IN THE SUPREME COURT OF FLORIDA

JOHN S. FREUND,)

Petitioner,)

vs.)

STATE OF FLORIDA,)

Respondent.)

_____)

CASE NO. 70,565
(4th DCA No. 4-86-0068)

REPLY BRIEF OF PETITIONER ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal for the State of Florida. The Respondent was the prosecution in the trial court, and the Appellee in the appellate court. In this Brief, the parties will be referred to by Petitioner and Respondent.

The following symbols will be used:

"R" Record-on-Appeal, Fourth DCA Case No. 4-86-0068

"SR" Supplemental Record-on-Appeal Fourth DCA Case No. 4-86-0068

"A" Appendix to Petitioner's Initial Brief on the Merits.

"RAB" Respondent's Answer Brief.

All emphasis in this Brief is supplied, unless stated otherwise.

STATEMENT OF THE CASE AND FACTS

The Petitioner will rely upon his Statement of the Case and Facts as set forth in his Initial Brief.

SUMMARY OF THE ARGUMENT

The Petitioner will rely upon his Summary of the Argument as set forth in his Initial Brief.

POINTS INVOLVED

POINT I

WHETHER THE FLORIDA SUPREME COURT'S HOLDING IN YOHN V. STATE, 476 SO.2d 123 (FLA. 1986), IS VIOLATED WHEN, PRIOR TO ISSUANCE OF THE YOHN OPINION, A TRIAL COURT INSTRUCTS THE JURY WITH THE OLD STANDARD INSTRUCTION ON INSANITY AND ADDS WITHIN THE CHARGE THE SENTENCE, "THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE."

POINT II

WHETHER THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER AND REQUEST TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.

POINT I

THE FLORIDA SUPREME COURT'S HOLDING IN YOHN V. STATE, 476 SO.2d 123 (FLA 1986), IS VIOLATED WHEN, PRIOR TO ISSUANCE OF THE YOHN OPINION, A TRIAL COURT INSTRUCTS THE JURY WITH THE OLD STANDARD INSTRUCTION ON INSANITY AND ADDS WITHIN THE CHARGE THE SENTENCE, "THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT WAS SANE.[1]"

The Respondent argues that the trial court's insanity instruction "adquately apprised the jury of the State's burden of proving sanity beyond a reasonable doubt, and the instruction given complied with the law as it existed at the time of Petitioner's trial." (RAB, P. 11). The Petitioner disagrees.

The basis of the Respondent's argument is that because the trial court inserted in the initial paragraph of its insanity instruction, (i.e., the old standard insanity jury instruction), the single sentence, "if the evidence causes you to have a reasonable doubt concerning the defendant's insanity, then the presumption of sanity vanishes and the State must prove beyond a reasonable doubt that the defendant was sane," (R. 2266), the jury was "adequately apprised" of the State's

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[1]The Fourth District Court of Appeal framed the certified question herein. However, as noted in the Initial Brief, Yohn v. State was actually decided July 11, 1985, with rehearing denied October 7, 1985. The Petitioner's jury trial commenced on October 21, 1985. The Petitioner had requested the Fourth District to certify the following question:" Is the Florida Supreme Court's holding in Yohn v. State, 476 So.2d 123 (Fla. 1985) violated wherein a trial court instructs the jury with the old standard instruction on insanity and adding within the charge only the sentence, "the State must prove beyond a reasonable doubt that the defendant was sane? (A., p. 7-8).

burden of proving sanity.

In extracting this one single sentence from the trial court's insanity instruction, the Respondent neglects his own advice. The Respondent notes that a reviewing court should look to the entire instruction rather than one sentence out of context in determining whether a jury instruction is confusing and misleading. (RAB, p.11).

Accordingly, in the context of the entire insanity instruction, the one sentence inserted by the trial court did not overcome the remaining misleading and confusing language of the insanity instruction given to the jury.

As noted in the Initial Brief, the one sentence inserted by the trial court referring to the State's burden of proof is both preceded and followed by language that implicitly placed a burden on the Petitioner of proving his insanity. Based on a purely numerical perspective, the trial court's insanity instruction told the jury in four (4) separate and implicit ways that the Petitioner had the burden of proving or establishing insanity, while the State's burden was only mentioned once.

On the otherhand, the Petitioner's requested instruction and this Court's new standard jury instruction on insanity clearly delineates the proper burden of proof in applying the insanity defense. Contrary to the Respondent's argument, the differences between the trial court's instruction and the requested/new insanity instruction are more than minor semantic differences.

First, the requested/new instruction merely defines insanity while the instruction given by the trial court spoke

of a finding of insanity thereby placing an obvious burden of proof on the Petitioner. In the requested/new instruction the phrase that "the State must prove beyond a reasonable doubt that the defendant was sane," follows the initial pargaraph which defines insanity. (R. 2607). This placement is important in that it directs the jury to focus on the State's burden of proving sanity. In addition, in the fourth paragraph of the requested/new instruction, the jury is told if they "have a reasonable doubt that he [i.e., the Petitioner] was sane at the time, then you must find him not guilty by reason of insanity." The changes made in the requested/new insanity instruction reiterates and unequivocally focuses the jury's attention on the State's burden of proving sanity.

