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IN THE SUPREME COURT OF FLORIDA

ARTHUR LEE HUGHES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 89,919

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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, Arthur Lee Hughes, the appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of eight volumes. Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State clarifies several facts.

Hughes states (at IB 6) that his accomplice "Jones was the only one . . . to carry a gun during the robbery." The State clarifies that Hughes was a full and knowing participant in the armed aspect of this robbery/burglary. Prior to the robbery/burglary, Hughes indicated that he and his accomplices

would need a gun for it (VII 646). Hughes held the gun (the murder weapon) in preparation for the robbery (VII 648, 651-52).

Hughes describes (IB 6) his participation in the planning of the robbery, including his statement to Jones to pull the trigger if a victim resisted the robbery. The State adds that the planning included an agreement that Hughes' share of the anticipated $20,000 booty from this robbery would be $7,000 (VI 419). Hughes discussed ways "to get in the house." (VII 654-56) Hughes, in preparation for the robbery/burglary, retrieved not only the gun but a ski mask. (VII 651-52).

Hughes describes (at IB 6) their forced entry into the home. The State adds that he and an accomplice yelled at another accomplice, Jones, to break the glass to gain entry. (VII 658) They forcefully entered the home sometime after 10 pm (V 306, 329).

The State adds that while inside the victims house, Hughes and an accomplice pulled phone lines out of the wall (VI 414. See V 264-65, 272, 276, 314-15. VII 665); Hughes rifled through drawers; and, he and his accomplices ransacked the house (VI 414, 422. See V 252, 254, 264, 273-76, 334, 352; VI 372-73).

The State also adds that, after the victim was shot, Hughes assisted in transporting a purse stolen during the robbery/burglary (VI 422), met with his accomplices, and split the robbery/burglary/murder booty with them (VI 403, 405-406, 415-16, 422, 523-24. VII 673-74).

Defense counsel used the independent-act theory in his closing arguments for Hughes, generally in the context of the general instruction on felony murder (VIII 809-16, 838-42). The prosecutor's closing argument relied upon "classic" felony-murder and principal theories (VIII 820-22), discussed the requirement that the State prove that the "death must be in furtherance or prosecution of the common design" (VIII 824), and then discussed the special causation instruction (VIII 825-34). The prosecutor contrasted the applicability of the independent-act instruction to the facts here. The independent-act defense would apply where, after the robbery,

> those two [including Hughes] are headed out and then he [Jones] decides to rape Rose and kills her while he's raping her. That's an independent act. That's what the law that the Judge is going to read you would apply to.
>
> And then, of course, Arthur Lee Hughes and Maurice Williams would not be guilty of murder.
>
> But that's not what happened. ***

(VIII 834)

SUMMARY OF ARGUMENT

ISSUE I.

Under this Court's recent cases, Hughes is entitled to what he has persistently argued on appeal, the right to, and in light of a reversal based upon this persistence, the requirement of, self-representation in a new trial. The certified question should be answered in the negative and the DCA's opinion disapproved.

In light of the State's position on Issue I, Issues II and III are moot. However, in an abundance of caution, they are addressed.

ISSUE II.

Hughes did not complain that counsel was incompetent. Instead, he complained about a lack of communication and a difference in opinion concerning tactics. Therefore, the trial court's inquiry of defense counsel was more than Hughes was entitled.

ISSUE III.

Hughes was a full participant in the planning and perpetration of a robbery/burglary in which his accomplice shot and killed one of the robbery/burglary victims. Hughes even assisted in securing the deadly force for the robbery/burglary and urged its use if a victim "bucked the jack." After the robbery/burglary/murder, Hughes assisted in transporting some of the booty and then rendezvoused for the purpose of dividing it up. These facts present "classic" felony murder, in contrast to an independent

act where an accomplice kills someone during an entirely different felony than the one intended. An example would be where Jones remained at the victim's home after Hughes left and raped the victim, killing the victim during that independent felony. The actual facts of this case demonstrate that any instruction on independent act was a gratuity to Hughes and any harm from error attached to the State.

