IN THE SUPREME COURT OF FLORIDA

MICHAEL GLEN PATRICK REILLY,

Appellant,

v.

CASE NO. 76,764

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND THE FACTS

Mr. Reilly's brief correctly sets forth the basic chronology of the case. His factual recitation sets forth Mr. Reilly's view of the case and is not complete. The State will rely upon the following statement.

Jonathan Wells went fishing near a neighbor's dock on February 2, 1988. (R 719-20). Jonathan was last seen by his mother shortly after 12:00 p.m., when he returned home with a tangled line. (R 720-21).

Paul Wells, Jonathan's father, came home at 1:45 p.m. (R 686). Mr. Wells had been fired from his job. (R 686). Although Mr. Wells was upset when he was first fired, (R 709), his wife, Jamie, testified that he was not very upset by the time he came home. (R 737). Paul and Jamie Wells went to help a neighbor with some yard work (R 687-89) and sent their older son, Paul, to look for Jonathan.

When his chores were done, Paul (senior) went looking for Jonathan. (R 692). When Mr. Wells had no luck, he returned home to change shoes. (R 698). Mrs. Wells went out looking for Jonathan. (R 698). Mr. Wells, in the meantime, exited his home and met Mike Eidson, a neighbor who was just arriving home. (R 700). While they stood in the street talking, they heard Mrs. Wells' screams. Mr. Wells ran to the beach and found his wife on her knees crying. (R 703). She told Paul "John's over there," directing Paul to some bushes where Jonathan's body lay. (R 703).

Jonathan's body was near the waterline for the incoming tide. (R 565-67). Nearby, Jonathan's fishing pole was propped on a stump. (R 705, 730). The fishing line had been cast farther than Jonathan could have thrown it. (R 705-706).

Paramedic Patricia Blow testified that Jonathan's body was near the waterline and obscured by some bushes. (R 565-67). She agreed that his fishing line was cast out much farther than a child could throw. (R 568).

The incoming tide was destroying footprints near the body. (R 581-2). No usable fingerprints were obtained from Jonathan's rod and reel. (R 602). A usable footprint was recovered from a sand-bar about 700 to 800 feet away (walking distance from the body). (R 639). The print was discovered by officers who were taping off the crime scene. (R 639).

The autopsy of Jonathan Wells revealed trauma and wounds to his head and neck. (R 832). Non-lethal bruises were found on Jonathan's forehead and some blood was found in his mouth. (R 833). Jonathan's throat had multiple lacerations and contained patterned bruises that appeared to be finger marks. (R 835). One deep, side to side, incision was noted. (R 836).

Dr. Birdwell stated that the cause of death was asphyxiation due to strangulation. (R 837-8). The incisions on Jonathan's neck could have been made before or after he died and, to Dr. Birdwell, were important. (R 83738). There was some blood in the trachea even though the victim was strangled. (R 842). Jonathan's death could have been very slow. (R 844-47).

A serologist, Kevin Nappinger, found semen and type "A" blood on the front of Jonathan's shirt. (R 1061-63). A lock-blade knife (Ex. 20-B) also contained traces of type "A" blood. (R 1071). Both Jonathan and Reilly had type "A" blood and further testing was not possible. (R 1074-82).

Reilly was linked to the crime scene as follows: First, a substitute mailman who knew Reilly saw him walking in the area around 3:30 p.m. (R 1122). Reilly seemed dazed and did not reply when spoken to. (R 1117). The shoe print found near the crime scene was made by one of Reilly's shoes. (R 966). Type "A" blood was found on a knife obtained, with consent, from Reilly's home. (R 1071).

Although Reilly had type "A" blood, his mother testified that no one, to her knowledge, had cut themselves with the seized knife. (R 1504).

Mr. Reilly's confessions and/or incriminating statements corroborated the physical evidence. Reilly confessed his crime, in detail, to a jail inmate named Randall White. (R 984). White was also advised that Reilly and his mother were constructing an alibi. (R 985). Mr. White did not receive any benefits from the state in exchange for his testimony. (R 989-90).

Mr. White also witnessed a fight between Reilly and an inmate named Alvin Johnson during which Reilly threatened to cut Johnson's throat "like he killed the little boy." (R 988). The comment was a spontaneous outburst. (R 988).

Reilly also confessed to an inmate named Ken Peck. (R 1156). Reilly described the murder and noted that the police

would not find the knife "in the bay." (R 1178). Peck received nothing for his testimony and, in fact, was no longer in jail at all. (R 1198).

The Appellant attempted to establish an alibi defense.

Reilly's expert, Dr. Antonett, found no wounds or scratches on Reilly but could not rule out the possibility that Reilly had had sexual activity. (R 1374).

