IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

GREGORY STEPHEN BIAS,

Respondent.

Case Nos. 83,598
83,557
Consolidated

---

ON DISCRETIONARY REVIEW OF THE DECISION OF
THE FLORIDA SECOND DISTRICT COURT OF APPEAL

---

# ANSWER BRIEF OF RESPONDENT

---

Stevan T. Northcutt
LEVINE, HIRSCH, SEGALL
& NORTHCUTT, P.A.
Florida Bar Number 262714
Post Office Box 3429
Tampa, Florida 33602
Telephone (813) 229-6585
ATTORNEYS FOR RESPONDENT

**CONTENTS**

## AUTHORITIES

*Cases*

*Constitutional Provisions and Statutes*



*Other*

## THE CASE AND FACTS

The State's recitation of the facts and case is generally accurate as far as it goes. However, Bias has also petitioned the Court to review the district court's decision. A more detailed discussion of the evidence and proceedings is necessary to the Court's consideration of Bias's issues.[1]

**The Crime**

According to the State's evidence, in January 1990 Bias, then aged 39, was living as a guest of his mother in her apartment at the N.A.P.F.E. Tower, a retirement center in Tampa. Late in the evening of January 14, a security guard posted in the building's lobby observed Bias step out of the elevator and proceed out the front door, carrying a duffel bag. *T.217*[2]

Something about the scenario didn't seem quite right to the guard. She knew that Bias was the son of one of the residents, Clarrice Bias. The guard telephoned Mrs. Bias's apartment, but received no answer. She then knocked on Mrs. Bias's door, with the same result. *T.217-18*

After being joined by another resident, the guard opened Mrs. Bias's door with a master key. She discovered Mrs. Bias's body on the floor of the bedroom. *T.218-19* A bit later, one of the residents determined that Mrs. Bias's car was missing from

---

[1]This Court previously consolidated the proceedings, and approved counsels' suggestion that the matter be brief as if Bias were a "cross-petitioner".

[2]The reference is to the trial transcript, which begins in volume two of the record and is not paginated consecutively to volume one.

the building's parking garage. *T.239*

The medical examiner who autopsied Mrs. Bias's body later testified that she had died from bran damage received as a result of blunt traumas to her head. There were six such injuries, he said, any one of which could have killed her. *T.349-50, 351*

The medical examiner noted that Mrs. Bias's skull had not been fractured; rather, he said, the fatal injuries had been caused by the jarring of her brain against the inside of her skull. This kind of injury could be fatal within minutes, or death could take hours, during which the victim could be ambulatory. *T.352-53, 367*

Tampa police investigators found Mrs. Bias's purses laying on her bed. They contained no money. *T.329* There were also blood spatters in various parts of the apartment, primarily in the living room and bedroom. *T.310-16* Though some tests were inconclusive, some of the spatters were of a blood type that was consistent with Mrs. Bias's. *T.379, etc.* In one of Mrs. Bias's hands, police found strands of human hair. *T.328* The Florida Department of Law Enforcement later determined that the hair was microscopically consistent with Bias's. *R.120*

The police issued a warrant for the arrest of Bias, and an alert for Mrs. Bias's car. *T.329, 340* On January 26 Bias was arrested by authorities in Parker County, Texas, just west of Fort Worth. *T.444* Sheriff's deputies there had discovered Mrs. Bias's car lodged in a roadside ditch. They found Bias waling

along the road about a quarter- to a half-mile away. *T.444, 447*

Bias gave the Texas authorities a false name at first. But he showed them where he had thrown the car keys in the woods beside the road, and he later correctly identified himself. *T.445, 450, 454* When he was arrested, Bias was carrying his duffel bag, and he had $7.11 in his pocket. *T.445, 450*

Bias was returned to Tampa. On March 7, 1990, a Hillsborough County grand jury indicted him for robbery (Count I) and first degree murder, either premeditated or in the course of committing a robbery (Count II). *R.14-16*

In May 1990 the trial court ordered examinations of Bias to assess his competency to stand trial. *R.25-29* Bias refused to see any of the three mental health experts appointed to the task. *R.30, 31, 32* But one of them reported that Bias's 20-year psychiatric history led him to believe that Bias was a paranoid schizophrenic, and that he was not competent to stand trial. *R.32-33* This view was echoed by a psychiatrist engaged by the defense, who relied in part on an interview in which Bias's cell mate described his bizarre, "loony" behavior. *R.34-35*

On May 30, 1990 the trial court committed Bias to the Department of Health & Rehabilitative Services for evaluation and treatment. In December of that year, the department reported that Bias continued to be incompetent to stand trial. *R.36* When the department reported again in June 1991, Bias's status was unchanged. *R.50-52*

