IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,665

BERNARD BOLENDER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

BRIEF OF APPELLEE

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INTRODUCTION

This is an appeal of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County's denial of Appellant's, Bernard Bolender, second motion for post-conviction relief. The circuit court summarily denied Bolender's claims, without an evidentiary hearing. The Appellant has also filed a petition for writ of habeas corpus with this Court which is currently pending under case no. 75,631. The State has filed a separate response to said petition.

In this brief, the Appellant will be referred to **as** he stands before this Court or as "Bolender." The Appellee will be referred to as "State." The symbol "R" designates the record on appeal herein. The symbol "App." refers to the Appendix attached to the Appellant's initial brief. The record on appeal has already been supplemented with the documents contained in said Appendix by order of this Court dated March 20, 1990.

STATEMENT OF THE CASE AND FACTS

Bolender was charged by indictment with four counts of first degree murder, four counts of kidnapping and four counts of armed robbery for the brutal torture slaying of four alleged drug dealers. (R. 1-9). After a trial by jury, Bolender was found guilty as charged. (R. 387-398). Thereafter, the cause proceeded to the penalty phase whereat the jury recommended a sentence of life imprisonment. (R. 399-402). The trial court rejected the jury's recommendation and sentenced Bolender to death. (R. 403, 406-415).

A) Direct Appeal

On direct appeal this Court affirmed, in all aspects, the judgments and sentences, Bolender v. State, 422 So.2d 833 (Fla. 1982), and in so doing established the following historical facts:

> The testimony at trial indicates that on the evening of January 8, 1980 the codefendants were at Macker's residence when two of the victims, John Merino and Rudy Ayan, arrived to participate in a drug deal. An argument erupted and Bolender, armed with a gun, ordered the two to strip. A short while later Thompson entered holding Scott Bennett, another subsequent victim, at gunpoint. Thompson said he had surprised Bennett lurking in the bushes outside, armed with two guns. Thompson also discovered

a kilogram of cocaine on Bennett which the defendants confiscated. Macker testified that at that point he picked up a gun and went outside to see if anyone else was hiding. He saw a car driving back and forth in front of the house and motioned the driver to come inside. The driver would not. Thompson then ordered Merino to get dressed, and the two of them lured the driver, Nicodemes Hernandez, into the house.

The defendants ordered the additional victims to strip and robbed all four of their jewelry. Thompson left to search the car driven by Hernandez and returned with approximately $3,000 in cash and two more guns. At that point Bolender threatened to kill all four if they did not reveal the location of an additional twenty kilograms of cocaine.

Macker testified that during the ensuing hours the victims were tortured and terrorized in an attempt to obtain their cocaine. He stated that Bolendar used a hot knife to burn the back of Hernandez. Bolender also kicked the victims and beat them with a baseball bat and even shot Hernandez in the leg in an attempt to make him talk. The victims insisted, however, that they only had one kilogram of cocaine and not the twenty that Bolender wanted. Macker admitted hitting Merino with the baseball bat but denied any further involvement in the beatings, saying that Bolender dominated him and Thompson. Later they wrapped the victims in sheets, rugs, bedspreads and the material from a beanbag chair. Bolender and Thompson placed them in the blue Monte Carlo Hernandez had been driving. John Merino was still alive at this point; the others were, presumably dead. Bennett's and Ayan's bodies were placed in the trunk, Merino in the back seat, and Hernandez in the front. At approximately 4:30 a.m. Bolender and Thompson left with the Monte Carlo and Bolender's car and drove onto the 1-95

> expressway. They parked the car on the side of the expressway a short distance past the entrance ramp. Intending to burn the car and the victims, they poured gasoline on the vehicle and the surrounding grass and set the grass on fire as they left. Burning the car failed, however, because several motorists saw the fire and put it out.
>
> The defendants thoroughly cleaned the Macker home, removing the bloodied carpeting from the bedroom and living room and scrubbing down the walls. Later, several of the sheets and rugs found wrapped around the bodies were identified as coming from the Macker home. Bolender's fingerprints were found on the Monte Carlo, and on January 13, 1980 he and Macker were arrested for the murders. Five days later Macker gave a statement implicating himself, Bolender, and Thompson. He also told the police where they had disposed of the weapons and other evidence.
>
> Id. at 834-835 (Footnote omitted).

On direct appeal, Bolender had raised the following four (4) issues:

I

> WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHTS TO CALL WITNESSES BY DENYING DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AD TESTIFICANDUM FOR PAUL THOMPSON WHEN THERE WAS NO SHOWING HE WAS INCOMPETENT TO TESTIFY AND NO EFFECTIVE EXERCISE OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION.

II

> WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT PERMITTING THE DEFENDANT TO RECALL CLAUDIA MERINO TO TESTIFY THROUGH AN INTERPRETER.

