IN THE SUPREME COURT OF FLORIDA

ROBERT LEWIS BUFORD,

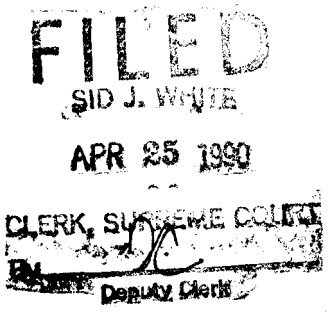
Appellant,

vs.

Case No. 72,592

STATE OF FLORIDA,

Appellee.



APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. **0143265**

STEVEN L. BOLOTIN
ASSISTANT PUBLIC DEFENDER

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL **33830**
(813) 534-4200

ATTORNEYS FOR APPELLANT

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PRELIMINARY STATEMENT

The state's brief will be referred to by use of the symbol "S". Other references are as denoted in appellant's initial brief.

This reply brief is directed to Issue I, concerning the life override. As to the remaining issues, appellant will rely on his initial brief.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN IMPOSING A SENTENCE OF DEATH, AS THERE WAS EXTENSIVE EVIDENCE OF STATUTORY AND NON-STATUTORY MITIGATING FACTORS TO SUPPORT THE JURY'S LIFE RECOMMENDATION, AND REASONABLE PEOPLE COULD DIFFER AS TO WHETHER DEATH OR LIFE IMPRISONMENT WAS THE APPROPRIATE SENTENCE.

"Law of the Case"

Contrary to what appears to be the state's main contention, "law of the case" is inapplicable to this appeal of appellant's death sentence, imposed by Judge Joe R. Young on June 1, 1988, after a new penalty evidentiary hearing held April 11-12, 1988. The resentencing was ordered because the original trial judge, in 1978, had failed to consider non-statutory mitigating circumstances, in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Hitchcock v. Dugger, 481 U.S. 393 (1987). The state now seems to think that, because the constitutional error in the original sentencing proceeding was remedied by order of a federal

court rather than a state court, that this Court on appeal should ignore all of the extensive mitigating evidence presented on resentencing, and simply rubber stamp the new death sentence based on its 1981 affirmance of the old - and constitutionally invalid - death sentence. For any number of reasons, the state is wrong.

First of all, as this Court has recognized, the "law of the case" doctrine does not apply where, subsequent to the original decision, new evidence bearing on the issues has been introduced. Steele v. Pendarvis Chevrolet, 220 So.2d 372, 376 (Fla. 1969); Mayflower Property, Inc. v. Watson, 233 So.2d 390, 392 (Fla. 1970). In Steele, this Court wrote:

> We agree with claimant that the Full Commission erroneously applied the "law of the case" doctrine. When the matter went back to the Industrial Judge with authority to take further testimony which developed new issues, the initial pronouncement was not necessarily binding. When a subsequent hearing or trial develops different facts and different issues, the "law of the case" doctrine will not preclude a conclusion at variance with the initially adjudicated result. Furlong v. Leybourne, 171 So.2d 1 (Fla. 1964). The Full Commission here relied on Wurwarg v. Lighthouse Restaurant, 131 So.2d 469 (Fla. 1964). There, the second order of the deputy was entered on the same record that had constituted the basis of the Full Commission's prior order. We held that "the law of the case" doctrine governed "unless the deputy commissioner exercised the authority to take further testimony and thereby buttress his original conclusion." In the case now here, the deputy did precisely that.

See also Johnson v. Bernard Insurance Agency,Inc., 532 F.2d 1382, 1384 (DC Cir. 1976); In re Kendarvis Industries International, Inc., 91 B.R. 742 (Bkrtcy N.D. Tex. 1988) ("law of the case" doctrine inapplicable where new evidence has been presented").

In the instant case, it was not even a question of the trial judge exercising his discretion to take further testimony. Compare Steele. Rather, because of the Hitchcock error, the original death sentence was invalid, and appellant was constitutionally entitled to an evidentiary resentencing proceeding. At that hearing, appellant presented extensive evidence of statutory and non-statutory mitigating circumstances (set forth at p. 10-21 of his initial brief), in support of his position that an override was improper under the Tedder standard. See initial brief, p. 27-41. The death sentence imposed by Judge Young in 1988 was plainly not entered on the same record as the death sentence imposed by Judge Norris in 1978. See Steele, distinguishing Wurwars v. Lighthouse Restaurant, 131 So.2d 469 (Fla. 1961). The intervening evidentiary penalty hearing, the new death sentence imposed on resentencing, and the constitutional invalidity of the old death sentence, are the critical facts which completely distinguish this case from Johnson v. Dusuer, 523 So.2d 161 (Fla. 1988), cited in Judge Young's sentencing order, and from the decisions relied on

in the state's brief.'

