IN THE SUPREME COURT OF FLORIDA

BETTY REESE, Petitioner, v. STATE OF FLORIDA, Respondent.	)	Case No. 65,633

ANSWER BRIEF OF RESPONDENT

JIM SMITH
Attorney General
Tallahassee, Florida

RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Respondent

TABLE OF CONTENTS

	PAGE
TABLE OF CITATIONS	i
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2-7
POINT INVOLVED	8
ARGUMENT	9-19
THE STANDARD JURY INSTRUCTION ON INSANITY, COUPLED WITH THE GENERAL REASONABLE DOUBT INSTRUCTION, WAS CORRECT AND SUFFICIENT.	
CONCLUSION	20
CERTIFICATE OF SERVICE	20

TABLE OF CITATIONS

	PAGE
Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983) aff'd and rev'd in part, 725 F.2d 1282 (11th Cir. 1984)	17
Brown v. State, 40 Fla. 459, 25 So. 63 (1898)	10,13,16
Byrd v. State, 297 So.2d 22 (Fla. 1974)	10,13
Corbin v. State, 129 Fla. 421, 176 So. 435 (1937)	11,15
Johnson v. State, 57 Fla. 18, 49 So. 40 (1909)	11,15
Jones v. State, 332 So.2d 615 (Fla. 1976)	9,10,13,18
Leland v. Oregon, 343 U.S. 790 (1952)	17
Parkin v. State, 238 So.2d 817 (Fla. 1970)	10
Patterson v. New York, 432 U.S. 197 (1977)	17
Reese v. State, 452 So.2d 1079 (Fla. 4th DCA 1984)	8
United States v. Jackson, 587 F.2d 852 (6th Cir. 1978)	18
Wells v. State, 98 So.2d 795 (Fla. 1957)	15
Williams v. Wainwright, 712 F.2d 1375 (11th Cir. 1983)	16
Yohn v. State, 450 So.2d 898 (Fla. 1st DCA 1984)	8

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court for the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee in those courts, respectively. In this brief, the parties will be referred to as they appear before this Court.

The following symbols will be used:

"R"	Record on appeal, including the transcript in the original record and the transcript in the supplemental record which is paginated consecutively to the original record;
"SR"	Supplemental record, being petitioner's Statement of Proceedings.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and her statement of the facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial and appellate courts with the following additions and/or clarifications:

Initially, it appears that petitioner inadvertently stated at page 8 of her brief that Dr. Patrick Peterson stated that "Petitioner suffers from non-organic brain disorder (T 256)". At that page of the transcript, Dr. Peterson actually said, as he did throughout his testimony, that petitioner suffers from "organic brain disorder."

Dr. Peterson is a clinical psychologist who was accepted as an expert in psychology without objection by the state (R 235). He evaluated petitioner based on certain psychological tests (R 240), and his findings were consistent with a diagnosis of temporal lobe epilepsy (R 242). On cross examination, Dr. Peterson stated that he did not perform an electroencephalogram (hereinafter called "EEG"), nor did he perform a CAT Scan (R 245). However, he maintained that a patient's ability to function in the tests which he applied can indicate "whether there is a great likelihood that there has been destruction of brain tissue." (R 245-246). He also maintained that a normal EEG and a normal CAT Scan would not contradict his findings, since many persons

with organic-based brain disorders will appear normal on those two tests (R 246). While on direct examination he stated that his diagnosis was consistent with temporal lobe epilepsy (R 242), on cross examination he clarified that he did not in fact make a diagnosis of temporal lobe epilepsy, although he had "a wealth of data that supports that diagnosis but lacks conclusive value." (R 255). His diagnosis was that petitioner "suffers from an organic brain disorder. I cannot be more specific from my data, but my data would support the finding of a temporal lobe epilepsy." (R 256). He acknowledged that nothing in his testimony would rule out the possibility that petitioner's actions on May 10, 1981 were done intentionally in the hope that it would appear that she was doing it while under an epileptic seizure (R 260).

Dr. Alfredo L. Hernandez was accepted as an expert witness in the field of psychiatry with no objection by the state (R 284), and testified on behalf of petitioner. He examined her on August 31, 1981 and on June 7, 1982 (R 285-286). There are different types of epilepsy, and an organic brain disorder can manifest itself in different ways, such as seizures or convulsions. An "epileptic equivalent" is a phrase used to describe the behavior of a person who suffers from organic brain syndrome without a seizure, one example of which is "called a rage attack, when a person may have sudden episode of anger, become combative or aggressive." (R 297). Dr.

