O/a 11-3-87 16

IN THE SUPREME COURT OF FLORIDA

ADAM BLAINE CHESTNUT,

Petitioner,

v. CASE NO. 70,628

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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I PRELIMINARY STATEMENT

This brief is submitted in reply to Respondent's Brief on the Merits. Respondent's brief will be referred to herein as "RB." All other references will be as set forth in Petitioner's Brief on the Merits.

II 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.

As argued initially in petitioner's brief on the merits, petitioner is not urging this Court to recognize an affirmative defense based on evidence of a mental condition short of legal insanity; rather, petitioner seeks this Court's reaffirmance of the long recognized, though perhaps misunderstood, principle that evidence of a mental condition which negates the specific intent element of the offense charged is relevant and probative evidence and therefore admissible. Respondent has, not unexpectedly, misconstrued the thrust of petitioner's argument and twisted the issue by focusing solely on the so-called doctrine of diminished capacity. Consequently, respondent has failed in its brief to address the certified question before this Court.

Florida law has consistently held that diminished mental capacity is not a defense to criminal conduct. Bradshaw v. State, 353 So.2d 188 (Fla. 2dDCA 1977); Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976). Petitioner is not asking this

Court to disapprove the decisions in Bradshaw or Tremain.1 Nor does petitioner dispute the rationale of those cases that a mental state less than insanity should be inadmissible simply to explain and justify criminal conduct. Petitioner does posit that there is a significant distinction between the introduction of psychiatric testimony to explain and justify criminal behavior and the use of such testimony to negate an element which the state must prove to establish the defendant's guilt. Clearly, it is one thing to say that a defendant has a low intelligence and should not be held responsible for his actions, and quite another to say that the defendant suffers from a mental defect (whether self-induced through drug or alcohol ingestion or incurred through disease or injury) such that he cannot form the specific intent to commit a certain crime.

1Both Bradshaw v. State, 353 So.2d 188 (Fla. 2d DCA 1977) and Tremain v. State, 336 So.2d 705 (Fla. 4th DCA 1976), deal with diminished mental capacity as a complete defense. Although Tremain treats diminished responsibility as an all or nothing proposition, the district court provided the following caveat to its holding in footnote:

> There is the theory of diminished responsibility under which evidence of a mental condition less than insanity is admissible. This evidence has been held admissible for purposes of negating specific intent, to determine what punishment to give a defendant, see 22 A.L.R.3d 1228, Annot.: Mental or emotional condition as diminishing responsibility for crime.

336 So.2d at 706 n.1. A careful reading of these decisions clearly shows that the precise issue before this Court was not addressed by either court in Bradshaw or Tremain.

Respondent appears oblivious to such a distinction, although it has been recognized by a growing number of federal and state courts.2

This issue was squarely met in a succinct and incisive decision of the Supreme Court of Pennsylvania in Commonwealth v. Walzack, 360 A.2d 914 (1976), where the court, "persuaded by the vast weight of authority," Id., at 915, held for the first time that psychiatric evidence should be admissible to negate the element of specific intent required for a conviction of first degree murder. Noting first that the state must prove each element of a crime beyond a reasonable doubt, the Walzack court reasoned that any analysis of the admissibility of a particular type of evidence must start with a threshold inquiry as to its relevance and probative value. The court determined that expert testimony concerning an accused's mental capacity to form the type of specific intent a conviction requires for first degree murder would significantly advance the inquiry as to the presence or absence of an essential element of the crime. "Thus, the exclusion of the proffered testimony cannot

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2As one court aptly stated:

> There is no logic in the 'all or nothing' assumption underlying so many court opinions on the subject--that a person is either 'sane' and wholly responsible for all his acts, or 'insane' and wholly irresponsible.

State v. Gramenz, 256 Iowa 134, 126 N.W.2d 285 (1964).

be based upon a lack of relevancy." 360 A.2d at 918. The court next found that there was no other basis for excluding the proffered testimony; psychiatric testimony was accepted in the courts of the state on other issues; and there was no policy reason to justify ruling such testimony incompetent. Finally, having determined that the proffered evidence was both relevant and competent, the court held that due process required its admission:

> Even the most myopic interpretation of [the Due Pocess Clause] would necessarily concede the right to offer relevant evidence to challenge a material issue of fact.

360 A.2d at 921, quoting, Commonwealth v. Graves, 461 Pa. 118, 334 A.2d 661, 665 n.7 (1975). The court further noted that its holding met with virtually unanimous approval among legal textwriters and authorities, including the American Law Institute's Model Penal Code. Id., at 920, n.19.