Finally, in November 1991 the department advised the court

that Bias was competent to proceed to trial. *R.53* The court appointed two more experts to examine Bias, and they disagreed about whether he was, in fact, competent to stand trial. *R.71, 81* The court appointed a third expert, who opined that Bias was competent. *R.88*

After a continuance to permit diagnostic testing on Bias's brain, the trial finally got underway in September 1992. *R.99, 120*

**Bias's Defense**

Although Bias was heavily medicated with Prolixin during the trial[3], Bias took the witness stand in his own behalf. *T.484, 491* Bias described himself as a schizophrenic and an alcoholic. *T.487, 493*

In January 1990 Bias had been hitchhiking to Corpus Christi, Texas in hope of getting a job on a boat, when he became stranded in Tallahassee. His mother talked him into returning to Tampa to stay with her, and she sent him money for a bus ticket. *T.485* He arrived at his mother's apartment on January 11. *T.485*

In the early evening of January 14, Bias walked to a convenience store several blocks from the apartment building, and bought two six packs of beer. Mrs. Bias did not approve of her

---

[3]In proffered testimony, forensic psychologist Robert Berland testified that Prolixin is one of the most potent psychotropic medications, and that the dose being administered to Bias was "the highest that I have ever observed somebody to be taking." *T.682*

son's alcohol use, so he sat on an upended cinder block under a tree on a vacant lot, and spent the next couple of hours drinking. *T.487-88, 527* Bias testified that he drank eleven 12-ounce beers in that sitting. *T.488* Then, hungry, Bias returned to the apartment to fix himself something to eat, intending to then come back to finish off the last beer and buy some more. *T.527*

When Bias entered his mother's apartment, she was sitting in the living room. Bias went into the kitchen to cook himself some bacon and eggs. *T.490, 492*

Soon thereafter, Bias and his mother began to argue about his drinking. *T.530* Bias walked into the living room and stood over his mother. He repeated his oft-stated accusation that she belonged to a satanic cult. *T.493*

> Anyhow, she said--and I swear to this. I swear. I swear to God as God is my witness, she said to me, "You've never seen the day you could whip my ass." And about that time, I was standing up. She pinched me in the face. That's where the bruises came from, said her hands and arms were bruised. We had a fight, actual fight. She connected. Not once, more than once.
>
> Anyhow, she hit me, I hit her and I hit her again. As far as I can tell, six punches sounds about right. I used nothing but my fist, no matter what anybody says. i swear, swear it's true, nothing but my fist. ...

*T.496-97*

The mother-son brawl spilled into the bedroom. As it did, Bias said, he realized that his mother had stopped hitting. He stopped, too, and realized that she did not look well. *T.497-98* Then, Mrs. Bias collapsed in front of him. *T.498* Believing his mother was dead, Bias panicked. He hastily gathered his belongings, took his mother's car keys and what little cash there was

in her purse, then took her car and fled. *T.501-04*

Bias asserted that he was drunk when he fought with his mother. *T.512* Alcohol "intensifies" his thoughts, he said. *T.512* He denied intending to kill Mrs. Bias. He hadn't thought he hit her that hard, and recounted that she had not left her feet during the fight. *T.497* Bias also testified that he'd had no thought of taking her money or car until he panicked after she collapsed. *T.511*

**The Excluded Evidence**

There was medical evidence to corroborate Bias's claim that he was intoxicated during the events of January 14, 1990. Dr. Michael Maher, a forensic psychiatrist, had examined Bias, reviewed his psychiatric history, and ordered an MRI (magnetic resonance image) of Bias's brain. *T.396-98*

Dr. Maher concluded that Bias had been suffering paranoid schizophrenia for roughly twenty years. *T.397, 399-400, 734.* Like epilepsy, or Alzheimer's disease, Dr. Maher said that schizophrenia is a physical disease of the brain. *T.402-03*

Dr. Maher's diagnosis was confirmed by the MRI results, which revealed that parts of Bias's brain had atrophied. *T.399-400* Dr. Maher had submitted the MRI results to a specialist at Wake Forest University's Bowman Gray School of Medicine, neuro-psychologist Frank Wood. Dr. Wood, too, observed the atrophy of Bias's brain. *T.398, 405-06*

According to Dr. Maher, those findings were significant to his opinion that when Bias committed the acts in question he was

intoxicated to the point that he was incapable of forming the specific intent to kill or rob. *T.405, 410-12* This was so, he said, because alcohol has a more dramatic effect on a schizophrenic, or for that matter, on anyone who has suffered the kid of physical brain damage that Bias had. *T.420*

Dr. Maher opined that for many years Bias had used alcohol to self-medicate. This was common among schizophrenics, he said, because drinking gives them immediate relief from their symptoms. But he noted that the relief is short-lived. As the schizophrenic continues drinking, the alcohol actually exaggerates his delusions, hallucinations, and other psychotic symptoms. *T.411*

