IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,715

HAROLD SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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# PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT
CASE NO. 84-1993

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## PRELIMINARY STATEMENT

Petitioner, Harold Smith, will be referred to in this brief as "defendant," "Happy" or "Mr. Smith." Respondent, the State of Florida, will be referred to as "the State," or "the prosecutor(s)." References to the pleadings contained in this Record on Appeal will be designated as "R," followed by the appropriate page number(s), set forth in parenthesis [Example: (R. 1)]. References to the trial transcripts in this case will be referred to as "T." followed by the appropriate page number(s), set forth in parenthesis [Example: (T.2)].

## STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, Harold Thomas Smith, known as "Happy" was tried by a jury and found guilty as charged of the second degree murder of his wife. He was sentenced to serve 17 years in prison and the trial judge recommended that he receive psychiatric and drug counseling while incarcerated.

On appeal, the District Court of Appeal, Third District, found that a substantial amount of both lay and expert evidence raised the issue regarding Happy Smith's insanity at the time of his offense, his sole defense. (R. 88). The court also found that the trial court had erroneously instructed the jury with former Standard Jury Instruction (Criminal) 3.04 which this Court has considered and found that it incorrectly and inaccurately states the law in Florida. Yohn v. State, 476 So. 2d 123 (Fla. 1985).

No objection to the jury instruction was made at trial, therefore the District Court affirmed the adjudication of guilt, as it was bound to do under the precedent of Snook v. State, 478 So. 2d 403 (Fla. 3d DCA 1985). In Snook a former panel of the Third District Court of Appeal had held that the issue could not be reviewed on appeal because the error had not been preserved and it did not constitute fundamental error.

The panel in this case, however, expressed concern about the rationale in Snook and certified the following question to this Court as being of great public importance:

> WHETHER THE JURY INSTRUCTION ON INSANITY DISAPPROVED IN YOHN V. STATE, 476 So. 2d 123 (Fla. 1985) IS FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF OBJECTION?

The matter before this Court turns on the legal question. The following summary of facts which were adduced at trial is provided primarily to afford this Court a practical insight into the substantial variety and complexity of testimony, both lay and expert, that the jurors faced and had to weigh and apply to the jury instruction in determining the only issue in the case: whether the State proved beyond a reasonable doubt that Happy Smith was sane at the time of the offense.

Harold Smith got the nickname "Happy" because it was the reverse of what he really was; he never smiled. (T. 636). He did not have a good home life. (T. 538). He had scarlet fever when he was young which left him with a learning disability. He was illiterate and could not read or write. (T. 657). In August of 1983, his mother died. (T. 655).

On January 31, 1984, at 5:00 p.m., Lorri Smith punched out at the Publix store where she worked. (T. 228-9). She then drove the mile and a half to the home she shared with her husband, Happy Smith (T. 231) at 13735 N.W. 4th Court. (T. 235). At about 5:10-5:12, Lorri's father telephoned her to make arrangements to go out to dinner with Happy and Lorri. Happy answered the telephone and told him that Lorri was changing her clothes. (T. 233). When Lorri's mother phoned back between 5:15 and 5:20, Happy again answered and said, "Lorri wasn't going anywhere, she was dead ... she was dead, dead, dead. I killed her." (T. 234). He then hung up. A neighbor reported having heard three shots at about the same time, between 5:15-5:20, (T. 477).

Lorri's mother testified that Happy had never talked to her like that before, so angrily. (T. 250). She went to his house, which was five minutes away. (T. 235). She called his name, banged on the door, and rang the door bell. (T. 235). Finally, after two minutes, he came to the door, and without opening it said, "She was dead and he had killed her and ... get away and leave." (T. 236).

She went next door and called the police. (T. 238). An officer arrived on the scene at 5:47. Lorri's mother advised the officer that Happy was probably heavily armed (T. 323), that he was paranoid, and also that he had been treated in the past for mental problems. (T. 326). The officer deemed it advisable not to enter the house but instead requested units for backup. A perimeter was set up to keep people out of the area and to con-

tain Mr. Smith therein. (T. 323-4). Detectives and police from the North Miami SWAT team came and tried to get him out, since he was barricaded inside with a house full of guns. (T. 238).

When Detective Craig got the initial call over the radio, it sounded to him as if it were being handled as a hostage situation. When he arrived they were setting up a command post, taking positions on all four corners, and then trying to make phone contact. (T. 331-2). Lieutenant Each, who made initial phone contact, wasn't getting anywhere with Happy, so Detective Craig took over. (T. 333).

Over a period of forty-five minutes, Craig had several phone conversations with Happy. Happy would hang up with Craig and Craig would call back. Happy wanted to think about things. He asked for a drink of water. He asked to hang up. He did hang up. Craig asked to speak to his wife and asked if she were okay. Happy assured Craig she was okay and at one point said she was in the shower. Another time, he said she was lying down. Craig asked Happy to let her leave but Happy said, "No, she was okay." (T. 334-5).

