IN THE SUPREME COURT OF FLORIDA

ROBERT BRYANT,

Appellant,

v.

CASE NO. 75,317

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR TAYLOR COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
LEON COUNTY COURTHOUSE
FOURTH FLOOR, NORTH
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT
FLA. BAR #271543

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

IN THE SUPREME COURT OF FLORIDA

ROBERT BRYANT, :

Appellant, :

v. : CASE NO. 75,317

STATE OF FLORIDA, :

Appellee. :

_____:

REPLY BRIEF OF APPELLANT

ISSUE I

THE TRIAL COURT ERRED IN DENYING BRYANT'S CHALLENGE FOR CAUSE OF ELEVEN PROSPECTIVE JURORS WHO SAID THEY WOULD AUTOMATICALLY RECOMMEND A DEATH SENTENCE IF THEY FOUND BRYANT GUILTY OF PREMEDITATED FIRST DEGREE MURDER WHICH ERRORS VIOLATED BRYANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The State understandably has a difficult job with this issue. Eleven prospective jurors clearly said that if they convicted a defendant of premeditated first degree murder, they would automatically recommend he be put to death. After the State and Bryant had questioned the rest of the prospective members of the jury, they challenged for cause those which they believed could not impartially determine Bryant's guilt or sentence. The court granted the State's challenge for cause of a Mrs. Parker and Mrs. Bates because of their views against imposing a death sentence (T 93, 97). It denied Bryant's similar request on the eleven who would automatically impose death because defense counsel had not "inquired far enough to explain to them their options under mitigating circumstances"

(R 96). The State has three arguments to explain why the court correctly refused to excuse these eleven members of the venire: 1) Bryant's challenge was premature and ill-founded. 2) There was no basis for the cause challenges. 3) Bryant requested the additional peremptories for reasons other than to excuse these particular people (Appellee's brief at p. 25).

To better understand the situation, the eleven prospective jurors Bryant challenged for cause were considered as follows:

a. 6 were peremptorily challenged after being questioned by the State and Bryant, and Bryant's challenge was denied (R 100).

b. 2 (Whitson and Presnell) were peremptorily challenged later (R 186).

c. 1 (Taylor) was excused for cause later (R 185).

d. 2 (Kerley and Payne) served on the jury.

BRYANT EXERCISED HIS CHALLENGES PREMATURELY

This argument applies to the six prospective jurors only and arises because the court, in denying Bryant's challenge for cause, said the defendant had not explained the mitigating circumstances. There was, however, nothing premature about the challenges. They were made in the normal course of the trial. The State had certainly had the opportunity to explain the death sentencing process but conducted instead an anemic questioning. The court, as other courts have done, did not seek to rehabilitate these persons. Why should Bryant be faulted for not doing what he did not think was necessary. These six prospective jurors had unequivocally said they would automatically impose a death sentence. For him that was enough

to justify excusing them for cause, even after the State had tried to rehabilitate them. The question, therefore, is whether under this court's ruling in Singer v. State, 109 So.2d 7 (Fla. 1959) there was a reasonable doubt as to the juror's ability to serve impartially. Likewise, under the United States Supreme Court's ruling in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), this court must determine whether there was a substantial likelihood the jurors would disregard their oaths and instructions.

Moreover, if Bryant's challenges were premature because the jury had not been fully instructed on the mechanics of capital sentencing (appellee's brief at p. 22), then the State's cause challenges for Baker and Parker were likewise made too soon and the court erroneously excluded them. There is, however, no requirement that the jurors be instructed regarding the mechanics of capital sentencing before an intelligent cause challenge can be made.

Now, the State complains that defense counsel's questions regarding the death penalty were "not a model of clarity." (Appellee's brief at 23). Yet, there was nothing unclear about that question:

> MR. HARRISON: Mr. Floyd, let me return to that last question that was asked by Mr. Phelps. Do you remember when I discussed things with Mr. Padgett, and I asked him under what circumstances he felt the death penalty was appropriate, and he said that premeditated murder would be an example where he felt that, I believe he said the death penalty automatically would be the appropriate thing. Is that your feeling still? (R 89-90)

There is nothing unclear about that question especially when it is compared with those of the State: "Mrs. Parker, how do you feel about the death penalty?" (R 37) To which Mrs. Parker answered, "I guess yes." The State's question had to do with the prospective juror's beliefs whereas Bryant's inquiry concerned their conduct. Bryant's focus on action rather than beliefs was what the court in Witt and this court in Singer said was important. After all, many people believe that the death penalty is an improper sentencing choice, yet under the pressure of an actual case, those opinions transform or solidify. Without denigrating those beliefs, the focus should be upon the jurors conduct, i.e. can he follow the court's instructions and obey his oath as a juror. Bryant's questioning clearly showed that at least six of those called to serve on this jury could not do so. His objection was timely, and the court erred in not excusing the six jurors he eventually challenged peremptorily.

