IN THE SUPREME COURT OF THE STATE OF FLORIDA

JERRY HALIBURTON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 72,277

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Jerry Haliburton, the capital criminal defendant below, will be referred to as "appellant." Appellee, the State of Florida, the prosecuting authority below, will be referred to as "the State."

References to the seven-volume record on appeal will be designated "(R:);" to the one-volume supplemental record, "(SR:);" and to the one-volume second supplemental record, "(SSR:)." References to certain prior records in this case will be designated in appropriately descriptive terms.

All emphasis will be supplied by the State.

STATEMENT OF THE CASE AND FACTS

The State accepts appellant's "statement of the case" and "statement of the facts," to the extent that they are nonargumentative and relevant, as reasonably accurate narrative synopses of the legal occurrences and the evidence adduced below for purposes of resolving the narrow legal issues presented upon appeal, subject to the considerable additions and clarifications contained in the argument portion of this brief.

SUMMARY OF ARGUMENTS

During the guilt phase of this capital proceeding, the trial judge abided by this Court's precedents by denying appellant's motion for a special verdict form; by limiting defense counsel's improper closing argument; by processing the jury's request for a readback of testimony; by admitting relevant pictures of the victim; and by refusing to declare a mistrial due either to "cumulative error" or to the prosecutor's alleged attempts to shift the burden of proof.

During the penalty phase, the judge again adhered to this Court's precedents by refusing to declare Florida's death penalty unconstitutional; by submitting the issue of whether this murder was heinous, atrocious or cruel to the jury; and by making sufficient findings to sentence appellant to death.

ISSUE I

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY DENYING APPELLANT'S MOTION FOR A SPECIAL VERDICT FORM

ARGUMENT

Appellant firstly alleges that the Hon. Jack Cook reversibly erred by denying his motion that the jurors be given a special verdict form requiring that they unanimously select whether he was guilty of the capital first degree murder of Donald Bohannon charged via premeditation and/or via commission of an underlying felony (R 609-613; 940; 976). The State disagrees.

Numerous holdings of this Court have established that the State may generically charge a defendant with committing first degree murder via premeditation and yet prove the defendant guilty of the charge at trial via his commission of an underlying felony. See e.g. Knight v. State, 338 So.2d 201 (Fla. 1976), State v. Pinder, 375 So.2d 836 (Fla. 1979), O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), and Bush v. State, 461 So.2d 936 (Fla. 1984), cert. denied, 475 U.S. 1031 (1985). This Court has further concomitantly held that...

> ...a special verdict form is not required to determine whether a defendant's first-degree murder conviction is based upon premeditated murder, felony murder or accomplice liability.

Buford v. State, 492 So.2d 355, 358 (Fla. 1986). In Brown v. State, 473 So.2d 1260, 1265 (Fla. 1985), cert. denied, 474 U.S. 1036 (1985), the Court explained the rationale for this ruling:

> Neither constitutional principles nor rules of law or procedure require such special verdicts in capital cases. The sentencing and reviewing courts can determine [when] a defendant may not constitutionally receive the death penalty... [A] special jury verdict... would not...resolve this question.

See also Wool v. State, 14 F.L.W. 152 (Fla. 2nd DCA Dec. 28, 1988), which relied upon Buford and Brown to hold that...

> ...there was [no] error in the trial court's refusal to instruct that the jury must unanimously agree upon the particular theory upon which a verdict of first degree murder is based.

Stare decisis requires that this Court stand by these well-reasoned precedents here, see also People v. Sullivan, 65 N.E. 989 (N.Y. 1903), People v. Milan, 507 P.2d 956 (Cal. 1973), State v. Williams, 285 N.W. 2d 248 (Iowa 1979), cert. denied, 446 U.S. 921 (1980), and State v. James, 698 P. 2d 1161 (Alaska 1985), particularly since Freddy Haliburton's testimony that appellant confided he had entered the victim's house and knifed the victim to death for the thrill of it would have strongly supported jury verdicts that appellant perpetrated the instant murder both with premeditation and while committing the underlying felony of residential burglary (R 527-529).

ISSUE II

THE TRIAL JUDGE DID NOT REVERSIBLY ERR IN RESTRICTING DEFENSE COUNSEL'S CLOSING ARGUMENT

ARGUMENT

Appellant secondly alleges that the trial judge reversibly erred in restricting defense counsel's guilt-phase attempt in closing argument to portray the State's case as weakened by the prosecutor's failure to call one Danny Lee, who had driven Bohannon's ex-girlfriend, Teresa Kast, to the victim's house where she discovered the body (R 641-645; 288). Primarily because Mr. Lee was available to be called as a witness by either side (R 643), the State disagrees.

