IN THE SUPREME COURT OF FLORIDA

JAMES DOY CHRISTIAN,

Appellant,

v. CASE NO. 71,636

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR BRADFORD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

For the convenience of the Court, the State will set forth in separate sections the general facts and those facts relevant to each issue on appeal.

(A) General Facts

The Appellant has described the victim in detai . The Appellant himself, however, had a long and violent criminal record (aggravated assault (1975), robbery (1976), and aggravated battery (1983)). (R 1442-1447). Christian's conduct did not improve in prison. His disciplinary record shows conspiracy to steal a watch and procure a weapon in April of 1978, fighting in October of 1978, two counts of unarmed assault in July of 1980, disorderly conduct in January of 1982, destruction of property in July of 1982, possession of a weapon in March of 1985, participation in a disturbance in August of 1985, fighting in September of 1986 and lying to officials in March of 1987. (R 1457).

The Appellant does not deny that this was a pre-planned and fully deliberate crime.

Christian testified that he played cards with the victim, Moore, for money. (R 1194). Christian won all of Moore's cash and agreed to play Moore for two bars of soap. (R 1194). Moore won the hand, but Christian, who was much larger than Moore, accused Moore of cheating and took the soap. (R 1195).

Later that day, Moore went to Christian's cell to talk about the game but Christian told him to forget about the incident. (R 1196).

While playing in a card tournament that afternoon, Christian was clubbed from behind with a curling bar swung by Moore. (R 1197). Christian was taken to the clinic and kept there about a day and a half. (R 1198).

Christian returned to population on "M" wing as he stated. On May 2, 1987, Christian claimed he was drinking "buck". (R 1207). He admitted he did not get drunk although he claimed he felt "light headed and good". (R 1208). Moore renewed his taunting, according to Christian, and in Christian's words "went too far" and "caused me to blow". (R 1209).

Christian fetched his knife from its hiding place and raced upstairs. (R 1210). On direct, Christian claimed he remembered nothing else.

On cross, Christian convicted himself. First, Christian said he did not "blow up" until after he had spotted Moore, gone to his cell and retrieved his hidden knife (which was taped under his cell door). (R 1215). Christian said that he went to an inmate named "Hubcap" prior to May 2 and specifically procured a knife. (R 1225). Christian confessed that the attack itself was deliberate, intentional and preplanned. (R 1220). Only Moore's death was unplanned. (R 1220). Thus, this was not a "black out rage" attack at all.

During the penalty phase, Christian's own expert, Dr. Krop, confirmed this theory of guilt. While Krop felt that Christian showed "emotional distress" (R **1538)** and "impaired judgment (R **1552),** Krop said that at the time of the murder Christian was not psychotic (R **1548)** and fully appreciated the criminality of his conduct. (R **1550).** Dr. Krop also rejected the "blackout" theory. Krop said that Christian was simply "repressing his memory" as any person might to protect himself from unpleasant recollections. (R **1538).**

Other testimony supported the State as well.

Leonard Ball said that Christian was not aware of "who" hit him until he heard that Moore intended to accuse him of robbing him. (R **1019).** After returning to M wing, Christian never asked Ball for a transfer, although he apparently asked some other official. (R **1235).**

Thomas Wilshire was escorting Moore at the time of the murder. Wilshire said that Moore never taunted Christian prior to the attack. **(R 781).** When the guards caught up to Christian he gestured threateningly at them with the knife. **(R 795).** Jerry Dyal, the second guard, confirmed that Moore did not taunt Christian. (R **826).** Earlier that day, Dyal did admonish Christian to stop yelling up to Moore. (R **832).**

The attack itself was not frenzied. Neither Dyal nor Wilshire smelled alcohol. (R **829, 796).** The attack was methodical. Christian "never missed" while stabbing Moore. (R

841). Tim White described how Moore begged for his life before Christian stabbed his eyes. (R 920). James Rhodes called the attack methodical and without frenzy. (R 940). Christian aimed his thrusts (R 940), stabbed Moore's chest in a pattern (R 939), stabbed Moore's eyes (R 943) and returned to the chest. (R 945-46).

Dr. Aviles was called to link a possible "subdural hemotoma" (as a result of the prior action by Moore) to the murder. While a subdural hematoma could cause a "little" personality change (R 1121), Aviles said that Christian did not suffer a hematoma. (R 1124-1126). His reason was impeccable. If Christian had suffered an untreated subdural hematoma he would have died during the three weeks between the clubbing and the murder. (R 1126).