Reilly put on testimony from Candace Wagner and her son, Brandon Hartjen, that they heard screams around 4:20 p.m. and, on investigation, saw Mrs. Wells screaming and a man leaving the area. (R 1417, 1436). There was no follow-up testimony indicating that Jonathan was murdered just moments before being found as opposed to an hour or so sooner.

Mary Ellen Reilly, the Appellant's mother, offered a detailed alibi for Tuesday, February 2, 1988. (R 1471, et seq.). Mrs. Reilly claimed she learned of Jonathan's death from the Wednesday newspaper and began putting together Reilly's alibi in case he became a suspect. (R 1479). Although her alleged knowledge of Reilly's activities on February 2nd was quite detailed, she could not recall anything Reilly did on February 1st or 3rd. (R 1508). Mrs. Reilly thought that the mail was delivered "on time" on the 2nd (R 1508) and that Reilly fetched it between 2:00 and 3:00 p.m. (R 1508). The mailman who saw Reilly wandering about at 3:30 p.m. testified that the mail was late. (R 1138-43).

Mrs. Reilly said that her husband got up to watch a television movie at approximately 1:45 p.m. and could vouch for Reilly's alibi. (R 1484 et. seq.).

Larry Reilly, the Appellant's father, was a nurse on the night shift of a local hospital. (R 1525). Shortly after the murder, Mr. Reilly could not vouch for his son's whereabouts on the day of the murder when questioned by the police. (R 1543-48). Larry Reilly's testimony did not agree with his wife's and Mr. Reilly attributed all discrepancies to the fact that he was upset. (R 1550).

Michael Reilly testified on his own behalf. (R 1586 et. seq.). Despite later claims of mental impairment, Reilly gave detailed alibi testimony and did not break under cross-examination. Reilly accused inmates Peck and White of conspiring with another inmate, Martinez, to frame him for their own benefit. (R 1609).

Reilly's attorney had inmate Martinez called as a court-witness, but Martinez damaged Reilly's case by relating how and when Reilly confessed. (R 1670-73).

Another witness, an inmate named Kelly, accused Martinez of trying to solicit inmates to testify against Reilly (R 1708, 09) but it turned out that Kelly and Martinez were personal enemies. (R 1709-23).

In rebuttal, the state called Officer Ladieu, who testified that the Appellant's father, Larry Reilly, had told the police (originally) that he had no idea where Michael was on February 2, 1988. (R 1732).

During the penalty phase Michael Reilly attempted to establish limited mental capacity as a mitigating factor.

Mr. Reilly, of course, testified on his own behalf and withstood cross-examination, than disproving any claim of incapacity or being "easily led." (R 1586 et. seq.). In addition to his testimony, Reilly engaged in specific conversation's with the bench regarding strategy and the course of the trial. (R 2030-34, 2044-46). Reilly's father testified that Michael passed his high school equivalency test and was admitted to college. (R 1526). Although Michael failed his first exam in one class, the problem stemmed from a lack of familiarity with psychological terms used on the test questions. (R 1450). Indeed, his professor, Jill Scroggs, did not think he was "disabled." (R 1450).

Reilly called Dr. James Larson as an expert witness. Larson had examined Reilly in Reilly's 1983 prosecution for armed sexual battery. (R 2068). Dr. Larson said that Reilly had a learning disability and emotional problems. (R 2070). Reilly had a low-normal "IQ." (R 2074). Larson considered Reilly sane and competent, but did not reevaluate Reilly for this particular case. (R 2078).

Michael Reilly testified again, asking the jury to recommend a death sentence just so they could live with their guilt whenever the "real" killer was captured. (R 2123).

The advisory jury voted for a life sentencing by an 8-4 vote. (R 2214).

In a carefully detailed, thirty page order, Judge Harper overrode the advisory jury's decision as unreasonable beyond any doubt. (R 2695 et. seq.).

The sentencer found three indisputable statutory aggravating factors:

(1) Reilly had a prior conviction for a violent felony in 1983.

(2) Reilly committed this murder during a sexual battery and aggravated child abuse.

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

(R 2698-99)

In mitigation, the sentencer noted that Reilly's mental problems were not "severe," so that they served as nonstatutory mitigation. (R 2705-13). Reilly's problem, however, was a learning disability, (not a mental illness such as paranoia or schizophrenia) and as such had little or no bearing on the crime. (R 2712-14). Thus, there was no rational basis for the jury's suggestion. (R 2717).

SUMMARY OF ARGUMENT

The Appellant raises only two issues.

