IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. CASE NO. 88,219

JIMMY DELL BOWEN,

Appellee.
_____/

DISCRETIONARY REVIEW OF A DECISION OF
THE DISTRICT COURT OF APPEAL SECOND DISTRICT
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 0238538

ANGELA D. McCRAVY
Assistant Attorney General
Florida Bar No. 983391
Westwood center
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLANT

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

PRELIMINARY STATEMENT

The record on appeal will be referred to by the symbol (R) followed by the appropriate page number. The transcript of the trial will be referred to by the symbol (T) followed by the appropriate page number.

ARGUMENT

CERTIFIED QUESTION

ONCE A TRIAL COURT HAS DETERMINED THAT A DEFENDANT HAS KNOWINGLY AND INTELLIGENTLY WAIVED HIS OR HER RIGHT TO COUNSEL, MAY THAT COURT NONETHELESS REQUIRE THE DEFENDANT TO BE REPRESENTED BY COUNSEL BECAUSE OF CONCERN THAT THE DEFENDANT MIGHT BE DEPRIVED OF A FAIR TRIAL IF TRIED WITHOUT SUCH REPRESENTATION?

Since Appellee has chosen not to address the certified question in his pro se answer brief, counsel for Appellant will rely upon the argument presented in the State's initial brief on the merits. However, Appellant would also draw this Court's attention to this supplemental authority in support of its argument on the certified question: **Morris v. State**, 667 So. 2d 982 (Fla. 4th DCA 1996), **appeal dism.**, 673 So. 2d 29 (Fla. 1996)(a trial judge may properly deny self-representation based on 'unusual circumstances' as long as the 'unusual circumstance' is something other than lack of legal knowledge.)

Issue II

APPELLEE HAS FAILED TO DEMONSTRATE ANY FATAL DEFECT IN HIS INDICTMENT.

Appellee makes so many allegations in such a rambling and disorganized fashion in his pro se answer brief that it is difficult to discern the exact nature of his complaints to this Court. Therefore counsel for Appellant will focus herein on addressing the three allegations made on page ten of Appellee's answer brief. Counsel for Appellant will provide additional briefing on any other matters which this Court may require upon order of this Court.

A. The Second District Court of Appeal was not required to address any other allegations of error in its written opinion, other than the dispositive one which resulted in reversal.

This issue was one of ten Appellee raised in his direct appeal to the Second District Court of Appeal. The second district reversed on the self-representation issue (Issue III below) and declined to address any of the other issues in its opinion.

Contrary to Appellee's assertions, the Second District Court of Appeal was not required to address each and every one of the ten allegations of error raised in the direct appeal of this case. More to the point, it was not required to write any

opinion at all. **Campbell v. Vetter**, 375 So. 2d 4 (Fla. 4th DCA 1979)(There is no hard and fast rule which requires a written opinion, even in reversing a lower tribunal), **cert. denied**, 392 So. 2d 6 (Fla. 4th DCA 1980). The reason and necessity for district courts to render summary decisions are explained in **Whipple v. State**, 431 So. 2d 1011 (Fla. 2d DCA 1983).

> Each of the some eight hundred cases reviewed by this Court in each calendar year does not require a full written opinion in the disposition of same. This Court and not the attorney for the losing party is charged with the responsibility of deciding which cases merit and warrant a full written opinion upon the basis of that opinion's contribution to the jurisprudence of this State and those cases of great public interest. [] Appellants are not entitled as a matter of constitutional right to a written opinion from this Court . . .

Taylor v. Knight, 234 So. 2d 156 (Fla. 1st DCA 1970). Moreover, this Court has no authority to require a written opinion by a district court of appeal. **School Board of Pinellas County v. District Court of Appeal**, 467 So. 2d 985 (Fla. 1985).

Furthermore, the absence of discussion of the other issues in the opinion of the Second District Court of Appeal is not an indication that that court did not carefully review the entire

record and each argument made by appellate counsel in the direct appeal. **Jackson v. State**, 452 So. 2d 533 (Fla. 1984). Written opinions are generally not issued "where the writing of an opinion would be without useful purpose, serving only to satisfy the parties that the court adverted to the issues and gave them attention, and to add needlessly to an already excessive volume of opinion." **Foley v. Weaver Drugs, Inc.**, 172 So. 2d 907, 908 n. 2 (Fla. 3d DCA 1965), **approved**, 177 So. 2d 221 (Fla. 1965).