THE BASIS FOR THE CHALLENGES

As to the remaining jurors (that is, the 5 Bryant did not challenge peremptorily with the other six), the State says there was no basis for the cause challenge because they said they could be impartial (Appellee's brief at pp 20-22). The State focuses upon Payne and Kerley and says those "two jurors did not merit excusal under the test set forth in Fitzpatrick v. State, 437 So.2d 1072, 1076 (Fla. 1983)." While that may be true, the test set forth in that case was based upon the now discredited standard found in Witherspoon v. Illinois, 391 U.S.

510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Instead of that stricter test, this court now follows that more relaxed one announced in Witt and quoted in Bryant's initial brief. (Initial brief at pp. 17-18) Under that test, a doubt remains that neither Payne or Kerley could set aside their views on the death penalty sufficiently to render an impartial recommendation as to the appropriate sentence. Under the Witt test those to prospective jurors should have been excused.

The State says virtually nothing regarding Whitson. He maintained his hard line stance to the very end, and his last words on the subject were:

> If I went out or anybody went out and intentionally murdered somebody, I believe in the death penalty instantly. I mean, I don't believe in hanging around with it."

(T 185).

The court denied Bryant's challenge for cause, yet Whitson certainly met the tests articulated in Witt and Singer. The defendant established a valid basis for excusing him.

The State, by way of footnote, argues that failing to excuse Whitson was harmless because the court gave Bryant one additional peremptory challenge (Appellee's brief at p. 24-25). That he had to use that peremptory on a juror who should have been excused for cause does not make the court's error harmless, especially in light of two other members of the venire who sat in Bryant's trial whom the defendant had wanted excused for cause. The error in forcing Bryant to use a peremptory challenge on Whitson was not harmless.

THE GRANTING OF ADDITIONAL PEREMPTORY CHALLENGES

Bryant requested additional peremptory challenges, and the court granted him one additional one. The State now faults Bryant for not asking for them for the right reason and for not asking for even more, after the court had denied his request for ten additional challenges (R 253, 256). Bryant was concerned that the venire panel lacked what he thought was a proper percentage of blacks (R 254). Although he said he wanted blacks on the jury, neither the State or the Court told him what the State now argues, that he was not entitled to a jury composed of at least some blacks. They, like defense counsel, were focussing upon the number of blacks represented in the venire (R 254-56). Thus, if defense counsel was clumsily trying to rectify a problem, that should not deflect this court from the central inquiry raised by this issue: did the court properly deny Bryant's cause challenges under Witt and Singer?

This court in Trotter v. State, Case No. 70,714 (Fla. December 20, 1990) held that for a defendant to preserve a claim that he was forced to improperly use his peremptory challenges he must, in addition to requesting additional peremptories, specify whom he would use those challenges on. Accord, Hitchcock v. State, Case No. 72,200 (Fla. December 20, 1990). This court did not say how a defendant could make the necessary indication, but in this case Bryant should have certainly met this standard when he challenged for cause eleven prospective jurors, six of whom he immediately exercised

peremptory challenges on. If he believed the remaining five should have been excused for cause, then had he been given sufficient additional peremptory challenges, he probably would excused them. Thus, presuming this court intends to require this additional step retroactively, Bryant has taken it in this case.

ISSUE III

THE COURT ERRED IN DENYING BRYANT'S MOTION FOR A MISTRIAL AND HIS REQUEST TO INDIVIDUALLY QUESTION EACH JUROR WHEN IT BECAME EVIDENT THAT THE JURY MAY HAVE BASED THEIR SENTENCING RECOMMENDATION UPON EVIDENCE NOT PRESENTED AT TRIAL IN VIOLATION OF BRYANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The State, on page 42 of its brief, says "James stated that he had determined that a stray bullet 'from a hunter' had caused the damage (R 1295)." What James actually said was

> After I went inside the house, I saw where glass had went approximately 14 feet inside the house, you know. And then I determined it was a projectile, you know, from a stray bullet, I summize from a hunter, you know some distance away.

