IN THE SUPREME COURT OF FLORIDA

BYRON B. BRYANT

Appellant

Vs.

STATE OF FLORIDA

Appellee

SUPREME COURT NO. 81,862
CIRCUIT NO. 92-791 CF A02

BRIEF OF APPELLANT

(An Appeal from the Circuit Court for Palm Beach County)

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PRELIMINARY STATEMENT

Appellant was the defendant in the Circuit Court in and for Palm Beach County, Florida. Appellee was the prosecution. The parties will be referred to as Bryant and State respectively.

The symbol R followed by a number will refer to the record on appeal.

STATEMENT OF THE CASE

By indictment returned February 6, 1992 (R1628-1629), Bryant was charged with the December 16, 1991, murder of Leonard Andre and armed robbery of Leonie Andre.

Bryant filed various challenges to the constitutionality of Florida's death penalty (R1694-1739, 1742-1787), and to its application to him (R1740-1741). The motions were denied (R232-238).

Bryant's motion to suppress his statements (1812-1815), was denied (R1944) following a hearing (R3-214).

The cause came on for trial on February 2, 1993 (R244). The jury found Bryant guilty as charged (R2063-2064). The jury met again March 15, 1993, and a majority of 9 recommended the death sentence (R2123).

On April 21, 1993, the Judge sentenced Bryant to death for murder and to life in prison for robbery (R2180, 2182). The Judge found two aggravating circumstances: that Bryant had been previously convicted of another capital felony or felony involving violence and that the murder was committed for pecuniary gain. He found no mitigating circumstances (R2184-2185).

By notice of appeal filed April 21, 1993, Bryant seeks review of his judgments and sentences (R2186). This Court has jurisdiction because the death sentence was imposed.

STATEMENT OF THE FACTS

At about 8:15 p.m. on December 16, 1991, two black males entered Andre's Market in Delray Beach. One went to the back where Mr. Andre, the deceased, was working. One went to the cooler where Mrs. Andre's brother was working. Mrs. Andre was the cashier that evening (R719-722).

The man at the cooler touched the contents and told his partner it was hot. Then he pulled a gun on Mrs. Andre and demanded money. She opened the register and gave it to him (R723-725).

Mrs. Andre heard a commotion in the back, then three shots. Her husband lay shot and dying (R727-728). One shot went through his right arm and in the right side. Another went through his back and intestine and out through the stomach (R901-902). Either shot would have been fatal (R907). He was shot at close range (R838).

One bullet went into the ceiling (R817). Another hit a Wesson oil bottle and was found inside (R779-781). A firearms expert said he could not say for sure that all four bullets that were fired (R871) came from the same gun, although they likely did (R894-896).

The areas around the body showed signs of a struggle. Goods were scattered on the floor (R758).

Police had no leads until friends of Byrant said he told them he shot Mr. Andre (R25-26). Those women did not testify at trial.

Bryant was arrested when he drove his girlfriend, Cheryl Evans, to the station for something else (R29-30). He was taken from the car at gunpoint and handcuffed (R32). He was questioned and confronted with evidence against him, including a statement just obtained from Cheryl Evans (R33-34, 36-38). He was falsely told that Mrs. Andre identified him (R92).

Bryant agreed to talk after he saw his mother (R84, 927, 932-933). She was called in (R39, 928, 929). After an emotional scene with his family (R931, 1054), Bryant admitted going out with friends to seek a place to rob. One place had too many people around (R1065), so they went to Andre's. He described pulling a gun on Andre and wrestling with him over it (R1068). Fish were tipped over (R1069).

Bryant told police he fired three times and hit the victim twice (R1077-1078). He also described fleeing in a brown Firebird belonging to a friend. On the tape the officer suggested it might have been a Camaro (R1083).

Prospar Alincar saw the robbers flee. On the night of the offense, he described the getaway car as possibly a light blue Camaro. He said it was parked in the alley (R1204-1210). On deposition he described the car as light blue, like the sky (R1146). At trial, he could not match the blue up with any color in the courtroom (R1144-1145), but continued to call it a light blue Camaro (R1143).

