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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 77,059

LESTER LEWIS GIBSON, :

Respondent. :

_____ :

CORRECTED
RESPONDENT'S BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
Florida Bar #242705

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ATTORNEY FOR RESPONDENT

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I. PRELIMINARY STATEMENT

The State of Florida sought this Court's discretionary review of the First District Court of Appeal's opinion reversing respondent's conviction for second degree murder and several related charges on two issues--whether the decision of the District Court of Appeal conflicted with the decision of the Second District Court of Appeal in Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989), and whether the decision of the District Court of Appeal conflicted with this Court's decision in Rojas v. State, 552 So.2d 1914 (Fla. 1989). Undersigned counsel, on behalf of respondent, did not oppose discretionary review because the District Court's opinion clearly conflicted with this Court's intervening opinion in Smith v. State, 573 So.32d 306 (Fla. 1990). This Court accepted jurisdiction on April 1, 1991.

Respondent will adopt the State's referencing system in this brief.

II. STATEMENT OF THE CASE AND FACTS

Respondent took a direct appeal to the First District Court of Appeal from his convictions for second degree murder and other crimes surrounding the shooting death of a drug dealer (R24-26) named Tony Harrell. The primary issues in his direct appeal concerned his competency to stand trial, incomplete and misleading jury instructions on excusable homicide, duplicitous convictions and sentences, and an improper departure from the sentencing guidelines.

There was a substantial issue concerning Gibson's trial competency. His first trial attorney, Assistant Public Defender Michael Minerva, filed a motion for appointment of a defense expert shortly after his appointment (R35), which prompted respondent to write a letter to the trial judge requesting a new attorney (R39). Subsequently, a third attorney, Silas Eubanks, was appointed (R59), and filed a motion to declare respondent incompetent (R60). Pursuant to this motion, Dr. Robert M. Berland, Ph.D., filed a report concluding that respondent was psychotic and unable to prepare a defense (R62-66). Another psychologist, Dr. Timothy Fjordback, Ph.D., also filed a report indicating that although he had been unable to examine respondent, the available data was sufficient to confirm the presence of a major mental illness which would impact negatatively upon trial competency (R90-92). Respondent then filed a motion to dismiss the attorney who had obtained these competency reports (R93-99).

A competency hearing was held May 12, 1988, and Dr. Fjordback, consistent with his report, testified that in his opinion

respondent was incompetent (SR13-16). Over his attorney's objection, respondent testified to the contrary, stating that he could assist his counsel with his defense and did not want matters prolonged by the competency issue. (SR32-33). Respondent's attorney represented to the court that he had handled the case diligently but did not feel that respondent was in the position to assist him in handling the trial (SR47). The hearing was then continued for additional witnesses to be brought in.

Subsequently, another attorney, Sandy Selvey, was appointed (R100) after respondent complained that Eubanks was not representing his best interests (SR30-36). At that hearing, respondent agreed to submit to new evaluations by psychologists who had not had access to the previous reports (SR78-81).

Another competency hearing was held July 8, 1988. Without challenge, the prosecutor announced that the burden of proof at the hearing would rest on the defense (SR86). Mr. Selvey, however, took the position that respondent was competent (SR160), so the hearing was not adversarial. The trial judge, Ralph "Bubba" Smith, did the bulk of the questioning at the hearing. Respondent's first attorney, Michael Minerva, testified that Mr. Gibson had shown an unusual amount of distrust in their relationship and appeared to have muddled thoughts about the significance of the evidence against him (SR91-99, 101-104). Mr. Selvey cross-examined Mr. Minerva in a way that suggested that respondent had distrusted him only because he was a public defender rather than a private attorney (SR105). The trial

court then continued that line of questioning, asking if there would still be a question about competency if another lawyer could overcome the distrust (SR106-107).

An investigator in the case, Paul Williams, testified that he had been working with respondent for nine months and that respondent had been able to assist him in the investigation (R108-109). This was in response to direct questioning by respondent's attorney, and there was no cross-examination.

