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 OF
AND FOR BRADFORD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

This is a capital case. It is unusual in two respects. The murder occurred at Florida State Prison, and a Bradford County jury recommended Christian live. The record on appeal consists of ten volumes, and references to them will be indicated by the letter "R."

II STATEMENT OF THE CASE

An indictment filed in the circuit court for Bradford Count on May **28, 1987** charged Doy Christian with the first degree murder of Alfred Moore (R **1-2).** Counsel filed several pre-trial motions, but none of them are relevant to this appeal.

Christian proceeded to trial before the honorable Osee Fagan and was found guilty as charged (R **266).** The penalty phase of the trial followed, and he and the state presented evidence in mitigation or aggravation of a sentence of death. The jury, after hearing this evidence, counsels' arguments, and the court's instructions on the law, returned a life recommendation (R **315).**

The court overrode that recommendation and sentenced Christian to death (R **340-359).** Justifying this sentence, the court found in aggravation:

1. Christian committed the murder while under sentence of imprisonment.
2. Christian had previously been convicted of felonies involving violence or the threat of violence
3. The murder was especially heinous, atrocious, or cruel.
4. The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

The court rejected all the mitigating circumstances argued by Christian, and it found nothing to mitigate the sentence of death it imposed (R **353-355).**

This timely appeal follows.

III STATEMENT OF THE FACTS

Albert Moore was a jitterbug: not all his screws were properly tightened (R 1531). He was also a new inmate at Florida State prison, and he needed to establish his reputation among the inmates there. If his past was any indication how he would do it, it would be through violence.

Housed at a prison noted for its violent inmates, Moore stood out as being one of its most violent. Convicted of battery upon a law enforcement officer (R 1555) (he had a lengthy juvenile and adult record including violent offenses (R 1555))[1], he came to the prison from the Palm Beach County jail where he had accumulated 123 incident reports for assaults, fights, and other violent activities (R 1556). He had set 10 fires (R 1556), assaulted and injured 19 deputy sheriffs (R 1556), attempted suicide, tried to escape twice and done so once (R 1556). The jail had never had a more violent inmate (R 1556). When he arrived at Florida State Prison, the prison administration immediately placed him in close confinement (R 1557). The administration released him into the prison's general population during the last week of February 1987 (R 1557).

Doy Christian also had a violent past, but his violence had occurred years earlier, and once in prison, Christian had

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[1] His record during his prior incarcerations included 35 disciplinary reports, including at least four disciplinary reports for armed assaults (R 1555).

adjusted well to prison life (R **1442-1443, 1447).** Guards and inmates respected him (R **1082, 1084, 1090, 1152):** he was good natured, easy to get along with, and a problem for no one. Inmates and staff knew him as a "jolly green giant" (R **1082).**

Moore met Christian and on April 12, **1987** the two men played cards. Christian trounced Moore (R **1194),** and in a final effort to regain some of what he had lost, Moore offered to bet his two bars of soap (R **1194).** Christian agreed, but the game had not progressed far when Christian caught Moore cheating (R **1195).** According to the inmate code, anyone caught cheating automatically lost if caught (R **1195),** and Christian won Moore's soap. Moore said he had not cheated (R **1196),** but he did nothing when Christian took his bars of soap. Afterwards, he said he "was tired of pussy niggers," and "he was going to end up hurting one of these pussy niggers." (R **1075)**

Christian liked to play cards, and later that day, he participated in a card tournament held in the gymnasium (R **1197).** As he played, Moore came into the gym, spotted Christian, and snuck up behind him (R **1033).** He carried a forty pound "curling" bar (R **1033),** and lifting the bar with both hands (R **1033)** he smashed Christian in the head with it. Christian fell to the floor, unconscious and bleeding (R **1034),** Moore drew back to hit him again (R **1034).** He would have killed Christian (R **1095),** but another inmate grabbed Moore as he was about to hit him again (R **1095).** Moore told the inmate to "Get off me. Let me kill him." (R **1095).** The other inmate

would not, telling Moore that "... he's already down and bleeding." (R 1095) Moore left Christian, saying that he should have killed him (R 1095). Eventually, he was arrested and placed in a cell on M wing of the prison. (R 776)

Christian had a deep head wound, and it required nine or ten stitches to close (R 1119). He was kept under observation for a couple of days (R 1115, 1119) then placed on M wing (R 1018).

Bars prevented Moore from attacking Christian again, but they could not stop his oral assaults upon Christian. Daily, for three weeks, Moore threatened to kill Christian. After he found out where Christian's parents lived (R 1156), Moore threatened to kill them (R 1147, 1156, 1165). He said Christian was a "pussy boy" who was not going to do anything to him (R 1165). Christian was a faggot, a homosexual, and his **"boy"** now (R 1134, 1204).

Three weeks passed while the prison investigated Moore's assault upon Christian. All the while, Moore kept up his barrage of insults and threats (R 1158). On May 1 Christian asked to be released into the population on M wing, and he was released. He had also asked to be moved to another wing, but that was denied. (R 1204)

On May 2 Moore apparently faked an illness so he could go to the prison clinic (R 1182). On the way there, he continued his threats towards Christian.

Moore soon returned to his cell on the third tier of M wing, escorted by two guards who had handcuffed his hands behind his back (R 780-781).

Although disputed by state witnesses (R 796), Christian said he and another inmate had been drinking "buck", an inmate concocted wine, that morning (R1206-1207). He was not drunk, having only drunk a quart of the brew (R 1167, 1206-1207).

When he saw Moore being led back to his cell, he "blacked out" (R 1209-1210), grabbed his knife (which an inmate had brought to him some time earlier (R 1205)) and ran up to the third floor of M wing.