(R 1295). James never said the bullet came from a hunter, and if he had, based upon what appears in this record, that would have been speculation. It is, in fact, hard to understand how he determined the bullet was a "stray" which had been fired from some distance away.

While Bryant agrees, as he must, that the trial court has a large degree of discretion in whether or not to inquire about jury irregularities, once he has decided to hold the hearing, the procedure he must follow is not discretionary. Thus, the court here erred as a matter of law when it failed to follow the correct method of questioning the jurors. Several of the cases cited by the State are irrelevant because they focus on whether the court had erroneously exercised its discretion in refusing to inquire into alleged jury problems. Waler v. State, 330 So.2d 110 (Fla. 3rd DCA 1976); Parker v. State, 336

So.2d 426 (Fla. 1st DCA 1976); Murray v. State, 356 So.2d 71 (Fla. 1st DCA 1978). The other cases cited provide scant support for its argument.

In Zeigler v. State, 402 So.2d 365, 374 (Fla. 1981), the defendant wanted to inquire into possible juror misconduct. The court questioned all the jurors, but it did not let defense counsel do any of the inquiry. That was not error this court held. The issue presented here differs significantly from that in Zeigler because the trial court in that case apparently questioned all the jurors, which the court in this case refused to do. The court there followed the correct procedure, whereas the court in this case did not. Zeigler is no help to the State.

Neither is Odom v. State, 403 So.2d 936 (Fla. 1981) in which a juror received a threatening phone call and told one of the alternates jurors about it. The court, as the one in Zeigler had done, interviewed the jurors (rather than only the one who had received the threat), even though there was no evidence other members of the jury had learned of the threat. The court denied Odom's motion for mistrial because the person who made the threat had never said which way the juror should vote. Hence, the situation was as if no threat had been made.

In this case, at least one juror, Mrs. Morrow, viewed the shooting incident as a threat by Bryant and his people. Why else would she have been worried? Why else would the jury foreman tried to comfort her by telling her she lived in the "best place in Taylor county not to be affected by [colored

people.]" (R 1309). Unlike the threat in Odom, the implicit one in this case could be linked (at least in the mind of one juror) with the defendant. The court erred in not questioning the rest of the jury, as the court in Odom had done.

In Jones v. State, 411 So.2d 165, 167 (Fla. 1982), a juror, during trial, talked with the murder victim's daughter. The court held an inquiry, but it limited it to just the one juror. This court approved that procedure, but that case is distinguishable from Bryant's case because in Jones there was no evidence any of the other jurors knew of the conversation or were influenced by it. Thus, the court fashioned a remedy to an alleged problem that fit its nature. Here, the entire jury obviously was aware not only of the shooting incident but of Mrs. Morrow's anxiety. Unlike the situation in Jones, the court should have interviewed the entire jury to determine if they remained impartial.

Likewise, the situation in Doyle v. State, 460 So.2d 353, 356-57 (Fla. 1984) was similar to that in Jones in that it involved only the question of the impartiality of a single juror. That juror happened to pass Doyle's counsel in a corridor during the trial and told him, "good luck. You're going to need it." The court denied the defendant's motion for a mistrial, but it issued a curative instruction to all of the jurors.

In this case, the court gave no curative instruction, and unlike the courts in Jones and Doyle, it crafted a procedure much too limited to properly resolve the problem before it.

In Medina v. State, 466 So.2d 1046 (Fla. 1985), a witness, contrary to the court's instructions, blurted out that Medina had stabbed him in an unrelated incident after the charged murder had occurred. The court gave a curative instruction, but one juror told the court that unless the defendant rebutted that allegation, he could not remain an impartial juror. The court excused him, but before he left, Medina wanted to question him regarding how the other juror's felt. The court denied that motion, and this court upheld its ruling because such questioning "would have produced only speculation and conjecture." Id. at 1049. Bryant obviously made no similar request; to the contrary he wanted the court to speak with the jurors directly.

In Dufour v. State, 495 So.2d 154 (Fla. 1986), the court excused a juror whose husband has received a strange telephone call (which could not be linked to the trial). Before leaving, however, the juror told the others about the call. The court talked to the rest of the jury and assured them that the telephone call had nothing to do with the trial. The court then asked the entire jury if they had any reservations about serving, and none of them did.

In this case, the court made no similar explanation to the jury, and it made no similar inquiry of all the jurors regarding their continuing impartiality. That was error.