Thus, defense counsel did not object to the instruction, but, instead, expressly approved it, thereby waiving the claim in Issue III.

ARGUMENT

ISSUE

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

Justice Wells' concurring opinion in State v. Bowen, Nos. 88,219 & 88,748 (Fla. April 24, 1997), spoke of the difficulty trial courts face in applying the "interplay between Faretta [v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)], Hardwick v. State, 521 So. 2d 1071 (Fla. 1988), and Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973)." This case illustrates that difficulty, as the trial court wrestled with anticipated complex facts and procedures for the defendant to traverse. Bowen, assuming that it is consistently adhered to by the appellate courts and implemented by changes to Florida Rule of Criminal Procedure 3.111(d)(3), presents a welcome bright line which should obviate many of the problems associated with self representation and adequacy of counsel.

The district court below based its decision on grounds that the state maintained in its Motion for Clarification were contrary to Hill v. State, 21 Fla. L, Weekly S515 (Fla. Nov. 27, 1996), and Roaers v. State, 21 Fla. L. Weekly S503 (Fla. Nov. 27, 1996). This insistence on a legal position regardless of the positions of the parties illustrates what, in the State's view,

is at the root of the continuing trouble the judicial system has had with the contradictions involved in self representation and adequacy of counsel. Both trial and **appellate courts** must recognize and accept that they are not guardian ad litems with authority to act in the best interests of the criminal defendant, as they understand those best interests to be, regardless of the wishes or actions of the criminal defendant.

The state is persuaded as a matter of law that the holdings of Hill, Rogers, and Bowen, are common sense statements of the law which mandate reversal of the district court decision by answering the certified question in the negative. It necessarily follows from this, however, that having chosen self representation at the beginning of the trial phase, a defendant may not thereafter impede the orderly proceedings of the court by misbehavior or by alternately asserting the right to counsel. See Jones v. State, 449 So. 2d 253, 259 (Fla. 1984) (Having voluntarily exercised the right to self representation, a defendant may not thereafter impede orderly proceedings by misbehavior or by demands for the appointment of counsel; the right to self representation, like the right to appointed counsel, "is not a license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by willy-nilly leaping back and forth between the choices.")

Accordingly, consistent with the state's position above and with Jones, the state urges the Court to hold that petitioner,

having obtained a reversal of his convictions following a trial with appointed counsel in which no reversible errors occurred, is now estopped, on retrial, from asserting the right to the assistance of counsel. To now require the appointment of trial counsel would make a mockery of the judicial system, particularly its appellate arm, and put the lie to petitioner's argument that his claim of self representation is made in good faith.

Hughes should be bound by his self-proclaimed persistent position and required to represent himself upon any reversal and remand.

The analysis infra will conclude that Hughes is entitled to a new trial under this Court's recently decided cases because he invoked his right to represent himself. Hughes asserted his right of self-representation in the trial court, in the DCA, and here. Accordingly, Hughes argues here (at IB 18-19) that he sat at counsel table during the trial only to comply with the trial court's order and that it would have been futile to persist in his proclamations of self-representation at the trial level. In other words, Hughes claims he has screamed loud and lengthily for his right to represent himself. His persistence appears to net him a reversal of the result of a trial reflected in almost 1,000 pages of transcript and untold tax dollars.

Given Hughes's self-proclaimed persistent and adamant position that he should receive a new trial because he **was** denied his right to represent himself, he should be bound by that request for the trial stage of this case. See Owens v. Singletary, 22

Fla. L. Weekly 31 (Fla. Dec. 19, 1996)("Having jointly stipulated with the State for a sentence reduction and having taken full advantage of that reduction upon his release, petitioner is in no position now to claim the reduction was illegal"; collecting authorities); State v. Roberts, 677 So.2d 264, 265 (Fla. 1996)("under normal circumstances, rule 3.111(d)(5) requires a trial court to advise a pro se defendant of the right to counsel at each subsequent stage of trial. However, to apply the rule strictly in this case would produce an absurd result"); Jones supra.

