IN THE SUPREME COURT OF FLORIDA

JERRY HALIBURTON,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 64,510

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The Appellant was the defendant in the trial court. The Appellee, the State of Florida, was the plaintiff/prosecution. In this brief, the parties will be referred to as they appear before this Court. The symbol "R" will be used to designate the record on appeal.

All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of the case and facts as a generally accurate account of the proceedings at the trial level with the following additions and exceptions noted below and in the argument portion of the brief.

1. Appellant was advised of his rights, including his right to an attorney, three times. The first time was at 6:38 a.m. by Sergeant Bryant. (R. 334-335). The second time was at 7:00 a.m. by Sergeant Houser. (R. 230). The third time was at 2:07 p.m. by the polygraph examiner, Adam Mariano. (R. 260-262). At no time did Appellant indicate that he wanted an attorney and never indicated that he was unwilling to talk to the police. (R. 233,234,238,239,246,252,262,268,337,344). Appellant's attitude was one of extreme cooperation in that he wanted to prove that he did not commit the crime. (R. 234). The questioning began at approximately 7:00 a.m. and continued until 9:30 a.m., with some short breaks. (R. 235). The officers obtained Appellant's consent to take the polygraph. (R. 237). At 10:10 a.m., Appellant was given coffee and food to eat. (R. 238).

During these statements, Appellant stated that he and the victim had smoked a reefer on Saturday night, after which Appellant went to a party at his sister's home. (R.1631-1633). The officers then told the Appellant that the victim had some people over at his house on Saturday night and that none of the people at the party had seen him there. (R. 1675-1676).

Appellant then admitted that he had burglarized a number of homes in the area, but denied breaking into the victim's home. (R. 1689-1693). The officers told Appellant that the victim did not socialize with blacks. The Appellant, however, insisted that he had smoked four joints with the victim. (R. 1694-1697). Appellant claimed that he had smoked the marijuana inside of the victim's apartment while sitting on the bed. (R. 1717).

2. Appellant signed a consent to take the polygraph at approximately 2:12 p.m. Mariano went through the Appellant's background and the questions he was going to ask with Appellant, until 3:00 p.m. From 3:00 p.m. until 3:30 p.m., the polygraph was given. (R. 264). At that time, Mariano told Appellant that there was deception. Appellant at first denied breaking into the apartment, but then admitted that he had broken into the front door, and once inside the apartment, saw the victim lying in the bed, bleeding. He then ran out of the apartment from the back door. (R. 265). At approximately 3:48 p.m., Appellant signed the post-test release confirmation, and Mariano told Houser and Bryant about what Appellant had told him. (R. 265-266). Houser and Bryant then questioned Appellant, during which time Appellant, in the taped statement which is the subject of the suppression motion, repeated what he told Mariano. (R. 246). Questioning ceased at 4:20 p.m. when ordered to by Chief Jamason. (R. 246-247, 344).

3. Adam Mariano testified that it is the police understanding, that once a polygraph begins, it is not interrupted, and that there would be no way for someone on the

outside of the polygraph room to know whether he was in the pre-testing or the testing stage. (R. 276).

4. Thomas Burford testified that it was probably after 3:00 p.m. when he told Sergeant Bryant on the telephone that he had been retained by Appellant's sister to represent the Appellant and that even though he wanted no further questions, it was all right to finish the polygraph test because Bryant had stated that they were just about finished with it. (R. 295-296). Burford stated that he had made the call about ten to thirty minutes before he was ejected from the police station at 3:58 p.m. (R. 297-298, 312). Burford testified that from the time Judge Barkett issued her first oral order to the police, until the time he saw the Appellant, it was ten to twenty minutes. (R. 307).

