IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,715

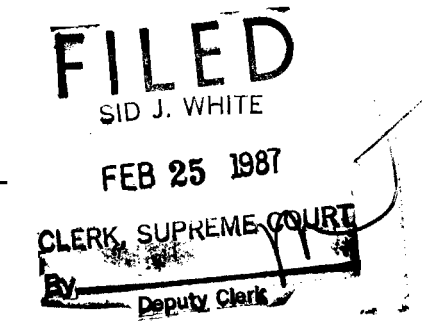
HAROLD SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.



PETITIONER'S REPLY BRIEF ON THE MERITS

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

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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.

A. THE STATE'S ESTOPPEL ARGUMENT IS NOT SUPPORTED BY THE RECORD.

The State's Brief inaccurately argues that Mr. Smith's trial counsel specifically requested that this jury instruction on insanity be given, and therefore initiated the error. (State's Brief at 15). The Record does not support the State's argument. It was the trial judge who began the charge conference by reviewing with counsel standard jury instructions for accuracy (T. 942). When the trial court reached standard jury instruction 3.04(b) on insanity (T. 947), defense counsel pointed out that the court's copy did not contain the complete standard instruction (T. 947-950). The only dialogue in the Record concerning the instruction is provided to this Court in Petitioner's Appendix attached to this Reply Brief. (T. 947-950). The State does not refer to any other places in the record which would support its position.

Therefore all of the "invited-error" cases relied upon by the State are inapposite to the within cause because they turn on situations where counsel specifically requested or agreed to admission of evidence or otherwise foreclosed the trial court from further inquiry of a matter.

The question here turns on whether the reversible error was fundamental because the following two facts are undisputed: (a) the insanity instruction that was given to the jury was subsequently found by this Court to be an inaccurate statement of law, and (b) Petitioner's counsel failed to object at trial.

B. MARTIN V. WAINWRIGHT, 12 F.L.W. 89 (FLA. NOVEMBER 13, 1986), IS NOT CONTROLLING LAW IN THIS CASE.

After the Initial and Answer Briefs were filed in the instant cause, this Court issued its opinion in Martin v. Wainwright, 12 F.L.W. 89 (Fla. November 13, 1986). That cause came before this Court upon a Petition of Writ of Habeas Corpus in the context of a Motion to Stay Execution of a death sentence. The written opinion in Martin v. Wainwright, summarily disposes of the issues, as the Court states them, "(1) His appellate counsel rendered ineffective assistance; [and] (2) the jury instruction on insanity unconstitutionally shifted the burden of proof". Martin v. Wainwright, supra at 90. This Court held in Martin:

> Regarding the claim of ineffectiveness, Martin argues that his appellate counsel should have challenged the instructions given to the jury on insanity. ... The trial court gave the then current standard jury instruction regarding insanity. Failing to attack this standard instruction, especially when it had not been objected to at trial, does not demonstrate ineffectiveness of appellate counsel. We hold, therefore, that Martin has not met the test set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984).

The brevity of this Court's opinion in Martin v. Wainwright, supra, could mislead one to conclude that this Court has therein determined the sole issue in this cause. However,

that is not the case. A review of the facts in Martin v. Wainwright, supra, reveals that the jury instruction challenged in Martin was different from standard jury instruction 3.04(b) (1981) which is challenged in the instant appeal. Indeed, the instruction on insanity challenged in Martin v. Wainwright, substantially differed in language from the instruction challenged herein.[1] (See Petitioner's Initial Brief at 21 n. 1 for instruction; T. 994) The language of the Martin instruction, unlike the instruction herein, contains additional language defining the burden of proof.

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1 In Martin v. Wainwright, 12 F.L.W. 89 (Fla. November 13, 1986), the instruction's relevant language that petitioner sought reviewed was as follows:

"The relevant instruction reads:

> Insanity may be permanent, temporary or may come and go. It is for you to determine the question of the sanity of the defendant at the time of the alleged commission of the crime. Until the contrary is shown by the evidence, the defendant is presumed to be sane, however, if the evidence tends to raise a reasonable doubt as to his sanity, the presumption of sanity is overcome. (Cite omitted).

It continues:

> If the evidence presented tends to raise a reasonable doubt as to the sanity of the defendant at the time of the alleged offense, the state must prove beyond a reasonable doubt that the defendant was legally sane at the time of the commission of the alleged offense. It is sufficient as to the defense of insanity if the evidence raised in the mind of the jurors a reasonable doubt as to the sanity of the defendant at the time of the alleged crime and if you have a reasonable doubt as to sanity at the time it is your duty to find him not guilty by reason of insanity. (Cite omitted)."

Brief of Petitioner in Martin v. Wainwright, Fla. S.Ct. Case No. 69,608 at p. 47.