Bryant's mother testified that her son suffered from seizures, migraine headaches, meningitis and sickle cell anemia (R1166). He did not sound like himself on the taped confession (R1162). In Phase 2 the defense introduced medical records suporting those problems, as well as a head injury and a gunshot to the leg (R1515, 1524-1525).

The parties stipulated that Bryant had been previously convicted of crimes. The records went to the jury (R1514). The parties also stipulated that because of Bryant's prior habitual offender life sentence would require Bryant to spend the rest of his life in prison at this time (R1513, 2133).

POINTS INVOLVED

I. DID THE COURT ERR IN REFUSING TO EXCUSE DEATH BIASED JURORS FOR CAUSE AND IN REFUSING TO GRANT THE DEFENSE ADDITIONAL CHALLENGES?

II. DID THE COURT ERR IN REFUSING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR VIOLATED THE JUDGE'S ORDER NOT TO IMPLY THAT AN UNCALLED WITNESS IMPLICATED BRYANT?

III. DID THE COURT ERR IN REFUSING TO CONSIDER INVOKING THE WITNESS RULE DURING THE SUPPRESSION HEARING?

IV. DID THE COURT ERR IN INSTRUCTING THE JURY ON LESSER OFFENSES?

V. DID THE COURT ERR IN REFUSING TO OBTAIN A NEW JURY FOR PHASE TWO OR AT LEAST TO POLL THE JURORS AND TO COVER BRYANT'S SHACKLES PLACED ON HIM AFTER HE THREW A CHAIR AT THE TIME OF THE FIRST VERDICT?

VI. DID THE COURT ERR IN IMPOSING THE DEATH SENTENCE ON BRYANT?

SUMMARY OF ARGUMENT

Bryant's jury was "death" qualified because he was denied challenges for cause on several jurors whose answers raised a reasonable doubt whether they could give proper consideration to recommending life in Phase II. The defense was forced to use peremptory strikes on those jurors and the one additional strike he was granted was not sufficient for Bryant to strike all the jurors he wanted to.

A mistrial was required when the prosecutor implied to the jury that an uncalled witness had implicated Bryant. The Judge had just instructed the prosecutor not to do so.

The Judge erroneously refused Bryant's routine request to invoke the witness sequestration rule at the hearing on his motion to suppress. The witness rule does not apply only at trial.

The jury should not have been instructed on lesser offenses over Bryant's objection. There was no doubt here that a murder took place in the course of a robbery, so the instructions on lesser offenses did nothing more than give the jury a chance to compromise any doubts about Bryant's guilt.

Phase Two was tainted by an outburst by Bryant after the verdict of guilt. The Judge did not take adequate steps to reduce the resulting prejudice. He should have granted a new panel. At a minimum, he should have polled the jurors individually. If he had to shackle Bryant, he should have at least covered the shackles.

The death sentence must also be reversed because the jury was not properly instructed, and because this was just a robbery gone bad, not the most aggravated and unmitigated of more serious crimes.

POINT I

THE COURT ERRED IN REFUSING TO EXCUSE DEATH BIASED JURORS FOR CAUSE AND IN REFUSING TO GRANT THE DEFENSE ADDITIONAL CHALLENGES

Certain prospective jurors strongly expressed their view that death was the appropriate penalty for murder. The following are examples:

Ms. Provenzano stated:

> "I do believe when someone takes someone else's life, unless somehow I can be persuaded or presented with some information, they in turn should also -- their life should also be taken." (R355)

Mr. Pekkola thought they should get the chair if it was cold murder (R361). He, Mr. Fernandez, Mr. Humphrey, Mr. Escobar and Ms. Provenzano all agreed that death was the appropriate penalty for anyone guilty in the first degree (R345-346).

Miss Gorelick, who described herself as an 8 in support of the death penalty on a scale of 1 to 10 (R336), questioned a system where murderers are released after a few years to do it again (R337).

Defense counsel moved to strike Gorelick, Pekkola, Fernandez and Provenzano for cause (R380-382). The Court allowed the prosecutor to attempt to rehabilitate the jurors (R382).

Miss Gorelick said she did not think the death penalty should be imposed in every case. She acknowledged that she would have to weigh the aggravating and mitigating factors (R384). She was not asked if she could set aside her feelings about the appropriateness of the death penalty and follow the Judge's instructions.

