IN THE SUPREME COURT OF FLORIDA

FILED
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CLERK, SUPREME COURT
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RAYMOND BULL,

Petitioner,

v.

CASE NO. 70,723

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

BRIEF OF THE RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602

OF COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

RICHARD RAMSEY will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On June 24, 1985, co-defendants, Raymond Lloyd Bull and Richard Lynn Ramsey were charged in the Circuit Court of the Tenth Judicial Circuit with escape, in violation of **Florida Statute 5944.40 (1985)** (R 3).

After trial by jury on November 18 - 19, 1985, both defendants were found guilty as charged. (R 423). They were adjudicated guilty, and at the time of sentencing, the public defender submitted affidavits for costs. (R 446). The trial court, offered the defendant thirty (30) days in which to request a hearing to oppose the amount of the public defender lien. No such hearing was every requested by the defendant.

Timely notices of appeal to the Second District Court of Appeal were filed on January 10, 1986, and January 15, 1986 respectively. (R 451). The public defender for the Tenth Judicial Circuit was appointed to represent both defendants in the prosecution of their appeal. (R 455).

In an opinion issued by the Second District Court of Appeal on May 20, 1987, the court of appeals struck the court costs imposed, but found that the appellant had waived objections to the imposition of a public defender lien by signing affidavits waiving such notice and hearing. The court found no merit in any of the other issues raised on appeal.

Timely notices of appeal to the Supreme Court of Florida alleging conflict jurisdiction were mailed on June 9, 1987. On August 27, 1987, this Honorable Court accepted jurisdiction.

STATEMENT OF THE FACTS

Respondent accepts petitioner's statement of the facts with several exceptions as follows:

Petitioner alleges in his Statement of the Facts that the petitioner was well aware of the guards, fences, barbed wire, dogs, walkie talkies, etc. It should be made clear that petitioners were well aware of these at the time of trial. However, there was no evidence to show that they were aware of these things on the day of their escape. It should further be noted that petitioner states in his Statement of the Facts that "they in fact surrendered shortly thereafter." The record is absolutely silent, and there is no evidence whatsoever to show that the appellants surrendered. There is only evidence below, that Officer Cool drove some two hundred feet beyond the outer perimeter of the prison grounds into **a** sewage treatment plant and headed the appellant off and captured him. (R 276 - 277). It should further be noted that petitioner states in his Statement of the Facts that the events sub judice occurred at dusk. Respondent would submit that the outer perimeter of the prison compound is surrounded by lamps which come on automatically at dark and illuminate the perimeter of the prison compound as if it were daylight (R 281), and that at the time of the escape, these lights were just beginning to come on. (R 281).

SUMMARY OF THE ARGUMENT

Defendants in Polk County are not improperly required to waive the rights to notice and a hearing on the imposition of public defender fees as the price of obtaining the services of a public defender. Neither the trial court below (who in accord with **Florida Rule of Criminal Procedure 3.701(d)** denied them an opportunity for such a hearing, nor is it conceivable that any court anywhere within this state would deny an indigent, court appointed counsel for failing to sign either an affidavit of indigency, after the court found the defendant to be indigent, or for failing to sign any waiver of notice and hearing for the imposition of a public defender lien.

There is no conflict in the representation of a defendant by a public defender at the time an affidavit for public defender fees are submitted to the court. The public defender does not collect these fees, nor does the public defender sue his former client for these fees.

Based upon the proffered testimony and case law relating to the defense of necessity, the trial court's exclusion of testimony relating to the necessity defense was entirely proper.

ARGUMENT

ISSUE I

WHETHER PETITIONER WAS DENIED HIS DUE PROCESS AND STATUTORY RIGHTS TO NOTICE OF, A HEARING ON, AND DISINTERESTED LEGAL REPRESENTATION DURING THE IMPOSITION OF A PUBLIC DEFENDER LIEN AGAINST HIM.

A.

On June 6, 1985, at his first appearance hearing pursuant to an obvious finding by the court that petitioner was insolvent, a public defender was appointed and the petitioner signed an affidavit of insolvency. (R 1, 2). A provision of this affidavit authorized the trial court to set a fee for the services of the public defender and to impose a lien against the petitioner without any notice of a hearing. (R 2).

