brief served 25 days late

IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,174

THE STATE OF FLORIDA,

Petitioner,

vs.

BERNARD BOLENDER,

Respondent.

* *

BRIEF OF PETITIONER

* *

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INTRODUCTION

The Petitioner will be referred to as the State. The Respondent will be referred to as the defendant or by his name. The symbol "R" represents the record on appeal. The symbol "ST" represents the supplemental transcript of the evidentiary hearing on the respondent's motion for post-conviction relief, being filed with this brief. The symbol "SR" will be used to designate the supplemental documents being filed with this brief. All emphasis has been added.

STATEMENT OF THE CASE AND THE FACTS

Bernard Bolender was tried and convicted of four counts of first degree murder, kidnapping and armed robbery. (R. 1-8A). The facts were cogently set forth by this Honorable Court in Bolender v. State, 422 So.2d 833 (Fla. 1982). The defendant's conviction and sentences of death were affirmed therein.

The defendant subsequently filed a Motion for Post-Conviction relief pursuant to Fla.R.Cr.P. 3.850. (SR. 1-3). The State's request to have the original trial judge hear the motion was denied. (R. 10-11). Among other things, Bolender claimed that his trial counsel was ineffective for failing to present certain allegedly mitigating evidence

during sentencing. The new judge heard the testimony of the defendant's mother and sister. They essentially asserted that the defendant was a good brother/son. That he had left high school although being offered a sports scholarship in order to support his mother and sister. (ST. 11, 24). His sister testified that Bolender was married at nineteen and had two of his own children. (ST. 12-13). His mother stated that the defendant's father was an alcoholic and had left home when the defendant was nine. (ST. 8-9). Judge Klein found that the foregoing constituted non-statutory mitigation. He ruled that trial counsel was ineffective for failing to present same. The court went on to rule that the existence of the newly found mitigating circumstance, despite the presence of six statutory aggravating circumstances mandated the vacatur of the death sentence. (R. 22-23). The State timely filed its notice of appeal. (SR. 4).

SUMMARY OF THE ARGUMENT

The trial court applied the incorrect standard of review in the instant case. After hearing laudatory testimony from the defendant's mother and sister at a post-trial evidentiary hearing, the trial court vacated the death sentence under the ill advised notion that life is an inappropriate sentence where any evidence of mitigation exists. Here, six valid statutory aggravating factors were upheld by this Court in Bolender v. State, 422 So.2d 833 (Fla. 1982).

It is the State's position that the sentencing judge was familiar with the defendant's background since he had reviewed a presentence investigative report on Bolender in an unrelated case. The court was aware of the evidence and rejected it as valid mitigation. Even if it is found that the court was unaware of the evidence, such does not constitute grounds for mitigation of the death penalty. First, the record does not support the conclusion that the defendant left school and forsook a scholarship to support his mother and sister. It does support the conclusion that the defendant left school to marry and raise children. Second, even if the defendant's actions and motives were genuine he has merely conformed to the societal norm of devotion to one's family. It rather appears that the court's decision

to vacate the death penalty after hearing the heart wrenching testimony of the defendant's mother and sister had its basis in emotion, rather than law.

Moreover, counsel's decision not to put the defendant's mother and sister on the stand during the sentencing phase was a valid trial strategy. Counsel felt that his best strategy was to harp on the fact that a co-defendant had testified against Bolender in exchange for a lighter sentence. He argued that the co-defendant was not credible and that Bolender should not receive a greater sentence. Trial counsel also believed that since the jury had appeared emotional after returning a guilty verdict, he was better to return them to the jury room for the penalty decision as quickly as possible. It is not the province of the appellate court "to second guess considered professional judgment with the benefit of 20/20 hindsight." Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985).

ARGUMENT

I

THE TRIAL COURT APPLIED THE INCORRECT STANDARD OF REVIEW IN REDUCING A DEATH SENTENCE TO LIFE IMPRISONMENT WHEN FINDING THAT A DEATH SENTENCE MAY NOT BE IMPOSED WHEN ANY EVIDENCE OF MITIGATION IS PRESENTED.

