IN THE SUPREME COURT OF FLORIDA

JAMES DOY CHRISTIAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. **71,636**

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

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE FACTS

Christian disagrees with the States presentation of the facts as follows:

1. On page 4, the State says Christian threatened to kill Moore and referred to R-1166 to support this claim:

> Q. In your conversations with Mr. Christian, did he ever make any threats against Mr. Moore?
>
> A. Initially, he did. From the start he said he was going to straighten it out, you know, and after a while, me and him talking, I thought I had convinced him to just let that die, you known, and obviously, I didn't
>
> * * *
>
> Like I said, when he first got on the wing, he mentioned about evening the score....
>
> * * *
>
> Yeah. He said, 'Well, ain't nothing, man. I probably won't never see the guy anyway, no more, anyway, so I'll just let it drop.

Christian never threatened to kill Moore.

2. On page 5, the State says Christian did not address the predicate objection the State had raised to him admitting

the testimony of several lay witnesses concerning Christian's mental condition on the day of the murder. That is incorrect. Counsel recognized the objection and during the proffer, he asked the necessary predicate questions (R **1039-1041**). The court acknowledged that the predicate had been laid (R **1040-1041**).

3. On page **7** of its brief, the State attacks the qualifications of Dr. Thomas, the expert Christian called to describe the living conditions in prisons. This the first time such a challenge has been made. The State made no objection to his qualifications or familiarity with the facts of the case at the trial level (R **1503-1504**). In any event, Dr. Thomas has been certified as an expert to testify for the Department of Corrections (R **1503**). He has been an adviser for five or six years to the Gainesville Police Department and the Alachua County Sheriff's Office, and he has been a consultant to the Attorney General's office (R **1502**).

4. On page **7,** the State says Dr. Krop said Christian was not psychotic, which is true. But this is what Dr. Krop also said:

> **...**I did not feel that Mr. Christian reached to the extent that he was psychotic. I just felt that he was so frustrated, that his judgment was so significantly impaired, that he functioned in a way that would be typically inconsistent for him at this given time in his life.

(R 1548)

5. Dr. Krop, who is "only a psychologist," also said:

1. Christian was seriously emotionally distressed at the time he attacked Moore. The killing was totally out of character for Christian (R **1538**).

2. Christian accepted responsibility for killing Moore (R **1538**).

3. Christian's capacity **to** conform his behavior to the law was diminished at the time of the homicide (R **1540**).

4. Christian "blanked out" as a means of coping with what he had done (R **1540**).

5. At the time of the killing, Christian was in a state of serious emotional disturbance or emotional distress (R **1542**).

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.

The State claims Christian's argument on this issue "...fails for an infinite variety of reasons.'' (Appellee's brief at p. **14)**. Actually, the state presented only six reasons, none of which are persuasive.

1. Christian never pled insanity. He did not because he recognized that was not a defense. Insanity is a complete exoneration of criminal culpability. Christian realized that was not a defense in this case. Thus, the State misses the point when it said Dr. Krop said Christian was not psychotic. (Appellee's brief at page 12).[1]

Christian wanted to present evidence of his lack of intent to negate the premeditation element required in first degree murder prosecutions. That defense was similar to that of voluntary intoxication. That is, the law recognizes that voluntary intoxication is a partial defense in certain cases. Garner v. State, **28** Fla. **113, 9** So. **835 (1891).** It does not

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[1]The State makes much of Dr. Krop's testimony that Christian was not psychotic, that he fully appreciated what he was doing, and that he did not black out. (Appellee's brief at page 12). Reading the portions of the testimony the State relies upon to substantiate those claims (R **1538-1550)** reveals that Dr. Krop was having problems relating his findings in terms lawyers used, and his statements were not as damning as the State implies. See e.g. R **1548.**

totally exonerate a person who has committed a specific intent crime. Instead, it merely negates the specific intent element of the crime. The person may still be guilty of a lesser, general intent crime.