Finally, we note that defense witness Gerald McCloud heard Christian threaten to kill Moore and tried to talk him out of it, without success. (R 1166).

(B) Evidentiary Ruling

Defense counsel wanted certain inmates to come before the court and swear that Christian suffered a change of personality as a result of Moore's attack. (R 1037).

The State objected on the ground that, at that point in the case, counsel had not laid a predicate of any kind for such opinion testimony. (R 1037). The defense attorney argued about

the admissibility of lay testimony but did not address the "predicate" objection. (R **1038).** The objection was sustained. (R **1039).** Counsel was allowed to proffer testimony.

At the outset, the court again asked counsel to establish a predicate. (R **1039-1040).**

Counsel asked his witness (Mr. Stacey) some questions about Christian's demeanor prior to the attack (by Moore) and then stopped. (R **1042).** The court said it thought that counsel intended to ask "before and after" questions so it sustained the State's objection. (R **1042).** If all Christian wanted was to put on character or reputation evidence, he would be allowed to do so. (R **1042).**

At that point counsel resumed the proffer, asking Mr. Stacey "**how**" Christian looked after being attacked. A State objection was overruled (R **1044)** and the witness was allowed to answer. The court specifically said that the witness could testify to his observations "before and after" but not to "cause and effect". (R 1044).

At this point defense counsel insisted he was not offering "reputation" testimony, challenging the court's "cause and effect" decision. (R **1047-50).** The court said it would not entertain a lay opinion on sanity. (R **1049).** The court (which had appointed three mental health experts to examine Christian pre-trial, see R **21-30),** stated that counsel was trying to substitute lay opinion in the absence of expert testimony. (R **1053).**

Counsel resumed his examination of Mr. Stacey before the jury. Stacey was allowed to testify that Christian (prior to the attack by Moore) was easy going and happy. (R **1064-66).** Despite having permission, counsel did not ask Stacey for post-attack observations at that time. Counsel did get comparative observations from Lewis Taylor. (R **1071-77).**

Two prison employees testified to Christian's "good" behavior (R **1082, 1090)** as did Betty Paige (R **1113)** and inmates Lupo (R **1148)** and Walker **(R 1152).**

Again, this "blow to the head" theory was debunked by Dr. Aviles, thus abolishing any possible predicate, as noted by the Court. (R **1128).**

(C) Sentencing

Four aggravating factors were established beyond a reasonable doubt:

(1) Christian committed the murder while under sentence.

(2) Christian had prior convictions for violent felonies.

(3) The murder was heinous, atrocious and cruel.

(4) The murder was cold, calculated and premeditated without any pretense of moral or legal justification.

(R 1665-70).

The Appellant's sentencing phase theory was that he suffered from impaired judgment and a real need to attack Moore in order to help preserve his social status in the prison.

To this end, Christian called a sociologist (Dr. Thomas), who testified that prisons were violent places. (R **1508**). Thomas had never qualified as an expert in the field of inmate-on-inmate crime, however (R **1505**), and Thomas had no familiarity with the facts of this case at all. (R **1518-26**). Thomas never spoke to Christian (R **1524**), had not studied conditions at Florida State Prison (R **1526**), and had not researched this case. (R **1523**).

When given a hypothetical based upon the facts of this case, Thomas testified that Christian "overreacted" and engaged in criminal conduct beyond that necessary to maintain a tough prison reputation. (R **1528**).

Dr. Krop testified to Christian's impaired judgment (R **1552**) but maintained that Christian was not psychotic (R **1548**), appreciated what he was doing (R **1550**) and that he was competent. Krop had not spoken to the eyewitnesses or read their testimony (R **1547**), nor had he called the State's Attorney. **(R 1544)**. Krop is not a doctor and is not competent to render medical opinions. He is only a psychologist. (R **1533**). Still, he rejected any possible "insanity" as well as "black out". Krop did testify that Christian "repressed his memory". (R **1538**).

The trial judge rejected the theory (in mitigation) that revenge or a desire for enhanced social status justifies the killing of even the vilest human being. (R 1670).

Finding insufficient evidence to support the close (7-5) life recommendation, the judge properly sentenced Christian to death.

SUMMARY OF ARGUMENT

In his first argument, Appellant alleges that lay opinion testimony was wrongly excluded. The court's ruling clearly satisfied the statute. In any event, Christian's own experts rejected the theory that Christian was trying to "back door" in through his lay witnesses. Of course, Appellant failed to ever lay a predicate for the opinion testimony thus negating the issue.

Appellant's challenge to his death sentence is a simple request for this Court to ignore **Tedder** and uphold the "mitigating theory" that prisoners should be allowed to solve their own problems by killing each other. That theory is too extreme for civilized society.