III

WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT BY IMPOSING FOUR DEATH SENTENCES WHERE THE JURY'S RECOMMENDATIONS OF LIFE SENTENCES HAD A RATIONAL BASIS.

IV

WHETHER THE TRIAL COURT VIOLATED THE DEFENDANT'S FEDERAL AND FLORIDA CONSTITUTIONAL RIGHTS AGAINST CRUEL AND UNUSUAL PUNISHMENT WHEN THE COURT BASED ITS DECISION IN PART ON AGGRAVATING CIRCUMSTANCES WHICH HAD NO BASIS IN THE RECORD AND ON NONSTATUTORY AGGRAVATING CIRCUMSTANCES.

See Initial Brief of Appellant in Bernard Bolender v. State of Florida, Fla. S. Ct. Case No. 59,333.

As to the first issue, this Court found that the trial court did not abuse its discretion in denying the petition for writ of habeas corpus ad testificandum, since Bolender failed to use due diligence to secure Thompson's attendance at trial. Bolender, supra, 422 So.2d at 835-836. This Court also found no abuse of discretion in denying the motion to have witness Merino testify through an interpreter since she never requested one and the record reflected she had no difficulty communicating in English. Id. at 837. As to the allegedly improper jury override issue, this Court held:

. . . In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), we held that for a trial court to override an advisory sentence of life imprisonment by a jury "the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Bolender contends that the jury's recommendation was reasonable because the victims were armed cocaine dealers who may have been planning to rob the defendants, because Macker received a comparatively light sentence, and because only Macker testified as to who shot, stabbed, and killed the victims.

We have examined the record and arguments of counsel and do not agree with these contentions. That the victims were armed cocaine dealers does not justify a night of robbery, torture, kidnapping, and murder. Two of the victims were unarmed and present at the Macker residence because of a previous agreement with Bolender.

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 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, 44 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). There was sufficient collaborating testimony regarding Bolender's participation in these crimes. Based on the evidence and testimony at trial, we agree with the trial court that virtually no reasonable person could differ on the sentence.
>
> Id. at 837 (emphasis added).

Finally, as to the remaining issue of improper aggravating circumstances, this Court invalidated two aggravating factors (that the crime was committed by a person under sentence of imprisonment and that the defendant knowingly created a great risk of death to many persons) Bolender, supra, 422 So.2d at 837-838. However, this Court upheld the remainder of the aggravating circumstances and the sentence of death as follows:

> The court properly applied the remaining factors. The crimes were committed during the perpetration of a robbery and kidnapping and were committed for pecuniary gain. They were committed for the purpose of avoiding or preventing a lawful arrest and to disrupt or hinder the lawful exercise of law enforcement. John Merino was described as a police informant and was still alive when the defendants attempted to burn the vehicle. After committing the robbery, kidnapping, and torture, the defendants murdered the victims partially to prevent their retaliation but also to prevent arrest. Finally, these crimes were especially heinous, atrocious, and cruel and were committed in a cold, calculated, and premeditated manner. Bolender presented no testimony showing any mitigating

> circumstance, statutory or nonstatutory. In the absence of any mitigating circumstance disapproval of two aggravating factors does not require reversal of the death sentence. Demps v. State, 395 So.2d 501 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981).
>
> Id. at 838.

A Petition for Writ of Certiorari was then filed in the United States Supreme Court. (R. 2037-2051). Said petition raised the following issues:

I

> THE IMPOSITION OF DEATH SENTENCES FOLLOWING A UNANIMOUS JURY VERDICT RECOMMENDING LIFE SENTENCES CONSTITUTES A DEPRIVATION OF PETITIONER'S LIFE WITHOUT DUE PROCESS AND DEPRIVATION OF HIS RIGHT TO THE EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT.

II

> THE AGGRAVATING CIRCUMSTANCES SET FORTH IN SECTIONS 921.141(5)(e) AND (g) ARE UNCONSTITUTIONALLY VAGUE AND UNCERTAIN WHEN APPLIED TO THE FACTS OF THIS CASE.

III

> THE REFUSAL TO ISSUE COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF A CO-DEFENDANT TO TESTIFY AS A DEFENSE WITNESS VIOLATED PETITIONER'S RIGHT TO CALL WITNESSES UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> (R. 2038).

This petition was denied on May 16, 1983. (R. 2062).

B. First Motion for Post-Conviction Relief

Bolender's first death warrant was signed on January 31, 1984. (R. 2075). Bolender had previously filed his first Rule 3.850 motion. (R. 2070-2072). In said motion Bolender raised the following issues:

> 1. That trial counsel was ineffective for failing to properly subpoena Paul Thompson.
>
> 2. That trial counsel was ineffective for failing to present any mitigating evidence.