Happy told Craig he knew the telephone was tapped, and also told him he thought people were after him. (T. 346). Craig handled Happy carefully. (T. 347). At one point, Happy said he would come out, but he did not; so Craig called him on the telephone again and said, "Harold, you promised me to come out. You didn't come out." He then assured Craig that he would. (T. 348). At 7:46, Happy exited the house. (T. 346).

When he came out he looked dazed, like he didn't know where he was. Jane Arganow, a friend and neighbor who was there at the time, tried talking to him; but he just stared at her. (T. 648). Later, when asked, he said that he did not remember seeing her. (T. 641). In fact, he didn't remember anything that happened (T. 536), except something about being dragged out of the house by the police. (T. 743). He walked down the walkway to the gate towards Detective Craig. (T. 339). Happy Smith was then taken into police custody and put in a holding cell monitored by video cameras. (T. 357).

Fire rescue went to check on Lorri. She was curled up on her side in a fetal position. (T. 362). The medical examiner testified that she had died from multiple gunshot wounds. (R. 27, 30, 32-35). She had one wound to the left back (T. 452) and another to the left arm (T. 454), both shots consistent with being shot at from a distance of two to three feet. (T. 454). The third shot was to the lower part of her abdomen. (T. 456).

At the time they found her, her green Publix uniform (shirt and pants), were under her, as were a pair of blue jeans. She was wearing a shirt, bra and panties. (T. 390-2). There was no sign of a struggle. (T. 402). She was not beaten up and there were no black and blue marks. (T. 469). It appeared that she had been shot and killed while she was changing clothes. (T. 402-3).

A Smith & Wesson Model 59, 9 ml. semi-automatic handgun, which caused her death, was found on the floor beneath Lorri's snoulder and the frame of the bed. (T. 393). The gun,

which could fire 16 rounds, was loaded with twelve rounds in the clip and one in the chamber. (T. 395). Weapons were also found in most of the other rooms of the house (T. 358), including a Smith & Wesson .12 gauge pump shotgun, .22 Derringer, a 30/30 bolt action rifle, and ammunition for those weapons. (T. 401). In the trash can was beer. (T. 386).

The exterior of Happy and Lorri's house was laid out like a fortress. (T. 349). All the windows were barred including the air conditioner, the vent in the kitchen and an exhaust fan. There were two fences across the front of the house -- both a stockade-type fence and a chainlink fence. There was a buzzer device on the front gate, wired to the front door. The front door had two dead bolts. Also, flood lights surrounded the house. There was a "Beware of the Dog" sign in the yard (T. 350-2) and his pit bulls. (T. 555, 637). The house had the most extensive security system the crime scene officer had ever seen, including two burglar alarm systems. (T. 377). No other houses in the neighborhood were similarly secured. (T. 561, 639). Even the door to Happy and Lorri's bedroom was kept locked. (T. 647).

Happy Smith made his living as a Volkswagen mechanic. (T. 662). Dr. Blum, a physician friend and client of Happy Smith's, who used to have his car fixed at the shop where Happy worked, testified that he was a good mechanic. (T. 546). When Happy decided to fix cars out of his house, Dr. Blum continued to take his car to him there. (T. 544).

Dr. Blum testified that in the past Happy had had a fair amount of business fixing cars. He testified, however, that

about a year before the murder, Happy became increasingly depressed and was unable to fix cars. (T. 544-46).

A neighbor testified that he was always working on cars and would spend most of his time outside working in the yard. (T. 560). At the time of the incident, there were several cars in front of the house. (T. 403). This same neighbor, who used to see him outside three or four times a week (T. 560), testified that in the few months prior to the shooting, Happy was never outside anymore. He had stopped working on cars. (T. 637). He was very withdrawn (T. 563), depressed and quiet. (T. 545). He was afraid people were after him and that they were going to kill him. (T. 547). He thought his telephone was tapped. (T. 639).

Happy Smith's fears had been triggered by an episode over a year ago in North Florida when he had been arrested for attempting to transport drugs. (T. 546-7). He thought that the people who had been involved with him in the incident thought that he was responsible for the whole thing going wrong. He was convinced something was going to happen to him; he didn't think he was going to survive. (T. 546-7). Friends who knew him testified that he never gave specific names of people out to get him, nor did they ever learn of anyone actually following him. (T. 547-8).

He became increasingly fearful and progressively worse. Dr. Blum prescribed valium for him (T. 548-9), and even tried to find an agency where he could get help. (T. 553). Prior to this time, he had confided to the doctor that he had sclerosis of the liver. The doctor advised him to stop drink-

ing. (T. 548-9). Others, however, testified that they had not ever known him to either drink or use drugs. (T. 566, 539).

