IN THE SUPREME COURT OF FLORIDA

ADAM BLAINE CHESTNUT

Petitioner,

vs. CASE NO. 70,628

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner Adam Blaine Chestnut was the defendant in the trial court and the appellant in the First District Court of Appeal. Respondent was the prosecuting authority below and the appellee respectively. Petitioner will be referred to herein either as "petitioner" or by his proper name. Respondent will be referred to herein either as "the state" or as "respondent".

The record on appeal consists of one volume of pleadings and other court papers and three volumes of transcript of the proceedings below. The record on appeal will be referenced by the symbol "R" followed by the appropriate page number, in

parenthesis. Transcripts of the trial and other proceedings in open court will be referenced herein by the symbol "T" followed by the appropriate page number, in parenthesis.

SUMMARY OF ARGUMENT

The concept of "abnormal mental condition" is too ill-defined to warrant the introduction of same into Florida law as a defense in specific intent crimes, by judicial fiat. Judicial activism should be eschewed and the question certified falls more within the province of the legislature.

Moreover, petitioner's theory of defense was that coercion and duress on the part of Jackie Bolesta was the cause of petitioner's involvment in the crime, as borne out by the record. Thus, the trial court, for sound reasons, disallowed the proffered testimony of the mental health experts. It was only at the beginning of the appellate stages of the matter sub judice that the concept of diminished capacity to form the essential specific intent became an issue, and took the form of an attempt to inject the concept of "diminished responsibility, into Florida law. The trial court was never actually given the opportunity to address any question of lack of specific intent. Petitioner's position at trial was that he had been kicked in the head by a bull 12 years earlier which allegedly rendered him less intelligent than he had been, easily led and susceptible to pressures exerted by the infamous Jackie Bolesta. The proffered testimony of the mental experts had nothing to do with ability to form specific intent. This is a new issue and an inappropriate one for this court to consider, given the facts and legal posturings of petitioner heretofor.

ARGUMENT

CERTIFIED QUESTION

> 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 LESSER DEGREE THEREOF, WAS IN FACT COMMITTED?

Florida does not follow the doctrine of diminished responsibility in cases where the defendant does not plead "not guilty by reason of insanity".

In 1976 the Fourth District had to decide whether the proffered testimony of a psychologist who would have testified, in furtherance of the defendant's plea of entrapment, that the defendant was dependent on others and lacked will power. In that case the defendant had not pled insanity as a defense. The psychologist's testimony was excluded and the court found no reversible error.

> It is our opinion that to allow expert testimony as to mental state in the absence of an insanity plea would confuse and create immaterial issues. If permitted, such experts could explain and justify criminal conduct. As lay people we could guess that almost everyone who commits crimes against society must have some psychiatric or psychological problem. However, the test continues to be legal insanity as defined and not otherwise and the court and jury should not be subjected to testimony as to mental

> flaws and justifications where the defendant knew the difference between right and wrong at the time of the crime.

Tremaine v. State, 336 So.2d 705 (Fla. 4th DCA 1976), at 707, 708. See also Ezzell v. State, 88 So.2d 280 (Fla. 1956), and Everett v. State, 97 So.2d 241 (Fla. 1957).

> In Florida, the test of mental capacity is the ability to distinguish between right and wrong, rather than the person's intelligence or general mental capacity. Young v. State, 140 So.2d 97 (Fla. 1962). See also Camp v. State, 149 So.2d 367 (Fla. 2d DCA 1963). Florida courts have rejected the concept of diminished responsibility as a defense to criminal conduct, unless framed within the defense of insanity. Tremaine v. State, supra. Here appellant did not choose to tender a defense of insanity and made no showing of being incapable of distinguishing right from wrong. Since retardation or diminished mental capacity does not insulate a defendant from criminal responsibility, the trial court did not err in striking the asserted defense. For courts to allow the proffered defense might open the door to evasion of criminal responsibility by those who know right from wrong. The trial court therefore correctly rejected the proffered defense and appellant's request to appoint an expert psychologist to support that defense.

