SUPREME COURT OF FLORIDA

ADAM BLAINE CHESTNUT,

Petitioner,

v.

CASE NO. 70,628

STATE OF FLORIDA,

Respondent,

PETITIONER'S BRIEF ON THE MERITS

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I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the First District Court of Appeal. Respondent was the prosecution and the appellee respectively. The parties will be referred to as they appear before this Court.

The record on appeal consists of one volume of pleadings and three volumes of transcript of the proceedings below. The volumes are consecutively numbered at the bottom of each page and will be referred to as "R" followed by the appropriate page number in parenthesis.

The opinion of the court below is attached hereto as an appendix. The appendix will be referred to as "A".

II STATEMENT OF THE CASE AND FACTS

Petitioner and co-defendant, Jackie Joseph Bolesta, were indicted by the grand jurors of Alachua County for the first degree murder of Carl Brown on May 14, 1984 (R 15-16).

Due to a conflict of interest, the Public Defender moved to withdraw from its representation of petitioner, and attorney Salvatore Mollica was appointed to represent petitioner (R 7-9).

On August 13, 1984, petitioner entered a written plea of not guilty (R 14). Petitioner's motion for appointment of an expert to determine his competence to stand trial (R 17-18) was granted by written order on September 11, 1984 (R 19). On June 25, 1985, after numerous continuances for completion of discovery (R 21,22,23,24-26,31-33,42-44, 45-47,51-52,56), petitioner moved for costs for an updated psychiatric evaluation to assist in the preparation of the defense (R 54-55). On July 15, 1985, the court entered an order limiting the state's cross-examination of the defense expert as to the staleness of the psychological evidence (R 57).

Prior to trial the state filed a motion in limine to restrict the testimony of certain defense witnesses, particularly that of Dr. Harry Krop, a psychologist, as to petitioner's mental condition which did not qualify for an insanity defense under the M'Naughten Rule. The state also sought to preclude the testimony of other defense witnesses who were not witnesses to the alleged crime but who would testify as to co-defendant Joseph Bolesta's general reputation for violence and/or specific acts of violence and petitioner's fear of Bolesta (R 63-64).

In response to the state's motion in limine, petitioner moved the court to determine the admissibility of both the lay and expert testimony. The motion alleged that the lay testimony regarding Bolesta's aggressive and violent nature was relevant both as to the factual basis for the defense of duress and as it pertained to the credibility of the state's key witness, Gary German, an unindicted co-conspirator. Petitioner contended that the medical testimony regarding his low intelligence, permanent brain damage resulting from a rodeo accident ten years earlier, and diminished capacity was crucial to his theory of defense (R 85-88). In its order granting the state's motion in limine, the trial court ruled that duress is not a defense to homicide and absent a plea of insanity, expert testimony as to mental status would be improper (R 82-84).

Subsequently, on November 19, 1985, petitioner filed a written proffer of the excluded evidence (R 96-105). The proffer detailed the findings of Dr. Krop, as well as a neurologist, Dr. Edward Valenstein, who examined petitioner following the 1974 rodeo accident. The medical evidence revealed that upon being kicked in the head by a bull during rodeo competition, petitioner suffered a basilar fracture of the skull and traumatic contact to the brain, resulting in severe brain damage and personality changes. The character changes were manifested by a lack of motivation, propensity toward confusion, impulsive behavior, rapid memory loss, and a passive personality causing him to avoid physical confrontation, with the result that he is easily led and manipulated. The evidence was offered to show both the cause of

petitioner's behavioral responses and effect of his passive-dependent and non-assertive personality with respect to his acting under the domination of Jackie Bolesta, and the absence of premeditation. The proffered testimony further showed that petitioner functions in a borderline range of intelligence, with impaired verbal memory, and suffers seizures which are only partially controlled by anti-convulsive medication (R 96-99).

In addition, petitioner proffered the testimony of three law enforcement officers who were familiar with Jack Bolesta's reputation for violence and truth and veracity. Carlos Yingst, a warrants officer with the Alachua County Sheriff's Office, knew Bolesta for several years and was familiar with his reputation in the community as being violent and manipulative. The witness was aware of "community knowledge" that Bolesta had killed his step-father with a machete, that he drank heavily and was capable of anything from burning down a house to killing someone. Although Bolesta did not work, he always had a means of livelihood, and he would manipulate others, either by threats or promises, to do his "dirty work" (R 100-101). Ed Williams, a former highway patrol-man, also had extensive knowledge of Bolesta's reputation for violence and lack of veracity, including knowledge that Bolesta murdered his step-father and committed arson in retribution for perceived wrongs committed against him. Williams expressed concern for his own safety from Bolesta (R 101). Deputy Sheriff Jerry Goad lived in the Hawthorne area for over 30 years and was acquainted with both petitioner and Jackie Bolesta. His proffered testimony included knowledge of petitioner's head injury

and susceptibility to manipulation, as well as Bolesta's violent nature and propensity to manipulate others to do his nefarious deeds. Although Goad was not involved in the criminal investigation, he opined that Bolesta was the ring leader who manipulated both petitioner and Gary German (R 101-102).

Finally, the defense proffered the testimony of 16 lay witnesses, including petitioner's family, friends and former employers, and the ex-wife of Jack Bolesta, all of whom were aware of petitioner's non-violent personality and Bolesta's particularly violent nature (R 102-105). Bolesta's former wife, Dell Pearson, observed Bolesta's influence over petitioner and Gary German and stated that both men were afraid to act independently. Ms. Pearson would have testified that while she and Bolesta were living together, he preferred the company of people who were passive and easily manipulated, that he sought out weaker personalities to do his dirty work and did not tell them of his plans to keep them off guard. Petitioner urged that this testimony was relevant to establish the extent of influence Jack Bolesta exerted over him and German, which was consistent with petitioner's theory of defense and explained the inconsistencies in petitioner's and German's accounts of the murder (R 104-105).

Based on the court's previous ruling, none of the proffered testimony was admitted at trial.

