

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER: 71,356

JAMES ALLEN BRYANT,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
CRIMINAL DIVISION

REPLY BRIEF OF APPELLANT
AND ANSWER BRIEF OF CROSS-APPELLEE
JAMES ALLEN BRYANT

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STATEMENT OF THE CASE AND FACTS

The appellant and cross-appellee, James Allen Bryant, respectfully relies upon the Statement of the Case and Statement of the Facts as described in his initial brief of appellant.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A HEARING OR OTHERWISE MAKE INQUIRY OF THE STATE UPON A SHOWING BY THE DEFENSE OF THE PROSECUTOR'S SYSTEMATIC AND UNJUSTIFIABLE EXCLUSION OF BLACK JURORS, THEREBY VIOLATING THE DEFENDANT'S FIFTH AMENDMENT DUE PROCESS AND SIXTH AMENDMENT IMPARTIAL JURY RIGHTS.

The state attempts to rationalize, a year and a half after the trial, its systematic exclusion of prospective black jurors. The state completely misses the point. It does not matter whether there might have been, or now can be found, legitimate non-racial reasons upon which to base the exclusion of jurors. Now is too late. The only safeguard the system enjoys against the improper exclusion of jurors is the requirement of contemporaneous inquiry. See, Goggins v. State, 528 So.2d 118 (Fla. 1st DCA 1988) (State's confession of error). Such a hearing must be conducted during the jury selection process. A hearing held after the trial has concluded is untimely. Blackshear v. State, 531 So.2d 956 (Fla. 1988). Here, no such hearing was held at all. The process simply failed.

There is no doubt that the defendants met their initial burden of proof. The state concedes that it used seven of its sixteen peremptory challenges to exclude black people. [Appellee brief at p. 68; TR 69371 This Court, in State v. Slappy, 522 So.2d 18 (Fla. 1988), held that "Any doubt as to whether the complaining party has met its initial burden should be resolved

in that party's favor," A defendant does not have the right to have an all white jury or an all black jury or a jury of any particular ethnic composition. Taylor v. Louisiana, 419 U.S. 522, 538 (1975). What the defendant does have a right to is a jury chosen without regard to race. The defendant was denied that right here.

Even the state's belated rationalizations appear hollow when the record is closely examined. Without record citation, the appellee baldly asserts that Mrs. McGee "appeared confused." It faults her for being soft-spoken and claims that "she felt that the defense was required to present evidence [TR 16651." [Appellee brief at p. 72] A closer examination of the record reflects what Mrs. McGee actually said:

Mrs. McGee: Like he said, there are two sides to every story, so you have to listen.

* * *

Mrs. McGee: Like you said, there are two sides to every story, so you have to listen to both sides to come up with a decision.

* * *

Mrs. McGee: I feel they are not guilty until they are proven guilty. [TR 1665-16661

Mr. Lapsley, who the state says would have required "a greater amount of evidence on a murder than on other crimes," was quickly disabused of any initial feeling he might have had and quickly came to an appreciation of the fact that the state's bur-

den of proof was no greater than "to a reasonable doubt." [TR 2415-2416] Mr. Lapsley did not say, as the appellee asserts, that his beliefs might prohibit a death penalty recommendation. [Appellee brief at p. 711 At TR 2436, cited by the state, Lapsley answers "Yes" to the question of the prosecutor, "I think you answer me, Mr. Lapsley, right?" Thus, Lapsley said no such thing as the state contends.

With regard to Mrs. Level, the appellee asserts that she "was asked if she could keep an open mind, decide the case only on the facts, and follow the instructions of the court [but] indicated that she would not. [TR 2813-2814; Appellee brief at p. 711 This is not a fair description of the record which reveals that the question being asked involved prior victimization, not open-mindedness:

Ms. Weintraub: *** Will you keep an open mind in this case and decide it only on these facts and follow the Court's instructions?

Mr. Asbury: I believe I can. Yeah.

Ms. Weintraub: Mr. Carr have you had any experience as a victim of crime?

Mr. Carr: No.

Ms. Weintraub: Mr. Chinio.

Mr. Chinio: I got -- somebody stole my Winnebago.

Ms. Weintraub: Can you put this aside, decide this case on these facts?

Mr. Chinio: It happens every day.

Ms. Weintraub: All right. Ms. Level.

Ms. Level: (indicating in the negative.)

Ms. Weintraub: Mr. Gutierrez.

Mr. Gutierrez: My father was held up about six years ago at gun point.

