IN THE SUPREME COURT OF FLORIDA

ERNEST LEE ROMAN,

Appellant,

v.

CASE NO. 72159

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY, FLORIDA
FROM THE DENIAL OF POST-CONVICTION RELIEF

BRIEF OF APPELLEE

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TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The facts of the present case, as well as its procedural history, are sufficiently set out by this court in its opinion affirming Roman's convictions for premeditated, first-degree murder, kidnapping and sexual battery and his sentence of death. Roman v. State, 475 So.2d 1228 (Fla. 1985). Clemency was denied by Governor Martinez and a death warrant signed on January 27, 1988 (R 1). The superintendent has selected 7:00 a.m. on April 7, 1988, as the precise time of execution.

An emergency motion to vacate judgment and sentence with special request for leave to amend, motion for stay of execution and request for continuance of evidentiary hearing was filed on February 26, 1988 (R 63-141). An evidentiary hearing on Claims I, II, and VI was held March 17-19, 1988. All relief was subsequently denied (R 547-622; 638-650).

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS JURISDICTION TO GRANT A STAY OF EXECUTION.

When entering an application for a stay the factors to be considered in the exercise of the court's discretion are (i) the probability of irreparable injury if no stay is granted, (ii) the remediable quality of such injury, and (iii) the likelihood of ultimate success on the merits. Sullivan v. State, 372 So.2d 938, 941 (Fla. 1979).

The motion to vacate judgment and sentence filed herein aptly demonstrates the unlikelihood of success on the merits in regard to the issues and grounds raised in the motion, and on appeal herein. Roman will suffer no irreparable injury by the denial of a stay by having the sentence carried out sooner than later, since he has no entitlement to have it carried out later through the vehicle of delay. A death row inmate is not well served by the cruelty of years on death row inflicted upon him by lawyers seeking to turn the administration of justice into a sporting contest. Sullivan v. Wainwright, 464 U.S. 109 (1983).

While it is true that "death is different" it must also be remembered that "death was different" for the victim as well, in this case young Tasha Marie Smith who was buried alive.

Granting a stay in this case would substantially harm other parties and not serve the public interest. Delay in the execution of capital sentences diminishes the deterrent effect of the death penalty. Society, further, must wait for years and has no recourse for justified community outrage. The presumption

that a criminal judgment is final is at its strongest in collateral attacks on that judgment. Strickland v. Washington, 466 U.S. 668, 697 (1987). Nothing presented on appeal in this case dispels such a presumption.

While the transcript of the evidentiary hearing below is fairly lengthy, it should be noted that hours were spent by opposing counsel inquiring of defense counsel as to whether items in a 78 page medical record would be important to know after counsel indicated it would be best to obtain all medical records. Thus, a large segment of the transcript is devoted to extraneous matters and the remainder can be examined for merit within the time frame of the warrant.

Capital cases such as this are routinely expedited, see, Barefoot v. Estelle, 463 U.S. 880 (1983), and the same can be achieved in this case as execution is scheduled for April 7, 1988, and the warrant does not expire by its own terms until April 13, 1988.

II. TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE IN ACCORDANCE WITH THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

It was contended below that if Roman committed the offense but was drunk, he would not have been convicted and sentenced to death. The trial record reveals, however, that intoxication was an issue throughout the trial, argued by the state and defense and properly decided by the jury.

The record reflects that defense counsel did properly impeach witness Arthur Reese with an inconsistent statement in a prior deposition as to Roman's possible intoxication on the night of the murder. On cross-examination, Reese testified that at deposition he did make the statement that "Ernest drank quite a bit of wine periodically, not all the time" (R 627). He also recalled recounting that on the evening of the murder Roman's sister had said to him "You are pretty high, you had better go on home and go to bed and sleep it off" (R 628). His entire statement at the deposition was brought up for the jury as follows:

> They was having a few drinks and whatever as the evening progressed Ernest got a little bit drunk or high or whatever you want to call it, and he flipped over backwards. He was sitting on a kitchen chair and he kinda flipped over backwards but he got up and retrieved his chair and sat down and his sister said, "You are pretty high, you had better go on home and go to bed and sleep it off." (R 628)