First, Mr. Reilly seeks rehearing of this Court's decision regarding the admissibility of his confessions to various inmates. We submit that his argument is improper and is still meritless.

Second, Reilly challenges the court's decision to override the advisory jury. The trial judge, as actual sentencer, made a decision that is fully supported by the record. Reilly is not entitled to resentencing on appeal.

ARGUMENT: POINT I

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE SUPPRESSION ISSUE.

The Appellant's first point on appeal is an untimely and improper request for rehearing of this Court's decision in Reilly v. State, 557 So.2d 1365 (Fla.1990). We submit that the issue is now moot. We would also submit that Reilly's second trial was conducted in reliance upon this Courts' opinion and that the trial court did not err in refusing to "reverse" the Florida Supreme Court.

As Reilly confesses, the original, illegally obtained, statement was followed by a first appearance in court, the appointment of counsel and consultation with his family. This Court concurred in this statement in your original opinion. Reilly v. State, supra. This Court also found that these intervening events were sufficient to cause a "breach" between Reilly's confession to the police and his unsolicited comments to his fellow inmates. Id., See State v. Maier, 378 So.2d 1288 (Fla. 3rd DCA 1979); Jetmore v. State, 275 So.2d 61 (Fla. 4th DCA), cert. denied, 279 So.2d 312 (Fla.1973).

One illegal confession does not "taint" future, voluntary, statements given after the receipt of "Miranda" warnings. Aycock v. State, 528 So.2d 1223 (Fla.2nd DCA 1988); DuBoise v. State, 520 So.2d 260 (Fla.1988); Dufour v. State, 495 So.2d 154 (Fla.1986); Perry v. State, 522 So.2d 817 (Fla.1988). Mr. Reilly does not contest this point, nor does he allege that the inmate-witnesses were state agents. Indeed, none received compensation for their testimony.

In this untimely "rehearing" petition, Reilly contends that his confessions were the product of programming he received during his illegal interrogation. There is no record support for this theory.

Reilly had a learning disability (apparently related to his vision) but was not retarded (his IQ was in the normal range) and was not mentally ill. Reilly's own expert said he was sane and competent.

The idea that Reilly could be programmed or "easily led" is refuted not only by his lengthy resistance to police interrogation, but also by his very capable performance on the witness stand during trial. Again, his own expert did not testify that Reilly could have been programmed to falsely confess. Thus, the entire appellate argument is based upon an unsupported assumption that a learning disability is the same thing as retardation or mental illness.

Reilly has failed to allege or show any basis for "rehearing."

ARGUMENT: POINT II

THE TRIAL COURT DID NOT ERR IN OVERRIDING THE ADVISORY JURY'S SENTENCING RECOMMENDATION.

The advisory jury suggested that the Appellant, Reilly, receive a life sentence. The trial judge, as the actual sentencer, carefully weighed the aggravating and mitigating evidence in a detailed order and concluded that the jury's suggestion was unreasonable and unsupported. Judge Harper then, appropriately, sentenced Reilly to death. We will review the evidence prior to discussing the law.

The statutory aggravating factors are undisputed.

Michael Reilly, in 1983, was convicted of the sexual battery, at knife-point, of an 83 year old woman. Reilly thus fell squarely with § 921.141(5)(b). This factor was undisputed.

Since the jury convicted Reilly of murder during the course of a sexual battery and aggravated child abuse, §§ (5)(d) applied to the Appellant and was not contested.

The sentencer also found that this murder was especially heinous, atrocious and cruel. The Court (at R 2701) found that the young victim suffered from incision wounds (plural) which could have been inflicted prior to death (given the presence of blood in the trachea) even though the victim was also strangled. As the Court noted, strangulation has been recognized as providing sufficient fear, anxiety and knowledge of impending death to support this statutory factor's imposition. Dudley v. State, 545 So.2d 847 (Fla.1989); Tompkins v. State, 502 So.2d 415 (Fla.1986); Johnson v. State, 465 So.2d 499 (Fla.1985); Doyle v.

State, 460 So.2d 363 (Fla.1984). This supporting evidence was augmented by the defendant's sexual assault on young Jonathan, forcing the child to perform fellatio. Such conduct by the defendant was unquestionably heinous and atrocious. Bundy v. State, 471 So.2d 9 (Fla.1985).

Mr. Reilly's brief does not dispute these aggravating factors. Instead, Reilly presumes that the jury's suggestion is a binding sentence as long as some record "facts," however speculative, arguably support the "verdict." Reilly then offers two speculative "facts" in support of the jury's suggestion. We will address them in order.