Respondent's second lawyer, Silas Eubanks, testified that respondent wanted an unusually high level of control over his case and appeared to be deluding himself about the evidence in the case after discovery (SR114-117). Eubanks answered yes to a court question asking if respondent's actions and conduct were so outrageous that he was incompetent (SR118). Eubanks also stated that respondent's assessment of the strength of his defense, after discovery, was not borne out by the evidence (SR119). Selvey cross-examined Eubanks on this point but Eubanks remained unequivocal: "the difference [between Gibson and other difficult clients] is that Gibson believes that he is going to win and he believes that regardless of the evidence" (SR124).

Selvey then related to the court certain information he had received from two other lawyers who had represented respondent during the same time period: Gordon Scott, who had represented respondent on some Gadsden County charges, and Judy Dougherty, who had briefly represented respondent in this case. Scott had said that respondent testified forthrightly in the

case he handled but that he thought Gibson would benefit from hospitalization "because of the unrealistic ways that he thinks that he's going to be absolved of all the charges against him." (SR125-126). Dougherty had said that respondent met the requirements of competency, but had a totally unrealistic understanding of the evidence against him. She too thought that he would benefit from hospitalization. (SR126-127).

Dr. Robert Berland, who had written the original report indicating incompetency, stated at the hearing that he had no opinion about respondent's current competency (SR138), but the state stipulated to his earlier report finding incompetency (SR138). Mr. Selvey resisted further testimony from Dr. Berland (SR138). Berland testified that when he did the original report, respondent had a fixed set of ideas about a conspiracy (SR144). Moreover, Berland's review of a witness deposition taken after his original report suggested the "core symptons of a psychotic disturbance going on before his arrest" (SR143).

The next witness was Dr. Harry McClaren, who testified that he had seen respondent three times in May and had spent time with him the night before the hearing (SR149). His report, introduced into evidence, recommended that Gibson be found competent (SSR4). The report stated, however, that inspection of the psychological tests validity scales indicated that Gibson had taken the test in a defensive manner, "with the effect of minimizing reported psychopathology." (SSR2) Mr. Selvey did not cross-examine Dr. McClaren.

Dr. Carolyn Stimel also testified at the hearing. Relying heavily on the fact that respondent had had no difficulties with his fourth attorney (Mr. Selvey) she concluded that respondent was competent to stand trial (SR159,SSR2).

After the testimony was completed, respondent's trial attorney argued that appellant was competent and represented to the court that he had a good working relationship with respondent (SR160). Without stating factual findings, the court then found the respondent competent (SR161).

Before the trial began, the court held a suppression hearing on respondent's motion to suppress statements he had made to an FBI agent and to the lead detective on the case. Over his attorney's objection, respondent testified at the hearing he was not crazy or incompetent at the time of his statements (R375). However, the motion was based on the argument that the FBI agent had a duty to check into respondent's competency after hearing that his trial attorney had filed a motion questioning his competency (R376-377). The court denied the motion to suppress (R384).

The State Attorney then took up an oral motion which respondent had made to represent himself in the case (R390). Respondent stated that attorney Selvey was not acting in his best interests. Selvey told the court that he and respondent disagreed about the defenses in the case (R398). The court granted respondent's motion to represent himself, but directed that Mr. Selvey remain as standby counsel (R396). After the court denied a motion for continuance of the trial date, respondent moved to have Mr. Selvey represent him (R411).

The state's proof at trial established that there was a shooting at a Tallahassee business called Dream Machines on May 11, 1987 at 10:15 p.m. (R710-11). When emergency personnel responded to the scene, they found a man laying on the floor inside the business with a head wound, and found a watch and currency lying under the man (R714-29). The victim died from a gunshot wound to the head (R741). Witnesses stated that they had seen respondent get into a car and put a gun to the victim's head, at which point there was running and a gunshot was heard from within the building (R757-59, 759-60, R853, 917). Expert testimony from the crime scene indicated that one of the bullets at the scene had hit a poster, traveled down and penetrated a bathroom door, and then grazed a first aid cabinet (R958-59). Other evidence indicated that that was the bullet that killed the victim (R960). A ballistics expert testified that the bullet would have changed directions after hitting the wooden panelling of the door (R1098).