Christian rushed up to Moore, pushing aside the two guards. Moore saw Christian and started to run. As he rounded a corner, he slipped and fell. Christian caught him and started to stab him (R 791-792). Christian stabbed Moore 26 times all over his body, hitting the lungs, stomach, arteries, and eyes (R 881-882). The guards tried to stop him, but they had only a hand held radio which was knocked out of one of the guard's hands (R 794). While they were going for help, Christian pushed Moore's body off the third floor. It hit the first floor and the skull was crushed (R 847, 886).

When help came, Christian surrendered his knife (R 854). He came to after the guards had placed him in a cell (R 1210).

IV SUMMARY OF ARGUMENT

Christian has only three issues to raise in this capital case: one guilt issue and two penalty phase issues. These three issues have a common theme: Christian's intent when he killed Alfred Moore.

A. The guilt phase issue.

In the guilt phase issue, Christian argues the trial court erred when it refused to let Christian present the testimony of five or six inmates who knew Christian. These inmates would have told the jury that after Moore had attacked Christian, Christian acted differently. He complained of headaches and dizziness. Most significantly, he blacked out, and he forgot what he had said only minutes earlier.

The court refused to let the jury hear this testimony because Christian's witnesses were not experts. He specifically rejected Christian's claim that lay witnesses could testify about Christian's mental condition at a time proximate to the killing. This court has rejected that rationale.

Section 90.401 Fla. Stats. (1987) defines relevant evidence as that evidence tending to prove or disprove a material fact. In order to convict Christian of first degree premeditated murder, the state had to present evidence tending to prove Christian had the requisite intent to kill Moore. Fairness, logic, and opinions of this court allow the flipside of this. The defense can present evidence tending to disprove what the state is required to prove.

The court implicitly acknowledged as much, but simply refused to let Christian present non-experts to testify about his mental condition. Applying that rationale raises serious constitutional problems with Christian's sixth amendment right to present a defense. It also conflicts with what this court has said. In opinions cited in the argument on this issue, this court has said a defendant can present lay witnesses who will testify about a defendant's mental condition as long as they base their opinions upon their personal knowledge.

The witnesses in this case had the requisite personal knowledge, and the court should have let them testify about Christian's mental condition.

B. The penalty phase issues.

This case is unusual in two respects. First, it is a prison murder, and second, a Bradford county jury recommended a life sentence for Christian.

The recommendation is not surprising when viewed in light of the conditions Christian faced when he killed Moore.

Alfred Moore's attempt to kill Christian and his unrelenting taunts, threats, and sexual harassment drove Christian to commit this murder. These physical and oral assaults were particularly aggravating in prison, where inmates were expected to "hang tough'' and solve their own problems. Christian could not ask the prison administration for help, and it only aggravated the situation by housing Moore and Christian on the same wing. This allowed Moore to see and threaten

Christian constantly. The prison enviornment, with its inmate code of conduct, its permeating fear of violence and death, and its inability to provide Christian any protection from Moore was a good reason for the jury to have recommended life for Christian. They had other reasons.

The jury could have recommended life because Christian had not had a very violent background. He, of course, had committed an armed robbery, an aggravated battery, and an aggravated assault, but those crimes had occurred years ago, and once in prison, Christian had generally led a quiet, peaceful life. The inmates and guards respected him, and he had a good reputation for being a "happy-go-lucky" person.

Alfred Moore was not. He came to Florida State Prison with an incredible record of violence. Once he got to prison, he continued his violent ways by attacking Christian because he had caught him cheating at cards. He continued his assault, at least verbally, with threats to kill him or his family. When compared with other prison murder cases this court has decided, this case is the only one where the defendant had at least adequate provocation to support a life recommendation. It also is one of the very few cases in which the victim "participated" or "consented" to his own death.

It is also one of the few cases where the defendant had at least a pretense of moral or legal justification for killing Moore. The trial court said Christian killed Moore in a cold, calculated and premeditated manner without any moral or legal justification. From the totality of the situation, however,

Christian had some justification for killing Moore. Based upon Moore's attempt to kill him and his promise to do so in the future, Christian at least had a pretense of killing Moore in self defense.

Christian also claims he did not commit this murder in a cold, calculated, and premeditated manner. When the evidence is viewed in the light most favorable to sustaining the jury's life recommendation, it reveals that Christian blacked out, and in a spontaneous, unchecked explosion of rage killed Moore. He did not plan to kill Moore.

V ARGUMENT

ISSUE I

THE COURT VIOLATED CHRISTIAN'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL WHEN IT EXCLUDED THE LAY TESTIMONY CHRISTIAN WANTED TO PRESENT REGARDING HIS MENTAL CONDITION BEFORE HE KILLED ALFRED MOORE.

During the presentation of his case, Christian sought to introduce the testimony of five or six inmates who would have testified about Christian's changed mental condition after Moore had hit him on the head. After Moore had smashed his head, he had entirely changed (R **1054-1058**). Instead of being a "happy-go-lucky" and friendly person (R 1054), "...he was withdrawn, not himself, forgetful, that he complained of headaches, dizziness..." (R 1055-1058).[2] One lay witness saw Christian a day or two before the killing, and he thought it odd that Christian had forgotten things he had said he had wanted only minutes earlier (R 1055).[3]

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[2]For purposes of a proffer, the court allowed Christian to summarize the testimony of the several witnesses he anticipated calling regarding Christian's mental condition after Moore had hit him in the head (R **1054**).

[3]At least one of Christian's lay witnesses had known Christian for several years (R 1056), and all had known him before Moore's attack.