* * *

Ms. Weintraub: All right. Ms. Johnson.

Ms. Johnson: (indicating in the negative.)

Ms. Weintraub: Ms. Calhoun.

Ms. Calhoun: (indicating in the negative.)

* * * [TR 2813-2815]

Ms. Level, therefore, never indicated that she could not keep an open mind - she was answering the previous question which was "Have you had any experience as a victim of crime?" [TR 28141
The state is wrong to read this record any other way. In fact, Ms. Level was a perfectly competent juror who had been seated on a federal criminal trial before and was part of a jury which reached a verdict in that case. [TR 2722-27231

The state also represents that Ms. Level "didn't know if her views on the death penalty would make it hard for her to be a juror. [TR 2913]" [Appellee brief at p. 711 In truth, the record reveals that Ms. Level suffered no such impediment to jury service:

Ms. Weintraub: All right. Ms. Level, if we reach that stage called the penalty phase, do you have any views about the death penalty that you think will make it hard for you to be a juror at that point?

Ms. Level: Do I have? No. I don't have any views. I don't have any.

Mr. Sohn: I am sorry, Judge. I --

Ms. Level: I said I don't have any views at this time about it. I just don't because I can't -- I don't know.

You are asking me something. I haven't heard any, you know, concerning the case, so I can't tell you how I feel about this or that because I don't know.

Ms. Weintraub: Right. You can't make up your mind because you haven't heard the evidence?

Ms. Level: I can't.

Ms. Weintraub: That was what I was discussing with Mr. Sierra.

My question is hard for you to consider under these circumstances but what I am asking is for you to share with us whether or not you have very strong views in either direction about the death penalty which is part of the law in Florida as a possible punishment for first degree murder.

* * *

Do you have such a view, Ms. Level?

Ms. Level: No. No. [TR 2913-29141

Ms. Level, therefore, said nothing like what the state represents she said and, in fact, repeatedly demonstrated an open mind and a lack of prejudice.

Although, as the state notes, Mr. Jackson had had a recent death in the family, he clearly explained that:

That wouldn't interfere. It was, that was, it was she died in her sleep, so it wouldn't interfere. [TR 3362-33631

Mr. Jackson did state that he felt singled out by the state and, in fact, appeared offended by some of the state's questions as well as resistant at first to the idea of using the judge's definitions at the end of the case. However, when Mr. Jackson

was corrected by the prosecution he responded:

Mr. Jackson: So I would guess I would have to use in the judge's terms, what he give me, I would have to use. [TR 33731

When the court intervened and more patiently explained the law to Mr. Jackson, his immediate response was:

Mr. Jackson: I understand so I guess I will follow the law.

It sounds more better.

* * *

Mr. Novick: Thanks, judge. Do I understand from that discussion, Mr. Jackson, that you now understand what the judge was saying?

Mr. Jackson: Yes.

Mr. Novich: Okay. And you will follow the law which comes from the book?

Mr. Jackson: Yes. [TR 3378-33791

This record, therefore, is not nearly so absolute as the state would have this Court believe. The state's consistent exclusion of black jurors from this jury was, at the very least, subject to various interpretations. The circumstances suggest that the prosecutors may have been simply misguided, but no less racist, in attempting to avoid what they perceived to be an "overly black" jury. The point is, we will never know. The time for the trial court to have tested the motives of the state was prior to trial. Because the court held no hearing on this issue, which fairly screamed for resolution at the time, reversible error has been demonstrated.

Finally, without much conviction, the state suggests that "there is significant doubt" whether the defendants have standing to raise this issue because they are white. This is a shameful position for the State of Florida to take. Racism should suffer universal renunciation. The concept of "standing" to raise the issue of the misuse of peremptory challenges by the state's systematic exclusion of members of a particular race solely for the reason of their race is irreconcilable with this Court's precedent. This Court should disapprove the majorities' dicta in Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987) to the extent it imposes a standing requirement and reproclaim its commitment to the eradication of even the appearance of racial prejudice within the jury selection process:

It would seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being - to ensure equality of treatment and even handed justice. Moreover, by giving official sanction to irrational prejudice, court room bias only inflames bigotry in the society at large. State v. Slappy, ___ So.2d ___ (Fla. 1988).