Respondent testified in his own defense, stating that the victim had approached him with a gun (R1186-89), at which point he picked it up, ran outside, spun around, and the gun went off (R1192). He bent over to check the victim and the gun then went off accidentally into the floor (R1193). He left in another man's car and accidentally shot the gun through the windshield (R1193). Later he turned himself in (R1195). Respondent stated that he did not intend to kill Tony Harrell (R1198).

Without objection by respondent's attorney, the jury instructions included only the shortened form of the excusable

homicide instruction (R1292-93, 1296). After nine hours of deliberation, the jury returned a verdict of second degree murder as a lesser included offense of first degree murder on count one, not guilty of attempted armed robbery with a firearm, guilty of shooting in a building, not guilty of carrying a concealed firearm, guilty of using a firearm in a commission of a felony, guilty of improper exhibition of a dangerous weapon, and guilty of grand theft motor vehicle (R251-259, 1324-1327). Subsequently respondent was adjudicated guilty of the five offenses, the court found that he was an habitual offender (R1342), and he was sentenced to a departure sentence with 40 years with 605 days credit on count one (R1345), 30 years concurrent on two other counts, 605 days with credit with 605 days on improper exhibition, and 10 years, concurrent on grand theft motor vehicle (R274-76, 1045). The court found that respondent was an habitual offender (R1345), but there was no written order explaining the guideline departure.

Respondent raised five issues in the First District Court of Appeal: (1) the trial court had erred in failing to conduct an adversarial competency hearing, (2) the trial court had committed fundamental error in instructing the jury improperly on excusable homicide, (3) the trial court erred in adjudicating and sentencing respondent for the duplicitous offense of using a firearm in the commission of a felony, (4) the trial court imposed an illegal sentence for improper exhibition for a dangerous weapon, and (5) the trial court erred in imposing a departure sentence without giving written reasons at the time of sentencing.

The District Court of Appeal found no error on the issue regarding the competency hearing, but granted relief on the other issues. Specifically, the court found that the giving of only the short form jury instruction on excusable homicide was a fundamental error. On Issue III, the court found that it was improper to convict appellant of using a firearm during the commission of a felony because the murder conviction and sentence had been enhanced due to the use of the firearm. The court also found that appellant had been impermissibly sentenced to a term of imprisonment in excess of one year for the misdemeanor of improper exhibition of a firearm. Finally, the court found that respondent's sentence would have to be vacated because the trial court had failed to provide any written reasons for its departure.

As noted previously, the state sought discretionary review only on the issues regarding the excusable homicide instruction.

This Court decided Smith v. State, 573 So.2d 306 (Fla. 1990) after the state's brief on jurisdiction was filed. Respondent agreed that there was conflict between this Court's opinion in Smith, and the First District's opinion regarding the excusable homicide instruction.

III. SUMMARY OF ARGUMENT

In Issue I, respondent asks this Court to reconsider its opinion regarding the short-form excusable homicide instruction in Smith v. State, 573 So.2d 306 (Fla. 1990). Specifically, respondent contends that well-established caselaw in the state at the time of his trial required an accurate instruction on excusable homicide and that the giving of the inaccurate short-form instruction constituted fundamental error in his case.

In Issue II, respondent challenges the validity of the non-adversarial competency hearing held in his case. Because there were significant indications of incompetency, respondent argues that the trial court's failure to provide proceedings which protected his right not to be tried and convicted while incompetent was a serious error which requires remand for an appropriate competency hearing.

IV. ARGUMENT

ISSUE I

THE TRIAL COURT'S SHORT AND INACCURATE JURY INSTRUCTION ON EXCUSABLE HOMICIDE FUNDAMENTALLY CONFUSED THE JURY ON THAT DEFENSE, DEPRIVING RESPONDENT OF DUE PROCESS OF LAW.

A. The Facts Of This Case And Previous Caselaw Required the Giving Of An Accurate Instruction On Excusable Homicide.

As noted, the trial court in this case at no time gave the "long form" version of excusable homicide in defining the different degrees of homicide to the jury. Instead, the court gave the "shortened" version of the instruction which describes a killing as excusable when:

> committed by accident and misfortune in doing any lawful act..., or by accident or by misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon any sudden combat, without any dangerous weapon being used....

