IN THE SUPREME COURT OF FLORIDA

ANTHONY BERTOLOTTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 76344

ON APPEAL FROM THE DENIAL OF POST-CONVICTION RELIEF IN THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. **300179**

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL **32399-1050**
(904) 488-0600

COUNSEL FOR APPELLEE

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_____/

PRELIMINARY STATEMENT/SUMMARY OF ARGUMENT

This appeal involves the summary denial of Bertolotti's successive motion for post-conviction relief, filed pursuant to Fla.R.Crim.P. 3.850. This motion presented two (2) claims for relief: (1) a contention that Bertolotti's electrocution would allegedly constitute cruel and unusual punishment, given what occurred at the May 1990 execution of Jesse Tafero, and (2) a contention that alleged victim impact evidence and argument was considered, in violation of **Booth** v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d **440** (1987). Bertolotti's motion was filed on July 23, 1990, and the State filed its response the same day. Circuit Judge Stroker denied Bertolotti's motion on July 23, 1990, finding that the claim in regard to **Booth** was without merit, or, in the alternative, procedurally-barred. As to the first claim, the judge denied such claim in regard to electrocution on the basis of this Court's precedents. The State suggests that the circuit court's ruling was correct in all respects, and should be affirmed.

Argument

POINT I

THE CIRCUIT COURT'S DENIAL OF BERTOLOTTI'S SPECULATIVE CLAIM, ALLEGEDLY PREMISED UPON THE MAY 1990 EXECUTION OF JESSE TAFERO, WAS NOT ERROR

As his first claim for relief, Bertolotti, like so many others similarly situated, contends that his execution, if carried out, would constitute cruel and unusual punishment, given the allegedly "botched" execution of Jesse Tafero on May 4, 1990. In support of his claim, Bertolotti, represented by the Office of the Capital Collateral Representative, proffers all the materials rejected by this Court in **Buenoano** v. **State,** 15 F.L.W. S355 (Fla. June 20, 1990), **Squires** v. **State,** 15 F.L.W. S382 (Fla. July 5, 1990), **Hamblen** v. **State, 15** F.L.W. S393 (Fla. July 16, 1990), and **White** v. **State,** 15 F.L.W. S391 (Fla. July 17, 1990). Given this Court's clear holdings in the above cases, it is clear that Bertolotti is entitled to no relief. This Court's holding in **Buenoano,** that the underlying issue regarding the competency of the Department of Corrections to carry out executions was, essentially, not a proper claim for review, remains correct. The execution of prisoners is clearly a matter within the exclusive province of the executive branch, and Bertolotti has failed to demonstrate that further inquiry is required into this matter. **See also** 3922.09; **Blitch v. Buchanan,** 100 Fla. **1202,** 131 So. 151 (1930); **Goode** v. **Wainwright,** 448 So.2d 999 (Fla. 1984); **Christopher** v. **State,** 416 So.2d 450 (Fla. 1982). Further, the fact that one electrocution out of twenty-two has allegedly been "blotched" hardly creates any presumption that all subsequent

electrocutions will be similarly marred. **See Louisiana** v. **Resweber,** 329 **U.S.** 459, 463-464, 67 S.Ct. 374, 91 L.Ed.2d 422 (1947); **Estelle** v. **Gamble,** 429 **U.S.** 97, 105-106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); **Glass** v. **Louisiana,** 471 **U.S.** 1080, 105 S.Ct. 2159, 85 L.Ed.2d 514, 519 (1985) (Brennan, J., dissenting from denial of certiorari). This is particularly true, in light of **Buenoano** v. **Dugger,** ____ F.**Supp.** ____ (M.D. Fla. June 22, 1990) (following evidentiary hearing on claim, federal district court found evidence proffered by capital collateral representative "unreliable") (Appendix to Response, Attachment "B" at 80, n.34).