Bradshaw v. State, 353 So.2d 188, 190 (Fla. 2d DCA 1977).

As petitioner points out, this court in Gurganus v. State, 451 So.2d 817 (Fla. 1984) employed some language that petitioner has embraced for the purpose of urging upon this court the

proposition that diminished capacity is a doctrine whose time has come in Florida.

However, as Judge Ervin pointed out in his concurring/ dissenting opinion below, Chestnut v. State, 505 So.2d 1352, 1356 (Fla. 1st DCA 1987), this court has not explicitly overruled its prior opinions precluding the admissiblity of evidence not meeting the test of legal insanity as a defense to a specific intent crime. Thus, to answer the certified question in the affirmative would represent a radical departure in Florida law.

Perhaps the day will come when the legislature of this state will see fit to lessen a citizen's responsibility for a specific intent crime occasioned by aberrant behavior resulting in a temporary or permanent diminution of ability to form specific intent. Even temporary insanity has been recognized by courts throughout the nation as bearing upon a question of responsibility for crimes because an insane person, however fleeting the condition might be, is presumed incapable of recognizing the difference "right" and "wrong". An "abnormal mental condition" might be generated by anything from prenatal injury to the psychological consequences of divorce. Respondent further submits that all crime is psycho-pathological in origin and what petitioner is suggesting offers the potential of creating an almost unlimited reservoir of legally acceptable reasons why a defendant did not specifically intend to do what he did do.

But historically, subnormal mentality was not recognized as a defense to crime in either the courts of England or the American states. The mental tests for criminal responsibility evolved in England first with the infant or "wild beast" test, Rex v. Arnold, (1724) 16 How.St.Tr.(Eng.) 695. Then came Lord Hale's Rule which adopted the test of the capacity and understanding of a normal child of 14 years. 1 Hale, P.C. 30. Finally, the law of England was settled in 1843 when, following the case of M'Naghten, one Car. & K. 130, note, 10 Clark & F. 200, 8 Eng. Reprint, 718, that test contemplating that the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong. See discussion at 44 A.L.R. 584 et. seq.

The right and wrong test gained acceptance in the United States. Basically, it holds that a weak or even disordered mind is not excused from the consequences of crime so long as at the time of the act the person knew the nature and quality of the act he was doing and that he knew that it was wrong. People v. Farmer, 194 N.Y. 251, 87 N.E. 457 (1909) A number of states came to adopt this interpretation of the M'Naghten Rule. See compendium of early cases at 44 A.L.R. 586. Respondent concedes that a number of states have modified their positions to the effect that interpretation of mental abnormality is not

restricted to the "all-or-nothing' doctrine of insanity as a complete defense. To date, this state has not joined that circle.

Respondent submits that even petitioner would agree that this court is not here concerned with mental abnormality (short of insanity) as a mitigating factor at time of sentencing.

Some states now take the position that evidence of diminished responsibility is admissible for the purpose of determining what crime was committed, e.g., second degree murder as opposed to first degree murder, specific intent being an essential element of the latter.

All things considered, the instant case is not one compatible with the suggestion of the Gurganus court, i.e.- "any condition relating to the accused's ability to form a specific intent, is relevant." Gurganus v. State, supra at 822-823. Even before petitioner obtained the services of an attorney he insisted (when questioned by detective Lentz) that it was Jackie Bolesta who clubbed the victim with the ax handle and that his (Chestnut's) only participation in the affair was helping to drag the body into the woods and driving the victim's truck to Ocala where it was abandoned.

During his opening statement counsel for the defendant, Adam Chestnut, told the jury outright:

"The question that you're going to have to be deciding over the next several days is whether or not Adam Chestnut is the one who was involved in this dastardly deed, or whether or not there is another individual who is, in fact, the one responsible, and whether or not Jackie Bolesta is the one responsible, and Adam Chestnut essentially the victim, just like Carl Brown and just like Gary German. That is going to be a major issue in the case." (T 168).