STANDARD OF REVIEW

In granting the defendant's motion for post-conviction relief the trial court found:

> (4) The law of the State of Florida is that a death sentence may not be imposed when any evidence of mitigating circumstances is presented. Thus, it is this court's conclusion that had Defendant's counsel presented the testimony of Defendant's mother and sister, the trial court could not have imposed the death sentences. Counsel was therefore ineffective.
>
> (R. 22-23).

The foregoing conclusion is not now and has never been consistent with the law in the State of Florida. In fact, there are several cases out of this Honorable Court which upheld death sentences despite the presence of mitigating circumstances. In Thomas v. State, 456 So.2d 454 (Fla. 1984) the jury recommended a life sentence. The judge

overrode the advisory verdict and imposed a death sentence after finding five aggravating and two mitigating circumstances. This Honorable Court found one aggravating circumstance impermissible, yet upheld the sentence. See also, Hoy v. State, 353 So.2d 826 (Fla. 1977); Oats v. State, 472 So.2d 1143 (Fla. 1985); Bassett v. State, 449 So.2d 903 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. 1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

The Legislature of the State of Florida, through its enactment of Section 921.141 Florida Statute, has provided a system where aggravating and mitigating circumstances are considered by the judge and jury through a weighing process. The most important aspect of the process is the "weighing" of the circumstances. If the aggravating circumstances outweigh the mitigating circumstances, death is an appropriate sentence. White v. State, 403 So.2d 331 (Fla. 1981). This Honorable Court addressed the importance of that weighing process in State v. Dixon, 283 So.2d 1 (Fla. 1973):

> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which

> imprisonment in light of the totality of the circumstances present.
>
> Dixon, at 10; see also Herring v. State, 446 So.2d 1049 (Fla. 1984).

In the case sub judice the trial court's action was in direct contravention of the principle set forth in Dixon, supra. Instead of balancing the several aggravating circumstances and one newly found mitigating circumstance, the court automatically vacated the death sentence, as a result of the presence of one alleged mitigating circumstance.[1] The result herein is most shocking in light of the quantity of aggravating circumstances. The trial court initially found all but one of the aggravating circumstances set out in §921.141 applicable. On direct appeal, this court disagreed with the trial court's findings as to two of the factors. Bolender v. State, 422 So.2d 833 (Fla. 1982). Thus, there were six clearly applicable aggravating factors: that the capital felonies were committed while defendant was engaged in the commission of four robberies and four kidnappings, Florida Statutes §921.141 (5)(d), that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest, Florida Statutes §921.141 (5)(e), that the capital felonies were committed for

[1]A discussion of what constitutes a valid mitigating circumstance is contained in point two of this brief.

pecuniary gain, Florida Statutes §921.141 (5)(f), that the capital felonies were committed to disrupt or hinder the lawful exercise of law enforcement, Florida Statutes §921.141 (5)(g), that the capital felonies were especially heinous, atrocious, or cruel, Florida Statutes §921.141(5)(h), and that the capital felonies were homicides committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, Florida Statutes §921.141 (5)(i), and one alleged non-statutory mitigating factor. The trial court's failure to weigh and balance the foregoing is error.

II

THE TRIAL COURT INCORRECTLY HELD THAT EVIDENCE ASSERTING THE DEFENDANT WAS A GOOD SON AND BROTHER CONSTITUTED A NON-STATUTORY MITIGATING CIRCUMSTANCE SUFFICIENT TO OUTWEIGH THE EXISTENCE OF SIX VALID AGGRAVATING CIRCUMSTANCES.

The Honorable Herbert Klein, Circuit Court Judge, Dade County found the defendant's trial counsel ineffective for failing to present evidence during the sentencing phase of the trial that the defendant had left school to support his family, and was a good son and brother. The court ruled that the foregoing established a valid non-statutory mitigating factor. (R. 22-23). Judge Klein, who was not the trial judge, further found that if the original sentencing trial court had the benefit of same, the jury verdict of life would not have been overriden. It is the State's position that the assistance rendered by trial counsel was in keeping with the standard set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

It is the State's first assertion that the original trial judge was aware of the defendant's background and family history. During the evidentiary hearing original trial counsel stated the defendant had previously been sentenced by the same trial judge in an unrelated case. At that time the trial judge had a presentence investigative report in his possession.