Hughes's invocation of his right to counsel upon remand would be like the defendant's complaint in Morris v. State, 557 So.2d 27, 29 (Fla. 1990), "that his lawyer should not have let him take the stand." As in Morris, Hughes has made a decision contrary to advice of counsel -- a fortiori, here he made the ultimate decision against advice of counsel, to disregard all such advice. As in Morris, Hughes should not be allowed to later complain that his decision was ill-advised.

Similarly, Haliburton v. State, 514 So.2d 1088, 1090 (Fla. 1987), held a defendant estopped from invoking one of his rights when he had previously invoked a mutually exclusive right: "A defense continuance constitutes a specific waiver of the speedy trial rule (or, more properly, an estoppel precluding reliance on the rule) as to all charges which emanate from a single criminal episode."

The principle in State v. Beamon, 298 So.2d 376, 378 (Fla. 1974), is on point. There, the defendant took a position in one trial that netted him the right to a second trial. Prior to the second trial, the defendant presented a position inconsistent with, and logically mutually exclusive of, the claim that netted the right to that second trial. As in Beamon, Hughes "cannot carry water on both shoulders."

Therefore, upon any reversal and remand, the State respectfully requests that Hughes be bound by his own position. He should not be allowed to flip-flop and invoke the right to counsel at the trial stage.

The foregoing discussion presupposes a reversal of the conviction, which the State recognizes is a determination for this Court, independent of any party's concession on the law.

Turning to the facts of this case, Hughes filed a document in the trial court styled "Defendant's Give Judicial Notice." In it, Hughes stated:

> Comes now ARTHUR LEE HUGHES and says: I, ARTHUR LEE HUGHES, do hereby represent myself in proper person pertaining to all of my legal matters.
> In pursuant to law, I, Arthur Lee Hughes, do hereby dismiss Richard D. Nichols, Esquire, from representing me in this court.

(I 40) At the time, and through the trial, Richard D. Nichols was Hughes' appointed attorney.

In spite of the prosecutor's agreement that Hughes represent himself (III 11-12), the trial court denied Hughes' request to represent himself, reasoning:

> What I'm going to do is find, that based on the evidence that's been presented here, that there are unusual circumstances which would deprive Mr. Hughes of a fair trial if he were permitted to conduct his own [de]fense. So over Mr. Hughes' objection, I'm going to deny his request that he be allowed to represent himself.

(III 25)

Immediately before trial, Hughes refused to come into the courtroom because, in his words, in part:

> ... now the trial court is trying to force me to go to court with an attorney that I don't even want. Because I also invoke my right to represent myself ... .

(IV 47) Hughes sat at counsel table in response to a direct order from the trial court, and jury selection began. (IV 48-49)

Hughes was convicted of various charges, including First Degree Murder. (I 115-23)

The DCA affirmed, while accurately summarizing the trial court's reasoning:

> In response to the appellant's request to represent himself, the trial court inquired about the appellant's age, education, and ability to conduct his own defense. The [trial] court emphasized that the state was seeking the death penalty in his case and that the defendant would have to prepare for a penalty phase should he be convicted of the murder charge. Despite the appellant's representations that he could handle such a defense, the trial court denied his request, concluding that 'there are unusual circumstances which would deprive Mr. Hughes of a fair trial if he were permitted to conduct his own defense.'

Hughes v. State, 22 Fla. L. Weekly D99-D100 (Fla. 1st DCA Dec. 30, 1996). The DCA certified the question, stated as the issue supra, and the State moved in the DCA for clarification, in light of this Court's decisions in Hill v. State, 21 Fla. L. Weekly

S515 (Fla. Nov. 27, 1996), and Rogers v. State, 21 Fla. L. Weekly S503 (Fla. Nov. 27, 1996).