At the time of sentencing, Ramsey's public defender submitted an affidavit to the trial court for $750. Mr. Bull's public defender, at the same time, submitted an affidavit in the amount of $1,000. (R 442). The trial court stated that neither Mr. Bull nor Mr. Ramsey had had an opportunity to consider whether these amounts were fair (R 443) and, therefore, the court stated that it was imposing the liens, but gave the defendants thirty days to request a hearing on the fairness of these respective amounts. (R 443). The record does not reflect that a hearing was requested. It is apparent then that notwithstanding any waiver either petitioner signed at their first appearances, the trial court in this case granted both petitioners an opportunity for a hearing. This was done in accord with **Florida Rule** of

Criminal Procedure 3.701(d), and therefore, obviously approved in form and procedure by this Court.

On direct appeal, petitioner raised the issue of notice, hearing and disinterested legal representation at the assessment of a public defender fee as required by Jenkins v. State, 444 So.2d 947 (Fla. 1984). On direct appeal, respondent (appellant below) responded that it was somewhat scandalous to allow a public defender to submit an affidavit for a public defender's fee without requesting the court for an opportunity to discuss with the defendant as to whether or not he actually thought the amount was fair, which would have provided the hearing required, and then on appeal to have another public defender attack this as denial of a hearing. In response, the public defender admitted scandal. The Second District Court of Appeal, in its issued opinion chose to ignore the admitted scandalous behavior, and held that the waiver in the affidavit of insolvency dispensed with the notice and hearing requirements of §27.56(7) Florida Statutes. Ramsey v. State, 507 So.2d 742, 743 (Fla. 2 DCA 1987); Bull v. State, 507 So.2d 744, 745 (Fla. 2 DCA 1987).

B.

Petitioner asserts that as a predicate for obtaining court appointed counsel, the petitioner had to sign this waiver of notice and hearing. In support of this assertion, petitioner cites Gryca v. State, 315 So.2d 221 (Fla. 1 DCA 1975) and McGeorge v. State, 386 So.2d 29 (Fla. 5 DCA 1980). Respondent disagrees. In Gryca v. State, supra, the defedant, in order to

even obtain a public defender, had to actually execute a lien as security for the debt created by the services rendered. It is true that in Gryca the defendant also executed a waiver of any notice of proceedings where the amount of this lien would be fixed as well as to any notice of the actual filing of the lien. However, it cannot be satisfactorily argued that had the respondent refused to sign the affidavit of indigency at his first appearance in the case sub judice, that the court would have denied him a public defender. And certainly, unlike Gryca, supra, the petitioner herein did not have to execute any lien as security for a debt created by the public defender's services. It should also be noted that the dissent in Gryca said that the record reflects the defendant knowingly and intelligently waived her rights and in no way shows that she was in any way forced to abandon those rights. Id. at 223, 224.

This Court in Jenkins v. State, 444 So.2d 947 (Fla. 1984), did not invalidate the imposition of a public defender lien, but rather required that adequate notice to the defendant that the county was seeking these costs, and an opportunity for the defendant to be heard on the issue. Id. at 950. Practical matters as to how often such liens are actually imposed or collected aside, Jenkins clearly does not prohibit the lien, it merely instructs that the defendant be given notice that the county is seeking recovery of the money expended on the defendant's behalf, with an opportunity for the defendant to be heard on the matter. Petitioner was given such notice at the time he signed his affidavit

of insolvency in accord with **Florida Rule** of **Criminal Procedure 3.701(d).** He was thereafter given an opportunity by the trial court to be heard. (R **443).** The fact that he failed to avail himself of this opportunity is petitioner's personal waiver. In McGeorge v. State, supra, the court specifically found that notice and an opportunity to be heard in compliance with **Florida Statute 27.56(7)** was not afforded the defendant. It was the particular probation order in McGeorge that offended because it required waiver of notice and hearing in order to obtain a public defender. This did not require finding that **Section 27.56(7)** was unconstitutional. The court held that a new probation order would have to be drafted that did not deprive the defendant of his statutory rights. Again, there is nothing in the record to show that the public defender would not have been appointed had petitioner failed to sign this waiver; Nor did the trial court sub judice deprive petitioner of notice and an opportunity to be heard. If the instant Polk County Order is offensive, then, as in McGeorge, new ones should be drafted; a finding that the statute is unconstitutional because of a single offensive form however, is inappropriate.

C.