1. "THE HOMICIDE WAS NOT INTENTIONAL"

This argument stems from the jury's "acquittal" of Reilly on the theory of premeditated murder as opposed to felony murder.[1]

Reilly argues that a "lack of intent to kill" is a valid mitigating factor, citing Norris v. State, 429 So.2d 688 (Fla.1988); Hawkins v. State, 436 So.2d 44 (Fla.1983) and DuBoise v. State, 520 So.2d 260 (Fla.1988).

In Norris, the defendant was a teenage drug addict, intoxicated at the time of the burglary, who did not recall beating his victim (a 97 year old woman who died a month later). Reilly was not drunk, nor was he an addict. Reilly suffered from no mental illness. Reilly consciously sexually battered his

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[1] Florida recognizes only one crime, "first degree murder," rather than separate crimes of "premeditated" and "felony" murder. Thus, a verdict form such as that used here is not required. Haliburton v. State, 561 So.2d 248 (Fla.1990); Schad v. Arizona, ___U.S.___, 5 F.L.W. Fed. S. 622 (1991).

victim, recalling what he did and why. Reilly took pains to strangle and slash the throat of his victim.

In Hawkins, the evidence supported the defendant's story that he merely accompanied his codefendant, Troedel, (who was the trigger-man) and that Hawkins had no idea Troedel would kill anyone. Hawkins also offered proof of good character and the absence of a criminal record of significance. Again, Reilly clearly approached his victim, perhaps using the excuse of helping him cast his fishing line out farther. (Again, the record shows that someone cast Jonathan's line.) Reilly attacked and horribly brutalized his victim. Reilly, unlike Hawkins, had a violent criminal record.

In DuBoise, the defendant was one of three men who abducted, raped and killed a young woman. DuBoise was not the actual killer and his confederates were never tried or captured. One of his confederates was an older brother who dominated him. DuBoise had a deprived background and a 79 "IQ."

Michael Reilly acted alone. As noted even in DuBoise, the death penalty is appropriate in a felony-murder involving sexual battery. E.g. Copeland v. Wainwright, 505 So.2d (Fla.1987); Jackson v. State, 502 So.2d 409 (Fla.1986); Cave v. State, 476 So.2d 180 (Fla.1985). Unlike DuBoise, Reilly was not the product of a deprived home but, rather, enjoyed strong familial support and years of special schools and camps. While Reilly scored an 80 (low normal) on an IQ test, Reilly suffered from a learning disability which obviously contributed to that score. Reilly had an equivalency-exam diploma and was enrolled in college. While

Reilly failed his first college exam, his instructor in that class detected no disability other than a lack of familiarity with certain medical terms used on the test.

Finally, Reilly cites as to Enmund v. Florida, 458 U.S. 782 (1982) and implies that death is an inappropriate sentence in felony murder cases. That theory was rejected in Tison v. Arizona, ___U.S.___, 95 L.Ed.2d 127 (1987) and in Reilly's own cited DuBoise, supra, case.

This record does not support the jury's rejection of "intent." Reilly clearly approached his victim, strangled his victim (after fellatio) and cut his victim's throat. These atrocities are not actions which occur by accident or without appreciation of the possibility of death. Reilly was not insane, Reilly had a history of armed sexual battery and Reilly knew just what he was doing.

No reasonable person could disagree that the jury acted unreasonably if it suggested "life" on some theory of "lack of intent." Tedder, infra.

(2) MENTAL IMPAIRMENT

The Appellant contends that the advisory jury may have suggested "life" in reaction to Reilly's alleged mental impairment. This argument is interesting for several reasons. First, the only impairment affecting Reilly is a learning disorder. Second, Reilly has never linked this disorder to his crime. Third, the argument is inconsistent with Reilly's penalty phase defense. Thus, no reasonable jury would have excused Reilly's crimes on the basis of any alleged mental impairment.

Reilly apparently suffers from a learning disorder, possibly related to a problem with his eyes. This Court can take notice of the fact that a learning disorder can produce low IQ test scores even in intelligent people. Thomas Jefferson and Thomas Edison suffered from learning disorders. "Learning disorder" is not synonymous with "retardation."

The Appellant offered no testimony explaining his learning disorder or contending that he was retarded, incompetent or insane. Indeed, his expert found just the opposite. Now, on appeal, Reilly wants this Court to create some "mental condition" for him and use it to reduce his sentence.

Even if this Court could fashion a mental disorder for Mr. Reilly, there would still be a complete lack of proof of any causal connection between the learning disorder and Reilly's crimes. Indeed, Reilly's expert, Dr. Larson, refused to connect the crime to Reilly's "problems." Larson merely testified that Reilly's condition, coupled with ample supplies of alcohol, played a hand in his earlier (1983) crime. As for this sober, brutal, killing, Dr. Larson offered no excuses.