Hernandez' opinion was that on the day of the incident "it is quite probable that [petitioner] may have suffered" an epileptic equivalent, and that "she may not have had the capacity to discern right from wrong." (R 292-293).

On cross examination, Dr. Hernandez acknowledged that in his examination in August of 1981 one of his conclusions was that petitioner's "main medical problem" was migraine headaches (R 294). Dr. Hernandez did not specifically diagnosis petitioner's seizure disorder as temporal lobe epilepsy, but did not rule it out either (R 307), he acknowledged that she could have deliberately and intentionally with premeditation beaten the victim, and she could have lied to him when she said that she did not remember it (R 307-308).

After the August examination, Dr. Hernandez suggested that there be a neurological examination (R 297). Prior to his examination of petitioner on June 7 he was given the results of the EEG and CAT Scan, both of which were normal (R 298-299). Nevertheless, that information did not change his opinion that petitioner has an organic brain syndrome (R 299), and stated that the fact that the EEG was normal does not rule out epilepsy (R 300). It did not trouble Dr. Hernandez that there was absolutely no aberration found in the EEG (R 308-309), and he acknowledged a statement from the text which was read to him indicating that in the absence of specific EEG evidence of psychomotor epilepsy it is a formidable task to differentiate it from hysteria, neurosis or psychosis, and that the "'burden of proof rests on anyone who contends

that a given psychic episode, isolated from other evidence of epilepsy, is epileptic'" (R 309). There was further cross examination of Dr. Hernandez concerning his contention that a normal EEG and CAT Scan would not affect his diagnosis (R 309-311, 322-324).

Dr. Richard Dube originally testified for the state only concerning the victim's injuries which he saw during his examination of her on May 10, 1981 at 10:50 p.m. at St. Mary's Hospital (R 177). Before that testimony, Dr. Dube recited his credentials (R 162-165), and was accepted as an expert in the field of medicine (R 177). He was later called as a rebuttal witness by the state, and recounted his training and experience regarding neurological disorders such as epilepsy (R 351-354). During the last five years of emergency medicine he had seen between thirty five and forty thousand patients, less than 10% of whom had neurological problems; approximately once or twice per week he deals with cases involving epilepsy and seizures; he is the one who makes a determination whether to call in a neurologist or psychiatrist (R 352-254). He had never seen petitioner before trial, so his testimony was of general applicability, and not specifically relating to her (R 354-355). The defense objection that Dr. Dube had been certified as an expert in medicine but had not qualified as an expert in neurology was overruled (R 359). The doctor was then presented with a long hypothetical based on the incident at issue in this case

(R 360-361), after which he opined that the incident did not involve a manifestation of temporal lobe epilepsy because rage reactions do not usually last that long and are usually purposeless (R 361-362).

When asked to relate the factors which Dr. Dube considered features of temporal lobe epilepsy to the hypothetical facts, defense counsel objected (R 366), and thereafter a long discussion ensued during which the witness' testimony was proffered (R 369-380). At the conclusion, the trial judge ruled that Dr. Dube could not give a mathematical opinion, but felt that the incidences of temporal lobe epilepsy which do not show up on CAT Scans or EEGs and those which involve automatisms were relevant, and that the witness could testify to that (R 381-382). Dr. Dube then testified that the incidence of epilepsy in the general population is between 1 and 5% (R 383); that the incidence of temporal lobe epilepsy among those who suffer from epilepsy is about 50% (R 384); that three fourths of the people with temporal lobe epilepsy will have an abnormal EEG (R 384); that approximately 40% of those with temporal lobe epilepsy will have a normal CAT Scan (R 384); and that less than one tenth of those who suffer from temporal lobe epilepsy demonstrate complex automatisms which last more than ten minutes (R 384-385). [On direct examination during the proffer, Dr. Dube had stated that those figures were supported by two text books which he considered to be "the two best medical and neurological text books

there are (R 372)" and on cross examination stated that while he is not a neurologist he sees "more acute neurological diseases than neurologists see. I do not feel that they are more expert in seeing acute neurological diseases than I am (R 373)."]

Dr. Edward R. Adelson, accepted as an expert in psychiatry without objection (R 399), also testified on rebuttal for the state. Dr. Adelson had been court-appointed to examine petitioner in August of 1981 (R 400). He found her competent to stand trial, sane, and based on his examination, found no indication of temporal lobe epilepsy (R 403-404). He stated that an EEG is of major importance in the diagnosis of temporal lobe epilepsy, while a CAT Scan is not (R 407). He also testified that approximately 10% of persons with temporal lobe epilepsy have a normal EEG (R 408). On cross examination, he acknowledged that a normal CAT Scan and EEG does not rule out epilepsy (R 417), and agreed that if an EEG is administered at the time of the seizure it is a specific test for epilepsy, but not otherwise (R 419).

