IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-166

DANIEL BURNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT, IN AND FOR MANATEE COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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Comes now, the Appellant Daniel Burns, by and through the undersigned counsel, hereby files this Reply Brief and states:

ISSUE I

APPELLEE IS INCORRECT IN STATING THAT THE LOWER COURT DID NOT ERR IN DENYING MR. BURNS' CLAIM THAT HIS RESENTENCING COUNSEL WERE INEFFECTIVE FOR FAILING TO PRESENT AVAILABLE MENTAL MITIGATION EVIDENCE

In the Answer Brief Appellee argues that the lower court order finding that the decision by resentencing counsel not to present mental mitigation evidence was "strategic" is supported by substantial competent evidence in the record (Appellee's Answer Brief at 41). However, the state is unable to point to any evidence within the record which supports a "strategic" decision by resentencing counsel not to present mental mitigation evidence. The transcript of the resentencing proceeding and a letter written by counsel to Dr. Berland are referred to by the state as evidence of a "strategic" decision (Appellee's Answer Brief at 43). A review of the transcript referred to in the state's brief reveals only that counsel informed the court at the resentencing proceeding that Dr. Berland would be available Wednesday to testify and that he did not know at that time whether Dr.

Berland would be called as a witness (R. 1614). As to the letter referred to in the state's brief, resentencing counsel merely wrote Dr. Berland stating he was considering calling him as a witness at the Spencer hearing and would try and decide whether to do so in the next two weeks (PCR. 116-117). Neither of these two references are substantial competent evidence of a "strategic" decision not to call Dr. Berland at the resentencing procedure or the Spencer hearing. The fact that resentencing counsel was contemplating whether to call Dr. Berland at the resentencing proceedings does not establish that the decision not to call him was "strategic" in nature. Both resentencing counsel testified repeatedly at the evidentiary hearing that the decision not to call Dr. Berland to testify as to mental mitigation evidence was **not** strategic (PCR. 437,438, 440, 442, 457,458, 474). Resentencing counsel were in the best position to know whether the decision not to call Dr. Berland to testify as to mental mitigation was "strategic" in nature. The lower court erred in ignoring the direct testimony of resentencing counsel and imputing a "strategic" decision where none existed.

The state further argues that the lower court did not rely upon an alleged inconsistency with presentation of mental mitigation evidence and efforts to "humanize" Burns and difficulty in overcoming state rebuttal witness Dr. Merin as factors in support of a "strategic" decision not to present Dr. Berland to testify as

to mental mitigation evidence (Appellee's Answer Brief at 42). However, the following excerpt from the lower court's order directly refutes the states argument:

> The trial strategy of counsel herein is akin to that of defense counsel in the case of *Rutherford v. State*, 727 So.2d 216, 212 (Fla. 1999). Here, as in *Rutherford*, the mitigation strategy focused on the "humanization" of Burns.
>
> > The theory on mitigation was to make Burns look as human as possible, knowing the jury had convicted him and he is now a convicted person, try to humanize him .....as a good fellow, good father, a good citizen ...loyal ...trustworthy, friendly.
>
> Similar to the conclusion in *Rutherford* , this court finds that trial counsel
>
> > was aware of the possible mental mitigation but made a strategic decision under the circumstances of this case to instead focus on the "humanization" of Burns through lay testimony. "Strategic decisions do not constitutes ineffective assistance of counsel if alternative courses of action have been considered and rejected.

(P-CR. 398-399)

Clearly the court found a strategic decision based upon an alleged inconsistency between attempts to "humanize" Mr. Burns and the presentation of

mental mitigation evidence. However, the record in the case is completely devoid of any evidence of strategic decision based upon this alleged inconsistency. In fact, resentencing counsel Metcalfe specifically testified on this issue as follows:

> Q. The fact that you did present some evidence of mitigation in this case, was that in any way a reason for not calling Dr. Berland in this case?
>
> A. No

(PC-R 458)

> Q. Was there anything about the testimony you presented in the way of mitigation that was inconsistent with Doctor Berland's opinionions concerning the mental condition of Mr. Burns at the time of the homicide?
>
> A. No, none. In fact, there was a strong indication that living in Mississippi, being a black person during that time, was not an easy thing, that there was a tremendous general fear among not only Daniel but other members of his family about police, fear of police. Just was a...they talked about it.

