IN THE SUPREME COURT OF FLORIDA

EDWARD PRITCH WALSH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-622

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01 THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, EDWARD PRITCH WALSH, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner.

The record on appeal consists of one volume, plus the two-volume trial transcript, which will be referenced as "R," "TI," and "TII," respectively, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed in Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts, except for the following:

1. Petitioner's detailed discussion of his pre-trial competency hearing (IB 3-5) is not relevant to the issues raised in his appeal and this petition, i.e., the sufficiency of the evidence to support the insanity defense instruction and the verdict of guilt.

2. Regarding Petitioner's action of unzipping his pants and exposing his penis to his mother, Petitioner states that his mother

testified that "he would not behave that manner if he had been on his medication" (IB 8). In fact, this testimony was elicited during Petitioner's cross-examination. Josephine Walsh, when asked by defense counsel whether she could tell that Petitioner had not been taking his medication, responded, "I guess" (TI 133). Ms. Walsh further testified that although Petitioner had never threatened her or her husband with knives, she did not know whether he would have done that if he had taken his medication (TI 134).

3. At the time Petitioner was interviewed by the police, he appeared to understand their questions and responded appropriately (TII 217). In his taped statement, Petitioner said that he grabbed a knife because his mother "pissed me off" and "I got mad" (TII 228-229). Regarding his father, Petitioner said, "He cussed me out and shit, so I stabbed him" (TII 234). When Petitioner saw his brother Christopher, he told Christopher, "you better get your dad before I kill his ass" (TII 242). When asked whether he had tried to cut his father's head off, Petitioner responded, "No, I just wanted to kill him, cut his jugular vein and watch him bleed to death" (TII 253). Petitioner also testified that he had thought about killing his father and had told a friend in jail prior to the murder that his family were "assholes" and that he wanted to kill his dad (TII 257-259). However, he then said he had not talked to anybody about wanting to kill his father, and had not thought about it recently (TII 258-259). Petitioner also stated that he was feeling fine when he went to his parents' house and that what happened arose from his father's refusal to give him the keys to

the truck (TII 262). During the interview, Petitioner did not act at all unusual (TII 266). Petitioner also stated that what he had done felt good and that he would have cut Christopher's head off if he had caught him (TII 267).

4. After the State rested, the defense rested (TII 270). The State moved to strike the insanity defense. Id. The following discussion occurred regarding whether the insanity instruction should be given:

> [Prosecutor]: ... now that the defense is going to rest, I would ask that their insanity defense be stricken. They've offered no evidence of insanity whatsoever. The evidence that's come out on cross-examination has been evidence of mental problems. But no evidence has been presented that at the time of the offense the defendant was legally insane as that term is defined under Florida law. Therefore, since there's been no evidence of insanity, I would ask therefore that the insanity defense be stricken.
>
> THE COURT: Mr. Loveless.
>
> [Defense Counsel]: Your Honor, I think there's been ample evidence presented in the form of the State's witnesses. His mother has testified that at age 16 that he had a head injury, that he's been on medication and been treated by psychiatrists, that he has been hospitalized any number of times, that he was required to be on medication, that he acts differently when he's on medication. He -- his own statement was that he had not been given the correct medication. He had not been on medication for at least six days.
>
> The officer testified that he was aware that the person had a mental illness, even a bipolar disorder. The instruction reads: A person is considered to be insane when he or she had a mental infirmity, disease or defect that's been testified to. Because of this condition, he did not know what his consequences, or although he knew, he did not

> know it was wrong. That's a question for the jury to determine.
>
> And it says: All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity -- and that's all that the Defense has to present, evidence by which a jury may have a reasonable doubt as to the defendant's sanity -- then the burden switches to the State to prove beyond a reasonable doubt that the defendant was sane at the time. That's amply been demonstrated here, Your Honor.
>
> [Prosecutor]: All that demonstrated is the presence of a mental illness, and that's not the legal standard of insanity. There's been no evidence of insanity.

