IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,174

THE STATE OF FLORIDA,

Appellant,

vs.

BERNARD BOLENDER,

Appellee.

* *

REPLY BRIEF OF PETITIONER

* *

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INTRODUCTION

The Appellant will be referred to as the State. The Appellee 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, unless otherwise noted.

STATEMENT OF THE CASE AND 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).

POINTS INVOLVED ON APPEAL

I

WHETHER 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.

II

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

SUMMARY OF ARGUMENT

Appellee fails to challenge the contention that the standard of review utilized to reach the order on appeal was incorrect. As such the case demands, at a minimum, a remand for re-weighing by the original trial judge (who is on the bench) or a new sentencing phase-with a jury. However, given the undisputed facts it is clear that attorney Della Fare was absolutely within his legal profession's boundaries of competence when he decided to abandon the evidence proffered in this collateral proceeding and move forward with a proven legal theory, which failed in the end not for lack of effort but, for lack of evidence. Lastly, no prejudice arises from the omission if precedent is followed.

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.

In rebuttal the State of Florida would point out the appellee's complete failure to address the contention that Judge Klein's written order[1] is based on an incorrect standard of review. This silent concession alone mandates reversal of the order in that the statute demands in indepandant weighing of the evidence by the trial judge regardless of the jury's recommendation. Section 921.141, Florida Statutes; Eutzy v. State, 458 So.2d 755, 758-59 (Fla. 1984). The soundness of the State's position is bolstered by this Court's decision in Porter v. State, 478 So.2d 33 (Fla. 1985). In Porter this court affirmed the denial of a motion for post-conviction relief in a nearly identical fact pattern. Convicted of a double-murder with three aggravating factors,[2] Porter saw his jury recommendation of life imprisonment overturned by the trial judge because the judge believed the jury was swayed by emotion. This court affirmed

[1](R. 22-23).

[2]Porter v. State, 400 So.2d 5 (Fla. 1981) on remand 429 So.2d 293 (Fla. 1983).

the override. Porter at 429 So.2d 293. On review of the collateral attack on competency of trial counsel this Court again affirmed the propriety of the death sentence. Porter had argued that his trial counsel's failure to call his mother or other family members to testify on his early life, schooling or mental status compelled a reversal of his sentence pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975) and Strickland v. Washington, 104 S.Ct. 2052 (1984). Porter had contended (as Bolendar now argues) that the existence of the testimony from his family, if coupled with the jury recommendation of life, compelled a reversal. In response this court held such contentions to be mere speculation. 478 So.2d 35. In so ruling this court implicitly rejected the formula utilized by Judge Klein in his order of reversal.[3] Now is the time to directly confront this attack on judicial discretion in sentencing and declare that no "automatic reversal" rule exists under Florida law.

At a minimum (see point II, below), this case should be remanded for one of two proceedings. Either Judge Richard Fuller should be ordered to weigh this new evidence against his prior decision in keeping with the Tedder standard or, an entirely new sentencing proceeding, with a jury, should

[3]The order of reversal states in pertinent part: "The law of the State of Florida is that a death sentence may not be imposed when any evidence of mitigating circumstances is presented." The context of the ruling is, of course, a jury recommendation of life imprisonment.

be undertaken. The State of Florida had sought to have Judge Fuller hear the post-conviction motion. (R. 10). For reasons not entirely clear in the record this request was denied.[4] As a matter of fairness and economy, this court should send a clear message that the original sentencing judge should, if possible, hear post-conviction motions in capital cases. It is impossible for a successor judge to know what a previous collegue was thinking or doing in over-riding the jury. All a successor can do is speculate, and speculation was rejected in Porter.

If this is an unworkable solution,[5] the State seeks a complete retrial of the sentencing phase with a jury. This so-called mitigating evidence of good behavior should be subject to cross-examination and rebuttal. If the new jury repeats the recommendation then the sentencing judge can weigh the factors and rule. The State firmly holds the belief that any judge who weighs this evidence will reach the conclusion that Bolender, like another convicted killer, was not the good person he appeared to be in the eyes of family and friends, Echols v. State, 484 So.2d 568 (Fla. 1985), and reject this alleged evidence as lacking in

[4]Judge Fuller was available but apparently assigned to another "division" of the court, perhaps civil. (R. 32, 41).