PC-R 472

Further, the lower court did not explain how the efforts to "humanize" Mr. Burns would be inconsistent with evidence of brain damage and statutory and nonstatutory mental mitigation. Persons with brain damage and Chronic Ambulatory Psychotic Disturbance are no less human than anyone else. Rather than serving to dehumanize Mr. Burns, the available mental health mitigation would

have served to explain his actions in shooting the Trooper. Such is the essence of mental mitigation testimony. The findings by the lower court reflect a fundamental misunderstanding of the meaning and purpose of mental mitigation evidence. Given the circumstances and the state of the evidence, it is understandable that the state would attempt to remove this as a consideration by the lower court for it's conclusion that the decision not to call Doctor Berland to testify was "strategic" in nature. However, the lower court's order clearly relies upon this nonsensical and wholly unsupported reasoning. This flawed reasoning is merely a missplication of the law and an unreasonable finding of fact in an attempt to manufacture a strategic decision.

Both the lower court and the state rely upon *Rutherford v. State*, 727 So.2d 216 (Fla. 1998), as support for the finding that the decision not to present mental mitigation evidence was "strategic" in nature. *Rutherford* is clearly distinguishable from the facts and circumstances of Mr. Burns' case. In *Rutherford*, the lower court found three aggravating factors of HAC, CCP, and committed in the course of a robbery. Id at 218. The lower court found one non-statutory mitigator of no significant criminal history. Id. Rutherford presented a 3.850 ineffective assistance of counsel claim based upon failure to present opinion testimony of two psychologists regarding post-traumatic stress disorder and alcohol dependency. Id.

at 221. Counsel had obtained competency evaluations which contained a notation of history of alcoholism and anxiety disorder resulting from combat experience in Vietnam. Id. At the 3.850 hearing, trial counsel testified that he intentionally did not present the competency evaluation to the jury because they contained episodes of previous violence and reference to time in jail for assault and battery charges. Id. The decision was made to forego other evidence of alcoholism and PTSD and instead focus on "humanization" of *Rutherford*. This Court upheld the lower court's finding that the decision was reasonable. Id. at 224. This Court also found that since there was no evidence presented as to statutory mitigators, no prejudice was found due to the nature of the mitigation and the multiple and substantial aggravators. Id. at 225.

The facts of the *Rutherford* case are completely different than in Mr. Burns' case. In *Rutherford*, counsel testified as to an informed strategy not to present the competency evaluation to the jury to avoid revealing a violent criminal history. In Mr. Burns' case, both resentencing counsel testified there was no strategic decision associated with failing to present mental mitigation evidence. Furthermore, in Mr. Burns' case, unlike *Rutherford*, both mental health experts testified at the evidentiary hearing as to the existence of both statutory mental health mitigators. Also, in Mr. Burns' case, unlike *Rutherford*, there is only a single aggravator to be

weighed against the uncontroverted substantial evidence of brain damage supported by objective neuropsychological testing and expert testimony as to the existence of the two statutory mental mitigators. For these reasons, both the lower court and the state erred in reliance on *Rutherford*.

The state further argues there was no prejudice associated with the failure of resentencing counsel to present mental mitigation evidence in Mr. Burns' case. In support of this position, the state cites several cases in which there was no finding of prejudice for failing to present mental mitigation evidence. However, all of the cases cited are multiple aggravator cases. (*See Breedlove v. State*, 692 So.2d 874 (Fla. 1997) (three aggravators); *Haliburton v. State*, 691 So.2d 466 (Fla. 1997) (four aggravators); *Tompkins v. Dugger*, 549 So.2d 1076 (Fla. 1989) (three aggravators); *Buenoano v. State*, 592 So.2d 1076 (Fla. 1992)(four aggravators)).

In Mr. Burns' case there is only one aggravator. The *Songer* case, cited in Appellant's Initial Brief, involving a single aggravator and the shooting death of a Florida Highway Patrol Officer, is directly on point with the facts and circumstances of Mr. Burns' case. In *Songer*, this Court vacated the death sentence due to only one aggravator and the existence of two statutory mental health mitigators. *Songer* at 1011. This Court clearly stated that affirmation of a death sentence with only one aggravator is proportional only in those cases

involving nothing or very little in mitigation. Id. The state's reliance on cases where multiple aggravators were proven is misplaced. Since in Mr. Burns' case there was only one aggravator proven, the reasoning of *Songer*, and not the cases cited by the state, more aptly apply. Prejudice is clearly established in Mr. Burns' case when weighing the single aggravator against the substantial evidence of brain damage and the existence of the two statutory mental health mitigators.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY BRIEF OF APPELLANT which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this_____day of November 2001.

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