Standard Jury Instructions, p. 61, (R1291-93,1296) As also noted, the shooting in this case involved a dangerous weapon. In addition, the proof supported an instruction on excusable homicide, because respondent testified that he had shot the victim by accident and the proof showed that the fatal bullet had traveled the length of a poster and bounced off in a different direction before striking the victim. This, then, was the classic case in which the jury needed, and the defendant deserved, accurate instruction on a defense which, if proven to the jury's satisfaction, would have required a not guilty verdict.

Unfortunately, respondent's trial attorney did not request the long form instruction. However, the First District Court of Appeal in reviewing the case followed the well established caselaw from its own court as well as other district courts which had considered the problem and found that the error was fundamental. All of the previous opinions on the subject had agreed that the short form instruction is critically misleading because it improperly suggests to a jury that a killing cannot be excusable if committed with a dangerous weapon. See e.g. Blitch v. State, 427 So.2d 785 (Fla. 2d DCA 1983); Berry v. State, 547 So.2d 969 (Fla. 3d DCA 1989); Kingery v. State, 523 So.2d 1199 (Fla. 1st DCA 1988); Shuck v. State, 556 So.2d 1163 (Fla. 4th DCA 1990). These opinions rested on the well-settled principle that giving a misleading jury instruction constitutes both fundamental and reversible error. Doyle v. State, 483 So.2d 89 (Fla. 4th DCA 1986), appeal after remand 513 So.2d 188 (Fla. 4th DCA 1987), review denied 520 So.2d 583 (Fla. 1988); Christian v. State, 272 So.2d 852 (Fla. 4th DCA 1973), cert. denied 275 So.2d 544 (Fla. 1973).

The only cases which had previously rejected the fundamental error argument involved cases in which there was no proof of excusable homicide, e.g. Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989), see also Lewis v. State, 572 So.2d 626 (Fla. 1990).

In Smith v. State, 539 So.2d 514 (Fla. 2d DCA 1989), the Second District Court of Appeal found that the failure to give the long form excusable homicide instruction, although mislead-

ing, was not a fundamental error. Reviewing a series of cases which had discussed the issue, e.g. Tobey v. State, 533 So.2d 1198 (Fla. 2d DCA 1988), Carter v. State, 469 So.2d 194 (Fla. 2d DCA 1985), Rodriguez v. State, 396 So.2d 798 (Fla. 3d DCA 1981), the court held that in a "context a" situation (where a defense of excusable homicide is presented by the offering of evidence), there is no fundamental error in failing to give the long form instruction. In its opinion, however, the Second District Court of Appeal certified the following question to this Court:

> Was the failure to give the long form instruction on the defense of excusable homicide fundamental error when the short form excusable homicide instruction had been given, when the defendant had neither requested the long form instruct nor objected to the giving of the short form instruction, and when that defense was supported by the evidence?

Id. at 517, 518.

The Second District Court of Appeal subsequently revisited the issue in Miller v. State, 549 So.2d 1106 (Fla. 2d DCA 1989). The court, finding that no view of the evidence could support a finding of justifiable or excusable homicide there, found no fundamental error but refined its Smith holding further, stating:

> While Smith would appear to mandate a finding of fundamental error in the case sub judice, a close reading of our opinion indicates that its holding is limited to situations in which the court fails to instruct fully on a lesser included offense which is one step removed from the offense for which the defendant is convicted. Id. at 518 (n.2 and text). In those situations, the trial court's failure to give

> complete instructions on the definition of the next lesser included offense has the effect of removing from the jury a fair opportunity to exercise its inherent pardon power. Id. See State v. Abreau, 363 So.1d 1063 (Fla. 1978).

Id at 1110. Miller's refinement would not have caused a rejection of the fundamental error argument in this case because respondent was convicted of second degree murder and the failure to instruct accurately on a lesser included offense one step removed from that offense--manslaughter--would have taken away the jury pardon power and required reversal.

