IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES PATRICK BONIFAY,

Appellant,

v. CASE NO.: 84,918

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY, FLORIDA

Division "A"
Honorable Michael Jones, Presiding

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PRELIMINARY STATEMENT

In this Reply brief, the Appellant, Mr. Patrick Bonifay, will be referred to by name or as the Appellant or Defendant. The Appellee will be referred to as the State.

Citations to the record on appeal will be made by the letter "R", followed by the appropriate page number. The transcript of the Penalty Phase hearings will be referred to by "TR", followed by the appropriate page number.

RESPONSE TO APPELLEE'S STATEMENT OF THE FACTS

The Defendant objects to the State's *in toto* recitation of the lower court's sentencing order in its Answer Brief as needlessly repetitive of the record on appeal, and presented solely to prejudice the Defendant. Further, as the State has done in its Answer Brief, the Defendant will cite specific references to the record and trial transcript in the body of the argument, below.

ARGUMENT

ISSUE ONE

> The Court failed to make a specific finding in its Sentencing Order regarding the weight of the Defendant's expert uncontroverted evidence of a pathological medical condition, and that the organic brain damage did not substantially impair or affect the Defendant's ability to appreciate the criminality of his acts, or to conform his conduct to the requirements of the law.

Without surprise, the State in its Answer Brief attempts to minimize the trial court's failure to properly weigh the Defendant's organic brain syndrome ("OBS") damage, and its cause and effects, as presented by the Defendant's expert, Dr. Larson during the penalty phase below. The State also quite incredibly

asserts that "Dr. Larson himself waffled on the question of whether Bonifay has organic brain damage." Appellee's Answer Brief, pg. 23. However, Dr. Larson testified unequivocally that the Defendant had organic brain damage, stating, "**yes, there is organic damage.**" (TR-363)(emphasis supplied).

Dr. Larson further stated that the Defendant's attention deficit disorder ("ADD") meant "that the brain isn't functioning quite right in a fairly significant kind of way . . . ," and that it could have been caused by a number of different reasons, among them, "brain injury, insult to the head, a lack of oxygen at birth . . . [and possibly from] . . . a genetic component (TR-363, 368). This system [ability to concentrate and attend], "was very much impaired . . . ," and was an "organic factor." (TR-363, 364). In addition to the cognitive ADD disorder, Dr. Larson stated that the Defendant manifested several other psychological disorders, including "borderline personality characteristics and antisocial characteristics," and depression, but because he was not asked, he did not conclusively attribute those idiosyncratic deformities to either an organic or a behavioral source (TR-361). Dr. Larson also stated that an earlier diagnosis of the Defendant indicated a penchant for impulsive, uncontrolled outbursts of physical aggression and anti-social behavior (TR-365, 373). The Defendant's personality exhibited possible irrationality and instability; he is subject to severe mood swings; and is prone to being easily guided by others (TR-369). Dr. Larson noted that the Defendant was placed in emotional handicapped classes for a number of years due to the

ADD, and his "cognitive disorder," and that he had been "psychiatrically hospitalized and under the treatment of a local psychiatrist" in the year preceding the crime (TR-360, 361). The Defendant also suffers from a negative self-image due to an alcoholic, disruptive and physically abusive home environment, and is in conflict with peers and authority figures (TR-364, 365). In addition, there was testimony that the Defendant and his mother were abandoned by the father, and Dr. Larson discovered from several sources that the Defendant had been sexually abused by his natural father (TR-364, 370). Further, the Defendant exhibits symptoms of suicidal impulses and ideation, and is both compulsive and impulsive (TR-364, 365).

With the exception of the sexual abuse, all of the above indicate the symptomatic presence of abnormal behavior that cannot be said <u>not</u> to be derivative of the Defendant's admitted OBS. In fact, Dr. Larson specifically linked the ADD to possible traumatic injury, lack of oxygen at birth, or an inherent genetic defect. Since the lower court did not specifically address the possible cause and effect relationship of the OBS to the Defendant's present and past criminal conduct, psychological composition, and general maladaptation in life, its findings are suspect. Thus, because the possible organic source of the Defendant's criminal behavior was not evaluated, the court erred when it assigned very little if any weight to this factor in determining that the Defendant was not impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

