IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v. CASE NO. 77,059

LESTER LEWIS GIBSON,

Respondent/Cross-Petitioner.

_____/

REPLY BRIEF OF PETITIONER
AND
ANSWER BRIEF OF CROSS/RESPONDENT

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STATEMENT OF THE CASE AND FACTS

CROSS-PETITIONER'S ISSUE. Judge Smith presided at three competency hearings, which were held on May 12, 1988, May 23, 1988, and July 8, 1988. At the first hearing, Mr. Gibson was represented by Silas Eubanks and at the next two hearings by Sanford Selvey. (SR. 5-6, 50-51, 83-84) At the first competency hearing, the defendant, under oath, engaged the trial court in an extensive dialogue, covering twenty-one pages of the transcript. (SR. 24-45) At the second competency hearing, the defendant, again under oath (SR. 59), engaged the trial court in a lengthy dialogue, covering twenty pages of the transcript. (SR. 56-78) At the third competency hearing, seven witnesses testified. (SR. 85) Judge Smith examined Michael Minerva (SR. 90-99), Silas Eubanks (SR. 114-119), Rosanna Gibson (SR. 128-137), and Dr. Berland (SR. 140-147). Judge Smith also briefly questioned Sanford Selvey as to why he thought Mr. Gibson was competent to stand trial. (SR. 160-161)

The trial court's finding that Mr. Gibson was competent to stand trial is supported by the following evidence: Two psychologists, who testified at the hearing and submitted written reports, were of the opinion that Mr. Gibson was competent to stand trial based on the criteria set out in Rule 3.211, Fla.R.Crm.P. (SR. 148-163; SSR. 1-7) Paul Williams, defense investigator who had worked with Mr. Gibson for approximately nine months, testified that Mr. Gibson was able to assist him in

the investigation of his case in a realistic and reasonable manner. (SR. 109, 112-113) Defense counsel himself told the court he believed Mr. Gibson was competent to stand trial. (SR. 160-161) Although defense counsel represented to the court that two prior defense attorneys, one in this case and one in a separate case, believed that Mr. Gibson could benefit from hospitalization, he also represented to the court that these two attorneys stated that Mr. Gibson was competent to stand trial based on the criteria set out in Rule 3.211, Fla.R.Crm.P. (SR. 125-127) Silas Eubanks, who was examined by the judge, admitted that part of the problem he had with Mr. Gibson may have resulted from a personality clash. (SR. 116) Finally, the psychologist, who a year earlier had concluded that Mr. Gibson was incompetent to stand trial, admitted, upon examination by the judge at the competency hearing, that Mr. Gibson "certainly could be" competent today merely by virtue of the lapse of time and even without the administration of medication. (SR. 141-142, 145-147)

SUMMARY OF ARGUMENT

PETITIONER'S ISSUE. This issue is controlled by State v. Smith, infra.

CROSS-PETITIONER'S ISSUE. This court should decline to review this issue because to do so would give Mr. Gibson indirectly the appellate review denied him directly by the constitution. If this court disagrees and elects to review the issue, the State submits that the issue is procedurally barred, it having never been raised in the trial court. Even if Mr. Gibson could overcome the procedural bar, the issue is without merit. The trial court has neither the obligation nor the authority to order defense counsel, against his wishes, to advocate his client's incompetency at the competency hearing. In addition, Mr. Gibson received an adequate competency hearing.

ARGUMENT

PETITIONER'S ISSUE

WHETHER THE TRIAL COURT'S FAILURE TO GIVE UNREQUESTED LONG-FORM INSTRUCTION ON EXCUSABLE HOMICIDE CONSTITUTED FUNDAMENTAL ERROR WHERE SHORT-FORM INSTRUCTION WAS GIVEN.

Mr. Gibson asks this court to revisit its very recent decision in State v. Smith, 573 So.2d 306 (Fla. 1990) (Smith I), which controls the issue presented here.

In attempting to persuade this court that this case was wrongly decided, Mr. Gibson overlooks another recent Smith decision from this court, Smith v. State, 521 So.2d 106 (Fla. 1988) (Smith II).