POINT INVOLVED

IF THE STATE HAS THE BURDEN TO PROVE BEYOND A REASONABLE DOUBT THAT A DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE WHEN THE DEFENSE OF INSANITY HAS BEEN RAISED, IS THE GIVING OF THE PRESENT INSANITY INSTRUCTION, AS SET FORTH IN STANDARD JURY INSTRUCTION 3.04(b), ALONG WITH THE GENERAL REASONABLE DOUBT INSTRUCTION SUFFICIENT, NOTWITHSTANDING THE DEFENDANT HAVING SPECIFICALLY REQUESTED THE COURT TO INSTRUCT THE JURY THAT THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE AT THE TIME OF THE OFFENSE?

[Question certified by the Fourth District Court of Appeal. Reese v. State, 452 So.2d 1079 (Fla. 4th DCA 1984). The same question was certified by the First District in Yohn v. State, 450 So.2d 898 (Fla. 1st DCA 1984).]

ARGUMENT

THE STANDARD JURY INSTRUCTION ON INSANITY, COUPLED WITH THE GENERAL REASONABLE DOUBT INSTRUCTION, WAS CORRECT AND SUFFICIENT.

Respondent maintains that the certified question should be answered in the affirmative, and that petitioner's argument (and Chief Judge Ansted's dissent) are grounded on a misperception of the role of insanity as an affirmative defense.

The essence of what has become the issue in this case was discussed by former Justice Sundberg in his concurring opinion in Jones v. State, 332 So.2d 615, 620-621 (Fla. 1976). Dealing with the insanity issue in that case, Justice Sundberg first presented the following statement of the law:

> It is the law of Florida that all men are presumed sane, but where there is testimony of insanity sufficient to present a reasonable doubt of sanity in the minds of the jurors the presumption vanishes and the sanity of the accused must be proved by the prosecution as any other element of the offense, beyond a reasonable doubt.

Id. (emphasis in original). Justice Sundberg then reviewed the expert and lay testimony presented in the Jones case, and explained the following:

> Based on the foregoing evidence I could reasonably conclude that the defendant created a reasonable doubt as to his sanity at the time of the commission of the crimes and, further, that the State then failed to carry its burden of proving sanity beyond a reasonable doubt. But that is not the

> test. The test is whether or not the evidence was such that the jury could only have concluded that there was reasonable doubt of sanity and the absence of evidence sufficient to overcome that reasonable doubt.

Id. (emphasis supplied and in original). Justice Sundberg cited this Court's opinion in Byrd v. State, 297 So.2d 22, 23 (Fla. 1974), where the following was stated:

> The rule is well settled in Florida that all men are presumed sane, but the presumption vanishes when there is testimony of insanity sufficient to present a reasonable doubt as to the sanity of the defendant, and he is entitled to an acquittal if the State does not overcome the reasonable doubt.

This Court's statement in Byrd, and Justice Sundberg's explanation in Jones, are consistent with the pronouncements of this Court regarding the burden of proof in cases where sanity is at issue. First, it is undisputed that in Florida insanity in a criminal trial is considered an affirmative defense. See Parkin v. State, 238 So.2d 817, 821-822 (Fla. 1970). In Brown v. State, 40 Fla. 459, 25 So. 63, 65 (1898), the following instruction regarding the burden of proof was upheld by this Court:

> "Crimes can only be commited by human beings who are in a condition to be responsible for their acts; and upon this general proposition the state holds the affirmative, and the burden of proof is upon it. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state; hence the state may

> rest upon the presumption without other proof. The fact is deemed to be proven prima facie. Whoever denies this, or interposes a defense based upon its untruth, must prove it. The burden, not of the general issue of crime by a competent person, but of overthrowing the presumption of sanity, and of showing insanity, is upon the person who alleges it; and, if evidence is given tending to establish insanity, then the general question is presented to the jury whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the state holds the affirmative; and, if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal."

(Emphasis supplied.) Later, in Johnson v. State, 57 Fla. 18, 49 So. 40, 41 (1909), and again in Corbin v. State, 129 Fla. 421, 176 So. 435, 436 (1937), this Court made it clear that when insanity is relied upon as a defense, if "the evidence for the state does not raise a reasonable doubt as to the sanity of the defendant when the offense was committed, it is incumbent upon the defendant to submit evidence sufficient to raise a reasonable doubt of his guilt." (Emphasis supplied)

Given these governing principles, respondent agrees that the prosecution has the burden to prove all elements of a crime charged beyond a reasonable doubt. This burden remains with the state throughout the entire trial, not withstanding any affirmative defense raised by the defendant.