The murder was cold, calculated and premeditated. The idea that any "pretense", however absurd or radical, defeats this aggravating factor is, again, unworthy of support.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN LIMITING APPELLANT'S PRESENTATION OF LAY WITNESS TESTIMONY.

Mr. Christian contends that he was prohibited from presenting the testimony of "five or six inmates" who would have testified about his "changed mental condition" after being struck in the head by Moore. The State submits that Christian was not restricted at all, but rather misunderstood the law, the trial judge, or both. We further suggest that given the totality of the case the "error", if any, was harmless beyond any reasonable doubt.

The presentation of lay testimony regarding mental condition is governed by Section 90.701, Florida Statutes. The rule states:

> If a witness is not testifying as an expert, his testimony about what he perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inferences or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party, and
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience or training.

Judge Fagan specifically told defense counsel that his witnesses could testify to their observations of Christian before and after the incident with Moore. Thus, Judge Fagan permitted testimony regarding "headaches" or "being withdrawn", "dizziness" or any other observable change in Christian's condition. **(R 1044).** The judge would not permit "cause and effect" opinion testimony.

The Appellant's attorney did, in fact, put before the jury testimony from Mr. Stacey regarding Christian's demeanor prior to the attack **(R 1064-66)** and comparative observations from witness Taylor. (R 1071-77).

Judge Fagan's ruling clearly comported with Section **90.701.** The witnesses were free to describe Christian, relate his moods or demeanor, discuss his reputation and report on his physical condition, all as provided by subsection (1) of the statute.

The witnesses were not permitted to give opinions regarding the causal effect of the blow to Christian's head. This, again, was a correct interpretation of subsection (2) of the rule. These inmates were not qualified by education, training or experience to render a professional opinion. If they were qualified, no predicate was ever laid. (The State's objections went to Christian's failure to lay a predicate).

Subsection (1) also precludes the rendition of lay opinion testimony that would mislead the trier of fact. The

giving of "cause and effect" testimony by lay inmates would indeed have misled the jury since the testimony would have squarely contradicted the expert testimony of Dr. Aviles.

Dr. Aviles was unequivocal in stating that while a subdural hematoma could cause a minor personality change, Christian did not suffer from a subdural hematoma. Had he suffered one, he would have died prior to May 2, the date of the murder. (R 1121-1126). Given the conflict between the expert, Dr. Aviles, and the lay witnesses, it is clear that this testimony would have been improper under subsection (1).

None of the Appellant's cited cases overcome this ruling by the trial court.

Christian presented absolutely no evidence that he lacked "premeditation". Christian admitted himself that he fully intended to attack (and stab) Moore (he only denied an intent to "kill", which is irrelevant since the germane intent is an intent to attack the victim). (R 1220). Christian spotted Moore, fetched his knife, stalked Moore and "blew up" later. (R 1215-1225). Dr. Krop, Christian's own expert, said that this crime was not committed while Christian suffered "psychosis" (R 1548), that Christian fully appreciated what he was doing (R 1550) and that Christian did not "black out" but rather was "repressing bad memories" after the fact. (R 1538).

Since Christian proved his own premeditation, Gurganus v. State, 451 So.2d 817 (Fla. 1984), is not a factor.

Garron v. State, 13 F.L.W. 325, 326 (Fla. 1988), did not abolish Section 90.701, Florida Statutes or even limit it.

Quoting **Rivers v. State,** 458 So.2d 762 (Fla. 1984), the **Garron** court held that lay witnesses could testify as to their opinion of the defendant's sanity based upon their observations of the defendant **at the time** of the shooting. This Court also held that mere prior contact with the defendant would not permit rendition of a lay opinion, nor would contact "a day removed from the events giving rise to the prosecution". **Garron** does not address situations where (as here) defense experts and the defendant himself testify that the defendant was sane, competent and acting with premeditation.

We must bear in mind that Christian **did not raise** an insanity defense. At most, he merely alleged emotional distress and lessened intent.

In **Kight v. State,** 512 So.2d 922 (Fla. 1987), the trial court excluded **expert** testimony by none other than Dr. Krop designed to show Kight's "inability to plan the crime". Since the defense of insanity was not raised, Krop's testimony as an expert was excluded along with lay testimony regarding Kight's mental capacity.

We submit that Christian has even less of a case than Kight had. Christian, like Kight, did not plead insanity. Kight offered evidence of actual mental problems, Christian did not. Kight's expert (Dr. Krop) arguably supported his lay witness (Det. Weeks), Krop did not support the inmates at bar, nor did Dr. Aviles. (Aviles, in fact, rejected the "blow to the head" theory).