The trial court ordered an evidentiary hearing and issued a stay of execution. (R. 2087, 2075).

On January 4, 1985, an evidentiary hearing was held on the claim of ineffective assistance of counsel for failure to present mitigating evidence. (R. 2105-2170). Evidence was presented by Bolender's mother and sister who testified as to Bolender's background. (R. 2111-2132). According to their testimony, the Appellant's father had left the family when he was nine years old and Appellant was a good son, a good brother, a good student and athlete, who worked hard, was non-violent and had supported the family financially. Id. Appellant's mother and sister also testified that they had discussed this background information with Bolender's trial attorney, "who knew

it all", prior to trial. (R. 2117, 2131-2132). Both had been present in the courtroom at the time of the sentencing and offered to testify but were told by the trial attorney "we will see what happens." Id.

The trial attorney also testified at this evidentiary hearing. (R. 2133-2147). He testified that he knew at sentencing that mitigating circumstances "are not limited to what is set out in the statute." (R. 2145). He further stated that the background evidence above "would go towards his [Bolender's] humanity. I was aware that I could put on that type of testimony." (R. 2146). Defense counsel finally testified that he did not present the background testimony as a matter of strategy based upon his observation of the jurors' demeanor at sentencing:

> [Defense Counsel]: The theory behind my thinking to the jury was such that I thought the state was arbitrary and capricious in allowing Mr. Joseph Macker, who was a co-defendant in the case, to take a plea agreement the date the trial was scheduled, wherein he pled to 13 concurrent or consecutive life imprisonments in order to testify against my client, and where the state would take opposing points of view; in one instance asking or giving life imprisonment to Mr. Macker who was equally culpable and the co-defendant, if that be the case, and in another instance asking for the electric chair against my client.

> That is what I argued to the jury; that it is inadequate. And if the sword cuts, it has to cut in both directions.
>
> *Q.* [State Attorney] Let me ask you, was there anything that you could observe or see about the jurors at the time they returned the verdict of guilty that caused you to take the tactic you did?
>
> A. [Defense counsel] 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 jury room because I thought we had a better chance of coming back with life imprisonment.
>
> (R. 2138-2139) (emphasis added).

Defense counsel also noted that the sentencing was a "very trying period" for the Appellant's mother and sister and that at that time putting them on the stand might have done more "bad than good" because an "argumentative" type of situation may have developed. (R. 2142).

The trial court then summarily denied the first claim (ineffectiveness for failure to subpoena Thompson), but vacated the death sentences on the ground that trial counsel was

ineffective for not having presented the foregoing mitigating evidence. (R. 2201).

The State appealed the foregoing order vacating the death sentences and this Court reversed and ordered that the death sentences be reinstated. State v. Bolender, 503 So.2d 1247 (Fla. 1987). This Court found that the mitigating evidence presented at the evidentiary hearing was known and available to his trial counsel who at the time of trial had concluded that same constituted "nebulous non-statutory mitigating evidence. . . ." State v. Bolender, supra, at 1249. This Court noted that the trial counsel had "made the tactical decision that a proportionality argument would be the better strategy." Id. This Court then held that "trial counsel made a reasonable choice [of arguing disparate treatment of codefendants] well within the wide range of professionally competent assistance. Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected." State v. Bolender, supra, at 1250. The Court then stated that the lower court had "erred in declaring trial counsel ineffective" and remanded with directions to reinstate the death sentences vacated by the lower court. Id.

Thereafter, the Office of the Capital Collateral Representative, assumed responsibility for the case. (R. 2294). A Petition for Writ of Certiorari was then filed with the United

States Supreme Court alleging that the Florida Supreme Court erroneously interpreted the ineffective assistance of counsel claim under Strickland v. Washington, 466 U.S. 668 (1984). (R. 2337-2351). On October 5, 1987, the Petition was denied.

On September 4, 1987, the trial court enforced the Florida Supreme Court's mandate and reinstated the death penalty. (R. 2294). Bolender filed an appeal therefrom (R. 2299-2331), but, upon the State's motion, said appeal was dismissed on the ground that it was not authorized by the mandate which only required the reinstatement of the death sentence, not a resentencing. (R. 2 336).