5. Lieutenant Gabbard testified that he spoke to Burford at 4:00 p.m. At that time he and Captain Griffin explained to Burford that he could not wait in the Detective Division, and that Appellant was involved in the polygraph test. (R. 279). Gabbard further explained that Appellant had been advised of his rights on several occasions and had waived them, and it was his opinion that Appellant had not requested a lawyer. Burford refused Gabbard's request to leave the Division and became angry and upset. Gabbard told Burford he would have ample opportunity to question their decision not to allow him into the polygraph room. (R. 279). Gabbard then became very firm with Burford and walked with Burford out of the Division. (R. 280, 285).

6. At the motion to suppress, Appellant stated that he was not arguing that there was any coercion used by the officers as a basis for the motion to suppress. (R. 294). Appellant's written memorandum, never alleged that the confession or waiver was not voluntarily given, only that the waiver was not knowingly and intelligently made. (R. 2286).

7. On August 13, 1981, Appellant was arrested for murder and burglary, but the grand jury refused to indict him for the murder. On November 3, 1981, Appellant was charged by information with burglary. (R. 2237-2238) Later, Appellant's brother, Freddie Haliburton and Freddie's girlfriend, Sharon Williams, came forward with confessions to the murder which Appellant had made to them. (R. 467-468). Thereafter, on March 24, 1982, the grand jury indicted Appellant for the murder. (R. 2542-2543).

8. Freddie Haliburton testified at trial that in December of 1981 while at a family barbecue Appellant confessed that he killed "the cracker," describing how he entered the apartment, and how after he stabbed the victim the first time the victim raised his arms in defense and Appellant continued to stab him. Appellant wanted to cut the victim's penis off and put it in the victim's mouth. Appellant advised Freddie that if he ever wanted to kill someone he should use a knife because it is hard to trace, and told Freddie that "there's a couple more people that I want to get." When Freddie asked him why he did it, Appellant responded that it was "to see if I have the nerve to kill someone like this and that's

when he stated about the people, couple people he had to get later on." No one else was present during this conversation, and the next time Appellant mentioned the murder to Freddie was almost one and one-half months later during a minor confrontation with another man on Tamarind Avenue after which Appellant said, "that nigger must don't know who I am. I kill him just like I kill that cracker." At first Freddie did not go to the police with the information because of the reaction he expected from his family, but he eventually did go to the police and gave a statement after his girlfriend called him and told him that she had been attacked by Appellant. Freddie testified that at the time he went to the police there were no criminal charges pending against him, and he was not looking for any sort of deal. However, he acknowledged that he had been convicted of crimes twice, and that he had reached an agreement with the prosecutor's office about a burglary charge in return for his tesimony at trial. He also acknowledged that he shot his brother, and had been given use immunity with respect to that acknowledgment at this trial. (R. 1775-1801).

Sharon Williams, Freddie's girlfriend, testified about the attack on her by Appellant on March 8, 1982 at 3:00 a.m. in her apartment, during which he also confessed the murder. At first she did not report the incident because she was frightened, but eventually she told Freddie about the attack, about what Appellant had said, and she and Freddie went to the police station and gave their statements separately. (R. 1837-1852).

ISSUES PRESENTED FOR REVIEW

The following are the issues that this Court in its order of January 28, 1987, ordered be addressed by supplemental briefs:

I

WHETHER THE FAILURE OF THE POLICE TO ADVISE THE APPELLANT THAT AN ATTORNEY WAS AVAILABLE TO SPEAK TO HIM WAS MISCONDUCT THAT MADE ANY STATEMENT BY THE APPELLANT AFTER THE ATTORNEY'S PRESENCE WAS KNOWN TO THE POLICE TO BE INVOLUNTARY?

II

WHETHER ASIDE FROM THE VOLUNTARINESS ISSUE, WAS THE POLICE CONDUCT A DENIAL OF DUE PROCESS TO THE APPELLANT?

SUMMARY OF THE ARGUMENT

The failure of the police to advise the Appellant that an attorney, unrequested by him, was available to speak to him was not misconduct, in that the Appellant had been advised of his right to counsel three times, and waived it three times. Furthermore, the officers were not constitutionally required to advise the Appellant that the unrequested attorney wanted to speak to him. Thus, because the actions did not violate Appellant's constitutional rights, they cannot be deemed as misconduct. In addition, the police officers' actions did not make the Appellant's statements involuntary, as Appellant has never claimed that he was coerced in any manner. The state clearly established that Appellant's statements were voluntarily made. If there was a violation of ethics, the people of the State of Florida should not be punished for the same by suppressing reliable evidence.