The court refused to let Christian present this lay testimony, saying:

> ...if you seek to have this witness testify about the mental state of the Defendant or any effect on him as a result of that injury, he is not qualified to give that kind of evidence.

(R 1045)

> MR. WEISS (Defense counsel): It's my understanding that the law of Florida permits lay people to give their testimony on the issue of sanity or insanity. I believe that the Florida Supreme Court has ruled in that fashion...If a lay person is permitted to give his opinion as to sanity or insanity, then, perhaps, through analogy, a lay person would be able to give an opinion as to mental state.
>
> THE COURT: Well, I'm going to rule that this witness cannot do that in this case.

(R 1049). The court erred when it denied Christian's request to present lay testimony about Christian's mental condition immediately before he killed Moore.

A. The relevancy of testimony regarding Christian's mental condition.

The first problem presented is whether Christian could present testimony tending to disprove the state's claim he had the premeditated intent to commit a first degree murder. This court answered that question in Gurganus v. State, 451 So.2d 817,822-823 (Fla. 1984). In that case, Gurganus wanted the two psychologists who had examined him to testify about the effects large amounts of drugs and alcohol would have had upon a person like Gurganus. The trial court refused to let Gurganus' witnesses testify because their testimony was irrelevant.

Rejecting the trial court's reasoning, this court said:

> When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant.

Id. at 822-823. (emphasis added, cites omitted.)

Because the state had charged Christian with committing a first degree murder, it had to prove he had a premeditated intent to kill Moore before the jury could find him guilty of first degree murder.[4] Id. at 822. If the court admitted evidence tending to prove Christian's premeditation, then the court should have also admitted evidence tending to disprove that intent. 590.401 Fla. Stats. (1987). Testimony of several witnesses that Christian had changed after Moore's attack was admissible because it tended to establish his "...mental capacity at the time of the offense, particularly to the element of premeditation.'' Id. at 823.

The rationale of Gurganus becomes more compelling here in light of the factual similarities of Gurganus to this case.

> Both [psychologists] testified that, in their opinion, Gurganus was unable to recall the events immediately surrounding the shootings ...One of the psychologists took this observation further and testified that such genuine amnesia is directly connected to the rationality or the pre-planning of the acts which are unable to be recalled later and that an individual who does act in a rational, pre-planned manner is unable to genuinely block the events from memory after the event. Regardless of

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[4]Christian filed a motion to elect asking the court to order to state to choose between prosecuting its case under of premeditation or felony-murder theory (R 82-83). The court did not rule on the motion because the state attorney said it would prove only premeditation (R 192).

> the weight or truth of this testimony, we find the testimony to be relevant to the issue of Gurganus' mental capacity at the time of the offense, particularly to the element of premeditation. We hold that it was also error for the trial court to exclude the portion of the testimony.

Id. at 823.

Christian said he "blacked-out" immediately before his attack upon Moore and did not regain consciousness until he had been arrested and placed in a cell (R 1210). The testimony of the other inmates would have corroborated his testimony, and it would have bolstered his argument that he lacked the specific intent to kill Moore (R 1346-1349). Testimony of his lack of intent was relevant.

B. Lay witnesses can give an opinion about Christian's mental condition at the time he killed Moore.

The trial court implicitly acknowledged as much, but it refused to let Christian present testimony supporting a defense of a lack of specific intent because the witnesses he sought to use were not experts (R 1048-1049).

This court's recent decision in Garron v. State, Case no. 67,986 (Fla. May 19, 1988) controls, and it rejects that rationale. In Garron, the state had five lay witnesses testify about Garron's sanity. Of those five, only Garron's daughter was competent to render an opinion regarding his mental condition.

> Of the other four lay witnesses who opined as to appellant's sanity, only the deputy who arrested appellant could even arguably have been capable of rendering such an opinion. The others simply did not know appellant well enough, had not observed him

> enough, and did not observe him close enough in time to the shooting to give competent, lay testimony as to his sanity at the time of the act.

Id.

In this case, the court did not reject Christian's witnesses because they had not met the criteria suggested by Garron. Instead, Christian's witnesses could not testify because they were not experts (R **1045**). This court in Garron also rejected that position:

> As this Court stated in Rivers v. State, **458** So.2d 762 (Fla. 1984), '[i]t is a well established principle of law in this state that an otherwise qualified witness who is not a medical expert can testify about a person's mental condition, provided the testimony is based on personal knowledge or observation.'

Id.

Competent testimony about the defendant's mental condition comes from a lay witness when he has gained this personal knowledge in a period reasonably proximate to the events giving rise to the prosecution. Id. Although, a non-expert cannot give an opinion based upon observations made more than a day before or after the crime, he may testify if he has known the defendant over an extend period of time. Id. See Footnote 3. That is, if the lay witness did not know the defendant yet observed his behavior more than a day before or after the crime, he cannot tell the jury what he saw. Long time acquaintances of the defendant are not so limited.

The court excluded Christian's lay witnesses because they were not experts. Thus, his proffer did not directly show how they had the requisite personal knowledge of Christian's mental

condition. Christian never established the basis for their knowledge because the court ruled, in essence, that even if they had the proper basis, their testimony was irrelevant. Despite this ruling, Christian's proffer suggested these witnesses knew Christian well enough to offer an opinion of his mental state on the day of the killing.