(TII 270-272). After a recess to research the insanity defense, the State again argued that there had been no evidence of insanity and defense counsel argued that the evidence of Petitioner's mental illness was evidence of insanity and that if there was any evidence to support the defense the instruction must be given (TII 275-277). The Court then made the following observations:

> THE COURT: The strongest case for the defense on this is not a Supreme Court case from what I've reviewed on the cases that I've cited, but it's Walker vs. State, [479 So.2d 274 (Fla. 2nd DCA 1985)]. In that case -- I'll just read this from here -- this is what causes me concern right now, Mr. Rimmer. They cite to the Yohn decision, Y-O-H-N, which is a major Supreme Court decision from 1985, 476 So. 2d, 123.
>
> They refer to Yohn, and I have reviewed Yohn also. I didn't bring that case up here, but I did review Yohn. And in this Walker case, the State was contending that Yohn was not applicable and that the instructions need not be given because the defense had not raised a reasonable doubt so as to, or created a reasonable doubt so as to rebut the presumption of insanity, the defendant's sanity.
>
> [The court reviews the Walker opinion].

> Now, what I get from [the Walker opinion] is that -- because I tended to think along with what you were making your argument about, Mr. Rimmer, that **although there was evidence presented about Mr. Walsh having a mental impairment, there hasn't been any evidence, expert or nonexpert, that he did not know the difference between right or wrong or did not know what he was doing or did not know the difference between right or wrong. So that those elements of M'Naghten, there's been no evidence presented in any way regarding those elements, but only the elements of -- the element of a mental illness.**
>
> This Walker decision suggests that once evidence of the mental illness comes in to the extent as it was elicited in Walker, perhaps to the extent as elicited in Walsh, that the instruction on insanity should be given because it's an issue for the trier of fact, the jury. **I'm really concerned about keeping it out, Mr. Rimmer, and then having this come back on appeal, when, quite frankly, you know, the strength of the defendant's insanity defense is almost negligible. ...**

(TII 277-280). The trial judge noted that he had expected more evidence of insanity (TII 282), but decided to give the instruction out of an abundance of caution:

> THE COURT: I think the trend is, particularly when you see it in light of like this voluntary intoxication defense, and all the trend in the court system is to reverse trial courts when there's been any evidence presented, when they refuse to give an instruction, Mr. Rimmer. I think that the Court's going to go ahead and give the instruction. **I think it's a very, very weak case for the Defense in that respect. I don't think that the State's going to be prejudiced being able to respond to that, based upon the evidence I've heard.**

(TII 283).

SUMMARY OF ARGUMENT

The State contends that Petitioner has not established that the district court decision below is in direct and express conflict with the decision in Walker v. State, 479 So.2d 274 (Fla. 2d DCA 1985). The Walker decision holds that a defendant need not present expert opinion testimony on the ultimate question of insanity in order to shift the burden of proof to the State and receive the insanity defense instruction. Here, the district court merely ruled that Petitioner failed to present any evidence of one of the elements of the insanity defense, and was therefore not entitled to the insanity defense instruction. These rulings do not address the same issues, and therefore do not conflict.

Moreover, the district court's opinion regarding the propriety of the insanity defense instruction was dicta (unlike in Walker), because Petitioner received his requested insanity defense instruction. The only question that the district court was required to decide was the sufficiency of the evidence to support the verdict. Thus, the Walker decision and the district court decision below do not conflict in this respect as well.

In any event, the district court correctly decided this case. A trial court is fully justified in refusing to instruct the jury on a matter for which there is no evidentiary support. As the trial court and district court accurately noted, Petitioner failed to present any evidence to suggest that he did not understand what he was doing or could not distinguish right from wrong when he killed Rupert Walsh. This failure to present any evidence of one

of the elements of insanity should have precluded Petitioner from receiving the instruction. The district court's decision does not misstate the burden of proof, nor does it allow the trial court to usurp the jury's authority to decide whether a defendant is legally insane. This Court should affirm the district court opinion in all respects.