B. Appellee has failed to demonstrate any fatal defect in his indictment, because no prejudice has been shown.

The indictment charged Appellee with the attempted first-degree murder of Mickey J. Lemons. (R13) This victim testified at trial that his name was Mickey Charles Lemons. (T224) While a material variance between the name of a victim as alleged in the information and that actually proven at trial constitutes a fatal defect, **Rose v. State**, 507 So. 2d 630 (Fla. 5th DCA 1987), the appropriate standard of review determines if a material variance did in fact occur, and whether the defendant suffered substantial prejudice as a result of the variance. **United States v. Prince**, 883 F.2d 953 (11th Cir. 1989). Any variance resulting from a question as to the victim's middle name could not be considered material. Additionally, Appellee suffered no prejudice in view

of the overwhelming evidence identifying Mickey Lemons as the victim and the defense's use of a photograph of the victim to pursue inquiry concerning his criminal record. (R44) Under these circumstances, the trial court failed to abuse its discretion in denying Appellee's motion for new trial based on this allegation of error. **Glendening v. State**, 604 So. 2d 839 (Fla. 2d DCA 1992), **rev. denied**, 613 So. 2d 4 (Fla. 1992). Absent the occurrence of fundamental error, the trial court also properly denied the motion for new trial where no previous objection or motion for mistrial was ever raised as to this issue. **State v. Delafuente**, 487 So. 2d 1083, 1085 (Fla. 4th DCA 1986).

Based on eyewitness testimony, as well as Appellee's own admission that he shot Mickey Lemons, the conviction for attempted first-degree murder could have been obtained even without Lemons' testimony. (T169) Fran Hall knew Mickey Lemons (T153), and testified that she witnessed Appellee shoot Lemons. (T169) Horace Brady knew Mickey Lemons and identified him as being at the bar on the night of the shooting. (T284-285) Terry Miller and Donna Guscott also testified that they saw Appellee argue with Mickey Lemons that night. (T303-304)(T343-351) Detective Stanton spoke with Lemons that night and recovered a bullet from his person. (T377-378) Finally, Appellee testified

that he knew Mickey Lemons (T532) and admitted shooting him. (T546)

A material variance between a victims's name as charged and that proven creates a danger the jury might convict a defendant of a crime with which he had not been charged. **Rose**, 507 So. 2d at 631. For instance, reversible error resulted where the information alleged an attempted armed robbery committed against a husband, but the proof at trial established an attempted armed robbery committed against the wife. **Rose**, 507 So. 2d at 631. This danger was not present in the instant case since the name in the indictment and the proof were sufficient to inform Appellee of the charge against him. **Id.** at 631.

By the same token, even if a material variance in names exists, Appellee has suffered no substantial prejudice. This particular objection was never even raised at trial. The only possible harm might have arisen in the investigation of Lemons' criminal background. However, defense counsel alleviated this concern by submitting a photograph of the victim for purposes of determining Lemons' criminal history. (R44) Consequently, Appellee has demonstrated no substantial prejudice resulting from the alleged error.

ISSUE III

IF THIS COURT UPHOLDS THE REVERSAL OF APPELLEE'S CONVICTION AND HIS CASE IS REMANDED FOR RETRIAL, SUCH RETRIAL DOES NOT VIOLATE DOUBLE JEOPARDY.

This issue is patently frivolous. It is a well-settled rule that retrial of an accused whose conviction is set aside for error in the proceedings leading to conviction is not barred by double jeopardy, as long as the accused is retried only for the offenses of which he was convicted. **Ray v. State**, 231 So. 2d 813, 815 (Fla. 1969). Appellee has failed to demonstrate error.

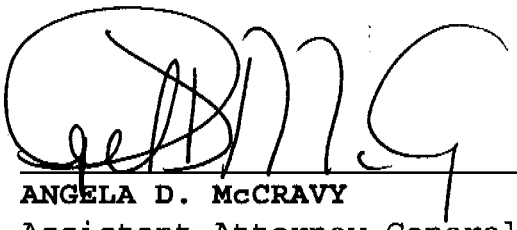
CONCLUSION

Based upon the foregoing reasons, arguments, and citations to authority, Appellant requests that this Honorable Court vacate the opinion of the Second District Court of Appeal in **Bowen v. State**, 667 So. 2d 863 (Fla. 2d 1996) and reinstate the conviction and sentence against Appellee.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Sr. Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 0238538

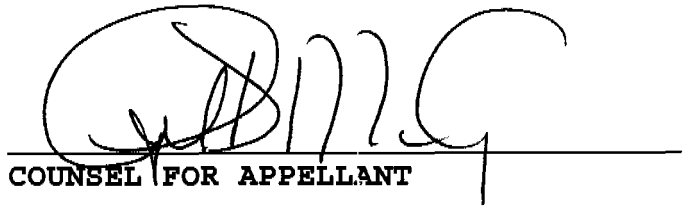


ANGELA D. McCRAVY
Assistant Attorney General
Florida Bar No. 983391
Westwood Center, Suite 700
2002 North Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. regular mail to Jimmy Dell Bowen, pro se, DC #856243, Sumter Correctional Institution, Post Office Box 667, Bushnell, FL 33513 on this 16 day of October, 1996.



COUNSEL FOR APPELLANT