IN THE SUPREME COURT OF FLORIDA

MITCHELL O. LINEHAN,

Petitioner

v. Case No. 64,609

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities:

PRELIMINARY STATEMENT

Mitchell O. Linehan will be called Petitioner and the State of Florida will be called Respondent in this brief. On November 9, 1983, the Florida Second District Court of Appeals (in an en banc opinion) certified three questions of great public importance to this Court for review. The inferior opinion is presently reported as Linehan v. State, —So.2d—, 8 FLW 2706 (Fla. 2d DCA 1983)(en banc).

STATEMENT OF THE CASE

For purposes of brevity and clarity, Respondent will incorporate by reference and rely on the case history as published by Judge Lehan in the instant decision on review. See, Linehan v. State, —So.2d—, 8 FLW 2706 (Fla. 2d DCA 1983)(en banc). The Florida Second District Court of Appeals has certified the following three questions to this Court:

> (1) Whether voluntary intoxication is a defense to arson or to any crime?
>
> (2) Whether voluntary intoxication is a defense to first degree (felony) murder?
>
> (3) Whether a jury instruction on second degree (depraved mind) murder is necessary, if supported by the evidence, when defendant is charged with first degree (felony) murder.
>
> (8 FLW at 2711)

On December 2, 1983, Petitioner filed Notice to Invoke Jurisdiction of the Supreme Court in the Second District; and, on December 5, 1983, Respondent filed Cross-Notice to Invoke Jurisdiction of the Supreme Court in the Second District. Thereafter, on timely motion of Respondent, the Second District entered an Order on December 19, 1983, staying its mandate.

STATEMENT OF THE FACTS

For purposes of brevity and clarity, Respondent will rely on the Statement of Facts as set forth by Petitioner which are taken from the lower court opinion. See, Linehan v. State, —So.2d—, 8 FLW 2706 (Fla. 2d DCA 1983)(en banc) (Fla. 2d DCA Case No. 82-1477; Opinion filed November 9, 1983).

ISSUE I.

WHETHER VOLUNTARY INTOXICATION IS A DEFENSE TO ARSON OR TO ANY CRIME?

(As stated by Judge Lehan)
(Question certified by Petitioner)

Petitioner, in her brief, addresses this issue as points I; III; and, IV in her brief. For purposes of brevity and clarity, Respondent will address this question as drafted by Judge Lehan.

The scope and significance of the instant appeal was recognized by your undersigned in his brief filed in the Second District designating the issues as worthy of "academic merit." One of the more perplexing questions of modern criminal law has been the obligation to accommodate an offender's physiological psychology that deals with the effect of voluntary intoxication in the decision as to whether to hold such an individual criminally responsible for his conduct. Webster's New Collegiate Dictionary, 1980 ed., S.V. "voluntary" and "intoxication" sets forth the following definitions:

voluntary:

1. proceeding from the will or from one's own choice or consent.
2. unconstrained by interferences: SELF-DETERMINING
3. done by design or intention: INTENTIONAL...
4. of, relating to, subject to, or regulated by will...
5. having power of free choice
6. provided or supported by voluntary action

7. acting or done of one's own free will without valuable consideration or legal obligation.

intoxication: 1. an abnormal state that is essentially a poisoning...
2. a. the condition of being drunk: INEBRIATION.
b. a strong excitement or elation.

Thus, the quality of intoxication is founded on an etiology of free-will and self-determination. Petitioner would have this Court opin an exculpation of nonblameworthiness for this state. In some factual patterns, it is desirable to have doctrines that prevent the conviction of those who are not in fact blameworthy despite their conduct. See, Daniel M'Naghten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843) which is the basis for the traditional insanity defense. However, voluntary intoxication, if recognized as a defense, would result in a misuse of the exculpatory doctrine. For purposes of argument, assuming voluntary intoxication fit the criteria of an acceptable exculpatory doctrine, one need not be clairvoyant to foresee that so many blameworthy offenders would be able to falsely claim the benefits of the rule that the costs of the rule would exceed its benefits. Respondent does contend that adoption of any voluntary intoxication exculpatory rule is replent with danger. Even the Model Penal Code (Proposed Official Draft, 1962), Section 4.01(2) states "...the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal

or otherwise anti-social conduct." It can be stated that intoxication (whether voluntary or involuntary) is "otherwise anti-social conduct."