Judge Harper's order reflects the absence of any nexus between the learning disability and the murder.

Finally, any jury decision to extend "mercy" based upon a learning disorder would be contrary to Reilly's defense. Reilly testified on his own behalf (at trial) during both phases. Reilly matched wits with the prosecutor and Reilly stuck steadfastly to his alibi - a defense requiring a good memory. Dr. Larson said he was sane and competent and even Professor

Scroggs (who failed him on his exam) refused to call him disabled or retarded. To accept Reilly's theory, this Court would have to believe that the jurors ignored the evidence and seized upon some nebulous and unidentified "disorder" as a basis for extending mercy. If they did, their action was unreasonable.

In James v. State, 489 So.2d 737 (Fla.1986) this Court recognized that even organic brain damage does not automatically translate into proof of incompetence or insanity. Here, there was no definitive proof regarding the nature, cause or extent of Reilly's "disorder" and even his doctor said he was sane and competent. We should also note Chestnut v. State, 538 So.2d 820 (Fla.1989) in this regard, since Chestnut discounted the worth as well as the admissibility of mere "diminished capacity" evidence in negating criminal intent.

Mr. Reilly has simply failed to show any rational basis for the jury's life recommendation. He has also failed to discredit or refute the meticulous findings contained in Judge Harper's sentencing order. As such, he has failed to satisfy Tedder.

Mr. Reilly takes final refuge in the bare fact that this is an "override" case. To the Appellant, this fact means that the sentence "must" be reversed because the law, as presently interpreted, mandates jury sentencing. To Mr. Reilly, the jury is the actual sentencer and the role of the trial judge is reduced to that of an intermediate appellate judge, free to reverse in the face of "plain error" but otherwise bound by the verdict. This is not the law. Section 921.141, Fla. Stat., Hoy v. State, 353 So.2d 826 (Fla.1977).

The override sentence at bar compares favorably with other override sentences affirmed by this Court. Spaziano v. Florida, 433 So.2d 508 (Fla.1983); Eutzy v. State, 458 So.2d 755 (Fla.1984); Lusk v. State, 446 So.2d 1038 (Fla.1984); Thompson v. State, 553 So.2d 153 (Fla.1989).

In Spaziano, supra, the defendant tortured and killed his female victim with a knife. His crime was considered to be torturous and conscienceless enough to clearly set the murder apart from the norm of capital felonies. See State v. Dixon, 283 So.2d, 1, 9 (Fla.1973).

In Johnson v. State, 433 So.2d 508 (Fla.1983), the override was upheld even though the defendant was in need of drugs and the victim defended himself. The defendant at bar was not on drugs and the victim at bar was a defenseless child.

In Eutzy v. State, 458 So.2d 755 (Fla.1984), an override was upheld despite the fact that one aggravating factor was stricken where valid aggravating factors remained and the only apparent basis for the jury's decision was the disparate treatment given to Eutzy's codefendant. In this case, the aggravating factors are all well established and there appears to be no basis for the jury's decision.

Again, in Lusk v. State, 446 So.2d 1038 (Fla.1984) the jury override was upheld even though the defendant and the victim were prison inmates and the victim allegedly threatened the defendant. Reilly had no such pretext to rely upon.

In Thompson v. State, 553 So.2d 153 (Fla.1989), the defendant's less-than-substantial mental impairment (described as organic brain damage) was offset by his activities in running a major drug enterprise. This is comparable to Reilly's minor problems as offset by his status as a college student and by his performance on the witness stand.

The presence of some nonstatutory "mitigating" evidence does not compel reversal of a jury-override. See Cheshire v. State, 568 Fl.2d 908, 914 (Fla.1990) (McDonald, J., concurring). The simple truth is that the recommendation of the advisory jury in the case at bar was purely irrational and illogical. Even on appeal, Mr. Reilly cannot fathom why the jury voted for "life" and his suggested "reasons" bear no nexus to the crime. Thus, as in Zeigler v. State, 16 F.L.W. S.257 (Fla.1991), his proffered mitigation is insufficient to overcome the override decision. Accord: Thompson v. State, 553 So.2d 153 (Fla.1989); Eutzy v. State, 458 So.2d 755 (Fla.1984).

Although the expanded reading of Tedder desired by Mr. Reilly is clearly unavailable, and although the "Tedder Rule" itself is not grounded on any legal authority, Reilly's override death sentence is clearly appropriate under the law and under the Tedder Rule.

CONCLUSION

The capital conviction and sentence at bar should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nancy Daniels, Public Defender, Second Judicial Circuit, and W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301 on this 9th day of October, 1991.

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