* * *

"The major issue in this case, or one of the major issues in this case I want you to have an idea of, is whether or not Adam Chestnut is the one responsible for striking that blow, because one of the other things I suspect that you're going to have in this case is an opportunity to listen to Adam Chestnut. I think Adam Chestnut is going to get on the stand and under oath tell you that he is not the one who struck Carl Brown at all." (Emphasis added) (T 171).

During rebuttal testimony Detective Lentz, the investigating officer, related for the jury Adam Chestnut's account of the victim Mr. Brown being struck by Bolesta with a fiberglass ax handle. (T 286-287). Adam Chestnut took the stand in his own defense and testified articulately as to his version of the events. His memory was flawless and his version of the events very detailed. (T 317-356).

Then, on final argument defense counsel argued that:

> "The main thing I think that Adam showed you when he testified is that he's not real bright, he doesn't handle crisis situations real well, he gets frustrated, he gets confused." (T 397).
>
> * * *
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> "Back in August of 84 that man, with his intellectual capacity, said, 'no, sir, that's not what I did. I didn't hit the man at all, I didn't know he was going to be robbed, I didn't know he was going to be murdered.'" (T 399).

Now, before this court petitioner claims deprivation of constitutional rights because he was prohibited from presenting evidence for the jury to the effect that maybe he did hit Mr. Brown with the ax handle but Jackie made him do it. He was to weak-minded to realize that he was participating in a robbery even though Bolesta had told him several days before that he was going to rob Brown. (T 344).

Robbery is a specific intent crime so now petitioner changes his position to the effect that perhaps he was only guilty of second degree murder or maybe only of aggravated battery since it was Bolesta's machete attack that killed the victim. Respondent had it both ways at trial in that his attorney was permitted to argue **(1)** that Adam Chestnut was too dull-witted to resist Bolesta's suggestions and **(2)** it wasn't Chestnut but Bolesta that hit the victim with the ax handle.

The case at bar is not comparable or analogous to Pope v. State, 458 So.2d 327 (Fla. 1st DCA 1984). In Pope the defense was premised simply on a general plea of not guilty and the incomplete defense of voluntary intoxication. The "unknown intruder" defense was never fully developed during the trial.

> Instead, defense counsel relied primarily on the presumption of innocence, referring to the events surrounding the stabbing as being "a mystery", and the state's case being just a lot of facts thrown together." Id. at 329.

Therefore, this court logically found a plea of not guilty should not preclude the defense of voluntary intoxication anymore than it precludes a defense of entrapment. But the case at bar was handled far differently. Defense counsel announced in his opening statement that it was not Chestnut but Bolesta who clubbed the victim with the ax handle. Petitioner took the stand and testified accordingly and then during summation for the jury counsel reiterated that it was the defenses position that Bolesta, not Chestnut was the actor with respect to the blow to the victim's head with the ax handle. Thus, petitioner did not rely upon a general plea of not guilty. Not only was the defense one of non-involvement but counsel was permitted to argue that it was the defendant's low intelligence that caused him to participate in disposal of the victim's body and truck. Even a casual reading of petitioner's testimony both on direct and cross-examination must have given the jury great pause as to the

proposition that one who could testify so articulately and remember so much detail could have been a plaything in the hands of someone like Bolesta. There was no evidence introduced to the effect that petitioner was in any way Bolesta's economic dependent. In any case, this court is faced with the dilemma of being asked to excuse, to a degree, petitioner's participation in felony murder based upon a record repleat with denials that petitioner was even involved beyond his mere presence and assistance in disposing of the victim's body and truck. Again, this is not a proper case for either consideration or application of the diminished capacity doctrine.

The case sub judice involved more than just a plea of not guilty. From the moment of petitioner's arrest until final argument the defense of "Jackie did it" was hammered into the jury. That was Chestnut's defense. After the state's pretrial motion in limine was granted prohibiting petitioner from calling to the stand several professional mental health practitioners to testify that Adam was to dull-witted to not be influenced by Bolesta, did counsel for the defense then suborn perjury by putting his client on the stand to deny committing any crime at all? Petitioner even claimed that his participation in concealing the victim's body and disposing of his truck was the result of duress and coercion-after the murder had been committed. If it was Bolesta that swung the ax handle then the

proffered testimony was irrelevant even if the law of this state recognized the diminished responsibility defense.