Last week, State v. Bowen, Nos. 88,219 & 88,748 (Fla. April 24, 1997), clearly answered the certified question. It held and reasoned, in pertinent part:

> The federal Court in Faretta made no provision for an additional layer of protection requiring courts to ascertain whether the defendant is intellectually capable of conducting an effective defense. Such a requirement would be difficult to apply and would constitute a substantial intrusion on the right of self-representation.
> ***
> The Florida Supreme Court recently reaffirmed this view in Hill v. State, 21 Fla. L. Weekly S515 (Fla. Nov. 27, 1996):
>
> > We emphasize that a defendant does not need to possess the technical legal knowledge of an attorney before being permitted to proceed pro se. As the [United States] Supreme Court stated in Godinez v. Moran 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed: 2d 321 (1993),, 'the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself.'
>
> Id. at S516 (emphasis added and omitted).
>
> Based on the foregoing, we hold that once a court determines that a competent defendant of his or her own free will has 'knowingly and intelligently' waived the right to counsel, the dictates of Faretta are satisfied, the inquiry is over, and the defendant may proceed unrepresented. *** The court may not inquire further into whether the defendant 'could provide himself with a substantively qualitative defense,' *** for it is within the defendant's rights, if he or she so chooses, to sit mute and mount no defense at all.

Therefore, the certified question should be answered in the negative, but, as discussed supra, Hughes should not now be allowed to invoke his right to counsel on retrial of the proceedings.

ISSUE II

DID THE TRIAL COURT FAIL TO CONDUCT AN ADEQUATE INQUIRY INTO HUGHES' REQUEST TO DISCHARGE COUNSEL? (Restated)

Issue I is dispositive. Hughes had the right to represent himself. However, in Issue II, Hughes essentially claims that he had the right to further trial-court inquiry about different counsel because he accuses court-appointed counsel of incompetency. The State disputes Issue II, but, because Issue I is dispositive, only briefly addresses it.

Hughes' dispute with his attorney distilled to accusations that court-appointed counsel had not communicated with him and a difference of opinion concerning tactics. These were insufficient to allege a prima facie case of incompetency and thereby trigger any inquiry into the competency of counsel. See Capehart v. State, 583 So. 2d 1009 (Fla. 1991)("Without establishing adequate grounds, a criminal defendant does not have a constitutional right to obtain different court-appointed counsel").

A lack of communication is not a ground for an incompetency claim. Watts v. State, 593 So.2d 198, 203 (Fla. 1992), had no trouble rejecting a claim that his attorneys "had not been to see him in the jail." There, as here, "no further inquiry was warranted."

Similarly, allegations of disagreements between counsel and the defendant, such as over tactics, are not prima facie grounds for incompetency requiring a hearing. In Smith v. State, 641 So. 2d 1319 (Fla. 1994), counsel and the defendant disagreed about

whether to present testimony that counsel thought to be false. Smith affirmed in the face of Smith's claim that the trial court "violated Smith's constitutional right to effective assistance of counsel and self-representation by failing to inquire" of counsel. No hearing was required. Similarly, no hearing was required here.

Therefore, defense counsel's responsive explanation to Hughes' complaints provided more than what Hughes deserved:

> There are two co-defendants. One is a juvenile who is alleged to have fired the fatal shot. The depositions, relative to the preparation of Mr. Hughes' case, were completed, in my opinion, fairly early on. The problem has been, and I explained this to Mr. Hughes at great length, that the Public Defender's Office represents one of the co-defendants, and they have not completed their discovery, or at least the last I heard, it had not been completed. Because of the local ruling it was up to Mr. Metzger [public defender representing accomplice Jones] to set the depositions.
>
> The depositions I wanted to take, were already taken and were prepared from that standpoint. The reason I didn't demand a speedy trial is I didn't want, from a tactical standpoint, Mr. Hughes tried by himself. I explained to him before, that given the background of the case it would be in his best interest to be tried along with the person who I think is more culpable.
>
> The delay has been waiting for the co-defendants to complete their preparations. We could go ahead to trial. There is nothing else, from my standpoint, to be done. Since Ms. Corey is not going to waive the death penalty, I need to file a death penalty motion.