POINT II

THE CIRCUIT COURT'S DENIAL OF BERTOLOTTI'S PROCEDURALLY-BARRED CLAIM INVOLVING AN ALLEGED VIOLATION OF **BOOTH** v. **MARYLAND,** 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), WAS NOT ERROR; ALTERNATIVELY, THE ELEVENTH CIRCUIT CORRECTLY RESOLVED THIS CLAIM ON THE MERITS

As an additional claim for relief, Bertolotti contends that his sentence of death must be vacated because improper "victim impact" evidence and argument were presented, in violation of **Booth** v. **Maryland,** 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Bertolotti contends that these matters were preserved through objection at trial and resolved, albeit incorrectly, on the merits by the Florida Supreme Court on direct appeal. Bertolotti contends that he is entitled to review and/or relief under **Jackson** v. **Dugger,** 547 So.2d 1197 (Fla. 1989). The State disagrees, and would note the subsequent cases of the Florida Supreme Court limiting **Jackson**. **See Parker v. Dugger,** 550 So.2d 459 (Fla. 1989); **Clark** v. **Dugger,** 559 So.2d 192 (Fla. 1990); **Porter v. Dugger,** 559 So.2d 201 (Fla. 1990). Further, the State would note that Bertolotti has already received a merits ruling on his **Booth** claim from the federal courts, and that the Eleventh Circuit has conclusively held these claims to be without merit. **See Bertolotti** v. **Dugger,** 883 F.2d 1503, 1524, n.19, 1528 (11th Cir. 1989) (See Appendix). Bertolotti's attempt to sneak these claims through the back door should be rejected. Further, the State would note that the **Booth** decision was rendered on June 15, 1987, and that Bertolotti's first 3.850 motion was filed on October 15, 1987. Bertolotti has failed to demonstrate why this

claim was not raised in the first motion, thus meaning that this claim is procedurally barred. **See** Fla.R.Crim.P. 3.850; **Witt** v. **State,** 465 So.2d 510 (Fla. 1985).[1]

The particular circumstances relating to the alleged victim impact "evidence" are these. During the trial in 1984, the State attempted to introduce the testimony of the victim's husband as to her fear of strangers, in support of its contention that the homicide had occurred during a burglary, and to rebut Bertolotti's claim that the victim had let him into the house voluntarily; while defense counsel objected to this testimony, he did so **solely** on the grounds that such "habit" evidence was inadmissible under Florida's Evidence Code (R 1039-1049). Although the judge sustained defense's objection at the guilt phase, he subsequently allowed the admission of this testimony at the penalty phase (R 1355-1359); again, counsel's **only** objection was that the evidence did not meet the evidence code's standards for "habit" evidence (R 1356). On appeal, Bertolotti presented this claim of error, but, again, **only** on the basis that the evidence had not been proper habit evidence under the evidence code (Initial Brief of Appellant, **Bertolotti** v. **State,** Florida Supreme Court Case No. 65,287, at 27-28). Indeed, in rejecting this claim on appeal, the Florida Supreme Court expressly found that, while Bertolotti challenged certain aspects of the penalty

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[1] Collateral counsel cannot seriously argue that they "needed" **Jackson** to raise this claim at this juncture, given the fact that **Booth** claims were raised in other post-conviction proceedings prior to the rendition of **Jackson. See, e.g., Woods v. State,** 531 So.2d 79 (Fla. 1988); **Preston** v. **State,** 531 So.2d 154 (Fla. 1988); **Jones** v. **Dugger,** 533 So.2d 290 (Fla. 1988).

phase, "his objection to the admission of certain evidence which may not have been admissible during the guilt phase does not rely on the claim of irrelevance or a lack of opportunity to rebut hearsay." **Bertolotti v. State,** 476 So.2d **130,** 132 (Fla. 1985).

