IN THE SUPREME COURT OF FLORIDA

NO. 71,286

ANTHONY BERTOLOTTI,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS AND
APPLICATION FOR STAY OF EXECUTION

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The respondent, by and through undersigned counsel, hereby moves this honorable court to deny the instant petition for writ of habeas corpus and the motion for stay of execution and in support thereof states:

PROCEDURAL HISTORY

For purposes of this proceeding the procedural and factual history of this case is set forth in this court's opinion on direct appeal. Bertolotti v. State, 476 So.2d 130 (Fla. 1985). At the same time that the instant petition was filed, a Florida Rule of Criminal Procedure 3.850 was filed on Bertolotti's behalf by the Capital Collateral Representative and argument was heard on October 23, 1987. Judge Stroker denied a stay of execution and scheduled a limited evidentiary hearing for 1:30 p.m., November 6, 1987. This petition should be held in abeyance until the Rule 3.850 claims are finally decided. Rose v. Dugger, 508 So.2d 321, 323 (Fla. 1987). Bertolotti's execution is **scheduled for 7:00 a.m.** on November 16, 1987, pursuant to a death warrant signed on September 15, 1987.

HABEAS CORPUS ARGUMENT

While challenges to the effectiveness of counsel on direct appeal are properly advanced by a petition for writ of habeas corpus, see, State v. Stacey, 482 So.2d 1350 (Fla. 1986); Perri v. State, 441 So.2d 606 (Fla. 1983); the instant petition cannot support issuance of the writ or a stay of Bertolotti's scheduled execution.

The issue before the appellate court when entertaining an appellate ineffectiveness challenge is limited to, first, whether the alleged errors are serious and substantial deficiencies falling outside the wide range of reasonable professional performance, and second, whether the deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the appellate outcome. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Pope v. Wainwright, 496 So.2d 798 (Fla. 1986). The merits of any allegedly omitted argument are not before the court and the proceeding is not in the nature of a second appeal. The standard used for assessing claims of

ineffective assistance of appellate counsel is the same standard used to judge trial counsel's performance. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985); Strickland v. Washington, 466 U.S. 668 (1984).

The right of the accused to reasonably competent assistance of legal counsel does not entitle him to have every conceivable constitutional challenge pressed upon the court. Engle v. Isaac, 456 U.S. 107 (1982). "Appellate counsel's responsibility is to present those contentions that are most likely to be successful, taking into consideration the limitations of time and space that necessarily accompany the taking of an appeal." Thomas v. State, 421 So.2d 160, 164 (Fla. 1982). Even though a lawyer who does not raise some possibly arguable matter on appeal does not consciously bypass an issue, but simply is not struck with its possible arguability when reviewing the record, it does not mean that the counsel was not functioning as legal counsel in a meaningful way. Johnson v. Wainwright, 463 So.2d 217, 211 (Fla. 1985).

If there is no objection made by trial counsel, appellate counsel is precluded from raising the issue on appeal. Davis v. Wainwright, 497 So.2d 857 (Fla. 1986). Similarly, absent a proffer of excluded testimony, appellate counsel cannot be ineffective for failing to argue that the exclusion was error. See, Jacobs v. Waiwright, 450 So2.d 200 (Fla. 1984). If the omitted argument would not have constituted reversible error, petitioner fails to sustain his burden of demonstrating ineffectiveness. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983). Counsel is not ineffective for failing to raise meritless issues. Bundy v. State, 497 So.2d 1209 (Fla. 1986); Jackson v. State, 452 So.2d 533 (Fla. 1984).

Claim I

THE PETITIONER HAS FAILED TO CARRY HIS BURDEN OF DEMONSTRATING INEFFECTIVENESS OF APPELLATE COUNSEL BASED UPON ORAL ARGUMENT PRESENTED GIVEN THE STRATEGICALLY REASONABLE NATURE OF THAT ARGUMENT AND THE LACK OF ANY DEMONSTRATION OF ACTUAL PREJUDICE TO THE PETITIONER.

By taking appellate counsel's oral argument to this court out of context Bertolotti attempts to create a showing of unprofessional conduct on appellate counsel's part which even if established could not require a new appellate proceeding because of the lack of any palpable prejudice.