(T 23-24) Defense counsel then responded to a trial-court query concerning Hughes' wish "to argue his motion for discharge"; counsel referred to case law provided by the State indicating that pro se motions are "a nullity" if the defendant is

represented by counsel. (III 24) Counsel then explained why he did not wish to adopt Hughes' pro se speedy trial motions:

> The problem with my doing that, frankly, as an officer of the court, is that again as a tactical matter, I am convinced it would be in this defendant's best interest to be tried jointly with the other co-defendants. So that in order to demand speed[y] trial, I have to allege that I'm prepared and willing to go to trial. Although, I'm prepared and not willing, from the standpoint of, I don't want to go to trial apart from the other co-defendants.
>
> And I also have to represent to the Court that I, on numerous occasions, when this matter was continued, I voiced no objection and joined in the initial motion for a continuance, which I think has effectively waived speedy trial.

(III 24-25) Thus, Hughes' request for a different attorney (III 17) was insufficient on which to base any reversible error.

Moreover, there were numerous instances in the trial indicating free-flowing communication between counsel and Hughes, and there was no indication that counsel's performance was deficient due to a lack of pre-trial communication between counsel and Hughes:

- In his voir dire of the jury (IV 133-35), opening statement (V 200-201), cross-examinations (VI 426-29, 528-30; VII 681-87), and closing arguments (VIII 809-17, 836-42), counsel hammered the defense theory that the killing was not in furtherance of the robbery/burglary.[1]

---

[1] The main theme of counsel's defense was to convince the jury that the killing was not in furtherance of any felony of which Hughes was a participant. This was a viable defense strategy below, but whether the events at the robbery/burglary of the victims' home satisfied the classic "in-furtherance-of"

- In his cross-examinations of key State's witnesses, counsel succinctly targeted a core idea OK the witnesses' **weakness(es).** (See V 288-92, 320-23; VI 426-31, 528-32: VII 681-87, 692)
- Similarly, in his closing arguments, defense counsel not only hammered the not-in-furtherance-of defense but also argued other significant ideas designed to assist Hughes, including the historical importance of the reasonable doubt standard (See VIII 805-807, 809, 840-41), the prosecution's burden of proof (VIII 816), the tragic nature of the victim's death for someone else to be held responsible (VIII 836, 839, 841), and aspects of Hughes' statement to the police favorable to him (VIII 837).

The extensive experience of Hughes' counsel (See III: 11: prosecutor referred to defense counsel high caliber; III 32: additional pending first degree murder case; I 27: bar number of 157378) was brought to bear on his trial.[2] As every experienced litigator knows, "hindsight is twenty-twenty," and a loss is not necessarily reflective of substandard preparation or performance. Issue II distills to a desire for more pre-trial "hand-holding"

---

definition of felony murder was for the jury to determine. It did not provide the basis for any special requested instruction on independent acts or his related argument in Issue III.

[2] Although not necessary to resolve the issue here, counsel's extensive experience is another factor indicating the lawfulness of the trial court's actions, Jones v. State, 612 So. 2d 1370, 1373 (Fla. 1992)(trial judge pointed out attorney's extensive trial experience and "that he had never known Pearl to compromise his advocacy").

and his re-interpretation of the history of the events of this case "enlightened" through Hughes' distaste for the jury's verdict.

Arguendo, under the foregoing circumstances, any alleged ineffectiveness pre-trial was rendered harmless by the time of trial. See § 924.33. Fla. Stat.; State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

ISSUE III.