On December 16, 1982, Happy went to the North Miami Community Mental Health Clinic. (R. 36-70). He was depressed and feeling paranoid, like someone was after him to kill him. (T. 501). He was evaluated by a psychiatrist who diagnosed him "major effective disorder, disease type with paranoia." Trilaton, elavil and cogentin were prescribed and continued out-patient psycho-therapy was recommended. (T. 502-3). Happy returned on January 6, 1983, with his wife, at which time the medication was changed to haldol, a major tranquilizer. He came again on January 20, 1983 (T. 504), and then for the last time, March 24, 1983. (T. 511). An after-care therapist contacted him in May of 1983 and closed the case in July of 1983. (T. 524). Six days before the homicide on January 25, 1984, Happy Smith contacted the clinic himself and requested a return to services. An appointment was set for Friday, January 27, 1984, but Happy did not keep it since he had located some valium elsewhere. He called back again on Monday, January 30, 1984, and again requested an appointment. An appointment was then set for February 1, 1984 (T. 527-8), the day after Lorri's death.

His neighbors also said that he became nervous and paranoid and always thought that someone was out to get him. He would say, "'They are out to get me.' 'They're gonna kill me.' I would ask him who, and there was never an answer." No one was ever seen trying to get him or threaten him. He could be sociable and just talking and then all of a sudden there would be a

total mood change. He would just get up and leave without explanation. (T. 562). Because neighbor William Holley was afraid that Happy might do something irrational, he told his girlfriend that he did not want Happy in their home if he was not there. (T. 563).

During the week preceding the shooting, Happy and Lorri went to visit a friend, Carolyn Catanzaro in the hospital. She discussed Happy's mental state with Lorri. Lorri related to her that she and Happy had been driving down the expressway and that Happy, the volkswagen mechanic, had thought that he saw a silver Mercedes following them. He thought someone was out to get them. When Lorri slowed down, she saw it was just a Volkswagen passing by. (T. 618).

To another friend, Joseph Catanzaro, a few days before the murder, he had said, "You know they've got a contract out on me... the big fellows, the biggees," although he never named the big fellows to him nor did he ever see any of them. (T. 627). Mr. Catanzaro testified that two or three months prior to the murder Lorri had mentioned the possibility of having Happy involuntarily committed to a mental health institution. (T. 630).

Another time, he walked out to the street with a friend, Thomas Patterson, and pointed to a car that drove by. Patterson related the following interchange with Happy: "'That's one of them that's going to kill me.' I said, Happy, that's Robert, he's not going to kill you. 'Yes he is,' Happy said." (T. 534-5).

Two days before the shooting, Linda Barnhart and her fiance went to visit Happy and Lorri. When they got there it was broad daylight and Happy was sitting on the couch shaking and trembling. She asked what was wrong and he said somebody was out to kill him. Her fiance then went outside in the yard to check. Then she and her fiance and Lorri encircled Happy so that he could go outside and see for himself. It took them twenty minutes to get him outside. Lorri told Linda that he had been without his medication for several days and that neither of them had left the house. (T. 487-9).

That same day Happy's brother, Edward Smith, came to visit and found him in the worst condition he had ever seen him. (T. 659). Again, Happy did not want to leave the house.

Lorri's mother, who was close to her daughter, knew of no problems in Happy and Lorri's relationship. They were deeply in love. (T. 245). None of their friends and neighbors thought they had any problems. (T. 494-535). When a friend suggested that he leave town because of his fears, he said he could not because Lorri would not leave with him. (T. 536). Happy was illiterate. He depended on Lorri to read to him. (T. 645). When he had to make out bills for repair work, Lorri would write the bills for him. (T. 549-550). Friends testified that they had a great relationship. They were always joking and never had any arguments. They talked to each other and were very open. They frequently sat on the couch with their arms around each other. (T. 658).

On January 30, 1984, the day before the murder, Lorri and Happy and Lorri's parents went to the Jefferson's Store to buy a video cassette recorder (VCR). Lorri went off to look for a Valentine's Day card for Happy. Happy then said he was going to look for Lorri but he disappeared and didn't come back. Lorri's parents discovered later that he thought he had seen someone in the store and he took a cab home. (T. 242-3).

There was testimony at trial that during the time he spent in jail awaiting trial both lay people and professionals who came in contact with him were concerned about his mental sanity. On January 31 or February 1, fire rescue got a call from the jail. Happy was complaining of sharp pain in the lower back. When they got there, they discovered no source for the pain but noticed Happy bouncing on the bench. (T. 580-1). On the morning of February 1, Mr. Smith was screened by a nurse at the Dade County jail. She asked him how he was feeling and he answered that he was depressed ... that he had just killed his wife. (T. 588). As part of her screening process (T. 591), the nurse made the following observations (R. 72):

> 2. Does inmate have ... symptoms suggesting the need for <u>doctor's care?</u> -- Yes.

She underscored doctor's care because she thought he should see a psychiatrist. (T. 592, 596).

> 3. Does the inmate appear to be under the influence of an unknown substance? -- Yes.