On redirect it was brought out that Mr. Reese was actually discussing Mildred Beaudoin's feelings as to Roman's intoxication

and not his own (R 631). The taped statement of Reese's interviews contained in the appendix to the 3.850 motion is not inconsistent with Reese's trial testimony. In a taped statement on March 15, 1981, page 7, Reese stated "No, no, ah, he was in the trailer with us. He was drunk. **Or drinking.** And had flipped over backwards in the kitchen chair and she told him to go to the trailer and go to bed. This is thirty minutes before the mother and the father left." It is clear that Reese, upon reconsideration, stated that at this time Roman was **drinking**, not drunk.

The other statements given by Reese in an interview on March 14, 1981 and in a taped statement the following day in the Sumter County Sheriff's department pertained to a time frame when Roman had returned to the trailer **after** the murder had taken place. That Roman drank wine after the murder has never been in dispute, as in his own confession, he indicated that after the murder he had gone down the hard-topped road, drank some more wine and stayed there all night (R 851-857; 860). Use of such statements at trial would hardly have affected the outcome of the case and a new trial is not warranted under United States v. Bagley, 105 S.Ct. 3375 (1985).

Defense counsel obviously utilized the defense of intoxication, and was aware of it. To counter testimony of prosecution witnesses that they had not seen Roman drinking or that he was not drunk, the defense elicited testimony from Mildred Beaudoin, Wanda Pritchard and James Howton as to the fact that Roman was intoxicated (R 1135-1136, 1329, 1330, 1345-

1352). Defense expert Doctor Lekarczyk was called to testify that had Roman been drunk, he would not have had the ability to reason accurately and that he would not have known right from wrong and would have been insane (R 1260-1261, 1311). In closing argument defense counsel argued as to the unshakable credibility of Doctor Lekarczyk and Mildred Beaudoin and further discredited state witnesses who testified that Roman was not drunk (R 1451-1453). Thus, defense counsel was hardly ineffective vis-a-vis an intoxication defense, particularly in reference to witness Reese.

It was also contended below that counsel failed to conduct a proper investigation into available background information. Testimony elicited at the evidentiary hearing reflects that a family history was taken by counsel from Roman's own sister Mildred Beaudoin. Much of the **family** background information in contention was contained in available medical records. The remaining inconsequential information, in light of the full mental health picture presented of Roman at sentencing by counsel, would not have influenced the jury to recommend a sentence of life imprisonment and the circuit judge below indicated that he would not have imposed such a sentence on the basis of such information. Moreover, no family members were even called to testify at the evidentiary hearing below.

Doctor Barnard was obviously aware of Roman's extensive medical history and testified on cross-examination in the guilt phase that Roman suffered from alcohol abuse or dependence which was extensive for the last **twenty** years and interfered with his occupational and social functioning and that he had been in many

different kinds of treatment settings to no avail and had difficulty with the legal system (R 1045). On cross-examination Doctor Carrera as well testified that on the day of the murder Roman was suffering from alcohol abuse or dependence as defined by D.S.M. III and had a **long documented** history of the abuse of alcohol which began in his late teens or early twenties (R 1098).

Defense expert Dr. Dorothy Lekarczyk testified on behalf of Roman as to his possible insanity at the time of the offense and she reviewed reports from North Florida Treatment and Evaluation Institute; the confession; psychiatric reports from Dr. Barnard and Dr. Carrera, as well as Dr. Langee; a neurologist report from Dr. Greer and all the medical reports from Lake Sumter Mental Health Center, spanning a period of **10** years (R 1198). The Lake Sumter Community Mental Health records with which she was provided were comprehensive in that they reflected Roman had been hospitalized at least 17 times (R 1259).