The Model Penal Code has not overlooked or failed to consider the effect of intoxication on criminal liability:

> Section 2.08. Intoxication
>
> (1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.
>
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.
>
> (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01 [providing for the defense of insanity].
>
> (4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.
>
> (5) Definitions. In this Section unless a different meaning plainly is required:
>
> (a) "intoxication" means a disturbance of mental or physical capacities resulting from the intoxication of substances into the body;
>
> (b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

> (c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.

The question before this Court has not escaped the Chief Justice of the United States Supreme Court. As then Circuit Judge Burger stated in Heideman v. United States, 259 F.2d 943, 946 (D.C. Cir. 1958) "Drunkenness, while efficient to reduce or remove inhibitions, * does not readily negate intent.*" (*Footnotes omitted).

The Second District correctly held that voluntary intoxication is not a defense to arson as the word "willfully" in Section 806.01, Florida Statutes (1981) means that an offender need have had only a general criminal intent. Judge Lehan recognizes that the distinction between "specific" and "general" intent crimes is nebulous and extremely difficult to apply with consistency. See, Annot., Modern States of the Rules as to Voluntary Intoxication as Defense to Criminal Charge, 8 ALR 3d 1236 (1966).

It would appear that presently, in Florida, voluntary intoxication remains a defense to a "specific intent" crime, as contrasted with a "general intent" crime. See, Cirack v. State, 201 So.2d 706 (Fla. 2d DCA 1967); Fouts v. States, 374 So.2d 22 (Fla. 2d DCA 1979).

The second prong of this issue (which Judge Lehan invites this court to visit) is whether the remaining specific intent crimes are appropriate for an involuntary intoxication defense.

The view advanced by the Second District is stated as follows:

> Perhaps in a proper case the Supreme Court of Florida may choose to clarify the situation by eliminating or modifying the test. The voluntary intoxication defense is not statutory in Florida, and we think there would be sound reasons for discarding the "general" versus "specific" intent test as a criterion relative to that defense, for basing a restriction on the voluntary intoxication defense upon the foregoing policy considerations, and for adopting the view that voluntary intoxication is not a defense to any crimes other than first degree premediated murder except under the circumstances described in (a) through (c) above. Proposals of this nature are within the province, and a responsibility, of district courts of appeal.
>
> (text of 8 FLW at 2710)

Respondent would advocate the minority position that voluntary intoxication is a defense to neither general nor specific intent crimes. Members of society at some point must take responsibility of their individual acts of free will and self-determination. Mr. Chief Justice Burger, concurring in the judgment, as reported in United States v. Ceccolini, 435 U.S. 268, 55 L.Ed.2d 268 at 282, 98 S.Ct. 1054 (1978) observed:

> "In the history of ideas many thinkers have maintained with persuasion that there is no such thing as 'free will,' in the sense that the term implies the independant ability of an actor to regulate his or her conduct. Others have steadfastly maintained opposite, arguing the human personality is one innately free to chose among alternatives. Still a third group would deny that the very term 'free will' has coherent meaning."
>
> (text of 55 L.Ed.2d. at 280)

Chief Justice Burger continues:

> As one philosopher has aptly stated the matter, "[t]he freedom of the will consists in the impossibility of knowing actions that still lie in the future." L. Wittgenstein, Tractatus Logico-Philosophicus Par. 5.1362 (Pears & McGuinness trans 1961).
>
> (text of 55 L.Ed.2d. at 282)