At least one of Christian's lay witnesses had known Christian for several years (R **1056),** and they had all known him before Moore's attack. Afterwards, they noticed a dramatic change in him (R **1054-1058).** Instead of being a "happy-go-lucky" and friendly person (R **1054),** he was "entirely changed." He was "withdrawn, not himself and forgetful; that he complained of headaches, dizziness..."(R **1055).** Others saw him a day or two before the killing and thought it odd he had forgotten what he had said only minutes earlier (R **1055).**

Again, had the court recognized that lay witnesses could testify about Christian's mental condition if he had laid a proper predicate, Christian may have been able to specifically answer the requirements mentioned in Garron. But the court did not let Christian get to that point. As far as it was concerned, "This witness and the others that you say you're bringing in in similar fashion are not competent to testify as to the mental state of this Defendant." (R **1053)** That was error.

The ruling gutted Christian's argument that he did not premeditate the killing of Moore.' The only issue at the guilt phase of the trial was Christian's mental condition when he killed Moore. The state's witnesses testified in gruesome detail about Christian's killing of Moore. In its sentencing order, the court noted how Christian had "brooded over [Moore's] prior attack" (R 352) and "cruelly and repeatedly stab[bed] the victim 26 times" (R 353). This supported a jury finding Christian committed a premeditated murder of Moore.

Christian, on the other hand, argued,

> that this was a wild, frenzied killing that just took seconds to occur. This was a mind out of control.... It happened in a blinding flash...this is a classic second degree murder case. This attack, I suggest to you, was a depraved attack.

(R 1349).

It was a good argument, but Christian did not have many facts to work with. The doctor who saw Christian after Moore's attack said the blow to Christian's head could have caused some mental changes (R 1121-1122), and Christian said he had blacked out immediately before he killed Moore (R 1209-1210). Yet, without the lay witnesses' testimony, Christian had no evidence

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'Because the court improperly excluded the lay testimony, Christian was denied his sixth and fourteenth amendment rights to provide witnesses in his own behalf. This means that this court must evaluate the harmlessness of the error according to the constitutional-error rule articulated by the United States Supreme Court. Gurganus, supra. at 823.

to corroborate his self serving claim of a blackout, or the doctor's suggestion.

Christian and another witness said on the day of the killing, he had drunk a quart of "buck," a prison brewed wine (R 1167, 1206-1207). But, two guards contradicted that saying they had not smelled the distinctive odor of buck on Christian's breath when they arrested him (R 796, 830).

All Christian had was argument. He did not have many facts to work with. Perhaps, if his lay witnesses had testified, the jury may have returned a second degree murder conviction. It is not clear beyond a reasonable doubt that they would have returned the same verdict even if they had been able to testify.

ISSUE II

THE COURT ERRED IN SENTENCING CHRISTIAN TO DEATH BECAUSE THE JURY HAD A REASONABLE BASIS FOR ITS RECOMMENDATION OF LIFE.

The jury in this case recommended that the trial court sentence Christian to life in prison without the possibility of parole for twenty-five years (R 1650). The court ignored this recommendation, however, and sentenced him to death. The court erred in doing so because the jury had several reasonable bases upon which it could have justified its life recommendation. The court, in its sentencing order, provided no justification for overriding the jury's recommendation, and at the sentencing hearing, it said only that it was aware of the great weight which it should give to the jury's recommendation.[6]

A. The standard of review.

Under the standard established by this court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), such indifference to the

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[6]The court, in rejecting the jury's life recommendation, noted "...that their vote was seven to five [is] significant to observe" (R 354). In Craig v. State, 510 So.2d 857 (Fla. 1987) this court rejected that observation as having any relevance in determining whether to impose a sentence of death:

> The fact that the jury recommended a sentence of life imprisonment for the murder of Eubanks by a vote of seven to five was not a proper matter to consider as an aggravating circumstance regarding that murder...[T]he margin by which a jury recommends life imprisonment has no relevance to the question of whether such recommendation should be followed.

Id. at 867.

jury's life recommendation as the court in this case showed was error. In Tedder, this court said:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Id. at 910.

The presumption thus arises that when a jury recommends life the court should impose that sentence. To overcome this presumption, the trial court must present evidence or reasons from which virtually all reasonable men would agree that death was the appropriate sentence. A court cannot dismiss the jury's recommendation by simply saying it should not be given "...more weight than it deserves..." (R 345).

Instead, the court should have examined the record to determine if there was any reasonable basis for the jury's life recommendation. If so, it should have imposed a sentence of life without regard to the presence of any aggravating factors or the weight it may have given them.

In doing this analysis, the trial court should have realized that it had earlier instructed the jury on the applicable law about the imposition of a sentence of death. The jury presumably followed this law and made its recommendation in favor of life after resolving the conflicts in the evidence and weighing the aggravating and mitigating factors. It may have made this recommendation despite the uncontradicted presence of several aggravating factors. But,

as the court had instructed, the jury weighed the aggravating factors against the mitigating factors and found the scale tipped in favor of life.

Thus, in evaluating the jury's recommendation, the trial court must assume that if a reasonable basis existed for a life recommendation, it outweighed all the applicable aggravating factors, and it should accordingly impose a sentence of life. The court should impose this sentence although it disagrees with the weight the jury gave the aggravating and mitigating factors. Tedder.

In short, when the jury has recommended life, the trial court should analyze the evidence similarly to that used with Motions for a Directed Verdict or Judgment of Acquittal. The court should resolve all conflicts in the evidence in the light most favorable to supporting the jury's life recommendation.

After the court has examined the record for evidence supporting the jury's life recommendation and has found none, and explaining why there is none, it can conduct its own, independent examination of the facts of the case and character of the defendant. This analysis when the jury has recommended life comports with the procedure approved by the U.S. Supreme Court in Barclay v. Florida, 463 U.S. 939, 962-963, 103 S.Ct 3418, 77 L.Ed.2d 1134 (1983). In that case the court again approved Florida's death penalty sentencing procedure because each stage of the procedure narrowed or more clearly identified the class of persons who deserved to be sentenced to death. Each successive stage eliminated those who should live, and the

Tedder standard served as a significant filter in the death sentencing procedure in Florida.