Dr. Harvey Langee testified for the defense at the penalty phase and reviewed a medical history of Roman to 1968 which involved treatment for mental illnesses or alcoholism (R 1534). Dr. Langee was aware that his first psychiatric hospitalization was in 1959 at the State Hospital in Chattahoochee and that in December, 1968 he was again admitted to Chattahoochee adjudged as incompetent with a diagnosis of schizophrenia, paronoid type consistent with a history of alcohol deterioration. He testified that Roman was released in February, 1968, then sent back and remained for two years, was given tranquilizers and eventually

returned home to be treated in a mental health center (R 1534-1535). Dr. Langee was aware of Roman's numerous hospitalizations and testified as to his low I.Q. as well (R 1535).

Dr. Barnard again testified at the penalty phase on behalf of Roman, and **indicated that the medical records made available to him went back to 1958 (R 1553).** His testimony also chronicled Roman's long psychiatric history. Thus, it is clear from the record that counsel provided comprehensive medical records to the experts and properly investigated Roman's medical history. Such history was fully presented to the jury including his various hospitalizations, mental problems, alcoholism and low I.Q..

It was contended below as well, that Roman was in poor mental shape at the time of the arrest and that his mental condition contributed to his confession and that counsel should have more vigorously challenged such confession and used a mental health expert to refute the confession or suppress it.

The issue of Roman's mental condition, possibly rendering his confession involuntary, has been fully litigated at trial and on direct appeal. At the hearing on the motion to suppress, Dr. Barnard testified that he found no overt indication of mental illness at the time of the statement, nor any indication of intoxication. He stated that dull normal is at the lower end of average intelligence, assessed as neither retarded nor exceptionally bright. The sheriff and deputies testified that Roman was read Miranda warnings and that he indicated verbally that he understood them, that he was given no promises or threats, that he appeared **understanding** and **did not appear**

intoxicated, that he was given coffee and water and that he refused food. He was not handcuffed, and despite vomiting and trembling seemed alert and perceptive. This court conclusively found that the state's evidence demonstrated that his rights were read and **understood** and that he offered several times to sign the Miranda card after completing his taped statements. The court, therefore, refused to find his confession involuntary. Roman v. State, 475 So.2d 1228, 1232-1233 (Fla. 1985).

Roman's mental health was fully litigated, not only on the motion to suppress, but on direct appeal as it affected the voluntariness of his confession and all pertinent facts were brought out and decided against Roman. His confession was properly found to be voluntary as a matter of law. Counsel would not have prevailed on this issue, even with the use of a mental health expert which counsel was not required to employ in order to be deemed to have provided effective assistance.

While it was alleged in the 3.850 motion that Dr. Barnard did not know various facts such as the fact that Roman felt he had no rights; slept on the way to the stationhouse; nodded off during interrogation; acted like an alcoholic coming off a drunk; trembled, vomited, was silent during interrogation; and the fact that the police showed Roman pictures of the victim, Dr. Barnard did not appear and testify at the 3.850 hearing as to his lack of knowledge of these facts.

Roman had previously been adjudicated incompetent, so it is not extraordinary that he would comment that he had no rights but he subsequently made several offers to sign a written waiver form

after completing his taped statement. That he may have appeared sleepy on the day following the murder is not surprising since, by his own confession, he slept little the prior evening. His trembling has been explained in his own 3.850 motion as a preexisting condition since childhood. Many of Roman's previous incarcerations resulted in treatment for alcoholism in Eustis, and his remark to such effect was consistent with his denial of guilt. Moreover, the lower court found that such facts would have had no effect upon the court's finding of voluntariness, even with the use of a mental health expert. Moreover, as a matter of law, taking the statements of a defendant who is mentally ill without coercion on the part of the police is not constitutionally forbidden in the first instance. Colorado v. Connelly, 107 S.Ct. 515 (1986).