Petitioner then asserts that the instant "waiver" was invalid because the signing of a boilerplate statement to the effect that a defendant is knowingly waiving his rights does not discharge the governments burden. In support of this assertion, appellant cites Jordan v. State, **334** So.2d **589, 592** (Fla. **1976)**

and United States v. Hayes, 385 F.2d 375, 377 (4th Cir.) and Fields v. State, 402 So.2d 46 (Fla. 1 DCA 1981). Respondent would urge that these cases are not only dissimilar to the case sub judice, but they each clearly hold that constitutional rights can, in fact, be waived. In Jordan v. State, supra, the court said:

> "Decisions rendered in this jurisdiction lead us to the conclusion that waiver of Miranda rights need not be by affirmative response or express waiver once the warning has been given."
>
> Id. at 592 (citations omitted)

A brief look at the plea colloquoy sub judice (R 443) where appellant was given thirty days to object to the assessment of the public defender fee and thereafter, requested no hearing, would clearly manifest a waiver of such hearing.

In Fields v. State, supra, the court held that the state bears the burden of showing a Miranda waiver was voluntary and intelligent. This is so because the state is going to use the defendant's words to convict him and is far different than what the public defender alleges is the state's burden in showing that petitioner waived his right to a hearing regarding the assessment of a public defender fee. In United States v. Hayes, supra, the court held that there is a heavy burden on the state to show an accused waive his privilege against self-incrimination.

In his brief on the merits, petitioner states "indeed that this waiver was made intelligently with full awareness of its consequences is hard to imagine." (See Brief of the Petitioner

on the Merits, page eight) It is obvious then that counsel for petitioner has no idea whether petitioner's waiver was voluntarily and intelligently made or not. Thereafter, petitioner asserts that "this waiver was the functional equivalent of giving the state a blank check to impose any amount it wanted without telling the defendant about it." (See Brief of Petitioner on the Merits, page eight) Respondent would urge that it is the public defender who fills in the amount on the check, not the state.

D.

Respondent attaches the affidavits of indigency from Collier and Hillsborough Counties as an appendix to his brief; and, although the contents of those affidavits clearly state otherwise, petitioner asserts that these affidavits all "suggest that whether the defendant can or will be able to pay is an irrelevant consideration at the hearing." (See Brief of Petitioner on the Merits, page nine) This is conclusory and without any basis. Excerpts from the affidavits sub judice and the two attached in petitioner's appendix are as follows:

> **A.** Polk County; (this excerpt is found at R 1 and 2 and was signed by the petitioner).
>
> I, the defendant, in the case before the court, having been duly sworn by the judge of this Court, swear the following statements to be true:
>
> > (i) I desire the assistance of an attorney in this proceeding, but I am without money or means with which to

hire one. I therefore request the court to appoint an attorney to represent me in my defense.

(ii) I further authorize this Court to set the fee for the services of my attorney and impose a lien against me for this amount without any notice of a hearing for such purpose. If at any time in the future I become financially able to hire private counsel, I will promptly advise the court.

B. Hillsborough County; (See Appendix Four attached to Petitioner's Brief on the Merits)

I, ______________________________, hereby consent to a lien against all of my real or personal property presently owned or acquired, in favor of Hillsborough County, Florida for an amount which shall constitute the reasonable value of the legal services rendered to me by the Public Defender of the Thirteenth Judicial Circuit. I further understand that I shall have the opportunity to be heard, and offer objections to the determination of the value of services of the public defender and costs, at the time of the final disposition of my case, and to be represented by counsel at such hearing.

____
Signature of Affiant.

C. Collier County; (Appendix A3 to Petitioner's Brief on the Merits and initialed "do not waive" by defendant)

I understand that pursuant to 27.56(7), Florida Statutes, I have the right to a hearing as to what, if any, attorneys' fees and costs will be assessed against me for services rendered if I am found guilty or enter a plea of guilty or nolo contendere to any criminal charges, and that I may waive notice of and the right to appear at said hearing and that the failure by me to execute said waiver will

> not effect my ability or my right to be represented by the Office of the Public Defender.
>
> Understanding the above, I hereby state that: I do _____ do not_____ waive notice of and right to appear at the hearing where a judge can and will assess a reasonable fee for the services of the public defender or appointed counsel in this matter, if 1 am found guilty.
>
> ______________________________
> Affiant.