Furthermore, the instructions delivered in the instant case correctly and adequately stated the law. Here, the jury was instructed pursuant to the standard instructions that the state must prove its case "by the evidence to the exclusion of and beyond every reasonable doubt (R 453)," that the "[d]efendant is not required to prove anything (R 454)," and was given the definition of the words "reasonable doubt," including that a doubt "may arise from the evidence, conflict in the evidence, or the lack of the evidence (R 455)." Specifically regarding the insanity defense, the jury was told that if they "have a reasonable doubt, you should find the defendant not guilty," and two sentences later the instructions tell the jury that petitioner is assumed sane "unless the evidence causes you to have a reasonable doubt about his sanity (R 455)." Thus, within a span of three sentences, the standard instructions as delivered in this case tell the jury that if the evidence causes a reasonable doubt about petitioner's sanity, they should find her not guilty. Furthermore, the next paragraph states: "If the defendant was legally insane, she is not guilty. To find her legally insane, these three elements must be shown to the point you had a reasonable doubt about her sanity....(R 455)" In other words, in order to find petitioner legally insane for the purposes of this prosecution, the jury

need only entertain a reasonable doubt about her sanity.

Petitioner's complaint, as expressed in the requested jury instruction (R 467), is that the instructions should also have stated that if the evidence raised a reasonable doubt regarding her sanity at the time of the offense, the prosecution must prove that she was sane beyond a reasonable doubt. However, as Justice Sundberg stated in Jones, supra, "that is not the test." Rather, as he stated, the test is whether there was evidence sufficient to overcome a reasonable doubt of sanity. See also Byrd v. State, supra; Brown v. State, supra.

Respondent submits that confusion in this area may have arisen from language in the cases which state that if testimony sufficient to create a reasonable doubt of sanity is presented, the sanity of the defendant must be proven by the state as any other element beyond a reasonable doubt. This statement is true in the sense that sanity is a requirement for any conviction. However, respondent submits that it applies more literally in cases where, before the criminal trial, the defendant has been adjudged to be insane and thus a presumption of insanity applies until overcome by proof to the contrary. See Wells v. State, 98 So.2d 795, 797-798 (Fla. 1957). In such a case, sanity must be proven by the state beyond a reasonable doubt from the outset of the case. However, where there has been no prior adjudication of insanity, respondent

submits that the prosecution's central task is to prove guilt (not sanity), and in the process to dispel any reasonable doubt which the defendant might attempt to create about his sanity.

While this distinction might be suttle, it is nonetheless real, and is illustrated by two paragraphs of the standard insanity instruction 3.04(b) which were neither requested nor delivered in the instant case:

> If there is evidence that the defendant was legally insane at some time before the commission of the alleged crime, you should assume the defendant continued to be insane at the time of commission of the alleged crime, unless the evidence convinces you otherwise.
>
> If the evidence establishes that the defendant had been adjudged insane by a court, and has not been judically restored to legal sanity, then you should assume the defendant was legally insane at the time of commission of the alleged crime, unless the evidence convinces you otherwise.

In place of those instructions which apply where a defendant has been found legally insane before the crime was committed, the instructions in the instant case told the jury, in effect: "Looking at all the evidence, do you have a reasonable doubt about defendant's sanity? If so, acquit." In a case such as this, the standard instructions are complete and correct.

Petitioner complains, as did Judge Anstead in dissent, that the standard instructions delivered in this case implicitly and improperly place the burden of proof upon the defendant. As Judge Ansted stated:

> In my view, this instruction is not a correct statement of Florida law and the instruction, at least inferentially suggests that the burden is upon the defendant, since it is the defendant who has asserted insanity as a defense, that must prove the elements of an insanity defense.
>
> * * * *
>
> The second part of the standard instruction...confuses the burden of presenting some competent evidence as to insanity, commonly referred to as the burden of going forward with the evidence, with the ultimate burden of proof. The instruction erroneously suggests that the burden of proof is upon the defendant to establish a reasonable doubt as to his sanity.