He was then placed in a safety cell by himself. The nurse went back every ten or fifteen minutes to check on him. She would find him just standing at the door. When she asked how he was doing, he just looked. Sometimes he would say 'yes', like he was out of it. (T. 597).

Because of the nurse's concern regarding Happy's emotional state, Dr. Robert Brewer, clinical psychologist, visited him. (T. 663-4). He found him very depressed, upset and crying. (T. 665). Happy described himself as being an 'asshole'. (T. 673). On February 3, when the doctor next saw him, he made three possible diagnoses: 1) Possibility of organic brain syndrome; 2) substance abuse -- suspected alcohol; and 3) personality disorder and simple reactive depression. He did not consider Happy to be an acute suicidal threat at that time and moved him to the general population. (T. 666-7).

Then, over the weekend, on February 4 and February 5, two incident reports were received. The inmates said that Happy was dangerous and imbalanced and a threat to everyone. (R. 74). He was attempting to break the television and threatening all of the inmates. One inmate had to remain awake at all times to protect the others. The inmates requested that he be moved. (R. 75).

On Monday, Febraury 5, when Dr. Robert Brewer next saw Happy he was back in a strip cell, confused and disoriented. It was obvious that he could not be with the general population. He did not respond and did not appear to be aware of where he was or what was happening. He was psychotic. (T. 668-9). Visits on

February 7, February 9, and February 10 revealed no change. Concerned, Dr. Brewer recommended that Happy be seen by a pyschiatrist. (T. 669). On February 13, he had improved and was taken from the strip cell to the general population. (T. 671).

One of the inmates testified that sometime in the latter part of February the inmates started complaining again about Happy. He would walk up behind them all of a sudden and they would turn around and he would be there. (T. 683). He would go to bed, sleep soundly for four or five minutes, then get up and pace for six hours. Then he would sleep soundly again but for only four or five minutes and then get up. (T. 680). He began talking to the television and the radio. He would get up by the television and listen to the vent. He thought someone was talking to him. An inmate testified: "I don't know if he was talking to his wife or who. He kept telling her, 'Honey', he didn't know why he was there and he didn't know what happened. And he was just talking to somebody by the name of Harold." (T. 682). "Finally, they took him downstairs. When they brought him back up he was medicated. Now it's hard for them to get him out of bed to go and eat. The inmates have to wake him up for everything." (T. 683).

Again, on March 26, there were incident reports stating he was confused and did not know where he was. They were not able to keep him in the general open population any longer. (T. 671). He was removed again to a rear holding cell. (T. 723). Dr. Brewer saw him on March 27. He was agitated and very upset and a minor tranquilizer was ordered immediately. (T. 672).

Happy, however, was refusing to take his medication because he felt he was being poisoned. He thought someone was trying to kill his family. (T. 726).

Three psychiatrists examined Happy and testified at trial. Psychiatrist, Dr. Arthur Stillman, examined him two times for the purpose of determining his sanity on the date of the crime, January 31, 1984. He examined him on May 30, 1984, (T. 735) and again on June 11, 1984 (T. 760), for a total of about four hours. (T. 778). Dr. Stillman concluded that Happy had brain damage and suffered from organic brain syndrome. (T. 740-44). Dr. Stillman based his opinion on what Mr. Smith told him, his own personal observations, jail records (T. 763), mental health records (T. 755; 778), and the information from the depositions of family, friends and neighbors (T. 751). Mr. Smith's memory was poor and he had little recollection of details (T. 740-1), he was a slow learner and with an uneven bent of abilities, i.e. he could not read or write but he had good mechanical abilities, (T. 744) and that he had had an early childhood disease (T. 744).

His subsequent substance abuse, starting at the age of 12 or 13 (T. 746, 768), including heavy drinking and heavy cocaine use (T. 746), coupled with the heavy psychiatric medication he had been prescribed during the past year (T. 750), accumulated in his brain and became toxic to the point that his brain was poisoned. This manifested itself in his paranoia, delusions and hallucinations in which he was defending himself from unseen foes that he believed were there. (T. 749). The substances that

he took had a far more serious effect in his case than they would have had on the normal person, due to the brain damage that he had suffered since early childhood. (T. 750).

In Dr. Stillman's opinion, Happy was insane on January 31, 1984 and had been for seven days previous. He had a mental infirmity--toxic psychosis based upon abuse and misabuse of substances and also an underlying organic brain syndrome. This rendered him in a state in which he did not know right from wrong nor the nature of his behavior. (T. 758).

Dr. Santord Jacobsen, a court appointed psychiatrist, conducted a one-hour interview with Happy on March 15, 1984. (T. 818). He testified that the only information he had was from the Arrest Form and observations he made while interviewing Happy in the jail. (T. 821, 865). On that information he made the following conclusions: Happy was a suspicious individual who was fearful and inclined to become angry and act impulsively. Drugs and alcohol had an addictive affect. (T. 826) At the time of the offense, he was influenced by the drugs and alcohol and they caused him to have diminished control. (T. 832-3). The fact that the alcohol and drugs caused him to do something which he would not have done ordinarily did not mean that he did not know what he was doing or that it was wrong. (T. 834). Dr. Jacobsen thought that the information on the A-Form regarding his telephone call with his mother-in-law saying that "She's dead, dead, dead" indicated an awareness of what he had done. (T. 836). His explanation for the hallucinations in jail was that he was suffering from intermittent, variable withdrawal, related to his drinking. (T. 835).