Petitioner asserts that all of these affidavits contained boiler-plate language which is insufficient as a valid waiver. Respondent would urge that the Collier County affidavit and the Hillsborough County affidavit clearly neither deprive an accused the opportunity for notice and a hearing on the assessment, nor do they predicate obtaining a public defender on the signing of the waiver. In fact, the affidavit under consideration sub judice, the Polk County affidavit also does not predicate appointment of the public defender upon signing the affidavit. Petitioner asserts that all three of these affidavits require the defendant to sign as a price of getting court appointed counsel. (Brief of Petitioner on the Merits, page ten) In support of this contention, petitioner cites Fuller v. Oregon, 417 U.S. 40 (1974). Although an equal protection case, in Fuller v. Oregon, the Supreme Court upheld a statute that allowed repayment of a public defender fee as a condition of probation. Repayment of this fee was not mandatory, unless the court found that the defendant was or would be able to pay the fee. No requirement to pay could be imposed at sentencing if there was a likelihood that

the defendant's indigency would not end, and any defendant could petition the court to relieve him of the obligation of paying this public defender fee. Id. at 650. In Fuller v. Oregon, supra the court stated:

> The argument is not that the legal representation actually provided in this case was ineffective or insufficient. Nor does the petitioner claim that the fees and expenses he may have to repay constitute unreasonable compensation for the defense provided him. Rather, he asserts that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus "chill" his constitutional right to counsel. . . . We have concluded that this reasoning is wide of the constitutional mark.

Id. at **417 U.S.** 51

and then,

> "The fact that an indigent that accepts state appointed representation knowns that he might some day be required to repay the costs of these services in no way effect his eligibility to obtain counsel.

Id. at **417 U.S.** 52

E.

Petitioner next asserts that he did not recieve the notice required by **Section 27.56(7) Fla. Stat.** and Jenkins v. State, supra. Respondent would urge that he was given notice at sentencing and an opportunity to object by the trial court. (R **443).** Petitioner next urges that he did not receive the required hearing. Respondent would urge that petitioner was given an opportunity for this hearing and never exercised that opportunity. In

support of his contentions, petitioner cites Cliburn v. State, (Fla. 3d DCA, Aug. 11, 1987) [12 F.L.W. 19441. There the trial court assessed costs and allowed the defendant to request a hearing thereafter. The Third District Court of Appeal found this violated Jenkins. However, respondent would urge it is, in fact,? in accord with **Florida Rule of Criminal Procedure 3.701(d).** 3.720 Petitioner urges that this procedure under **3.720(d)** is inefficient and constitutes bad policy. Petitioner then asserts that "court dockets should not be clogged by and defendants should not have to wait for hearings on public defender liens when these hearings can be held much more efficiently at the sentencing hearing." (See Petitioner's Brief on the Merits, page eleven) Respondent is at a loss to adequately address this assertion by petitioner. First, petitioner says that notice of the imposition of the lien at sentencing as in the case sub judice is unlawful, and thereafter suggests that that's exactly how it should be done. It should be noted that the committee note to the 1980 amendment of 3.720 states:

> Modification of the Rule requires a trial judge to adequately inform a defendant of the imposition of lien for the public defender's services. A uniform procedure for scheduling hearings to contest liens would reduce the number of post-sentence petitions from incarcerated defendants at times remote from sentencing. The procedure is designed to complete all lien requirements established by §27.56, Florida Statutes (1979), before defendants are removed from jurisdiction of the trial court.

Therefore, this rule is in accord with precisely what petitioner suggests. Petitioner then asserts that "defendants must

unnecessarily delay their appeals if they wish to contest the fees, since the trial court does not have jurisdiction to hold the hearing once the notice of appeal is filed." (See Brief of Petitioner on the Merits, pages eleven and twelve) Respondent would assert that that the trial court has concurrent jurisdiction with the appellate court until the record is transmitted. **Florida Rule** of **Appellate Procedure 9.600(a),** and that subsection (b) of this appellate provision would not impede the progression of a defendant's appeal.

F.