Q:[2] Were you familiar with and aware of a presentence investigation from a previous case that involved the defendant?

A: Yes, I was aware of a presentence investigation. I had seen that Bo's affidavit had a rap sheet. I believe he made that available to me.

Q: And, to the best of your knowledge, that presentence investigation had been seen by Judge Fuller when he sentenced him on the burglary charge?

A: Yes, it had. I knew it had.

Q: In the presentence investigation, it had facts about his background as well as the things he testified to on the stand?

A: Yes, it did. I can't recall the document per se, but I am sure it did.

(ST. 37-38).

It is clear from Mr. Della Fera's testimony that the original trial judge did consider and was aware of the defendant's background and did reject it as a valid non-statutory mitigating factor. In Francois v. State, 423 So.2d 357 (Fla. 1982), the defendant presented numerous assertions concerning his background, character, and the circumstances of his upbringing which he claimed defense counsel should have discovered and presented at the sentencing phase. This Court in finding the point without merit, held:

[2]Questions were asked by Abe Laeser, on behalf of the State, and answered by G.P. Della Fera, the defendant's trial counsel.

> This is not a case of total failure to present any mitigating evidence or argument whatsoever. Defense counsel did in fact present witnesses who testified concerning appellant's character and background.
>
> Francois, at 360.

Although, in the instant case, the alleged mitigating evidence was revealed in another proceeding, its exposure had the same effect as did the evidence in Francois, supra.

Assuming this Court finds that the "good boy" evidence was not brought out, the State would submit that the evidence that the defendant treated his mother and sister well, and left school to help support them failed to constitute a valid non-statutory mitigating circumstance. The testimony of the defendant's mother and sister revealed that he forsook a college scholarship in order to go to work to support his immediate family. (ST. 11, 24). The irony of this assertion is that the defendant was married at nineteen and began a family. (ST. 12-13). Thus, it appears that the defendant chose not to continue his education because he wanted to start his own family. This choice was not one selected for unselfish motivations deserving of commendation. Also, the defendant's father left home when he was nine. (SR. 9). The family was apparently able to subsist without his alleged support for all that time. That points

to the inescapable conclusion that the defendant's choice to leave school was not one done to maintain his family's support. Moreover, almost any citizen could look to their own heritage and note grandparents who were unable to pursue even secondary educations because they needed to help support their family. This situation in the majority of instances did not cause them to turn to a life of murder and mayhem!

Accordance to societal norms does not constitute the type of circumstance which would mandate a reversal of an override. Tedder v. State, 322 So.2d 908 (Fla. 1975). This Honorable Court has held that a mitigating circumstance must, in some way, ameliorate the enormity of the defendant's guilt. Eutzy v. State, 458 So.2d 755 (Fla. 1984). Being a good son and brother is expected. Although good behavior should be appreciated, it is the State's contention that it would not be adequate to rise to the level of a non-statutory mitigating factor sufficient to ameliorate guilt. Furthermore, this Court asserted that to determine whether evidence presented in mitigation would rise to the level stated in Eutzy, supra, the facts of the case must be considered in light of prior cases, and must be compared and contrasted and weighed in light thereof.

This Court's holding in Thompson v. State, 456 So.2d 444 (Fla. 1984) is in sharp contrast to the case sub judice.

There, the jury recommended a life sentence. The trial court found two aggravating factors and no mitigating factors and overrode the jury. This Court on direct appeal reviewed the record and found that there were mitigating factors on which the jury could have properly relied. Those mitigating circumstances were that the defendant was mildly retarded, had a personality disorder, was a good father and son and that the defendant's father had mental illness and died in an institution. This court concluded that there were sufficient mitigating circumstances for the jury to reasonably conclude that the aggravating circumstances were overcome and that life was an appropriate sentence. Here, however, it was established that the defendant was a good son and father. Nothing more. He was not retarded. He did not suffer from a personality disorder. Importantly, this court, on the defendant's direct appeal did not find any mitigating evidence. It did find the presence of six aggravating circumstances. (See point I infra).