Finally, in Occhicone v. State, Case No. 71,505 (Fla. October 11, 1990), during voir dire a spectator told a prospective juror that she thought the defendant guilty. The

court denied the defendant's motion for mistrial, but by then it had determined that the rest of the jury pool had not been tainted and significantly it let counsel for Occhicone inquire about any bias that the comment may have caused. Counsel, however, made no such inquiry. That case is obviously distinguishable from this one.

Thus, the court and this court cannot say with any satisfactory degree of assurance that the court's truncated inquiry insured the jury was impartial and remained so despite Mrs. Roach's revelation and Mrs. Morrow's response to it.

ISSUE IV

THE COURT ERRED IN FINDING AS AN AGGRAVATING FACTOR THAT BRYANT COMMITTED THIS MURDER FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

The only evidence produced establishing that Bryant killed Mrs. Kennedy to avoid arrest was circumstantial. While, the State can establish this aggravating factor with such evidence, it must, eliminate any reasonable hypothesis of innocence. State v. Law, 559 So.2d 187 (Fla. 1990). While the State's argument on this issue has merit, it does not eliminate the reasonable theory that Bryant killed the victim while drunk and drugged. Because it does not do so, this court cannot say the dominant motive to kill her was to avoid arrest.

ISSUE V

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEY COULD FIND AS MITIGATION "THAT THE CAPITAL FELONY WAS COMMITTED WHILE BRYANT WAS UNDER THE INFLUENCE OF EXTREME OR MENTAL OR EMOTIONAL DISTURBANCE, WHICH VIOLATED HIS RIGHT AS PROVIDED BY THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State presents a two prong argument on this issue. First, it says that this court's decisions in Stewart v. State, 558 So.2d 416, 420-21 (Fla. 1990) and Roman v. State, 475 So.2d 1229, 1234-35 (Fla. 1985) control. Second, if they do not, Bryant should nevertheless lose because the error was harmless. The State is wrong on both arguments.

In Stewart, the defendant requested that the adjectives "extreme" and "substantially" be taken from the standard jury instructions on the two statutory mental mitigating factors. The court not only denied that request, it also refused to give the standard instructions on those factors. This court said the court correctly refused to give the instruction on extreme disturbance because Stewart had presented no evidence to support giving it. The trial court, on the other hand, had erred in not instructing the jury on impaired capacity.

> The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances `for which evidence has been presented' and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment.

Id. at 420.

In Roman v. State, 475 So.2d 1228 (Fla. 1985), the court gave one of the mental mitigating instructions, but it refused to give the other one, which happened to be the one Roman wanted the court to give. This court saw nothing wrong doing this.

> The two mitigating circumstances involving mental state describe two different mental states, which may, but do not necessarily, overlap. In this instance they did not.

Id. at 1235.

Following Stewart, the focus of this court's inquiry should be upon the "quantum of evidence" Bryant presented to support instructing the jury on his claimed emotional disturbance. That evidence consisted of him being recognized when a child as having such significant emotional problems that he was placed in a program at school for the emotionally handicapped. Add to that his mental retardation, his drug and alcohol addiction, and his father trying to shoot his arm off and this court can only conclude that Bryant has presented at least the minimum amount of evidence to justify giving the standard instruction on emotional impairment. In this case, unlike the situation in Roman, the two mental states described by the statutory mental mitigating factors overlap, and the court should have instructed the jury on both.

The State, perhaps conceding the strength of this argument, says that whatever error the court committed, the catch-all instruction that the jury could consider "any aspect of the defendant's character or record or circumstance of the

offense" cured it. This court in Stewart applied a harmless error analysis in that case and found it inapplicable. If giving this catch-all instruction could cure all errors in instructing on the mitigating factors, then the logical conclusion would be that it is the only instruction the jury need hear. This court has not taken that extreme step, and it should not do so. If a defendant is entitled to an instruction of the law on his theory of defense, Hooper v. State, 476 So.2d 1253 (Fla. 1985), this court should not dilute the efficacy of that instruction by ruling that an anemic "one size fits all" instruction adequately covers one of the most crucial aspects of an already vitally important part of a defendant's trial.

In this case, Bryant's emotional immaturity permeated this case, and the catch-all instruction may have covered it but it certainly did not focus for the jury the fact that such emotional impairment can mitigate a death sentence. Failure to give an instruction on emotional impairment cannot be harmless in this case.

