IN THE SUPREME COURT OF FLORIDA

DONALD ROBERT KRITZMAN,

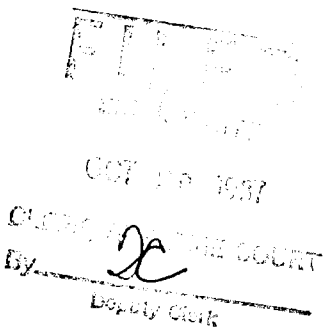
Appellant,

vs. CASE NO. 69,058

STATE OF FLORIDA,

Appellee.

_____/



APPELLEE'S SUPPLEMENTAL ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOHN M. KOENIG, JR.
ASSISTANT ATTORNEY GENERAL
FLA. BAR #394180

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
904/488-0600

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(cont'd)

IN THE SUPREME COURT OF FLORIDA

DONALD ROBERT KRITZMAN,

Appellant,

vs. CASE NO. 69,058

STATE OF FLORIDA,

Appellee.

_____/

APPELLEE'S SUPPLEMENTAL ANSWER BRIEF

PRELIMINARY STATEMENT

References to the record on appeal will be designated by the symbol "R," and followed by the appropriate page number in parentheses. The parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

The State relies on the statement of the case and facts as set forth in its Answer Brief and submits the following additional facts:

At the sentencing hearing held on June 13, 1986, before the judge alone, the State presented testimony of three members of the victim's family without objection by defense counsel. The sole question asked by the prosecutor of each witness was, "[d]o you have anything you would like to say to the court before he imposes sentence . . ." (R 2795-2796) In response, each witness expressed an opinion as to the penalty which should be imposed (R 2795-2796).

In reaching its findings and conclusions, the trial court took into consideration all the evidence presented during both the guilt phase and penalty phase of the proceedings (R 2805, 2807).

SUMMARY OF ARGUMENT

The trial court gave proper weight to all the circumstances, both aggravating and mitigating, which were presented and the court's reasoned judgment that the mitigating circumstances were not sufficient to outweigh the aggravating circumstances was correct. The weight to be given a particular mitigating circumstance rests with the judge and jury and should not be disturbed on appeal.

The brief testimony of the victim's family expressing the opinion that the death penalty should be imposed does not fall within the proscriptions of Booth v. Maryland, infra. There was no testimony here as to the emotional distress suffered by the family members as in Booth. Moreover, the testimony was presented to the judge alone and not the jury, after the jury had rendered its advisory opinion. Should the Court disagree with the argument herein, the State submits that the error was harmless in view of the fact that the trial judge's sentencing order was prepared prior to the presentation of the testimony in question.

ARGUMENT

ISSUE I

THE TRIAL COURT'S IMPOSITION OF THE DEATH SENTENCE UNDER THE FACTS OF THIS CASE DID NOT CONTRAVENE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his supplemental brief, Appellant now contests the qualitative weight assessed by the trial court to the respective aggravating and mitigating circumstances found in support of the sentence of death. He does not assert error in the court's findings. Supplemental Brief at 4. More specifically, Appellant contends that more weight should have been given to the "nonstatutory mitigating factors which included Kritzman's mental disorders, his deprived background and the disparity in treatment of his codefendants." Supplemental Brief at 5.

Section 921.44, Fla. Stat. (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant. Patterson v. State, 12 F.L.W. 528 (Fla. October 15, 1987). See also Nibert v. State, 508 So.2d 1 (Fla. 1987); Muehleman v. State, 503 So.2d 310 (Fla. 1987). Although consideration of all mitigating circumstances is required by the United States Constitution, Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), the decision of whether a particular mitigating circumstance in sentencing is proven and the weight

to be given it rests with the judge and jury. Smith v. State, 407 So.2d 894 (Fla. 1982); Lucas v. State, 376 So.2d 1149 (Fla. 1979). The reasoned judgment of a trial judge will not be overturned on appeal. Card v. State, 453 So.2d 17 (Fla.), cert. denied, 469 U.S. 989 (1984). The circumstances herein do not warrant an invasion of the trial court's domain.