ARGUMENT

ISSUE I

DOES THE DISTRICT COURT DECISION IMPROPERLY SHIFT THE BURDEN OF PROVING THE DEFENSE OF INSANITY FROM THE STATE TO THE DEFENDANT? (Restated)

ISSUE II

DOES THE DISTRICT COURT DECISION ALLOW THE TRIAL JUDGE TO USURP THE JURY'S AUTHORITY TO DECIDE THE QUESTION OF INSANITY? (Restated)

Jurisdiction

As a preliminary matter, the State continues to argue that Petitioner has not established jurisdiction in this Court by showing that the district court decision below, Walsh v. State, 751 So.2d 740 (Fla. 1st DCA 2000), expressly and directly conflicts with the decision of the Second District in Walker v. State, 479 So.2d 274 (Fla. 2d DCA 1985).

In Walker, the trial court had refused a defense-requested instruction on the burden of proof for an insanity defense, and gave only Standard Jury Instructions 3.04(b) and 2.03. Id. at 275. Subsequent to the trial court decision, this Court decided Yohn v. State, 476 So.2d 123 (Fla. 1985). According to the Walker court, Yohn held that "Standard Jury Instructions (Criminal) 3.04(b) and 2.03 [as then existing] do not adequately instruct on the state's ultimate burden to prove that the defendant was sane at the time of the offense, once there was sufficient evidence presented to rebut the presumption of sanity." Walker at 276. The State agrees with that statement of law. The court then recounted the evidence which created reasonable doubt to rebut the presumption of the

defendant’s sanity. This evidence consisted of lay witness testimony that the defendant had been hospitalized for treatment of mental illness and had exhibited irrational, paranoid behavior, and expert testimony. Id. The expert testimony consisted of various diagnoses of mental illness, but the court specifically stated that “none of [the experts] were able to state unequivocally that the defendant **was insane** at the time of the offenses.” Nonetheless, without further analysis, the court concluded that “[c]learly, the trial produced sufficient evidence to raise a reasonable doubt about the defendant’s sanity” and vacated the conviction. Id.

In the instant case, the district court summarized the evidence as following:

> [Petitioner] suffered from bipolar disorder, required medication to treat the disorder, became angry and erratic when he was not taking his prescribed medication, and may not have been taking his medication on the night the offenses were committed. However, no evidence was presented indicating that, because of his mental disorder, the appellant did not understand the nature and consequences of his actions, nor was evidence presented that, because of his mental disorder, the appellant did not know that his actions were wrong, even if he understood their nature and consequences.

Walsh at 740. The court held that “without such evidence, the presumption of [Petitioner’s] sanity at the time of the offense was not rebutted, the state was not required to prove beyond a reasonable doubt that the appellant was legally sane at the time of the offenses, and no jury instruction on the insanity defense was required to be given.” Id. The court cited several cases to

support this holding, including this Court's decisions in Hall v. State, 568 So.2d 882 (Fla. 1990) and Chestnut v. State, 538 So.2d 280 (Fla. 1989).

A person is considered to be insane when 1) he had a mental infirmity, disease or defect, and 2) because of this condition he did not know what he was doing or its consequences, or, although he knew what he was doing and its consequences, he did not know it was wrong. Florida Standard Jury Instructions (Crim.) 3.04(b). In the instant case, the district court held that without evidence of the second element of insanity set out above, a defendant is not entitled to a jury instruction on the insanity defense. In contrast, the Walker court held that the defendant was entitled to an insanity defense instruction even though the defense experts did not testify to the **ultimate conclusion** of the defendant's sanity. These holdings are not inconsistent: Walker did **not** hold that the evidence failed to produce facts showing one of the essential elements of an insanity defense, only that the expert witnesses did not testify to the ultimate conclusion that the defendant was insane. The district court below did not address the necessity of opinion testimony regarding the ultimate question of the defendant's sanity.

Moreover, the decision below does not conflict with Walker because it was addressing a different alleged error. In Walker, the defendant appealed the court's denial of an insanity instruction, whereas Petitioner here appealed the court's denial of his motion for judgment of acquittal. Although the court below

ruled that the trial court was not required to give the insanity defense instruction, the State submits that this ruling was dicta. Petitioner cannot complain about any refusal to instruct the jury, because the court gave his requested instruction. All that was necessary to support the trial court's ruling was a determination that the State had presented sufficient evidence of sanity to send the case to the jury.

In short, the district court's statement that the evidence was insufficient "contrary to our sister court's holding in [Walker]" was an extraneous expression regarding an inapplicable case. In fact, the two cases do not directly conflict, and this Court should reconsider its decision to accept jurisdiction in this matter.