DID THE TRIAL COURT REVERSIBLY ERR BY MISLEADING THE JURY WITH ITS FELONY-MURDER INSTRUCTIONS IN THE CONTEXT OF COUNSELS' ARGUMENTS, ALL OF THE TRIAL COURT'S INSTRUCTIONS, AND THE ADMITTED EVIDENCE ESTABLISHING CLASSIC FELONY MURDER? (Restated)

As in Issue II, the State addresses this issue in an abundance of caution.

Issue III was not preserved and was waived.

Consistent with his theory of defense, trial counsel explicitly and repeatedly agreed to, and argued for, an independent-act instruction (VIII 750, 752, 755-56, 759-60, 765, 770, 895), which the State persistently opposed (VIII 751, 754, 755-56, 763-65, 770, 802). Hughes complains on appeal about the instruction that his counsel requested. As such, Issue III was not preserved. See Archer v. State, 673 So.2d 17, 20-21 (Fla. 1996)("failure to define reasonable doubt to the jury in the sentencing phase of a capital trial is not fundamental error"; "Similarly, we reject Archer's claims that the trial court erred in failing to give the jury any general instructions or miscellaneous instructions on principals").

Hughes has not demonstrated that the supposed error here is any more serious than the claim in Burns v. State, 609 So.2d 600, 604 (Fla. 1992). There,

> Burns maintains that the short-form standard jury instruction on excusable homicide that was read to the jury is inherently misleading because it

> incorrectly suggests a homicide committed with a deadly weapon can never be excusable, thereby negating his defense of an accidental shooting. However, defense counsel did not object to this instruction, and the giving of the instruction, as worded, is not fundamental error.

Moreover, even if the purported error is fundamental, it was waived. See State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994)("exception [to fundamental error] . . . where defense counsel affirmatively agreed to or requested the incomplete instruction"); Armstrong v. State, 579 So. 2d 734, 735 (Fla. 1991)("By affirmatively requesting the instruction he now challenges . . . waived any claim of error in the instruction"); Gunsby v. State, 574 So.2d 1085, 1089 (Fla. 1991)("Gunsby not only did not object to the instruction given by the trial judge, he expressly approved the instructions given. Even if there was error in how these instructions were given, under Florida Rule of Criminal Procedure 3.390(d), Gunsby may not now raise this issue"; collecting authorities).

A fortiori, here the independent act instruction, as given, was a correct statement of the law, albeit gratuitously given. Hughes was entitled to no such instruction whatsoever where the facts overwhelmingly showed "classic" felony murder. The instruction therefore did not harm Hughes.

The instruction was a correct statement of the law, especially when viewed in the context of the other instructions.

The contested language was a correct statement of the law. As such, it was properly given. See Wilson v. State, 284 So. 2d 24,

26 (Fla. 2d DCA 1973)("wilfully" used in instruction but not defined) reversed on other around 294 So. 2d 327 (Fla. 1974); U.S. v. Jiminez, 484 F.2d 91, 92 (5th Cir. 1973)("defendant has no right to a charge in any particular language"). The trial court's instruction closely tracked the language in Brvant v. State, 412 So, 2d 347 (Fla. 1987), which Hughes' counsel had cited to the trial court (VIII 746-48).

Moreover, the entire package of jury instructions presented the jury an accurate picture of the applicable law, as the trial court instructed the jury on:

- First Degree Premeditated Murder (VIII 846-47);
- First Degree Felony Murder (VIII 847-50);
- Principal theory, including a correct definition –

> I will now explain the principal theory.
>
> If two or more persons help each other commit or attempt to commit a crime and the defendant is one of them, the defendant is a principal and must be treated as if he had done all of the things the other person or persons did if the defendant; one, knew what was going to happen; two, intended to participate actively or by sharing in an expected benefit; and, three, actually did something by which he intended to help commit the crime.
>
> "Help" means to aid, plan or assist.