Thus, this Court should embrace the reasoning of Judge Orfinger's specially concurring opinion in Kibler where he notes that the majority's "standing" ruling is dictum and that it is not at all clear that this Court, in Neil or its more recent decisions, intended to limit the challenge only to cases where the defendant is a member of the same race as the challenged jurors. As Judge Orfinger appropriately observed, the "Neil

Court intended to decide the issue on state constitutional grounds rather than on the federal constitution or on federal court decisions" and that, therefore, Batson, upon which the state so strongly relies, need not apply. Judge Orfinger suggested that this Court's desire to protect against improper bias in the selection of jurors precedes, foreshadows and exceeds the current federal guarantees. We hope that he was right.

That he was is evidenced by the following holding in State v. Slappy, supra:

In interpreting our own Constitution this Court in State v. Neil, 457 So.2d 481 (Fla. 1984) clarified sub nom, State v. Castillo, 486 So.2d 565 (1986) recognized a protection against improper bias in the selection of juries that preceded, foreshadowed and exceeds the current federal guarantees. We reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. See Art. I, Section 16, Fla. Const. [emphasis added].

As Judge Orfinger also noted, "in many instances, state constitutional protections are broader than the corresponding federal rights." *Id.* at 78. Indeed, in this case, they should be.

Accordingly, this Court should adopt and ratify the simple holding of the Third District Court of Appeal in Rolando Del Sol v. State, 14 FLW 336 (Fla. Opinion filed January 31, 1989), in which it held:

A defendant, whatever race, has standing to challenge the arbitrary exclusion of members of any race for grand or petit jury service. Id. at 336.

Similarly, the Arizona Supreme Court on July 19, 1988, in State v. Superior Ct. (Gardner), 43 Crim.L. 1069, held that racial bias in jury selection requires a new trial in that state even if the defendant was not of the same race as the jurors that were excluded. Although not binding on this court, the Arizona court's logic is compelling:

"If we apply the Batson principle exclusively to those cases in which the defendant and the excluded jurors are of the identical race or ethnic group, our trial judges and lawyers will frequently be forced to inquire into the racial and ethnic makeup of particular jurors.

We should adopt the rule that would obviate or reduce the necessity for such an unseemly intrusive procedure.

The discriminatory exclusion of jurors from any cognizable group necessarily violates the right to a chance for a fair cross section no matter what the racial or ethnic characteristics of the defendant, his lawyer, the judge, or any party to the action. [emphasis on "necessarily" added to demonstrate the court's ruling that the actions are a per se requirement. This court should not consider the failure to inquire harmless error].

This Court should reach the same conclusion here. The defendants made a timely objection and demonstrated on the record that black persons consistently challenged by the state were members of a distinct racial group and that there was a strong likelihood that they were challenged solely because of their race. The defendants met the test of Neil and should have been afforded a hearing. Because they were not, reversible error is demonstrated. The defendants are entitled to a new trial.

THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR SEVERANCE DUE TO THE EXTRAORDINARY DEGREE TO WHICH HE WAS PREJUDICED BY HIS CO-DEFENDANTS' IRRECONCILABLE AND ANTAGONISTIC DEFENSES, IN VIOLATION OF THE RIGHTS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The appellant respectfully relies upon the comprehensive factual discussion and legal argument presented in his initial brief, except to correct the state's apparent misapprehension.

Defendant Bryant does not raise a Bruton severance issue as the state suggests. He does claim, however, that he has demonstrated "a conflict in defenses so irreconcilable" that a jury would infer his guilt due to that conflict, alone. [Appellee brief at p. 93] In fact, he claims that his forced joinder compelled a condition of antagonism with his co-defendants so extreme that it rendered his receipt of a basic fair trial impossible.

III.

THE TRIAL COURT'S REDACTION OF THE DEFENDANT'S CONFESSION, TO ACCOMMODATE THE CONFRONTATION RIGHTS OF THE CO-DEFENDANTS, SO SERIOUSLY CHANGED THE TONE AND MEANING OF THE DEFENDANT'S STATEMENT THAT IT DENIED HIM DUE PROCESS OF LAW.

The defendant relies upon and restates the arguments and authorities presented in his initial brief except to address the state's claim of harmless error. The defendant Bryant did not testify and, therefore, his redacted statements formed a substantial part of the state's case. The court's redaction of that statement, however, grossly distorted and virtually eliminated those parts of it which sustained the defendant's claim of duress. Thus, the redaction so substantially altered the defendant's statement so as to render both it, and the jury's verdict based upon it, untrustworthy. Harmless error is limited to those cases where, after the required scrutiny, the reviewing court can say that beyond a reasonable doubt the result would have been the same absent the error. Holland v. State, 503 So.2d 1250 (Fla. 1987) citing Rose v. Clark, 106 S.Ct. 3101, 3105 (1986). As this court held earlier in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), "the burden upon the state to prove harmless error whenever the doctrine is applicable is most severe." Id. at 1139.