Forensic psychologist Robert Berland agreed that Bias was a paranoid schizophrenic. *T.674, 678* And he also agreed that on the evening of January 14, 1990 Bias was too intoxicated for form a specific intent to kill or rob. *T.680*

None of the foregoing medical evidence or expert testimony reached the jury. That is because when forming their opinions about Bias's degree of intoxication at the time of the crimes, both Dr. Maher and Dr. Berland relied on Bias's underlying psychiatric condition. *T.412, 675-77* Indeed, both testified that it was necessary to take an individual's underlying condition into account when forming an opinion whether they were intoxicated after consuming a given amount of alcohol. *T.403-04, 680*

According to Dr. Maher, the reason for this was:

A. Because the individual individual's reaction to alcohol exposure, alcohol ingestion is so variable and directly relevant to the question of their brain functioning that to render an opinion simply based on an anonymous or average or typical individual and the amount of alcohol consumed would be -- would be irresponsible. It would be below the standard of care, would be medically improper.

Now I would hasten to add that under the extreme conditions of one drop of alcohol or two gallons of alcohol, I could render an opinion, but within any reasonable range that might be clinically or socially relevant. I don't think that's possible.

Q. Does alcohol affect a person who is suffering from schizophrenia different that it would someone who is -- has a healthy brain?

A. Generally speaking, yes, it does.

Q. So you wold find that Bias's schizophrenia to be relevant in your being able to render an opinion?

A. Yes.

*T.404-05*

Dr. Berland held a similar view: If the court permitted him to consider only Bias's size and weight and the amount of alcohol he had consumed in a given period, Dr. Berland said he could not render an opinion as to the level of his intoxication. *T.680* The reason, he said, is that an individual's response to alcohol is highly individual.

In the person with a whole brain, an undamaged brain, there are a large number of internal biological variables that will affect how much alcohol it takes to alter their state of mind or their consciousness significantly so that two people, even of the same height and weight, will absorb the oxygen differently -- I mean the alcohol differently. They will have different blood flow in the brain, different susceptibility of tissue and so forth, so that even among people with whole brains, unless you have individualized information, you cannot make an assumption about the effects of alcohol on them, certain amount of alcohol on them.

But certainly if you add to that the complex variables of

> a defective brain, somebody who has an unhealthy brain which has produced mental illness, all those other variables for somebody with a healthy brain continue to further complicate the variables of a person with a defective brain.
>
> The reason this is called an idiosyncratic response to alcohol is because it appears to be a fairly individualized sort of thing so you need highly individualized information.

*T.681*

Prior to trial, the State had filed motions in limine to exclude any evidence of Bias's mental defects. *R.100, 127* The State contended that [i]n Florida there is no defense of diminished capacity. An accused must either elect the defense of insanity, or stand in the shoes of a mentally competent person. Any evidence of a mental disease or defect is irrelevant." *R.107* The trial judge granted the State's motions, and precluded the experts from testifying about Bias's brain disease. *T. 3-5, 14, 167-69*

**The Result**

At the close of the State's proof, and again at the conclusion of all the evidence, the trial judge denied Bias's motions for judgment of acquittal which, *inter alia*, asserted the circumstantial evidence rule. *T.461-80, 565, 569-70*

The jury found Bias guilty of first degree murder and robbery. *R.168; T.702*

The trial judge found that Bias was a habitual felony offender. For the murder, she sentenced Bias to life without possibility of parole for 25 years. For the robbery conviction, the judge sentenced Bias to an enhanced sentence of 30 years'

incarceration, consecutive to the sentence for murder. *R.181-85*

**Proceedings in the District Court of Appeal**

Bias appealed his conviction and sentence to the Florida Second District Court of Appeal. He challenged the exclusion of expert testimony regarding the extent and nature of his brain disease and its effect on his tolerance for alcohol. He also contended that the evidence was insufficient to support his convictions of first degree murder and robbery. Finally, Bias contended that his classification and sentence as a habitual felony offender was erroneous.

In an April 8, 1994 decision, the district court held that the evidence was sufficient to support Bias's convictions, but reversed and remanded for a new trial on the ground that the expert testimony regarding Bias's brain disease should have been admitted. In reaching its decision, the court certified two questions to this Court:

> WHERE A DEFENDANT WHO HAS A MENTAL DISEASE OR DEFECT RAISES THE DEFENSE OF VOLUNTARY INTOXICATION, CAN A TRIAL COURT EXCLUDE EXPERT TESTIMONY ABOUT THE COMBINED EFFECT OF THE DEFENDANT'S MENTAL DISEASE AND THE INTOXICANTS ALLEGEDLY CONSUMED ON HIS ABILITY TO FORM A SPECIFIC INTENT IF THE EXPERT CANNOT OFFER AN OPINION WITHOUT EXPLAINING THAT ONE OF THE FACTS HE RELIED UPON IN REACHING HIS OPINION WAS THE DEFENDANT'S MENTAL DISEASE?