In this case the trial court skipped the essential first step in the sentencing process by not examining the record for a reasonable basis for the jury life recommendation. Had it conducted this analysis, it would have found several bases for upholding that recommendation.

B. The Inmate Code, Christian, and Alfred Moore.

This court has decided nine cases involving prison murders resulting in a sentence of death.[7] Except for Brown, the court affirmed the conviction and sentence in each case,[8] and of the eight remaining cases, the jury recommended death in each case except for Lusk. Christian's case is therefore unusual because a Bradford County jury recommended life for an inmate at a prison noted for its violence.

Of the nine reported cases involving the death penalty, five have come from Florida State Prison, three from the neighboring Union Correctional Institution, and one from Cross

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[7] Demps v. State, 395 So.2d 501 (Fla. 1981); Morgan v. State, 415 So.2d 6 (Fla. 1982); Williams v. State, 438 So.2d 781 (Fla. 1983); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Agan v. State, 445 So.2d 326 (Fla. 1984); Woods v. State, 490 So.2d 24 (Fla. 1986); Muhammad v. State, 494 So.2d 969 (Fla. 1986); Brown v. State, 515 So.2d 211 (Fla. 1987); Williamson v. State, 511 So.2d 289 (Fla. 1987).

[8] In Brown, this court reversed for a new trial because of a discovery violation.

City Correctional Institution'. Seven of those cases have involved inmate on inmate violence, the remaining two being inmate assaults upon guards[10]. Prisons are inherently violent places, and many inmates, like Alfred Moore, readily resort to violence to create or solve their problems. As a result, fear permeates the prison and distorts life behind its walls or fences. What inmates fear is death, sudden violent death. That fear is always present, and even when an inmate sleeps in his cell, death is present. State v. Vickers, 633 P.2d 315 (AZ 1981) (Inmate killed while he slept.)

The unarmed prison staff ineffectively controls the crime and violence in prison. Virtually every inmate will have a weapon of some sort (R 1205), and drugs, homosexuality and other vices are readily available. The prison administration sits on a powder keg trying to blow out several burning fuses.

With the high concentrations of criminals in prisons, and the especially high number of violent criminals at Florida State Prison, an inmate code of existence has evolved to help the inmate cope with the terror of prison life and survive his sentence. The code, though harsh, and at odds with many of the rules of free society, at least helps the inmate survive, and that is the goal of all inmates (R 1508).

'Florida State Prison: Demps, Williams, Lusk, Agan, Muhammad. Union Correctional Institution: Morgan, Woods, Brown, Cross City Correctional Institution: Williamson.

[10]Woods and Muhammad involved inmate killings of guards.

The inmate code requires that all inmates do their own time (R 1507). When you do your own time you are strong enough to solve your own problems (R 1507). Prison society is a "macho" society which respects strength and exploits weakness (R 1507). Violence pervades inmate life, and the strong prey upon the weak or those perceived to be weak (R 1508). The weak cannot call the police for help or resort to the courts. Prison informants or "snitches" are pariah subject to sudden execution. See, Demps v. State, 395 So.2d 501 (Fla. 1981).[11] Even if the inmate asked the prison staff for help, it often denies the request (as in this case) (R 1205) or cannot provide the needed help. With so many inmates at Florida State Prison and the staff undermanned and poorly trained[12] an inmate must resort to his own devices to survive.

Thus, doing time in prison is tough (R 1514), and an inmate who can do his own time will probably leave the prison jungle alive. But this survival requires constant attention to

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[11] In Demps v. State, 395 So.2d 501 (Fla. 1981), Demps and two other inmates killed another inmate who had gone to prison authorities. Demps and other cases illustrate the significant risks an inmates takes when he reports his problems to the prison staff. With the ability of the prison administration to aid the inmate limited, and the danger of reprisal great, the inmate has few options but to solve his own problems. People v. Gangstead, 434 N.E. 2d 841 (Ill 2 Dist. 1982); Commonwealth v. Moody, 382 A.2d 442 (Pa. 1977).

[12] See, Report of Advisory Commission in the case of Vann v. Wainwright, Case No. 80-230-CA. (Eighth Judicial Circuit). A copy of the report is on file at the Florida Legislative Library, Room 701, The Capitol.

the nuances of prison status, where the perception of weakness is as important as its reality (R **1514).**

Christian had learned how to do his own time. He had earned the respect of guards and inmates, and he was known as a "Jolly Green Giant. (R **1082)** He was easy going, he gave no one a hard time, and he had a reputation for being mellow and easy to get along with (R **1066).** He rarely fought in prison (R **1066).**[13] Christian had established his reputation: he had learned how to do his own time.

Alfred Moore had not. Convicted of battery upon a law enforcement officer (R **1555),** he came to the prison from the Palm Beach County jail where he had accumulated **123** incident reports for assaults, fights, and other violent activities (R **1556).** He had set 10 fires (R **1556),** assaulted and injured 19 deputy sheriffs (R **1556),** attempted suicide, tried to escape twice and done so once (R **1556).** He was the most violent inmate the jail had ever had (R **1556).** When he arrived at Florida State Prison, he was immediately placed in close confinement (R **1557).** He was released into the general

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[13] In the twelve years Christian had been in prison, he had accumulated 9 disciplinary reports for fighting or assault or similar type infractions of prison rules (R **1473-1475).** The state presented no facts about those incidents, and we do not know if Christian started the fights. In any event, given the violence prone nature of prisons and the fact the prison never prosecuted Christian for these infractions, they must not have been too serious.

population during the last week of February 1987 (R 1557). Six weeks later, Moore tried to kill Christian.