Here, the sufficiency of the evidence to sustain the trial court's denial of the defendant's motion for judgment of acquittal after the presentation of the state's case is, in and of itself, a substantial issue. [Appellant's Supplemental Brief]

In addition, the redaction of the defendant's confession was a direct result of the defendant's improper joinder at trial with his three co-defendants and therefore presents an issue which is intimately intertwined with the severance issue. [Point 11, supra] The implication of the defendant's Fifth and Sixth Amendment Federal Constitutional rights is also clear - they were sacrificed by the trial court to protect the competing rights of the co-defendants. Accordingly, the substantial issue presented and the egregious error of the trial court cannot simply be dismissed as "harmless error."

IV.

THE TRIAL COURT ERRED IN PERMITTING THE REPEATED ELICITATION OF EVIDENCE OF THE DEFENDANT'S BAD CHARACTER AND OF UNRELATED COLLATERAL MISCONDUCT FOR NO REASON OTHER THAN TO DENIGRATE THE DEFENDANT'S CHARACTER AND INFLAME THE JURY AGAINST HIM, THEREBY DENYING HIM DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The accusation of a prior unrelated theft from another restaurant was not, as the state contends, "clearly relevant" to any legitimate issue in this case. The state's exploitation of such evidence did nothing but constitute an improper attack on the defendant's character and demonstrate to the jury his propensity to commit similar crimes. The introduction of this "bad character" evidence, in and of itself, denied the defendant a fair trial and compels reversal of his conviction and sentence.

The state offers "motive" as the after-the-fact rationalization for the introduction of such evidence. It suggests that Bryant murdered to "remove the possibility of being reported for theft, once again." [Appellee brief at p. 1251] Never before has such a claim been made by the state in this case. The theory the state proceeded upon at trial involved Bryant's desire to leave his lover and steal his property, but never was it suggested that the defendant committed two homicides and a string of additional thefts in order to avoid being reported to the police. The disingenuous and belated argument of the state must fail.

V.

THE TRIAL COURT ERRED IN COMMUNICATING WITH MEMBERS OF THE JURY OUTSIDE THE PRESENCE OF THE DEFENDANT, OUTSIDE THE PRESENCE OF DEFENSE COUNSEL, AND OFF THE RECORD, THEREBY DENYING THE DEFENDANT HIS RIGHT TO DUE PROCESS OF LAW, HIS RIGHT TO BE PRESENT, AND HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS WELL AS ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION.

The defendant respectfully relies upon the argument in his initial brief.

VI .

THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH, THEREBY DENYING THE DEFENDANT DUE PROCESS OF LAW AND EQUAL PROTECTION WHILE IMPOSING A DISPROPORTIONAL, CRUEL AND UNUSUAL, PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A.

The Imposition of the Death Penalty Against James Bryant Constitutes a Disproportional and Constitutionally Impermissible Application of Capital Punishment.

At least the state concedes that the defendant's argument is "interesting." The fact remains, however, that no matter what the state may think about the crimes of which the defendant stands convicted, the death penalty is disproportionate in light of other, similar cases. Here, the homicides of which Bryant stands convicted are simply not so extraordinary as to justify the imposition of the extraordinary sentence of death. Specifically, the levy of the ultimate penalty against Bryant cannot be reconciled with the prison sentences of the defendants in Spivey v. State, 13 FLW 445 (Fla. 1988) or Roth v. State, 359 So.2d 881 (Fla. 3d DCA 1978). The sentence of death imposed upon defendant Bryant should be reversed.

B.

The Sentencing Proceedings Were Constitutionally Deficient Due to the State's Repeated Efforts to Minimize the Importance of the Jury's Role, thereby Denying the Defendant Due Process of Law, Equal Protection, and His Right to a Jury Trial Guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The appellee excuses the conduct of the prosecutors before the trial court on the basis that they did not misrepresent the law, but correctly stated it. Such an argument is faulty because what the prosecutors repeatedly emphasized to this jury was not a correct and complete statement of the law.