ISSUE VI

THE COURT ERRED IN IGNORING, IN ITS SENTENCING ORDER, THE WEALTH OF MITIGATING EVIDENCE BRYANT PRESENTED, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State has essentially three arguments on this issue: 1) this court's opinion in Campbell v. State, Case No. 72,622 (Fla. December 13, 1990) 16 F.L.W. 51 should not be applied retroactively (Appellee's brief at pp. 60-61). 2) Finding or not finding mitigation should be left to the sound discretion of the trial court. 3) What Bryant offered as mitigation was either covered by the court's finding of low intelligence, was not established by the greater weight of the evidence, or was not mitigating.

RETROACTIVE APPLICATION OF CAMPBELL

In Campbell this court provided guidelines to clarify how trial courts should treat the mitigating evidence presented at trial. The guidelines do not provide new requirements for trial courts to follow; instead that opinion summarizes what this court and the United States Supreme Court have been saying for years. For example, that the findings must be in writing is a statutory requirement, which this court has insisted be observed. Section 921.141(3) Florida Statutes (1989). Holmes v. State, 374 So.2d 944, 950 (Fla. 1979). Likewise, trial courts have been on notice for almost as long that their sentencing orders must be of "unmistakable clarity." Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Sentencers also can not be precluded from considering any mitigating evidence,

Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), thereby giving it no weight. Eddings v. Oklahoma, 455 U.S. 104, 114, 15 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

This court's opinion in Campbell does little more than pull together the various strands of the law on how to treat mitigating evidence and weave them into a coherent fabric to guide trial courts. Certainly, the principles underlying that decision had been articulated by this court and the U.S. Supreme Court. See, Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 30 (1990).

What is more, this court applied Campbell retroactively in Lucas v. State, 568 So.2d 18 (Fla. 1990). There is nothing so new in Campbell to prevent this court from applying the holding of that case to this one.

Moreover, if this court decides not to apply that case retroactively, this court should nevertheless remand for resentencing because the trial court's sentencing order lacks the "unmistakable clarity" this court requires. The State, for example, claims that much of what Bryant claims was mitigation, such as his mental retardation and emotional handicaps, was included within the court's finding that he had a "low intelligence." (Appellee's brief at pp. 67-68) If the court actually did that, it should have said as much so this court does not have to guess what it considered as mitigation. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981) (Trial court, not the Supreme Court, makes findings of fact.)

TRIAL COURT DISCRETION

The State next argues that this court can not mandate what is mitigation, and this court should leave to the trial court's discretion what is mitigating (Appellee's brief at pp 63-64).

First, this court reads more into Campbell than this court put there. As to mandating what is mitigation, this court in Lucas, supra, said:

> We, as a reviewing court, not a fact-finding court, cannot make hard-and-fast rules about what must be found in mitigation in any particular case. . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion.

Id. at 23 (citations omitted.)

Second, courts have on occasion mandated certain mitigation. For example, this court in Buford v. State, 403 So.2d 943 (Fla. 1981) declared that defendant's guilty of sexual battery of a minor could not be executed. Similarly, the United States Supreme Court has said defendants who were neither present when a murder occurred or intended it happen, cannot be executed. Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Likewise, this court has considered whether children can be executed. LeCroy v. State, 533 So.2d 750 (Fla. 1988). The Florida legislature cannot limit what this court can declare is mitigation.

Third, the State seems to view the exercise of a trial court's sound discretion as the ultimate goal of rational sentencing in capital cases (Appellee's brief at pp 63-64).

Sentencing discretion, however, is only a brief stop on the road to what is the ultimate destination in imposing a death sentence: reasoned judgment.

> Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

The requirements of Campbell push sentencing courts towards that final resting place, and this court should not convert the truck stop of judicial discretion into a sentencing heaven.

THE SPECIFIC MITIGATION BRYANT ARGUED

The State has a particularly difficult chore dismissing the wealth of obvious mitigation which the court as evidently chose not to discuss in its order sentencing Bryant to death. It dismisses this mitigation by saying that the court's order somehow included what Bryant now claims it omitted, it was not established "by the greater weight of the evidence," or it was not mitigation at all.

In the first category, the State says the court's order acknowledging the defendant's low intelligence encompassed Bryant's mental retardation and emotional handicap (Appellee's brief at pp. 667-68). Such a sweeping inclusion by the trial court, if it in fact made such a conclusion, can only evidence a gross misunderstanding of the nature of Bryant's mental retardation and emotional problems. (See Initial brief at pp. 40-41, note 6, and issue VIII, dealing with executing the

mentally retarded.) It does not evidence the reasoned judgment this court now requires.