Notwithstanding his inconsistent positions at trial and later on appeal petitioner's position is clear. He wanted to present evidence that he was too manipulated by Bolesta to avoid participation in a robbery or too stupid to know that a robbery was occurring and thus escape responsibility for first degree murder or escape responsibility altogether.

Petitioner appears to argue that the granting of the state's motion in limine required him to change his trial strategy where his only chance of acquittal then was to deny outright that he struck Mr. Brown with the ax handle because the court prohibited his presenting evidence that he was incapable of forming specific intent. This is utter nonsense. Even before trial petitioner never took this approach. In his motion of October 30, 1985 petitioner pled, inter alia:

> "The defendant further contends that the defense of duress is applicable to the lesser included offenses incorporated in the charge of murder and the defendant, Adam Blaine Chestnut, will not waive his rights to have all lesser included offenses offered to the jury." Paragraph five, (R 86). (Emphasis added).

On October 12, 1985 Judge Mickle made a specific finding with respect to the mental health experts Harry Crop, a psychologist and Edward Valenstein, a neurologist or neuro-

surgeon. The judge wrote "Basically, they would testify as experts as to the mental status as it relates to the defense of duress". Even Judge Ervin, who wrote a very scholarly dissent in the First District said:

> In that the evidence of any danger immediately preceding the crime is not apparent from the record, I would affirm the lower court's ruling excluding appellant's proffered evidence as it relates to the defense of duress.

Chestnut v. State, supra at 1354.

Petitioner cannot seem to make up his mind whether he is urging upon this court the notion that whatever it was he did, it was because of threats from Jackie Bolesta-after the murder was committed or whether he was at the scene of the murder because he was so dull-witted or that he followed Jackie Bolesta around like a dog. In any event, from the moment of his arrest until the end of his trial he expressly, publicly and under oath denied striking the victim, Mr. Brown. Petitioner's motion of October 3, 1986 (R 85) does not mention the term "specific intent". What the motion is all about, from beginning to end is duress and coercion although petitioner draws only a hazy line between fear of Bolesta and petitioner's alleged low intelligence as the motivating force as to why petitioner was where he was at the time the victim was murdered. In his motion, petitioner seems unable to distinguish between the two factors-almost to the point of attempting to enmesh and intertwine them to the point of being

confusing. Looking at the four corners of petitioner's "motion to determine the admissibility of evidence" one can only conclude that petitioner is attempting to convince the trial court that because of Chestnut's low intelligence and passive personality he was unable to resist the influences of Bolesta. But no evidence was presented to the effect that Bolesta exerted or attempted to exert any influence on petitioner until after the killing had taken place. At this stage, petitioner is attempting to salvage something out of an original defense that was grounded on coercion and duress. But this argument failed to survive the scrutiny of the First District.

For these reasons, the case sub judice is a totally inappropriate one for the introduction into Florida jurisprudence the concepts of "diminished responsibility" or "diminished mental capacity. Further, what are the parameters for such a notion? The term "abnormal mental condition, as set out in the lower court's certified question of great importance cuts too wide a swath for this court to answer the question with any degree of precision. Could a sociopath fit the mold of someone with "an abnormal mental condition not constituting legal insanity?" Must the "abnormal mental condition" be physical or traumatic in origin? How long must such a condition have been present? Answering the lower court's certified question in the affirmative would open the door to special treatment for any person claiming to have any number or kinds of personality disorders which might

be leaned on as a basis for escaping criminal responsibility or at least the full impact of the law where specific intent is an essential element of the crime. To do so in this particular case would amount to unwarranted judicial activism in an area that is much too fraught with uncertainty even if restricted to crimes of violence such as robbery and murder. Every feeble minded or sociopathic thief or burglar would be in a position to force upon the trial courts evidence of their social maladjustments in an effort to escape criminal responsibility for their acts.
Some years ago the courts of California began admitting evidence of "diminished capacity" but after a time it became apparent that chaos was resulting. It appears that there was a lack of consensus as to what kinds of "abnormal mental condition" could be properly cognizable by the courts or what might be origins of same recognizable by the courts, i.e., divorce, death in the family, business reversals, prenatal injury?