The prosecutors here repeated emphasized that the jury's function was "merely" to recommend. [TR 1353-1354, 61691 Thus, the state ignored what is truly the law in Florida - a jury's recommendation regarding the sentence in a capital case is afforded great weight. Tedder v. State, 322 So.2d 908 (Fla. 1975). In fact, the jury's recommendation is afforded so much weight that it can be overridden by the judge only if virtually no reasonable person could agree with it. Fead v. State, 512 So.2d 176 (Fla. 1987); Ferry v. State, 507 So.2d 1373 (Fla. 1987).

For the state to take the position that the jury's role was not improperly minimized in this case is simply wrong. It was. Because the prosecutors' repeated comments demeaned and minimized the importance of the jury's function, the defendant's sentence of death should be vacated.

VII.

[DEFENDANT'S SUPPLEMENT BRIEF; APPELLEE'S POINT VI]

THE TRIAL COURT ERRED IN FAILING TO GRANT THE DEFENDANT'S REPEATED MOTIONS FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE PRESENTED BY THE STATE WAS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE THE DEFENDANT GUILTY OF EITHER COUNT OF FIRST-DEGREE MURDER (II AND IV) OR BURGLARY (I) .

Except for one significant misinterpretation, the appellee's report of the evidence most convincingly demonstrates the insufficiency of the state's case. The facts, in a light most favorable to the state, established that the victims were dead and buried, that the defendant had a motive, that the defendant helped dispose of the bodies, that the defendant afterwards used Arthur Venecia's name, and that the defendant sold Venecia's property for his own gain. Such evidence is not sufficient, in any way, to establish the defendant's commission of the crimes charged.

The state asserts, mistakenly, that the defendant's statement constituted an admission that he had paid the killers to cause them to commit murder. [Appellee Brief at p. 116, citing TR 7233-72351:

Q. When you got back to the House of Pancakes, what occurred?

A. I was given the keys and told to take and give them to someone.

Q. Was the restaurant open for business at this time?

A. Yes.

Q. Were there any customers inside?

A. Yes, there were customers.

Q. All right, so what happened then?

A. I went in the back door. I did not go near, you know, where the customers were. I went into the back.

Q. When you came in, did you have any conversation with anyone as to what had occurred at Mr. Venecia's house?

A. Well, not until after the others were gone.

Q. You say you pull the safe? What do you mean by that?

A. There was money kept in envelopes at different type periods of the day that was dropped into the safe.

Q. So then, by pulling the safe, you emptied the safe?

A. Yeah, the envelopes of money.

Q. After you got the money out of the safe, what did you do with it?

A. I gave it to someone.

Q. Do you know how much money was in the bag?

A. No, sir, I don't.

Q. Did someone say how much money was in the bag?

A. No, sir.

Q. Did you have any prior knowledge to any of this, any of the events that occurred so far?

A. No sir.

Q. After someone gave the money to the others in the car, what happened then?

A. They left.

[TR 7233-7235; emphasis added]

Thus, the state's case did not establish that the defendant paid the killers. At best, it suggested that the defendant gave money to "someone" and "someone" gave it to the others in the car. The state's evidence, consisting entirely of the defendant's own statement, established only the defendant's knowledge after-the-fact of the victims' deaths. It expressly and directly refuted the state's theory that he had caused those deaths to come about.

What remains abundantly clear is the irrefutable fact that the state failed to establish the defendant Bryant's commission of either homicide or the burglary charged. The defendant's convictions cannot be sustained.

ANSWER OF CROSS-APPELLEE JAMES ALLEN BRYANT
TO BRIEF OF CROSS-APPELLANT

I.

THE TRIAL COURT DID NOT ERR IN FINDING
THAT THE MURDER OF ARTHUR VENECIA **WAS** NOT
ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The term "heinous" as used in Florida Statute §921.141(5)(h) means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. The word "cruel" describes conduct designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. Alford v. State, 307 So.2d 433 (1975), cert. denied, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221, rehearing denied 429 U.S. 873, 97 S.Ct. 191, 50 L.Ed.2d 155; Maggard v. State, 399 So.2d 973 (Fla. 1981) cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 454, 70 L.Ed.2d 598; State v. Dixon, 283 So.2d 1 (1973) cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295. The homicide of Arthur Venecia of which the defendant stands convicted and sentenced to death, as senseless and inexcusable as it was, was not heinous, atrocious or cruel under established law. The trial court correctly rejected heinous, atrocious and cruel as an applicable aggravating factor.