Appellant finds it necessary to summarize the testimony regarding his impoverished background, mental disorders, alcohol impairment, and the lack of impulse control attributable thereto. However, there is nothing in the record to suggest that these factors were not considered by the trial judge. In fact, to the contrary, the court specifically stated that it "carefully reviewed" all of the mitigating factors argued by defense counsel including the disparity in treatment of codefendants, the defendant's mental status, his age, impoverished background, and his diminished capacity due to alcohol consumption (R 129). As stated above, it lies within the province of the trier of fact to weigh the evidence presented. Here, the trial judge found, as nonstatutory mitigating factors, the impoverished cultural and educational background of Appellant as well as "circumstances surrounding his birth, childhood, and formative years which tend to mitigate in some degree, the criminal conduct for which the Defendant has been found guilty." (R 129-130). He did not find that Appellant's capacity was diminished due to alcohol consumption as the State presented testimony which tended to rebut any evidence offered in support thereof (R 2713-2721).

Appellant finally argues that since his codefendants received life sentences, his sentence should be reduced to life. It is well established that lesser sentences imposed on accomplices may be considered in mitigation, Gafford v. State, 387 So.2d 333 (Fla. 1980), and that defendants should not be treated differently upon the same or similar facts, Slater v. State, 316 So.2d 539, 542 (Fla. 1975). See also Rogers v. State, 12 F.L.W. 368, 372 (Fla. July 9, 1987). However, it is permissible for different sentences to be imposed on capital codefendants whose culpability differs in degree. Williamson v. State, 12 F.L.W. 422 (Fla. July 16, 1987); Hoffman v. State, 474 So.2d 1178 (Fla. 1985). Here, as in Williamson, there is sufficient evidence from which the jury and the trial court could have concluded that Kritzman was the "dominant force behind the homicide." See Marek v. State, 492 So.2d 1055 (Fla. 1986). The record demonstrates that Appellant shot the victim four times in the head at point blank range (R 1907-1913, 2278-2290). There was conflicting testimony as to which co-defendant then hit the victim with a tire tool (R 1907-1910, 2279-2280). Dr. Charles McConnell, who performed the autopsy on the victim, testified that one of the four bullets entered the brain and was considered a "lethal injury." (R 2662) He further testified that based on the severity of the injuries from the gunshots, Appellant was unconscious prior to being hit with the tire tool (R 2663-2664).

In conclusion, the State submits that the judge and the jury heard the testimony concerning the nonstatutory mitigating

factors and apparently concluded that the testimony should be given little or no weight in their decisions. There is nothing in the record which compels a different result. Appellant simply disagrees with the force and effect given to the testimony. The decision was one within the domain of the judge and jury, and a reversal thereof is not justified simply because Appellant draws a different conclusion from the testimony presented. See Smith, supra.

ISSUE II

THE TRIAL COURT DID NOT ERR IN CONSIDERING TESTIMONY OF THE VICTIM'S FAMILY AS TO THE APPROPRIATE SENTENCE TO BE IMPOSED.

In this second issue, Appellant represents that "[t]he victim's mother, sister, and brother-in-law testified as to the emotional impact the crime had on them and their feelings concerning the proper sentence (R 2794-2796)." Supplemental Brief at 12. Such a representation is patently incorrect! The extent of the testimony in question is as follows:

> BY MR. RIMMER:
>
> Q. State your name for the record, ma'am.
>
> A. Esther McKeen.
>
> Q. Are you the mother of Mark McKeen?
>
> A. Yes, I am.
>
> Q. And you sat throughout the trial of these two defendants, did you not?
>
> A. Yes.
>
> Q. Do you have anything that you would like to say to the Court before he imposes sentence upon Johnny Davis and Donald Kritzman?
>
> A. Yes, I do.
>
> I hope you will give him the death penalty, Davis. But if you don't, I hope you give him a hundred years in prison without parole, because I think he deserves it. My son is dead, and they are still alive, and I don't like it.

And Kritzman, well, I'll just see him later when they pull the switch on him. And I hope that's what you're going to give him.

And that's all I have to say.