However, even if this Court retains jurisdiction, it should decline to reverse the district court's correct decision below.

Merits

Florida Standard Jury Instructions (Crim.) 3.04(b) sets forth the legal standards for the affirmative defense of insanity at the time of Petitioner killed Rupert Walsh. The instruction reads in pertinent part:

> A person is considered to be insane when
> 1. He had a mental infirmity, disease or defect.
> 2. Because of this condition
>   a. he did not know what he was doing or its consequences or,
>   b. although he knew what he was doing and its consequences, he did not know it was wrong.
>
> All persons are presumed to be sane. However, if the evidence causes you to have a reasonable doubt concerning the defendant's sanity, then the presumption of sanity

> vanishes and the state must prove beyond a reasonable doubt that the defendant was sane.

In determining whether to give the insanity instruction, the trial court noted "there's been no evidence presented in any way" regarding the element of the insanity defense that Petitioner did not know the difference between right or wrong or did not know what he was doing (TII 280). Nonetheless, the court agreed to give the insanity defense instruction out of an abundance of caution, even though the court acknowledged that Petitioner's insanity defense was "very, very weak" and that "the strength of [Petitioner's] insanity defense is almost negligible" (TII 280, 283). Petitioner then moved for a judgment of acquittal on the ground that the State has not presented any evidence of his sanity, which the court denied (TII 289-290).

Petitioner appealed the denial of the motion for judgment of acquittal to the district court. The district court ruled, in essence, that not only did legally sufficient evidence support the verdict, but that the trial court was not required to give the insanity defense instruction in the first place.

Appellant does not challenge the district court's ruling that the trial court did not err in denying his motion for judgment of acquittal. Instead, Petitioner takes issue with the court's <u>dicta</u> regarding the propriety of the insanity instruction, even though Petitioner requested and received this instruction at trial.

Nonetheless, the district court's reasoning is simply an expression of an elementary principle of law regarding jury instructions:

> While a defendant is entitled to have the jury instructed on the law applicable to his theory of defense, an instruction is not necessary where there is no evidence to support it.

Ray v. State, 755 So.2d 604, 608 (Fla. 2000). The insanity defense requires that the mental infirmity, disease or defect from which a defendant suffered prevented the defendant from knowing what he was doing or its consequences, or, although he knew what he was doing and its consequences, he did not know it was wrong. Florida Standard Jury Instructions (Crim.) 3.04(b). Although there was evidence that Petitioner suffered from a mental illness and may not have been taking his medication at the time of the offense, there was simply no evidence presented that he did not understand the nature and consequences of his actions, or that he could not distinguish right from wrong. The trial court specifically noted that Petitioner presented no such evidence. The district court agreed that Petitioner presented no such evidence. Moreover, Petitioner himself has not identified any such evidence in his initial brief. No evidence was presented from which the jury could conclude that Petitioner did not understand the nature and consequences of his actions, or that he could not distinguish right from wrong, and the district court properly concluded that the trial court would have been justified in denying the insanity instruction.

The State agrees with Petitioner that he "was only required to go forward with sufficient evidence to raise a reasonable doubt as to his sanity" to shift the burden of proving his sanity to the State, and to support the insanity instruction (IB 22). Simply put, Petitioner failed to meet this burden. Without any evidence relating to Petitioner's inability to understand the nature and consequences of his actions, or to distinguish right from wrong, Petitioner did not raise a reasonable doubt that he was sane at the time of the killing.

Petitioner argues that the district court's ruling violates Florida law regarding the burden of proving an insanity defense:

> [The district court's decision] improperly shifts the burden of proof from the State to the defense. Under the First District's decision, the defense would no longer have to merely present enough evidence to raise a reasonable doubt as to sanity. The defense would be required to present some level of conclusive proof of insanity.