The failure of the police to advise the Appellant that the attorney, unrequested by him, was available to speak to him did not deny Appellant his due process rights, as there was no misrepresentation to the attorney or not one that affected the Appellant's rights. Appellant's rights to counsel did not attach as he never requested counsel and interrogation, pre-first appearance, is not a critical stage of the proceedings. Finally, the Appellant was not denied his due process rights when the admission of the statement was harmless error.

ARGUMENT

I

THE FAILURE OF THE POLICE TO ADVISE THE APPELLANT THAT AN ATTORNEY WAS AVAILABLE TO SPEAK TO HIM WAS NOT MISCONDUCT THAT MADE ANY STATEMENT BY THE APPELLANT AFTER THE ATTORNEY'S PRESENCE WAS KNOWN BY THE POLICE TO BE INVOLUNTARY.

1. The Failure of the Police to Advise the Appellant that an Attorney was Available to Speak to Him was Not Misconduct.

Contrary to the Appellant's assertions, there is no misconduct by the police if they fail to advise a defendant that an attorney, unrequested by him and retained by a third party, was available to speak to him. This Court did not rule that there was police misconduct in its initial opinion, but only held that the failure to advise the Appellant that Mr. Burford was at the police station asking to speak to him vitiated his otherwise valid waiver of his right to counsel. Haliburton v. State, 476 So.2d 192, 194 (Fla. 1985). The United States Supreme Court in its opinion in Moran v. Burbine, 475 U.S.___, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), and by its vacation of this Court's opinion in this instant case has held otherwise. In Burbine, the Court held that the Fifth Amendment does not require the police to inform a suspect of an attorney's efforts to reach him. 89 L.Ed.2d at 1410. The police actions should not be deemed as "misconduct" when such actions did not violate the appellant's constitutional rights.

The cases cited by Appellant do not support his

argument of misconduct. In State v. Alford, 225 So.2d 582 (Fla. 2d DCA 1969), the defendant was never advised of his rights to counsel. In Davis v. State, 287 So.2d 399 (Fla. 2d DCA 1973), the defendant was an inexperienced seventeen year old boy. In addition, the attorney had requested to see the defendant thirty minutes before questioning. In the instant case, the Appellant was an experienced adult. He was informed of his rights on three different occasions and waived those rights on each occasion. In addition, the polygraph was well underway before Burford either called or arrived at the police station. Escobedo v. Illinois, 378 U.S. 478 (1964) is likewise distinguishable because there, the defendant requested counsel.

The Appellee submits that there is no compelling reason for this Court to deviate from the United States Supreme Court's decision in Moran v. Burbine, supra. In issues involving the admissibility of a defendant's statements, this Court has followed the decisions of the United States Supreme Court. In Montgomery v. State, 176 So.2d 331 (Fla. 1965), a pre-Miranda [1/] decision, this Court held that an extrajudicial confession, if freely and voluntarily made was admissible, even though the defendant was not warned of his constitutional rights. This Court held that under the Supreme Court decisions, the Fourteenth Amendment did not require this Court to adopt the federal rule requiring

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1/ Miranda v. Arizona, 384 U.S. 436 (1966).

the advisement to the defendant of his constitutional rights. 176 So.2d at 333. Then in Nowlin v. State, 346 So.2d 1020 (Fla. 1977), this Court overruled a prior decision of the Court and followed the United States Supreme Court's decisions in Harris v. New York, 401 U.S. 222 (1971) and Walden v. United States, 347 U.S. 62 (1954) in allowing confessions obtained in violation of Miranda, to be used to impeach the defendant's trial testimony. See State v. Retherford, 270 So.2d 363 (Fla. 1972).