Petitioner proceeded to jury trial on November 18-20, 1985. On the eve of the trial, the state stipulated not to seek the death penalty and the parties agreed to a six person jury (R 92).

Prior to the presentation of testimony, the state and defense stipulated to the identity of the deceased and further stipulated that the co-defendant, Jackie Bolesta, had been found guilty and sentenced for the first degree murder of Carl Brown. The court instructed the jury as to the effect of the parties' stipulation (R 174-175).

The first state witness was Nancy Neely, a deputy sheriff with the Lake County Sheriff's Department. On July 27 and August 6, Deputy Neely photographed the area of the Lochloosa Creek bridge. The photographs were admitted into evidence without objection. Also on July 27, Neely received a skull and other items of evidence which were recovered by divers in the creek. The skull was also admitted without objection (R 175-179).

Deputy Alfonso Rawls, Jr., an evidence technician with the Alachua County Sheriff's Department, photographed a wooded area in East Alachua County off State Road 325 in July, 1984. These photographs were admitted into evidence, as were two photographs each of Jackie Bolesta's vehicle and a house trailer. Other photographs taken by Rawls depicted State Road 301 where a creek runs underneath it. In that area Rawls recovered a machete and a set of keys. All the items were introduced without objection (R 179-184).

The keys recovered in the creek off State Road 301 belonged to Carl Brown's truck. Photographs of the truck were likewise admitted (R 187-188).

The state's primary witness was Gary German, who testified that he was with petitioner and Jackie Bolesta on May 14 when

they met Carl Brown. Prior to that day, Bolesta, petitioner and German rode to Starke, where they left Bolesta at a Jiffy store, while German and petitioner went to Brown's place of employment to tell him they had horses for sale. German testified that petitioner said he had horses, although he [German] did not know whether petitioner had any horses. They later saw Brown and his employer, Mr. Dowling, in the Hawthorne area (R 191-192).

Over petitioner's objections (R 192-196), German testified that Bolesta and petitioner discussed having to kill both Brown and Dowling. On May 14, the two discussed robbing Carl Brown. German, Bolesta and Chestnut were all in Jackie's truck that day when they met Brown on State Road 301 and told him about some horses for sale. Brown followed the trio in his truck to the Management Area at Lochloosa, then got in the back of Jackie's truck with petitioner. German sat up front while Bolesta was driving. They drove around but did not see any horses and eventually returned to Brown's truck. They all got out of the vehicle and were standing at the front of Bolesta's truck when petitioner got an ax handle out of the truck and "they told him [Carl Brown] to hand over the money" (R 197-201). Brown gave his wallet to petitioner and petitioner hit Brown in the forehead with the ax handle. Bolesta had a machete and Brown pleaded with German to help him, "but I couldn't do nothing" (R 201). German stayed at the truck when Bolesta and petitioner took Brown down the road. After Brown was dead, German and petitioner took the body in the woods; Bolesta used his machete to cut some trees and bushes and they covered the body. Bolesta then told petitioner

to drive Brown's truck to Ocala, where they left it at a motel. The three men then drove to Bolesta's trailer, stopping at a bridge on the way to dispose of the machete, ax handle and the victim's bloody T-shirt (R 201-202, 204-205).

On cross-examination, German testified that Jackie Bolesta was married to his sister and he had known Bolesta for a long time. In fact, German lived with Bolesta and bought and sold horses and horse equipment with him. The trip to Starke to talk to Brown about selling horses was Jackie's idea; Jackie drove to Starke and it was his idea to stop at the convenience store. German knew that petitioner had helped Bolesta sell some horses and knew that Carl Brown was a horse trader. He also knew that Brown was often at E.J. Dowling's horse ranch (R 207-211).

Bolesta did not tell his brother-in-law about every horse deal he had and for all German knew, when they went to Starke the week before the murder, Bolesta may have had horses to sell to Brown. When they went to look for the horses the gate to the property was locked. Brown and Dowling got in their truck and left; German, Chestnut and Bolesta left in the latter's truck, and no harm came to either Dowling or Brown that day (R 211-213).

German was familiar with Bolesta's truck and had borrowed it in the past. Bolesta kept a tool box in the bed of the truck and a fiber glass ax handle by the door next to the driver's seat. He kept the machete there also. On May 14, Bolesta, German and Chestnut were at a truck stop having coffee when they saw Brown's truck and horse trailer pass by. German did not know Brown would drive by at that time. He knew that Bolesta and

Brown had some horse dealings and Bolesta said he needed to stop Mr. Brown to talk about some horses. Jackie drove the truck and flagged down Brown. Brown had a horse in the trailer and was driving north on SR 301 toward Starke. After a conversation between Brown and Bolesta by the side of the road, Brown followed Jackie's truck up State Road 20 to Cross Creek Road. Jackie was driving, but German could not recall if petitioner was riding in Jackie's or Brown's truck, or if there was any discussion between petitioner and Bolesta regarding Carl Brown (R 213-219).

German further testified that it was Bolesta, and not petitioner, who told Brown to hand over his money (R 222, 224). When Brown pleaded for his life, Bolesta told him, "We're going to do it, we've got to do it. I'm going to kill you" (R 222). Petitioner did not say anything at all. German stated that even he was scared for his own safety (R 222-223). He saw Bolesta hit Brown in the back of the neck with the machete (R 225). German admitted that although he referred to "they" in his testimony, it was really Bolesta who planned to rob and kill Mr. Brown. German also testified that he was granted immunity by the state for testifying against petitioner (R 226-227).

On redirect examination, German confirmed that Bolesta took Mr. Brown's wallet; he never saw petitioner in possession of it. Neither German nor Brown were armed. German claimed that he saw petitioner strike the first blow and he saw Jackie hit Brown once (R 228-230).

Sue Sullivan lives on a dirt road off of State Road 325. At approximately 6:00 or 6:30 p.m. on May 14, 1984, Ms. Sullivan

and her husband were driving home when they passed a white pick-up truck with two men in it. The truck was going very fast. It was followed by a blue truck pulling a horse trailer. Sullivan identified petitioner as the driver of the blue truck. She stated that in the 13 years she had lived in the area, she had only seen a horse loose one time (R 235-237).