Finally, we suggest that if Moore struck Christian with a pipe, Mr. Christian was fully capable of disliking Moore and planning revenge upon him without the help of any physical problem.

Thus, Christian's appeal fails for an infinite variety of reasons. First, he never pled insanity. Second, his own testimony conceded premeditation. Third, Dr. Aviles and Dr. Krop expertly refuted the "blow to the head" theory. Fourth, the "opinion" evidence was excluded for lack of a predicate. See **Beck** v. Gross, **499** So.2d **886** (Fla. 2nd DCA **1986**), **as well** as Section **90.701**, Florida Statutes. Fifth, the court never forbade Christian from having his witnesses testify to their observations of him "before and after" the attack by Moore. (Even if the convicts had rendered an opinion, defense experts Aviles and Krop would have refuted it). Finally, under Garron and Rivers, Christian failed to offer evidence sufficiently close in time to the attack itself. His questions were general in scope and in point of reference.

In the absence of error by the court or a factual basis for any claim of error or any resulting prejudice, Christian cannot prevail.

ARGUMENT

II.

THE TRIAL COURT DID NOT ERR IN SENTENCING THE APPELLANT TO DEATH.

The Appellant contends that the trial judge erred in overriding the jury's recommendation of a life sentence. The Appellant suggests that under the standard announced in **Tedder v. State, 322** So.2d **908,** 910 (Fla. 1975), the trial court had no reasonable basis for overriding the jury.

The details of this case bear review. According to Christian, he planned his attack upon Moore and fully intended to hurt him. According to Dr. Aviles, Christian was not impaired due to the head injury. According to Dr. Krop, Christian was sane, competent and appreciated the criminal nature of his conduct. According to the witnesses, Christian stabbed Moore systematically, calmly and methodically. Christian carefully aimed his thrusts, cut precise circular patterns in his victim, stabbed his victim's eyes, and spat in the victim's face.

The sentencer found four statutory aggravating factors, which we justify as follows:

(1) Christian was under sentence of imprisonment. This is undisputed.

(2) Christian had prior convictions for violent crimes. This is undisputed.

(3) The murder was heinous, atrocious and cruel.

This case clearly falls within Dixon v. State, 283 So.2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The methodical stabbing of Moore's body while Moore, handcuffed, begged for his life satisfies Dixon. Christian did not flail wildly at Moore. Christian brought down his victim, cut a circular pattern in his chest, lifted him, spat in his face, gouged out (or tried to) his eyes, returned to cut a second circle on Moore's chest and then dropped him over the ledge. This reflects contempt for the victim, enjoyment of his suffering and a heinous, atrocious and cruel attack.

Although not a prison killing, the knife attack at bar compares nonetheless to Spaziano v. Florida, 468 U.S. 447 (1984). "Crazy Joe" Spaziano systematically stabbed his victim to death and left her body at a dump. The jury recommended life, but a death sentence was imposed and the override was upheld. Of course, "inmate stabbings" have also resulted in valid death sentences. See Williams v. State, 438 So.2d 781 (Fla. 1983); Williamson v. State, 511 So.2d 289 (Fla. 1987); Agan v. State, 445 So.2d 326 (Fla. 1984); and Demps v. State, 395 So.2d 501 (Fla. 1981).

In Lusk v State, 446 So.2d 1038 (Fla. 1984), the defendant received an "override" death sentence which this Court upheld. Lusk killed Michael Hall, a fellow inmate, by stabbing him to death during the prison's Thanksgiving dinner. Lusk alleged that Hall had robbed and threatened him earlier that day. When Lusk killed Hall, it was accompanied by a "public warning" not to mess with Lusk.

Our crime compares with Lusk's. Like Lusk, Christian had a prior, unsuccessful, physical altercation with the victim. Like Lusk, Christian procured an illegal knife. Like Lusk, Christian rushed his victim and stabbed him to death. Christian, however, went further than Lusk, for these reasons:

(1) Christian had three weeks to cool off, Lusk did not.

(2) Christian was merely taunted, Lusk was under an actual threat of future violence.

(3) Christian's case was known to prison authorities and the victim, Moore, was locked up where he could not hurt Christian. Lusk's problem was unreported and his assailant was loose.

(4) Lusk stabbed his victim only enough to kill him. Christian took time to mutilate and torture his victim.