The talk with Mr. Pekkola went this way:

> "MR. JOHNSON: Let me be sure I understand this thing. You do not feel, then, that if there is a first degree conviction that the death penalty should automatically be imposed"
>
> MR. PEKKOLA: Should be imposed if everything points in that direction, yes." (R386)

although he did say he could follow the Judge's instruction if the Judge told him the death penalty should not be automatic. However, he wasn't so sure he could follow an instruction to vote for life if he found the mitigating circumstances outweighed the aggravating (R387). Asked if he could recommend life, he replied

"MR. PEKKOLA: Yes. I don't think so." (R388)

Mr. Fernandez insisted he could follow the law (R388-389), as did Ms. Provenzano (R390).

The defense renewed its challenges for cause to Gorelick, Pekkola and Provenzano[1], claiming they had not been adequately rehabilitated, and that there was a reasonable doubt as to their ability to follow the law (R452-453). The Judge denied the motion (R454). The defense was forced to strike all three (R454-455, 538).

Mr. Knowles said he believed death was the only appropriate penalty for murder (R462). After being lead through the fact that he could not decide punishment until after Phase II, he had this exchange with the prosecutor:

> "MR JOHNSON: Mr. Knowles, when you hear the word death penalty, what do you think of?
>
> MR. KNOWLES: Well, I think if it's really proven that a person takes somebody's life for no reason at all, and why his life should be taken."

(R465)

1/

Pekkola was juror 3 (R284), Provenzano was juror 11 (R285), Gorelick was juror 1 (R309)

He was then lead again to say that he could keep an open mind until Phase II (R466). Even the prosecutor wasn't sure whether Knowles could follow the Judge's instruction (R467). Knowles said he could wait, but wasn't sure he would return a recommendation of life (R468), unless the Judge told him he had to (R468). The defense ended up using a strike of Mr. Knowles (R504).

Mr. Rozier also believed in an eye for an eye and a tooth for a tooth. He strongly believed only the death penalty should be applied for first degree murder (R637-638). Later, he backed away slightly, saying:

> "MR. NATALE: Do you think then if you found someone guilty of first degree murder, would you start off where it's the death penalty unless we would present to you something that would say otherwise?
>
> MR. ROZIER: Yes. Yes.
>
> MR. NATALE: That is how you would interpret it?
>
> MR. ROZIER: Yes.
>
> MR. NATALE: Would you listen to other stuff, but would you start off with, he's in the electric chair unless we can take him out? Is that sort of how you...
>
> MR. ROZIER: No, not exactly that. But pretty close to that.
>
> MR. NATALE: Pretty close to that. I mean when you think about it, if you are saying that forever -- if it's a first degree murder, they start off in the -- with the electric chair death penalty, and then if something convinces me, then maybe we can get him out; I mean is that really how you feel about it?
>
> MR. ROZIER: Yes."

(R640-641). After that, he told the prosecutor he would not automatically vote for death, but would weigh the aggravating and mitigating circumstances as instructed by the Judge (R645-647). He did not say that he would not start off voting for death and require the defense to convice him otherwise. Nonetheless defense challenge for cause was denied (R662-664). Rozier stated that he understood the jury was not to begin with the assumption that death was the proper sentence (R664-665).

The defense, having exhausted its peremptory challenges, asked for more so it could strike Rozier and Batchelder (R666). The Judge allowed one extra challenge, which was used on Rozier (R668). The other requests were denied. The defense expressed its desire to strike Batchelder, Lawrence, Leff, Turke and Hull (R669).

The test was established by this Court many years ago, in Singer v. State, 109 So.2d 7 at 23-24 (Fla. 1959):

> "[I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion."

The rule must be read together with this Court's statement in Lusk v. State, 446 So.2d 1038 at 1041 (Fla. 1984), cert. den. 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984):

> "[t]he test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely on the evidence presented and the instructions on the law given to him by the court."

As this Court observed in Hill v. State, 477 So.2d 553 at 556 (Fla. 1985):

> "A juror is not impartial when one side must overcome a preconceived opinion in order to prevail."

It is not sufficient for a juror to claim he or she can be impartial if his or her other responses raise a reasonable doubt, Hamilton v. State, 547 So.2d 630 at 633 (Fla. 1989), Price v. State, 538 So.2d 486 at 489 (Fla. 3DCA 1989).