Moreover, the issue raised in Martin v. Wainwright, differs from the issue in the cause sub judice. In Martin v. Wainwright, the petitioner phrased his claim III as follows:

> "The Florida Sanity Presumption and Conduct of Trials in Which Sanity is at Issue Unlawfully Relieves the State of Its Burden of Proof, in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution."

Brief of Petitioner in Martin v. Wainwright, Fla. S.Ct. Case No. 69,608 at p. 44.

The claims of ineffective assistance of trial and appellate counsel raised in Martin v. Wainwright, are based upon counsel's failure to object and challenge the validity of Florida's statutory rebuttable presumption of sanity. Petitioner in Martin v. Wainwright, essentially requested this Court to reconsider its decision in Yohn v. State, 476 So. 2d 123 (Fla. 1985) and to hold unconstitutional Florida's statutory framework for the insanity defense.

The issues in Martin v. Wainwright, are broader and go much further than the issue raised herein. In the cae at bar, Mr. Smith requests this Court to provide him with a new trial on the grounds that he did not receive a fair trial in that the jury was inaccurately instructed on the law and confused and misled regarding the only element of the offense at issue, that is, the requisite intent.

The issue here comes to this Court by a different vehicle than did Martin v. Wainwright, supra. Here, appellate counsel raised the issue of the reversibly erroneous jury instruction on insanity on direct appeal notwithstanding the absence of a trial objection. The District Court of Appeal, Third District, affirmed the conviction, but certified the question as being of great public importance. Smith v. State, 11 F.L.W. 2361 (Fla. 3d DCA November 12, 1986). The Third District Court of Appeal panel, through Chief Judge Alan R. Schwartz, opined that although the panel was bound by the prior decision of another panel of that court in Snook v. State, 478 So. 2d 403 (Fla. 3d DCA 1985)[2] that:

> Nevertheless, we are concerned 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 involve fundamental error. (Emphasis added).

Martin v. Wainwright, differs significantly because it came before this Court upon collateral review of ineffective assistance of counsel and therefore the standard of review applied in Martin was that set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is not the standard to be applied in the instant case. Rather, the standard to be applied in the instant cause is a fairness test.

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2 Snook v. State, 478 So. 2d 403 (Fla. 3d DCA 1985), was decided per curiam by a panel composed of Schwartz, C.J., and Hubbart and Daniel S. Pearson, J.J.

C. THE INTERESTS OF JUSTICE PRESENT A COMPELLING DEMAND FOR THE APPLICATION OF THE FUNDAMENTAL ERROR DOCTRINE.

The State's Brief is overzealous when it claims that the "evidence of sanity is quite strong." (Respondant's Brief at p. 20). The State's reliance upon Roman v. State, 475 So. 2d 1228 (Fla. 1985), is misplaced. First it is unclear whether that case addressed standard jury instruction 3.04(b) or merely a special or additional instruction on burden of proof. However, in reviewing the record in Roman, supra, this Court found "the evidence to be more than sufficient to support appellant's convictions." Roman, supra at 1234.

The same cannot be said here. A review of the record precludes any discussion of harmless error here. To the contrary, the district court of appeal specifically found that "Smith presented substantial expert and lay evidence in support of his defense" and that the jury instruction was on a "close and vital issue." Smith v. State, 11 F.L.W. 2361 (Fla. 3d DCA 1986).

The State's Brief also misinterprets the holding in Rose v. Clark, _____ U.S. _____, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). The State's Brief at p. 17 claims that "Rose made clear, Sandstrom error is not fundamental."

To the contrary, Rose v. Clark, holds that a conviction obtained, as here, in violation of the due process principles of Sandstrom v. Montana, 442 U.S. 510 (1979), can only be affirmed if the burden-shifting was harmless beyond a reasonable doubt. Here it was not. Harmless error is to be determined by

"consideration of the entire record." United States v. Hestine, 461 U.S. 499, 509 n.7 (1983). "[T]he inquiry is whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." Rose, 106 S.Ct. at 3109, (quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983)). Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) (en banc), refined the harmless error inquiry to a consideration of whether (1) "the evidence of the defendant's guilt was overwhelming; and (2) [whether] the instruction concerns an element of the crime not at issue in the trial." Brooks, 762 F.2d at 1390.

There can be no doubt that sanity was directly at issue at trial here. The record in the instant case contains virtually no support for a harmless beyond a reasonable doubt argument. All of the experts testified that Mr. Smith had a long history of mental problems and drug and/or alcohol abuse. This is not the type of case where there were inferences of faking illness.