If the answer to this question is in the affirmative, then:

> IN THE SITUATION DISCUSSED ABOVE, MAY THE TRIAL COURT ALLOW AN EXPERT TO OPINE ABOUT THE EXTENT OF A DEFENDANT'S INTOXICATION AND HIS ABILITY TO FORM A SPECIFIC INTENT AS LONG AS THE EXPERT DOES NOT DISCLOSE THAT HIS OPINION IS BASED TO SOME EXTENT ON THE DEFENDANT'S MENTAL DISEASE OR DEFECT?

Based on the certification, both parties petitioned this

Court to review the decision.

## SUMMARY OF ARGUMENT

I. The district court correctly held that the expert testimony regarding Bias's brain disease was relevant admissible in support of his voluntary intoxication defense. Though this Court has held that evidence of a defendant's generally diminished mental faculties is irrelevant in the absence of an insanity defense, it has expressly reaffirmed that voluntary intoxication is a defense to charges that the defendant committed a specific intent crime. Here, Bias's physically atrophied brain was directly relevant to the question whether he was too intoxicated to form the specific intent to kill or rob. That physical condition is readily understandable by the ordinary lay person, and was admissible notwithstanding Chestnut v. State.

II. The evidence was insufficient to sustain Bias's convictions of first degree murder and robbery. The State's evidence was entirely circumstantial, and failed to the exclude the reasonable hypothesis of innocence of the specific intent crimes advanced by Bias.

III. Bias was erroneously classified and sentenced as a habitual felony offender. First, the classification does not apply to capital offenses; thus Bias's murder sentence must be amended to delete reference to his habitualization. Bias's habitualization for the robbery must fall, as well, since he was classified under the unconstitutional 1989 statute, and the

record contains no finding or evidence to support habitualization under the 1988 statute.

## ARGUMENT ON THE STATE'S PETITION

### I. THE DISTRICT COURT CORRECTLY HELD THAT THE EXPERT TESTIMONY REGARDING BIAS'S BRAIN DISEASE WAS RELEVANT AND ADMISSIBLE IN SUPPORT OF HIS VOLUNTARY INTOXICATION DEFENSE.

An accused's right to present evidence in his defense is a minimum requirement of the due process guarantee. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973).

Here, Bias did not deny that he killed his mother or took her car. What was at issue, however, was his state of mind, or intent, when he did those things. In this regard he presented evidence that he had ingested a large quantity of alcohol in the hours preceding the incidents. He contended that he was intoxicated to the point that he was incapable of forming the specific intent necessary to render him guilty of premeditated murder or robbery.[4]

But the trial judge cut off Bias's defense in mid-course. She excluded evidence of factors bearing directly on the effect that Bias's drinking had on his state of mind when he committed the crimes, *i.e.*, the severe brain disease that had afflicted him since his late teen years, and his efforts to combat it with

---

[4]Since robbery is a specific intent crime, *State v. Allen*, 362 So.2d 10 (Fla. 1978), the defense of lack of specific intent to commit it is also a defense to felony murder under section 782.04(1)(a), Florida Statutes.

alcohol.

The judge excluded the evidence in the mistaken belief that it was inadmissible by virtue of this Court's decision in Chestnut v. State, 538 So.2d 820, 824 (Fla. 1989). In its argument here, the State contends that a strict reading of Chestnut supported the judge's ruling. But that is not so.

**Chestnut**

Chestnut held that, in the absence of an insanity or voluntary intoxication defense, evidence of an abnormal mental condition was inadmissible to prove that the defendant had a "diminished capacity", and therefore could not have formed the intent necessary to proof of the crime. In Chestnut, a murder case, the defendant sought to disprove intent with evidence that he was of low intelligence; that some years earlier he had been kicked in the head by a bull, sustaining a fractured skull and brain damage which caused a seizure disorder; and that he had an impaired verbal memory and a passive personality that rendered him easily led. Chestnut, 538 So.2d at 821.

Holding this evidence inadmissible, the Supreme Court majority was loath to rule that a person's mental abnormalities short of insanity could exempt him from the presumption that all persons are capable of the *mens rea* necessary to commit premeditated homicide.

> It could be said that many, if not most, crimes are committed by persons with mental aberrations. If such mental deficiencies are sufficient to meet the definition of insanity, these persons should be acquitted on that ground and treated for their disease. Persons with less serious mental

> deficiencies should be held accountable for their crimes just as everyone else.

Chestnut, 538 So.2d at 825.