Three years before Smith II was decided, this court in Yohn v. State, 476 So.2d 123 (Fla. 1985) held that the Florida standard jury instruction on the defense of insanity did "not adequately and correctly charge the jury on the substantive law in Florida applicable to this issue." Id., 126. The court held that it was "crucial that the jury be clearly instructed on the state's ultimate burden to prove that the defendant was sane at the time of the offense." Id., 128. Since the defendant in Yohn had requested a special jury instruction accurately reflecting the law, the issue had been preserved for appeal, and he was granted a new trial.

In Smith II, the defendant had not preserved the issue for appeal by either objecting to the standard jury instruction on sanity or by requesting a special jury instruction on the

subject. Relying on Yohn, he, nevertheless, sought to overturn his conviction on the ground that the trial court had committed fundamental error in giving an unclear standard jury instruction. This court rejected that argument, holding that the standard jury instruction on insanity disapproved in Yohn was not fundamental error requiring reversal in the absence of an objection.

The error complained of here is even less objectionable than that in Yohn and Smith II. Here, this court amended the standard jury instruction to "preclude the possibility that a jury could have a contrary understanding" to what was intended. Id., 311. This is a far cry from finding that the standard jury instruction misstated the law or provided an incomplete statement of the law.

The contemporaneous objection rule codified in Florida Rule of Criminal Procedure 3.390(d) is based upon necessity and fairness, not only to the trial court but also to the prosecution. On several occasions, this court has expressed concern over the problem of defense counsel building reversible error into the case. In State v. Jones, 204 So.2d 515 (Fla. 1967), this court stated:

> This [exception to contemporaneous objection rule] made it possible for defense counsel to stand mute, if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be "not guilty" it remained unassailable.

Id., 518. Later, in Clark v. State, 363 So.2d 331 (Fla. 1978), this court stated:

> If the defendant, at the time the improper comment is made, does not move for mistrial, he cannot, after trial, in the event he is convicted, object for the first time on appeal. He will not be allowed to await the outcome of the trial with the expectation that, if he is found guilty, his conviction will be automatically reversed.

Id., 335. More recently, in State v. Rhoden, 448 So.2d 1013 (Fla. 1984), this court stated:

> The [contemporaneous objection] rule is intended to give trial judges an opportunity to address objections made by counsel in trial proceedings and correct errors. The rule prohibits trial counsel from deliberately allowing known errors to go uncorrected as a defense tactic and as a hedge to provide a defendant with a second trial if the first trial decision is adverse to the defendant. [citations omitted]

Id., at 1016.

The same concern was recently expressed by the First District in Jones v. State, 571 So.2d 1374 (Fla. 1st DCA 1990):

> We do not want to encourage the creation of "gotchas" whereby the defense is allowed to sit on its rights, saying nothing until after it sees whether the jury returns an adverse verdict. These kinds of situations can occur just as easily early in protracted trials with enormous consequences of an inordinate waste of judicial time and resources.

Id., 1376, fn 3.

Unless the jury in the instant case concluded that both attorneys were talking total nonsense in their closing arguments, there is no way that it could have misinterpreted the challenged jury instruction. (R. 1221, 1225, 1245, 1247, 1256-57, 1262, 1264, 1272, 1274, 1285, 1288, 1289, 1290-91) Although defense

counsel primarily argued that the shooting was accidental, even he "conceded that perhaps [Mr. Gibson] is guilty of manslaughter." (R. 1289) The State introduced evidence proving that Mr. Gibson fired his gun twice, less than a minute apart, in the building where the shooting occurred and a third time in the getaway vehicle. (R. 764, 765, 853, 917, 920, 959, 979) Mr. Gibson, therefore, clearly had nothing to lose and all to gain by remaining silent.[1]

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[1] The United States Supreme Court has rejected the argument that an erroneous burden-shifting jury instruction automatically renders a trial fundamentally unfair. Rose v. Clark, 478 U.S. 570 (1986) In its view, fundamental error means the denial of the right to counsel or denial of the right to a trial before an impartial judge. Id., 577-78.

CROSS-PETITIONER'S ISSUE

WHETHER THE TRIAL COURT CONDUCTED AN ADEQUATE COMPETENCY HEARING.