Rather the jury was faced with the delicate question of whether at the moment Mr. Smith pulled the trigger he knew right from wrong. Dr. Stillman, the expert who had interviewed Mr. Smith the longest number of hours and reviewed outside records, had no equivocations that Mr. Smith was legally insane at the time he shot his wife. (T. 758; See also, T. 730-804). Dr. Stillman testified that Mr. Smith suffered from organic brain damage exacerbated by toxic drug and alcohol abuse:

A. [Dr. Stillman]: Well, to begin with, I believe that Mr. Smith has a -- had and still had to some degree when I saw him elements of a toxic psychosis, with many paranoia delusions, based on an organic brain syndrome which had existed since early childhood and which demonstrated itself as a learning disability or dyslexia.

Interestingly enough, wherever there is an organic disturbance of the cortex of the brain, any substance taken, be it alcohol or cocaine and/or mixtures, has a far more serious affect on brain damaged people than normal people.

It's almost as if the resistance to the toxic effects that most people have disappears and they have a very profound effect and they become quite disturbed early on, more earlier than you would find in the healthy normal range. So he had those two things, essentially.

And I believe that he had been -- was poisoned by the cocaine and alcohol and mixture of substances.

T. 749-750.

. . .

This man was not only using cocaine and alcohol, but also the medication that he was given at the Community Mental Health Center.

T. 751.

Dr. Stillman testified that Harold Smith had many delusions and was fearful that he was going to be killed. (T. 752). He was constantly in preparation either to get away or to defend himself. (T. 752):

Q. Did you determine whether or not Mr. Smith had a mental infirmity, defect or disease?

A. [Dr. Stillman]: Yes. He had a mental infirmity which was toxic psychosis,

> based upon the abuse and misuse of substances, and he had an underlying organic brain syndrome. This rendered him in a state which he did not know right from wrong. He did not know the nature of his behavior and he certainly did not know the consequences of his behavior at that time.

T. 758-759.

The State's two rebuttal expert witnesses concurred that something was amiss with Mr. Smith's mental state, but testified that he was legally sane at the moment of the shooting.

Dr. Miller, one of the State's rebuttal witnesses, testified that in his professional medical opinion Mr. Smith suffered from psychosis two or three days prior to the shooting. Although Dr. Miller conceded that Mr. Smith was insane during the two to three days prior to the shooting, he felt he was legally sane at the moment he shot his wife. Dr. Miller based his conclusion of sanity, in part, on Mr. Smith's statements to him that he felt that his wife was trying to get him out of the house, that she threatened him and that they argued. (T. 892).

However, the statements of fear and suspicion support the picture drawn by the numerous neighbors, family and disinterested witnesses of a man who had delusions that people were out to kill him. The lay witnesses reported instances when Happy Smith would not recognize well known friends, but rather run away fearful that they were trying to harm him. The lay witnesses described the painful degree of paralyzing irrational fear that Mr. Smith experienced shortly before the shooting. (See Petitioner's Initial Brief - Statement of the Facts).

His statements that he feared that his wife or the person he thought he saw in the room that day, was part of a conspiracy to get him out of the house where danger lurked, fitted into the pattern of mental disturbance described by the lay witnesses.

Likewise, the State's second expert, Dr. Sanford Jacobson, testified that in his opinion Happy Smith was sane at the moment of the shooting. Dr. Jacobson testified that at the time of the shooting Happy Smith was influenced by drugs and alcohol and therefore had a diminished control. He concluded that although the alcohol and drugs may have caused him to do something that he might not otherwise have done, Mr. Smith was able to tell right from wrong at the moment of the shooting.

However, Dr. Jacobson, had based his opinion that Mr. Smith knew right from wrong largely from information in the police arrest form which was the only information he had about how Mr. Smith behaved after the incident. (T. 820). The arrest form stated that after the shooting, Mr. Smith telephoned his mother-in-law and told her that he had killed his wife. (T. 836).

The uncontradicted testimony, however, shows to the contrary that it was the mother who telephoned Mr. Smith, and he redundantly responded "She's dead, dead, dead," and then he hung down the telephone. (T. 234). Dr. Jacobson's reasoning was therefore based on inaccurate information.

Dr. Jacobson testified that "I think he was suffering from something at the time of the offense" (T. 832). But his

conclusion was that he was legally sane. Dr. Jacobson conceded that his opinion was only as accurate as the information he had been given:

> Q: Dr. Jacobson, one more question. In your opinion, was Harold Smith sane when he killed his wife?
>
> A. [Dr. Jacobson]: Well, I would say yes, unless there is some other information that would make me change that opinion. (Emphasis added).