[5]When, for example, the original judge is no longer on the bench.

weight.[6] Bolender might have shined in his family's eyes but it is speculation to say a jury would agree when the original trial transcript indicates rebuttal testimony from Detective McElveen that he heard Bolender ask the widow of one victim if she wanted her husband cremated "regular or crispy." (see Initial Brief of Bolender on direct appeal, Case No. 59,333 at page 16).

This is just the first reason why reversal is necessary.

[6]In Echols, this court noted:

> In examining the mitigating evidence that appellant was outwardly a businessman, churchgoer, family man, and generally a law abiding citizen, the trial judge found that appellant's statements on the tapes showed that his real character was entirely different: appellant was a cunning, conscienceless, criminal, capable of carrying out a sophisticated murder without a twinge of regret. The trial court was required to set forth the reasons for its findings. It was not improper to use the evidence to negate mitigation.
>
> 484 So.2d 575.

II

THE TRIAL COURT INCORRECTLY HELD THAT EVIDENCE ASSERTING THAT 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 court need not remand this case for any reason should it find merit to the Appellant's second argument. Recent interpretation of the standard set out in Strickland v. Washington, 104 S.Ct. 2052 (1984) by the federal courts and by this court in similar capital cases make clear the errors made by the court below.

First, the actions of Bolender's trial lawyer during the sentencing phase did not constitute "error so egregious that counsel was not functioning as the 'counsel' guaranteed to the defendant by the Sixth Amendment." Griffin v. Wainwright, 760 F.2d 1505, 1510 (11th Cir. 1985). Undisputed is the fact of trial counsel's presentation in the sentencing phase of a three-pronged argument against the death penalty. As noted in this court's previous opinion, Bolender contended that life imprisonment was appropriate because his victims were armed cocaine dealers who themselves might have planned the same end for Bolender, because co-defendant Macker received a lighter sentence and because the only evidence of Bolender's actually killing anyone

came from Macker. 422 So.2d at 837. During the evidentiary hearing on the motion for post-conviction relief, trial counsel, G.P. Della Fare, explained his actions during the trial and sentencing phase. (ST. 34-37).

The logic behind the theory of defense is compelling. Proportional judgments on culpability have often led to reversal of the death penalty. Smith v. State, 403 So.2d 933 (Fla. 1981); Slater v. State, 316 So.2d 539 (Fla. 1975). Thus, it cannot be said of attorney Della Fare that he lacked a basis on which to defend Bolender in an effective manner. Cf., Stanley v. Zant, 697 F.2d 955, 966-69 (11th Cir. 1983), cert. denied, 104 S.Ct. 2667 (1984)(lawyer testified at hearing on his ineffectiveness that he has no strategy, offers no mitigating evidence and fails to explain why he did not present existing evidence.) Although Della Fare was aware of the availability of Bolender's family for testimony (ST. 35), he reasoned that it was better to quickly get the jury back to deliberation before the prosecution could harden their view of his client. He also reasoned that "good-boy" testimony would have little weight in the eyes of the sentencing judge given his client's prior appearance for sentencing on a probation violation, (S.R. 34, 36), and Della Fare's knowledge of the existence of a P.S.I. report and "rap" sheet which he believed the sentencing judge had seen before or could see via State

rebuttal to the family's testimony. (S.R. 36-39). The rational behind counsel's tactics was implicitly approved by this court in the Echols case discussed in Point I above:

> The testimony was that appellant was a conscientious businessman, a devout churchgoer, a good family man, and, generally, a law-abiding citizen. The difficulty which the trial judge found in allocating sufficient weight to this testimony is that it is directly contradicted by the appellant's own statements in the two taped conversation be had with Adams. These statements are more than a confession of guilt, they reveal the appellant boastfully and gleefully recounting his criminal exploits and, as the trial judge put it, 'shows the law-abiding surface character of this fifty-eight year-old man to be but a shielding cloak paraded before his family, his legitimate business associates, church and friends; in short, hypocrisy of the highest order."
>
> at 484 So.2d 577.