Citing Graham v. Murrell, **462** So.2d **34** (Fla. 1 DCA **1984)** and Baran v. State, **381** So.2d **323** (Fla. 5th DCA **1980),** petitioner asserts that it is unethical for the public defender to represent a client and at the same time participate in the imposition of a public defender fee against that client and asserts that **27.56(1)** is unconstitutional. First, respondent would urge that Baran v. State, supra was misread by the petitioner. Baran prohibits a lawyer from the same office that provided evidence to convict the defendant from thereafter representing that defendant at a probation revocation hearing for failure to pay a public defender fee. This case stands for no proposition that would place a public defender in violation of the rules of professional responsibility. The court in Graham v. Murrell, supra, found **27.56(1)(a)** unconstitutional because it regulated a procedure for attorneys without Surpeme Court approval, and found it thrust the public defender into a dilemma when it required the public defender to

assess costs and attorneys' fees against the client. Respondent would assert that this is no different than a private attorney sending his client a bill, or even suing his client for a fee. In fact, as stated earlier in this brief, the indebtedness is not to the public defender. Pursuant to **27.56(4), Florida Statutes** the debt is owed to the county, and it is the Board of County Commissioners that enforces and collects the debt owed. Subsection 4 also allows a court to remit all or part of the amount owed if it appears that manifest hardship would be imposed by enforcement. Respondent would therefore urge that the court in Graham v. Murrell, supra was mistaken in its interpretation of **27.56(1)(a). Florida Statute 27.56(2)** advises that funds collected via 27.56 are remitted to the county and used to defray expenses incurred by the county in defense of criminal prosecutions. "All judgments entered pursuant to the provisions of this act shall be in the name of the county in which the judgment was rendered." Therefore, it is the county through its attorney that collects these fees; not the public defender, and there is no conflict whatsoever either real or imagined. Petitioner appears to be confusing the submission of an affidavit for costs with the enforcement of a lien. Clearly, he is mixing apples and oranges.

G.

Petitioner next urges that "public defenders might thus want to request arbitrarily high fees and to violate their clients' due process rights with regard to notice and hearings" because the county uses the monies collected from public defenders' fee

to defray expenses incurred by the county in defense of criminal prosecutions. (See Petitioner's Brief on the Merits, page thirteen) Pursuant to **Florida Statute 27.5301,** salaries of the public defenders are paid by the state as provided in the General Appropriations Act. Therefore, no matter how much a public defender may or may not submit in the way of an affidavit for costs, his salary would be uneffected thereby, whether the defendant pays the amount or not. To be sure, **Florida Statute 27.54** provides that the county will provide the public defender with office space, utilitites, custodial services, etc. However, that statutory provision provides that the county cannot provide less than the amount provided in the prior fiscal year (no matter how much was or was not collected from indigents) and that the office space and utilities must meet the standards promulgated by the Department of General Services and does not advise that either the space or conditions are contingent on how much was or was not collected from indigent clients. **Florida Statute 27.53 (1)** advises that the elected public defender establishes the number of assistant public defenders he needs and appropriations are made therefore. Subsection **4** provides that these appropriations are determined by a funding formula. It is therefore obvious that no matter how much is or is not collected from the public defender's clients, his working conditions and/or salary will not be adversely effected thereby.

H.

In State v. Williams, 343 So.2d 35 (Fla. 1977), this Court upheld the constitutionality of this statute. Although Williams addressed an equal protection issue, it can only be assumed that this Court in its review of the statute, and after deleting the offensive portion, id. at 38, found no other constitutional infirmities. In DiBartolomeo v. State, 450 So.2d 925 (4th DCA 1984), the Court found that the denial of a court appointed attorney could not be based on the defendant's failure to submit an affidavit of indigency with the public defenders office after being twice instructed by the court to do so. Therefore, contrary to what petitioner asserts, that appointment of a public defender is predicated upon signing such an affidavit, clearly is not so.

In Enrique v. State, 408 So.2d 635 (3d DCA 1982), the court held "it is axiomatic that an accused is entitled to counsel at every critical stage of a criminal proceeding." Id. at 637 (citations omitted). Here, the court determined that the right to counsel is not dependent on the defendant's request. (citations omitted). The statutory affidavit of indigency need only be filed under the trial court's request after it has first advised the accused of his rights to counsel. Id. at 639. Again, respondent would urge it is therefore obvious that signing or refusing to sign the affidavit of indigency is not a predicate to obtaining court appointed counsel.