This attempted murder was qualitatively different from what the victims in other prison murder cases had done. In, Morgan, the victim owed Morgan $400 and refused to pay the money. Morgan killed him. In Agan, the victim had robbed Agan, and later the two fought. As a result, the prison administration put Agan in confinement for two years. During this time, Agan brooded about how he would get back. In Lusk, the victim had robbed Lusk. Later that day Lusk killed him.

Here, Moore tried to kill Christian, and he would have succeeded if another inmate had not stopped him. For three weeks after this attack, he constantly (R 1158) barraged Christian with taunts, insults and threats to kill Christian or his family:

> He was cussing him, trying to make him mad, make him cuss him back at him. He called him a pussy boy, a faggot, a homosexual. He told him he was [a] coward ...

(R 1134)

> Well, it was after they got locked up together and after Doy started coming out on call-out and going to population, he told him, said, "Don't worry about it, if I don't get a second chance at you, if you don't snitch me out to the man, I'll see you again. If I don't see you again, I'll see your people in Brevard or Broward county,...

(R 1147, see also R 1156).

Given the opportunity, Moore would kill Christian. Under these circumstances, the jury could reasonably have concluded Alfred Moore provoked Christian to do what he did. It was, of

course, insufficient provocation to avoid a conviction for first degree murder, see, S782.03 Fla. Stats. 1987, but it was a reasonable justification for their life recommendation.

C. Moore initiated the events leading to his death.

Unlike other cases this court has considered, this is one of the very few in which the victim initiated or contributed to his death. Moore started the feud and fueled it when Christian was willing to drop it (R 1166). In a real sense, Moore contributed to his own death by his unrelenting oral and physical attacks upon Christian.

The trial court rejected this argument when it said the application of §921.141(6)(c)[victim participant] as a mitigating factor in this case was "preposterous." (R 356). Yet, given the circumstances under which Christian lived and the sworn enemy determined to kill him, Moore's "participation" in his own death is not so "preposterous."

In Chambers v. State, 339 So.2d 204 (Fla. 1976), Justice England, agreed with this court's reversal of the trial court's jury override, saying:

> The jury had evidence in abundance that appellant and Connie Weeks [the victim] had voluntarily shared a long-standing sado-masochistic relationship which included severe and disabling beatings. They also knew that Connie Weeks had herself obtained appellant's release from jail on the very day he had beaten and dragged her through the streets in an unholy rage.

Id. at 209.

Also, this court has consistently recognized that a defendant's passion, while not justifying a killing, can justify a jury recommendation of life. In Irizarry v. State, 496 So.2d 822 (Fla. 1986), Irizarry killed his ex-wife with a machete as she slept with her lover.[14] This court said the jury could have reasonably based its life recommendation upon its belief that Irizarry killed his ex-wife while under the influence of a passionate obsession. Id. at 825.

While Christian obviously had no passionate obsession for Moore, he nevertheless had very strong emotions regarding the man. What is more, like Connie Weeks, Moore provoked these intense emotions so that when Christian erupted, Moore was caught in the flood of unchecked rage he had created.

When the jury considered Christian's sentence, it could have reasonably believed the prison environment and Moore's attempt to kill him and promises to make good on his threats justified their recommendation of life. In an environment where the threat of violence is ever present, he was like a pedestrian caught in the middle of Tennessee Avenue during the 5 p.m. rush hour. He could be killed if he went to the prison staff, and if Moore was released into population, he would die.

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[14] He also tried to kill the lover but was unsuccessful.

D. Proportionality review.

In its order sentencing Christian to death, the court relied upon Lusk v. State, 446 So.2d 1038 (Fla. 1984) (R 352). Judge Fagan had sentenced Lusk to death, and that case has some surface similarities with this case. In that case, the victim robbed Lusk, and Lusk, claiming he could not "take it" anymore, killed the inmate who had robbed him earlier.

Despite the dissenting votes of Justices McDonald and Overton, this court affirmed the trial court's override of the jury's life recommendation. The only articulated reason for affirming his death sentence was Lusk's criminal record.

> ...[T]he instant murder was committed by Lusk while he was serving three consecutive life sentences imposed in 1977 for a prior first degree murder and two armed robberies with a pistol.

Lusk at 1043.(emphasis supplied.)

Lusk, like several other prison murderers, had a propensity to kill which he had brought with him to prison. See, also Demps (two prior first degree murders and one attempted first degree murder), Agan (one prior first degree murder. Had no remorse. Pled guilty so he could kill again.), Morgan (in prison for second degree murder although charged with first degree murder), and Williams (second degree murder). Not so with Christian, who has a short and milder history of violence.

Christian, of course, had a violent background. During the Christmas season in 1975 he committed an armed robbery and an aggravated assault for which he received thirty year and

thirty month sentences (R 349). In 1983 he was convicted of aggravated battery and given a nine month sentence consecutive to the other sentences he was serving (R 349). While these are serious crimes, they pale in comparison with Lusk's two armed robbery convictions and first degree murder conviction. Unlike Lusk and other prison murderers sentenced to death, Christian did not enter prison with the "...loathsome distinction of having been previously convicted of...first-degree murder...." Demps at 506. His crimes had occurred years earlier, and once in prison he had adjusted to prison life. He had left his violent past at the prison gate.