452 So.2d at 1080-1081. Respondent respectfully maintains that, as has already been established by the authorities cited at the beginning of this argument, both petitioner and Judge Anstead are wrong. As this Court stated in Corbin v. State, supra, and Johnson v. State, supra, if the state's evidence does not raise a reasonable doubt regarding the defendant's sanity, then "it is incumbent upon the defendant to submit evidence sufficient to raise" that doubt. Thus, the defendant bears the burden of going forward, but only when he cannot base his defense on the state's own evidence.[1/] However, regardless of whose evidence is

1/ For this reason the instruction does not specify by whose evidence the "three elements [of insanity] must be shown;" the defense can be based either on evidence produced by the prosecution or the defense.

used, in every case the defendant assumes the burden of persuasion, but only to the extent that that evidence must be sufficient to raise a reasonable doubt. Brown v. State, supra.

While the burden of proof (or persuasion) to prove the entire case beyond a reasonable doubt stays with the state throughout the entire trial, the Constitution permits the state to allow the burden of persuasion to shift to the defendant in the manner described here. As the Eleventh Circuit Court of Appeals explained in Williams v. Wainwright, 712 F.2d 1375, 1377 (11th Cir. 1983):

> [U]nder the law of Florida insanity is an affirmative defense. See Parkin v. State, 238 So.2d 817, 821-22 (Fla. 1970). As with the entrapment defense, the burden of producing sufficient evidence to establish a jury question may constitutionally be placed on the defendant so long as the threshold level of proof is not of such a magnitude to deprive the defendant of due process protections.

Again, contrary to petitioner's argument at page 30 of her brief, the burden of persuasion placed upon the defendant is not to prove insanity beyond a reasonable doubt, but simply to create a reasonable doubt about insanity.

At page 24 of her brief, petitioner makes explicit what is implicit in the contested special jury instruction. That is, petitioner argues that the jury should be instructed

that the state must disprove the affirmative defense beyond a reasonable doubt. However, respondent emphatically asserts that this is not the law, nor should it be. There is no constitutional requirement that the prosecution disprove an affirmative defense beyond a reasonable doubt. In fact, as Judge Anstead noted in his dissent, 452 So.2d at 1081, the United States Supreme Court has held that the state may require the defendant to carry the burden of persuasion and to prove the affirmative defense of insanity. See Patterson v. New York, 432 U.S. 197 (1977); Leland v. Oregon, 343 U.S. 790 (1952). Cf. Alvord v. Wainwright, 564 F.Supp. 459, 478 (M.D. Fla. 1983), aff'd and rev'd in part, 725 F.2d 1282 (11th Cir. 1984) ("[n]o matter how a state designs its presumptions on the issue, insanity remains an affirmative defense unless the sanity of the accused is expressly defined as part of the crime charged.")

Moreover, petitioner's and Judge Anstead's references to federal practice do not establish any insufficiency in the standard instructions in Florida. Under federal practice, it is for the trial judge to determine whether insanity has been shown sufficiently to create an issue, and if so to then instruct the jury that the government bears the burden of proof.

See, e.g.,United States v. Jackson, 587 F.2d 852, 854 (6th Cir. 1978). However, as Justice Sundberg explained, under Florida law that determination occurs "in the minds of the jurors...." Jones v. State, supra, at 620. Rather than telling the jurors about burdens of proof, as do the federal pattern instructionsquoted at pages 23 and 24 of of petitioner's brief, respondent submits that Florida's instructionstell them more. Within the space of three sentences the jury is told that if the evidence raises a reasonable doubt, the defendant is not guilty. Respondent maintains that those instructions adequately and accurately portray the law in Florida on the insanity defense.

Finally, petitioner stresses the reinstruction request by the jury in this case. It should be noted that the jury was reinstructed twice (R 472, 513). Only before the first reinstruction did they express a concern regarding the burden of proof as it relates to insanity (R 466, 471), and after the reinstruction the jury foreman stated: "I think that was adequate." The second reinstruction occurred after a read-back of a portion of the testimony, and it included virtually all of the instructions (R 513-523). Thus, by that time the jury's question about the rules governing the insanity defense appears to have been answered. In conclusion, respondent respectfully maintains that the question certified in this case

should be answered in the affirmative as it applies both to the standard instructions in general and to the instructions delivered in the instant case.

CONCLUSION

Based on the foregoing argument, respondent respectfully submits that the certified question should be answered in the affirmative.

Respectfully submitted,

JIM SMITH
Attorney General
Tallahassee, Florida

Russell S. Bohn
RUSSELL S. BOHN
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 8th day of October, 1984 by Mail/ Courier to ANTHONY CALVELLO, ESQUIRE, Assistant Public Defender, and ROBERT E. ADLER, ESQUIRE, Assistant Public Defender, Harvey Building, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401.

Russell S. Bohn
OF COUNSEL