Officer Chas Mayer investigated the truck and horse trailer found at the Ramada Inn in Ocala. He traced the vehicle tag to Carl Brown and wrote a missing person's report (R 239-240).

The medical examiner, Dr. William Hamilton, was summoned to a wooded area in Alachua County on July 25, 1984, to examine the remains of a body. The body was in an advanced state of decomposition and almost completely skeletonized. The mandible was there but the rest of the skull was recovered from another site (R 245). The skull revealed multiple injuries of both a blunt traumatic nature and deep incision wounds. An ovoid or pond fracture was evident on the front of the head. Dr. Hamilton concluded that the cause of death was due to blunt trauma and chop wounds to the head. Several of the wounds would have been sufficient to individually cause death, although the expert could not identify one particular wound as the cause of death. The pond fracture at the front of the skull could have caused death, but would not necessarily have been fatal, he stated. Such blunt force to the head could prove fatal due to subsequent changes in the brain, such as swelling or hemorrhaging. The same would be true of the linear fractures at the back and base of the skull. Dr. Hamilton opined that the pond fracture would be consistent

with a blow by a fiber glass ax handle. A machete handle could also produce that type of injury. The other injuries to the head were consistent with Jackie Bolesta's machete (R 247-251).

After a proffer (R 260-269), Investigator Lentz testified that he took a statement from petitioner on August 2, 1984, at petitioner's request. Petitioner signed a waiver of rights form which was admitted into evidence without objection (R 271-276). The form indicated that petitioner was presently on medication. Lentz stated that he talked to Gary German on July 25, 1984, after which they located the body of Carl Brown, and recovered the machete and car keys (R 277, 283). The head was removed from the body, but Lentz ascertained that German and petitioner had nothing to do with the removal of the head (R 284).

Over objection, Lentz testified that petitioner admitted going to Starke with Jackie Bolesta a week before the homicide. He dropped Bolesta off at a Suwanee Swifty store and then went to Carl Brown's residence at Bolesta's direction. Petitioner stated that he and Bolesta discussed robbing Mr. Brown prior to May 14. On the day of the murder, petitioner and Brown were riding in the back of Bolesta's truck, and Bolesta and German were inside the vehicle. When the truck stopped, Brown got out and Bolesta struck him with a fiber glass-type rod. According to the statement, Bolesta asked Brown for his wallet; Brown gave it to him and then ran into the woods. Bolesta put the ax handle in the rear of the truck, took a machete from the tool box in the truck bed and chased Brown in to the woods. Petitioner saw Bolesta strike Brown several times in the back with the machete as Brown

fled. Bolesta solicited petitioner's help in dragging the body further into the woods and then petitioner returned to the truck. Bolesta cut branches and concealed the body. Gary German never left the vehicle or participated in the attack (R 284-287).

Petitioner told Lentz that he left Brown's truck at a motel in Ocala. He then rode back to Gainesville with German and Bolesta, stopping at a spillway to discard the machete, car keys and shirt in the river. They arrived at Bolesta's trailer later that evening and changed clothes. Petitioner said blood splattered on his clothing when Bolesta first hit Brown with the ax handle (R 288). Lentz never asked petitioner whether he received any proceeds from the robbery (R 290).

On cross-examination, Lentz recalled petitioner telling him that he went to Starke to help Bolesta sell some horses; Bolesta told him that his aunt owned the property in Alachua County and there were horses on the property, but the gate was locked when they took Dowling and Brown there. The murder occurred within a couple of miles of that location. Petitioner never said that he planned to rob or kill Carl Brown (R 295-298).

Lentz testified on redirect examination that petitioner said Bolesta had mentioned robbing Mr. Brown, but he did not know when Bolesta planned to do it (R 301). On recross examination, Lentz clarified that petitioner never stated that he agreed to join Bolesta in committing the robbery, although Bolesta said he was going to rob Brown. Petitioner knew that Bolesta had prior business dealings with Brown (R 301-302).

Following this testimony, the state rested (R 303).

Petitioner moved for a judgment of acquittal, which motion was denied (R 303-308).

Petitioner testified as the only defense witness and stated that he first met Carl Brown in February of 1984 when he and Jackie Bolesta went to Starke to sell some horses. Mr. Dowling bought two horses from Bolesta on that occasion. Petitioner had only known Bolesta for a few months; they met at a truck stop. He met Gary German through Bolesta at the truck stop. Early in May, Bolesta said he wanted to sell some horses to Brown that belonged to his aunt and uncle. Petitioner rode to Starke with German and Bolesta to find Carl Brown. They located him at Mr. Dowling's horse stable. Bolesta stopped at a convenience store and German drove Bolesta's truck to the Dowling ranch. As far as petitioner knew, the sole purpose of the trip was to sell horses; there was no discussion about any other business or about illegal activities or hurting Brown or Dowling. German told Brown that Bolesta was at the store getting coffee and wanted to know if Brown was interested in buying horses. They agreed to meet in Hawthorne at a truck stop on State Road 301 (R 318-323).

Petitioner and German returned to pick up Bolesta, and then Bolesta drove the truck to a Jiffy store in Orange Heights. They were drinking coffee when Dowling and Brown drove by in a car. The three got in Jackie's truck, passed the car and pulled over to the side of the road. Jackie told the two ranchers to follow him and they drove out River Stix Road. During this time there was no discussion about committing any crime against either Brown or Dowling. Although petitioner did not know for a fact that

Bolesta's family had property in the area, he thought they were going to see Bolesta's aunt's and uncle's horses. The gate was locked and everyone left (R 323-326).