E. Prison Negligence.

In a free society, the police would have arrested Moore and put him in jail. He would have probably been convicted and sent to prison. Christian would have been safe, and he would have felt safe because Moore could not get at him. Not so in this case. Instead, by oversight or negligence, the prison administration set the stage for a future explosion by putting Moore and Christian on M wing (R 779, 1018).

Generally, inmates are restricted to the wing they are assigned to. They can move to other areas of the prison, such as the library and TV room, but only if they have a pass. See, Report of Advisory Commission in the case of Vann v. Wainwright, Case No. 80-230-CA. (Eighth Judicial Circuit) pg 6. Thus, to put two known antagonists on the same wing was inviting trouble.

Realizing the threat Moore posed, Christian asked one of the prison lieutenants to move him off M wing (R 1204). He denied that request (R 1204). Had he moved Christian, Christian probably would never have seen Moore again. If they met, it would have been only by chance.

The prison staff, however, refused Christian's request, and he was kept with Moore. At a minimum, the prison administration should have separated Moore and Christian so he could not have seen or taunted Christian. Such sight and sound separation would have reduced the tensions. Instead, the prison administration contributed to the problem by housing Moore and Christian on the same wing (R 779, 1018).

Christian was in an arena with a hungry lion. The staff which should have protected him made no effort to do so. The prison code prohibited him from requesting such help, and Moore would kill him if given the chance. With violence lurking beneath a thin veneer of calm, Christian had to solve his problem with Moore. He tried to avoid it by requesting the transfer, but when that failed he attacked Moore.

F. Christian.

Christian also differs from the other inmates who have killed in prison and been sentenced to death.

Unlike Lusk, Demps, Williams, and Agan, Christian was an easy going person who despite his violent past, had generally been accepted into the prison system (R 1537). Violence was not his method of solving his problems: even in this case he

wanted to avoid trouble with Moore. He never threatened Moore (R 1135, 1159), and he only told Moore not to "try him" (R 1135).

His revulsion at what he had done is evident by the repression or blackout he suffered during the murder (R 1540).

> Q: Can you describe his appearance or his looks [at the time of the murder]?
>
> A: Oh, he was like in a meditated state. He was psyched out. He was blank, nothing there, just like a mannequin, just moving around.

(R 1140)[15]

The frenzied killing reveals an exhausted and frazzled mind. (R 1541). Moore's attack upon Christian, his continual taunts, threats, and sexual harassment, the limitations of prison life, his limited options and the prison's indifference to his plight drove Christian. He committed the murder when his capacity to conform his conduct to the requirements of the law was diminished (R 1540), his judgment was significantly impaired (R 1548, 1552), and he was suffering from an extreme mental or emotional impairment (R 1542).[16] The constant harassment, the attack, and the probability of some future, promised attack upon Christian so frustrated him, that he

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[15]Alternatively, the head injury Moore gave Christian could have caused the blackout. See, Issue I.

[16]Although the evidence conflicts, Christian and another inmate said they had been drinking "buck," an inmate concocted wine, on the day of the murder (R 1167, 1206-1207). He had drunk about a quart but was not drunk, only light-headed (1207).

snapped and committed a crime totally inconsistent with his personality (R 1548). Unlike Williamson's methodical plan to do away with another inmate in Williamson v. State, 511 So.2d 289 (Fla. 1987), Christian killed Moore in an unplanned explosion of uncontrollable rage (R 1549).

Prison, in many respects is comparable to combat, especially the type of combat American soldiers fought in Vietnam. Boredom overwhelms everyone, and permeating this boredom is the palpable fear of sudden, violent death. All Vietnameese were potential enemies, none could be trusted, and sleep was never very sound. Tension was so high that inconsequential noises at night triggered five minutes firefights with a mouse or bird. Afterwards, there would be the giddy, embarrassed laughter but also a temporary release of the tension.

Like Vietnam, in prison the tension remains tight, the boredom overwhelming, and the fear of sudden, violent death as palpable. Unlike the soldier in Vietnam, the prisoner has no one to turn to for help. He has no squad, platoon, or company to rely upon. He also has no place to go to relax. Vigilance must be constant, even in his cell. His tour often is not 365 days, but extends to years. But like combat, the inconsequential act can trigger an outburst of retaliatory violence.

This murder was an isolated (for Christian) explosion of total criminality State v. Dixon, 283 So.2d 1, 10 (Fla. 1976). On top of the daily tensions inherent in a prison, and especially so at Florida State Prison, was added Alfred Moore.

He increased the pressure by his assault, and he kept raising it by his barrage of taunts and threats. The jury, representing our society, condemned Christian's killing Moore, but it also understood and accepted as mitigation the facts of prison life at Florida State Prison and the particular forces driving Christian to do what he did.

G. The Court's rejection of all mitigating evidence.

The court, in rejecting all the mitigating evidence Christian presented, rejected, as a matter of law, the applicability of §921.141(6)(b) (R 355-366):

> **§921.14(6)(b)[sic]** Certainly defendant was emotionally and psychologically disturbed because his status in the hierarchy among prisoners had been affected by the victims prior attack upon him, but even understanding this fact, the law cannot allow such feelings and irritations to rise to the level of mitigation against imposition of the ultimate penalty for taking the life of another.

In Brown v. State, Case No. 68, 690 (Fla. May 12, 1988) the trial court rejected, **as** a matter of law, mitigating evidence that Brown had abusive parents, a disadvantaged childhood, and a lack of education and training. Rejecting this conclusion, this court said,

> Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant. See, Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Like the mitigating evidence in Brown, the evidence of what drove Christian to commit this murder was relevant

mitigation and should not have been rejected as a matter of law. The court should have considered it as mitigation and as a reasonable basis upon which the jury could have based its life recommendation. The court's override was thus improper and this court should remand for imposition of a life sentence.