That is, Christian accepted that he killed Alfred Moore, and for that homicide he was culpable. The only question the jury had to resolve was the degree of murder he was guilty of committing. The State insisted this was a premeditated murder (It specifically said it was not relying upon a felony murder theory (R192)). Christian, on the other hand, argued he had committed only a second degree murder (R 1349). The lay testimony regarding Christian's mental condition would have been relevant to disprove the State's claim of premeditation, and it would have been relevant to prove his claim that "This was a mind out of control....This is a classic second degree murder case. This attack...was a depraved attack." (R 1349)

To say, as the State does, that the State can charge and prove Christian had the premeditated intent to kill Moore but that Christian could not present evidence to refute that claim, seriously disrupts statutory and Constitutional law.

First, Section 90.402 Fla. Stats (1987) says that all relevant evidence is admissible, except as provided by law. Section 90.401 Fla. Stats (1987) says that relevant evidence is evidence tending to prove or disprove a material fact. Certainly, premeditation is a material fact the state had to prove in this case. Just as certainly Christian should have

been able to present his evidence tending to prove this material fact.

On the Constitutional level, refusing to let Christian present evidence of his mental condition affected his right to present a defense. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct 1058, 35 L.Ed.2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Id., at 294). Also, once the State had provided some evidence of premeditation, there arose an irrebuttable presumption that Christian in fact premeditated the murder. See, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The presumption was irrebuttable because Christian could not present any evidence to rebut the only contested Issue in this case: Christian's mental condition at the time he killed Moore.

As long as Florida distinguishes different types of murder solely upon the mental state of the defendant at the time he committed the murder, the defendant must be allowed to present evidence refuting that element of the crime.[2]

2. Chrisitan's testimony condeded premeditation. Not so. What Christian conceded was that he intended to attack Moore, not kill him:

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[2]The precise issue raised here is currently pending before this court in Chestnut v. State, Case No. 70, 628. See, Chestnut v. State, 505 So.2d 1352 (Fla. 1st DCA 1987). See, generally, 22ALR 3d 1228.

> Q...You had not yet blown or exploded, like you said, and blacked out and you can't remember. When you got the knife from under the door, what were you going to do with it? What was your plan?
>
> A. Was to attack Moore
>
> * * *
>
> Q. How hard, once or twenty-six times?
>
> A. I wasn't going to kill him.

(R 1220).

Such an admission accorded with his depraved mind defense which is what he tried to argue (R 1349). Without the evidence the court excluded, that argument was doomed to fail. Thus, if he failed to present any evidence of a lack of premeditation, as the state claims (Appellee's brief at page 12), it is because the court refused to let him do so. That refusal is what this issue is about.

3. Dr. Aviles and Dr. Krop expertly refuted the "blow to the head" theory. Whether their testimony did so or not was for the jury to determine, not the State. Burr v. State, 466 So.2d 1051 (Fla. 1985)(A jury can accept all, none, or some of a witness' testimony). The jury is not bound to accept expert testimony even if it is uncontradicted. Bates v. State, 506 So.2d 1033 (Fla. 1987). In this case, this simply means that the state or the defendant can present lay witnesses to prove or disprove the defendant's mental condition. Byrd v. State, 297 So.2d 22 (Fla. 1973). Contrary to the State's claim (Appellee's brief at page 12), expert testimony is not

inherently more believable or reliable than that of a lay witness.

4. Christian failed to lay an adequate predicate for the admissibility of the testimony of his lay witnesses. Again, not so:

> Mr. Weiss [defense counsel]: So I might better supply the information to this witness, before asking him the question, may I know the Court's specific basis for sustaining the objection?
>
> The Court: Yes sir. This witness--you have not established the predicate for this witness to give testimony about the mental state of the Defendant...
>
> Mr. Weiss: In that instance, I will ask a series of predicate questions without going into anything else.

(R 1039-1040).

Counsel then asked his predicate questions, (R 1040-1041), after which, he said:

> Mr. Weiss: It would be based upon those predicate questions, your Honor, that I would ask him to describe briefly before the jury the Defendant's personality.
>
> The Court: Go ahead.

(R 1041).

The only fair interpretation of the Court's "Go ahead" is that Christian had established the requisite predicate. If not, the court should have told him so, as it had done so earlier. This conclusion is bolstered by the court's reason for rejecting Christian's proffer:

> The Court:...to depict him [Christian] as a non-violent person, I will permit it, but 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. Now, that's my ruling.