That was a hotly debated decision by a bare majority of the Court. Bias weighs in with the Chestnut dissenters for obvious reasons, and for reasons in addition to those expressed in Justice Overton's dissenting opinion.

The Chestnut decision was driven in large part by a policy favoring public safety--the majority was concerned that a dangerous accused would be set free by a confused jury. The majority noted that a jury could find a first-degree murder defendant guilty of a lesser homicide, but that there are other crimes that do not have lesser included offenses requiring only general intent.

> [I]n the case of robbery, which was held to be a specific intent crime in *Bell v. State*, 394 So.2d 979 (Fla. 1981), the application of diminished capacity could result in an absolute acquittal of any crime whatsoever. This is so because the only necessarily lesser included offense of robbery is petit theft and that, too, is a specific intent crime. *State v. Allen*, 362 So.2d 10 (Fla.1978). Apparently, the same would be true for battery, *Mellins v. State*, 395 So.2d 1207 (Fla. 4th DCA), *review denied*, 402 So.2d 613 (Fla.1981). Since burglary is also a specific intent crime, *Presley v. State*, 388 So.2d 1385 (Fla. 2d DCA 1980), one acquitted of that offense could only be convicted, if at all, of trespass. Unlike the case where one is found guilty by reason of insanity, there would be no authority to commit these persons for treatment except through the use of civil remedies and its concomitant burdens.

Chestnut, 538 So.2d at 824.

But those policy concerns are singularly *legislative*. Even insofar as Florida adheres to common law definitions of crimes, that is the product of legislative enactments. Sections 2.01 and 775.01, Florida Statutes. And in those enactments the legisla-

ture reserved to *itself* the power to deviate from the common law. *Id.*

It has done so in the case of homicide. At common law there were two kinds of unlawful homicide. A killing with "malice aforethought" was murder. All other inexcusable homicides were termed manslaughter. *Perkins on Criminal Law 2d*, pp.34, 51.

The "malice aforethought" necessary to establish murder was malice in the legal sense; that is to say, it could be "express", as in the case of an intentional killing, or "implied by law", as where death was the unintended result of conduct in wanton or willful disregard of an unreasonable risk. *Perkins* at 35-36, 48-49.

Eventually, in order to restrict imposition of the death penalty to only the most culpable, states began enacting statutes to subdivide murder into degrees, generally according to the nature or level of the malice involved. 2 *Wharton's Criminal Law, 14th ed.*, s.138.[5]

Florida first codified the law of homicide in 1868 with enactment of Ch.1637, Laws of Florida (1868). The statute established classifications of murder that in pertinent part

---

[5]The first state to do so was Pennsylvania, in 1794:

> All murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.

*Wharton's*, s.138.

remain substantially unchanged today.

A killing "perpetrated from a premeditated design to effect the death of the person killed, or any human being" was and is murder in the first degree. Second degree murder was and is a homicide "perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual[.]" Sec. 2, Sub-Chap. 3, Ch. 1637, Laws of Florida (1868); s. 782.04(1)(a)1 & (2), Florida Statutes (1987).[6]

Under the 1868 statute, manslaughter was "the killing of one human being, by the act, procurement or omission of another, in cases where such killing shall not be murder, according to the provisions of this chapter[.]" Sec. 3, Sub-Chap. 3, Ch. 1637, Laws of Florida (1868). Compare, s.782.07, Florida Statutes (1987).

By codifying the law of homicide into degrees based on what in fact was the accused's state of mind at the time of the offense, and accordingly prescribing punishments of varying severity, the legislature struck what it considered the appropriate balance between public safety and relative culpability. The person who kills with the specific intention to do so is deemed the most culpable, and therefore is subjected to the most

---

[6]In addition, both statutes also established the category of third degree murder, inapplicable here. Also, under the current section 782.04, unlawful killings committed in the course of certain felonies are murders in the first, second, or third degree as specified in the statute.

restrictive or severe penalty. The person who, *in fact*, does not kill with the specific intention to do so is *less* culpable, and therefore is subjected to a lesser penalty. In both instances, the public safety is protected, because both killers are confined.

In Chestnut the majority overrode these legislative policy determinations. Under the statute an accused who did not kill from a premeditated design is not guilty of first degree murder, period. But by excluding evidence of that fact, the Chestnut majority placed in the category of first degree murderers a class of defendants the legislature did not include when establishing the statutory criteria for that offense.

The Court's concern about other crimes for which there are no lesser included offenses involving general intent underscored the essentially legislative nature of its reasoning. As to these the Court noted that "[u]nlike the case where one is found not guilty by reason of insanity, there would be no authority to commit these persons for treatment except through the use of civil remedies and its concomitant burdens." Chestnut 538 So.2d at 824.