C. Second Motion for Post-Conviction Relief

On April 24, 1989, Bolender filed his second Rule 3.850 motion wherein he raised the issues on appeal herein.[1] The trial court found this motion to be "a successive Rule 3.850 motion." (R. 2493). The trial court denied the motion without

[1] In his second motion for post-conviction relief, Bolender raised a Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), claim. At a subsequent hearing, however, counsel for Appellant, after having investigated the State's files, conceded that there was no meritorious Brady issue herein: "The materials that were looked through in the State Attorney's files in and of themselves are not enough to establish what we believe to be the Brady claims." (R. 2615). This conceded issue is apparently not being raised on appeal. To the extent that Appellant may be attempting to raise this issue in its footnote 9 (see Appellant's initial brief at p. 42), he is foreclosed from doing so by virtue of his concession below.

an evidentiary hearing, finding issues 11, III, IV, V, VI, VII, VIII, IX and X herein to be procedurally barred, issue XI legally insufficient , and, issue I to be "conclusively refuted by the record and without merit." (R. 2493; see also, Appellant's initial brief herein). This appeal has ensued.

POINTS INVOLVED ON APPEAL

I

WHETHER MR. BOLENDER'S SENTENCE OF DEATH STANDS IN VIOLATION OF HITCHCOCK V. DUGGER AND ITS PROGENY BECAUSE THE SENTENCING JUDGE DID NOT PROPERLY CONSIDER NONSTATUTORY MITIGATION AND DEFENSE COUNSEL'S PRESENTATION OF NONSTATUTORY MITIGATING EVIDENCE WAS INHIBITED BY THE LAW THEN IN EFFECT, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

II

WHETHER MR. BOLENDER WAS DENIED A RELIABLE, MEANINGFUL, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE OF COUNSEL'S UNREASONABLE FAILURES TO CONDUCT INDEPENDENT INVESTIGATION INTO AND PRESENT COMPELLING AND AVAILABLE MITIGATING EVIDENCE AT MR. BOLENDER'S CAPITAL SENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

III

WHETHER BERNARD BOLENDER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

IV

WHETHER RECENT DECISIONS FROM THIS COURT MAKE MANIFEST THAT THE JURY OVERRIDE IN MR. BOLENDER'S CASE RESULTED IN AN ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

V

WHETHER THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. BOLENDER'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

VI

WHETHER THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. BOLENDER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

VII

WHETHER THE SENTENCING PROCEDURE EMPLOYED BY THE TRIAL COURT SHIFTED THE BURDEN TO MR. BOLENDER TO ESTABLISH THAT LIFE WAS THE APPROPRIATE SENTENCE AND RESTRICTED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

VIII

WHETHER MR. BOLENDER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN CONTRAVENTION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

IX

WHETHER MR. BOLENDER'S SENTENCING JUDGE USED A NON-RECORD REPORT TO SENTENCE MR. BOLENDER TO DEATH, IN VIOLATION OF GARDNER V. FLORIDA, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

X

WHETHER THE COURT'S FAILURE TO FULLY AND PROPERLY INSTRUCT THE JURY ON THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT VIOLATED MR. BOLENDER'S

RIGHTS UNDER THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS.

XI

WHETHER MR. BOLENDER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN ALL PROCEEDINGS RESULTING IN HIS DEATH SENTENCE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND WAS DENIED HIS RIGHT TO MEANINGFUL POST-CONVICTION REVIEW BECAUSE OF THE INEFFECTIVENESS OF FORMER COLLATERAL COUNSEL, IN DEROGATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AMENDMENT.

SUMMARY OF ARGUMENT

Appellant's Hitchcock claim fails for several reasons. Although the instructions to the jury were essentially the same as those in Hitchcock, those instructions could not be deemed to prejudice the defendant since the jury returned a recommendation of life imprisonment. Moreover, the record reflects that the trial judge did consider nonstatutory mitigating evidence argued, and rejected it. Alternatively, the record reflects that defense counsel, as a matter of trial strategy, decided to limit the sentencing phase argument to the alleged disparity between codefendants' circumstances. As that argument was rejected on the merits by this Court, the defendant, having failed to present other nonstatutory mitigating evidence, cannot complain that the court erred in failing to consider such alleged mitigating evidence. Finally, in the context of the aggravating circumstances of this case, any error in failing to consider the nebulous nonstatutory factors alleged herein must be deemed harmless.

All other issues raised herein by the Appellant were procedurally barred, as they either could have or should have been presented on direct appeal, or they were presented in a successive rule 3.850 motion, or they were already decided on the merits in the direct appeal.

ARGUMENT

I

BOLENDER'S SENTENCE IS NOT IN VIOLATION OF HITCHCOCK V. DUGGER AND ITS PROGENY.

