion to Vacate Judgment and Sentence/Response filed below which contains exhaustive argument on these issues.

CONCLUSION

Based on the above and foregoing reasons the appellees respectfully request that this honorable court affirm the order denying post-conviction relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARGENE A. ROPER

SEAN DALY
ASSISTANT ATTORNEYS GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Fl. 32014
(904) 252-1067

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellees from the Denial of Post-Conviction Relief has been furnished by mail, to Mark E. Olive, Capital Collateral Representative, at the Office of the Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32301, this 13th day of November, 1987.

Margene A. Roberts
Of counsel