This Court answered the certified question in State v. Smith, 573 So.2d 306 (Fla. 1990). Inexplicably, this Court rejected the fundamental error argument, finding that:

> To hold fundamental error occurred because of the failure to give the long form instruction on excusable homicide when it was not requested 'would place an unrealistically severe burden upon trial judges concerning a matter which should properly be within the provence and responsibility of defense counsel as a matter of trial tactics and strategy.' Id at 517.

In its treatment of the issue, the Court did not acknowledge several previous cases which had discussed it and on which the First District Court had relied in this case, e.g. Kingery v. State, supra; Schuck v. State, supra. Moreover, the opinion did not explain why defense counsel would ever choose a strategy which would allow a court to give a misleading instruction suggesting that a killing could never be excusable if committed with a dangerous weapon eliminating consideration of a proffered defense. Respondent therefore requests this Court to reconsider its Smith decision.

B. The Giving Of A Jury Instruction Which Gives The Jury An Incomplete And Inaccurate View Of the Offense Charged Has Always Been Considered To Be Fundamental Error.

Fundamental error is a somewhat elusive concept. In its Smith opinion, this Court, citing Adams v. State, 412 So.2d 850 (Fla.), cert. denied 459 U.S. 882 (1982) and Ray v. State, 403 So.2d 956 (Fla. 1981), stated that fundamental error occurs where "a jurisdictional error appears or where the interest of justice present a compelling demand for its application." Id. at 310. The Court noted that the trial judge had given the short form instruction on excusable homicide and acknowledged that the short form instruction by all accounts is confusing and misleading. Id. at 311. This is so because the instruction as given here tells a jury that an excusable homicide defense is unavailable, whether the killing occurs by accident and misfortune while defendant was doing a lawful act by lawful means with usual care and acting without any unlawful intent, or in the heat of passion brought on by sudden provocation, or engaged in sudden combat, if a dangerous weapon was used. However the excusable homicide statute, Section 782.03, Fla. Stat. (1989), makes it clear that a homicide committed in the first two ways--by lawful act or in the heat of passion--can still be excusable even if committed with a dangerous weapon. Therefore, respondent submits that the misleading nature of this instruction does in fact present a compelling demand for the application of the fundamental doctrine.

Fundamental error is error which goes to the foundation of the case. Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Gen-

erally speaking, fundamental error has been found where a defendant is convicted of a charge on which he had no notice (e.g. Cox v. State, 530 So.2d 464 (Fla. 5th DCA 1988) (defendant found improperly convicted of enhanced degree of battery on law enforcement officer with firearm because information did not charge use of firearm); or where a defendant is convicted of an offense when there is no proof of every element of the offense, e.g. State v. Dominguez, 509 So.2d 917 (Fla. 1987) (inadequate proof of knowledge that the defendant knew the substance was cocaine required reversal of conviction for trafficking in cocaine). Failure to instruct on a necessary element of an offense is fundamental error if that element was contested at trial, Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981), cert. denied, 459 U.S. 1149 (1983).

In contrast, failure to give an instruction unnecessary to prove an essential element of the crime charged is not fundamental error. See, e.g. Sochor v. State, 16 FLW S297 (Fla. May 2, 1991). In Sochor, supra, the Court refused to find fundamental error because voluntary intoxication, although a defense to the crime, was not an essential element of kidnapping. Because the complained-of instruction went to the defendant's defense and not to an essential element of the crime charged, the court found an objection was necessary to preserve the issue on appeal. Here, however, that reasoning is not applicable because manslaughter, the next lesser included offense below second degree murder, is a residual offense which is defined as the absence of excusable or justifiable homicide. Hedges v. State, 172 So.2d 824 (Fla. 1965).