When Lusk came before this Court on collateral attack (alleging ineffective assistance of counsel), see Lusk v. State, 498 So.2d 902 (Fla 1986), this Court noted that Bradford County jurors, at least according to counsel, were tolerant of "inmate

on inmate" crime (no guards injured) and indeed were "defense biased". The court also held that Lusk could not raise a defense of "dominating passion" because he had time to cool off.

We submit that Christian had more time and better reason to cool off than Lusk did. We further submit that Christian benefited improperly from the "defense bias" factor noted in Lusk. As in Lusk, the jury override should be affirmed.

(4) Cold, calculated and premeditated.

Mr. Christian conceded this point from the witness stand.

Mr. Christian offered a curious, if not dangerous, theory of mitigation. Once Dr. Aviles and Dr. Krop eliminated any insanity defense, Christian had to develop a novel theory of "social pressure leading to diminished judgment".

Dr. Krop, a noted anti-death activist, could not find any psychological basis for actual reduced mental capacity so the psychologist "waffled into" a "reduced" or "substantially impaired" judgment theory apparently geared to Christian's problems with peer pressure. Such illusory theories are no strangers to Dr. Krop. The uncertain "diagnosis" at bar is analogous to Krop's similar, speculative diagnosis in James v. State, **489** So.2d **737** (Fla. **1986),** which this Court rejected.

The Appellant's "peer pressure" theory is as dangerous as it is novel. The idea that murder can be mitigated or excused because a criminal needs to preserve his "social standing" in prison can only, if adopted, lead to mayhem in the prisons.

Naturally, the value of this mitigating evidence was a factor to be determined by Judge Fagan, not this Court. **Toole**

v. State, 479 So.2d 731 (Fla. 1985); Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228 (1983); see also Tibbs v. State, 397 So.2d 1120 (Fla. 1981). This Court has also held that Tedder will not preclude an override when the jury's life recommendation is not supported by the evidence. Craig v. State, 510 So.2d 857 (Fla. 1987); Francis v. State, 473 So.2d 672 (1985); Mills v State, 476 So.2d 172 (Fla. 1985); and Stevens v. State, 419 So.2d 1058 (Fla. 1982).

Christian's theory that we must allow prisoners leeway to kill each other in order to preserve social standing in prison is illogical and clearly insufficient to support a Tedder override. First, Christian's system poses a threat to the lives of everyone in the prison system. Second, unless Christian is kept in solitary confinement for life, any sentence less than death would equal no sentence at all. Third, a life sentence would place the imprimatur of this Court upon "revenge killings" in or out of prison.

The evidence supporting the Court's sentence has been set forth. Christian has offered no mitigating evidence of any consequence. He was never in danger once Moore was "locked up", he never "blacked out" and he planned the murder in advance by his own admission. There was no basis in fact for any life recommendation.

ARGUMENT

III.

THE COURT DID NOT ERR IN FINDING THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED.

Playing upon the word "pretense", Christian wants this Court to adopt the position that any pretextual excuse for a murder automatically qualifies as a "pretense" and thus defeats any finding of "cold, calculated or premeditated" murder. This is too radical an idea for our acceptance.

At page 31 of his brief, Christian alleges that the court "overlooked" certain factors. Based upon Christian's own testimony if nothing else, we disagree.

(1) Mr. Christian testified that he fully intended to hurt Moore with his knife and that he did not "black out" until after he stalked Moore. (R 1210, 1215, 1220).

(2) After returning to population, Christian stopped communicating with the authorities and threatened to kill Moore. (R 1166). Christian only decided to talk to the authorities in the first place (after denying he knew who hit him at first) because he was afraid Moore would go to Mr. Ball "first". (R 1019). He (Christian) never simply agreed to let the prison handle the case.

(3) Christian says he "blacked out", but Krop, his own expert, said Christian merely repressed his memory. (R 1538). Also, witnesses all agreed his attack was not frenzied but rather was methodical and systematic. (R 841, 940).

(4) Conflicts between the guards' testimony and the inmates' testimony, on appeal, are resolved in favor of the judgment, not defense speculation.

Christian simply cannot overcome his own admission that he planned and intended to stab Mr. Moore. The attack was deliberate, cold, calculated and premeditated. Dr. Krop said Christian was sane and appreciated the criminality of his conduct. In other words, the finding of "cold, calculated and premeditated''was entirely correct.

CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. David A. Davis, Esq., Assistant Public Defender, Post Office Box 671, Tallahassee, Florida **32302**; and to Mr. James Doy Christian, **#034915,** Florida State Prison, Post Office Box 747, Starke, Florida **32091**, this 7th day of October, 1988.

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