It should be abundantly clear that petitioner is not seeking a "radical departure" from accepted law, as respondent charges (RB 6). In England, where the law of insanity was first formulated, the position advocated by petitioner has now been engrafted into the law. The English Homicide Act, 1957, 5 & 6 Eliz.II, c.II §2(1), provides:

> Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired the mental

> responsibility for acts and omissions in doing or being a party to the killing.

The Model Penal Code has adopted a similar principle:

> Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

Model Penal Code (U.L.A.) §4.02(1) (1962).

Respondent's contention that the concept of "abnormal mental condition" is too ill-defined to warrant judicial recognition further ignores nearly a quarter century of case law defining and refining the concept. Respondent's only legitimate concern is defining the parameters of admissible psychiatric testimony to negate an element of the offense. Respondent foreshadows an "almost unlimited reservoir of legally acceptable reasons why a defendant did not specifically intend to do what he did do" (RB 6), but this concern is unwarranted. Obviously, petitioner is not advocating that "every feeble minded or sociopathic thief or burglar" could foist "their social maladjustments" on the courts "in an effort to escape criminal responsibility for their acts" (RB 16). States which have recognized the admissibility of evidence for this purpose have had no difficulty in defining the parameters of relevant evidence to negate the mental intent element of an offense charged. In Pennsylvania, for example, the court in Commonwealth v. Walzack, supra, sustained as relevant the admission of psychiatric testimony that a pre-frontal lobotomy negated the required mens rea for first degree murder.

Subsequently, in Commonwealth v. Weinstein, 451 A.2d 1344 (Pa.1982), the court explained that diminished capacity was an extremely limited defense and interpreted Walzack to hold only that "psychiatric testimony which speaks to the legislatively defined state of mind encompassing a specific intent to kill is admissible," 451 A.2d at 1347, and that psychiatric testimony is competent and relevant if "it speaks to mental disorders affecting the cognitive functions [of deliberation and premeditation] necessary to formulate a specific intent." Id. Consequently, the court rejected proffered psychiatric testimony as to the defendant's irresistible impulses. And in Commonwealth v. Zettlemoyer, 454 A.2d 937 (Pa.1982), the court held that personality disorders or schizoid/paranoid diagnoses were not relevant to the so-called Walzack/diminished capacity defense.

In reality, the dimensions of a defense based on a mental defect which impacts the ability to entertain a specific intent are not boundless. Not all psychiatric testimony, regardless of its nature, is relevant to the question of specific intent. There should be no doubt, however, that evidence of brain damage and the effects of medication on one's cognitive abilities are highly probative on the issue of one's ability to entertain the intent required for first degree murder.

Respondent's only purported authority for disallowing expert evidence of a defendant's mental state to negate the specific intent element of a crime is People v. McCowan, 182 Cal.App.3d 1, 227 Cal.Rptr. 23 (1986). Respondent's reliance

on this case is misplaced. First, respondent has apparently misread the opinion in McCowan to mean that evidence of a mental condition or defect not amounting to insanity is inadmissible in California. To the contrary, the California court held that such evidence is admissible, and, in fact, the defendant in McCowan was permitted to present substantial psychiatric evidence to the effect that he suffered from a mental disorder and from depression, which had a significant impact on his mental process on the night of the crimes, that he had hallucinations, was out of control and unable to think clearly or make judgments, and that his mental condition was caused by numerous, intense pressures and stresses, including his divorce and difficulties at work. The Court of Appeal in McCowan noted that a defendant has the right to present a defense, and that the prosecution is required to prove every fact necessary to constitute the crime beyond a reasonable doubt. Consequently, such evidence could not constitutionally be excluded.

After quoting the statutory provisions governing the admission of such evidence, which respondent has set forth in its brief (RB 17-18), the McCowan court held that Sections 28 and 29 of the California Penal Code did not bar psychiatric testimony regarding a defendant's mental state at the time of the crime, but did preclude psychiatric testimony on the ultimate conclusion whether the accused had the requisite mental state at the time of the offense, placing the determination of that ultimate fact in the province of the trier of

fact. In other words, the California statute does not forbid an expert from stating his opinion about the accused's mental condition, but it does preclude the expert from testifying whether one of the mental states required for the offense existed at the time. The court cautioned that the statute be viewed:

> not as a prohibition on the use of expert testimony, but as a limitation on the use of expert testimony, and a determination that such testimony on the ultimate issue whether the accused had the requisite mental state is unnecessary. Expert testimony embracing the ultimate issue to be decided by the trier of fact generally is admissible.