There are additional reasons why the "law of the case" doctrine cannot and should not be invoked to preclude review under the Tedder standard of all of the statutory and non-statutory mitigating evidence in this case. (1) When the original appeal was decided in 1981, this Court had not yet settled on a consistent standard of review in life override cases. See Cochran v. State, 547 So.2d 928, 933 (Fla. 1989). However, as further recognized in Cochran:

> Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.

(2) Application of the "law of the case" doctrine under the set of circumstances involved here would render the new penalty hearing meaningless; would perpetuate the constitutional error which necessitated resentencing in the first place; would violate the principles of Lockett and Hitchcock; and would result in manifest injustice. See, generally, Strazzula v. Hendrick, 177 So.2d 1 (Fla. 1965); Harris v. Lewis State Bank, 482 So.2d 1378, 1382 (Fla. 1st DCA 1986). (3) The interest of justice, substantive and

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[1] United States Gypsum Co. v. Columbia Casualty Co., 169 So.2d 532, 535 (Fla. 1936), quoted by the state (S.8), expressly recognizes that, in order for the "law of the case" doctrine to apply, the evidentiary facts on which the earlier decision was based must continue to be the facts of the case before the court.

procedural due process, and Florida's constitutional and statutory scheme of death penalty review support - indeed require - de novo review of the death sentence imposed by Judge Young after the 1988 penalty hearing. See Preston v. State, 444 So.2d 939, 942 (Fla. 1984).

The Override

Appellant agrees with the state that the presence of one or more mitigating factors does not automatically mean that an override is unwarranted. Pentecost v. State, 545 So.2d 861, 863 n.3 (Fla. 1989), receding from any implication to the contrary in Fead v. State, 512 So.2d 176, 178 (Fla. 1987). Where the evidence in mitigation is so weak and insignificant in comparison to the aggravating factors that virtually no reasonable person could differ from the conclusion that death is the appropriate penalty, this Court will affirm a life override. See Torres-Arboledo v. State, 524 So.2d 403, 413 (Fla. 1988) (only mitigating evidence was testimony of a psychologist that defendant was very intelligent and an excellent candidate for rehabilitation; latter conclusion was belied by defendant's subsequent commission of another murder); Thompson v. State, 553 So.2d 153, 158 (Fla. 1989) ("contract killing conducted in a professional manner by an underworld crime boss"; five valid aggravating circumstances, no statutory mitigating circumstances, and very little non-statutory mitigating evidence). Torres-Arboledo and Thompson, however, are two of the very few overrides which have been upheld in recent years.

See this Court's discussion of the Tedder standard in Cochran v. State, 547 So.2d 928, 933 (Fla. 1989). In cases in which there was any significant mitigating evidence which, weighed against the aggravating factors, could allow reasonable people to differ as to whether death or life imprisonment was the appropriate sentence, this Court has consistently reversed the override. As emphasized in Cochran, "Tedder means precisely what it says." A representative sample of reversals under Tedder where the totality of the mitigating evidence was comparable to (or in some instances lesser than) that in the instant case includes the aforementioned Pentecost decision (545 So.2d at 862-63), as well as Holsworth v. State, 522 So.2d 348, 354 (Fla. 1988); Masterson v. State, 516 So.2d 256, 257-58 (Fla. 1987); Fead v. State, 512 So.2d 176, 178-79 (Fla. 1987); Huddleston v. State, 475 So.2d 204, 206 (Fla. 1985); Norris v. State, 429 So.2d 688, 690 (Fla. 1983) (override reversals based in part on evidence of defendant's alcoholism, drug abuse, and/or intoxication at the time of the crime); Freeman v. State, 547 So.2d 125, 129 (Fla. 1989); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986); Huddleston, 475 So.2d at 206; Norris, 429 So.2d at 690; Cannady v. State, 427 So.2d 723, 727, 731 (Fla. 1983); McKennon v. State, 403 So.2d 389, 391 (Fla. 1981) (override reversals based in part on defendant's age);[2] Pentecost, 545 So.2d at 863; Wasko v. State, 505 So.2d 1314, 1318 (Fla. 1987); Irizarry v. State, 496 So.2d 822, 825 (Fla. 1985); Huddleston, 475

[2] Appellant was 19 at the time of the crime - younger than the defendants in Huddleston, Cannady, and Freeman, and the same age as Amazon and Norris.