From these two cases, it can be seen that this Court in the area of extrajudicial confessions has not expended a defendant's rights under an interpretation of the state constitution or statutes. Rather, as stated by Justice England in his concurring decision in Nowlin v. State, supra, "in this area of criminal law enforcement behavior, we have an obligation to maintain reasonable decisional stability." 346 So.2d at 1025. (England., J., concurring). Thus, Appellee submits that if the police officers have not violated a defendant's constitutional rights, as is the case before this Court, there can be no benefit to society in deeming the officer's actions as misconduct and

suppressing the statements. 2/

Appellee would further submit that this Court's decision in Jamason v. State, 455 So.2d 380 (Fla. 1984) is irrelevant to this instant case. This Court did not approve Judge Barkett's underlying oral order to allow the attorney access to the defendant, but rather ruled on the narrow ground that oral orders are valid and must be followed on pain of contempt. The Appellee submits of course, that the underlying order in Jamason as in the instant case was an incorrect interpretation of what the law required the police officers to do.

Finally, Appellee would submit even if there can be deemed to be some sort of violation of ethics by the police, that does not require the suppression of the defendant's statements. To that extent, the issue is similar to that when a prosecutor improperly comments on a defendant's right to remain silent or makes any other improper

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2/ The only area in which this Court has deviated from federal interpretations as they involved the Fifth Amendment is that involved in what test should be applied in determining if a prosecutor has impermissibly commented on a defendant's right to remain silent. See State v. Kinchen, 490 So.2d 21 (Fla. 1985). However, that is because as explained by this Court in State v. DiGuilio, 491 So.2d 1129 (Fla. 1986), Florida has had in effect, since 1895, statutes which prohibited those types of arguments. As shown supra, prior to 1966 and the Miranda decision, this Court did not even require the advisement of a defendant's rights in order for the statement to be admissible against the defendant. Thus, there is a clear distinction in the way this Court has treated comments on silence and admissibility of extrajudicial statements. It should also be noted that in DiGuilio, this Court overruled its prior cases, and held that it would follow the United States Supreme Court's decisions that such comments are subject to the harmless error rule.

comments. The remedy in those cases, if the comment did not prejudice the defendant, such that it affected the verdict, was to refer the matter to the Florida Bar for disciplinary investigation.[3/] However, such individual professional misconduct is not to be punished at the citizen's expense. See State v. Marshall, 476 So.2d 150, 153 (Fla. 1985); Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). The Appellee submits that as with improper prosecutorial comments, the people of the State of Florida should not be punished by the exclusion of reliable evidence, i.e., the defendant's statements, where the alleged misconduct did violate the defendant's constitutional rights. [4/]

3/ The police officers could be punished by contempt as in Jamason, supra, if they do not obey a court's order, even if the order was legally incorrect.

4/ Appellee would note that since Moran v. Burbine, several states have followed Burbine. See Lodowski v. State, 307 Md. 233, 513 A.2d 299 (1986); Ex Parte Neelley, 494 So.2d 697 (Ala. 1986); State v. Porter, 210 N.J. Super. 383, 510 A.2d 49 (1986); State v. Lohman, 707 S.W.2d 478 (Mo.App.1986). In Lodowski v. State, supra, the United States Supreme Court, like in the instant case, had vacated the previous decision in light of Moran v. Burbine. The Maryland Supreme Court on remand found no violation of the federal or state constitution. 513 A.2d at 304-307. Of course prior to Burbine, several states also found that the police were not required to inform a defendant that counsel was available. See, e.g., Blanks v. State, 254 Ga. 420, 330 S.E.2d 575 (1985); State v. Blanford, 306 N.W.2d 93 (Iowa 1981); State v. Chase, 55 Ohio St.2d 237, 378 N.E.2d 1061 (1978); State v. Burbine, 451 A.2d 22 (R.I. 1982); Wheeler v. State, 705 P.2d 861 (Wyo. 1985). Appellee recognizes that since Burbine, supra, that California in People v. Houston, 230 Cal.Rptr. 141, 724 P.2d 1166 (Cal. 1986) found a violation under their state constitution. But see People v. Gott, 117 Cal.App.3d 125, 173 Cal.Rptr. 469 (1981). Appellee submits that the dissenting opinion in Houston is the more persuasive one.

