

IN THE SUPREME COURT OF FLORIDA

NO. 75631

FILED
SID J. WHITE

MAR 5 1990

CLERK, SUPREME COURT
Deputy Clerk

BERNARD BOLENDER,,

Petitioner/Appellant (Defendant Below),

v.

STATE OF FLORIDA;
RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondents/Appellees (Plaintiff Below).

EMERGENCY APPLICATION FOR STAY OF EXECUTION

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0122540

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This case is in a tenuous posture. Mr. Bolender filed a motion for Rule 3.850 relief presenting, inter alia, a significant claim for relief under Hitchcock v. Dusser, 107 S. Ct. 1821 (1987), and its progeny, under the appropriate filing date established by this Court. See Spalding v. Dusser, No. 74,355 (Fla. June 30, 1989) (establishing filing date for Rule 3.850 litigants to present claims predicated on Hitchcock and its progeny). The motion was filed well before a death warrant was signed in this case. Before the State had even responded to the motion, and notwithstanding the facts that the motion had been timely filed, expeditiously supplemented, and was to be heard under the usual circuit court practice after the State filed a response, the Governor issued a death warrant.

1. In this jury override case, Mr. Bolender's claim is supported by the judicial instructions, see Zeigler v. Dusser, 524 So. 2d 419, 420 (Fla. 1988) (sentencing judge is presumed to follow the standard of review concerning nonstatutory mitigating evidence embodied in his jury instructions), by the judge's on-the-record statements and sentencing order -- demonstrating that "serious," "meaningful," and "independent" consideration was not afforded to nonstatutory mitigating factors, see McCrae v. State, 510 So. 2d 874 (Fla. 1987); Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Zeisler, supra, and by the constraints under which defense counsel operated at the time of Mr. Bolender's sentencing. See Hall v. State, 541 So. 2d 1125 (Fla. 1989). Former defense counsel's affidavit in this regard is appended hereto for this Honorable Court's review. The affidavit was submitted to the circuit court in the presently pending Rule 3.850 proceedings.

A petition for writ of habeas corpus has been filed with this Court, thus invoking the Court's jurisdiction. A (nonevidentiary) hearing was held before the circuit court (Sepe, J.) on February 12, 1990.

Another hearing is scheduled before the circuit court tomorrow, March 6, 1990, one day before the scheduled execution. Mr. Bolender's execution is scheduled for 7:00 a.m., Wednesday, March 7, 1990.

This case was proceeding in a timely, orderly manner. Because of the death warrant, the courts, counsel and Mr. Bolender must all operate under the predicament created by this difficult schedule. Mr. Bolender's counsel shall be in Miami for the hearing in the Bolender case on Tuesday, March 6, 1990. As this Honorable Court is aware, this is also the Court's oral argument week. Undersigned counsel is responsible for conducting three (3) oral arguments in capital cases other than Mr. Bolender's before this Court this week. And Mr. Bolender's execution is scheduled for Wednesday, March 7, 1990.²

2. The circuit court proceeding is predicated, in part, on the fact that the State declined to turn over materials pursuant to Fla. Stat. section 119 until February 20, 1990. A CCR investigator has been copying materials in the Dade County State Attorney's office since that date, and shall be copying materials today (Monday) and tomorrow (Tuesday) as the police reports and other documents collected by the office of the State Attorney concerning the three co-defendants and this case are substantial.

(footnote 2 continued on next page)

Should the circuit court reject undersigned counsel's arguments on March 6, this case will have to proceed to full and fair review by this Honorable Court in substantially less than 24 hours. The circuit court has not yet entered an order of transcription of the February 12 and March 6 hearings, no record on appeal has been prepared, and counsel (who of necessity must be in Miami before the circuit court on this case) shall have no opportunity to prepare and file a professionally responsible brief on appeal, notwithstanding the fact that the Rule 3.850 motion (see n.1, supra) and the habeas corpus petition present valid claims for post-conviction relief.

Under these circumstances, given the fact that time constraints shall make full and fair review of the circuit court's rulings of February 12, and .. should the requested relief be denied .. of March 6, 1990, virtually impossible, it is respectfully submitted that the entry of a stay of execution would be proper. Mr. Bolender's counsel is making this application at this juncture, in **part**, in order to inform the Court that the circumstances involved are literally impossible.

(footnote 2 continued from preceding page)

Undersigned counsel has yet to even review all of the materials. Mr. Bolender has presented a claim for relief under Brady v. Maryland and its progeny, but the State did not even begin to comply with Fla. Stat. section 119 until February 20, 1990, after the circuit court intervened.

Counsel has also filed a habeas petition, invoking this Court's habeas corpus jurisdiction under Fla. R. App. P. 9.100(a) and 9.030(a) (3) and Article V, sec. 3(b)(9), Fla. Const., and requests that this Honorable Court enter a stay of execution in order to afford Petitioner proper, reasoned review.

In conjunction herewith, Petitioner also respectfully informs the Court that he wishes to prepare and present a professionally responsible brief for this Court's review on appeal of the denial of Rule 3.850 relief, but that the circumstances now make it impossible to do so. This Court's habeas corpus jurisdiction has been invoked pursuant to the statutory and constitutional provisions noted above, on the basis of the accompanying habeas application, and Petitioner requests that the Court enter a stay of execution and allow a reasonable time period for the presentation of professionally responsible pleadings.

Undersigned counsel sincerely apologizes for the sloppiness of this submission, which had to be hastily put together while counsel was en route from his office (located in Tallahassee, Florida) to the hearing scheduled for tomorrow in Miami in this

case. There has been no opportunity to edit this application for stay of execution.³

WHEREFORE, Petitioner/Appellant respectfully requests that the Court enter a stay of execution, jurisdiction having been invoked by the petition for writ of habeas corpus, and, should relief be denied by the circuit court, that the Court enter a briefing schedule on the appeal of the denial of Fla. R. Crim. P. 3.850 relief.

RESPECTFULLY SUBMITTED,

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By: Billy H. Nolas / Lynn

3. Aside from Mr. Bolender, undersigned counsel currently represents four (4) other clients with outstanding death warrants. Aside from oral arguments which counsel must conduct in capital cases before this Court on Wednesday and Thursday of this week, counsel must appear before the Marion County Circuit Court for a hearing in the Remeta case -- another case under death warrant -- on Friday, March 9, 1990.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by HAND DELIVERY/UNITED STATES MAIL, first class, postage prepaid, to Fariba Komeily, Assistant Attorney General, Department of Legal Affairs, 401 NW 2nd Avenue #921N, Miami, Florida 33128, this 5th day of March, 1990.

Billy H. Nolas / by jw
Attorney