While Bertolotti views his appellate counsel's argument as "inexplicable" and without even possible "tactic or strategy" this view is easily rejected as the last gasp effort of a defendant left with nothing of significance to argue in this appellate forum because of prior appellate counsel's detailed ten point argument of all issues preserved for appellate consideration on direct appeal. See, Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

Appellate counsel's argument was focused upon sentencing and not upon the guilt phase of the trial and was presented to show that Bertolotti's problems - including the murder in this case and his previous assaults - were part of a sexual deviation or "sexual undercurrent" which rendered the petitioner "out of control and in a frenzy ... situation" so as to set this case apart from "coldblooded designed murder." That a murder may have been committed while the perpetrator was in a "frenzy" has been considered a significant factor by this court in the past. See, Hansbrough v. State, 509 So.2d 1081, 1087 (Fla. 1987); Jones v. State, 332 So.2d 615 (Fla. 1976). Appellate counsel's argument was clearly a strategical effort to raise a potential mitigating factor overlooked by the sentencing court but supported by the evidence which might justify a life sentence. Indeed, counsel focused upon sentencing phase testimony in arguing that while Bertolotti did not "fit in well to society" "he does fit in well to prison" where he is not exposed to women and his sexual problem is controlled such that life imprisonment was necessarily the appropriate punishment. Testimony at the penalty phase reflected that Bertolotti had adjusted well to prison life, was a counselor and, if he was reincarcerated, would be able to help other inmates (R 1433-1439). While appellate counsel noted in her argument that she was well aware of the trial judge's

rejection of sexual battery as a basis for aggravation it is also nevertheless clear that the evidence adduced at trial would have supported a finding of sexual battery beyond a reasonable doubt had the court reached a different conclusion, given the discovery of the victim's nude body and the obvious evidence of sexual activity in concert with the husband's testimony that no recent sexual relations had occurred between the two. Appellate counsel's strategical effort to utilize that evidence to create a potential mitigating factor was not unreasonable especially given the otherwise hopeless nature of any alternative effort to demonstrate the impropriety of the trial court's determination that guilt had been proven beyond a reasonable doubt and that death was the appropriate penalty in light of three virtually unchallengeable aggravating circumstances and the proper rejection of other potential mitigating factors. Bertolotti v. State, supra at 132, 134.

In light of the overwhelming evidence of Bertolotti's guilt of premeditated first-degree murder, as well as felony murder under the robbery-felony murder theory, no actual prejudice can be demonstrated sufficient to justify relief even assuming an unreasonable tactical decision by appellate counsel in oral argument. The overwhelming nature of the evidence against Bertolotti through his own confession and the circumstantial evidence presented adequately explains appellate counsel's failure to even challenge the sufficiency of the evidence to support conviction on direct appeal and it is interesting to note that Bertolotti does not see fit to second-guess that decision in his habeas corpus petition.

In any event this court's opinion makes clear that it has reviewed the entire record and found no reversible error, a review which necessarily included an evidentiary sufficiency determination notwithstanding Bertolotti's recognition of the meritless nature of any such claim. Section 921.141(4), Fla. Stat. (1983); Fla. R. App. P. 9.140(f); See also, Melendez v. State, 498 So.2d 1258, 1262 (Fla. 1986); Kokal v. State, 492 So.2d 1317, 1320 (Fla. 1986). There is nothing within this

court's opinion on direct appeal to indicate that it became so disoriented or confused by the allegedly unreasonable oral argument of appellate counsel that it did not conduct an independent analysis of the propriety of Bertolotti's conviction or sentence as mandated by statute and rule. To the contrary, this court's opinion correctly refers to the evidence adduced at trial and properly analyzes the aggravating circumstances actually applied by the trial judge in affirming the conviction and sentence in this case and Bertolotti has totally failed to demonstrate how "but for" the allegedly improper argument presented the appellate outcome would have been different. The petitioner's failure to carry his burden in this respect is easily explained, i.e., given the hopeless nature of his case for conviction and sentencing purposes no alternative argument that his new and perfect counsel would have presented (the substance of which they do not suggest) would have altered the outcome in this case.