A week later petitioner went by Bolesta's trailer on his way to Hawthorne to check his mail. Petitioner, Bolesta and Gary German went together for coffee and as they were leaving, Brown drove past in his truck. Petitioner did not know it was Brown, but Jackie identified him and again said he wanted to sell Brown some horses. Petitioner knew that Brown was a horse dealer, but denied having any discussions about Brown with Bolesta. Bolesta drove his truck, with German and petitioner in the passenger seat. He flagged down Brown and asked him if he wanted to see the horses. Bolesta told petitioner to ride with Brown in the latter's truck. Brown and petitioner then followed Bolesta to the woods off Cross Creek Road. They drove on a wide graded road and petitioner assumed people lived there. When they entered the woods, Jackie stopped and told petitioner and Brown to ride in the back of his truck, leaving Brown's truck and trailer behind. They rode through the woods until a muddy ravine created an impasse; Bolesta turned around and returned to the entrance of the woods. As petitioner got out of the back of the truck, he saw Bolesta hit Brown on the top of the head with a fiber glass stick. Brown fell and cried for help. Bolesta took the man's wallet; he then threw the ax handle in the back of the truck, grabbed the machete and chased Brown into the woods (R 326-334).

Petitioner testified that he was scared to death when this happened. He denied ever striking the first blow with the ax

handle. He went into the woods only after Bolesta threatened his life. Brown was prone and Bolesta was chopping him in the back of the head. Bolesta told petitioner and German to drag the body and cover it with limbs. Bolesta then ordered petitioner to drive Brown's truck to Ocala, threatening to kill him and his family if he did not follow instructions (R 334, 336-337). Petitioner said he did not receive any money, nor was he offered any money. He denied robbing or killing Carl Brown (R 337-338).

On cross-examination, petitioner admitted that Bolesta had discussed robbing Carl Brown, but petitioner never said he would take part in it and did not know where it was going to happen (R 343-344). Petitioner claimed he told Deputy Lentz that he moved Brown's car because Bolesta threatened him (R 346).

On redirect examination, petitioner repeated that he did not know Jackie Bolesta was going to rob Brown on the day of the murder and did not agree to help in the robbery (R 354).

The defense rested following this testimony (R 356).

The state recalled Deputy Lentz, who testified that in his conversation with petitioner on August 2, 1984, petitioner never mentioned any threat by Bolesta to cause him to move Brown's vehicle (R 358).

After the charge conference (R 365-369) and before closing arguments, petitioner sought to restrict prosecutorial argument on the lack of duress or recent fabrication of threats by Bolesta against petitioner, in light of the state's pretrial motion in limine excluding the defense witnesses on the theory of defense. The trial court ruled that the state could argue about any

inconsistencies in the testimony regarding the threats, as well as all reasonable inferences arising from the evidence. The court denied petitioner's motion for mistrial based on the exclusion of the proffered evidence (R 369-374).

In its final arguments to the jury, the prosecutor referred to petitioner as "a snake in the grass, slithering, slimming, trying to avoid an answer as best he could" (R 429). Defense counsel's objection was sustained and the jury was instructed to disregard the comment (R 429).

Following instructions on the law (R 445-460), the jury retired to deliberate. Petitioner renewed his motion for judgment of acquittal and previous objections, the court adhering to its prior rulings (R 461). After approximately one hour of deliberations (R 464), the jury submitted the following questions:

> Is Mr. Chestnut under medication at this time? What is it and what is its purpose, since we are to consider "how a witness acts"?
>
> What medication was he on at the time of the statement to Mr. Lentz?
>
> Was the skull found at the creek? It appears that it might be at the place in the photo where the machete and keys were found?
>
> Is it known how it was moved there or when?

(R 466). The court advised counsel that it would not answer the jury's questions but would instruct the jury to rely on their recollections of the evidence. Defense counsel noted that petitioner was prepared to respond to the jurors' questions

regarding the medication. The court instructed the jury as indicated and deliberations were resumed (R 465-467). The jury returned after more than three hours of deliberating with its verdict, finding petitioner guilty of first degree murder as charged (R 129, 471).

The trial court immediately proceeded with sentencing, the presentence investigation report being waived by the defense (R 472). The court adjudicated petitioner guilty and sentenced him to life imprisonment without possibility of parole for 25 years. Petitioner was awarded credit for 486 days time served (R 127-128, 472-473, 477).

Petitioner's motion for new trial (R 130) was heard on December 10, 1985 (R 480-507) and presumably denied, there being no written order in the record.

On December 13, 1985, petitioner filed a timely notice of appeal (R 132-133). In his appeal to the First District Court of Appeal, petitioner argued that he was deprived on his right to present a defense by the exclusion of expert and lay witnesses to support his claims of duress and lack of intent to commit the crimes charged. On February 23, 1987, the District Court issued its opinion affirming petitioner's conviction and sentence. The per curiam opinion by a two judge majority held only that petitioner failed to demonstrate reversible error (A 1). Judge Ervin dissented and suggested that a question be certified to this Court as a question of great public importance (A 1-5).
On March 10, 1987, petitioner filed a motion for rehearing, rehearing en banc, or certification (A 7-12). By opinion dated

April 29, 1987, the District Court denied petitioner's motion for rehearing, but agreed to certify the following question as one of great public importance:

> IS EVIDENCE OF AN ABNORMAL MENTAL CONDITION NOT CONSTITUTING LEGAL INSANITY ADMISSIBLE FOR THE PURPOSE OF PROVING EITHER THAT THE ACCUSED COULD NOT OR DID NOT ENTERTAIN THE SPECIFIC INTENT OR STATE OF MIND ESSENTIAL TO PROOF OF THE OFFENSE, IN ORDER TO DETERMINE WHETHER THE CRIME CHARGED, OR A LESSER DEGREE THEREOF, WAS IN FACT COMMITTED.

(A 6).

On June 1, 1987, petitioner filed a notice to invoke the discretionary jurisdiction of this Court, on the ground that the decision of First District Court of Appeal passes upon a question certified to be of great public importance, and a motion for belated request to seek discretionary review. By order dated July 2, 1987, this Court granted petitioner's motion. This appeal follows.