Additionally, the requested/new standard jury instruction on insanity instructs the jurors that a defendant found not guilty by reason of insanity does not mean he will be released from custody.

The Respondent also argues that in Yohn v. State, supra, this Court merely concluded that the "bottom line problem" with the former insanity instruction was the lack of one sentence delineating the State's burden of proving sanity beyond a reasonable doubt. (RAB, p. 12). This "bottom line problem" was cured according to the Respondent by the trial court's insertion of the one sentence previously quoted herein

The Respondent's argument is without merit. It is true that this Court determined in Yohn v. State, supra, that a major deficiency of the old insanity instruction was the lack of a specific instruction within the insanity instruction itself directly delineating the State's burden of proof. However, this Court went further. This Court agreed with Judge

Anstead's review of the old insanity instruction in Reese v. State, 452 So.2d 1079 (Fla. 4th DCA 1984), that the framing of the old instruction, paragraph by paragraph, erroneously suggested and could be interpreted by jurors that the burden of proof is upon the accused to establish a reasonable doubt as to his sanity in order to prevail. This, of course, is contrary to Florida law. Parkin v. State, 238 So.2d 817 (Fla. 1970), cert. denied, 401 U.S. 974, 91 S.Ct. 1189 (1971). Consequently, this Court following Yohn v. State, supra, adopted a completely revised and new standard jury instruction on insanity. This instruction is the verbatim instruction the Petitioner requested the trial court to give. See, Standard Jury Instruction Re: Criminal Cases (Supplemental Report No. 85-2), 483 So.2d 428 (Fla. 1986). These judicial determinations and events demonstrate that the Respondent's "bottom line" argument and cure are without merit.

The Respondent's last argument is that the instruction given by the trial court complied with the law as it existed at the time of the Petitioner's trial. He argues that the trial court was therefore not in error for refusing to give the Petitioner's requested instruction. (RAB, p. 13).

The Respondent overlooks the fact that the Petitioner's case proceeded to jury trial after this Court had decided Yohn v. State, supra. See, f.n.1, supra, at page 5 of this Brief. Based upon Yohn, and the arguments made in the Initial Brief and herein, the trial court's insanity instruction did not comply with the existing law even at the time of Petitioner's trial. Furthermore, the Petitioner's appeal to the Fourth District was pending during the time that this Court formally

adopted the new standard jury instruction on insanity.[2] The case law is well established that the law as it exists at the time of the appeal is the law that must be applied, even where there has been a change of law since the time of trial. Wheeler v. State, 344 So.2d 244, 245 (Fla. 1977), cert. denied, 440 U.S. 924, 99 S.Ct. 1254 (1979)[3]; Evans v. St. Regis Paper Co., 287 So.2d 296 (Fla. 1973).

In conclusion, the certified question must be answered in the affirmative. In light of both this Court's decision in Yohn v. State, supra, and subsequent adoption of a completely revised insanity instruction, it is clear that the trial court's insertion of the one sentence did not overcome the otherwise misleading and confusing old insanity instruction. The Petitioner's sole defense was insanity. The Respondent has failed to sustain his burden of showing beyond a reasonable doubt that the confusing, misleading, and burden shifting instruction on insanity did not reasonably contribute to the Petitioner's conviction. Butler v. State, 493 So.2d 451 (Fla. 1986).

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[2]Standard Jury Instruction Re: Criminal Cases (Supplemental Report No. 85-2, supra, was decided February 16, 1986.

[3]In Wheeler, the defendant requested the trial court to instruct the jury as to the consequences of a verdict of not guilty by reason of insanity. The trial court denied the request. However, at the time of the defendant's appeal the law had changed to require the giving of the defendant's requested instruction. The defendant's conviction was reversed.

POINT II

THE TRIAL COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER AND REQUEST TO REDUCE THE CHARGE TO SECOND DEGREE MURDER.

The Petitioner will rely upon his argument presented in his Initial Brief.

CONCLUSION

The Petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand this cause for a new trial, and/or with such directives as deemed appropriate.

Respectfully submitted,

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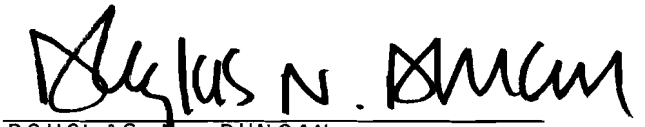

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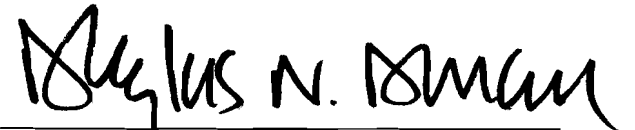
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished by mail to Eddie Bell, Esquire, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, this 14th day of September, 1987.



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