The claim that Bryant did not establish other mitigation by the greater weight of the evidence likewise fails. Under that argument, the State says Bryant did not establish that he was functioning on a second or third grade level, he was not chronically aggressive, or he was not drunk or drugged when he killed Mrs. Kennedy (Appellee's brief at pp. 68-71). Significantly, none of what Bryant said was mitigation in his initial brief was challenged by the State at trial, and now it claims it was not proven because he mentioned it with only a quiet voice rather than shouting it. What Bryant offered remains unchallenged and unrebutted, and the State can refute it only by negative inferences such as that found at the bottom of page 69 where it mentions that none of Bryant's "family members, friends or former educators noted [Bryant's addiction.]"[1] Such conclusions drawn, not from positive testimony but its absence, cannot defeat the specific record citations Bryant has provided this court establishing the mitigation he has argued in his initial brief. Such

---

[1]See also the top of page 68 where the State attempts to refute Bryant's claim that he functioned only at a second or third grade level by noting that the psychiatrist who examined Bryant "never specifically testified that Bryant was functioning at a lower `age' or `grade' level than his chronological age would suggest."

references, as brief as they may be, nevertheless provide sufficient evidence to establish the mitigation argued.[2]

NON-MITIGATING EVIDENCE

Finally, the State argues that Bryant's emotional handicaps and his family life were not mitigating (Appellee's brief at pp. 68, 72-74). As to his emotional problems, this court in Brown v. State, 526 So.2d 903 (Fla. 1988) explicitly recognized that a jury could legitimately recommend life because of Brown's "mental and emotional handicap and impoverished background." Id. at 907. Brown, like Bryant, had been placed in programs for the emotionally handicapped, which this court suggested was mitigating. Bryant, also like Brown, was not chronically aggressive, even though in both cases the defendants had certainly overly reacted to emotionally charged situations.

Likewise, that Bryant's childhood may have gotten better after his father was sent to prison for shooting him does not somehow negate the effect of the years of abuse the defendant suffered.

---

[2]The State also claims that because the jury rejected Bryant's alibi, it must have necessarily also rejected his claim that he was drunk (Appellee's brief at p. 71.) That conclusion does not necessarily follow because, as this court has recognized, the jury is not bound to accept all that a witness says. It can, instead, selectively chose what it believes and rejects. Burr v. State, 466 So.2d 1051 (Fla. 1985). The jury, for example, could have believed that Bryant was drunk the night he killed Mrs. Kennedy and had killed her before he stumbled home.

> The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Nibert v. State, Case No. 71,980 (Fla. December 13, 1990) 16 F.L.W. S3.

Evidence of Bryant's battered childhood mitigated a death sentence, and the trial court erred in not discussing it in its sentencing order.

This court should, therefore, reverse the trial court's sentence and remand for resentencing.

ISSUE VII

UNDER A PROPORTIONALITY REVIEW OF THIS CASE, A DEATH SENTENCE IS NOT WARRANTED.

The crucial part of the State's argument on this issue is the cases it presents to show that a death sentence is proportionally warranted in this case. It relies upon two series of four cases, to support its position, yet those cases are readily distinguishable from the controlling facts in this case. The first cases, Quince v. State, 414 So.2d 185 (Fla. 1982); Lightbourne v. State, 438 So.2d 380 (Fla. 1983); Hardwick v. State, 461 So.2d 79 (Fla. 1984); Wright v. State, 473 So.2d 1277 (Fla. 1985), have the same common theme of a burglary/murder. In that sense, this case is like them. Yet, if the death penalty is reserved only for those who are the most culpable, the most morally blameworthy, then this court cannot simply match fact patterns. The focus has to be on the evidence of the additional moral culpability the defendant has demonstrated when he murdered his victim. Often, the facts of the case will clearly show this, as for example, it does in Lightbourne, where the defendant cut the telephone lines going into the victim's house, and he killed the victim because she recognized him. Such facts demonstrate a coldness, an indifference to human life that the "typical" first degree murder lacks. Thus, evidence of the defendant's mental state or intentions assumes critical importance in proportionality review because such proof is the best measure of his culpability. That is why Bryant focussed upon cases which

emphasized the defendant's mental state at the time of the murders. Of course, the facts in those cases differ from this case, but the common, unifying theme in each one was that because of the defendant's drinking or mental retardation, he did not have that additional degree of moral culpability which would make him death worthy.