In the case at bar, there is a reasonable doubt as to impartiality of more than one juror who expressed such strong support for the death penalty. Mr. Pekkola gave a final answer which was at best ambiguous and at worst confirmed that he could not vote for life. Mr. Rozier left very little doubt that he would require the defense to talk him out of the death penalty if he convicted of murder in the

first degree, notwithstanding his later claim that he understood the law was different. Mr. Knowles' responses even left the prosecutor doubting if he could follow the law. Miss Gorelick never did say she could follow the law, and the claims of Mr. Fernandez and Ms. Provenzano that they could just do not dissipate the reasonable doubt raised by their prior responses.

> "Close cases should be resolved in favor of excusing the juror rather than leaving a doubt as to his or her impartiality."

Sydleman v. Benson, 463 So.2d 533 (Fla. 4DCA 1985). It was reversible error to deny the challenges for cause on these jurors and then to grant the defense only one additional peremptory challenge.

POINT II

THE COURT ERRED IN REFUSING TO DECLARE A MISTRIAL WHEN THE PROSECUTOR VIOLATED THE JUDGE'S ORDER NOT TO IMPLY THAT AN UNCALLED WITNESS IMPLICATED BRYANT

It must be remembered that the State did not call any of the witnesses who caused them to seek Bryant, even though one, Cheryl Evans, was available in the holding cell (R1283).

Defense counsel challenged the prosecutor to point out from the record what evidence gave police cause to arrest Bryant (R1272). He argued that police had no evidence to confront Bryant with or the jury would have heard it (R1276-1277).

The prosecutor attempted to address the issue of what evidence police had (R1282-1283). Counsel objected to any effort to tell the jurors what Cheryl Evans allegedly told police (R1283-1284). The Judge told the prosecutor he could not tell the jurors that (R1285), or intimate that is what police confronted Bryant with (R1286). The prosecutor read the statement made by Bryant, as authorized by the Court, and then added:

> "They were speaking to Cheryl, and then they came back in to talk to the defendant."

(R1287).

The defense requested a mistrial, alleging that no curative instruction would be adequate (R1287-1288). Counsel also requested an instruction to disregard the prosecutor's last remarks (R1289). The instruction was given (R1290), and the issue of a mistrial was left open.

There is nothing quite so insidious as to suggest there is other evidence of guilt which the jury has not heard. In Thompson v. State, 318 So.2d 549 at 551-552 (Fla. 4DCA 1975), cert. den. 333 So.2d 465 (Fla. 1976), the Court put it this way:

> "[I]t has consistently been held to be reversible error for the prosecutor to express his belief in the guilt of the accused, ... or the credibility of a key witness, ... where doing so implies that he does have additional knowledge or information about the case which has not been disclosed to the jury.
>
> > '...the inquiry should be whether the prosecutor's expression might reasonably lead the jury to believe that there is other evidence, unknown or unavailable to the jury, on which the prosecutor was convinced of the accused's guilt.' McMillian v. United States, [363 F.2d 165 (5th Cir. 1966) supra, at 169.
>
> Nothing as subtle as an expression of belief of guilt implying access to additional evidence occurred in the case at bar. Instead, the prosecutor here represented outright to the jury that he had additional evidence of appellant's guilt which he simply saw no need to present to them. This representation was highly improper and prejudicial, especially in the context of this case."

(citations omitted).

In that case, the Court found statements that there were uncalled, corroborating witnesses to be incapable of being cured by cautionary instruction to the jury.

Here, as there, the prosecutor attempted to tell the jury what an uncalled witness could have said to shore up an alleged confession that was critical to the State's case. Here, as there, the instruction given was not adequate to cure the prejudice. See also Stewart v. State, 622 So.2d 51 at 56-57 (Fla. 5DCA 1993), where the prosecutor said he would get into more of the proof at the next phase. The Court ordered a new trial, calling that the most egregious here by the fact that the prosecutor had already been warned not to say what he said.

In the case at bar, there was no physical evidence against Bryant. Only his statement implicated him, and he presented evidence that the statement was obtained after his request for counsel was denied and that the statement differed from the actual offense in material ways.