Mr. Della Fare had an alternative to painting his client as a good son and brother. His notion was to stand on a recognized legal rule of proportionality and fairness and hope the jury and the facts compelled a sentence of life. That hindsight reveals the facts were against him is no reason to rule on collateral attack that he failed to provide the type of "counsel" required by the Sixth Amendment. Accord, Funchess v. Wainwright, 772 F.2d 683, 689-90 (11th Cir. 1985), cert. denied, 106 S.Ct. ___(1986); Griffin v.

Wainwright, 760 F.2d 1505, 1513 (11th Cir. 1985)("Established legal precedent does not require that counsel, in order to be effective, submit to the jury all arguably mitigating character evidence that might exist."); Tafero v. State, 459 So.2d 1034 (Fla. 1984); Witt v. State, 342 So.2d 497 (Fla. 1977).

Turning to the second prong of the Strickland test it is clear that Appellee suffered no sufficient prejudice in the weighing process undertaken by the original sentencing judge. Appellee has never denied the brutality of these four torture killings. This court affirmed the finding of six aggravating factors on direct appeal. In other situations where the Tedder standard[7] was interposed by vicious killers seeking more favorable treatment, this court has found meager evidence of prior good behavior insufficient to justify setting aside the death sentence. Maxwell v. Wainwright, ___So.2d___(Fla. No. 66,117 and 66,129, May 15, 1986)[11 FLW 219]; Porter v. State, 478 So.2d 33 (Fla. 1985); Deaton v. State, 480 So.2d 1279 (Fla. 1985). Appellee has failed to address this aspect of the Strickland test and the Eutzy decision, cited in the Appellant's brief, is so compelling that little doubt can remain on this aspect of the case.

[7]Tedder v. State, 322 So.2d 908 (Fla. 1975).

Appellee's reliance on the finding of fact standard in Stewart v. State, 481 So.2d 1210 (Fla. 1986) ignores the rule that ineffectiveness of counsel is a mixed question of fact and law, Griffin, supra, citing Cuyler v. Sullivan, 100 S.Ct. 1708 (1980), subject to appellate court examination of "the totality of circumstances and entire record." Id. at 1510. Furthermore, the contention that Jurek v. Texas, 96 S.Ct. 2950 (1976) compels the inclusion of all possible evidence in the sentencing phase runs afoul of more recent pronouncements in Strickland and Bagley v. United States, 105 S.Ct. 3375 (1985) to the effect that failure to produce all the evidence prior to or during trial is not per se reversible error.

Lastly, the bold assertion that Judge Fuller would have ruled differently if armed with this evidence based on his statement that he could not find a single mitigating circumstance is overbroad. Recent cases make clear that the mere presentation of evidence with some value of mitigation does not equate to a finding of mitigation. Eutzy, supra; Funchess, supra; Straight v. Wainwright, 772 F.2d 674, 681 (11th Cir. 1986). The case of Holmes v. State, 429 So.2d 297 (Fla. 1983) is distinguishable on its face. Counsel in this case gave Bolender a zealous, professional trial defense in both the phases. To pin a reversal of the sentence on a single word taken out of context is to walk

the legal equivalent of the razor's edge. It was the undisputable facts that led to the conviction and sentence, not any act or omission by Mr. Della Fare. There is no need to resentence Bolender only a need for accurate application of precedent.

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. Alternatively, a remand with instructions is requested.

Respectfully submitted,

JIM SMITH
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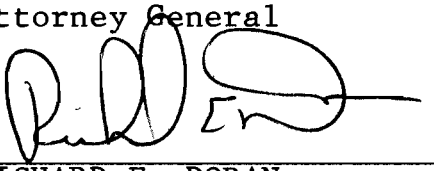

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was furnished by mail to N. JOSEPH DURANT, JR., Assistant Public Defender, 1351 N. W. 12th Street, Miami, Florida 33125, on this 23rd day of June, 1986.

RICHARD E. DORAN
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