The defense brought the medical records, prior diagnoses, and the prescribed use of haldol to the attention of Dr. Jacobsen in addition to the incidents of paranoia that had occurred in the week preceding the crime (T. 850-2) and his behavior and hallucinations subsequent to his arrest (T. 853, 863), none of which Dr. Jacobsen had had the benefit of at the time he had formed his opinion. Dr. Jacobsen said it would lead him to have doubts regarding Happy's sanity at the time of the offense (T 867-8), but that it didn't change his diagnosis, i.e., that he was sane at the time of the offense, though there was doubt about his mental state. (T. 870).

Dr. Lloyd Miller, a psychiatrist, also examined Happy. He saw him on March 13 and then again on March 19 (T. 893) for a total of 2-1/2 hours. (T. 919). Happy had told Dr. Miller in their interview that at the end he felt that his wife was trying to get him out of the house. At the time of the offense he remembered her threatening him with something. (T. 892). Dr. Miller also reviewed the A-Form and the Dade County jail medical records. (T. 901). Although he concluded that Mr. Smith was suffering psychosis 2 or 3 days prior to the crime (T. 936) and that these psychotic incidents would support the position that he was insane <u>at that time</u> (T. 937), Dr. Miller concluded, nonetheless, that at the time of the offense Happy was sane. (T. 901). Dr. Miller concluded that his primary problem was alcoholism, and he was not otherwise mentally ill or psychotic. (T. 902).

On two occasions after the jury retired to deliberate it asked to be reinstructed. (T. 1004, 1005, 1008, 1009, 1010). The jury deliberated for an additional two (2) hours after being instructed. (T. 1021-1022).

## SUMMARY OF ARGUMENT

The sole defense in this case was that Petitioner, Happy Smith, was legally insane at the time that he committed the offense.

In Florida a defendant enters the courtroom with a rebuttable presumption of sanity. Where, as here, the defense raises a reasonable doubt as to sanity, the burden shifts to the State. The State must then prove the defendant's sanity, beyond a reasonable doubt, just like any other element of the offense. The appellate court found that Happy Smith did raise sufficient grounds for the burden to shift to the prosecution to prove Mr. Smith's sanity beyond a reasonable doubt just like any other element of the offense.

Without objection the trial judge instructed the jury according to former Standard (Criminal) Jury Instruction 3.04(b), 1981, which was subsequently held by this Court, in Yohn v. State to be legally incorrect in that it inaccurately stated the law and confused the jury as to who had the burden of proof regarding sanity. The instruction leads the jury to erroneously conclude that the defendant carries the burden of proving his insanity.

Fundamental error occurs where, as here, the jury is given an instruction which confuses or misleads the jury with

regard to an essential element of the offense which is disputed by the evidence at trial. Fundamental error occurs where, as here, the jury instruction impermissibly shifts the burden of proving an essential element from the prosecution to the defense.

Petitioner asserts that he is entitled to a new trial, even though his trial attorney failed to object to the instruction, because it was fundamental error to give this erroneous, confusing and misleading instruction which shifts the burden of proving an element of the offense to the accused.

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE JURY INSTRUCTION ON INSANITY DISAPPROVED IN YOHN V. STATE, 476 So. 2d 123 (Fla. 1985), IS FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF AN OBJECTION?

## ARGUMENT

### I.

**THE JURY INSTRUCTION ON INSANITY DISAPPROVED IN YOHN V. STATE, 476 So. 2d 123 (Fla. 1985), IS FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF AN OBJECTION.**

This Court has held that former Florida Standard Jury Instruction (Criminal) 3.04(b) does not completely, and accurately state the law, thus it misleads the jury with respect to the State's burden to prove beyond a reasonable doubt that the defendant was sane at the time of the offense, once there was sufficient evidence presented to rebut the presumption of sanity. Yohn v. State, 476 So. 2d 123 (Fla. 1985); See also, Standard Jury Instructions re: Criminal Cases (Supplemental Report No. 85-2), 483 So. 2d 428 (Fla. 1986). This Court made it clear in Yohn that reversal of a conviction and new trial are required in all cases in which the instruction was given over a defendant's objection.

In the instant case, the jury was given the identical insanity instruction[1] which this Court considered in Yohn and which this Court recognized as being wholly misleading and inaccurate. Happy Smith's attorney, however, failed to object to the instruction as given. Petitioner asserts that this omission is not, however, fatal because the error was fundamental, requiring reversal. The Third District Court of Appeal has certified to this Court the following question as being of great public importance:

> WHETHER THE JURY INSTRUCTION ON INSANITY DISAPPROVED IN YOHN V. STATE, 476 So. 2d 123 (Fla. 1985), IS FUNDAMENTAL ERROR REQUIRING REVERSAL IN THE ABSENCE OF AN OBJECTION?