Bolender has claimed that his sentence is in violation of Hitchcock v. Dugger, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), where the United States Supreme Court found reversible error when the jury was instructed to consider only statutorily enumerated mitigating circumstances under Fla. Stat. 921.141(6) (1975) and where the trial judge declined to consider proffered nonstatutory mitigating circumstances. Bolender was not barred from raising this claim in the proceedings below since the Court' ruling in Hitchcock represents a sufficient change of law so as to defeat the application of procedural bar. Thompson v. Dugger, 515 So.2d 173 (Fla. 1987). However, the court below properly denied this claim on its merits because the trial judge in the instant case did not limit his consideration of nonstatutory mitigating evidence. Ford v. State, 522 So.2d 345 (Fla. 1988). Furthermore, if any error existed, it is harmless beyond a reasonable doubt. Heiney v. Dugger, 15 FLW 47 (Fla. Feb. 2, 1990); Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); Clark v. State, 533 So.2d 1144 (Fla. 1988).

In the instant case, the trial judge gave the jury essentially the same instructions on aggravating and mitigating circumstances which were deemed erroneous in Hitchcock, i.e., that the mitigating circumstances which the jurors could consider were those itemized in the prior statute and there was no mention of "nonstatutory mitigating circumstances." However, the error in the jury instructions cannot be deemed to prejudice Bolender since the jury returned a recommendation of life imprisonment. Heiney, supra, at 47 ("Because of the life recommendation of the jury, it is obvious that the [Hitchcock] error was harmless."); Zeigler v. Dugger, 524 So.2d 419, 420 (Fla. 1988) ("presumably, this [Hitchcock] error standing by itself did not prejudice Zeigler since the jury returned a recommendation of life imprisonment").

However, since the trial judge in this instant case overrode the jury's recommendation, it must be determined whether the trial court also felt constrained to consider only statutory mitigating factors. "Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." Zeigler, supra, at 420. Thus, where the jury instructions and the trial judge's sentencing order only enunciated the statutory mitigating factors with no mention of nonstatutory mitigating factors, it may be presumed that the trial judge did not consider nonstatutory mitigation and

therefore committed a Hitchcock error. The record in the instant case, however, clearly reflects that the trial judge did not feel limited to statutory mitigating factors and did consider the nonstatutory mitigation which was argued. This is because the sentencing order in the instant case, after the separate enumeration, discussion and rejection of every statutory mitigating factor, as follows:

> A careful consideration of all matters presented to the court compels the following finding of fact relating to mitigating circumstances as specified by section 921.141(6) Florida Statutes.
>
> (A) The defendant does have a significant history of prior criminal activity . . . .
>
> (B) (F) The defendant at the time of the commission of these crimes was not under the influence of extreme mental or emotional disturbance and had the capacity to appreciate the criminality of his conduct. . . .
>
> (C) The victims in this case neither participated in or consented to the defendant's conduct. . . .
>
> (D) The defendant was a principal participant in the planning and execution. . . .
>
> (E) There is nothing in the evidence in this cause to indicate that the defendant was acting under duress or substantial domination of another person. . . .
>
> (G) There is nothing about this defendant's age or approximately 27 years which in any way may be considered a mitigating factor. . . .

(R. 413-4141, further continues to state:

> There has been no evidence or matters brought to the attention of this court in addition to those mitigating factors enunciated above which would in any way influence the court in making a different conclusion of fact or in making its decision as to the sentence of this case.
>
> (R. 414) (emphasis added).

The above language clearly reflects that **all** evidence of mitigation in addition to and beyond any statutory mitigating factors, was considered by the trial judge who then rejected same. See, Ford, supra, at 346 (despite erroneous Hitchcock instruction to the jury, this court held that "it appears that the trial judge was aware that nonstatutory mitigating circumstances could be considered because in the sentencing order he stated: 'There are no mitigating circumstances existing - either statutory or otherwise - which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather that a sentence of death.'" (emphasis in original.).

Moreover, as noted by this Court on direct appeal, "Bolender presented no testimony showing any mitigating circumstance, statutory or nonstatutory. [footnote 61 The State's deal with Macker [one of the co-defendants] was argued

as mitigation, ..." Bolender, supra, 422 So.2d at 838. The disparate treatment[2] argument was specifically addressed and rejected by this Court on direct appeal:

> Bolender contends that the jury recommendation was reasonable because the victims were armed cocaine dealers who may have been planning to rob the defendants, because Macker received a comparatively light sentence, and because only Macker testified as to who shot, stabbed and killed the victims.
>
> We have examined the record and argument of counsel and do not agree with these contentions. . . .
>
> 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 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

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[2] Disparate treatment of co-defendants may be a non-statutory mitigating circumstance in appropriate cases. White v. Dugger, 533 So.2d 140, 141 (Fla. 1988). Tafero, supra, at 289.

> (Fla. 1976), cert. denied, 439 U.S. 991, 99 S.Ct. 592, 58 L.Ed.2d 666 (1978). There was sufficient collaborating testimony regarding Bolender's participation in these crimes. Based on the evidence and testimony at trial, we agree with the trial court that virtually no reasonable person could differ on the sentence.
>
> Bolender, supra, 422 So.2d at 837 emphasis added).