Whether an offender is possessed of the highest degree of mental fault (specific intent) or a lower degree of mental fault (general intent) is from Respondent's point of view a complete abstraction. One's philosophical exercise of either conscious or sub-conscious free will in becoming inebriated should serve as no defense to any crime. All intoxication arguably establishes is absence of specific intent. It overlooks one societal issue. Whether a need exists to discourage voluntary consumption of intoxicants by those prone to commit crimes? As petitioner points out, there exists a minority of states (Georgia, Missouri, Texas, Vermont, and Virginia) which have seemingly never recognized the defense of voluntary intoxication. Wharton, Criminal Law, §108. The certified question quieries whether voluntary intoxication can be a defense to arson. The answer is no. Specifically, the question under Section 806.01, Florida Statutes is whether the statutory language "willfully" relates to a specific or general intent; intent being a mental purpose or design to commit an act. Is an individual who unlawfully sets fires causing structural damage where reasonable grounds exists to believe human occupancy is present performing an

innocent act in itself? Respondent thinks not! There need be no specific intent as the "willfulness" language of the statute is surplusage. Had the Florida Legislature used the word "intentionally" rather than "willfully", then arson might be designated a specific intent crime. An offender's philosophical exercise of free will does not necessarily mean that an individual is possessed of the ultimate degree of mental fault. To set fires where reasonable grounds exist to believe strutures are occupied by humans is a general intent crime underwhich voluntary intoxication does not serve as a defense.

The second aspect of certified question number one is whether voluntary intoxication can serve as a defense to any crime. The defense of voluntary intoxication was recognized by this Court in Garner v. State, 9 So. 835 (Fla. 1891). This Court held that in cases where specific intent is an essential element of the crime charged, voluntary intoxication becomes relevant as to a defendant's ability to form specific intent. Petitioner points out that this holding has been followed in Russell v. State, 373 So.2d 97 (Fla. 2d DCA 1979); Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979); Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA 1981); Cirack v. State, 201 So.2d 706 (Fla. 1967); and, Edwards v. State, 428 So.2d 357 (Fla. 3d DCA 1983). It should be noted that the Second District, en banc, has receded from any inconsistencies in Russell. See, Linehan v. State, 8 FLW at 2708. As there does exist a

correlation between consumption of intoxicants (be it alcohol or narcotics) and criminal activity, the effect of voluntary intoxication criminal liability a topical issue. For any crime, whether a specific intent or general intent one, what does voluntary intoxication contribute to the proof of guilt? Respondent would urge that voluntary intoxication does not vitiate the culpability involved in criminal activity. But this is not to say that the effect of voluntary intoxication is not something to be considered in sentencing. Respondent's position is that voluntary intoxication is not a defense to any crime.

ISSUE II.

WHETHER VOLUNTARY INTOXICATION IS A DEFENSE TO FIRST DEGREE (FELONY) MURDER?

(As stated by Judge Lehan)
(Question certified by Petitioner)

Petitioner, in her argument, addresses this issue as points II and IV in her brief. For purposes of brevity and clarity, Respondent will address this question as drafted by Judge Lehan.

In essence, petitioner urges an apparent conflict with the Linehan holding and this Court's holding in Jacobs v. State, 396 So.2d 1113 (Fla. 1981). There is no inconsistency. As a matter of constitutional law, an individual may be held criminally responsible for even unintentional deaths resulting from the commission of a dangerous felony. The felony-murder rule has long been established in this country's jurisprudence and is constitutional. See, Westberry v. Mullaney, 406 F.Supp. 407, 417 fn 11 (D.Me. 1976); United States ex rel. Stukes v. Shovlin, 464 F.2d 1211, 1215 fn 8 (3d Cir. 1972). This Court is sensitive to proportionality review in felony-murder cases. Compare Enmund v. Florida, —U.S.—, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) where another was the trigger-man (the accused was not present) with Enmund v. State, —So.2d—, 8 FLW 417 (Fla. 1983) where the death sentence was vacated by this Court. Felony-murder has been recognized in Hall v. State, 420 So.2d 872 (Fla. 1982), later 28 USC §2254 relief denied in

Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983) and Ruffin v. State, 420 So.2d 591 (Fla. 1982) post-conviction relief denied where the prosecution never knew whether in fact it was Ruffin or Hall who killed their victim. In Clark v. State, —So.2d—, 9 FLW 1, 2 fn 2 (Fla. 1983)(FSC Case No. 62, 126, Opinion filed Dec. 22, 1983), this Court noted that Section 921.141, Florida Statutes (1981) does not unconstitutionally mandate the death penalty for felony murder.