In Rojas v. State, 552 So.2d 914 (Fla. 1989), this Court reversed a second degree murder conviction because although the judge had defined excusable and justifiable homicide at the beginning of the homicide instructions, he had not referred to excusable and justifiable homicide in defining manslaughter. The Court found that as in Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988) and Ortagus v. State, 500 So.2d 1367 (Fla. 1st DCA 1987), the total omission of any reference to justifiable or excusable homicide was fatal. In reviewing the law on the subject, the Court stated:

> Consistent with the principle of Lomax v. State, 345 So.2d 719 (Fla. 1977) (failure to instruct on lesser included offense constitutes prejudicial error), a substantial number of murder convictions have been set aside because of a Hedges error in the manslaughter instruction (citations omitted). In Hedges, the failure to refer to justifiable and excusable homicide while defining manslaughter occured when the jury requested a re-instruction on the different degrees of murder. However, subsequent cases have applied the same principle to instructions first given to the jury before it retires for deliberation. Brown v. State, 467 So.2d 323 (Fla. 4th DCA 1985); Delaford v. State, 449 So.2d 983 (Fla. 2d DCA 1984). The error has been deemed fundamental when it occurs during the original instructions, Alejo v. State, 483 So.2d 117 (Fla. 2d DCA 1986), but an objection is required to preserve the error when it occurs during a re-instruction. Castor v. State, 365 So.2d 701 (Fla. 1978). Id at 915.

In Castor, supra, the Court simply found that because accurate instructions had been given initially, a contemporaneous objection was needed to preserve error in the re-instructions. The Court specifically distinguished Bagley v. State, 119 So.2d

400 (Fla. 1st DCA 1960), where the court's initial instructions to the jury were flawed. The Court found that the differentiation was crucial if the doctrine of fundamental error was to remain a limited exception to the requirement that a trial judge must be given an opportunity to correct his own errors.

Other cases finding no fundamental error have involved three categories: (1) preliminary instructions which do not go to the essential elements of the offense, e.g. Farrow v. State, 15 FLW D2762 (Fla. 4th DCA 1990) (improper preliminary instructions on whether testimony of the witnesses could be read back to the jury); Van Note v. State, 366 So.2d 78 (Fla. 4th DCA 1978) (an improper Allen charge in voir dire was not fundamental error), (2) situations where there is a danger that defense counsel is sandbagging by failing to object to matters which may or may not prejudicial, hoping for a favorable jury verdict, e.g. Clark v. State, 363 So.2d 331 (Fla. 1978) (improper comment on defendant's exercise of right to remain silent); Ray v. State, 403 So.2d 956 (Fla. 1981) (failure to object to instruction on lewd and lacivious act on a minor under 14 as lesser included offense of sexual battery); State v. Cumbie, 380 So.2d 1031 (Fla. 1980) (improper closing argument by prosecutor), or (3) where defense counsel creates the error, e.g. Travers v. State, 16 FLW D1095 (Fla. 1st DCA April 18, 1991) (excessive emphasis on sexual battery on victim's older sister not fundamental error because attributable for the most part to defensive efforts of defendant).

Whatever the definition of fundamental error--whether it be "error that reaches into the very heart of the proceeding"

Peterson v. State, 376 So.2d 1230 (Fla. 4th DCA 1979), cert. denied 386 So.2d 642 (Fla. 1980), error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the error", Brown v. State, 124 So.2d 481 (Fla. 1960), error "which goes to the foundation of the case or goes to the merits of the cause of action", Clark v. State, supra, or "error that amounts to a denial of due process", Castor v. State, supra, no previous decision of this Court has failed to find fundamental error when the error below involves a fundamental misdefinition of the essential elements of the offense which was not invited by the defense. Here the jury could not evaluate excusable homicide as a defense without a complete and proper jury instruction, and could not properly understand manslaughter without an accurate instruction on excusable homicide. Accordingly, respondent requests this Court to reconsider its opinion in Smith, supra, and find that the giving of the short form excusable homicide instruction is a fundamental error as a matter of due process.

C. This Court's Amendment Of The Excusable Homicide Instruction In The Smith Opinion Still Does Not Accurately Reflect The Statutory Definition Of Excusable Homicide.