The State filed a motion to strike this issue from the respondent's merits brief, together with a motion to toll the time for filing the reply brief. Twenty-two days later and one week after the time had expired for filing the reply brief, this court denied the motion to toll time but delayed ruling on the motion to strike. No ruling was made on the State's alternative request for permission to file an enlarged reply brief to respond to the de facto cross-petitioner's issue. As a result of this court's actions, the State is now filing its response to that issue.

Prior to addressing the merits of the issue, however, the State will briefly elaborate on the arguments presented in its motion to strike this issue from the respondent's brief. The district courts of appeal were never intended to be intermediate appellate courts, as is evidenced by the fact that this court's power to review decisions of the district courts is limited and strictly prescribed. By stating that it has the discretion to review any issue in a case coming before it, this court has converted a petition for review of a particular question of law into an ordinary writ of error with respect to all questions in the case. Such a broad range of review undercuts the existing limitations on its appellate power and gives defendants indirectly the appellate review denied them directly by the constitution.

There is no reason to assume that a second review by this court will be more accurate than the first review by the district court. What Justice Jackson stated in Brown v. Allen, 344 U.S. 443 (1953) is equally applicable here:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Id., at 540.

Not only is this issue improperly before this court, but it was also improperly before the district court. Mr. Gibson's contention that his competency hearing was inadequate because it was not an adversarial proceeding was never raised in the trial court. The absence of a contemporaneous objection was brought to the attention of the district court, who apparently overlooked it and proceeded directly to the merits of the issue. In view of Harris v. Reed, 489 U.S. 255 (1989), the district court's decision should be quashed on the ground that the issue was procedurally barred.

Turning to the merits, in substance Mr. Gibson contends that the trial court has an affirmative duty to guarantee that the competency hearing is adversarial in nature. Presumably what Mr. Gibson means by adversarial is that both sides of the issue will

be presented in the light most favorable to each side before a neutral decisionmaker. His position is untenable for several reasons.

First, a competency hearing is not adversarial in the same manner as that of a trial to determine the defendant's guilt. A competency hearing is concerned with the defendant's ability to participate in the legal proceedings in a meaningful way. Florida Rule of Criminal Procedure 3.210(b) authorizes not only defense counsel but counsel for the State and the court itself to move for an examination of the defendant where reasonable grounds exist to believe that the defendant is mentally incompetent to stand trial. The trial court is further authorized to order the defendant to be examined by experts, and the court (as well as the parties) may call these experts to testify at the competency hearing. Rules 3.210(b) and 3.212(a), Fla.R.Crm.P. Thus, the rules of criminal procedure anticipate that the trial judge may take an active role at the competency hearing, unlike his role at trial. See, also, Christopher v. State, 416 So.2d 450, 453 (Fla. 1982) (trial court has affirmative duty, whether requested or not, to determine defendant's competency to stand trial after being placed on notice that defendant may be incompetent).

Second, if Mr. Gibson's position were accepted, then every time defense counsel and the prosecutor were in agreement, additional counsel would have to be appointed to argue the opposite position, unless defense counsel changed his mind. This would be equally true whether counsel agreed that the defendant was competent or incompetent to stand trial.

Third, requiring counsel to take certain positions on issues inhibits their freedom to act in accord with their best professional judgment. It may also interfere with the attorney-client relationship, for the attorney may have confidential information justifying his decision. Judicial intervention could violate this element of confidentiality. What Mr. Gibson is requesting this court to do here is to instruct the trial court to hold another competency hearing and to order defense counsel to argue that Mr. Gibson was incompetent to stand trial.

Mr. Gibson cites seven federal cases, only one of which potentially addresses the issue presented here, Bundy v. Wainwright, 808 F.2d 1410 (11th Cir. 1987), cert. denied 98 L.Ed.2d 149 (1987). The State emphasizes the word, "potentially," for not even the employee(s) of West Publishing Company, who prepared the headnotes for the Bundy case, viewed it as standing for the proposition for which Mr. Gibson cites it. The relevant headnote states:

> Habeas corpus petition seeking stay of execution presented serious question regarding state court determination of defendant's competency to stand trial sufficient for grant of stay of execution.

Id., at 1412.