227 Cal.Rptr. at 30. The court concluded that McCowan was not deprived of his due process rights or right to present a defense by the trial court's exclusion of expert testimony solely on the question of whether or not he had the required mental state at the time of crime.

Of course, any discussion of the California rules of evidence are inapplicable here since Florida clearly allows expert testimony as to the ultimate issues. Section 90.703, Florida Statutes, provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.

Thus, any limitations placed on the use of expert testimony by California would not apply here, yet the constitutional rights to due process of law and to present a defense would govern

regardless of the rules of evidence.3 Respondent simply cannot find comfort from the California legislature to support its stance.

Nor can respondent deny petitioner the right to present his defense because he testified at trial that he never hit the victim.4 This case involved essentially a one-on-one confrontation between Mr. Chestnut and Gary German, who claimed that petitioner struck the first blow. Of course, the credibility of these two witnesses was a matter solely within the province of the jury, but the jury here was deprived of crucial evidence which would have aided in its consideration.5 Although petitioner maintained his innocence, he should not be foreclosed

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3See Chambers v. Mississippi, 410 U.S. 284, 302 (1973)(Where constitutional rights directly affecting the ascertainment of guilt are implicated, rules of evidence may not be applied mechanistically to defeat the ends of justice).

4Petitioner's written proffer in the trial court outlined the testimony of numerous witnesses bearing both on the asserted defense of duress as it applied to the charge of felony murder, and on the lack on specific intent to commit first degree murder (R 96-105). On appeal to the First District Court of Appeal, petitioner challenged the exclusion of the proffered testimony as to both defenses. See Chestnut v. State, 505 So.2d 1352, 1352-1354 (Fla. 1st DCA 1987)(Ervin, J., concurring and dissenting) (A 1-3). Petitioner limited its argument in this Court to the specific question certified by the District Court of Appeal.

5The proffered testimony of Dr. Krop and George Bass, the polygraph examiner, was also intended to rebut any charge of recent fabrication in petitioner's trial testimony (R 96, 100), and the lay testimony was proffered both in support of the theories of defense and as bearing on Gary German's credibility (R 86, 102, 104-105).

from introducing evidence to show that, if the jurors believed German's version of events, Chestnut was nonetheless incapable of forming the requisite intent necessary for proof of the crime charged.

Certainly, if the trial court excludes evidence prior to trial, defense counsel cannot argue a theory of defense which the evidence presented does not support. Yet respondent, in a perverted twist of logic, argues that because defense counsel never argued duress or lack of intent to the jury, petitioner comes to this Court singing a different tune. Respondent conveniently ignores the explicit ruling of the trial court (R 82-84), the opinions of the district court below (A 1-6) and the certified question before this Court.

The issue before this Court is not whether to adopt the doctrine of diminished capacity as a defense, but whether expert evidence of an abnormal mental condition not constituting 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 charged. This Court has for many years permitted a defendant in a criminal prosecution to introduce evidence of intoxication to negate a finding that he had a specific intent to kill. There is no reason in law or logic or public policy why courts should not similarly receive psychiatric testimony in a homicide prosecution to establish that the act was not committed with premeditation. Petitioner avers that the argument for admitting psychiatric evidence to determine whether a defendant

suffers a mental condition or defect which negates formation of a specific intent to kill is more compelling than when the asserted defense is based on drug or alcohol usage.6 It seems too obvious to emphasize that a defense based on lack of intent resulting from mental disorders is entitled to at least the same recognition and consideration as is presently accorded a defense relying on conditions engendered by drugs and alcohol.

Petitioner is not seeking a radical departure from the law, but a natural and logical application of the law as it now exists. Garner v. State, 28 Fla. 113, 9 SO. 835 (1891); Gurganus v. State, 451 So.2d 817 (Fla. 1984). Petitioner requests this Court answer the certified question in the affirmative and reverse the decision of the district court.

6To iterate the reasoned opinion in United States v. Brawner, 471 F.2d 969, 999 (1972)(en banc):

> 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.

III CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in petitioner's brief on the merits, petitioner respectfully requests this Court reverse the decision of the First District Court of Appeal and the 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 Reply Brief of Petitioner 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 Blaine Chestnut, this 8th day of September, 1987.

Paula S. Saunders
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