It was, further, contended below that Roman's actions that led to a finding of incompetency were consistent with his being in active psychosis as opined by Dr. Taubel in contradiction to the findings of Dr. Barnard and Carrera and, therefore, his mental condition at the time of the **offense** "could" likewise have been psychotic. In support of this claim it was averred in a 3.850 motion that Dr. Benarroche would testify to this fact. Such testimony would have merely constituted an after-the-fact opinion of a new psychiatric expert that differed with the opinion of the experts at trial and would have presented no compelling new information with which the court could find that Roman could possibly have been psychotic at the time of the offense. The fact remains, however, that Dr. Benarroche never

appeared and testified at the 3.850 evidentiary hearing in support of this contention. It was never demonstrated that anything other than the horrible facts of the crime and stress of incarceration upon an alcoholic were responsible for Roman's subsequent mental state or that such state existed at the time of the crime. The experts who did testify as to this issue admitted that legal insanity ebbs and flows. Dr. Fox's analysis was consistent with that of the experts at the time of the trial that if Roman was not drunk he was competent and sane and that Roman did not commit crimes during periods of mental illness in the **absence of alcohol.**

Moreover, contrary to Roman's further assertion, counsel did stress the fact that the court had found Roman mentally incompetent and the details of his competency were fully before the jury in cross-examination of Dr. Frank Carrera (R 1090-1096). The fact of his psychotropic medication was also before the jury (R 1092-1093). Dr. Barnard, further, never appeared at the 3.850 evidentiary hearing below to testify that at sentencing he would have found the mitigating factor of "extreme emotional distress" if asked by counsel. That a new doctor felt such could have been found is not compelling since Roman was appropriately found to have lacked the capacity to conform his conduct to the requirements of the law based on such history.

Roman also contended below that he was incompetent to stand trial and that trial counsel was ineffective for not requesting further testing at a competency hearing in violation of his Sixth, Eighth and Fourteenth Amendment rights. This claim, and

the testimony of experts pursuant to it is largely based on an affidavit and testimony from Public Defender Babb and Investigator David Franklin who spoke to Roman before jury selection for his trial about accepting an offer to plea to a life sentence. Babb indicated that Roman was tired of talking about his case and hung his head refusing to look at them. He felt that Roman, therefore, was not capable of making a rational decision about his case or aiding attorneys in his defense. Franklin indicated that there was absolutely no reaction from Roman. Roman contended that he should, therefore, have again been evaluated for competency despite a previous return to competency. The lower court found that such non-communication on Roman's part was more reasonably consistent with his being competent, having committed indefensible crimes against a two year old child, and that the conclusions of Babb and Franklin were contrary to logic and common sense and the exact opposite from the conclusion of the last mental health defense witness, Dr. Lekarczyk, who found him sane and competent.

Testimony during the evidentiary hearing reflects that on March 19, 1981, the investigator was able to communicate with Roman. It was the opinion of jail personnel that Roman was putting on, according to the testimony of defense attorney Julian Harrison. The defense attorneys testified that there was no behavior change by Roman to again challenge competency. Defense attorney Harrison testified that there was a marked difference in Roman after he was restored to competency than when he had seen him in jail, and there was no further basis for a competency

challenge. Defense counsel, in an abundance of caution, had Roman examined by defense expert Dr. Dorothy Lekarczyk and she found him sane and competent. Thus, there were no **reasonable grounds** under Florida Rule of Criminal Procedure 3.210 for counsel to raise the issue of competency.

Unlike Public Defender Babb, who in testimony at the hearing admitted that he was not at trial much, defense trial counsel and the trial judge were present during the duration of Roman's trial and found no evidence of incompetency or any basis on which to again require a competency determination. The lower court also properly gave little weight to the testimony of the new medical experts who have appeared on the eve of execution with only retrospective differing diagnoses. That Roman was uncommunicative in talking to Public Defender Babb is not surprising since testimony at the 3.850 hearing revealed that **numerous** people spoke to Roman to urge him to accept an offer to plead to a life sentence including the defense attorneys, so Public Defender Babb was not the first to strongly urge or badger Roman to accept such a plea agreement. Many clients reject a plea and go to trial, and this does not indicate that they are not capable of making a rational decision about the case. Moreover, the testimony of defense counsel Sam Power reflects that Roman, in rejecting the offer, was acting upon the advice of his family who had counseled him that he should not plead guilty because he would only be found not guilty and be sent back to the state hospital.