Nevertheless, those remedies are in place, and they embody legislative and/or constitutional choices about what burdens should be born by those who would involuntarily incarcerate a person for treatment of a mental disorder. Surely those burdens are not so great that their avoidance would justify preventing an accused from presenting evidence that he is innocent of the

crime charged against him.

Be that as it may, Chestnut is the law. The question is whether it was applicable to Bias's case.

**Bias's Defense**

Bias did not seek to prove that he had diminished mental faculties generally, or that his mental deficiencies rendered him generally incapable of forming the state of mind necessary to commit a specific intent crime. Rather, Bias tried to show that at the time he acted on January 14, 1990, he was intoxicated to the point that he was not capable of forming a specific intent to kill or rob.

Of course, Chestnut, did not undermine the intoxication defense. To the contrary, the Court reaffirmed its holding in Gurganus v. State, 451 So.2d 817 (Fla. 1984), which "reaffirmed the long-standing rule in Florida that evidence of voluntary intoxication is admissible in cases involving specific intent." Chestnut, 538 So.2d at 822. *See also,* Bunney v. State, 603 So.2d 1270, 1273 (Fla. 1992)("[I]t is beyond dispute that evidence of voluntary intoxication or use of medication is admissible to show lack of specific intent.")

And, of course, the intoxication defense involves two main elements: (1) whether the defendant consumed intoxicants, and (2) whether the defendant was rendered so intoxicated as to be incapable of forming the requisite specific intent. *See,* Linehan v. State, 476 So.2d 1262 (Fla. 1985). Here, the judge allowed Bias to prove the first element, but not the second.

Proof of the latter element may involve factors other than the amount of alcohol consumed. And, indeed, in most cases those factors are relevant only to the question of intoxication, *e.g.*, the defendant's body weight or metabolism rate. *See, e.g.*, Garone v. State, 503 So.2d 421 (Fla. 3d DCA 1987).

Gurganus, also, touched on the fact that a number of variables may be relevant to the question of intoxication. Gurganus held that the trial court erred by excluding the testimony of psychologists sought to be introduced in support of the defendant's intoxication defense. Notably, that evidence was not limited to what the defendant had ingested. Rather,

> [t]he testimony of both experts was based on the direct examinations of Gurganus and on hypothetical questions posed by the defense concerning the actions of an individual ***with a background similar to Gurganus'*** who had ingested twenty-nine Fiorinal capsules in a twenty-four hour period along with alcohol.

Gurganus, 451 so.2d at 820 (emphasis added). See as well, Mullin v. State, 425 So.2d 219, 220 (Fla. 2d DCA 1983):

> [W]e note no support for the lower court's exclusion of testimony regarding appellant's condition. Appellant's expert witness, a neurologist, was qualified to testify to the medical effects of sniffing glue and other hydrocarbons upon human behavior if he knew the effects. Appellant's testimony of his prior abuse, if relevant to the above medical opinion, would also be admissible to establish a voluntary intoxication defense to the specific intent crime.

Here, Bias's experts confirmed that his affliction--a physical disease involving demonstrable physical brain damage--was directly relevant to the question whether Bias was intoxicated to the point that he could not form the specific intent to murder or rob on the evening in question.

**The State's Policy Arguments**

The State asserts that Bias's intended defense was precluded by a strict reading of Chestnut, and would invoke the policy concerns expressed in that decision. Not so.

As for the first assertion: It is clear that a strict reading of Chestnut would *not* prevent the introduction of evidence of Bias's brain disease. For starters, Chestnut involved an attempt to defend on the basis of a general diminished capacity. Here, on the other hand, the evidence was aimed at demonstrating that Bias was too intoxicated to form the necessary specific intent at the time of the event in question.

Note that Bias's experts did not claim that Bias was unable to form a specific intent to kill simply because he was a paranoid schizophrenic, or even because alcohol has a more dramatic effect on schizophrenics or others suffering similar brain damage. Rather, they contended that (1) the defendant suffered physical brain damage; (2) as a result he was more susceptible to the intoxicating effects of alcohol; and (3) *on the occasion in question*, he drank a quantity of alcohol which, in light of the foregoing factors, rendered him intoxicated to the point that he could not form the specific intent to kill or rob.

If, instead of the first factor just mentioned, the experts had testified that the defendant suffered some other relevant condition--a very low body weight, for example, or even a brain injury that affected some function other than behavior--the Chestnut issue would not even arise.

Which brings us to the Chestnut policy concerns. As the State points out, Chestnut expressed the fear that jurors would be confused by evidence of esoteric mental conditions not comprehensible to the ordinary lay person. At the same time, however, the Court recognized that a number of conditions are within the common experience, *e.g.*, intoxication, epilepsy, senility. Chestnut noted the distinction, and indicated that evidence of the latter conditions likely are admissible. *See,* Bunney, *supra*, involving epilepsy.