In Robbins v. State, 318 So.2d 472 (4th DCA 1975), the court found that the mere fact that the defendant was ordered to pay a public defender's fee as a condition of probation and failed to do so did not raise any conflict of interest between the public defender's office and the defendant which would preclude the public defender from representing the defendant in the probation revocation hearing. The court said:

> "To begin with, a defendant represented by a public defender does not owe any money to the public defender; he owes it to the state. Section 27.56(1), Florida Statutes (1973). It is true that section 27.56(1) provides that liens for the services of the public defender 'shall be enforced on behalf of the state by the public defender'; however, it is also true that there was no showing in this case that the public defender's officer which was representing appellant made any attempt to enforce any lien against appellant under section 27.56 (1), or that it sought to collect any debt from appellant under section 27.56(2)(c) Florida Statutes (1973).

It is clear that this statutory scheme in its present day state deletes those portions cited above which provide that the public defender would enforce this lien on behalf of the state. However, the reasoning of Robbins is clear, and respondent urges placing that without this responsibility onto the public defender, there is no conflict.

ARGUMENT

ISSUE II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE RELEVANT TO THE CO-DEFENDANT'S MOTIVE FOR LEAVING THE PRISON. (As stated by the Petitioner).

Although Petitioner seems to be intertwining the issue of motive with the issue of the defense of necessity, Respondent herein will address both. Petitioner alleges that the trial court erred in excluding any testimony relating to the defense of necessity. It should be noted from the outset that the defense of necessity is a narrow one afforded only to prisoners whose escape has been motivated by sufficiently perilous circumstances. Helton v. State, 311 So.2d 381 (Fla. 1st DCA 1975). It is apparent from a review of cases dealing with this issue, that the defense of necessity has always been applied narrowly in accord with Helton, supra. In Kent v. State, 11 F.L.W. 2 (Fla. 5th DCA, Jan. 3, 1986), the court found error in the exclusion of evidence on the defense of necessity. However, in Kent, supra, the defendant was arrested for shoplifting, handcuffed, and put in the rear of the police cruiser. He was slow in exiting the vehicle, because of a pre-existing injury and the defendant proffered that the arresting officer grabbed him by the neck and pulled him out of the car. Once out of the vehicle, the defendant alleged that the arresting officer kicked him in the tailbone and at that point the defendant fled. The defense in Kent proffered testimony of a sheriff's department nurse that had examined the

defendant and her discovery of a hemotoma or bruise type injury in the tailbone area. Despite this, the court in Kent excluded the evidence because the defendant did not run to the police station that was located right where he was exiting the police vehicle, but rather in another direction. On appeal, the Fifth Circuit reversed finding the five criteria set out in People v. Lovercamp, 118 Cal. Rptr. 110, 43 Cal. App. 3rd 823 (1974) and adopted by the First District Court of Appeal in State v. Alcantaro, 407 So.2d 922 (Fla. 1st DCA 1981), pet. for rev. denied, 413 So.2d 875 (Fla. 1982) were met. Clearly, the facts of the case sub judice are not analogous to those in Kent, supra, wherein there was obvious evidence that the defendant had in fact suffered an injury, and had no opportunity to complain since the only one present was the arresting officer who in fact had physically abused him. In Bavero v. State, 347 So.2d 781 (Fla. 1st DCA 1977), evidence of the defense of necessity in that the defendant was asthmatic and was assigned to rigorous labor was improperly excluded. It should be noted however, that in Bavero the defendant had previously been classified at another institution as having a medical condition allowing him to perform only light work, and he was unable to obtain reclassification even after experiencing great physical difficulty in performing the road work assigned to him. After being given an "inhaler" to ease his breathing, he found he had to use it two to four times per hour, and the label on the inhaler itself warned that use in excess of six times daily could cause cardiac arrest. The

defendant in Bavero made repeated efforts to be medically reclassified to non-life threatening work in order to avoid suffocation, Bavero, supra, at 782, and was captured while attempting to bring his plight to the attention of federal authorities.

In Muro v. State, 445 So.2d 374 (Fla. 3d DCA 1984), cited by Petitioner, the defendant had been brutally beaten and sexually assaulted with a broom handle and was taken to a hospital for treatment. Upon learning that he would be returned to the same prison after treatment at the hospital, the defendant escaped. However, in Muro, supra, prison guards rescued the defendant from the cell and took him to the hospital, and hence were well aware of the abuse that he suffered, hence there waas no immediate recourse save for escape. Respondent submits that the cases cited above have a common thread of absolutely immediate danger posed to the defendant without the ability or time to take any corrective measures in reporting the incidents to authorities, or that their report of the life threatening situation to authorities was to no avail, and that in fact, as stated earlier the defense of necessity was narrowly applied.