Even though this Court found no fundamental error in the giving of the short form instruction in Smith, supra, it amended the short form instruction currently found on page 61 of the Standard Jury Instructions as well as the long form instruction which currently appears on page 76 of the Standard Jury

Instructions. With all due respect to the court, the amended long form instruction still does not accurately reflect the statutory definition of excusable homicide in Section 782.03, Fla.Stat. (1989). Specifically, the Court's amendments, basically tracking the current long form instruction, provide that a killing is excusable, and therefore lawful "if committed by accident and misfortune" and then goes on to define the three types of excusable homicide. However, read carefully, the statute only requires that accident and misfortune be involved in the first two types of excusable homicide--doing a lawful act by lawful means with usual ordinary caution and without any unlawful intent--or by accident and misfortune in the heat of passion. Accident and misfortune is not required for the third type of excusable homicide--sudden combat, without any dangerous weapon being used. To accurately reflect the statute, the second paragraph of the instruction should be eliminated and the "accident and misfortune" language should only be included with subheads 1 and 2 of the excusable homicide definition. [1/]

As this court noted in the Smith opinion, the excusable homicide statute is itself somewhat confusing. The Court's amendment of the short form instruction clears up the confusion

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1/ This Court in Smith indicated its awareness that the Supreme Court's committee on Standard Jury Instructions was reviewing both the short form and long form instructions for excusable homicide. After the Smith opinion, the committee, of which undersigned is a member, recommended that the long form instruction be amended as indicated above, with "or's" inserted between the three subheads of the definition.

regarding whether the "dangerous weapon exception "applies to only sudden combat excusable homicide. In addition, it more accurately sets out that the "accident and misfortune" requirement only applies to the first two types of excusable homicide, in contrast to the amended (and present) long form instruction. Accordingly, respondent suggests further amendments of the long form instruction or elimination of the long form instruction altogether and adoption of the short form instruction as amended by this Court in Smith, to accurately reflect the statute.

For the reasons stated, respondent requests a new trial because of the erroneous and misleading jury instruction on excusable homicide in his case. He contends that the instruction misstated the law on an essential element of the offense of which he was convicted, infecting the fairness of his trial and amounting to a violation of due process of law.

ISSUE II

THE TRIAL COURT ERRED IN FAILING TO CONDUCT A COMPETENCY HEARING WHICH WOULD ALLOW ADEQUATE DEVELOPMENT OF ALL MATERIAL FACTS REGARDING RESPONDENT'S COMPETENCY TO STAND TRIAL.

As noted in the statement of case and facts, respondent exhibited numerous signs of incompetency during the pre-trial stages of his case. His first lawyer, Michael Minerva, made a motion for expert assistance in evaluating his competency, and respondent promptly fired him. Minerva testified that respondent, during his representation, exhibited an unusual amount of distrust.

Respondent's second lawyer, Judy Dougherty, also believed that respondent had an unrealistic assessment of the evidence in his case, and would benefit from hospitalization. His third lawyer, Silas Eubanks, filed a motion to have respondent declared incompetent, and testified similarly; that respondent did not have a rational appreciation of the evidence which was coming forward in discovery. Respondent then requested that Mr. Eubanks be removed from his case, and Mr. Selvey was appointed. Obviously bowing to respondent's assessment of his own competency, however, Mr. Selvey abandoned the competency issue and in fact took the position at the final hearing that respondent was competent. Accordingly, the competency hearing in this case was not an adversarial proceeding; there was no cross-examination of the witnesses who testified that respondent was competent, and no one argued to the judge that respondent was incompetent.

Under these circumstances, the competency hearing was unconstitutional because it did not protect respondent's due process right to have a full and fair hearing on whether he was indeed competent to understand and appreciate the significance of the evidence against him.

A criminal defendant's mental fitness to stand trial is a fundamental requirement under our adversary system and our notions of justice. Drope v. Missouri, 420 U.S. 162, 95 S.Ct 896, 43 L.Ed.2d 103 (1975). Moreover, failure to provide proceedings which adequately protect a defendant's right not to be tried and convicted while incompetent to stand trial, deprives him of his due process right to a fair trial. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). An appellate court must take a "hard look" at the record when a competency issue is presented. Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988); Locos v. Capps, 625 F.2d 1258 (5th Cir. 1980).