It hardly needs to be pointed out that the actual, physiological or psychological causes and effects of intoxication, epilepsy, or senility, may well be highly complex and, indeed, beyond the comprehension of the ordinary lay person or even of the scientific community. But *experience* of those conditions and their effects is common.

We submit that the same is true here. Surely it is within the capability of the ordinary person to understand that an organic brain injury could exacerbate someone's susceptibility to the effects of alcohol. And, we submit, the same is true of depression, a condition that is often felt or encountered in the common experience. Easley v. State, 629 So.2d 1046 (Fla. 2d DCA 1993).

**State v. Stewart**

The Louisiana decision, State v. Stewart, 633 So.2d 925 (La.App. 1994), cited by the State bears only superficial resemblance to the instant case. That decision held that the trial

judge properly excluded an expert psychologist's testimony about the effects of intoxication on a mildly retarded individual as it related to his ability to form the specific intent to murder. Noting that Louisiana does not recognize the diminished capacity defense, the court held that the defendant could not elicit testimony about the his underlying mental capacity.

But that ruling must be viewed in light of the appellate court's other one affirming the exclusion of the expert's opinion as to whether the defendant was intoxicated at the time of the crime, because the expert lacked enough information upon which to based his opinion.

> The only evidence of intoxication came from the defendant's own confession, wherein he admitted that he was under the influence of cocaine when he murdered the victim. However, as the trial court correctly noted, Dr. Zimmerman was not a medical doctor; and he had never observed the defendant under the influence of cocaine. Furthermore, there was no evidence introduced at trial regarding the amount of cocaine used by the defendant or the amount of time between such use and the commission of the murder.

Stewart, 633 So.2d at 935.

Certainly, lacking sufficient evidence on which to determine whether the defendant was intoxicated, the expert could not have opined about the effects of the intoxicants on a retarded defendant without violating the "Chestnut Rule", as we might call it in Florida.

The instant case is quite different. Here, Bias offered the testimony of a psychiatrist--a medical doctor--who based his opinion in large part on the results of a medical diagnostic procedure that revealed organic brain damage. Moreover, Bias

did not merely relate that he was intoxicated, or that he had been drinking, at the time of the homicide. He testified that he had consumed eleven 12-ounce beers in the two-hour period preceding it. Thus, unlike the situation in Stewart, here there was ample evidence upon which the psychiatrist could base his opinion that Bias was too intoxicated to form a specific intent to kill at the time in question.

Bias's brain damaged condition was directly relevant to that question, and evidence of it should have been admitted in that context.

**ARGUMENT ON BIAS'S PETITION**

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT BIAS'S CONVICTIONS OF FIRST DEGREE MURDER AND ROBBERY.

The jury was offered two views of this tragedy. The State insisted that Bias murdered his mother in order to rob her of money and her car. Bias maintained that he killed Mrs. Bias without meaning to during an altercation which she provoked, and that he'd had not thought of taking anything from her until he panicked after she collapsed.

The State did not present sufficient evidence to support a conviction under its theory. To be sure, Bias killed his mother; he admitted it. And he took her car and the few dollars he found in her purse. But the State's proof of premeditation and an intent to rob rested entirely on circumstantial evidence, and that evidence did not refute a reasonable hypothesis that Bias acted without a prior design to commit either crime.

Evidence which furnishes nothing stronger than a suspicion,

> even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Tien Wang v. State, 426 So.2d 1004, 1006 (Fla. 3d DCA 1983), rev. den. 434 So.2d 889, quoting Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956).

In Tien Wang, as here, there was no doubt that the defendant committed the homicide. But the court deemed the State's circumstantial evidence of premeditation to be insufficient under the foregoing standard; specifically,the court observed that the circumstances on which the State relied did not refute the possibility that the defendant acted in the heat of passion or in some other state of mind short of premeditation. The court ordered the defendant's conviction reduced to one of second degree murder.

Indeed, the law is settled that in a homicide case the defendant's version of the crime must be accepted unless the State produces sufficient competent evidence to disprove it. McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977); Mayo v. State, 71 So.2d 899, 901 (Fla. 1954). And where, as here, the State's counterproof is entirely circumstantial, that proof must exclude any reasonable hypothesis of innocence. Mayo, 71 So.2d at 904; State v. Laws, 559 So.2d 187 (Fla. 1990).

As pointed out in Tien Wang, this principle applies to questions of the defendant's intent. *See*, Thomas v. State, 531 So.2d 708, 710 n.2 (Fla. 1988):

> Obviously, care must be exercised when the evidence of the requisite intent is circumstantial. In such instances, the state must prove that the evidence is inconsistent with any reasonable hypothesis of innocence. McArthur v. State, 351 So.2d 972, 976 n.12 (Fla. 1977); Davis v. State, 90 So.2d 629 (Fla. 1956); Mayo v. State, 71 So.2d 899 (Fla. 1954); Head v. State, 62 So.2d 41 (Fla. 1952).