So.2d at 206; Rivers v. State, 458 So.2d 762, 764-65 (Fla.1984); Cannadv, 427 So.2d at 731 (override reversals based in part on defendant's lack of a significant history of criminal activity or violence); Burch v. State, 522 So.2d 810, 813 (Fla. 1988); Brown v. State, 526 So.2d 903, 907 (Fla. 1988) (override reversals based in part on defendant's impoverished and neglected childhood, or family history of alcoholism).

Probably the closest case factually to the instant case is Wasko, in which this Court reversed the override on considerably less mitigating evidence than is present in the instant case. Here, there was substantial evidence from which reasonable people could find at least three, and probably four, statutory mitigating factors [(1) age [19]; (2) no significant history of prior criminal activity; (3) substantial impairment of appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; and (4) extreme mental or emotional disturbance],[3] along with a number of significant non-statutory mitigating circumstances arising from appellant's deprived and neglected childhood; his family history of alcoholism; his

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[3] Dr. McClane unequivocally stated the opinion that appellant's capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law were substantially impaired. (SR132, 135, 145) Regarding the extreme mental or emotional disturbance mitigating factor, McClane was not sure whether appellant's condition fell within the legal definition, but "from the purely psychiatric sense'' he believed that it did apply. (SR143) McClane further testified that appellant had been under mental or emotional disturbance for his whole life from the age of six or seven. (SR142-43) See Cannady, 427 So.2d at 731; Amazon, 487 So.2d at 13; Fead, 512 So.2d at 179. Dr. McClane's conclusions were corroborated by the report of Dr. Amin, which was admitted into evidence. (SR9-12, 168-69)

assumption of the responsibility (because of the parents' default) of taking care of his five younger siblings at an age when he was far too immature to cope with it; and the resulting anxiety and depression which contributed (along with the example set by his parents) to his becoming a serious alcoholic by his mid-teens, and to his being intoxicated on alcohol and/or druas virtually every night for the three or four years precedina the commission of the offense. From appellant's 1978 trial testimony, corroborated by the testimony of Richard Bennett and Dr. McClane on resentencing, reasonable people could conclude that he was drinking heavily and using marijuana and pills throughout the day and night of the crime, and was "staggering drunk" and incoherent by the time he encountered his cousins in front of Tiki's bar. Dr. McClane testified that, in his opinion, appellant was intoxicated at the time of the offense. The crime was out of character for appellant, who had no prior history of violence or sexual deviancy. Dr. McClane stated the opinion, in response to the trial court's question, that the crime was not the act of a person devoid of morals and "not a pattern of a sexual pervert with a propensity toward children", but rather a bizarre, isolated event which occurred in a state of intoxication.

Clearly it cannot be said that no reasonable person, weighing all of this mitigating evidence against the two aggravating factors found by the trial court, could differ from the conclusion that death is the appropriate sentence. See e.g. Pente-

cast; Holsworth; Masterson; Wasko; Amazon; Huddleston; Norris; Cannady.

Finally, with regard to the state's argument that the death sentence should be presumed correct (S12-13), appellant would refer again to the Cochran opinion (Tedder means exactly what it says), and also to Ferry v. State, 507 So.2d 1373, 1376-77 (Fla. 1987), in which this Court soundly rejected the state's contention:

> The state ... suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, and that contained in his initial brief, appellant respectfully requests that the Court vacate the death sentence,

and remand for imposition of a sentence of life imprisonment without possibility of parole for twenty-five years, in accordance with the jury's life recommendation.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 23rd day of April, 1990.

Respectfully submitted,

Steven L. Bolotin

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NUMBER 0143265

STEVEN L. BOLOTIN
Assistant Public Defender
P. O. Box 9000 - Drawer PD
Bartow, FL 33830
(813) 534-4200

SLB/an