If the underlying felony is a general intent crime, then one is not entitled to use intoxication as a defense to felony murder. The underlying felony remains intact. For example, in the case at bar arson is a general intent crime whose commission supports a felony-murder conviction. To set fires where reasonable grounds exist to believe structures are occupied by humans is a general intent crime for which voluntary intoxication is not a defense. Alternatively, the question then progresses as to whether voluntary intoxication serves as a defense to felony-murder where the underlying felony is a specific intent crime. As noted in Judge Lehan's opinion: "...the felony-murder doctrine in this state is grounded upon the policy of deterence of crime. The purpose of the doctrine, codified in section 782.04(1)(a), Florida Statutes (1981) is 'to prevent the death of innocent persons likely to occur during the commission of certain inherently dangerous and particularly grievous felonies.' State v. Williams, 254 So.2d 584 (sic) 548, 550 (Fla. 2d DCA 1971).

That statute effectively substitutes the 'mere intent to commit those felonies for the premeditated design to effect death which would otherwise be required in first degree murder...' Id. at 551."

Because of the scholarly significance of the question certified, there exists a myriad of both domestic and foreign articles on the question. A bibliographic reference on the topic is contained in Dix & Sharlot, Basic Criminal Law, n. 210: "See generally Baumgartner, The Effect of Drugs on Criminal Responsibility, Specific Intent, and Mental Compency, 8 Am. Crim. L. Q. 118 (1970); Paulson, Intoxication as a Defense to Crime, 1961 U.Ill.L.Forum 1; Note, Volitional Fault and the Intoxicated Criminal Offender, 36 U.Cin.L.Rev. 258 (1967); Annot., Modern Statutes of the Rules as to Voluntary Intoxication as Defense to Criminal Charge, 8 A.L.R. 3d 1236 (1966). For a historical analysis, see Sigh, History of the Defense of Drunkeness in English Criminal Law, 49 L.Q.Rev. 528 (1933). For comparative purposes, see Bryden, Mens Rea and the Intoxicated Offender, 1968 Juridical Review 48 (Scottish) and Parker & Beck, The Intoxicated Offender— A Problem of Responsibility, 44 Can.B.Rev. 563 (1966)(Canadian). The relationship between the 'insanity' defense and the voluntary intoxication 'defense,' especially in one who exhibits symptoms of mental illness when intoxicated, is discussed in Comment, The Mentally Impaired and Voluntarily Intoxicated Offender, 1972 Wash.U.L.Q. 160." 1/

1/ All articles are available on inter-library loan.

As urged under Issue I, evidence of voluntary intoxication is not appropriate to negate even "specific" intent crimes. Respondent would urge this Court to note Texas Penal Code §8.04 where evidence of intoxication can be considered only in mitigation of penalty and then only if the intoxication is an etiology of temporary insanity.

This Court has now the opportunity to adopt the en banc opinion of the Second District and in your adoption hold that voluntary intoxication is not defense to arson; first degree (felony) murder; and, for that matter, any crime.

ISSUE III.

WHETHER A JURY INSTRUCTION ON SECOND DEGREE (DEPRAVED MIND) MURDER IS NECESSARY, IF SUPPORTED BY THE EVIDENCE, WHEN DEFENDANT IS CHARGED WITH FIRST DEGREE (FELONY) MURDER?

(As stated by Judge Lehan)
(Question certified by Respondent)

The crux of the above certified question asks to what extent the state judiciary might rely on the promulgated Florida Standard Jury Instructions in Criminal Cases. The Linehan opinion is not the first case and controversy upon which reversible error was based after reliance on the Instructions.

In Bragg v. State, 433 So.2d 1375 (Fla. 2d DCA 1983), the Second District reversed when the trial court instructed the jury on a lesser included offense of sexual battery since no force, either great or slight, was alleged in the information; and, since the lesser offense was not required to be proved in order to prove the charge in Count II of the information.

