ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ARTHUR LEE HUGHES,

Petitioner,

v.

CASE NO. 89,919

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Several observations on respondent's "Statement of the Case and Facts" are in order.

Respondent states that, in the initial brief, "Hughes describes" a statement he purportedly made to the murderer, Alexander Jones, to pull the trigger if a victim resisted the robbery. (AB2) This misleadingly suggests some sort of admission or concession, when the passage to which the state refers merely recounts Jones' testimony in the state's case. (IB6) The state, which has been known to complain of renditions of the case and facts not to its liking, should refrain from twisting a fair and balanced presentation to suit its rhetorical purposes.

The state makes reference to a division of the "robbery/ burglary/murder booty" between Hughes and his codefendants. (AB2) There was, of course, no booty from the murder, which occurred after the robbery and, according to the testimony of the

murderer, was committed on a whim, without being prompted by any resistance from the victim. (T671, 681-684)

For some reason, respondent sees fit to excerpt the closing argument of the prosecutor postulating the facts of Bryant v. State, 412 So. 2d 347 (Fla. 1982), as an example of the proper application of the doctrine of independent act. (AB3) It is noteworthy that failure to instruct on independent act on those facts was in error. Defense counsel also gave an example of an independent act outside the common felonious design, more applicable to the facts of this case:

> For example, if two people decide to go rob a liquor store; one is going to go in and one's going to stay out and drive the car. And they have a conversation beforehand and they say, we don't want you to take the gun in there, I'm not going to be part of this if anybody gets hurt, and that's the understanding, and the man who goes in takes a gun in and his intention is to make sure that there aren't any witnesses who can identify him, if he shoots somebody to prevent that person from being a witness, that is in furtherance of this criminal enterprise and the getaway driver, under our law, is responsible for that shooting.
>
> On the other hand, if the guy goes inside, has a mask on and he's not identified and the robbery is complete and he looks through an open door and he sees somebody out in the back that just happens to be the boyfriend of his ex-wife and he decides well, **I'm** standing here with a gun, I might as well shoot him while I'm here, and shoots him, it is not in furtherance of the robbery, it is not in furtherance of the common scene or designed, [sic] it is not causally connected to the underlying felony, that is, the robbery, it's what civil law calls frolic **and** detour, it's a

departure from the plan that is not done to further the plan, and under our law that person, the guy outside would not be responsible for that shooting.

The critical factor is whether or not the shooting is done in furtherance, to facilitate, to help, to aid in the commission of the underlying crime. That's the meat of this. That's what you have to decide about Alexander Jones's act.

(T811-813)

ARGUMENT

1. A DEFENDANT WHO MAKES A KNOWING WAIVER OF HIS RIGHT TO COUNSEL HAS A CONSTITUTIONAL RIGHT TO SELF-REPRESENTATION IN A CAPITAL CASE, THE TRIAL COURT'S CONCERN THAT HE OR SHE MAY NOT RECEIVE A FAIR TRIAL NOTWITHSTANDING.

Petitioner welcomes the state's recognition that the trial court wrongly denied him self-representation and that the district court perpetuated this error by finding it justified. In light of this Court's recent precedent, culminating in State v. Bowen, 22 Fla. L. Weekly S208b (April 24, 1997), no other position is defensible. As in Bowen, the certified question must be answered in the negative, and the case remanded for 'a new trial consistent with" Hughes' 'right prescribed in Faretta[1]." Bowen v. State, 677 So. 2d 863, 867 (Fla. 2d DCA 1996), approved, State v. Bowen, supra.

However, respondent's assertion that Hughes must be forced to represent himself on retrial is, if it results in conviction, a prescription for yet another reversal and a third trial costing, in the state's words, "untold tax dollars." (AB8) The state cites no authority for its misbegoten position. Neither this Court nor the Second DCA in Bowen imposed any such requirement. The state's transparent attempt to save money while gaining a tactical advantage on retrial will surely backfire. Greater

[1]Faretta v. California, 422 U.S. 806 (1975).

savings would have resulted had the state acknowledged earlier in the proceedings that Hughes must receive a new trial.