2. Any Misconduct by the Police in Failing to Advise the Appellant That an Attorney was Available to Speak to Him Did Not Make the Statements by the Appellant Involuntary.

Appellant, alleges that because he was held incommunicado from 6:30 a.m. on, that counsel was told incorrectly that the polygraph was still going on when he called, and that counsel's visit and the first call from Judge Barkett were rebuffed by the police, his statements were coerced and involuntary. Appellee submits that this argument is without merit.

First, it must be noted that during the motion to suppress, Appellant waived any reliance on coercion as a basis for the motion to suppress. (R. 294). As such, Appellant has waived this issue for appellate review. See Kennedy v. State, 261 So.2d 862, 863 (Fla. 3d DCA 1972). See generally Tillman v. State, 471 So.2d 32, 34-35 (Fla. 1985).

Secondly, Appellant was not held incommunicado. He was questioned for approximately two hours and ten minutes in the morning. Short breaks were given, and at the end of the questioning Appellant was given coffee and food. Appellant was advised three times of his rights, but never requested to speak to counsel or anyone. Appellant was cooperative and wanted to prove his innocence. Appellant consented to a polygraph, which began a little after 2:00 p.m. and concluded at 3:30 p.m. Appellant was then questioned from 3:56 p.m. until 4:20 p.m. What occurred between Burford, the police

and Judge Barkett simply had no bearing on the Appellant's willingness to make the statements. As the Supreme Court stated in Moran v. Burbine, supra, the withholding of the information is irrelevant where it did not deprive the Appellant of information essential to his ability to understand the nature of his rights and the consequences of abandoning them. 89 L.Ed.2d at 422. See also Colorado v. Spring, 479 U.S.___, 107 S.Ct. ___, 93 L.Ed.2d 955 (1987). The state clearly carried its burden of proving by a preponderance of the evidence that Appellant voluntarily made the statements and voluntarily waived his rights. See Colorado v. Connelly, 479 U.S.___, 107 S.Ct. ___, 93 L.Ed.2d 473 (1986). 5/

5/ Appellee would also note that the officers never misrepresented or gave Burford any incorrect information concerning the Appellant's status. When Burford called the second time to inform the police that he had accepted the representation of Appellant, he was told that the Appellant was almost finished with the polygraph and it could not be interrupted. Burford agreed that it was all right to finish the polygraph. (R. 295-296). Burford stated he made the call about ten to thirty minutes before he was ejected from the police station at 3:58 p.m. (R. 297-298, 312). That would make Burford's call somewhere between 3:28 p.m. and 3:48 p.m. The polygraph began at 3:00 p.m. and finished at 3:30 p.m. Thus, the information given to Burford was true. Even if the polygraph had not begun or just begun, there was no way for someone outside the polygraph room to know that. (R. 276).

II

ASIDE FROM THE VOLUNTARINESS ISSUE, THE POLICE CONDUCT WAS NOT A DENIAL OF DUE PROCESS TO THE DEFENDANT.

In Moran v. Burbine, supra, the Supreme Court held on facts which could be deemed "worse" than in the instant case, that there was no due process violation. 89 L.Ed.2d at 428. In Burbine, the police either intentionally or negligently gave false information to the defendant's attorney concerning whether they were interrogating him. In the present case, there was no such false information. See footnote 4, supra. Because there is no federal due process violation, Appellant asserts that one exists under the state constitution because under the state constitution and statutes, Appellant's right to counsel had attached. Appellee submits that Appellant's argument is without merit. In Moran v. Burbine, supra, the United States Supreme Court rejected the argument that the defendant's Sixth Amendment right to counsel had attached during the interrogation sessions where the prosecution had not yet commenced by way of formal charge, preliminary hearing, indictment, information or arraignment. 89 L.Ed.2d at 425-428. See also United States v. Gouveia, 467 U.S. 180 (1984). The Court rejected Burgine's argument that under Escobodo v. Illinois, supra, interrogation was a critical stage of the proceedings, stating that Escobedo's dictum concerning the Sixth Amendment was expressly disawvowed. 89 L.Ed.2d at 426.