In White v. State, 403 So.2d 331 (Fla. 1981) the jury recommended life. The sentencing judge found five aggravating circumstances, no mitigating circumstances, and imposed a sentence of death. This court, consistent with its responsibility to review the entire case recognized that the only "colorable" mitigating circumstance was the non-statutory consideration that the defendant was not the trigger-man. This court nonetheless upheld the sentence and found

that that factor alone failed to outweigh the enormity of the aggravating facts.

After a review of the cases and analysis of the content of the evidence presented, it would be the State's position that Judge Klein's conclusion to find mitigation has its basis in emotion, rather than in law. Understandably, the sights and sounds of a mother trying to save her son's life is heart wrenching. It is not, however, sufficient to constitute mitigation in terms of Florida's imposition of the death penalty. Francis v. State, 473 So.2d 672 (Fla. 1985). As pointed out by Justice England, concurring in Chambers v. State, 339 So.2d 204 (Fla. 1976):

> [T]he judge's role is primarily to insure the jury's adherence to law and to protect against a sentence resulting from passion rather than reason.
>
> Chambers, at 208-209.

Surely, when the decision is in the judge's hands, passion should not guide the court. Here, unfortunately, passion seems to have prevailed.

It is the State's final contention that failure to present evidence of the defendant's background is a sound sentencing strategy. Defense counsel argued during the sentencing phase that John Macker, also present during the

night of the massacre, had testified on behalf of the State to save his own life. Counsel argued that Macker was equally, if not more culpable than Bolender. That Macker had received life sentences and Bolender should be sentenced no differently because of the equality of their culpability. This Court held in Bolender, supra, that this argument was legitimate, although not factually supported.

> The disparity between Bolender's death sentences and Macker's twelve concurrent life sentences is supported by the facts. Bolender acted as the leader and organizer in these crimes and inflicted most of the torture leading to the victims' deaths. Bolender used a hot knife to burn Nicomedes Hernandez on the back and inflicted slash wounds on two of the victims. He also shot Hernandez in the leg in an effort to make him reveal the location of his cocaine and inflicted the stab wounds and gun-gunshot wounds that led to the victims' deaths. Macker's role was less significant, and there is no evidence that he participated in the stabbing and shooting of the victims. Jackson v. State, 366 So. 2d 752 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Meeks v. State, 339 So.2d 186 (Fla. 1976) cert. denied, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978).
>
> Bolender, at 837.

The next logical inquiry is whether the Constitution as it is interpreted in Strickland v. Washington, requires counsel to travel on more than one sentencing theory to be effective. It does not. Strickland, supra holds that for counsel to be ineffective his representation must be reasonable under the circumstances. Here, counsel represented an admitted cocaine dealer whose fingerprints were found on the car in which the bodies were disposed, and who was identified by an eyewitness as the main culprit. Counsel's reasonable strategy choice was to discredit the eyewitness participant and urge the jury to sentence his client to life, as his co-participant Macker was given life in exchange for his testimony. Presenting evidence that the defendant was a good son and brother was almost laughable, in light of his revealed involvement. It is evident that counsel was not ineffective, simply because the jury recommended life. Although the jury's choice was irrational in light of the extent of aggravation, it was quite an accomplishment for trial counsel.

Counsel felt that he would only anger the sentencing court if he presented "apple pie" testimony. This was especially true in light of the fact that the defendant had appeared before the same trial judge on an unrelated burglary charge and been placed on probation. (ST. 34). Mr.