When viewed in that light, three of the State's cited cases, Lightbourne, Hardwick, and Wright, have no relevance to this issue because there is no evidence the defendants in those case were mentally retarded. In two of them, Lightbourne and Wright, the defendants were not under the influence of drugs or alcohol.[3] In Quince four of the five experts who examined the defendant found that although he was "not of normal intelligence," neither of the statutory mitigating factors applied. The fifth expert, on the other hand, found that at least one of them fit Quince, who he described as having the mental abilities of an eleven year old. That conclusion was sharply questioned by one of the four other experts. The issue this court had to resolve concerning this testimony was not if a death sentence was proportionally correct for a mentally retarded defendant, but whether the defendant was mentally defective at all.

---

[3]The same could arguably be said of Hardwick, but there was evidence he had been drinking at least several hours before he committed the murder. There was not evidence, however, that he was drunk when he killed the victim.

> Rather, this is a case in which the appellant disagrees with the weight that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence.

Id. at 187.

Here there is no doubt Bryant is mentally retarded (R 1380-81), so this case begins where Quince ended. Or, in other words, Quince never addressed the issue of proportionality because the court rejected the conclusion of one of the five experts that the defendant was mentally retarded. That case has no bearing on the proportionality review here.

The Second group of four cases poses greater problems, but they likewise do not control this case. Freeman v. State, 563 So.2d 73 (Fla. 1990) is the most troublesome because Freeman had a low IQ (although there was no finding he was mentally retarded), and he had an unexplained troubled childhood. Significantly, there was no evidence the defendant was drunk or under the influence of drugs when he committed the murder, and he had the "loathesome distinction" of having committed a prior murder. Demps v. State, 395 So.2d 501 (Fla. 1981). Like the defendant in Kight v. State, 512 So.2d 922 (Fla. 1987), Freeman disabled his victim then made sure he was dead. Such determined efforts to kill the victim only emphasize the readily apparent differences between Freeman and this case.

In Harvey v. State, 529 So.2d 1083 (Fla. 1988), Harvey, like Freeman had a low IQ. He also had poor educational and social skills. Significantly, the murder was committed in a

cold, calculated and premeditated manner, evincing greater planning than most mentally retarded can do. See, Luckason and Ellis, "Mentally Retarded Criminal Defendants," 53 George Washington Law Review, 414, 428-32. Supporting this aggravating factor was evidence that the telephone lines going into the house had been cut. Harvey and his co-defendant also calmly discussed the need to dispose of the witness-victims. After having shot both victims Harvey, as the defendant in Kight did shot one (of the two) victims again when he found her still alive. Such coldness, in light of a vague finding of a low IQ and no evidence of Harvey's use of drugs or alcohol, justified a death sentence. The case is, however, distinguishable from this one.

In Johnson v. State, 497 So.2d 863 (Fla. 1986), the evidence of Johnson taking L.S.D. on the night of the murder was conflicting and the court rejected finding it as mitigating a death sentence. The court found, however, that he was suffering from an unspecified "mental disorder." The facts of the case show a rather clever defendant who tried to mask his killing of his grandmother by calling the police and telling them that "somebody killed my grandma." He had used a false name when talking with them. Thus, whatever mental problems Johnson may have had, he probably was not mentally retarded, and the court rejected his claim that he was under the influence of drugs when he committed the murder. Johnson has few crucial similarities with this case.

Finally, in Cherry v. State, 544 So.2d 184 (Fla. 1989), the defendant had a history of child abuse and marijuana use. There was, however, no evidence he had a low IQ, much less that he was mentally retarded. That crucial absence distinguishes that case from Bryant's.

Admittedly, the cases the State has cited share some features presented by this case. But none of them have all of the disabilities Bryant presented. He was mentally retarded. He was emotionally handicapped. He was addicted to alcohol and drugs. His father had tried to kill him, and failed only in that he crippled the boy for life. None of the cases presented by the State, or Bryant for that matter, exhibit a defendant as disadvantaged and undeserving of a death sentence as the defendant has by the evidence describing him here. This court should reverse the trial court's sentence and remand for imposition of a sentence of life without the possibility of parole for twenty-five years.

ISSUE VIII

IT IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION TO EXECUTE A MENTALLY RETARDED PERSON CONVICTED OF COMMITTING A FIRST DEGREE MURDER.

The State again raise three arguments. It first says that Bryant is procedurally barred from arguing this point because he never presented it to the court below. Second, the legislature, not this court, should pass on the whether the mentally retarded should be executed. Third, in any event, Bryant is not really very retarded. The State's arguments are unconvincing.