This Court, likewise has never held that interrogation, prior to first appearance was a critical stage of the proceedings.

In fact, in Montgomery v. State, 176 So.2d 331, 334 (Fla. 1965), this Court held that due process under the state constitution did not require counsel at a preliminary hearing. Of course, the United States Supreme Court, has subsequently held otherwise. See Coleman v. Alabama, 399 U.S. 1 (1970). What this establishes is that this Court has not interpreted the state constitution to provide any further rights to counsel than required by the Sixth Amendment. See Anderson v. Charles, 420 So.2d 574, 576 (Fla. 1982) (a defendant's right to counsel was interpreted the same way under state and federal constitution).[6/]

Appellant relies on Rule 3.111 of the Florida Rules of Criminal Procedure to support his argument before this Court. However, Appellant never cited the rule to the trial court, and as such cannot raise it for the first time on appeal. See Tillman v. State, supra. However, the rule is inapplicable in that it is clear that when Rule 3.111(a), which provides that a person is entitled to the appointment of counsel as soon as feasible after custodial restraint, is read in pari materia with Rule 3.111 (c)(1)(2), its purpose is to effectuate a defendant's request for counsel, not an unrequested counsel's desire to see a defendant. The same purpose is behind section 901.24, Florida Statutes, that is, to effecuate the arrested person's request to consult with an attorney. See State v. Hoch, 500 So.2d 597 (Fla. 3d DCA 1986).

6/ Recently, this Court in Keen v. State, ___ So.2d ____, case no. 67,384 (Fla. March 19, 1987) followd Moran v. Burbine supra, and held that a defendant's right to counsel does not attach until formal charges have been filed.

Appellant's main contention seems to be that a defendant's due process rights are violated if an attorney, even though unrequested by him is denied access to the defendant.[7/] In other words, the violation of the attorney's right to see his client, becomes a violation of the defendant's due process rights. Appellee submits that such a focus is improper. Rather, the focus must be on the defendant, whether his rights were violated. Otherwise a defendant's right against self-incrimination is no longer personal. As this Court stated "the determination of the need of counsel is the defendant's prerogative. Thus, just as his attorney would have no right to waive [defendant's] right to counsel without his consent, [he] likewise would have no right to unilaterally invoke that right." Valle v. State, 474 So.2d 796, 799 (Fla. 1985). See also Roman v. State, 475 So.2d 1228 (Fla. 1985). Thus, unless the Appellant had requested counsel, and then access to counsel was denied, there can be no violation of any of the defendant's state or federal constitutional rights.

Appellee maintians that a rule which would allow an attorney to interrupt an interrogation after the defendant has been advised of his rights, has waived them, and has willingly submitted to questioning would effectively move the

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7/ Cash v. Culver, 122 So.2d 179 (Fla. 1960) relied upon by the Appellant is inapplicable to the present case. In Cash the defendant had already been tried, a trial that resulted in a mistrial. He was denied a continuance to consult and obtain a new attorney for the retrial. This Court found that such actions denied the defendant his right to due process. But it is clear that defendant's right to counsel had attached as the defenant was about to be retried.

focus of the rule against self-incrimination from eliminating coercion to eliminating confessions. "Whether, its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring(s) to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter? 67 Geo. L.J. 1, 95 (1978). The criminal justice system is intended to be a search for the truth, and confessions (with proper safeguards) should be encouraged, not eliminated. See Culombe v. Connecticut, 367 U.S. 568, 578 (1961). Appellant was accorded those safeguards, and the trial court correctly denied the motion to suppress.