1 The jury was told:

> An issue in this case is whether Harold Smith was legally insane when the crime alleged was committed. You must assume he was sane unless the evidence causes you to have a reasonable doubt about his sanity.
>
> If the Defendant was legally insane, he is not guilty. To find him legally insane, these three elements must be shown to the point that you have a reasonable doubt about his sanity.
>
> One, Harold Smith had a mental infirmity, defect or disease. Mental infirmity, defect or disease may result from the use of alcohol. Two, this condition caused Harold Smith to lose his ability to understand or reason accurately. And three, because of the loss of these abilities, Harold Smith did not know what he was doing or did not know what would result from his actions or did not know it was wrong, although he knew what he was doing and its consequences.
>
> In determining the issue of insanity, you may consider the testimony of the expert or nonexpert witnesses. The question you must answer is not whether Harold Smith is legally insane today or has always been legally insane, but simply if Harold Smith was legally insane at the time the crime was allegedly committed.

(T. 994). This instruction took effect July 1, 1981. In the Matter of the Use by Trial Court's of Standard Jury Instructions in Criminal Cases, 431 So. 2d 594, modified 431 So. 2d 599 (Fla. 1981).

This Court should answer the certified question in the affirmative. Where, as here,[2] the evidence presented clearly raised a reasonable doubt concerning Petitioner's sanity, the inaccurate and misleading instruction concerning his sole defense constitutes fundamental reversable error. The panel of the Third District Court of Appeal decided this case, as it was bound to do, based upon the precedent created by Snook v. State, 478 So. 2d 403 (Fla. 3d DCA 1985). However, the panel expressed concern "that Snook may run counter to several Florida decisions that indicate that instructions which mislead the jury as to the controlling law, particularly upon a close and vital issue such as this one, do indeed involve fundamental error." (R. 89). The appellate panel below further questioned the rationale of Snook, and certified the question to this Court because of the far reaching possible consequences of a holding contrary to Snook, which, if applied retroactively, might involve numerous other cases.[3]

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2 The Third District found that "... Smith presented substantial expert and lay evidence in support of his [sole] defense [of insanity]." (R. 88) Indeed the jury requested reinstruction twice, then continued to deliberate an additional two hours, indicating the closeness of the question.

3 Two other appellate courts have considered this question. The First District considered an identical factual situation and held that it was fundamental and reversable error to instruct the jury with former Standard Jury Instruction (Criminal) 3.04(b), notwithstanding the absence of an objection. In Lentz v. State, ___ So. 2d ___, 11 F.L.W. 2545 (Fla. 1st DCA December 5, 1986) the First District Court of Appeal certified that the decision conflicts with the same question decided by the Third District in Snook v. State. The Fifth District, in State v. Lancia, ___ So. 2d ___, 11 F.L.W. 2536 (Fla. 5th DCA December 4, 1986), considered the same question and followed Snook. Neither the Lentz court nor that of Lancia mentioned the decision of the Third District Court of Appeal issued in the instant case questioning the correctness of Snook.

**Former Insanity Instruction 3.04(b) Offends Due Process By Impermissibly Shifting the Burden of Proof.**

In Yohn v. State, supra, this Court reiterated that the law in Florida is well settled regarding the State's 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. This Court considered the argument that the United States Supreme Court had held in Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977) that it does not violate the due process clause to place the burden on the defendant to prove he was insane at the time of the commission of the offense. Fully mindful of the federal due process parameters, this Court held that Florida positive law has created a protected interest, stating:

> However, we have chosen not to place this burden of proof on the defendant in the state of Florida, but as we have said, to create a rebuttable presumption of sanity which if overcome, must be proven by the state just like any other element of the offense.

Yohn v. State, supra, at 126.

Liberty interests protected by the 14th Amendment may arise from two sources - the Due Process Clause itself and the laws of the States. Hewitt v. Helms, 459 U.S. 460, 466, 103 S.Ct. 864, 868, 7 L.Ed.2d 675 (1983); See also, Meachum v. Fano, 427 U.S. 215, 223-227, 96 S.Ct. 2532, 2537-2540, 49 L.Ed.2d 451 (1976); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 10, 99 S.Ct. 2100, 2105, 60 L.Ed.2d 668 (1979) (entitlement created

where under state law "there is [a] set of facts which, if shown, mandate a decision favorable to the individual"). That test is easily met here.