Claim II

BERTOLOTTI HAS FAILED TO CARRY HIS BURDEN OF DEMONSTRATING APPELLATE INEFFECTIVENESS WHERE THE ISSUE RAISED WAS NEVER PRESERVED FOR APPELLATE CONSIDERATION BY TIMELY AND SPECIFIC OBJECTION AT THE TRIAL COURT LEVEL; ALTERNATIVELY, THE UNDERLYING BASIS OF THE INEFFECTIVENESS CLAIM IS TOTALLY WITHOUT SUBSTANTIVE MERIT IN THAT NONE OF THE ALTERNATIVE FELONY MURDER THEORIES PRESENTED TO THE JURY IN CONCERT WITH THE PREMEDITATED MURDER ALLEGATION WAS CONSTITUTIONALLY INVALID.

Aside from the substantively baseless nature of Bertolotti's claim that the first degree murder conviction in this case violated due process because it "might be based on an unconstitutional ground", i.e. a felony murder theory unsupported by the evidence, Bertolotti has failed to carry his burden of demonstrating that appellate counsel's failure to raise this issue fell outside the "wide range" of reasonable professional assistance.

The cornerstone of Bertolotti's ineffectiveness claim is an allegation that the general verdict form utilized made it

impossible to determine if the first degree murder conviction returned by the jury was based upon a premediated murder finding or utilization of one of the three alternative felony murder possibilities presented upon allegations of robbery, sexual battery, and burglary. Bertolotti argues that because the sentencing judge at the penalty phase relied only upon a finding that a robbery had been committed and rejected sexual battery and burglary as additional and alternative bases for finding the aggravating circumstance defined by section 921.141(5)(d), the jury could not therefore constitutionally convict him of felony murder based upon a burglary or sexually battery determination. Accordingly, petitioner claims that under the Stromberg[1] rule because it is impossible to determine whether the conviction was based upon one of the allegedly unconstitutional theories reversal was required and appellate counsel was deficient in failing to raise the issue.

However, as previously noted, appellate counsel is under no duty to raise issues that have not been preserved for appellate consideration, Davis v. Wainwright, supra; and in this case this specific "constitutional" question was never presented nor determined by the trial court. No objection to the general verdict form was presented by defense counsel at trial, nor was any issue as to the impropriety of the general verdict of guilty of first-degree murder raised by motion for new trial (R 2332-2333).

A review of the record in its totality reveals that Bertolottti's trial counsel were well aware that under Florida law an indictment charging premeditated first-degree murder is also presumed to contain within its allegations any appropriate felony murder theories and in fact defense counsel specifically relied upon their awareness of the potential and automatically incorporated felony murder allegations in seeking additional peremptory juror challenges prior to trial (R 1156-1157, 2212-

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[1]Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

2213). In fact, trial counsel in a motion in limine acknowledged the potential for conviction under an alternative felony murder theory under Florida law but challenged the use of any felony murder allegations because it was not specifically alleged in the indictment (R 2258-2259). The trial court considered the motion in limine prior to trial at which point the prosecutor in argument made clear that the state would rely alternatively upon burglary, sexual battery, and robbery felony murder theories (R 714-718, 717). At the jury charge conference Bertolloti's trial counsel reraised the argument made in their pre-trial motion in limine and challenged jury instruction on felony murder because it was not specifically charged in the indictment but, conceded in argument thereon that under Florida law no specific felony murder allegation need be contained within the indictment (R 1063-1067). More importantly in the argument on the felony murder instruction defense counsel made clear that he was aware of the potential felony murder theories to be advanced by the state, i.e., robbery, burglary or sexual battery (R 1063).

Neither the argument raised at the jury charge conference nor defense counsel's motion in limine raised any specific constitutional challenge to the adequacy of the evidence to support a felony murder conviction with sexual battery or burglary as the underlying felony offense; nor was any specific objection made to the verdict form which failed to delineate or separate a premediated murder finding and the three separate felony murder possibilities (R 1076-1077, 1129-1131, 1134). Furthermore, despite the obvious awareness that the state would rely in part upon the robbery, sexual battery, and burglary felony murder theories defense counsel did not specifically challenge the adequacy of the evidence presented to support a first degree murder conviction based upon those separate and alternative theories, other than to assert in a clearly "bare bones" manner that there was no evidence of premeditation "even taking into consideration the possibility of the felony murder rule applying" (R 1053). See Fla. R. Crim. P. 3.380(b); Williams v. State, 12 F.L.W. 790 (Fla. 5th DCA March 19, 1987); Argenti v.