(VIII 850-51) See Fla. Std. Jury Instr. (Crim) 3.01;

- The contested portion of the instruction that "combined" the felony murder rule with the law of principals and included a requirement that the State prove causation (VIII 851);

- Lesser-included offenses of First Degree Murder (VIII 851-56), including mentioning without defining principals in conjunction with Third Degree Murder (VIII 854) until the end of the Third Degree Murder instruction (VIII 856), where the trial court defined it without any of the contested "causation" language;
- Burglary, as Count II (VIII 857-60);
- Lesser-includeds of Burglary (T 860-62);
- The three counts of Armed Robbery (VIII 862-66);
- Lesser-includeds of Armed Robbery (VIII 866-68);
- Robbery elements and lesser-includeds to the charges (VIII 868-81), reasonable doubt, the presumption of innocence, and other general instructions (VIII 881-93).

The trial court's principal instruction accurately required the State to prove that:

> [T]he death of [James Timothy Channelle] occurred **as a consequence of and while** Arthur Lee Hughes was engaged in the commission of a robbery or burglary, or the death occurred as a consequence of and while Arthur Lee Hughes or an accomplice was escaping from the immediate scene of the robbery or burglary.

(VIII 847; I 75. See VIII 847; I 75: State required to prove that Hughes was a principal with the killer) As defense counsel in the charge conference accurately pointed out, "consequence is the operative word" (VIII 763).

Buford v. Dugger, 841 F. 2d 1057 (11th Cir. 1988)(constitutional issue) is substantially on point. There, the trial court had interjected the term "associates" into its Felony-Murder jury instruction, There, as here, the defendant

claimed on appeal that the instruction was tainted by the interjected concept. Buford looked at the totality of the instructions to conclude that the

> instruction given on 'associates' did not authorize a finding of guilt unless the death of the victim was the result of activity by associated persons within the scope of the association. Therefore, it did not authorize a finding of petitioner's guilt based upon independent acts of the claimed other participant outside the scope of his association.

841 F. 2d at 1059. Here, the totality of the instructions did not mislead the jury. See Green v. State, 184 So. 504, 508 (Fla. 1938)(in context of other instructions, failure to define "an array of force" not error).

The trial court erred yet again against the State. The trial court neglected to tell the jury that the instruction on principals, which had been accurately defined, applied to the other charges. Thus, the trial court's answer to the jury's question whether the principal theory applied to all of the counts reflected the jury's acumen, and the trial court's answer provided them with the correct answer. Hughes' complaint about the trial court's answer to the jury question (IB 33) rings hallow: It is based on the faulty premise that the instruction he now contests was presented to the jury as the principal theory, the faulty premise that the instruction was misleading, the faulty premise that there were no other instructions clearly stating the law of principals, and the faulty premise that, under the facts of this case, the contested instruction had any effect whatsoever.

Arguendo, any error was harmless.

The forgoing paragraphs indicate the harmlessness of any supposed defect in the instruction. See Sneeringer v. State, 469 So. 2d 125, 126 (Fla. 1985)(instruction erroneously changing "were" to "weren't," harmless in light of "the total instruction on entrapment and the arguments to the jury"). The instruction on principals was pertinent to the facts, and it was correctly given. Moreover, if anything, the contested instruction provided Hughes with a windfall, in the context of facts showing his integral involvement in a felony murder.

In concert with accomplices Jones and Williams, Hughes went to the victims' home intending to burglarize it and rob its occupants at gunpoint. While they were leaving the victims' house, Jones shot and killed James Timothy Channelle in cold blood as Mr. Channelle lay helpless on the floor. More specifically, the facts adduced at trial included:

- Hughes agreed to participate in the robbery (VII 645), even to the point that he indicated that he and his accomplices would need a gun for it (VII 646) and holding the gun in preparation for the robbery (VII 648, 651-52).
- Hughes and his accomplices agreed that Hughes' share of the anticipated $20,000 booty from this robbery would be $7,000 (VI 419).
- Hughes' dawning of a ski mask for the robbery/burglary (VII 651-52) is symbolic of his full participation in it.