In Hill v. State, 515 So.2d 176, 178 (Fla. 1987), cert. denied, ___U.S.___, 108 S.Ct. 1302 (1988) this Court axiomized:

> The purpose of closing argument is to help the jury understand the issues by applying the evidence to the law applicable to the case.

Defense counsel's argument below simply did not serve this purpose under the Court's decision of State v. Michaels, 454 So.2d 560, 562 (Fla. 1984):

> When...witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness.

Alternatively, any error in the instant limitation of counsel's closing would be clearly harmless under State v.

DiGuilio, 491 So.2d 1129 (Fla. 1986) and Ciccarelli v. State, 531 So.2d 129 (Fla. 1988) given its modest nature, the broad discretion traditionally afforded trial judges in regulating the arguments of counsel, and the vast evidence of appellant's guilt for this murder.

ISSUE III

THE TRIAL JUDGE DID NOT REVERSIBLY ERR IN PROCESSING THE JURY'S REQUEST FOR A READBACK OF TESTIMONY

ARGUMENT

Appellant thirdly alleges that the trial judge reversibly erred by processing the jury's straighforward request for a readback of the testimony of "Cindy Miller, Mike Bohannan, and Roger Miller...that deal[t] with the time of the replacement of the jalousies" which appellant displaced to enter the victim's house (R 693-707) by refusing to include a readback of the unrequested testimony of Sgt. James Wilburn dealing with the fact that portions of these jalousies had been spray painted at some unspecified point in the past (R 348-349; 384-385; 697-698). The State disagrees.

"Florida law has given the trial court a wide latitude in deciding whether or not to have testimony re-read to jurors upon request." Kelley v. State, 486 So.2d 578, 583 (Fla.1986), cert. denied, 479 U.S. 871 (1987). If the judge does opt for a re-reading, it cannot constitute an abuse of this discretion to limit same to those items explicitly requested by the jurors. See Thomas v. State, 220 So.2d 638, 639 (Fla. 3rd DCA 1969). Matters not germane to such a request should obviously not be included in a readback. Cf. Jenkins v. State, 317 So.2d 114, 116 (Fla. 3rd DCA 1975). Appellant's jurors simply did not ask for a readback of Wilburn's testimony, and appellant has not explained

how such was even marginally relevant to their question. Clearly, no reversible abuse of judicial discretion occurred by virtue of the instant ruling.

ISSUE IV

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY ADMITTING PROBATIVE PHOTOGRAPHS OF THE VICTIM'S BODY

ARGUMENT

Appellant fourthly alleges that the trial judge reversibly erred by admitting three photographs of Bohannon's body (R 110; 228A), probative of the victim's identity and wounds (R 95; 229), because such were taken at the crime scene only after a sheet had been removed from the body and were somewhat gory (R 93; 98-99; 102; 104-105; 235-236; 340). The State disagrees.

Fundamentally, "those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments, " Henderson v. State, 463 So.2d 196, 200 (Fla. 1986), cert. denied, 473 U.S. 916 (1986). "The basic test of admissibility of [such] photographs...is not necessity, but relevance.'' Straight v. State, 397 So.2d 903, 906 (Fla. 1981), cert. denied, 454 U.S. 882 (1981). In Straight v. State, this Court affirmed the admission of several autopsy photographs which depicted the obviously altered appearance of the murder victim's body after it had spent twenty days in a river, despite the gruesome nature of these photographs and despite the defendant's offer to stipulate to the only fact the photographs were relevant to prove, which was the manner of death. Under Straight, the current photos were clearly admissible. See also Adams v. State, 412 So.2d 850 (Fla. 1981), cert. denied, 459 U.S. 882 (1983) and

Jennings v. State, 512 So.2d 169 (Fla. 1987), cert. denied, U.S.___, 108 S.Ct. 1061 (1988). Appellant's reliance upon Young v. State, 234 So.2d 341 (Fla. 1970) for the proposition that the judge here reversibly abused his considerable discretion in admitting the three pictures, is woefully misplaced insofar as that case involved the admission of 45 highly inflammatory photos, mostly of marginal relevance, compare Straight v. State, 397 So.2d 903, 907.

ISSUE V

THE TRIAL JUDGE DID NOT REVERSIBLY ERR IN REFUSING TO DECLARE A MISTRIAL DUE TO "CUMULATIVE ERROR"

ARGUMENT

Appellant fifthly alleges that the judge below reversibly erred by refusing to declare a mistrial due to "cumulative error" (R 592), which included permitting Sharon Williams to testify that appellant had told her he would kill her "just like [he] did to that man" when he attacked her at knifepoint and raped her (R 468-474; 479-481; 486-489); plus permitting Freddy Haliburton to testify that this case had previously been on "appeal" and that appellant had threatened to kill others unspecified with a knife, which he preferred to use for killing because knives were harder to trace than guns (R 558;528-529). The State disagrees.