III SUMMARY OF ARGUMENT

Petitioner contends in this brief that he was deprived of the right to present a defense by the exclusion of expert testimony to prove that he either could not or did not entertain the specific intent required to constitute the crime charged. Just as where evidence of voluntary intoxication is admissible for the purpose of negating a certain state of mind, evidence of an abnormal mental condition less than insanity should be no less relevant to the existence of a specific state of mind.

Petitioner urges this Court to answer the District Court's certified question in the affirmative and reverse the court's opinion affirming petitioner's conviction and sentence for first degree murder.

ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING PETITIONER'S PROFFERED EXPERT TESTIMONY AS TO HIS BRAIN DAMAGE AND MENTAL CONDITION, WHICH EVIDENCE WAS RELEVANT TO NEGATE AN ESSENTIAL ELEMENT OF THE CRIME CHARGED AND TO PETITIONER'S THEORY OF DEFENSE, THEREBY VIOLATING PETITIONER'S RIGHT TO A FAIR TRIAL AND TO PRESENT WITNESSES ON HIS BEHALF AS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.

The District Court of Appeal certified to this Court as a question of great public importance whether evidence of an abnormal mental condition not constituting legal insanity is admissible for the purpose of proving either that the accused could not or did not entertain the specific intent or state of mind essential to proof of the offense (A 6). Case law and the constitution mandate that the certified question be answered in the affirmative.

Petitioner was charged with first degree murder and prosecuted under the alternative theories of premeditated and felony murder, robbery being the underlying felony. Premeditated murder is defined as

> The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.

Section 782.04 (1)(a)1, Florida Statutes. Premeditation is an essential element of the crime and must be proved beyond a reasonable doubt. Gurganus v. State, 451 So.2d 817, 822 (Fla. 1984); Daniels v. State, 108 So.2d 755, 759 (Fla. 1959); Snipes

v. State, 154 Fla. 262, 17 So.2d 93, 97 (1944); Miller v. State, 75 Fla. 136, 138, 77 So. 669 (1918).

> If every homicide shall be presumed to be murder until the perpetrator show that the act is not murder, this emasculates the statute; for the design of the statute is to require that the degree or quality of crime shall be established by proofs. The common law says the killing is murder; the statute says the unlawful killing is murder, manslaughter or not criminal at all according to the facts and circumstances. And so it is to be ascertained from all the facts and circumstances whether any crime has been committed, and it cannot therefore be allowed that a man shall be adjudged guilty of the highest crime upon proof of only one of the ingredients, the single act of killing being but one of the ingredients of the crime. The very terms of the classification of the different degrees of murder and manslaughter and of justifiable and excusable homicide require something more than the proof of the killing, because it cannot be determined without consideration of all the facts and circumstances of each case whether the act be murder, manslaughter or the criminal intent be entirely wanting.

Miller v. State, 75 Fla. at 139, quoting, Dukes v. State, 14 Fla. 499 (1874).

In order to prove first degree felony murder the state must prove that the defendant entertained the requisite intent required to convict on the underlying felony. Gurganus v. State, supra; Jacobs v. State, 396 So.2d 1113 (Fla. 1981). Robbery is a specific intent crime. Bell v. State, 394 So.2d 979 (Fla. 1981); Smith v. State, 461 So.2d 991 (Fla. 1st DCA 1984).

Consequently, under either theory of the prosecution, the state was required to prove beyond a reasonable doubt that

petitioner had a specific intent at the time of the offense. Petitioner will demonstrate that the proffered medical testimony was relevant to both theories of prosecution, and the exclusion of this evidence violated his right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I Sections 9 and 16 of the Florida Constitution.

In Gurganus v. State, supra, at 822-823, this Court held that when specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Relevant evidence is evidence tending to prove or disprove a material fact. Section 90.401, Florida Statutes. Evidence which tends to disprove the specific intent element of the crime charged is relevant and must be allowed.

Prior to trial, the state moved in limine to exclude the testimony of an expert witness and several lay witnesses relevant to petitioner's defense (R 64-65). Petitioner also sought a pretrial ruling to determine the admissibility of testimony by the defense witnesses relevant to his theories of defense (R 85-88). Although the state did not directly challenge the medical testimony regarding petitioner's head injury from the rodeo accident and resulting brain damage, the trial court's order granting the state's motion in limine specifically precluded the testimony of Dr. Harry Krop and Dr. Edward Valenstein as to petitioner's mental status, since the

testimony did not meet the M'Naughtenl test for insanity and petitioner had not interposed a plea of not guilty by reason of insanity. The trial court ruled that expert testimony as to mental status, especially when offered to bolster an affirmative defense, would be improper since it would tend to confuse the jury, relying on Zeigler v. State, 402 So.2d 365 (Fla. 1981), Cawthon v. State, 382 So.2d 796 (Fla. 1st DCA 1980), Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976), and Bradshaw v. State, 353 So.2d 188 (Fla. 2d DCA 1977) (R 82-84). Petitioner subsequently filed a written proffer of the evidence to support his theory of absence of premeditation (R 96-105). Petitioner submits that the exclusion of the expert witnesses deprived him of the right to present a defense, which would negate the necessary intent element of the offense charged, and rendered his trial fundamentally unfair. Chambers v. Mississippi, 410 U.S. 284 (1972).

As noted above, evidence of a mental condition offered as bearing on the capacity of the accused to form the specific intent essential to constitute a crime is relevant. Case law from Florida and elsewhere indicates that petitioner should have been allowed to present expert testimony on this issue.

In the landmark case of Garner v. State, 28 Fla. 113, 9 So. 835 (1891), the Court ruled:

1M'Naghten's Case, 10 Clark & F. 200, 2 Eng.Rep. 718 (H.L. 1843).

> Whenever, however, a specific or particular intent is an essential or constituent element of the offense, intoxication, though voluntary, becomes a matter for consideration, or is relevant evidence, with reference to the capacity, or ability of the accused to form or entertain the particular intent, or upon the question whether the accused was in such a condition of mind to form a premeditated design. Where a party is too drunk to entertain or be capable of forming the essential particular intent, such intent can of course not exist, and no offense of which such intent is a necessary ingredient, be perpetrated.