(IB 21). Nothing in the district court ruling suggests that a defendant must "present some level of conclusive proof of insanity" to properly raise the insanity defense and shift the burden to the State. Petitioner's ground for this faulty argument is his incorrect implication that the district court based its decision on the lack of opinion testimony on the ultimate issue of insanity (IB 20). In fact, the district court wrote nothing about the necessity of opinion testimony regarding Petitioner's sanity. The district court came nowhere near to ruling that a defendant must present conclusive proof of insanity to shift the burden to the State;

rather, the district court ruled that there simply must be **some** evidence of each element in the insanity defense.

Petitioner also claims that the district court holding "made the issue of whether the evidence rebutted the presumption of sanity one for the trial judge, rather than the jury, which is contrary to Florida law" (IB 21). Petitioner is apparently arguing that he was entitled to present his insanity defense to the jury merely by asserting the claim without adequate evidence to support it. Again, it is well settled that the trial court is not required to give an instruction which is not supported by the evidence. Ray, supra; Sandine v. State, 172 So.2d 634, 635 (Fla. 3d DCA 1965)("The court is not required to instruct upon an issue which is not presented by any reasonable view of the evidence"). A trial court correctly refuses to instruct the jury on a matter that is not supported by the evidence because such an instruction would be confusing and misleading. See Butler v. State, 493 So.2d 451, 452 (Fla. 1986)("the court should not give instructions which are confusing, contradictory, or misleading"). The court is entitled to determine that a defendant has not presented any evidence of an element of the insanity defense and therefore refuse to present the issue to the jury, and its decision to do so does not usurp the jury's authority to decide whether a defendant (who properly presents the issue) was insane at the time of the offense.

The district court's decision is amply supported by decisions of this Court and other district courts. This Court in Hall, supra, held that "expert testimony that a defendant suffered from

a mental infirmity, disease, or defect without concluding that, as a result, the defendant could not distinguish right from wrong is irrelevant." Hall at 885. This ruling is directly contrary to the proposition for which Petitioner claims that Walker stands, and directly supports the decision below. Evidence of mental illness without evidence that the defendant could not distinguish right from wrong is not sufficient to raise reasonable doubt. If in fact Walker holds that such evidence is sufficient to raise reasonable doubt, it has been was overruled by this Court.

Hall was applied in Crockham v. State, 723 So.2d 355 (Fla. 4th DCA 1998), rev. den., 735 So.2d 1284 (1999). In Crockham, the defendant suffered from bipolar disorder, but the evidence showed that at the time of the offense she knew and was able to distinguish between right and wrong, and was able to understand the act she committed was wrong. Id. at 356. Citing Hall, the court ruled that with such evidence, the burden did not shift to the State to prove that the defendant was sane. Id. Crockham is substantially identical to the case at bar, and correctly applies the law.

Petitioner acknowledges the recent passage of § 775.027, Fla. Stat. (2000), in his initial brief, but relegates it to a footnote. This statute reads as follows:

> (1) AFFIRMATIVE DEFENSE.--All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when:

> (a) The defendant has a mental infirmity, disease or defect; and
> (b) Because of this condition, the defendant:
> 1. Did not know what he or she was doing or its consequences; or
> 2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.
> Mental infirmity, disease, or defect does not constitute a defense of insanity except as provided in this subsection.
> **(2) BURDEN OF PROOF.--The defendant has the burden of proving the defense of insanity by clear and convincing evidence.**

Although Petitioner correctly argues that this statute was not in effect at the time he killed Rupert Walsh, it demonstrates that his argument regarding the burden of proof is irrelevant under current law. Under current law, the presumption of sanity no longer "vanishes" once the defendant produces evidence of insanity. The rule of law Petitioner urges this Court to craft with regard the shifting burden of proof would have no application to any case arising after the effective date of § 775.027.

In summary, Petitioner has not demonstrated that the district court erred in ruling that he failed to present any evidence of an element of the insanity defense, and that he was therefore not entitled to an insanity instruction or a directed verdict of acquittal. This Court should affirm the district court opinion in all respects.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 751 So. 2d 740, should be approved, and the judgment entered in the trial court should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

____
JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

____
THOMAS D. WINOKUR
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 906336

OFFICE OF THE ATTORNEY GENERAL
PL-01 THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR RESPONDENT
[AGO# 00-1-4573]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to William C. McClain, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 6th day of November, 2000.

____
Thomas D. Winokur
Attorney for State of Florida

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