Of these pieces of evidence, the State acknowledges that the passing references to the existence of a prior "appeal" and to the fact of a "rape" - both of which were spontaneously volunteered by the witnesses in question - were arguably improper. The State notes, however, that appellant declined the judge's offer of a cautionary instruction as to the former comment (R 559-560) and accepted it as to the latter (R 493-495; 680), thus waiving or ameliorating any claim of substantial prejudice and averting the manifest necessity of a mistrial, see e.g. Ferguson v. State, 417 So.2d 639, 641-642 (Fla. 1982). The State further notes that the parties had agreed pretrial to refer

to appellant's prior trial for Bohannon's murder in innocuous terms not suggesting its outcome to the jury (SSR **29-30;** R **61-62).** Freddy Haliburton's brief mention of an "appeal" of this trial did not specify whether such was taken by the defense or by the prosecution, and thus did not reveal this outcome (R **591).** The State also notes that Sharon Williams' brief mention of a "rape" must be seen as insignificant given the soon-to-be demonstrated relevance and hence admissibility of the evidence of appellant's confessionary attack upon Ms. Williams and his confessionary boasting of his fondness for knife killings to Mr. Halburton. See also Correll v. State, **523** So.2d **562, 567** (Fla. **1988),** cert. denied, ___U.S.___, **109** S.Ct. **183 (1988),** holding that a defendant's confessions should ordinarily be admitted unedited.

The Court must bear in mind that although appellant's "defense" to this instant killing was ostensibly "reasonable doubt" (R **621),** in truth appellant was angling for a second degree murder conviction, as he repeatedly insinuated during his cross-examination of pathologist Dr. Frederick Hobin that the killer's use of a knife instead of a gun and the allegedly frenzied nature of the attack and the victim's resulting wounds did not suggest premeditation (R **249-253).** The State was absolutely entitled to counter this misimpression and fortify Freddy Haliburton's unassailably admissible testimony that appellant had confessed to him that this was a grossly premeditated highly motivated thrill killing (R **529)** with the

very relevant evidence under dispute here, which suggests the same thing (SSR 25-26; R 515). Whether this evidence was inextricably intertwined with the event for which appellant was on trial under Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986), review denied, 496 So.2d 144 (Fla. 1986), as the prosecutor postulated below (R 458), or was true collateral fact evidence as appellant argues here, is beside the point.

§ 90.401, Fla. Stat. defines "relevant evidence" as that "tending to prove or disprove a material fact," while § 90.402, Fla. Stat. provides that "all relevant evidence is [generally] admissible." However, "relevancy is not a precise concept, and its use as a test for admissibility must often rest upon the [trial] court's informed notions of logic, common sense and simple fairness." Wadsworth v. State, 201 So.2d 836, 838 (Fla. 4th DCA 1967), reversed on other grounds, 210 So.2d 4 (Fla. 1968). For this reason, "[t]he trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed" upon appeal. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981); see also Nelson v. State, 395 So.2d 126 (Fla. 1st DCA 1981). Again, the evidence disputed here was highly probative of the contested issue of appellant's premeditation to kill, and also the related issue of his motive, so the judge below could not have reversibly abused his vast discretion by admitting it. Jackson v. State, 451 So.2d 458, 461 (Fla. 1984), relied upon by appellant for the contrary conclusion, is

distinguishable simply because the evidence in that case that the defendant had bragged of being a "thoroughbred killer" was not linked by the State to any material fact in issue. Compare Jackson v. State, 498 So.2d 406, 410 (Fla. 1986), cert. denied, ___U.S.___, 107 S.Ct. 1325 (1987); Medina v. State, 466 So.2d 1046, 1048-1049 (Fla. 1985); and Talley v. State, 36 So.2d 201, 203-205 (Fla. 1948).

The State closes its discussion of the "cumulative error" issue by noting that appellant raised most of the same claims in his first appeal ("Brief of Appellant" in Case No. 64,510, p. 21-23; see also "Answer Brief of Appellee", p. 32-35). The State is fully confident that if this Court had been persuaded by appellant's argument, its decisions in Haliburton v. State, 476 So.2d 192 (Fla. 1985), vacated and remanded, 475 U.S. 1078 (1986), on remand, 514 So.2d 1088 (Fla. 1987), ordering a new trial on constitutional grounds, would have included a caveat not to use this evidence. Compare Huff v. State, 437 So.2d 1087, 1091 (Fla. 1983). As this Court noted in Johnson v. Feder, 485 So.2d 409, 412 (Fla. 1988), it will not adjudicate constitutional issues unnecessarily.