The State's interpretation of the Bundy case is in accord with this headnote; i.e., all that the case stands for is the proposition that these alleged facts will justify a stay of execution in a death sentence. The Bundy case does not hold that a competency hearing must be "adversarial" in nature. This issue

was not developed in the Bundy case, neither in terms of the facts nor the case law. Indeed, all that the court had before it were allegations of the petitioner. It commenced its recitation of the facts with the statement, "The petitioner alleges the following." Id., at 1422. Clearly, the Eleventh Circuit did not hold that the trial court had an affirmative duty to order defense counsel to advocate his client's incompetency or, alternatively, that the judge himself had a duty to call witnesses and examine them.

Not only does the case not stand for the proposition for which Mr. Gibson cites it, but its facts are distinguishable from those in the instant case. In Bundy, a former attorney, who was present at the hearing, would have testified to the defendant's incompetency, but he was not called as a witness. In addition, the Bundy opinion is silent as to whether the trial judge actively participated at the competency hearing. The only relevant fact reported is the trial judge's statement "that he was in the unusual position of entering a ruling on which all parties agreed." Id., at 1422.

By contrast, in the instant case, former counsel testified, and the trial judge himself actively participated in the proceeding, thereby achieving the basic objective of a fair factfinding process. Judge Smith presided at three competency hearings, which were held on May 12, 1988, May 23, 1988, and July 8, 1988. At the first hearing, Mr. Gibson was represented by Silas Eubanks and at the next two hearings by Sanford Selvey.

(SR. 5-6, 50-51, 83-84) At the first competency hearing, the defendant, under oath, engaged the trial court in an extensive dialogue, covering twenty-one pages of the transcript. (SR. 24-45) At the second competency hearing, the defendant, again under oath (SR. 59), engaged the trial court in a lengthy dialogue, covering twenty pages of the transcript. (SR. 56-78) At the third competency hearing, seven witnesses testified. (SR. 85) Judge Smith examined Michael Minerva (SR. 90-99), Silas Eubanks (SR. 114-119), Rosanna Gibson (SR. 128-137), and Dr. Berland (SR. 140-147). Judge Smith also briefly questioned Sanford Selvey as to why he thought Mr. Gibson was competent to stand trial. (SR. 160-161)[2]

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[2] Mr. Gibson wisely refrains from arguing that the evidence was insufficient to support the trial court's finding of competency to stand trial, for the record would not support such an argument. Two psychologists, who testified at the hearing and submitted written reports, were of the opinion that Mr. Gibson was competent to stand trial based on the criteria set out in Rule 3.211, Fla.R.Crm.P. (SR. 148-163; SSR. 1-7) Paul Williams, defense investigator who had worked with Mr. Gibson for approximately nine months, testified that Mr. Gibson was able to assist him in the investigation of his case in a realistic and reasonable manner. (SR. 109, 112-113) Defense counsel himself told the court he believed Mr. Gibson was competent to stand trial. (SR. 160-161) True, defense counsel did represent to the court that two prior defense attorneys, one in this case and one in a separate case, believed that Mr. Gibson could benefit from hospitalization, but he also represented to the court that thesee two attorneys stated that Mr. Gibson was competent to stand trial based on the criteria set out in Rule 3.211, Fla.R.Crm.P. (SR. 125-127) Silas Eubanks, who was examined by the judge, admitted that part of the problem he had with Mr. Gibson may have resulted from a personality clash. (SR. 116) Finally, the psychologist, who a year earlier had concluded that Mr. Gibson was incompetent to stand trial, admitted, upon examination by the judge at the competency hearing, that Mr. Gibson "certainly could be" competent today merely by virtue of the lapse of time and even without the administration of medication. (SR. 141-142, 145-147)

The State suggests that Mr. Gibson's real complaint is his dissatisfaction with the representation he received at the competency hearing. This issue should be addressed in a collateral proceeding. State v. Barber, 301 So.2d 7 (Fla. 1974).

CONCLUSION

The State respectfully requests this Honorable Court to quash the district court's opinion reversing Mr. Gibson's murder conviction and decline to review the issue raised by Mr. Gibson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional brief has been furnished by U.S. Mail to Nancy A. Daniels, Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 24th day of June, 1991.

Carolyn J. Mosley
Assistant Attorney General