In Helton v. State, 311 So.2d 381 (Fla. 1st DCA 1975) cited by Petitioner, the court held that in providing proof of intent, the state can rely on circumstantial evidence. **Id.** at 384. The Helton court found however, that the state is not required to show that the intent to escape existed prior to or even contemporaneously with the physical act of escape. Sub judice, not only does the record show that the Petitioner Bull planned this

escape with his co-Petitioner Ramsey for at least three weeks, (R.339) but the circumstantial evidence surrounding the events of the escape clearly show an intent to avoid lawful confinement. Petitioner Bull came to Polk Correctional Institution less than three weeks before the escape (R.247). When he was asked on cross-examination, "Q. Okay. Now how did you happen to get together with Mr. Ramsey on this escape? A. How did I get together. From the instant that I arrived." (emphasis added) (R 339) Sub judice, the alleged threats against Petitioner occurred during an inmate softball game some three to four hours prior to the escape, (R.306-308) and prison authorities were not advised of any such threat by Petitioner. Instead, Petitioner shared this alleged threat with a so-called snitch (R.314) in a so-called plan that the snitch would tell the authorities of the proposed feigned escape and then catch him (R.310). Supporting the absurdity of this contention is evidence that the snitch too, was actually part of the escape plan, and backed out at the last minute (R.310). In Holdren v. State, 415 So.2d 39 (Fla. 2d DCA 1982), pet. for rev. den., 422 So.2d 842 (1982) the exclusion of evidence of the defense of necessity was upheld. In Holdren, the defendant alleged as does Petitioner herein, that his testimony as it concerned a necessity of his escape was relevant to the issue of intent to escape from custody. The court stated that there is a clear distinction between intent to escape on the one hand and the defense of necessity on the other. The court stated it was receding from its earlier view that evidence of duress and

necessity had bearing on the issue of intent. Id. at 41. The Holdren court citing Watford v. State, 353 So.2d 1263 (Fla. 1st DCA **1978)** said, "In summary we declare the general rule to be that when the state has established its right to legal custody and the conscious and intentional act of defendant leaving the established area of such custody, the offense of escape is prima facie established. In such circumstances, the only viable defense to such a charge that may be available is necessity involving, as to such defendant, reasonable grounds to believe that he is faced with the real, imminent and present danger of death, great bodily harm, or such type of danger to his health, if he does not temporarily leave his place of confinement." Watford v. State, supra. at 1265. The Holdren court further adopted the sound reasoning of United States v. Bailey, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed.2d 575 **(1980)** wherein the court held that in order to present testimony concerning the danger which prompts leaving, the escapee must proffer evidence of a bona fide attempt to surrender or return as soon as he was no longer under the coercive force of duress. In the case sub judice, there was no such proffered testimony of any effort to surrender. The evidence showed only that the Petitioner attempted to flee and that he was cornered and caught. There was testimony that the prison grounds are surrounded a green fence (R.202). Thirty feet beyond this green fence is a twelve foot red fence (R.203). On top of this outer red fence is razor sharp concertina wire with razor type blades on it (R.202,213). Beyond this outer red fence is a

road circling the perimeter of the prison compound (R.202) and approximately 50 feet beyond the perimeter road is a sewage treatment plant (R.204). The defendants were running away from Officer Pegg (R.239) when they were headed off by Officer Cool (R.275, 276) and were finally stopped some 200 feet beyond the red outer fence (R.207). Officer Cool got ahead of the Petitioner and pointing his shotgun, ordered Petitioner to raise his hands and lay on the ground (R.277). Respondent submits that that is not surrender. Petitioner was wearing gloves (R.278) and even though it was a hot June evening, was wearing a sweatshirt over his prison garb (R.210). It was dusk (R.279). There are lights that circle the perimeter of the compound that come on automatically when it gets dark and illuminate the entire area as if were daylight (R.280). These lights were just beginning to flicker on (R.280). Respondent submits that it is apparent that Petitioner chose a time of night before the entire area was fully illuminated to effect his escape. Petitioner's prison identification was found that evening in a prison trash can, at the bottom of the can underneath all of the trash (R.283). Respondent quieries the point in disposing of identification if, as Petitioner alleges, he meant only to go over the fence and then surrender and submits that the circumstantial evidence proves the element of intent to escape. Helton v. State, supra.