In In Re Standard Jury Instructions in Criminal Cases (1981 ed.), this Court emphasized that "this schedule will be an authoritative compilation upon which a trial judge should be able to confidently rely." In Bragg, the trial court dutifully followed the promulgated instructions by giving the instruction as required by the schedule of lesser included offenses. In apologetic reversal, the Second District noted

he followed the Standard Jury Instructions; however, inasmuch as the applicable form of instruction in Bragg was found to be erroneous and in conflict with current case law, reversal ensued. The Bragg panel relied on Smith v. Mogelvang, 432 So.2d 119 (Fla. 2d DCA 1983) for the proposition that this Court never intended jury instruction to bind trial courts in all circumstances. For internal reliance, the Smith panel relied on In re: Use by the Trial Courts of the Standard Jury Instructions, 198 So.2d 319 (Fla. 1967). This latter per curiam opinion teaches that jury instructions are promulgated without prejudice to the rights of any litigant objecting to the use of one or more such approved forms of instructions. Respondent would urge that the Committee appointed subsequent to this latter opinion had a different theme in mind. Respondent perceives the present Committee's purpose as one to gather limitless unscheduled diversity into an encompassing, scheduled instructive unity. See, Judge Grimes concurring opinion in Linehan, supra 8 FLW at 2711.

It is without question that the Jury Instruction manual lends itself to more than tertiary respect by both the bench and bar. Deference and respect is commanded by a committee which operates under the auspices and authority of this Court.

With Respondent's projected committee purpose in mind, there is no question but that both Bragg and Linehan opinions have a great effect on the proper administration of justice throughout the state.

If the Linehan jury instruction is erroneous, then this Court has now an opportunity to direct that an errata sheet be inserted in the Jury Instruction manual so that the Florida Standard Jury Instructions in Criminal Cases sets forth sound statements of law. It should be noted that a Suggestion to certify a comporable question was denied on September 12, 1983, in Bragg v. State, 433 So.2d 1375 (Fla. 2d DCA 1983). If it is appropriate that an errata sheet be inserted, then more stability will be lent the law.

This question opens the door for this Court to address the extent to which the bench and bar may confidently rely on the published instructions as authority.

Not all jurists have the same opportunity as Judge Grimes in his concurring opinion to be privy to the background, history, and intent of the Fla. R. Crim. P. 3.490. As Judge Grimes candidly points out in his concurring opinion, "...the table was not changed to coincide with the rule as adopted. Hence, this particular aspect of the schedule is inconsistent with the rule, and one or the other should be changed."

Respondent's position in the Second District noted that the record demonstrated a premeditated design to kill Theresa Ward. Mr. Linehan asked for his girlfriend at her apartment; was to the victim's apartment by the manager; and, then Petitioner mumbled something about burning down the house. (R 161-164). There is the impact of transferred intent. Without question, there is a direct causal connection between

the felony and the death which occurred; and, the fire which caused the death occurred while the arson was in progress. As the trial judge placed authoritative reliance on the Florida Standard Jury Instructions in Criminal Cases, 1981 ed., there was no error in the declination to give a jury instruction on Second Degree Murder. Most simply, the rationale of the trial Judge Bryson is not to be overlooked:

> The Court: That thing says that even permissive, saying no facts to justify giving second-degree murder as a lesser-included of felony murder. That's what the Supreme Court is telling you. What they did when they rewrote that rule is that it finally dawned on them that pardon was a function of the governor's office, not of juries.
>
> (R-297)

CONCLUSION

WHEREFORE, this Court having received two certified questions from Petitioner and one certified question from Respondent drafted by the Second District en banc, Respondent would pray that this Court answer the first two negatively and the third with reliance on the Florida Standard Jury Instructions in Criminal Cases, 1981 ed. as this question is a matter of great public importance reflecting on the integrity of the Standard Jury Instructions which serves a foundation for the proper administration of justice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Allyn Giambalvo, Assistant Public Defender, Criminal Courts Complex, 5100-144th Avenue North, Clearwater, Florida 33520 on this 11th day of January, 1984.

OF COUNSEL FOR RESPONDENT