This Court has already established that the insanity instruction impermissibly shifts the burden of proof from the State to the Defendant. In Yohn this Court found that the former insanity instruction violates both state and federal concepts of due process because it:

> ... stops after instructing the jury on the presumption of sanity and the requirement that the elements of insanity be shown sufficiently to raise a reasonable doubt as to the defendant's sanity. The instruction frames the issue as one of finding the defendant legally insane. This places the burden of proof on the defendant's shoulders since it will always be the defendant who will be showing his or her insanity. The jury is never told that the state must prove anything in regard to the sanity isue. This is not the law in Florida. (Emphasis added).

Yohn v. State, supra, 128.

Since, as a matter of State law, sanity is an element of the offense, due process is violated when the jury charge impermissibly shifts the burden of proof from the prosecution to the defense. See, Sandstrom v. Montana, 422 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. (1965), 85 L.Ed.2d 344 (1985).

Unlike the instruction in Rotenberry v. State, 468 So. 2d 971 (Fla. 1985), this Court found in Yohn, supra, that the general standard instruction on reasonable doubt and burden of proof (T. 994-996) could not cure the deficiencies in the insanity instruction because the insanity instruction failed to inform the jurors that insanity was an element of the offense:

> The general standard jury instructions on reasonable doubt and burden of proof in Standard Jury Instruction 2.03 do not rectify the failure of Standard Jury Instruction 3.04(b) to set forth the state's burden of proof as to the defendant's sanity. These instructions were general, whereas the instructions on insanity were specific. Also, the general instruction in 2.03 refers to the state's burden to prove every element of the offense beyond a reasonable doubt. The instruction on insanity in 3.04(b) says nothing about insanity being an element of the offense, which it clearly is. See Parkin v. State. Therefore, we cannot conclude that the erroneous specific instruction was cured by the general one.
>
> In sum, the law in Florida provides for a rebuttable presumption of sanity, which if overcome by the defendant, puts the burden on the state to prove sanity beyond a reasonable doubt just like any other element of the offense. The standard jury instructions given in this case do not completely and accurately state that law. (Emphasis added).

Yohn v. State, supra at 128.

**Former Insanity Instruction 3.04(b) Offends Due Process By Mistating the Law and Confusing and Misleading the Jury.**

Because of the nature of the definition in SJI 3.04(b), it falls within the exception to the general rule that errors in jury instructions must be timely objected to at trial. This Court pointed out in Yohn that its approval of former SJI 3.04(b) did not relieve the trial judge of his responsibility of adequately charging the jury. Yohn, supra, at 126-7.

In Castor v. State, 365 So. 2d 701 (Fla. 1978), this Court held that an error which amounts to a denial of due process or deprives the accused of a fair trial, may be urged on appeal absent a trial objection because of its fundamental nature.

It is well settled in Florida that "... a charge attempting to define the offense which does not cover material elements of the offense is necessarily misleading and prejudicial to the accused." Croft v. State, 158 So. 454 (Fla. 1935). This Court went on to hold:

> It is equivalent to directing a jury that it is not necessary for the State to prove any element of the offense except those included in the definition given by the court.
>
> ...
>
> It is not necessary that the accused request special charges concerning the elements of the offense.

Croft v. State, supra, at 455. See also, Finch v. State, 159 So. 489 (Fla. 1934);

Recently this Court again warned that trial courts "should not give instructions which are confusing, contradictory or misleading." Butler v. State, ____ So. 2d ____, 11 F.L.W. 457 at 458 (Fla. September 4, 1986). This Court found the instant insanity instruction to be "confusing" and since it did "not completely and accurately state the law" it misled the jurors.

In Butler, supra, the instruction improperly shifted the focus of the case from the applicability of the defense of self-defense to the right of the victim to fight force with force. As a result, the confusing and misleading instruction virtually negated the defendant's only defense, that of self-defense. Likewise, the insanity instruction here improperly shifted the burden of proof with respect to an element of the offense, and as a result, the confusing and misleading instruc-

tion negated Mr. Smith's only defense, that of insanity, in the same way that the instruction in Butler negated that of self-defense.

Other courts have followed the well settled doctrine and found that instructions which mislead the jury as to the controlling law constitutes fundamental error requiring a new trial. See, Doyle v. State, 483 So. 2d 89, 90 (Fla. 4th DCA 1986) ("The instruction was, or certainly could have been, misleading to the jury by suggesting that if they believed the defendant's version of self-defense, they would have to find the defendant guilty of murder in the third degree. The giving of a misleading instruction constitutes both fundamental and reversible error."); Carter v. State, 469 So. 2d 194, 195-96 (Fla. 2d DCA 1985) ("We further recognize the fact that counsel made no objection to these instructions as given by the court. However, where, as here, a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleading to the jury, and the effect of that instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant. Failure to give a complete and accurate instruction is fundamental error, reviewable in the complete absence of a request for objection.").

In Lentz v. State, supra, the First District Court of Appeal reached its decision partly based on the reasoning in Williams v. State, 400 So. 2d 542 (Fla. 3d DCA 1981) cert. denied. 459 U.S. 1149 (1983). In Williams, the issue was whether the omission from the jury instructions of the element of intent

from the crime of robbery was a fundamental error so as to permit review absent an objection below. The court held that fundamental error occurred in such a situation only when the omission was pertinent or material to what must actually be considered by the jury in order to convict.