THE PROCEDURAL BAR

Bryant, first, is not making a fact based claim that he can not be constitutionally executed. Instead, he is arguing all mentally retarded defendants who have been convicted of first degree murder can not be executed because of their mental condition. Thus, the constitutional claim presented here does not rely upon a particular set of facts, but challenges the validity of Section 921.141 Florida Statutes (1989) in not prohibiting the execution of such persons.

Several of the cases cited by the State hold that issues challenging the constitutionality of various aspects of Florida's death penalty scheme can not be argued for the first time on appeal. Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984); Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Ventura v. State, 560 So.2d 217, 221 (Fla. 1990). Yet, in each

of those cases, the constitutional issues raised had been repeatedly rejected in other cases. That is not the case here, and as evidenced by the three dissenting votes in Woods v. State, 531 So.2d 79 (Fla. 1988), even raising the constitutionality of executing the mentally retarded in a post-conviction proceeding does not produce a unanimous result that unpreserved constitutional issues raised for the first time on appeal can not be considered.

In this case, this court has not ruled on the constitutionality of executing the mentally retarded. Since this court already has jurisdiction over this case, it can decide that issue without it having been raised first in the trial court. Trushin v. State, 425 So.2d 1126 (Fla. 1982).

LEGISLATIVE DETERMINATION OF THE ISSUE

The State next claims that the United States Supreme Court in Penry v. Lynaugh, ___ U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) held that "this matter represents a policy argument which should be addressed to the legislature, not to this court." (Appellee's brief at p. 82). That was not one of the holdings of that case.[4] In Penry, the Supreme court decided two issues. First, under the Texas capital sentencing scheme, Penry's death sentence was invalid because the jury was not

---

[4]Thus, the State's discussion on page 83 of its brief is largely irrelevant to the issue Bryant has raised. He has never argued that Florida's capital sentencing statute is in any way similar to that of Texas' scheme.

instructed that the defendant's mental retardation and deprived home life could mitigate a death sentence. Second, at this time, there is no national consensus, as indicated by legislative action, against executing the mentally retarded. The nation's high court did not say that the legislature has the exclusive duty to determine if mentally retarded murderers should be executed; to the contrary, the mere fact that it accepted jurisdiction in that case and decided the issue indicates that courts, as well as the legislature, can determine the fate of the mentally retarded.

BRYANT IS NOT REALLY MENTALLY RETARDED

The State's final argument on this issue is, in effect, that Bryant is only a little bit mentally retarded. But saying that is like two pigmies arguing about which of them is tallest. The unrebutted evidence here is that Bryant is mentally retarded, and to say he is only barely so, evidences a misunderstanding of what being classified mentally retarded means (See Initial Brief). Contrary to the apparent implication of the State's argument, persons who are mentally retarded can be educated, although such learning is very limited. Also, the mentally retarded can be productive citizens, although the jobs they can do make minimal intellectual demands. Such persons, thus, are not catatonic lumps of flesh, but human beings with the same feelings and drives of brighter people. Their intellectual level, however, is so minimal that they have a very difficult, if not impossible, time living in modern society.

Bryant's life demonstrates well how the mentally retarded live in an unstructured society. The defendant never held a steady job, and at the time of the murder, he would only occasionally find a job mowing lawns. The high point of his daily life apparently was getting drunk, and from his mother's testimony she considered him merely as an overgrown child, treating him as such (R 914-16). The distinct impression given is that this man-child lived an aimless life among the run down shacks, clubs, and houses on the north side of Perry on highway 27.

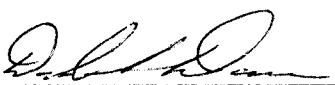
This court should hold that the mentally retarded murderers in Florida cannot be executed.

CONCLUSION

Based upon the arguments presented here, Robert Bryant respectfully asks this honorable court to either: 1) reverse the trial court's judgment and sentence and remand for a new trial, 2) reverse the trial court's sentence and remand for a new sentencing hearing before a new jury. 3) reverse the trial court's sentence and remand for resentencing, or 4) reverse the trial court court's sentence and remand for imposition of a sentence of life in prison without the possibility of parole for twenty-five years.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



DAVID A. DAVIS
Assistant Public Defender
Leon County Courthouse
Fourth Floor, North
301 South Monroe Street
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Richard Martell, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, ROBERT BRYANT, #724476, Florida State Prison, Post Office Box 747, Stark, Florida, 32091, on this 23rd day of January, 1991.

DAVID A. DAVIS