After Roman was sentenced to death, the testimony of

Attorney Power reflects that Roman requested to see him, and was rationally inquiring as to his appellate rights and how long such an appeal would take, which indicated to Power that Roman knew the proceedings he had been through. Power could not think of one fact from the time of trial to the present that should have caused him to question Roman's competency to stand trial so as to request a further evaluation.

The lower court correctly gave little weight to the testimony of Valerie Moss, who now seeks to contradict her previous finding that Roman was restored to competency, as she actually joined in a finding of competency at the North Florida Evaluation and Treatment Center, and despite her new contradictory opinion of Roman's competency, the **consensus** of the staff at that institution was that Roman was competent to stand trial.

The lower court, after an evidentiary hearing, also properly found that Roman was not denied effective assistance of counsel by failure to challenge the inconsistencies of witness testimony, unreasonable failure to impeach state witnesses and conceding that Roman committed murder.

In Roman's taped statement, in which he tried to blame Arthur Reese, he gave details that only one present at the time of the murder could give - the only problem was that Arthur Reese was not present, leaving Roman as the actual murderer (R 851-865). Experts determined that two pubic hairs and a scalp hair on the pink bedspread in which the body was wrapped were consistent with the pubic hairs and scalp hairs of Roman (R 937,

941). Further, fibers from the clothes worn by Roman the evening of the murder were present on the victim's tee shirt (R 972). In addition, Roman's clothing contained fibers which came from the mattress cover and innerspring cover of a bed located in the abandoned trailer (R 760-761). In essence, it is clear that defense counsel was clearly confronted with overwhelming evidence of Roman's guilt.

It is obvious that faced with this situation, Roman's counsel wisely chose to concentrate on an intoxication-based insanity defense. That a strategy employed by defense counsel did not prove successful from a defendant's point of view does not mean that representation was inadequate. Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982). Such insanity defense, however, was not to the exclusion of all other evidentiary areas subject to attack, as closing argument reflects. The lower court found that evidence of guilt was refuted up until Roman's damning confession was introduced and its impact on the jury perceived by counsel. In view of this, it was not unreasonable for counsel to make some concessions to the truth. In any event, a defendant's right to reasonably competent counsel does not entitle him to have every conceivable challenge pressed upon the court. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983). Moreover, the decision whether to cross-examine a certain witness is a tactical choice within the standard of competency expected. See, Armstrong v. State, 429 So.2d 287 (Fla. 1983); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982).

The initial opening statement of counsel was nothing more

than a concession to the obvious. When faced with the duty of attempting to avoid the consequences of overwhelming evidence of the commission of an atrocious crime, it is commonly considered a good trial strategy for a defense counsel to make some partial concessions to the truth in order to give the appearance of reasonableness and candor, and to thereby gain credibility and jury acceptance of a more important position. McNeal v. Wainwright, 722 F.2d 674, 676 (11th Cir. 1984).

Roman complains that defense counsel, in essence, sold his case away by concessions made initially in opening argument (R 1129). Such statements are not by far, however, the crux of the defense opening argument and it is clear from the remainder of the argument and the evidence in the case and the testimony of defense attorney Sam Power at the evidentiary hearing that the defense goal was to demonstrate that Roman had a mental condition of insanity by virtue of excessive and long continued use of intoxicants and his past psychiatric history (R 1131-1133).

Evidence was introduced at trial concerning Roman's mental state the night of the murder. The state's expert psychiatrists, Drs. Barnard and Carrera, testified that if Roman had not been drinking on the night of the murder, he would have known right from wrong and would have been sane (R 1029, 1083). To counter testimony of prosecution witnesses that they had not seen Roman drinking or that he was not drunk, the defense elicited testimony from Mildred Beaudoin, Wanda Pritchard and James Howton as to the fact that Roman was intoxicated (R 1135-1136, 1329-1330, 1345-1352). Defense expert Dr. Lekarczyk was called to testify that

had Roman been drunk, he would not have had the ability to reason accurately, that he would not have known right from wrong, and that he would have been insane (R 1260-1261, 1311). She stated that Roman was suffering from chronic alcohol syndrome resulting from excessive abuse of alcohol, and that he suffered and continues to suffer from schizophrenia (R 1260). She outlined his history of alcohol and incompetency as well.