ISSUE III

THE COURT ERRED IN FINDING CHRISTIAN COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

One of the consequences of a jury recommendation of life is the way a trial court determines whether the various aggravating factors apply in a given case. If the jury's life recommendation raises a presumption that life is the correct sentence in a particular case, the trial court should examine the evidence relevant to a particular aggravating factor in the light most favorable to the defendant.

That is, if the evidence conflicts regarding the applicability of a particular aggravating factor, the court should resolve it in favor of the defendant. If, after doing this, the court believes the evidence supports a finding of a particular aggravating factor, the court should find that factor applicable.

The court in this case ignored the jury's life recommendation in this respect; instead it found evidence which it concluded supported this finding. The court erred in two respects. First, the evidence, when viewed in the light most favorable to Christian shows he did not commit this murder in a cold, calculated and premeditated manner. Second, assuming Christian did commit the murder in a cold, calculated, and premeditated manner, he had at least a pretense of moral or legal justification for committing it.

A. This was not a cold, calculated, and premeditated murder.

In support of its finding of this aggravating factor, the court found the following facts:

1. Christian secured a knife from a fellow inmate a few days before the killing.
2. Christian brooded over Moore's attack.
3. Christian knew Moore would be handcuffed when led back to his cell after his visit to the medical clinic.
4. Christian moved from his cell on the first floor to the third floor so he could stab Moore.
5. Christian pushed the two unarmed guards out of the way as he rushed towards Moore.
6. Christian would not heed Moore's cries of mercy.
7. Christian stabbed Moore 26 times and then pushed him head first over the edge of the deck.
8. He surrendered only after he had accomplished his plan.

(R 352-353).

To make these findings, the court had to ignore the following evidence which contradicted many of its findings:

1. There is no evidence Christian got a knife so he could kill Moore. Christian said every one in prison had a knife for their protection (R 1205). Christian may have gotten a knife simply to protect himself from the general possibility of something violent happening to him. There is no evidence he got the knife solely to kill Moore.
2. Of course Christian brooded over what Moore had done do him. What sane man would not have thought about what had almost cost him his life? What is significant is that Christian had resolved to forget getting revenge and had taken the potentially dangerous step of agreeing to prosecute Moore (R 1019, 1165, 1202-1203).
3. Christian also said he blacked out when Moore started sneering at him and doing other things (R 1209). He remembered getting his knife, but after that all was black until he woke up in a cell with blood on his hands (R 1210).
4. The two guards did not hear Moore cry for mercy, contrary to what the inmates said (R 819). This makes sense because after the third stab wound, Moore was probably unconscious (R 819) and was not talking (R 820).

5. The psychologist who examined Christian said Christian probably did not plan this murder (R 1549). Instead, Christian's drinking on the day of the murder coupled with Moore's harassment caused him to "snap". (R 1539)
6. The frenzied killing revealed someone overcome with rage; it was not the result of a coldly premeditated plan (R 1541).

B. Christian had at least a pretense of moral or legal justification for killing Moore.

In finding Christian murdered Moore in a cold, calculated and premeditated manner without any pretense of moral or legal justification, the court said:

> If the retribution by defendant her is to be classified as having any pretense of moral or legal justification, then the lives of all prisoners and others are in jeopardy at the hands of those so inclined vengeance.

(R 352)

The court erred in over generalizing Christian's case to all inmates regardless of the differences in each case. Christian is not claiming inmates have some general right to kill those who have in some way hurt them. This court's opinions in Agan and Lusk make it clear that killers cannot escape a death sentence because someone stole from or robbed them.

Christian's problem differed from those faced by Agan or Lusk. Moore had deliberately tried to murder him. The prison administration had compounded the problem by confining both men to the same wing where Moore could continue to threaten Christian. It refused to move Christian to another wing when he asked for a transfer (R 1205). If this Christian turned his

other cheek, he might have been killed, and appellate counsel would be representing Moore before this court. Christian had at least a pretense of self defense when he killed Moore.

In Williamson v. State, 511 So.2d 289 (Fla. 1987), Williamson claimed he killed his victim because the victim would have killed him and his co-defendant for not paying a $15 drug debt. Rejecting this claim of moral or legal justification, this court said:

> There is no evidence of any threatening acts by Drew [the victim] prior to the murder: nor is there any evidence that Drew planned to attack either Omer or Williamson.

Id. at 293. Accord, Cannady v. State, 427 So.2d 723 (Fla. 1983).

Here, we of course have Moore's attempt to murder Christian, and his repeated threats to kill Christian. Moore provoked Christian sufficiently to justify his attack as a form of self-defense. Christian had at least a pretense of moral or legal justification in killing Moore.[17]

For these reasons, Christian either did not commit this murder in a cold, calculated, or premeditated manner, or he had a pretense of moral or legal justification for committing it.

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[17] A pretense is a claim indicated outwardly but not supported by fact: it is something alleged or believed on slight grounds: Webster's Third International Dictionary. It denotes a hope that a statement will convince others of the truth of something that is false. Webster's Dictionary of synonyms.

VI CONCLUSION

Based upon the arguments presented above, Christian respectfully asks this court to either:

1. Reverse the trial court's judgment and sentence and remand for a new trial, or

2. Reverse the trial court's sentence of death and remand for imposition of a life sentence without the possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to William Hatch, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, James Doy Christian, #034915, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 26 day of July, 1988.

DAVID A. DAVIS