A significant factor upon which an appellate court can rely in evaluating a competency issue is counsel's position on whether the defendant is competent. U.S. ex rel Rivers v. Franzen, 692 F.2d 491 (7th Cir. 1982). This is so because a standard for determining competency is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well factual understanding of the proceedings against him." Dusky v. U.S., 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960). As stated in Franzen, supra,

> Counsel for a defendant, perhaps more than any other party or the court is in a position to evaluate a defendant's ability to understand the proceedings and assist counsel with his defense. Id. at 500.

Other relevant factors are a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial. Franzen, supra; Drope v. Missouri, supra.

Here, it is obvious that if the court takes the required hard look at this record, there are significant indications of incompetency requiring a full blown advesarial competency hearing. First, three out of four attorneys who represented respondent during the course of his trial believed there were substantial questions regarding his trial competency. A fourth attorney, Gordon Scott, who had handled a contemporaneous case in another county, felt that respondent would benefit from hospitalization. Mr. Selvey, his fifth attorney, represented at the final competency hearing that he and respondent had a good working relationship, but it is obvious from the transcript that that relationship too erroded as time went by. For example, respondent testified over Mr. Selvey's objection at the pre-trial suppression hearing and then attempted to discharge Mr. Selvey as the trial began.

Other indications casts doubt on competency. As indicated, respondent during his pre-trial incarceration initiated contact with and FBI agent claiming that he was being railroaded by state authorities and needed the federal agent to play the part of a neutral party in his case (R328-340). Then, when

respondent's attorney attempted to get the statements suppressed on grounds of incompetency, respondent insisted on testifing that he was perfectly competent at the time he made the statements (R375).

In addition, and perhaps most significantly, the two psychologists who examined appellant initially, Dr. Robert Berland and Dr. Timothy Fjordback, found that he suffered from a mental illness and met the criteria for incompetency.

Thus, combining the medical reports, the testimony of various attorneys who worked with respondent, and the record evidence concerning his activities in pre-trial proceedings, it is obvious that a significant question of competency existed. Moreover, even though there was countervailing evidence in the testimony of respondent's investigator, his mother, and two other psychologists, the issue was not presented to the judge in an adversarial setting because no one present at the hearing --not respondent, not his lawyer, and certainly not the state attorney--cross-examined the witnesses who spoke in favor of competency or fully developed the testimony of the witnesses who testified against competency.

On this state of the record, respondent's due process right to a full and complete hearing on the issues--a matter of fundamental constitutional law--was not satisfied. In this respect, the case is identical to Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987), cert. denied 98 L.Ed.2d 149 (1987) where the court explained:

> Bundy, apparently dissatisfied with his lawyer because he had raised a question of

> his competency, secured an appointed lawyer for purposes of the hearing, and both Bundy and the new lawyer joined the state in contending at the hearing that Bundy was competent. The hearing judge remarked that he was in the unusual position of entering a ruling on which all parties agreed. Bundy's former lawyer was present and prepared to testify that in his opinion Bundy was not competent. He was not called as a witness. No one participating in the hearing adequately developed in an adversary manner the issue of whether Bundy was competent, which was what the hearing was all about. Obviously it is not an answer to questions raised concerning the constitutional adequacy of the hearing that Bundy did not wish to be found incompetent--if in fact he was incompetent, he was not competent to make such a decision. Id. at 1422.

In Bundy, supra, the case was remanded to the lower court for additional competency proceedings. On the state of the record in this case, this Court should grant the same relief, remanding this case to the trial court for an adversarial competency hearing.

V. CONCLUSION

For the reasons stated in Issue I, respondent requests that this Court reverse his conviction and grant him a new trial on second degree murder.

For the reasons stated in Issue II, respondent requests that the Court vacate all of his convictions and remand the case to the trial court for full and fair adversarial competency proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. mail to James W. Rogers, Bureau Chief-Criminal Appeals, and Assistant Attorney General, Carolyn J. Mosley, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399, and to the Respondent, this 23 day of May, 1991.

Nancy A Daniels
NANCY A. DANIELS