Finally, Appellee would assert that Appellant was not denied his due process rights, certainly not at trial, where the admission of the statement, even if improper, did not affect the jury's determination of the proper verdict. See State v. Diguilio, supra. In the recorded statement, Appellant never admitted that he had committed the murder, but he did admit breaking in and seeing the body. That statement did not affect the jury's decision to convict. There is little question that Appellant committed the burglary. His fingerprints were found on the newly-replaced jalousies at the point of entry to the house. (R. 967, 1150, 1185, 1276, 1281-1282). Appellant, in his earlier admissible taped statements, provided no reasonable explanation for his fingerprints to be on the jalousies. He stated that he had been

in the victim's apartment only one time to smoke a joint in the bedroom. (R. 1683, 1687). That does not explain his fingerprints on the jalousies. Furthermore, there was testimony that the victim was a racist who did not socialize with blacks. (R. 936-937, 955-956, 960-964, 1000, 1053-1054).

What is most important was Appellant's confessions to his brother, Freddie Haliburton, and Sharon Williams, Freddie's girlfriend. Without these confessions, the grand jury refused to initially indict Appellant on the murder charge even though it had the taped statements. Thus, it is obvious that these confessions were the key in Appellant's conviction for murder.

Freddie Haliburton testified at trial that in December of 1981 while at a family barbecue Appellant confessed that he killed "the cracker," describing how he entered the apartment, and how after he stabbed the victim the first time the victim raised his arms in defense and Appellant continued to stab him. Appellant wanted to cut the victim's penis off and put it in the victim's mouth. Appellant advised Freddie that if he ever wanted to kill someone he should use a knife because it is hard to trace, and told Freddie that "there's a couple more people that I want to get." When Freddie asked him why he did it, Appellant responded that it was "to see if I have the nerve to kill someone like this and that's when he stated about the people, couple people he had to get later on." No one else was present during this conversation, and the next time Appellant mentioned the murder to Freddie was almost

one and one-half months later during a minor confrontation with another man on Tamarind Avenue after which Appellant said, "that nigger must don't know who I am. I kill him just like I kill that cracker." At first Freddie did not go to the police with the information because of the reaction he expected from his family, but he eventually did go to the police and gave a statement after his girlfriend called him and told him that she had been attacked by Appellant. Freddie testified that at the time he went to the police there were no criminal charges pending against him, and he was not looking for any sort of deal. However, he acknowledged that he had been convicted of crimes twice, and that he had reached an agreement with the prosecutor's office about a burglary charge in return for his testimony at trial. He also acknowledged that he shot his brother, and had been given use immunity with respect to that acknowledgement at this trial. (R. 1775-1801).

Sharon Williams, Freddie's girlfriend, testified about the attack on her by Appellant on March 8, 1982 at 3:00 a.m. in her apartment, during which he also confessed the murder. At first she did not report the incident because she was frightened, but eventulaly she told Freddie about the attack, about what Appellant had said, and she and Freddie went to the police station and gave statements separately. (R. 1837-1852).

Thus, Appellee submits that the Appellant's statements were at most cumulative to the testimony of Freddie

Haliburton and Sharon Williams, as well as to the physical evidence of the fingerprints. As such, the admission of the taped statement was clearly harmless error. See Milton v. Wainwright, 407 U.S. 371 (1972); Barfield v. State, 402 So.2d 377 (Fla. 1981); Roth v. State, 359 So.2d 881 (Fla. 3d DCA 1978).

CONCLUSION

Based on the foregoing argument Appellee respectfully submits that no error was committed by the trial court and respectfully requests that the judgment and sentence of the trial court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Answer Brief of Appellee has been furnished, by United States Mail, to CHARLES W. MUSGROVE, ESQUIRE, Attorney for Appellant, Congress Park, Suite 1-D, 2328 South Congress Avenue, West Palm Beach, Florida 33406 this 19 day of March, 1987.

Penny H. Brill
Of Counsel