The evidence sub judice does not show any intent on the part of Petitioner to surrender. In Holdren v. State, supra, the defendant alleged he escaped to avoid being homosexually raped.

The evidence was found to be properly excluded because as in the instant case, there was no evidence of any intention to surrender. Petitioner testified he thought he was going to be transferred to a road camp not to Polk Correctional Institution (R.324). He testified he wanted to go to a road camp where there is "more freedom and better conditions" (R.324). He further stated he felt "let down" when he wasn't transferred to a road camp. Petitioner stated he'd planned the escape from the instant he arrived with Mr. Ramsey (R.339). Petitioner further stated when he saw Officer Pegg approaching in the car he ran away in order to surrender (R.336), and that he feigned the escape in order to get transferred (R.338). There was no testimony as to why he wanted the transfer except that a road camp has better conditions and more freedom (R.324). Respondent queries how an escape from a maximum security prison will effect a transfer to a road camp.

In Helton v. State, supra, cited by the Petitioner, the court determined the elements of escape to be the physical act of leaving or not being in custody, and the intention to avoid lawful confinement. The defendant in Helton was given alcoholic drinks by a prison guard before escaping and alleged he lacked the requisite intent to do so. The court did not decide the issue of intent to escape because the defendant remained outside for an entire month and therefore upheld the conviction on the grounds of intent to avoid lawful confinement. Id. at 384. Although cited by the Petitioner, Respondent would submit the

principles of Helton, supra, are applicable herein. In Watford v. State, 353 So.2d 1263 (Fla. 1st DCA 1978) the trial court's exclusion of evidence of defense of necessity as well as evidence of the defendant's intent to escape was upheld. In Watford, the defendant, while en route to a work cite on a bus with other inmates, heard a radio communication that another corrections officer was coming to get him. Believing he would be transferred back to Florida State Prison from the road camp, he fled the bus and was found later in a shopping center. The defendant stated he fled because he wanted a chance to speak to the superintendent about any transfers and did not intend to escape. In affirming the conviction the court found that this failed to present for jury determination a viable issue as to necessity. Respondent would submit that Watford, supra is on point with the case sub judice, and that the proffers provided in the record do not support any issue for jury determination on the issue of necessity, and that the trial court properly excluded such evidence.

In State v. Alcantaro, 407 So.2d 922 (Fla. 1st DCA 1981) the state appealed the dismissal of an escape charge. In reversing, the court found that the defense of necessity exists where the "defendant's conduct was necessitated by a specific and imminent threat of injury to his person under circumstances which left him no reasonable alternative other than escape. Id. at 924. Respondent submits that sub judice, the 3 to 4 hours between any alleged threat and the escape (R.308) left Petitioner ample time

for alternatives other than escape. In Alcantaro, the court adopted 5 criteria necessary to be shown prior to the admission of evidence of the defense of necessity:

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
>
> (2) There was no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
>
> (3) There is no time or opportunity to resort to the courts;
>
> (4) There is no evidence of force or violence used toward prison personnel or other innocent persons in the escape; and
>
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

All 5 of the above criteria must be met. State v. Alcantaro, supra, at 925. Respondent would submit that the evidence of the Petitioner's prison identification in the trash can, the gloves he was wearing in order to get over the concertina wire, the sweatshirt he was wearing to hide his prison garb, and his failure to surrender to Officer Pegg clearly shows the Petitioner intended to escape. Regarding the defense of necessity, it is clear that the Petitioner had ample time to make a complaint to the authorities and to report any threats against him in accord with the second point in Alcantaro, supra. Of the 5th point in Alcantaro, instead of immediately reporting to the authorities when he has attained a position of safety from any

immediate threat, the evidence shows that Petitioner viewed the corrections officers as his immediate threat rather than the alleged threat of several other inmates, and intended to escape from the corrections officers rather than surrender to them.

In light of the foregoing, it is evident that the trial court properly excluded any and all testimony regarding the defense of necessity.

CONCLUSION

Based on the above stated facts, arguments and authorities, Respondent would ask that this Honorable Court affirm the judgment and sentence of the lower court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
1313 Tampa Street, Suite **804**
Park Trammell Building
Tampa, Florida **33602**
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Stephen Krosschell, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida **33830,** this 21st day of October, **1987.**

OF COUNSEL FOR RESPONDENT.