Whether the statement was Bryant's own as the police said or was spoon fed to Bryant by police, as the defense argued (R1249, 1277-1280), was the critical issue in this trial. The jury certainly thought so. It asked for a readback of the reasons Bryant was arrested and of his statement (R1339-1340).

The unauthorized shoring up of the prosecutor's version on this issue was prejudicial error here, requiring a new trial.

POINT III

THE COURT ERRED IN REFUSING TO CONSIDER INVOKING THE WITNESS RULE DURING THE SUPPRESSION HEARING

The defense attempted to invoke the witness rule at the beginning of the hearing on Bryant's motion to suppress his statements to police. The Judge declined, saying he doesn't do so in motion hearings unless there is a special reason to do so (R3).

The Judge had the applicable rule of law wrong. As this Court said in Spencer v. State, 133 So.2d 729 at 731 (Fla. 1961):

> "Ordinarily, when requested by either side, the trial judge will exclude all prospective witnesses from the court room during the trial. The obvious reason for the rule is to avoid the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand."

Judge Mounts seemed to think the witness rule should routinely be invoked only at trial, but that was also error. It applies to all proceedings, in Court and out. In Dardashti v. Singer, 407 So.2d 1098 (Fla. 4DCA 1982), the Court found an abuse of discretion in refusing to exclude the witness's wife from a deposition. The Fourth District relied on Spencer v. State, supra.

In the case at bar, there was a factual dispute as to whether Bryant requested counsel. Bryant insisted he asked for his attorney, Joe Karp, repeatedly (R166, 167, 169, 172, 180). He was told he didn't need one (R167) and was threatened with a gun (R181).

Bryant said he had a wallet when he was arrested (R1777). His mother saw the wallet while Bryant was being questioned (R148). She heard him say he wanted a lawyer and tried to get his lawyer's card out of the wallet so she could call him, but Officer Brand stopped her (R149-150). She claimed Officer Hartman admitted hearing Bryant's request to talk to his lawyer, but said he would let

make the call (R159). This was at 9:50 p.m. (R160). The typed statement began after that (R978). Bryant was removed from the car at 7:15 (R32).

Joe Karp confirmed that he was Bryant's attorney at the time (R13-14). He was sure Bryant had access to his business cards, and thought he'd undoubtedly sent him one (R15).

Police denied that Bryant or his family ever requested counsel or mentioned Joe Karp (R40, 79, 109, 113). Hartman couldn't even recall seeing Bryant's wallet, much less Karp's card in one (R98-99). On deposition he remembered checking the wallet before Bryant went to the jail (R140-141). The wallet was not on the property receipt from the jail (R211). Its absence is unexplained.

There were other incongruities in the police testimony. Police said Bryant was read his rights (R34, 106-107). They did not get the rights card signed because Bryant was handcuffed and the area was not secure enough to uncuff him (R35, 86). However, he was still in an unsecure area when one hand was uncuffed to eat food from Burger King and to use the phone (R86-89).

Bryant denied being read his rights (R184). He testified that his statement came from information on tapes police played for him (R195). He said he acknowledged being given his rights on the tape because he was still being threatened (R196).

In short, the suppression hearing in this case was like a trial. Moreover, the oft-stated discretionary exception for law enforcement officers (see Spencer v. State, supra) does not apply here. The officers were hardly disinterested parties when the controlling issue was their conduct in obtaining Bryant's statement. The trial Judge should have invoked the rule as requested and **should have** excluded all witnesses except Bryant from the hearing.

The refusal to consider invoking the rule as requested unless the defense made some showing of a reason to do so cannot be considered as being within the Judge's discretion in these matters. To refuse to invoke the rule is arbitrary, not discretionary, just as was recognized in County of Dade v. Callahan, 259 So.2d 504 at 507 (Fla. 3DCA 1971), cert. den. 265 So.2d 50.

The suppression hearing was fatally flawed here, requiring reversal.

POINT IV

THE COURT ERRED IN INSTRUCTING THE JURY ON LESSER OFFENSES

There was never any doubt in this case that an armed robbery occurred and a murder in the course of it. The only real issue was whether Bryant did it.