The "heinous, atrocious and cruel" aggravating factor applies only to a capital crime the actual commission of which is accompanied by such additional acts as set the crime apart from the norm of capital felonies. Its application is restricted to conscienceless or pitiless crimes which are unnecessarily torturous to the victim. Blanco v. State, 452 So.2d 512 (Fla.

1984), cert. denied, ____ U.S. ____, 105 S.Ct. 940, 83 L.Ed.2d 953.

The application of this aggravating circumstance has been deemed to be appropriate to offenses "shockingly evil." Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1976) (Murder of nine year old daughter). It has been applied to murders committed in connection with abductions, confinement, sexual abuse and execution-style killings, Smith v. State, 424 So.2d 7206 (Fla. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 3129, 77 L.Ed.2d 1379. The aggravating circumstance has been upheld in torture murders. Thompson v. State, 389 So.2d 197 (Fla. 1980). Most recently, this Court in Cook v. State, 14 FLW ____ (Fla. Opinion filed April 6, 1989) succinctly noted:

This aggravating factor generally is appropriate when the victim is tortured, either physically or emotionally, by the killer [slip opinion at pp. 9-10]

This case does not involve torture or the defendant's desire to inflict suffering. The record fails to establish either the infliction of an extraordinary degree of pain or prolonged anticipation on the part of the victim sufficient to establish the degree of suffering required to invoke the wicked, heinous, and cruel aggravating circumstance. The victim, Arthur Venecia, died of a single stab wound which, as the state recognizes, historically will not support an H.A.C. finding. Profitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, 464 U.S. 1002 (1983). The circumstantial evidence of the homicide here, in which the defendant Bryant was not an active partici-

pant, was circumstantially shown by the state's own evidence to have resulted during a struggle. This is not such a case as those involving the infliction of repeated and multiple stab wounds intended to cause pain and suffering. E.g., Nibert v. State, 508 So.2d 1 (1987) (victim stabbed seventeen times); Floyd v. State, 497 So.2d 1211 (1986) (victim stabbed twelve times); Hansbrough v. State, 509 So.2d 1081 (1987) (victim stabbed thirty or more times). This case presents circumstances which are clearly more analogous to those cases involving homicides perpetrated by a single gunshot wherein this Court has been remarkably consistent in rejecting the application of this aggravating circumstance. Craig v. State, 510 So.2d 857 (Fla. 1987); Kampff v. State, 371 So.2d 1007 (Fla. 1979); Cooper v. State, 336 So.2d 1133, 1141 (Fla. 1976); Fleming v. State, 374 So.2d 954, 959 (Fla. 1979); Antone v. State, 382 So.2d 1205 (Fla. 1980); Maggard v. State, 399 So.2d 973 (1981); Cook v. State, supra.

This Court has repeatedly reiterated its established rule and concluded "that in order for a capital felony to be considered heinous, atrocious, or cruel it must be "accompanied by such additional acts as to set the crime apart from the norm of capital felonies'." Simmons v. State, 419 So.2d 316 (Fla. 1982); State v. Dixon, supra. The same consideration applies here and the same result should follow. The trial court made specific findings of fact which are entitled to great deference:

While the Court is offended by the manner of death legally it does not find it to be especially heinous, atrocious or cruel in the absence of specific evidence of prolonged suffering on the part of the

victim and in light of other capital cases considering the same aggravating factor. [CR. 1220-1221, TR 7605, 7718-7719, 7769-7770]

The homicide committed in this case was not, under established case law, accompanied by such additional acts as to set the crime apart from the norm of capital felonies. The trial court's determination that the aggravating circumstances of H.A.C. is factually inapplicable to the circumstances of this case is amply supported by this record. Its judgment should not be disturbed in this regard by this Court on appeal.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the appellant, James Allen Bryant, respectfully urges this Honorable Court to reverse his conviction and sentence of death - to order his discharge for the insufficiency of the evidence to sustain his conviction, to grant him a new trial for the unfairness of his prosecution, or at least to vacate his sentence of death.

Respectfully submitted,

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By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Charles Fahlbusch, Esquire, Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128, Lee Weissenborn, Esquire, 235 N.E. 26th Street, Miami, Florida 33136, Gary W. Pollack, Esquire, 1320 S. Dixie Highway, Suite 275, Coral Gables, Florida 33146, and Sheryl Lowenthal, Esquire, 2250 S.W. Douglas Road, Suite 206, Coral Gables, Florida, this 13~~th~~ day of April, 1989.

By: 

GEOFFREY C. FLECK, ESQUIRE