Thus the record herein is clear that the trial judge and this Court considered but gave no weight to the only nonstatutory mitigating factor argued at the penalty phase of Bolender's trial.[3]

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[3] The Appellant has argued that apart from disparity of treatment argument, other non-statutory mitigation was present in the guilt phase record. (See Appellant's Brief, p. 10). Appellant contends that Bolender was a "DEA Agent", "had a history of being a non-violent person" and "he had no prior acts of violence." Id. However, the record reflects that evidence of being a "DEA Agent" consisted of co-defendant Macker's guilt phase testimony that while being "partners in the cocaine business", Bolender had showed him some papers he was sending to New York, indicating that Bolender was an "informant." (R. 1364). As to the alleged history of non-violence, Mr. Bolender testified that he had previously been convicted of possession of burglary tools, loitering and prowling, sale of cocaine and "gun charges." (R. 1488-1490). He was also pleading guilty to prior New York charges of resisting arrest. (R. 1491). Furthermore, he testified that he had been a "large cocaine dealer" and it was not unusual for him to be called for help and assist in an "aborted cocaine rip-off", which involved a large number of individuals with guns, "some kind of a wild war." (R. 1534, 1529). As noted in Clark, supra, at 1146, "Even if there were relevant mitigating factors, a doubtful proposition, there is no indication that Clark attempted to raise them during the penalty phase." As in Clark, there was no attempt herein to raise this alleged mitigation in the penalty phase.

Furthermore, the record herein reflects that trial counsel in the instant case was not precluded from presenting evidence of nonstatutory mitigating circumstances. Trial counsel, at the evidentiary hearing on the first motion for post-conviction relief herein, specifically testified that at the time of trial he understood that mitigating factors were not limited to those enumerated in the prior statute. (See page 10 herein). As later noted by this Court, having investigated and having had available background testimony from the defendant's family, trial counsel made a "tactical decision" to forego "such nebulous nonstatutory evidence" and presented the disparity argument as the "better strategy." Bolender, 503 So.2d 1247, 1249 (Fla. 1987).[4]

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[4] Appellant contends that the current affidavit of defense counsel reflects that he did feel constsrained in his preparation. However, said affidavit merely states that defense counsel would have considered using Bolender's relatives' testimony and mental health testimony as to the effects of Bolender having been shot in the head. As previously noted, the background testimony of relatives was thoroughly investigated but not presented due to tactical reasons. As to any mitigation relating to Bolender being shot in the head, current counsel's mental health proffer reflects that "medical information is lacking regarding the severity of the injury." (See Appellant's brief at p. 27). Furthermore, Bolender has now been "screened for possible impairments" which reflect he had a "better than average early adjustment." (See Appellant's brief at p. 26). Again, this case is in the same posture as Clark, supra, at 1146, where even though the attorney admitted she was constrained by the statute, she did investigate and presented no mitigating testimony due to strategy.

It is therefore abundantly clear that as to the override sentence herein, the trial judge did not commit a Hitchcock error because trial counsel was not limited to presenting only statutory mitigating evidence, he argued the nonstatutory mitigating factor of disparity between codefendants as a matter of strategy and this was considered by both the trial judge and this Court, who then rejected it.

Assuming arguendo, that the trial judge herein was not aware that he could consider nonstatutory mitigating circumstances, this error did not affect his imposition of the death sentence and was harmless beyond a reasonable doubt in this case. Clark, supra: Tafero, supra. This is because as noted above, no statutory or nonstatutory mitigating evidence was presented at the penalty phase of Bolender's trial. Trial counsel, based upon an informed tactical decision, only argued the disparity of the codefendants' circumstances. Said argument of disparity has already been rejected by this Court as not justified under the facts of the instant case. Bolender, supra, 422 So.2d at 837. Thus, where no nonstatutory mitigating evidence is presented, a defendant can hardly complain that the trial court committed error in not considering such alleged mitigation. Clark, supra, at 533 (where trial counsel after investigation made a tactical decision not to present any testimony or mitigating evidence at the penalty phase, Hitchcock error was held to be harmless because judge and jury could not

be said to have been restricted in their ability to consider that which was not presented to them); Tafero, supra, at 289 (suggesting that the jury's recommendation of death or the judge's order would be different, "is contrary to reason," where the defendant deliberately and as a matter of strategy presented no mitigating evidence whether statutory or nonstatutory).