ISSUE VI

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY REFUSING TO DECLARE A MISTRIAL DUE TO THE PROSECUTOR'S ALLEGED ATTEMPTS TO SHIFT THE BURDEN OF PROOF

ARGUMENT

Appellant sixthly alleges that the trial judge reversibly erred by refusing to declare a mistrial due to the prosecutor's supposed attempts during voir dire to shift the burden of proof to the defense by asking the prospective jurors whether they could fairly judge appellant's "guilt or innocence" and correctly suggesting that both sides would put on evidence in the eventuality of a penalty phase (SSR **73-80**). Inasmuch as the judge repeatedly instructed the jurors that the prosecution had the sole burden of proof (SSR **34**; **135**; R **677**; 680), and this was reinforced by both parties (SSR **86**; **113-115**), the State disagrees, see generally Ferguson v. State.

ISSUE VII

THE TRIAL JUDGE PROPERLY DECLINED TO HOLD THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

ARGUMENT

Appellant next claims for the record that the trial judge erred in declining to hold that the Florida capital sentencing statute is unconstitutional on its face and as applied (R 924-925; 981-1029; 1122). The State notes for the record that the Florida capital sentencing scheme is indeed constitutional in every way. See, e.g., State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974); Proffitt v. Florida, 428 U.S. 242 (1976).

ISSUE VIII

THE TRIAL JUDGE DID NOT REVERSIBLY ERR BY INSTRUCTING THE JURY AND PERMITTING THE PROSECUTOR TO ARGUE THAT IT COULD CONSIDER WHETHER THIS MURDER WAS HEINOUS, ATROCIOUS OR CRUEL IN AGGRAVATION

ARGUMENT

Appellant further alleges that the trial judge reversibly erred by instructing the jury and permitting the prosecutor to argue that it could consider whether this murder was heinous, atrocious or cruel in aggravation of sentence (R **1037; 734-739; 856; 881-883; 897-899).** The State disagrees.

This Court's Florida Standard Jury Instructions In Criminal Cases, **1981** edition, page **78,** provides that a trial judge in a capital sentencing proceeding should instruct upon "those aggravating circumstances for which evidence has been presented." In Hansborough v. State, **509 So.2d 1081, 1086** (Fla. **1987),** the Court held that the following evidence was sufficient to support a finding of "H.A.C.":

> The medical examiner identified several of the victim's thirty-some stab wounds as defensive wounds, indicating she was aware of what was happening to her. Moreover, testimony indicated that she did not die, or even necessarily lose conscious-ness, instantly.

This evidence virtually mirrors that given by the medical examiner here (R **233-238; 267-270; 812),** compare also Roberts v.

State, 510 So.2d 885 (Fla. 1987), cert. denied, ___U.S.___, 108 S.Ct. 1123 (1988), Phillips v. State, 476 So.2d 194 (Fla. 1985), and Johnson v. State, 465 So.2d 499 (Fla. 1985), cert. denied, 474 U.S. 865 (1985). Indeed, the trial judge could and probably should have found "H.A.C." established here, just as he did at appellant's first trial without incurring a rebuke from this Court (see record in Case No. 64,510, p. 2689; "Brief of Appellant," p. 37-38; see also "Answser Brief of Appellee" p. 49-52). In any event, merely permitting the jury to consider this factor was not reversible error.

ISSUE IX

THE TRIAL JUDGE PROPERLY SENTENCED APPELLANT TO DEATH

ARGUMENT

Appellant lastly alleges that the trial judge reversibly erred in imposing a sentence of death (R 1055-1059; SR 24-31) upon the jury's 9 to 3 vote for same (R 1049) because he improperly found two of four aggravating factors. The State disagrees.

The State begins by noting that the judge found these two aggravating factors to exist when he imposed appellant's first death sentence upon virtually identical proof (see record in Case No. 64,510, p. 2688-2689). If this Court had felt such findings improper when appellant challenged them in his first appeal (see "Brief of Appellant", Case No. 64,510, p. 35-39, and "Answer Brief of Appellee,''p. 46-55), it would certainly have said so in remanding this cause for retrial, compare Huff v. State, 437 So.2d 1087, 1091.