Delle Fera, trial counsel, testified at the post-conviction hearing as follows:

> [I] believe, presenting mitigating circumstances to Judge Fuller would really not have mattered that much to Judge Fuller at the time. I thought that the testimony that either Bo's mother or Bo's sister might put on with reference to his family, his background while he was a child in Long Island would not mean a hill of beans to Judge Fuller.
>
> (ST. 36).
>
> I think at [sic] would have absolutely no effect on Judge Fuller, that is one of the reasons I elected not to put these on.
>
> (ST. 37).
>
> Well, it was a very trying period for both Mrs. Bolender and Denise Crane.
>
> I thought that perhaps by putting them on the stand we might do more good--more bad than good, rather. Excuse me.
>
> . . .Well, you know, as far as I thought that it was pretty heated and, again, I go back to my general feelings that it would have done no good and maybe it would have become even an argumentative type of situation.
>
> I just didn't feel that it would have had any persuasive effect on Judge Fuller at all. I just didn't think that a mother's tears--you

> know, as much as I am sure she would have liked to testify on behalf of her son--would have persuaded Judge Fuller in any other direction than the direction he took.
>
> (ST. 38-39).
>
> But I believe that Judge Fuller at the end of the trial ended with a--and I am not sure whether it was exactly these words, but that this was the most brutal case he had seen during the 25 years or so that he had been sitting on the Dade County bench.
>
> (ST. 39).

Trial counsel had another valid reason for expediting the sentencing hearing. The jury deliberated for six hours before returning a guilty verdict. Counsel perceived that the decision was an emotional one for the jury. He felt that his client would be benefitted if the jurors were returned quickly to the jury room. Mr. Delle Ferra stated.

> Yes. There were two reasons why I elected not to put anyone on the stand. Firstly, after it took the jury six and a half hours of deliberation, after the guilty phase of the trial when they came out several jurors were very teary-eyed when they read the verdict of guilty.
>
> Consequently, when we got to the sentencing phase of the trial and the state put on the aggravating criteria, which had already been brought out in the trial, rather

> than covering new ground, I argued about the inadequacy in order to get the jury back into the juryroom because I thought we had a better chance of coming back with life imprisonment.
>
> . . .
>
> They came back 12 minutes later, twelve-zero for life imprisonment.
>
> (ST. 35).

The foregoing strategic choices are a far cry from the requirement for ineffectiveness that "counsel's errors were so serious that he was not functioning as 'counsel' guaranteed to him by the Sixth Amendment. Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985). It has been repeatedly held that counsel will not be deemed constitutionally deficient merely because of tactical decisions. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). In fact counsel is not required to submit to the jury all arguably mitigating evidence that might exist, in order to be effective. Eddings v. Oklahoma, 102 S.Ct. 869 (1982); Lockett v. Ohio, 98 S.Ct. 2954 (1978). In Griffin, supra, counsel explored and examined the possibility of using character and background evidence at the penalty stage, but made an informed choice between reasonable alternatives. Here, trial counsel did explore the possibility of presenting Bolender's mother and sister in mitigation. He decided that it was better, to argue the inequality of the co-defendant's

sentence. According, Bolender, like Griffin has not carried his burden of proving ineffective assistance of counsel.

Moreover, the defendant has failed to survive the second requirement for ineffectiveness. That the alleged deficient performance prejudiced the defendant. As was earlier noted, Judge Fuller was familiar with the defendant's background as a result of having read a presentence investigative report in another case. (ST. 37-38). Therefore, since the court did have that knowledge, although not presented during the capital case, failure to present it at the later point did not prejudice the defendant.

Bolender was convicted of four counts of first degree murders and sentenced to death four times.[3] He was the leader and organizer of "brutal torture slayings". Bolender, at 422. Although six aggravating factors were present and mitigation absent, the jury recommended life. This court in upholding the initial trial judge's override and consequent imposition of the death penalty inferentially found "the facts suggesting a sentence of death were so clear and convincing that virtually no reasonable person

[3]He was additionally found guilty of four counts of kidnapping and four counts of armed robbery.

could differ." Tedder, at 910. The State strongly believes that even if Judge Fuller had heard the testimony of the defendant's mother and sister his decision to override the jury's recommendation of life would not have changed. The State accordingly requests that the order granting the defendant's motion for post-conviction relief be reversed and the sentence of death be reinstated.

CONCLUSION

Based on the foregoing argument and citations to authority the order granting the respondent's motion for post-conviction relief must be reversed and the sentence of death be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER was furnished by mail to N. JOSEPH DURANT, JR., Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 16th day of May, 1986.

RANDI KLAYMAN LAZARUS
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