Moreover, the instant case involves the brutal torture-murders of four (4) victims. The trial judge in his sentencing order stated that the crime herein not only justifies but "cries out" for the sentence of death. Considering the totality of these circumstances, in light of the brutal nature of the crimes, four torturous murders, the number of aggravating circumstances and the absence of any statutory mitigating circumstances, any error in not considering the nebulous nonstatutory factors alleged herein is harmless beyond a reasonable doubt. Smith v. Dugger, 529 So.2d 679, 682 (Fla. 1988) (Hitchcock error and allegations that nonstatutory mitigating evidence of remorse, traumatic and unstable childhood, physical abuse and neglect, immaturity and weak emotional controls existed, held to be harmless in a brutal double murder situation); Ford, supra (Hitchcock error held harmless in a brutal murder of a policeman where the nonstatutory mitigating evidence consisted of testimony that defendant had helped his mother with the support of their family, possibility of rehabilitation and depression caused by

dyslexia); White, supra (Hitchcock error held harmless where the alleged nonstatutory mitigating evidence consisted of residual doubt of guilt, disparity of the codefendant's sentence, and defendant's consumption of alcohol); Heiney, supra (Hitchcock error harmless in a jury override sentence where there were three aggravating factors and the nonstatutory mitigation consisted of occasional use of alcohol, courtesy and cooperation with the police, and lack of prior violence). Thus, the Hitchcock claim herein is without merit.

II and III

THE SUMMARY DENIALS OF THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS WERE PROPER.

This was Bolender's second Rule 3.850 motion and therefore was subject to dismissal under the successive motion doctrine. A claim in a second Rule 3.850 motion must be denied if it fails to raise a new ground for relief and the prior determination was on the merits; or, if a new ground is alleged and the failure to raise it previously is unexcused then the second motion is an abuse of the procedure of Rule 3.850. Christopher v. State, 489 So.2d 22 (Fla. 1986); Bundy v. State, 538 So.2d 445 (Fla. 1989); Tafero v. State, 524 So.2d 987 (Fla. 1987).

In issues II and III herein, Bolender alleged that he was denied effective assistance of counsel at both the sentencing and guilt/innocence phases of his trial. Since Bolender's first motion for post-conviction relief raised the claim that his counsel was ineffective at both the guilt/innocence and sentencing phase (see page 9 herein), ineffectiveness is successive and procedurally barred. Card v. Dugger, 512 So.2d 829, 830 (Fla. 1987).

IV

THE SUMMARY DENIAL OF THE ALLEGED IMPROPRIETY OF THE JURY OVERRIDE HEREIN WAS PROPER.

Issues with "either were or could have been raised on appeal are,foreclosed in a motion for post-conviction relief." Sireci v. State, 469 So.2d 119, 120 (Fla. 1985). In this claim, Bolender alleges that the jury override was improper. This claim was specifically raised on direct appeal and was determined adversely to Bolender. (See pages 5-7 herein). Therefore, since this issue was raised, it is not the proper subject of either an initial or successive motion for post-conviction relief. Smith v. State, 453 So.2d 388 (Fla. 1984). The trial court's finding of procedural bar as to this issue was thus proper.

V

THE TRIAL COURT PROPERLY DENIED THE CLAIM THAT THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO BOLENDER'S CASE IN AN UNCONSTITUTIONAL MANNER.

Bolender had alleged that the aggravating circumstance of cold, calculated and premeditated was unconstitutional. The validity of this aggravating circumstance was upheld on direct appeal. Therefore this claim was procedurally barred. Bolender contended in the proceedings below, that Rogers v. State, 511 So.2d 530 (Fla. 1987), cert. denied, 108 S.Ct. 733 (1988), constituted a change in the law and therefore provided a basis for reaching the merits of this claim. This contention has already been rejected in Harich v. State, 542 So.2d 980 (Fla. 1989), where this Court held that Rogers was not a fundamental change in the law, but was merely an evolutionary refinement in the development of the parameters of this aggravating circumstance. The procedural bar applied by the trial court was thus proper as to this issue.

VI

THE TRIAL COURT PROPERLY DENIED BOLENDER'S CLAIM THAT THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE WAS APPLIED TO BOLENDER IN AN UNCONSTITUTIONAL MANNER.

In his motion for post-conviction relief, Bolender alleged that his death sentence, which rests in part on the finding of the aggravating circumstance of heinous, atrocious and cruel, is invalid in light of Maynard v. Cartwright, 108 S.Ct. 1853 (1988). This claim was procedurally barred since the validity of this aggravating circumstance too was upheld on appeal. Even if the claim was not procedurally barred, Bolender would still not be entitled to relief herein since it has been held that Maynard v. Cartwright is inapplicable to Florida's aggravating circumstance of heinous, atrocious and cruel. Smalley v. State, 546 So.2d 720 (Fla. 1989) (This aggravating circumstance is not unconstitutionally vague in view of the Supreme Court of Florida's narrow construction limiting the findings of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victims).

VII

BOLENDER'S BURDEN SHIFTING CLAIM WAS PROCEDURALLY BARRED AND PROPERLY DENIED.