28 Fla. at 153-154. The Garner court further explained the rule as it applied where murder is divided into degrees, stating that voluntary intoxication was relevant evidence only regarding first degree premeditated murder, and that where a jury concludes the accused lacked the requisite intent to commit that crime due to intoxication, such does not operate as an outright acquittal, but (assuming the jury is otherwise convinced beyond a reasonable doubt that the accused was responsible for the killing) it does operate so as to reduce the crime to second degree murder or manslaughter. See also, Gentry v. State, 437 So.2d 1097, 1099 (Fla. 1983) (while not a defense to second or third degree murder, voluntary intoxication may negate requisite specific intent such as that required in first degree premeditated murder); Jacobs v. State, 395 So.2d 1113, 1115 (Fla. 1981) (in first degree premeditated murder, intoxication "may make the killer incapable of the reflection called for by the requirement of premeditation"); Cirack v. State, 201 So.2d 706, 709 (Fla. 1967) ("while not a complete defense, voluntary intoxication is available to

negative specific intent, such as the element of premeditation essential in first degree murder").

Of course, the distinguishing characteristic between murder in the first degree and murder in the second degree is the lack of premeditation in the latter. Section 782.04, Florida Statutes. Where a particular state of mind, such as premeditation, must be proved beyond a reasonable doubt to establish the degree of crime, evidence of any condition relating to the accused's ability to form the specific intent should be admissible. Gurganus v. State, supra. In Gurganus, the defendant was charged with first degree murder and attempted first degree murder. At trial, he sought to introduce the testimony of two psychologists concerning the effects of his consumption of drugs and alcohol. The testimony was excluded. This Court reversed the convictions, finding the evidence relevant to the issue of Gurganus' ability to form or entertain a specific intent at the time of the offense. Although finding no sufficient evidence of insanity, the Court held:

> It is clear that Gurganus' ability to entertain a specific intent at the time of the offense, an element required to be proved by the state, was a relevant issue pertaining to both the first-degree murder and the attempted first-degree murder charges regardless of whether the state sought conviction under either a premeditated or a felony murder theory. To convict an individual of premeditated murder the state must prove, among other things, a 'fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues.' Sireci

v. State, 399 So.2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982). Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. E.g., Snipes v. State, 154 Fla. 262, 17 So.2d 93 (1944); Chisolm v. State, 74 Fla. 50, 76 So. 329 (1917). . . .

In order to prove first-degree felony murder the state need not prove premeditation or a specific intent to kill but must prove that the accused entertained the mental element required to convict on the underlying felony. Jacobs v. State, 396 So.2d 1113 (Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Adams v. State, 341 So.2d 765 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977). . . . It is clear that each crime for which Gurganus was convicted, whether under a premeditated or a felony-murder theory, required the state to prove beyond a reasonable doubt that Gurganus did have a specific intent at the time of the offense.

When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant. Cirack v. State, 201 So.2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So.835 (1891). . . . In this case, after having been told to presume that Gurganus had ingested Fiorinal and alcohol the psychologists testified that Gurganus would have a lessened capability for making rational choices and directing his own behavior, he would not be in effective control of his behavior, and would have had a mental defect causing him to lose ability to understand or reason accurately. We find these responses to be relevant to the issue of Gurganus' ability to form or entertain a specific intent at the time of the offense. Their exclusion from evidence was error.

Id., at 822-823 (Emphasis added). The Court concluded that the exclusion of this testimony deprived Gurganus of his Sixth and Fourteenth Amendment rights to provide witnesses on his own behalf and the error could not be considered harmless beyond a reasonable doubt.

The proffered testimony below was likewise admissible to show that petitioner was incapable of forming the requisite premeditation and specific intent to commit the crime of first degree murder. Certainly, evidence of petitioner's brain damage, mental impairment and medication was relevant to the issue of his ability to form or entertain a specific intent at the time of the offense. In Gurganus, large amounts of drugs and alcohol lessened Gurganus' capability for making rational choices and directing his own behavior; the evidence showed a mental defect (less than insanity) causing him to lose his ability to understand or reason accurately. Equally relevant is evidence that the defendant has suffered severe brain damage, resulting in confusion, memory loss and impaired judgment, and was under medication at the time of the offense. Petitioner's injury and infirmity caused him the same inability to make choices, direct and control his own behavior and reason accurately that the drugs and alcohol caused Gurganus.

Other jurisdictions also recognize that where the crime charged requires proof of a specific mental state, evidence is admissible to show that because of a mental defect or condition not amounting to legal insanity the defendant did not possess the requisite mental state at the time he committed the crime.

See, e.g., Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978); United States v. Brawner, 153 App.D.C. 1, 471 F.2d 969 (1972) (en banc); State v. Brooks, 97 Wash.2d 873, 651 P.2d 217 (1982); State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981); Commonwealth v. Gould, 405 N.E.2d 927 (Mass. 1980); People v. Wetmore, 22 Cal.3d 318, 149 Cal.Rptr. 265, 583 P.2d 1308 (1978). See also, People v. McDowell, 69 Cal.2d 737, 73 Cal.Rptr. 1, 447 P.2d 97 (1968) (failure to introduce psychiatric testimony regarding capacity to form specific intent in prosecution for robbery, burglary and murder deprived defendant of effective assistance of counsel). The courts reason that just as evidence of intoxication bears on a defendant's ability to premeditate intent to commit murder, so, too, does evidence of a mental defect or disorder. United States v. Brawner, supra; State v. Brooks, supra; Commonwealth v. Gould, supra.