As the United States Supreme Court has stated and this Court has affirmed, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it **no weight by excluding such evidence** from their consideration. Campbell v. State, 571 So.2d 415 (Fla. 1990)(emphasis supplied), citing Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (original emphasis and footnote omitted). This Honorable Court has further stated that the Defendant is not required to prove he was insane to have the "appreciate or conform" mitigator evaluated and weighed, however, because "[t]he finding of sanity . . . does not eliminate consideration of the statutory mitigating factors concerning mental condition." Campbell, supra, 571 So.2d 415 (Fla. 1990); Mines v. State, 390 So.2d 332 (Fla. 1980). This Court has also made clear that "when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved." Knowles v. State, 632 So.2d 62 (Fla. 1993); Nibert v. State, 574 So.2d 1059 (Fla. 1990); Campbell v. State, 571 So.2d 415, 419.

Since death cases are different, and the findings in support of a death penalty must be of "unmistakable clarity," Lucas v. State, 568 So.2d 18, 24 (Fla. 1990), the sentencing result here

cannot be relied upon because of the lingering question of the non-quantified effect of the OBS on the Defendant's instant conduct, personality formation, and criminal history, and the lower court's failure to consider it. The Defendant presented a reasonable quantum of competent, uncontroverted evidence of OBS, and this evidence was not critically evaluated by the sentencing court. For this deficiency alone, the Defendant must, at minimum, be reevaluated by experts to determine the extent and ramifications of the OBS on his mental, emotional, and moral capacities, and the lower court must thereafter reassess its sentence.

ISSUE TWO

The evidentiary record of enumerated mitigating circumstances and their weight in comparison to the aggravating circumstances does not support the Court's sentence of death, and the evidence does not otherwise support the findings and/or conclusions of this court.

As argued under Issue One, above, a true weight of the Defendant's mitigating circumstances cannot be ascertained without a comprehensive evaluation and weighing of the Defendant's OBS. Therefore, with the OBS issue unresolved, the sentencing court could not properly and logically compare the mitigators to the aggravators, with the result that the aggravators cannot support the sentence of death in accord with due process of law. The court's sentence of death must necessarily therefore be reversed.

ISSUE THREE

The evidence does not support the Court's conclusion that the Defendant is not capable of rehabilitation.

The Defendant incorporates by reference his previous argument on this issue as asserted in the Initial Brief.

ISSUE FOUR

The prosecutor's repeated biblical alliterations, references, analogies, comparisons, invocation of Godly judgments, and request for the jury to "exterminate" the Defendant inflamed the emotions and prejudiced the jurors' sensibilities by urging them to abdicate their own responsibility to weigh the evidence under the law, and to instead, weigh the Defendant.

Without repeating the Defendant's explication of his previous argument on this issue at length here, the Defendant nevertheless incorporates by reference his previous argument as asserted in the Initial Brief. It is readily apparent, and in fact verbatim in this case, that the State invited the penalty jury to play God and to exterminate the Defendant. Just as God's "writing was on the wall" meant doom before sunset for Belteshazzar in the Old Testament, the State likewise urged that God's writing was on the wall for Bonifay in the instant case, and it spelled "Bonifay must die by extermination." As argued previously, the prosecutor's divine admonitions were less than subtle in directing the jury to reach the conclusion that God Almighty had obviously already reached, i.e., an eye for an eye and Bonifay must die. Yet, as one sagacious Justice recently stated, "[w]hen a prosecutor tells jurors that they will be as evil as the defendant if they fall to vote in accordance with the State's view of the evidence, the error is fundamental and the defendant has been denied the right to a fair trial. King v. State, 623 So.2d 486 (Fla. 1993)(Justice Barkett, concurring opinion). While the prosecutor did not tell the jury that they would be evil if they did not weigh the facts properly, he nevertheless implied that their responsibility to

weigh the facts was a foreknown and foregone divine conclusion.

Responding to similar arguments, this Court has held that "[c]losing argument must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant," Bertolotti v. State, 476 So.2d 130 (Fla. 1985)(internal quotations omitted), and that if "[c]omments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument." Garron v. State, 528 So.2d 353 (Fla. 1988). Of course, even emotional and fearful prosecutorial comments can be harmless, however, if there is no reasonable possibility that those comments affected the verdict. King, supra, citing Watts v. State, 593 So.2d 198 (Fla. 1992), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3006, 120 L.Ed.2d 881 (1992); State v. Murray, 443 So.2d 955 (Fla. 1984).