In Williams, the omitted element of intent was not at issue and the court held that it could not be said that the defendant's right to a fair trial was compromised by the failure to tell the jury that the state must prove something which was undisputed. Williams at 544. The court therefore concluded, in Williams, that the omission from an instruction of an element of the crime constituted fundamental error only when it concerned a "critical and disputed jury issue in the case"; when it does not appear that the defective charge was an issue at trial, review will be declined absent objection. Williams at 544-45 (citations omited). See also Enrique v. State, 449 So. 2d 845 (Fla. 3d DCA 1984); Morton v. State, 459 So. 2d 322 (Fla. 3d DCA 1984).

Here, as in Lentz, the omitted element of Mr. Smith's sanity was a "critical and disputed" issue since, as the appellate court noted below (R. 88-90), it was his only defense and he presented substantial evidence, both lay and expert.

Although in Williams, supra, the court found no fundamental error because there was no contradictory evidence as to the intent issue, other cases have been reversed on a fundamental error rationale where there was an issue at trial with respect to

the omitted element.[4] E.g., Graham v. State, 406 So. 2d 503 (Fla. 3d DCA 1981) (failure to instruct on specific intent to permanently deprive in robbery case is fundamental reversible error where intent made a material issue of trial by defense of voluntary intoxication); Jackson v. State, 412 So. 2d 381 (Fla. 3d DCA 1982), pet. for review denied 419 So. 2d 1200 (Fla. 1982) (failure to instruct on specific intent in robbery case is fundamental error where intent made material issue of trial by defense of duress and coercion; "Since the intent question was thus a real issue at the trial, and even though the omission was not objected to, the trial court committed fundamental error in failing to instruct the jury that intent to deprive is, as held in Bell v. State, 394 So. 2d 979 (Fla. 1981), indeed an element of the crime." Id. at 382). See also, Ramadanovic v. State, 480 So. 2d 112 (Fla. 1st DCA 1985) (trial judge's inadvertent omission of essential phrase from standard instruction which could lead to confusion in the juror's minds constitutes reversible error).

In a different context, the United States Supreme Court considered the role of the jury in determining whether the state had met its burden to prove sanity beyond a reasonable doubt under the similar Oklahoma law. The Court in Ake v. Oklahoma, 470 U.S. ____, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) recognized

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4 The court in Williams v. State, supra, documented many other cases which have considered similar questions. See also, Annot: Instructions Defining Offense. 169 A.L.R. 315; C.f., Annot: Presumption - Continuing Insanity. 27 A.L.R. 2d 121, §§ 11 and 13 at pp. 152-153.

that a determination as to sanity made by jurors is "about issues that inevitably are complex and foreign." Here, because the instruction concerned a delicate balancing of substantial evidence, the mistatement of law as to who had the burden of proof was critical. The instruction clearly affected the outcome of the verdict.

The logical extension of this Court's reasoning in Yohn is that the trial court committed fundamental error in failing to completely and accurately instruct the jury that the State had the burden to prove Mr. Smith's sanity beyond a reasonable doubt once he came forward with evidence. The issue is therefore properly urged on appeal despite the complete absence of any objection. Harold Smith's sanity at the time of the offense, his only defense, was clearly in dispute and critical. Once the presumption of sanity has been rebutted as it was here, sanity becomes an element of the offense. This Court stated: "The instruction on insanity in 3.04(b) says nothing about insanity being an element of the offense, which it clearly is"; "In sum the law of Florida ... puts the burden on the State to prove sanity beyond a reasonable doubt just like any other element of the offense." Yohn v. State, supra, at 128. Where, as here, the jury was confused and misled by the court's instruction, and might have acquitted Happy Smith but for following the erroneous instruction, reversal is required. It would undermine confidence in the judicial system to let stand the conviction from such an inherently unfair trial merely because of the incompetence of an attorney.

A failure to define for the jury all of the elements of the offense and an instruction which erroneously shifts the burden of proof to the defendant comprises such a fundamental matter that reversal is required even in the absence of a contemporaneous objection.

## CONCLUSION

The foregoing authorities demonstrate by precedent that instructing the jury with the disapproved former instruction on insanity constitutes fundamental error because it mistates the law in Florida by impermissibly shifting the burden of proof from the prosecution to the accused, fails to instruct on a disputed essential element of the offense and otherwise misleads and confuses the jurors. This Court's reasoning in Yohn v. State, 476 So. 2d 123 (1985) leads to the inexorable conclusion that the conviction and sentence of Petitioner Happy Smith must be reversed and a new trial granted notwithstanding the absence of an objection to the instruction.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 12th day of January, 1987, to: The Office of the Attorney General, 401 Northwest Second Avenue, Miami, Florida 33128.

Sharon B. Jacobs

Sharon B. Jacobs, Esq.