In United States v. Brawner, 153 App.D.C. 1, 471 F.2d 969 (1972), the Court of Appeals, sitting en banc, adopted a new standard for the insanity defense and considered the possibility of a defense based on a mental condition that is not, like insanity, a complete exoneration, but negatives a specific mental element of certain crimes or degrees of crime. The court ruled that even when there is no defense of insanity, expert testimony of an abnormal mental condition is admissible when it bears on the existence of a specific mental element necessary for a crime, as in the issue of premeditation in first degree murder, provided the judge determines that the testimony is grounded in sufficient scientific support and

would aid the jury in reaching a decision on ultimate issues. The court reasoned:

> The issue often arises with respect to mental condition tendered as negativing the element of premeditation in a charge of first degree premeditated murder. As we noted in Austin v. United States, 127 U.S. App.D.C. 180, 382 F.2d 129 (1967), when the legislature modified the common law crime of murder so as to establish degrees, murder in the first degree was reserved for intentional homicide done deliberately and with premeditation, and homicide that is intentional but 'impulsive,' not done after 'reflection and meditation,' was made murder only in the second degree. (127 U.S.App.D.C. at 187, 382 F.2d at 135).
>
> An offense like deliberated and premeditated murder requires a specific intent that cannot be satisfied by showing that defendant failed to conform to an objective standard. This is plainly established by the defense of voluntary intoxication. . . .
>
> * * *
>
> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.

471 F.2d at 998-999. The court noted that its holding found support in the opinions of the highest courts of 15 states.2

2California, Connecticut, Colorado, Idaho, Iowa, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Rhode Island, Utah, Wisconsin and Wyoming.

Presumably, many more states have joined that number since Brawner was decided in 1972. See State v. Brooks, supra; State v. Christensen, supra; Commonwealth v. Gould, supra.

As recognized in Brawner, an abnormal mental condition short of legal insanity may be material in negativing premeditation; it does not exonerate the perpetrator, but it may reduce the degree of criminal homicide. The mental defect asserted here admittedly did not rise to the level of an affirmative insanity defense, but it was nonetheless relevant to the issue of lack of premeditation. The expert testimony proffered below would have shown that petitioner suffered from brain damage when he was kicked in the head by a bull, resulting in post-traumatic seizure disorder and personality changes; he functioned in a borderline range of intelligence and his judgment was impaired; he would respond to crisis situations in an impulsive and unplanned manner, and would typically conform or withdraw when confronted by others (R 97-99). See State v. Christensen, supra, where the court held that it was error in a first degree murder prosecution to exclude psychiatric testimony that the defendant had difficulty in dealing with stress and in stressful situations, his actions were more reflexive than reflective. The court noted that since the jury found the defendant guilty of first degree murder, it must have believed the defendant did not act in the heat of passion, or if he did act in the heat of passion, it was not the result of provocation; that his actions were intentional (second degree murder) and that he premeditated (first degree murder). The court

reasoned that with the proffered testimony, however, which would tend to show that the defendant acted impulsively, the jury could have concluded that he did not premeditate the homicide. Clearly, here, the fact of petitioner's brain damage and its impact upon his mental processes were relevant to demonstrate an absence of premeditation or specific intent.

Undoubtedly, respondent will argue that petitioner is actually attempting to foist a "diminished capacity" defense upon this Court. To the contrary, evidence of a mental condition short of insanity is not the equivalent of diminished capacity where it directly relates to the issue of intent in a prosecution for first degree murder. As emphasized by the court in United States v. Brawner, 471 F.2d at 998, its holding

> has nothing to do with 'diminishing' responsibility of a defendant because of his impaired mental condition, but rather with determining whether the defendant had the mental state that must be proved as to all defendants.

In Commonwealth v. Gould, 405 N.E.2d 927 (Mass. 1980), the court recognized that evidence of a mental condition short of insanity is not the equivalent of diminished capacity where it directly relates to the issue of intent in a homicide prosecution, reasoning:

> Permitting a jury to consider whether a defendant's mental illness affected his capacity to deliberately premeditate is not tantamount to adopting a doctrine of diminished responsibility. This change merely broadens our present practice by allowing jury consideration of mental impairment as well as voluntary intoxication on the issue of deliberate premeditation. Our rule 'contemplates full responsibility, not

> partial, but only for the crime actually committed.' [Citations omitted]. Evidence of the defendant's mental disease, like voluntary intoxication, bears on the specific intent required for murder in the first degree based on deliberate premeditation.

405 N.E.2d at 932.

Similarly, in Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978), the court was reviewing the defendant's convictions of two counts of first degree murder imposed and upheld by the courts of Wisconsin. The defense proffered testimony from a psychiatrist that the accused had an abnormal condition which prevented him from forming the specific intent to kill. The trial court excluded this evidence. Hughes successfully sought habeas corpus in the federal district court and on review in the Seventh Circuit Court of Appeals, that court held that the defendant's right to present witnesses on his behalf had been violated by the exclusion of the expert testimony. The court took great pains to emphasize that it was not seeking to impose a "diminished responsibility" defense for emotional or mental problems upon the State of Wisconsin, nor was it attempting to constitutionalize the law of evidence by constructing a constitutional right to introduce psychiatric testimony. The court was simply recognizing the defendant's basic due process right to present evidence relevant and competent to his defense, namely, that he was guilty of only second degree murder because of his inability to form the requisite intent for premeditated murder. By way of clarification, the court noted that the defendant sought to introduce the psychiatric

testimony to support his theory of "diminished capacity" to form specific intent in order to disprove an element of the crime of first degree murder, rather than to support a defense of "diminished responsibility." Id., at 1254 n. 8. The court noted the "semantical difficulties" involved and further explained:

> In the present action, while terming the lack of capacity to intend a 'defense,' the state does not dispute its obligation to prove intent. . . . It is true that by showing lack of capacity to have specific intent, petitioner would be presenting what is referred to as a 'defense.' However, what he actually is doing is attempting to disprove an element of the crime, not prove a defense.

Id., at 1255 n. 9. Accord, United States v. Brawner, supra at 998 ("Some of the cases following this doctrine use the term 'diminished responsibility,' but we prefer the example of the cases that avoid this term . . ., for its convenience is outweighed by its confusion").