## III. BIAS WAS ERRONEOUSLY CLASSIFIED AND SENTENCED AS A HABITUAL OFFENDER.

The district court did not address this issue, because it became moot when the court reversed Bias's convictions and remanded for a new trial. In the event this Court were to reinstate the convictions, the issue would no longer be moot.

Bias's habitual felony offender sentences must be reversed for three reasons.

First, at Bias's October 28, 1992 sentencing hearing the trial judge classified and sentenced him as a habitual felony offender on the robbery conviction, but did not announce an enhanced sentence for the murder conviction. *T.762-65*

Nevertheless, Bias's written sentence for the murder classified him as a habitual felony offender. *R.184* That was erroneous. The statutory habitual felony offender classification does not apply to capital offenses. McLain v. State, 612 So.2d 664 (Fla. 2d DCA 1993); Nixon v. State, 595 So.2d 165 (Fla. 2d DCA 1992). For this reason, Bias's sentence for the murder conviction must be corrected to delete references to his habitualiza-

tion. *Id.*

Second, the offenses for which Bias was convicted occurred in January 1990. Therefore, in October 1992 the trial judge classified Bias as a habitual felony offender under the 1989 version of the statute. But the statutory amendments enacted that year were declared invalid in State v. Johnson, 616 So.2d 1 (Fla. 1993).

For this reason, Bias is entitled to be re-sentenced, and in the process to have his habitualization reconsidered, unless his habitualization would have been proper under the 1988 version of the statute. The critical distinction is that the 1989 statute permitted habitualization if the defendant was found to have been convicted of two felonies in any state, whereas the earlier version required two felony convictions *in this state*. *See,* Rankin v. State, 620 So.2d 1028 (Fla. 2d DCA 1993).

Here, the trial judge relied on at least one out-of-state conviction, from South Carolina, to support Bias's classification as a habitual felony offender. *R.764* The question, then, is whether Bias would have qualified for habitual felony offender treatment without consideration of the South Carolina conviction. Rankin, *supra*.[7]

That inquiry gives rise to the third sentencing issue: the sufficiency of the record to support Bias's habitualization

---

[7]Even if Bias could otherwise have been treated as a habitual felony offender, he would have the right to petition the trial court to revisit his sentence under Rule 3.800 because the judge relied on the out-of-state conviction when exercising her discretion whether to habitualize him. *Rankin, supra* at n.3.

under the 1988 law.

The transcript of the sentencing hearing reflects that the prosecutor tendered to the judge a list of Bias's prior convictions, together with certified copies of them, but the transcript does not show that the exhibits were ever admitted to evidence. *R.726-77* The clerk's notes of the hearing contain the entry "Certified copies of prior convictions" under the heading "STATE EXHIBITS". *R.177* However, the exhibits are nowhere in the record on appeal, and the undersigned's investigation failed to turn them up in the trial court file.

When making the required findings to support Bias's habitualization, the trial judge specifically referenced just two of the convictions: the one from South Carolina, and one that the prosecutor had represented occurred in Lee County, Florida. *R.726-27, 764*

The 1988 habitual felony offender statute required a judicial finding based on a preponderance of the evidence that the defendant had two prior Florida felony convictions. But, the prosecutor's representations aside, the record contains no evidence, nor any finding, that *any* of Bias's prior convictions arose in Florida. That being the case, his robbery sentence must be vacated. Frazier v. State, 595 So.2d 131 (Fla. 2d DCA 1992).

## CONCLUSION

For the reasons described, this Court should affirm and approve the district court's ruling on the admissibility of evidence regarding Bias's brain damage in support of his intoxication defense. However, the Court should reverse the district court's ruling on the sufficiency of the evidence to support Bias's convictions. In the event Bias's convictions are reinstated, the Court should either reverse Bias's habitualization, or direct the district court to visit this issue.

Respectfully submitted,

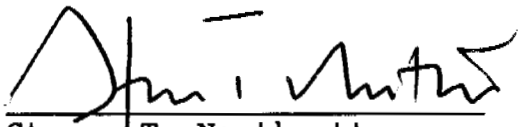
LEVINE, HIRSCH, SEGALL &
NORTHCUTT, P.A.

By 

Stevan T. Northcutt
Florida Bar Number 262714
Post Office Box 3429
Tampa, Florida 33601-3429
(813) 229-6585
ATTORNEYS FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was furnished by U.S. Mail to Brenda S. Taylor, Assistant Attorney General, Westwood Center, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607 on July 15, 1994.



Stevan T. Northcutt