Because it cannot be said with certainty in the instant case that the prosecutor's combined dehumanizing characterization of the Defendant and his prophet-like request for the Defendant's extermination was not such prejudicial prosecutorial misconduct that it vitiated the entire trial, however, the instant sentence of death must be reversed.

ISSUE FIVE

The Court erred in not declaring a mistrial when the prosecutor urged the jury to "exterminate" the Defendant.

The Defendant incorporates by reference his previous argument on this issue as asserted in the Initial Brief, and in Issue Four, supra.

ISSUE SIX

The Court erred in allowing the State to introduce evidence of the victim's begging for his life and referring to his wife and children, since this evidence was used to inflame the jury's emotions, appeal to their sympathy, and to tacitly urge them to find a "heinous, atrocious, and cruel" aggravator on facts which, absent the prejudicial references, were only supportive of the "cold, calculated and premeditated" aggravator.

In the penalty phase re-trial, the State elicited in testimony or raised in opening statement and closing argument, at minimum, fifteen separate references to the victims' begging or pleading for his life and/or for mercy because of his wife and children. This inflammatory testimony and argument was not necessary to prove the "heightened premeditation" component of the cold, calculated, and premeditated aggravator ("CCP"), because the State had amply proved through multiple witnesses and the Defendant's own prior testimony and statements, that the original plan to burglarize the auto parts store was premised on the Defendant's willingness to murder the victim for hire.[1]

The lower court recognized this "heightened premeditation" component in its sentencing order and called the crime a "classic case of a murder for hire -- a contract murder"

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[1] This Court has held that the HAC and CCP aggravators rest on "separate factual predicates . . . . ," and that "[t]he factor of heinous, atrocious and cruel arises from the **means actually employed** in the killing; the factor of cold, calculated and premeditated refers to the degree of calculation and planning that preceded the killing." Hardwick v. State, 521 So.2d 1071 (Fla. 1988)(emphasis supplied). The State's evidence of the victim's pleas here, more aptly describes the factual predicate which determines the presence of the HAC aggravator, previously disallowed in this case by this Court's prior opinion. Bonifay v. State, 626 So.2d 1310 (Fla. 1993).

(R-105). The Court also found that since the scheme to murder the intended victim was not impulsive but was carried out with planning "over a period of days," the Defendant was left with "ample time for reflection." (R-105). Thus, the State's interjection of fifteen separate inflammatory references emphasizing the victim's begging and pleading were irrelevant to prove the "heightened premeditation" component of the CCP aggravator or any other material fact in issue. These references clearly established the victim's pleas as an emotional feature and hingepin of the State's case; they inflamed the jury's passions against the Defendant; and they doubtless secured the death penalty for the State. Resultantly, the sentencing proceeding rests on emotion instead of reason, and must be reversed.

ISSUE SEVEN

The State presented improper victim impact evidence and argument to the jury, the Defendant moved for a mistrial, and the Court erred in not granting it.

As indicated in Defendant's Initial Brief, at the penalty-phase re-trail the State called Sandra Faye Coker, the decedent's widow. Ms. Coker's testified that her husband's death caused "severe damage to [her] health," and that she had "nearly hemorrhaged to death, back in January. I've had to be put on high blood pressure pills, my thyroid is all messed up because of stress and just worry from all of this, how he was murdered." (TR-329)(emphasis supplied). Counsel for Defendant objected at this point, preserving the issue, and arguing that victim impact evidence was limited to the "victim's uniqueness as an individual

to the community [and not to the widow of the victim]." (TR-330)

The prosecutor then argued erroneously that the testimony was relevant victim impact evidence because every homicide impacts "certain members of the community, mainly their family," and that "obviously, we're talking about impact on the victim, that's why they call it victim impact." (TR-330, 331). Recognizing the error, the Court then attempted to cure, stating, "[m]embers of the jury, I hereby instruct you that you may consider the previous testimony of Mrs. Coker only so far as it demonstrates the victim's, Mr. Coker's uniqueness as an individual human being and the resultant loss to the community's members by Mr. Coker's death. Thank you." (TR-333).

Notwithstanding this attempted curative instruction, Ms. Coker later answered non-responsively that, "I don't know if I'm allowed to say this or not . . . but when I lost my husband, it hurt so much that no matter what may come or may not come, nothing is going to help that area because you can't replace a human life, you know." (TR-335). Defendant's counsel later moved for mistrial on his earlier objection, which was denied. (TR-339).