T. 841.

On cross examination Dr. Jacobson conceded that he had been unaware of many aspects of the history of Mr. Smith's mental illness that had come out during the other lay witnesses' testimony, for example:

> Q. Did Mr. Smith remember to tell you that on the Sunday preceding his arrest, two days before the arrest, he had been visited by a couple who are friends of his and Lorri's and that he would not come out of the house without being physically encircled by these people, with these people assuring him that no one was in the yard, no one was going to kill him?
>
> A. [Dr. Jacobson]: I don't have a recollection of his telling me that.
>
> Q. Would you find that in fact to be a relevant fact in considering his condition at the time of the offense?
>
> A. Well, I think it certainly suggests that Mr. Smith was very paranoid.
>
> Q. Now, did Mr. Smith remember to tell you that on the Monday, the day before the offense, he had been on a shopping trip to Jefferson's Department Store with family and had suddenly seen an individual, thought he saw an individual who appeared to him to

threaten him and took a cab home and later returned to Jefferson's after his family was wondering where he was because he had left without explanation?

Did he tell you about that?

A. I don't recall him telling me that.

Q. Would you find that factor a further indication of his paranoia if in fact there is no documentation of a threat to him by an individual?

A. I would think that -- I am not sure I would use the word paranoia, but it is suggestive. I am not sure what kind of mental attitude it suggests, but might suggest paranoia.

T. 852-853.

. . .

A. Well, it's significant in, one, he told me when I interviewed him that he had been hearing these voices and he apparently told other people as well.

Q. Did he tell you he had been talking to the television and to the radio?

A. Not specifically that, no.

Q. Did he tell you he had been hearing threats from the television and the radio?

A. He told me he had threats, but not from the television or the radio.

T. 857.

Dr. Jacobson conceded that Mr. Smith "may have been psychotic intermittently, periodically" during the point in time when the shooting occurred. (T. 859). He also conceded that "he could have been hallucinating at that time as well." (T. 858).

After being given additional facts during cross examination Dr. Jacobson did not change his bottom-line opinion that Mr. Smith was sane, but did express caution:

> Q. Given the information I have outlined for you, which was not included in your report, would you have a doubt as to Mr. Smith's sanity at the time of the offense?
>
> A. [Dr. Jacobson]: Yes, I have some doubts about his sanity at the time of the offense. I would describe him as an individual who was basically depressed, frightened, helpless, is abusing various substances which impaired his development and control, that he was generally suspicious, that his level of suspiciousness arose and faded over those weeks, that it was intermittent.
>
> He would at times go out of the house, he would at times not go out of the house. At times he was more suspicious. I don't think that there is -- I really don't doubt that general picture of him.
>
> I think that the death of his wife was certainly related to his mental state. I would not deny that. But, in terms of the specific question as to whether he knew the nature of his abilities and that he had an awareness that that kind of act was a wrongful act, I don't think that all those things would make me think he was insane. I think it makes me think that he didn't have much control over his conduct, that he was a mentally ill individual. I --

T. 867-868. And Dr. Jacobson testified:

> [Dr. Jacobson]: ... I think one would have to have doubt about his sanity or insanity. I don't think it is something that in this kind of case that one could look at without having some doubts.

T. 869.

Petitioner offers the above testimony of the State's experts to show that even the testimony offered against Mr. Smith elucidated the difficulty of the determination that the jury would have to make regarding sanity. One psychiatrist

unequivocably testified that Happy Smith was insane and the State's two rebuttal experts testified that he was psychotic several days before the shooting and in an abnormal mental state at the time of the shooting, but yet sane. The numerous lay witnesses provided extensive examples of bizarre and paranoid behavior.

Given the complexity of the only issue in the case, the wording of the jury instruction was of critical importance. The jury instruction was the blue print by which the jury made its final determination of sanity. The impermissible shifting of the burden of proof made the difference between whether Mr. Smith had to prove his insanity or the State had to prove his sanity beyond a reasonable doubt.

The burden-shifting in this case affected (1) the presumption of innocence and (2) mental ability to form an intent to break the law. These two principles are fundamental to a fair trial and fair system of jurisprudence. This Court can hardly say that the error was harmless beyond a reasonable doubt.

The interests of justice present a compelling demand for the application of the fundamental error doctrine under the facts of this case. Due process requires that Harold Smith be granted a new trial. In the event that this Court concludes that the certified question in this case has been previously determined by either Martin v. Wainwright, supra, or Roman v. State, supra, Petitioner respectfully requests that this Court consider the unique facts of this case and grant Mr. Smith a new trial based upon the due process principle which guarantees a fair trial.

CONCLUSION

By reason of the foregoing, Petitioner, Harold Smith, respectfully urges this Court to reverse his conviction and sentence and remand the matter for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 24th day of January, 1987, to: The Office of the Attorney General, 401 Northwest Second Avenue, Miami, Florida 33128.

Sharon B. Jacobs
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