The state's position that Hughes should be denied counsel on retrial apparently stems from its aggravation over Hughes' consistency in, first, attempting to exercise his right to self-representation and, second, maintaining that the trial court erred in denying this right. But the state overlooks the fact that Hughes made his demand only because he considered the representation by a specific attorney substandard and because the options of acting as cocounsel or having different counsel appointed were foreclosed, If, on remand, Hughes receives counsel who regularly consults with him, provides him depositions to read and advocates his right to a speedy trial, he may have no cause to demand self-representation. Significantly, although the state would deny Hughes' counsel on remand, it has made no complaint about representation by appointed counsel on appeal.

The cases cited by the state for its position are far afield. The holding of this Court that a defendant will not be heard to complain that a sentence reduction he agreed to was illegal, in Owens v. Singletary, 687 So. 2d 1298 (Fla. 1996), does not authorize compelled self-representation on remand from reversal of a conviction obtained after the trial court forced upon him counsel he considered unacceptable. An inconsistent position as to a single circumstance must be distinguished from

different responses to different circumstances. The state cites State v. Roberts, 677 So. 2d 264 (Fla. 1996) for the proposition that literal application of a rule should not be required where it would produce an absurd result. Absurdity, however, is a matter of perspective. The petitioner considers it absurd, as well as unconstitutional, to bind him now to a choice forced upon him at a different time and under different circumstances.

The state cites State v. Beamon, 298 So. 2d 376 (Fla. 1974), for the aphorism that the accused "cannot carry water on both shoulders." (AB10) Respondent neglects to point out that the Court was speaking of a defendant's inconsistent positions as to the alleged date of the offense. Apart from the maxim above and the inclusion of the buzzwords "inconsistent" and "estopped," petitioner cannot fathom how Beamon is even remotely 'on point" in compelling Hughes to represent himself on retrial from a reversal of a conviction obtained after he was wrongly denied the right to proceed pro se rather than with counsel whose actions he did not trust.

Respondent's position should be seen for what it is: an appeal to vindictiveness. Had Hughes been granted self-representation at trial and the resulting conviction been reversed for other reasons, no question would arise as to his right to counsel (or to forego counsel) on remand. Only because it has been compelled to acknowledge that the conviction must be

reversed because the trial court erred in denying self-representation does the state seek to deprive Hughes of counsel on remand. Its concession, albeit late, is laudable; its desire to punish Hughes for the errors of others is not.

Accordingly, as the state agrees, the decision of the district court must be quashed with directions to reverse Hughes' conviction and remand for retrial. However, in contrast to the position of the state, the remand must, as in Bowen, be with directions to comply with Faretta v. California, 422 U.S. 806 (1975), not to require Hughes to proceed *pro se.*

II. THE TRIAL COURT ERRED IN CONDUCTING AN INADEQUATE INQUIRY INTO HUGHES' REQUEST TO DISCHARGE COUNSEL.

The state dismisses petitioner's argument on this point as the judicial equivalent of whining. As respondent states, hindsight is 20-20, (AB16) but Hughes had the foresight to realize that, if he continued to proceed with the assistance of counsel he could not trust, he would end up with a guilty verdict of first-degree murder. Moreover, what respondent terms "hand-holding" (AB16) is, to an accused on trial for his life, "assistance of counsel."

Moreover, the question is not whether the state now thinks trial counsel did a good job, but whether the trial court conducted an inquiry sufficient to address Hughes's claim of incompetence of counsel at the time it was made. Cf. Graves v. State, 642 So. 2d 142 (Fla. 4th DCA 1994) (immensity of state's evidence may have stemmed from very defects in counsel's performance identified by defendant). It appear respondent also seeks the benefit of perfect hindsight.