Finally, the legislature of that state had to step in.[1] The defense of diminished capacity was abolished by statute. The current position of the California courts with respect to admissibility of evidence of mental defect not constituting

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[1] Proposition 8 added section 25 to the Penal Code. The Legislature enacted sections 28 and 29. Proposition 8 became effective on June 9, 1982. (Cal. Const., art. I, §28; art. XVIII, §4.)

insanity was cogently explained in People v. McCowan, 182 Cal.App.3d 1, ___ Cal.Rptr. ___ (1986), viz:

> Over defense objections, the trial court ruled the defense could not "ask any psychiatrists or other expert on mental condition a question as to whether or not the defendant had the capacity to form a mental state in issue here on the date of the alleged commission of the offense." The court also barred expert testimony "as to whether or not the defendant did or did not form the required mental state at the time of the alleged commission of the act, . . ." The court expressly relied on sections 25, 28 and 29 for its rulings.
>
> Section 25, subdivision (a), states in part: "The defense of diminished capacity is hereby abolished. In a criminal action, . . . evidence concerning an accused person's. . . mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged."
>
> Section 28 provides in pertinent part: "(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged. [§] (b) As a matter of public policy there shall be no defense of diminished

capacity, diminished responsibility, or irresistible impulse in a criminal action . . . [§] . . . (d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to admit or exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense." Section 29 states: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

* * *

(2) Not all relevant evidence is admissible. Evidence Code section 351 provides that all relevant evidence is admissible except as otherwise provided by statute. The Legislature has created exceptions where relevant evidence is excluded on grounds of unreliability or public policy. (See Evid. Code, §900 et seq. [privilege] and §1200 et seq. [hearsay].)

(3) Both the Legislature and the electorate have the power to enact criminal statutes which define the elements of crimes. [citations omitted] A fortiori, they also have the power to determine which defenses will exist and the mental states required for the commission of crimes. **(4)** The restrictions imposed by sections 25, subdivision (a), 28 and 29 are determinations by the electorate and

> the Legislature that for reasons of reliability or public policy, capacity evidence is inadmissible.

It is apparent that in California a trial court, within its discretionary authority, may admit testimony from a psychiatrist or psychologist as to whether the accused had a mental disease, mental defect or disorder at the time of the alleged offense. Id., at 12-13.

In petitioner's motion to determine the admissibility of evidence (R 85) he implored the trial court to allow him to present the testimony of Harry Kropp PhD, a psychologist to show that he was of low intelligence, brain damaged, easily led, and coerced. Petitioner further contended that absent that testimony, he would be stripped of his sole defense. (R 87) This is totally inconsistent with the position announced by defense counsel during opening statement when he announced to the jury that the defendant would take the stand and tell the jury that it was Jackie Bolesta that clubbed the victim with the ax handle, not Adam Chestnut. Defense counsel repeated this argument during summation.

It is anticipated that petitioner will deny that he is attempting to foist the defense of "diminished capacity" upon this court but the familiar maxim about a rose by another name seems applicable here. Respondent finds no fault with the California position but would emphasize to this court that the

rules governing testimony relative to admissibility of testimony showing that a defendant suffered from some mental defect at the time of the crime were formulated by the legislature of that state or by that body which is responsible for amending the California Evidence Code.

It is possible that there is a future for the concept of "diminished responsibility" or "diminished capacity" in Florida but without a system of definitions and statutory structure the result would be chaos and uncertainty. Such a task is best left for the legislature.

CONCLUSION

The decision of the First District Court of Appeal should be affirmed and the question certified answered in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Paula S. Saunders, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 on this 17th day of August, 1987.

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