In an analogous situation in Hawthorne v. State, 408 So.2d 801 (Fla. 1st DCA 1982), rev. denied, 415 So.2d 1361 (Fla. 1982), the district court approved the admissibility of expert evidence as to the battered woman's syndrome as it related to the defendant's claim of self-defense, rejecting the state's contention that the syndrome was simply a form of diminished capacity which did not rise to the level of insanity. The court reasoned:

> We think there is a difference between offering expert testimony as to the mental state of an accused in order to directly 'explain and justify criminal conduct,'

> Tremain, at 706, and the purpose for which the expert testimony was offered in the instant case. In this case, a defective mental state on the part of the accused is not offered as a defense as such. Rather, the specific defense is self-defense which requires a showing that the accused reasonably believed it was necessary to use deadly force to prevent imminent death or great bodily harm to herself or her children. The expert testimony would have been offered in order to aid the jury in interpreting the surrounding circumstances as they affected the reasonableness of her belief. The factor upon which the expert testimony would be offered was secondary to the defense asserted. Appellant did not seek to show through the expert testimony that the mental and physical mistreatment of her affected her mental state so that she could not be responsible for her actions; rather, the testimony would be offered to show that because she suffered from the syndrome, it was reasonable for her to have remained in the home and, at the pertinent time, to have believed that her life and the lives of her children were in imminent danger. It is precisely because a jury would not understand why appellant would remain in the environment that the expert testimony would have aided them in evaluating the case.

408 So.2d at 806-807 (footnote omitted).

The evidence of a substantial mental impairment, though not a defense in itself, is akin to the battered woman's syndrome, in that it aids the jury in understanding the circumstances and evaluating the defendant's state of mind. Expert testimony is not admissible where the subject of the expert testimony is commonly understood by laymen. Johnson v. State, 393 So.2d 1069 (Fla. 1981); Hawthorne v. State, supra. Certainly, evidence of organic brain injury and the effects of Dilantin are beyond the knowledge and experience of most

jurors. It is important to emphasize here that petitioner was not merely offering evidence as to his limited intelligence, or that he was an anti-social personality or psychopath, but rather he was offering medical proof of a severe and long-standing mental condition which substantially impacted on his capacity to form the requisite intent. Unlike in Cirack v. State, 201 So.2d 706 (Fla. 1967), where the expert's opinion was based solely upon facts of a self-serving nature related orally to the expert by the defendant, the evidence here was based on medical data of petitioner's head injury which pre-dated the crime. The expert testimony was clearly grounded in sufficient scientific support and would have aided the jury in reaching a decision on the ultimate issues. United States v. Brawner, supra. See also, Burnham v. State, 497 So.2d 904 (Fla.2d DCA 1986).

Not only was the testimony here relevant to a material issue at trial, but it would have aided the jury in evaluating petitioner's demeanor and credibility as a witness. During its deliberations, the jury returned with a question:

> Is Mr. Chestnut under medication at this time? What is it and what is its purpose, since we are to consider 'how a witness acts'?

(R 466). At that point the jury could not be advised that petitioner had brain damage, suffered seizures and was on 400 mg. Dilantin daily. Undoubtedly, medical testimony as to the

effects of the medication3 would have satisfied the jury's concerns about petitioner's demeanor on the witness stand. See State v. Gonzales, 140 Ariz. 349, 681 P.2d 1368 (1984). Left unexplained, the jury could have inferred from petitioner's medicated state and brain damage that he was lying, evasive, or, in the prosecutor's words, "a snake in the grass, slithering, sliming, trying to avoid an answer as best he could" (R 429). Considered in the context of the trial as a whole, where the jury was deprived of vital information which would explain petitioner's behavior, the prosecutor's remark was highly prejudicial.

Numerous cases in Florida, beginning with Garner v. State, have recognized that where a defendant is charged with an offense involving specific intent, evidence of a condition which impairs his ability to form the intent necessary to commit the crime is relevant. As the Garner Court held, if the defendant is incapable of forming the essential particular intent, such intent cannot exist, and no offense of which such intent is a necessary ingredient be perpetrated. The exclusion of petitioner's proffered evidence deprived him of any

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3The most common manifestations of Dilantin include nystagmus (jerking movement of the eyes), ataxia (loss of coordinated movement), slurred speech and mental confusion. Physicians' Desk Reference (38th ed. 1984).

opportunity to challenge this element of the offense.4

As noted by the United States Supreme Court in Chambers v. Mississippi, 410 U.S. 284, 302 (1972), few rights are more fundamental than that of an accused to present witnesses in his own defense. The improper exclusion of the defense witnesses here unfairly and severely restricted petitioner's opportunity to persuade the jury that he did not and could not entertain the requisite intent to rob and murder Carl Brown. Such error cannot be deemed harmless beyond a reasonable doubt where the issue of specific intent was crucial to petitioner's defense. Gurganus v. State, supra.

Garner and Gurganus affirmatively answer the District Court's certified question. This Court must reverse petitioner's conviction and sentence and remand to the District Court with directions that petitioner be granted a new trial.

4The net effect of the trial court's pretrial ruling was to create an irrebuttable presumption of intent to commit the crime charged. A conclusive presumption establishing an element of the crime violates the due process clause of the Fourteenth Amendment by relieving the state of the burden of proving each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). The state must prove criminal intent to convict a defendant of murder. Mullaney v. Wilbur, 421 U.S. 684 (1975). By excluding evidence offered to rebut the presumption of intent, the court unconstitutionally relieved the state of its burden of proving the element of specific intent beyond a reasonable doubt. See Hughes v. Mathews, 576 F.2d 1250 (7th Cir. 1978).

V CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, petitioner respectfully requests that this Court reverse the decision of the First District Court of Appeal and remand the cause with directions that petitioner be granted a new trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Brief on the Merits has been furnished by hand delivery to Royall P. Terry, Assistant Attorney General, The Capitol, Tallahassee, Florida; and, a copy mailed to petitioner, Mr. Adam Chestnut, this 28th day of July, 1987.

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