Bryant objected repeatedly but unsuccessfully to instructions on lesser included offenses (R960-965, 1218). The law has allowed the Court to instruct on lesser included offenses over objection ever since this Court decided State v. Washington, 268 So.2d 901 (Fla. 1972). Bryant urges this Court to reconsider, at least in a case such as this where there is no valid basis to return a lesser offense.

There are only two possible reasons for a request for lesser offenses in a case like this. One is so the jury can exercise a jury pardon by returning a lesser offense. That is clearly for the benefit of the accused and he should be able to waive it.

The other reason is that the prosecutor lacks confidence in his case, and wants the jury to have the opportunity to compromise on guilt. Where, as here, Bryant says by his plea that he did not do it, such a compromise should be unacceptable. If the jurors are in doubt they should acquit.

This Court should allow the defense to waive lessers where there is no dispute that the major crimes occurred, and should take this opportunity to say so.

POINT V

THE COURT ERRED IN REFUSING TO OBTAIN A NEW JURY FOR PHASE TWO OR AT LEAST TO POLL THE JURORS AND TO COVER BRYANT'S SHACKLES PLACED ON HIM AFTER HE THREW A CHAIR AT THE TIME OF THE FIRST VERDICT

When the jury verdict of guilt was announced, Bryant picked up a twenty six pound chair (R1460) and threw it at the prosecutor (R1401-1402, 1406). Bryant also swore and said "you'll pay" or "they'll pay" (R1407). A number of jurors began to cry and were extremely fearful (R1407).

The defense immediately requested a new panel for Phase 2 (R1408). The prosecutor said only that he believed Bryant's acts were directed at him, and not at the jury. Defense counsel suggested that would not be clear to the jurors (R1410). The Judge was inclined to keep the same panel, but willing to yield later (R1411).

As Phase 2 was to begin, Bryant renewed his request for a new panel. The defense also requested that the jurors be polled to determine what effect the chair-throwing incident would have, and what effect seeing Bryant in shackles would have (R1498-1499). Counsel objected to the shackling.

The Judge kept the same jurors. He did nothing more than ask them to put aside the traumatic and difficult events that happened and concentrate on the issues of the proceeding (R1504). When no one raised a hand to say he or she couldn't, Phase 2 went on. The Judge did not even refer to it as the chair-throwing incident.

The undersigned realizes that Bryant is substantially responsible for what happened to him here. Shackling is well within the Judge's discretion if there is reason to believe the security of the courtroom is threatened. However, the shackling should be done is such a way that the jurors cannot see the shackles, as in Blanco v. State, 603 So.2d 132 (Fla. 3DCA 1992) and McCoy v. State, 503 So.2d 371 (Fla. 5DCA 1987).

Far more prejudicial was the indelible impression left by the sight of Bryant throwing a chair and threatening that someone would pay. Whether the jurors thought it was directed at the prosecutor or at them, their reaction at the time demonstrates that the scene made a deep impression on them. Any chance that this death qualified jury (see Point I) would recommend a life sentence almost certainly went flying out the window.

It may be customary for the same jurors to make the recommendation, but new panels have been obtained frequently, expecially where resentencing is required. See e.g. Elledge v. State, 346 So.2d 998 at 1003 (Fla. 1977), where this Court found an error which may have adversely affected the weighing of aggravating and mitigating circumstances. Because a man's life was at stake, this Court felt compelled to order a new sentencing trial.

Because Bryant's life is at stake, it was error to keep the same jury after what happened. The event at trial was prejudicial. If the Judge really wanted to know whether the jurors were affected by the incident he needed to poll the jurors individually, not just ask for a show of hands without even referring specifically to "the chair incident".

What is remarkable is that three jurors still voted for a life sentence (R1551). Without the prejudicial chair incident and Bryant being visibly shackled in the courtroom, a life recommendation may well have followed.

A new sentencing hearing is required.

POINT VI

THE COURT ERRED IN IMPOSING THE DEATH SENTENCE ON BRYANT

Bryant also contends that his death sentence cannot stand for several additional reasons.