State, 427 So.2d 363 (Fla. 4th DCA 1983). This contention was hardly sufficient to place the trial court on notice as to any evidentiary insufficiency allegation challenging the sexual battery or burglary basis for felony murder conviction.

Given the total absence of any challenge in the new trial motion to the propriety of utilization of the alternative felony murder theories or the possibility that the conviction might have been based thereon it is clear that the issue was not properly preserved for appellate consideration. See, Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985); Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Appellate counsel was not ineffective for failing to raise an issue unpreserved for appellate review.

Alternatively, Bertolotti cannot show actual prejudice sufficient to support the second prong of the appellate ineffectiveness claim. Bertolotti presents no legal authority in support of his claim that a jury's guilt determination can after the fact be rendered unconstitutional because a sentencing judge refuses at the penalty phase to find that an aggravating factor was proven to his satisfaction beyond a reasonable doubt. Again, respondent notes that no specific sufficiency of the evidence challenge was raised at the trial court level based upon the alternative burglary or sexual battery felony murder theories; however, it is clear that the trial judge necessarily determined that sufficient evidence existed to support a conviction based upon those theories since he specifically authorized a jury instruction on the elements of those offenses as potential bases for a felony murder conviction. (R 1066-1067, 1116-1118) In fact, the jury was specifically allowed to consider sexual battery and burglary at the penalty phase clearly indicating the judge's feeling that they might find the factors established based upon the evidence. (R 1281-1284, 1464-1475)

The evidence adduced at trial was more than sufficient to allow the jury as fact-finders and ultimate arbiters of guilt to determine that Bertolotti had in fact murdered the victim in the course of a burglary and sexual battery. The simple fact that the trial judge in performing his role at the penalty phase chose

to reject the sexual battery and burglary bases as aggravating factors because he had not found them proven beyond a reasonable doubt despite "strong evidence that the capital crime was committed while the Defendant was also engaged in a burglary and rape" is easily explained as a determination made by a sentencing judge acting in an abundance of caution. (R 2350-2354, 2351) That finding, however, based upon the trial judge's own opinion of the significance of the "strong evidence" presented does not require rejection of a potential jury determination that murder during the perpetration of a sexual battery and/or burglary was in fact proven beyond a reasonable doubt. Indeed, it must be noted that in the context of a motion for judgment of acquittal the trial judge, despite his own opinion that the offense had not been proven beyond a reasonable doubt to his satisfaction, would nevertheless be required to allow the case to reach the jury for their determination of the issue of guilt since it is their conclusion that is of import and not the opinion of the trial judge. As noted by this court in Lynch v. State, 293 So.2d 44, 45 (Fla. 1974):

> A defendant, in moving for a judgment of acquittal, admits not only the facts stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence. The courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law. Where there is room for a difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as to the inferences which might be drawn from conceded facts, the Court should submit the case to the jury for their findings, as it is their conclusion, in such cases, that should prevail and not primarily the views of the judge...(underscoring supplied).

Here, the trial judge's concession that "strong evidence" of sexual battery and burglary was in fact presented is, in concert with the evidence adduced at trial, sufficient to support the

conclusion that the view which the jury might lawfully take of the evidence presented to allow them to reach a different opinion from that of the trial court as to whether the offenses had been proven a reasonable doubt.

Accordingly, even assuming arguendo that the jury convicted Bertolotti of first-degree murder based upon a sexual battery or burglary felony murder theory, and assuming that the issue had been preseved for review, there is no constitutional impropriety in such a verdict and the Stromberg rule is therefore totally inapplicable since all of the potential theories of conviction were properly presented to the jury and were each alternatively sufficient to support their verdict. It follows then that appellate counsel cannot be deemed ineffective for failing to raise an issue neither preserved for state appellate consideration by a timely contemporaneous objection or motion below and otherwise legally insufficient to justify reversal or otherwise affect the appellate outcome.

WHEREFORE the respondent respectfully requests that this honorable court dismiss or deny the petition for writ of habeas corpus and application for stay of execution.

Respectfully submitted,

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