Contrary to Roman's assertions, counsel did argue the inconsistency of testimony as to when the child was discovered missing (R 1455-1456). Smith checked on the child at midnight and she was still asleep. Mogg drove Beaudoin to work at 12:12 a.m. (R 559). Smith and Mogg left 5-20 minutes after Mogg returned (R 551; 609). Whether they drove four miles before discovering the child, or were gone an hour and a half, or discovered the child missing upon leaving would not create a time discrepancy that would exonerate Roman. Nor would he be exonerated if the child were actually taken prior to Mogg taking Beaudoin to work since Roman left the trailer before such time, was only in the trailer for a few minutes, and Smith, Mogg, and Reese all left together at a later time (R 492, 530, 564, 1157), leaving only Roman with access to the child. When they first went to the trailer is irrelevant considering that all statements indicate the time they returned was approximately 11:00 p.m., and the child was unmolested at midnight. Counsel also elicited ample testimony to support a theory of intoxication. The suggestion that Mogg's interview with the police had anything to do with police handling of Roman or the voluntariness of his

confession is ludicrous, and Roman's confession was properly challenged. Counsel further properly argued the inconclusiveness of fiber and hair analysis to the jury and did not have a duty to belabor the point in view of Roman's detailed confession.

In closing argument, defense counsel argued as to the unshakable credibility of Dr. Lekarczyk and Mildred Beaudoin (R 1451-1453). He discredited the state witnesses who testified that Roman was not drunk (R 1453). He also specifically discussed the inconsistencies in testimony of Smith, Mogg and Wolfe as to what time the baby was discovered missing (R 1455-1456). He further attacked Arthur Reese for having made a prior inconsistent statement in a deposition that Roman was drunk and fell over backwards in a chair, and had to be helped out of the trailer (R 1457). He argued as to the logic and correctness of testimony that Roman was drunk (R 1457-1460), and therefore legally insane pursuant to the psychological testimony (R 1459-1461). Counsel argued that the facts did not reflect premeditation (R 1462-1465). Counsel then discussed Roman's alcoholism (R 1465-1466), schizophrenia, past incompetency and borderline intelligence as corroborating Dr. Lekarczyk's diagnosis of insanity (R 1468). It was argued that based on the experts' testimony, Roman fit the criteria for insanity (R 1472). Counsel further discussed the lack of proof that Roman ever wore the clothes the crime lab examined (R 1472-1473), and the lack of testimony as to the reliability of fiber and hair matching analysis (R 1472-1474).

During the evidentiary hearing held on this claim, former

defense counsel Sam Power testified that counsels' primary trial tactic was to convince the defendant to accept a plea bargain in view of the overwhelming evidence of guilt and a likely sentence of death. When Roman refused to accept a plea which was in his best interest, relying upon the advice of family rather than counsel, the only plausible defense available, that relating to Roman's alleged insanity by virtue of chronic alcoholism, was developed and presented, albeit unsuccessfully, to Roman's jury. As indicated by Attorney Power, the concerted effort to establish and maintain credibility with Roman's jury would not have been advanced by offering every possible objection to the introduction of state's evidence and belaboring every inconsistency in witness testimony.

In reaching its determination that counsel was not ineffective, with respect to all allegations contained in the 3.850 motion, the lower court correctly afforded little weight to the testimony of Attorney Austin Maslanik, who failed to qualify as a legal expert on behalf of the defendant. Mr. Maslanik has only minimal experience with the issues of insanity and competency to stand trial and possesses less legal expertise in the capital litigation arena than one of the attorneys whom he currently criticizes for being ineffective.

III. REMAINING CLAIMS.

Roman's remaining claims are either procedurally barred or were properly decided as a matter of law by the lower court. The state relies on its response to the Florida Rule of Criminal Procedure 3.850 motion and the dispositive orders of the lower court in response to any argument thereon.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order denying the motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief of Appellee has been furnished by mail to Mark Olive, Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301, this 28th day of March, 1988.

Margene A Roper

Of Counsel
Margene A. Roper