For one, Florida's death penalty statute and procedure is invalid. Bryant filed motions attacking that statute, which were denied. The undersigned realizes that this Court has frequently upheld the statute. Nonetheless, Bryant urges that it was error to deny his motions and to sentence him under an invalid statute. He will not burden this Court with lengthy argument, but would note the following:

1) The statistical evidence that race of the victim influences the death penalty is overwhelming (R1712-1713) and demonstrates that the penalty is applied arbitrarily.

2) There is no logic in automatically giving every felony murder one aggravating factor while a premeditated murder starts with a clean slate (R1744). This Court can and should avoid that anomaly by holding that the felony cannot be counted as an aggravator where it is used to make the murder first degree. See State v. Cherry, 257 S.E. 2d 551 at 567-568 (N.C. 1979).

3) This Court continues to allow an indictment charging only premeditated murder to be the springboard for a conviction of felony murder (R1791). There is a basic defect in such an accusatory pleading.

Moreover, Bryant's jury was not adequately instructed as to Phase 2. The majority of his requested instructions were denied (R1426-1430). The jury was not instructed that the death penalty should be imposed only in the most aggravated and unmitigated of first degree murders, as Bryant requested (R1426-1427). They were not instructed to presume Bryant innocent of the aggravating circumstances, and to disregard any evidence of aggravating circumstances that did not convince

them beyond a reasonable doubt. They were not instructed that each of them should consider mitigating evidence individually, and give such evidence independent mitigating weight, regardless of the views of fellow jurors, as required by Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Bryant's requests in these regards were erroneously denied (R1427-1428).

Bryant also contends that this offense does not qualify for the death sentence under proportionality review.

"Any review of the proportionality of the death penalty in a particular case must begin with the premise that death is different." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla. 1989). Death is the most severe and unique punishment, one which requires "the most aggravated, the most indefensible of crimes" in order to be imposed. State v. Dixon, 283 So.2d 1 at 8 (Fla. 1973), cert. denied 416 U.S. 943 (1984). The purpose of proportionality review is "to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each sentence to ensure that similar results are reached in similar cases." Proffit v. Florida, 428 U.S. 250, 258, 96 S.Ct. 2690, 49 L.Ed.2d 913 (1976).

The case at bar is simply a robbery that went astray. Had the shop owner not resisted, there is no reason to believe anyone would have died. It is a tragedy, but it is not the type of offense which justifies the death penalty. This Court has previously overturned death penalties in cases where a robbery goes astray. See e.g. Rembert v. State, 445 So.2d 337 (Fla. 1984), Lloyd v. State, 524 So.2d 396 (Fla. 1988).

Another significant case is Cook v. State, 542 So.2d 964 (Fla.1989). Cook and his companions robbed a Burger King. Cook confronted one employee, and shot him when the employee attacked him with a long metal rod. The jury recommended

death for that murder, but the trial Judge sentenced Cook to life in prison. As Cook tried to leave, the employee's wife began screaming and grabbed him. He shot her as well, and was sentenced to death for that shooting.

This Court thus had a rare opportunity[2] to review a life sentence in a murder case. While this Court ordered a new sentencing for the second murder, it approved the life sentence imposed for the first. The first Cook murder also demonstrates why Bryant's sentence is not proportional. It is incongruous to sentence Bryant to die, but not Rembert and Cook for robberies gone astray.

This Court should also remember that Bryant is not alleged to have acted alone in this case. However, he is the only one who has been charged, much less convicted and sentenced to die, even though police know who his alleged accomplices are (R1023-1024, 1027-1028). Disparate treatment of accomplices is a well-established basis to reduce a death sentence, going all the way back to Slater v. State, 316 So.2d 539 (Fla. 1979).

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In State v. Dixon, supra, this Court ordered trial Judges to give reasons for their life sentences too, "to provide a standard for life imprisonment against which to measure the standard for death" (283 So.2d at 8).

CONCLUSION

Because Bryant was improperly denied challenges for cause and was unable to select the jury he wanted, his convictions must be reversed. A new trial is also required because the prosecutor implied that an uncalled witness implicated Bryant. His new trial must include a new suppression hearing in which the witness rule is invoked. His jury should not be instructed on lesser offenses if he objects. In any event, his death sentence must be reversed because nothing was done to dissipate the prejudice from his chair-throwing incident and because death is inappropriate in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served on the Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida, 33401, by mail, this 25th day of February, 1994.

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