(R 1045).

The court's objection to Christian presenting his lay testimony was not that he could not present an adequate predicate; instead, it was that these witnesses were incompetent to testify about Christian's mental state. Christian had laid an adequate predicate, and the court accepted it, but sustained the State's objection on other grounds.

Finally, contrary to what the State claims, Section 90.701 Fla. Stats. (1987) does not prevent a lay witness from presenting opinion testimony. Fields v. State, 46 Fla. 84, 35 So. 185 (1903); McIntyre v. McIntyre, 452 So.2d 14, 29 (Fla. 1st DCA 1984)(Zehmer, concurring.)

5. The Court never forbade Christian from having his witnesses testify to their observations of him before and after the attack. What they testified about was Christian's general reputation (e.g. R 1076). The court's ruling prevented them from testifying about his mental condition at the time of the murder.

6. Christian failed to offer evidence sufficiently close in time to the attack itself. His questions were general in scope and in point of reference. This would be a valid argument had the court recognized the law in Garron v. State, Case No. 67,986 (Fla. May 19, 1988) 13 FLW 325, 326. Instead, it ruled that lay witnesses are, as a matter of law, incompetent

to render an opinion about a defendant's mental state (R 1045). Thus, the Court prevented Christian from trying to satisfy the requirements of Garron because, assuming he could do so, the witnesses were incompetent to testify. In short, Christian never presented evidence to satisfy Garron because the court never let him get to that point.

ISSUE II

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

If we assume, as the State has done in its brief, that the court properly found four aggravating factors, the question remains, was there a reasonable basis for the jury's life recommendation? The problem of examining the record for that reasonable basis is more subtle than the State realizes. When the jury has recommended life, it is not the court's function to examine the record to find facts to support a death sentence. Instead, its first duty is to find any reasonable basis upon which the jury could have based its life recommendation. If it finds one, then it sentences the defendant to life imprison. If it can find none, it then is free to impose whatever sentence it believes is appropriate .

The search for the reasonable basis implies that the court must resolve all the conflicts of evidence in favor of supporting the jury's life recommendation. It is not entirely free, at this stage, to resolve the conflicts as it sees fit.

Thus, here, was there a reasonable basis for the jury's life recommendation? Yes, there was.

First, resolving the facts.

1. The State says on page 16 of its brief that Moore "...begged for his life." Yet the two guards who had accompanied Moore heard no cries for mercy (R 819).

2. On page 15, the State says Christian stabbed Moore systematically, calmly and methodically. Yet a witness to the

murder also said Christian was in a meditated state. He was "psyched out. He was blank, nothing there, just like a mannequin, just moving around" (R 1140).

3. On page 17, the State compares this case with Lusk v. State, 446 So.2d 1038 (Fla. 1984). The state says " Christian had three weeks to cool off, Lusk did not.'' Actually Lusk had the better part of a day to cool off. But during the three weeks Christian had to cool off, Moore continually insulted and taunted him with threats to kill him and his family (R 1134, 1147, 1156). The State responded that Christian was "merely taunted, Lusk was under an actual threat of future violence." That statement ignores the facts of this case. Christian had not been "merely taunted." Alfred Moore had tried to kill him, and he would have succeeded if another inmate had not stopped him. Moore's "mere" taunts were much more serious than in Lusk where the victim had only stabbed Lusk's mattress several times. Moore was determined to kill Christian. That was not a threat. It was a certainty.

4. Citing this court's opinion in Lusk v. State, 498 So.2d 902 (Fla. 1986), the State claimed this court "...noted that Bradford County jurors, at least according to counsel, were tolerant of 'inmate on inmate' crime (no guard injured) and indeed were 'defense biased.'" (Appellee's brief at pp. 17-18). What this court actually noted was not what the State claims but:

> Trial counsel testified below that his experience with Bradford County juries was that they were extremely familiar with cases involving inmate

> crimes, and that there exists almost a 'defense bias' in such cases, so long as no prison guards were injured.