In his assertions that appointed counsel had not kept him apprised of the progress of his case, had not given him depositions to read and had not advocated his right to a speedy trial, Hughes articulated his concerns over counsel's competence as well as he could under the circumstances. The overview of the case requested of counsel by the court in response was inadequate

to address these concerns. To the authority cited in the initial brief for this position, petitioner adds Burgos v. State, 667 So. 2d 1030 (Fla. 2d DCA 1996). There the trial court erred in failing to inquire of counsel regarding the defendant's complaints that counsel had not consulted often enough, that he had not investigated witnesses identified by the defendant, and that he thought the defendant was guilty. If Burgos' claim was sufficient to trigger a Nelson inquiry, so too was Hughes'. The overview requested of counsel did not suffice.

111. THE TRIAL COURT ERRED IN GIVING A JURY INSTRUCTION ON INDEPENDENT ACT THAT FOCUSED ON CAUSATION RATHER THAN THAT THE KILLING BE IN FURTHERANCE OF THE FELONY, AND IN INFORMING THE JURY THAT THE PRINCIPAL THEORY APPLIED TO ALL COUNTS (INCLUDING MURDER).

First, respondent is vexed that the court gave any independent act instruction. However, it did not cross-appeal the ruling. Its complaints ring hollow. Second, respondent distorts the issue by saying, obviously incorrectly, that "Hughes complains on appeal about the instruction that his counsel requested." (AB18) In actuality, Hughes complains about an instruction different from the one proposed by counsel, one which eviscerated the principle that felony murder constitutes a killing committed in furtherance of the felony.

The state's assertion that Hughes affirmatively waived argument on this issue is wrong. Defense counsel did not affirmatively request the instruction given, as in the precedent cited by respondent; instead, he requested a different instruction, and expressed concern over the response. This is inconsistent with the concept of waiver as an intentional relinquishment of a known right. A correct instruction on the theory of defense is a fundamental right. See Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (1945); Dawson v. State, 597 So. 2d 924 (Fla. 1st DCA 1992). Moreover, counsel for a codefendant continued to favor the instruction proposed by the defense over the court's version. To reiterate from the initial brief, the

issue was brought before the court in a timely fashion.

On the merits, the state's invocation of the "entire package of jury instructions" (AB20) overlooks the fact that the complained-of instruction was the only one given on Hughes' theory of defense. The principal instruction, which the state excerpts in whole, actually further undermined the defense theory because the trial court neglected to instruct the jury that the law of principles was limited or circumscribed by the defense of independent act. This was the problem with the court's rsponse to the jury question.

Next, respondent is wrong in finding Buford v. Dugger, 841 F. 2d 1057 (11th Cir. 1988) "substantially on point." First, the federal court considered the issue procedurally barred, rendering the remainder of its brief opinion dictum. Second, Buford raised the complete omission of an independent act instruction; this issue concerns an independent act instruction that was affirmatively harmful to the defendant. Third, the Buford court concluded that the use of the term "associates" did not mislead the jury. In contrast, the independent act instruction given here was both misleading and confusing.

The state's bullet-laden argument on harmlessness cannot withstand the simple observation that a misleading instruction on the sole theory of defense, if that defense is supported by the evidence, cannot be harmless. Again, respondent's premise here

is that no independent-act instruction was warranted, period. However, the trial court correctly concluded that an instruction was justified by the evidence. It erred in giving an instruction that failed to convey the principle that, to render cofelons liable, the killing must be committed in furtherance of the felony. Thus, the error was harmful.

In conclusion, petitioner reiterates that this issue demonstrates that the contents of appellate opinions, which bear on legal issues and are written largely for lawyers and judges, often do not make suitable jury instructions for lay jurors called upon to decide issues of fact. Some words of caution to that effect by this Court would be of benefit to bench and bar.

CONCLUSION

Based on the arguments contained herein and in the initial brief, petitioner requests that this Honorable Court disapprove of the district court decision and answer the certified question in the negative. The conviction should be reversed, and the case remanded for a new trial consistent with the dictates of Faretta, supra.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Steven R. White, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this 21st day of May, 1997.

Respectfully submitted
& Served,

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