The State yields to Judge Cook for an explanation of why the particular aggravating circumstance that appellant was under sentence of imprisonment at the time of the murder was properly found:

> On January 21, 1975, the Defendant was convicted of the offense of robbery and sentenced to the Department of Corrections. While in the Department of Corrections, the Defendant pled guilty to the offense of attempted

sexual battery with a knife on another inmate and on January 31, 1977, he was sentenced to one year in the Department of Corrections, to run consecutive to his prior sentence. The Defendant was placed on mandatory conditional release on January 2, 1981, and was on that status at the time of the murder.

At the time the Defendant was placed on mandatory conditional release under Section 944.291, the statute read as follows:

> "A prisoner who has served his term or terms, less allowable statutory gain-time deductions and extra good-time allowances, as provided by law, shall upon release, be under the supervision and control of the department and shall be subject to all statutes relating to parole, but in no event shall such supervision extend beyond two years, as determined by the parole and probation commission."

The Florida Supreme Court has held in Straight [v. State], 397 So.2d 903, that a Defendant on parole at the time of a homicide was under a sentence of imprisonment. Additionally, the Fourth District Court of Appeal has specifically held that a prisoner on mandatory conditional release under this very statute is under a

> sentence of imprisonment, Williams v. State, 370 So.2d 1164 (Fla. 4th DCA 1979).

(R 1056). This finding is factually supported by the record (R 788-798; 864-870), and hence is legally inviolable.

The State also yields to Judge Cook to support his finding that this murder was cold, calculated and premeditated:

> Hardwick v. State, 461 So.2d 79 (Fla. 1985), cert. denied, [471 U.S. 1120] (1985), and Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, [__U.S.__], 108 St.Ct. 533 (1988), teach that this aggravating factor requires more than the premeditation necessary to support a finding of premeditated first degree murder. What is necessary is evidence establishing that the Defendant fully contemplated effecting the victim's death and proof of a prearranged plan or design. In this case, the facts that the Defendant broke into the victim's home and attacked him while he slept, with no provocation, combined with his statement that he committed the murder to see if he could kill another human being, is evidence beyond a reasonable doubt that the Defendant fully contemplated effecting the death of Donald Bohanan and did effect that death through a prearranged plan or design.
>
> The Court has found guidance in applying this aggravating circumstance in two cases from the Florida Supreme Court. The facts of

Mason v. State, 438 So.2d 374 (Fla. 1983), cert. denied, [465 U.S. 1081] (1984), were strikingly similar to this case. In Mason, supra, the Florida Supreme Court held that this aggravating circumstance was properly applied stating:

> "We also disagree with appellant's argument that the murder was not committed in a cold, calculated, and premediated manner without any basis of moral or legal justification.' ...
>
> The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. There was sufficient evidence for the trial court to find this circumstance applicable." Mason, at 379.

In Johnson v. State, 438 So.2d 774, 779 (Fla. 1983) cert. denied, [465 U.S. 1051] (1984), a deputy was killed while investigating a robbery. The Florida Supreme Court held that testimony that the defendant stated he would not mind shooting people to obtain money was sufficient to establish the cold and calculating circum-

> stance. In the instant case, the statement of the Defendant was made after the murder and was much more indicative of cold calculation than was the statement in Johnson.

(R 1057-1058). This finding is also factually supported by the record (R **527-529)** and is likewise legally inviolable, notwithstanding defense counsel's skillful manipulation of the pathologist to question appellant's premeditation (R **249; 808),** given that Dr. Hobin was unaware that appellant had admitted selecting a knife for this killing with great forethought (R **815).** Compare Michael v. State, **437** So.2d **138, 141-142** (Fla. **1983),** cert. denied, **465** U.S. **1013 (1984).**

For the record, the State disagrees with appellant that the striking of any one aggravating circumstance here would necessitate a resentencing under Elledge v. State, **346** So.2d **998** (Fla. **1977)** given the excessively meager nature of appellant's nonstatutory mitigation (R 1058)[1], compare Hill v. State, **515** So.2d **176, 179.** Moreover, appellant's claim that the death penalty is proportionally unwarranted here is absurd. Compare Caruthers v. State, **465** So.2d **496** (Fla. **1985).** Appellant's case for this proposition, Burch v. State, **343** So.2d **831** (Fla. **1977),** was a jury override.

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[1] Appellant has been a good prisoner (R **906)** and is "not a bad guy" (R **855).**

CONCLUSION

WHEREFORE appellee, the State of Florida, respectfully submits that this Honorable Court must AFFIRM the judgment and sentence under appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Answer Brief of Appellee" has been forwarded by United States Mail to: CHARLES W. MUSGROVE, ESQUIRE, Congress Park, Suite 1-D, **2328** South Congress Avenue, West Palm Beach, Florida **33406**, this 27 day of April, **1989**.

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