Id. at 904. (emphasis supplied.)

This court never said Bradford County juries were tolerant of inmate on inmate crimes, and it never said those juries had a defense bias. Moreover, if Bradford County juries have a general defense bias, the State has made no reference to the record that they had one in this case.

5. The State on page 18 of its brief also says that "Dr. Krop [is] a noted anti-death activist...." There is nothing in the record to establish that.

There is also nothing in the record to support the State's claim on page 18 of its brief that Christian conceded that this murder was cold, calculated and premeditated.

The State has also mischaracterized Christian's argument. He did not claim that the threat to his "social standing" in prison exonerated this crime. (See appellee's brief at page 18,19). He did argue that prison society is radically different from the free world. Learning how to do your own time in a violent, closed society was essential to survival. Being attuned to the realities and nuance of prison life is essential, and status, as defined in terms of strength or weakness, is a key ingredient to survival (R 1514).

Moreover, Christian did not claim that this murder must be "excused" as the State claims. He does claim that, in light of the peculiarities of prison life in general, and Christian's

situation, specifically, that "social standing" can mitigate a death sentence.

Christian is also not claiming "... we must allow prisoners leeway to kill each other in order to preserve social standing in prison." (Appellee's brief at page 19) He is also not asking this court to "...place the imprimatur of this court upon 'revenge killings in or out of prison." Id. at 19.

Instead, Christian is asking this court to recognize the unique facts of this case:

> 1. Alfred Moore, the victim, initiated the series of events leading to his death by his unprovoked attack upon Christian.
>
> 2. Christian, unlike other inmates sentenced to death for killing other inmates or guards, was a peaceable inmate who had left his violent behavior at the prison gate.
>
> 3. Alfred Moore, on the other hand, had an extremely violent past, and there is nothing in the record that he intended to leave his violent propensities at the prison gate. To the contrary, he promised to kill Christian given the chance.
>
> 4. Christian asked to be moved off "M" wing, but the prison administration refused to do so (R 1204). Christian tried to solve his problem by avoiding Moore, and the prison staff should have known better than to house two known antagonists on the same wing (R 779, 1018).

Christian, of course, could have probably done more to protect himself, but that is not the test. The situation Christian found himself in mitigates, but not exonerates, his culpability for this murder. The flip side of this argument is that if Christian had done nothing and Moore had killed him, counsel would now be arguing to save Moore's life, a much more difficult task. If Christian's "system poses a threat to the

lives of everyone in prison," (Appellee's brief at page 19), the alternative is to punish those inmates who are trying to rehabilitate themselves by avoiding trouble that will not avoid them.

Christian is being punished for killing Moore. Given the unique facts of this case, that punishment does not need to be escalated to a death 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.

The State claims Christian is "Playing upon the word pretense..." (States brief at page 20). Neither Christian or his appellate counsel wrote section 921.141(5)(i) Fla. Stats (1987), and if we are playing with that word, it is in a game this court has joined. Banda v. State, Case No. 69,102 (Fla. July 14, 1988).

In Banda, Banda killed a man from whom he had stolen ten dollars. The victim told Banda he was going to beat him up and that he had better watch out. Afraid, Banda said he was not going to hide, but was going to get him first. So he killed the victim while he slept.

Banda was later convicted of first degree murder and sentenced to death. The court found in aggravation only that Banda had committed this murder in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

On appeal, this court tacitly admitted the cold, calculated nature of the murder, but it said Banda had at least a "pretense" of moral or legal justification. Namely, the victim was a violent man who had made threats against Banda.

In this case, not only had Moore made threats against Christian and his family, he had tried to kill Christian. There is no evidence Moore did not intend to kill Christian,

and from his past behavior, Christian could have expected a surprise attack from Moore. What is more, other people confirmed the threats Moore had made, and the facts of the case consistently support the reasonable belief that Moore would try to kill Christian given the chance.

Christian has made at least a colorable claim that he acted in self defense although it was insufficient as a legal defense for the homicide. Christian had a pretense of moral and legal justification in killing Moore, and the court erred in finding that factor applied to this case.

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 10 day of November, 1988.

DAVID A. DAVIS