In his motion for post-conviction relief, Bolender alleged that the trial court's instructions to the jury during the penalty phase were improper since they allegedly shifted the burden to Bolender to prove that the death penalty was inappropriate. This claim should have been raised on direct appeal and therefore was procedurally barred. Jones v. Dugger, 533 So.2d 290, 293 (Fla. 1988); Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988); Adams v. State, 543 So.2d 1244 (Fla. 1989); Harvard v. State, 486 So.2d 537 (Fla. 1986), cert. denied, 107 S.Ct. 215 (1986). The denial of this claim in the proceedings below was thus proper.

VIII

THE CLAIM OF AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE WAS PROCEDURALLY BARRED AND PROPERLY DENIED.

In his motion for post-conviction relief, Bolender alleged that his death sentences rest upon an unconstitutional, automatic aggravating circumstance, i.e., felony murder. This issue should have been raised on direct appeal and is now procedurally barred. Atkins v. State, 541 So.2d 1165 (Fla. 1989).

IX

THE TRIAL JUDGE PROPERLY DENIED THE GARDNER CLAIM.

In his motion for post-conviction relief, Bolender alleged that the trial court used non record material, i.e., a prior presentence investigation reports, in imposing the death sentence. This contention should have been raised on direct appeal and therefore is also procedurally barred. Armstrong v. State, 429 So.2d 287, 289 Fla. 1983), cert. denied, 104 S. Ct. 203 (1983).

X

THE SUMMARY DENIAL OF ALLEGED ERRONEOUS JURY INSTRUCTIONS WAS PROPER.

In his motion for post-conviction relief, Bolender alleged that the trial court improperly instructed the jury on the State's burden to prove guilt beyond a reasonable doubt and did not explain "how that concept applies to a criminal action." Such claims regarding jury instructions could have and should have been raised on direct appeal and/or at the first Rule 3.850 proceeding. Thus, this claim was procedurally barred and properly denied. Raulerson v. State, 420 So.2d 567 (Fla. 1982), cert. denied, 103 S.Ct. 3562 (1983).

XI

BOLENDER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL OF THE PRIOR POST-CONVICTION PROCEEDINGS WAS PROPERLY DENIED.

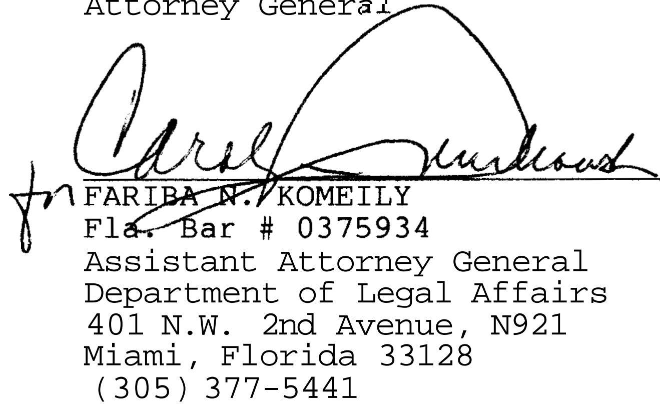
In his motion for post-conviction relief, Bolender alleged that his United States Constitutional rights were violated when he received ineffective assistance of post-conviction counsel at the appeal of this first motion for post-conviction relief. This claim was not cognizable in the rule 3.850 proceedings below because there is no constitutional right to post-conviction counsel and therefore there can be no claim that post-conviction counsel was ineffective. Pennsylvania v. Finley, 107 S.Ct. 1990 (1987); Murray v. Giarratano, 109 S.Ct. 2765 (1989).

CONCLUSION

Based on the foregoing, the order of the trial court denying the motion for post-conviction relief should be affirmed. Pursuant to Harris v. Reed, 489 U.S. ___, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), the State requests a specific finding of procedural bar as to each issue so found.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General



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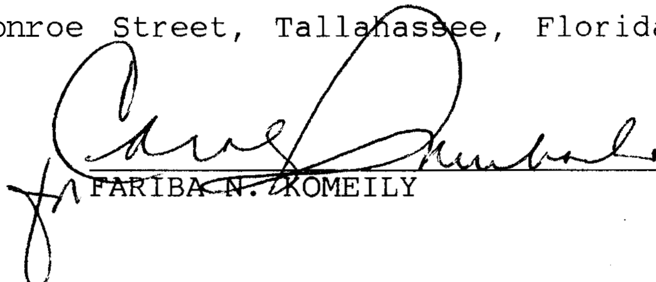
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this 27th day of March, 1990, to BILLY NOLAS, Office of the Capital Collateral Representative, 1533 South monroe Street, Tallahassee, Florida 32301.



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