EXAMINATION

BY MR. RIMMER:

Q. Will you state your name for the record.

A. Julie Crow.

Q. How did you spell your last name?

A. C-r-o-w.

Q. Are you the sister of Mark McKeen?

A. Yes.

Q. And did you also sit throughout the trial of this case?

A. Yes.

Q. Do you have anything that you would like to say to the Court before he imposes sentence on these two defendants?

A. I hope they burn in hell.

EXAMINATION

BY MR. RIMMER:

Q. State your name, sir.

A. Jim Crow.

Q. And what's your relationship to Mark McKeen?

A. Best friend and brother-in-law.

Q. Do you have anything that you would like to say to the Court?

A. Yes. You two guys, you two deserve the same thing he got, and he's six foot under right now. And I hope you are, too, shortly.

(R 2794-2796) Nowhere in the sentencing phase is there any testimony whatsoever from any of the victim's relatives regarding the emotional trauma suffered by them. Nevertheless, Appellant argues that such evidence is inadmissible under the United States Supreme Court's decision in Booth v. Maryland, 482 U.S. ___, 96 L.Ed.2d 440, 107 S.Ct. 2529 (1987), and this Court's recent decision in Patterson v. State, 12 F.L.W. 528, 531 (Fla. October 15, 1987). The State disagrees.

In Booth v. Maryland, the high court was faced with the issue of whether the Eighth Amendment to the United States Constitution prohibits a capital sentencing jury from considering victim impact evidence. The evidence consisted of a victim impact statement which: 1) described the personal characteristics of the victim and the emotional impact of the crimes on the family and, 2) set forth the family members' opinions and characterizations of the crimes and the defendant. 96 L.Ed.2d at 2533. The Court held that said evidence is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner.

Soon thereafter, in Patterson, supra, this Honorable Court, in a per curiam decision, sua sponte decided that the admission of testimony from the victim's niece at the sentencing hearing, before the judge alone, concerning the effect of the victim's death on the children and her opinion that the death penalty was appropriate, "appears" to be reversible error in view of Booth v. Maryland. 12 F.L.W. at 531. The State respectfully

disagrees with the Court's conclusion for the following reasons.

First, the fact that the testimony in Patterson, as well as the testimony in the instant case, was presented to the judge and not the jury makes the cases distinguishable from Booth. In this case, and in Patterson, the jury recommended the death penalty after determining whether sufficient aggravating circumstances existed and whether sufficient mitigating circumstances existed to outweigh the former. The juries in both cases rendered an advisory opinion to the trial court without hearing testimony relating to victim impact or any "emotionally-charged" opinions or characterizations of the crime, unlike in Booth. Here, and in Patterson, the trial judge followed the juries' "untainted" recommendation and imposed a sentence of death after weighing the aggravating and mitigating circumstances. The Booth Court was more concerned with the jury's attention being diverted away from the defendant's background and record, and the circumstances of the crime. 96 L.Ed.2d 2534. Such is not the case here or in Patterson where only the judge heard the testimony and is presumed to have followed his own instructions to only consider the aggravating and mitigating circumstances (R 2781). See Harris v. Rivera, 454 U.S. 339, 341 (1981).

Secondly, the State submits that the disputed evidence in the instant case does not fall within the proscription of Booth. In Booth, the Court found unconstitutional the use of emotional distress of the victim's family and the victim's personal characteristics and "emotionally-charged" opinions

and characterizations of the crimes. 96 L.Ed.2d at 2536. Such does not exist in the instant case. Here, the prosecutor merely inquired of each witness whether he/she had anything they would like to say to the court. Each response was very brief and simply opined that the death penalty was the appropriate sentence (R 2794-2796). One could hardly say that said responses were "emotionally-charged" as in Booth.

Finally, the undersigned submits that the error, if any, in the admission of the testimony in question was harmless in light of the fact that clearly it did not play a role in the trial judge's final decision as the written order of findings in support of sentence (R 122) was prepared prior to and read into the record at the sentencing hearing immediately after the victim's family testified (R 2793-2819). Consequently, Appellant's sentence of death should be affirmed.

CONCLUSION

Based on the foregoing, the judgment and sentence should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOHN M. KOENIG, JR.
Assistant Attorney General

Department of Legal Affairs
The Capitol
Tallahassee, Florida 32399-1050
(904) 488-0600

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to William McClain, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, on this 30th day of October, 1987.

JOHN M. KOENIG, JR.