Inasmuch as the hallmark of any Eighth Amendment claim under **Booth** is that the evidence is **irrelevant,** the State would suggest that no **Booth** claim has ever been preserved for post-conviction consideration. The State reads **Jackson** as requiring that a timely objection be imposed on relevant grounds, and highly questions whether any **Booth** argument is preserved through quibbling over whether the evidence in question is proper "habit" evidence under Florida's Evidence Code. Accordingly, this claim is procedurally barred. **See Clark, supra; Daugherty v. State,** 533 So.2d 287 (Fla. 1988). Further, as argued above, this claim is procedurally barred for not having been raised in the first 3.850 motion in 1987. **See Witt, supra.** Finally, to the extent that the merits must be reached, this claim is certainly not **Booth** evidence, as even **Booth** recognizes that characteristics of the victim which are relevant to the circumstances of the crime are admissible. **Booth,** 482 U.S. at 507, n.lO. The victim's fear of strangers was relevant to whether or not a burglary had occurred **sub judice.** The Eleventh Circuit's resolution of this matter was correct. **Bertolotti,** 883 F.2d at 1528. **See also Clark, supra,** (Florida petitioner presents **Booth** claim to state

courts after losing on the merits in federal court). No relief is merited as to this claim.[2]

As to the portion of the prosecutor's argument now under attack, the State initially questions whether this claim was, in fact, the object of any contemporaneous objection or review by the Florida Supreme Court. The comment now at issue is the prosecutor's one observation that the victim was, at that stage of the proceedings, being forgotten, and that, if the victim, as well as the defendant, were to receive justice, death was the appropriate penalty (R **1457**). While it is true that defense counsel subsequently objected, it would seem that his objection was interposed in regard to the prosecutor's final remark - to the effect that unless the jury voted for death, such would only confirm what was on bumper stickers, that only the victim got the death penalty (R **1458**). Indeed, when the Florida Supreme Court reviewed this matter on direct appeal, it would appear that it was only the "bumper sticker" remark which it regarded as properly before the court. **See Bertolotti, 476** So.2d at **133**, n.3. Accordingly, this claim would seem procedurally barred, in that no contemporaneous objection was interposed at the time of

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[2] Bertolotti also complains, for the first time, of testimony concerning the victim's poor health (R **753**), such testimony offered in support of the felony-murder prosecution premised upon sexual battery. Bertolotti did **not** seek to raise this matter on appeal (See Initial Brief of Appellant, **Bertolotti** v. **State,** Florida Supreme Court Case No. **65,287**, at **27-29**), and thus cannot use **Jackson** as a basis to relitigate this matter. While defense counsel did object to this testimony, it unquestionably was relevant to the "circumstances of the offense", **Booth, 482** U.S. at **507**, n.lO, especially given Bertolotti's contention that the victim had consented to, if not insisted upon, having sex with him.

the argument. See **Daugherty, supra; Clark, supra.** Further, Bertolotti has failed to demonstrate why this claim was not raised in his first **3.850** motion in **1987. See Witt, supra. To** the extent that the merits of the claim must be reached, the State would contend that the Eleventh Circuit reached the correct result,

> Bertolotti characterizes the following prosecutorial statement as impermissible victim-impact evidence:
>
> > And Carol Wayne is just kind of an abstract person. Everybody's forgotten about her.
>
> We doubt this statement rises to the level condemned by the Supreme Court in Booth v. **Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96** L.Ed.2d **440 (1987).** Nevertheless, considered as another element of Bertolotti's prosecutorial-misconduct claim, we do not consider this statement unconstitutionally prejudicial. (citation omitted).

Bertolotti, 883 F.2d at **1524, n.19.**

Assuming that Bertolotti is at all allowed to litigate these matters, it is clear that he is entitled to no relief, as the Eleventh Circuit *so* held. The State would ask this Court, however, to find, at least in the alternative, that these matters are procedurally barred, due to Bertolotti's failure to raise them in his first **3.850** motion in **1987** and/or due **to** the seeming lack of contemporaneous specific objection on these grounds at the time of trial. No relief is warranted as to **this** claim.

Conclusion

WHEREFORE, for the aforementioned reasons, Appellee moves this Honorable Court to affirm the circuit court's order in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
Assistant Attorney General
Florida Bar No. **300179**

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL **32399-1050**
(904) 488-0600

COUNSEL FOR APPELLEE

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Billy Horatio Nolas, Esq., Office of the Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301**, this 23 day of July, **1990**.

RICHARD B. MARTELL
Assistant Attorney General