IN THE SUPREME COURT OF FLORIDA

CASE NO. 67, 334

JAMES A. MORGAN,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE NINETEENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARTIN COUNTY.

APPELLANT'S SUPPLEMENTAL BRIEF

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit in and for Martin County, Florida. In this Brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will designate the appropriate portions of the record:

"R"	Record on Appeal
"T"	Transcript of Trial Proceedings

POINT II

THE TRIAL COURT ERRED IN SUSTAINING THE APPELLEE'S OBJECTION TO THE TESTIMONY OF DR. CADDY AND DR. KOSEN AND IN FURTHER PRECLUDING THE APPELLANT'S TWO PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THE STATEMENTS MADE BY THE APPELLANT WHILE UNDER HYPNOSIS AND IN FURTHER PRECLUDING THESE TWO EXPERT PSYCHIATRIC WITNESSES FROM TESTIFYING AS TO THEIR OPINION AS TO THE APPELLANT'S INSANITY AT THE TIME OF THE KILLING.

The Appellant does hereby supplement his previously filed Brief in order to answer a question which was posed to counsel for the Appellant at the Oral Argument which was previously held in this matter. The question was posed to counsel for the Appellant during Oral Argument as to why the Appellant's trial counsel did not call as witnesses on behalf of the Appellant at the Jury Trial in this matter the two expert psychiatric witnesses who were prepared to testify on behalf of the Appellant at the Appellant's second trial. The undersigned attorney does hereby represent to this Court that he has spoken with the Appellant's trial counsel in the matter sub judice, and he has informed the undersigned that he spoke with the psychologist and the psychiatrist who were prepared to testify as psychiatric expert witnesses on behalf of the Appellant during his second trial and was informed by both of these said psychiatric expert witnesses that they were not available to testify on behalf of the Appellant during his third trial for the following reasons. The psychologist informed the Appellant's trial counsel that he was suffering from heart problems and was simply physically unable to appear as a witness on behalf of the Appellant at his third trial. Dr. Rufus Vaughn, the psychiatrist, informed the Appellant's trial counsel that he was presently working for some State agency and that he had discussed the matter with his employers and was informed that they would not allow him to testify on behalf of the Appellant.

The undersigned attorney does hereby admit that there is obviously no factual basis in the Record on Appeal for any of the aforesaid but this information is provided to this Honorable Court simply as a follow-up in response to the question which was posed to the undersigned attorney at the Oral Argument as stated hereinabove.

POINT VIII

THE TRIAL COURT ERRED IN ITS WRITTEN FINDINGS OF FACT IN SUPPORT OF THE DEATH PENALTY IN THAT THERE WAS INSUFFICIENT EVIDENCE UPON WHICH THE TRIAL COURT COULD HAVE FOUND THAT THE CAPITAL FELONY WAS A HOMICIDE COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION OR THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL REQUIRING THE DEATH SENTENCE TO BE VACATED.

The trial court erred in its written findings of fact by the Court wherein it held that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (T 392) The trial court found that the circumstances of the numerous and repeated wounds and an attempt by the Appellant to wipe off his bloody footprints from the scene such that he could not be identified clearly show that the Appellant intended to kill the victim. The trial court went on to find that this was done either for the sake of killing the victim or to facilitate the commission of a sexual battery upon her. (T 392)

The Appellant would submit, however, that the case law is clear that the evidence was insufficient for the trial court to find that this particular aggravating factor existed as enumerated in Section 921.141(5) of the Florida Statutes because the level of premeditation to convict in the guilt or innocence phase of a First Degree Murder trial does not necessarily rise to the level of premeditation in the aggravating circumstance for imposition of the Death Penalty that the homicide was committed in a cold, calculated and premeditated manner. Jent v. State, 408 So.2d 1024 (Fla. 1982)

As this Court has previously held, where, in a capital case the State presented no evidence that the murder was planned and the instruments of death were all from the victim's premises, the State has failed to establish

beyond a reasonable doubt that the aggravating circumstance for purpose of sentencing that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Harris v. State, 438 So.2d 787 (Fla. 1983) It is clear that there was no evidence before the trial court from which the Court could have found that the murder was planned and it was equally clear that all of the instruments of death came from the victim's residence. As such, it is sufficiently obvious that the trial court improperly found the homicide to have been committed in a cold, calculated and premeditated manner. Mann v. State, 420 So.2d 578 (Fla. 1982)

The Appellant would submit, in view of the aforesaid, that there were no more than two aggravating factors which could probably have been found to exist by the trial court and that the trial court did, in fact, find that there were two mitigating factors. The fact of the numerous and repeated wounds, standing by itself, does not provide sufficient evidence for a finding of this particular aggravating factor. The fact that the Appellant tried to wipe off the bloody footprints goes only to his state of mind after the murder was actually committed and should in no way effect or otherwise be relevant to the Appellant's state of mind at the time of the commission of the offense.

Consequently, it is clear that a balancing of the two possible remaining aggravating factors and the two mitigating factors which were found by the Court to exist, requires and mandates that this Honorable Court vacate the sentence. The evidence before the trial court was that at the time of the commission of the offense, the Appellant was a sixteen year old, brain-damaged youth.

The trial court also found in its written findings of fact in support of the Death Penalty that the capital felony was "especially heinous, atrocious or cruel as enumerated in Section 921.141(5)(h) of the Florida Statutes. The Appellant would submit that the Judge improperly weighed this factor, however, because he did not consider and weigh that the heinousness of the crime was directly caused by Appellant's severe mental problems. This Court has previously held that although the aggravating and mitigating circumstances were equal in number, the mitigating circumstances must outweigh those in aggravation because the heinous nature of the crime was the direct consequence of the Appellant's mental illness. Huckaby v. State, 343 So.2d 29 (Fla. 1977) See also Miller v. State, 373 So.2d 882, 886 (Fla. 1979). Here as in Huckaby and Miller, the heinousness of the crime was caused by Appellant's mental illness and thus, it must be given less weight. The mental factors in mitigation must outweigh the remaining aggravating circumstance because of this casual relationship.

Appellant's severe mental problems, in conjunction with his age and lack of significant prior criminal history, present strong factors for reduction of his sentence to life imprisonment as these factors clearly outweigh the remaining aggravating circumstance. The fact that Appellant was sixteen and severely mentally retarded cannot be given too much weight. Because it was given little weight, the Judge's findings were erroneous. Appellant's death sentence was a direct result of the erroneous findings by the Judge. Consequently, the Appellant would submit, the death sentence should be reduced to life imprisonment.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the Appellant's prior Brief, the Appellant respectfully requests that this Honorable Court to Vacate the Judgment and Sentence of the Trial Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Supplemental Brief has been furnished to the Office of the Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, by mail on the 14th day of November, 1986.

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