The State cavalierly dismisses the emotional impact of the wife's testimony as to the murder's repercussions to her, individually, claiming that the testimony meets the *per se* permissible standard enunciated in Payne v. Tennessee, ___ U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). However, this Court in Hodges v. State, 595 So.2d 929 (Fla. 1992), *cert granted and judgment vacated on other grounds,* __ U.S. __, 113 S.Ct. 33, 121

L.Ed.2d 6 (1992), clarified Payne, and recognized that while victim impact evidence may be *per se* admissible under §921.141, Fla. Statutes in the sentencing phase, it is **not** admissible for characterizations and opinions by family members about the crime, the defendant, or the appropriate sentence. Id. at 933 (emphasis supplied).

Here, the State introduced impact evidence of the victim's death upon the victim's wife, which had nothing to do with the victim's "uniqueness as an individual human being and the resultant loss to the community's members by [his] death." Ms. Coker was further allowed to emotionally characterize "how [the victim] was murdered" as the cause of her mental and emotional distress. Coupled with the State's fifteen references to the victim's pleading for himself, his wife, and his family, the prejudicial import of Ms. Coker's reference to the impact of the manner of her husband's death was prejudicial and reversible error. Her testimony did not offer any edification to the jury concerning the victim's uniqueness to the community at large, and through testimony evoking impermissible emotion and sympathy, it functioned to invite the jury to imagine the victim's final pain, terror and defenselessness, and its emotional impact on his wife. Although before the jury was the victim's **wife** and not the victim, the State's incessant emotive testimony invited the jury to stand in the shoes of the victim calling out his dying thoughts to his wife, i.e., the testifying witness, and of his family.

Here, as in Taylor v. State, 640 So.2d 1127, 1138-39

(Fla. 1st DCA 1994), the prosecutor's comments and Ms. Coker's testimony "were designed to evoke an emotional response to the crimes or to the defendant, and fall outside the realm of proper argument [or evidence]." Similarly, continued reference to the victim's last words and the emotional testimony of the victim's wife as to how the manner of the murder impacted her, were harmful error within the contemplation of King and Bertolotti, supra.

There is thus a reasonable possibility that the error of admitting this prejudicial evidence when combined with the prosecutor's comments affected the jury's recommendation of death. Aggregated with the other prejudicial error that occurred, it cannot be said that the recommendation of death was not compelled by these inflammatory improprieties, and that this evidence did not prejudice the jury. Since the State has not met its burden of proving that it did not, and since the taint of the prejudice cannot be said to have been cured by the court's instruction, the sentence of death must be reversed.

ISSUE EIGHT

The cumulative effect of the Court's combined errors was prejudicial and fundamental error, requiring review.

The Defendant incorporates by reference his previous argument on this issue as asserted in the Initial Brief, and would reiterate that the cumulative, prejudicial effect of the non-curable errors in the re-trial were harmful within the contemplation of State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), and require a reversal and re-trial.

CONCLUSION

Because the court failed to evaluate the Defendant's organic brain damage, it assigned an improper weight to the Defendant's potential for rehabilitation and his inability to appreciate the criminality of his acts or to conform to the requirements of the law. The court did not specify how it assigned weight to the mitigators, and it compared the statutory and non-statutory mitigators to the aggravators without detailing the results of either the weighing or the comparison. This was improper under the Court's guidelines for establishing a reviewable record, and the case must therefore be remanded for resentencing.

The prosecutor swayed the jurors' emotions by improper and prolonged references to God; he improperly compared the Defendant to undesirable biblical figures and asked the jury to "exterminate" him; he urged the jury to weigh the Defendant rather than evaluate the facts; he appealed to the jurors' sympathies by putting on improper victim impact evidence; and he referred numerous times to the victim's begging for life, all of which constitute prejudicial and reversible error.

The court erred in allowing the victim's "begging" testimony; in not granting *sua sponte* a mistrial for the prosecutor's "extermination" recommendation; and in not granting a mistrial for the improper victim impact testimony. All of these errors, whether taken singly or combined, and certainly when viewed with the overall conduct of the trial, deprived the Defendant of a fair trial, and require reversal for a new penalty phase trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Curtis M. French, Assistant Attorney General of the State of Florida, the Capitol, Tallahassee, FL, by United States Mail, on this the 29th day of February, 1996.

MICHAEL R. ROLLO