- During the robbery/burglary, Hughes not only saw the gun used as a part of the robbery/burglary, he encouraged the use of the gun to perpetrate it. (VII 659: "telling me to take the gun out . . . and point it". VII 662-63. See V 238: "Rosie, they got a gun"; V 240-42: victim threatened with the gun; VII 663: "I . . . pointed the gun")
- Hughes and an accomplice told Jones, the gunman, "if anything get out of hand, then pull the trigger." (VII 673)
- Hughes was a full participant in discussing ♦♋⌂♦ "to get in the house." (VII 654-56) He and an accomplice yelled at another accomplice, Jones, to break the glass to gain entry. (VII 658)
- Hughes and his accomplices forcefully entered the victims' home together with masks on (E.g., VI 421-22) sometime after 10 pm (V 306, 329).
- When Hughes entered the home to commit the robbery/burglary with his accomplices, he knew that the premises were occupied. (See VI 421, 657-58)
- While inside the victims' house, Hughes
  - heard his accomplice threaten victim-Channelle with the gun (See VI 422);
  - and an accomplice pulled phone lines out of the wall (VI 414. See V 264-65, 272, 276, 314-15. VII 665);
  - rifled through drawers, and he and his accomplices ransacked the house (VI 414, 422. See V 252, 254, 264, 273-76, 334, 352; VI 372-73);

- stole a ring from the victim (VI 415);
- assisted in transporting a purse stolen during the robbery/burglary (VI 422).

- An accomplice used the gun[3] (V 347. VI 373, 511-12. VII 572-81. VII 677: 45 caliber casing and projectile recovered at the crime scene, 45 caliber pistol recovered) to kill the victim while Hughes and his accomplices were in the process of leaving the scene of the armed robbery/burglary (VII 668-70. V 261-62, 314, 334-36).
- After the shooting, Hughes demonstrated his continuing full participation in the **armed** robbery/burglary by meeting with his accomplices and splitting the booty with them (VI 403, 405-406, 415-16, 422, 523-24. VII 673-74).
- Hughes, orally and in writing, admitted to the police that he was part of the **armed** robbery/burglary. (VI 408-23, 523-27)

Moreover, defense counsel used the independent-act theory in his closing arguments for Hughes, generally in the context of the general instruction on felony murder (VIII 809-16, 838-42). Accordingly, the prosecutor's closing argument did not remotely attempt to use the causation instruction to the State's advantage. Instead, the prosecutor relied upon "classic" felony-murder and principal theories (VIII 820-22), discussed the

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[3] There was also some evidence indicating that Hughes was the trigger man. (<u>See</u> T 261: "Arthur, . . . you don't have to shoot nobody."

requirement that the State prove that the "death must be in furtherance or prosecution of the common design" (VIII 824), and then discussed the special causation instruction in a manner comporting with applicable law (See VIII 825-34). Indeed, the prosecutor explained the non-applicability of the independent-act instruction in terms of the contrasting facts of Bryant: After the robbery,

> those two [including Hughes] are headed out and then he [Jones] decides to rape Rose and kills her while he's raping her. That's an independent act. That's what the law that the Judge is going to read you would apply to.
>
> And then, of course, Arthur Lee Hughes and Maurice Williams would not be guilty of murder.
>
> But that's not what happened. ***

(VIII 834)

In Parker v. State, 458 So. 2d 750 (Fla. 1984), Parker testified that he was forced to cooperate with Groover, that he had no prior indication that Groover would kill two victims, that "these murders were not part of any common scheme or in furtherance of any common goal," and that he was even a friend of one of the victims. Id. at 752. Like there, Hughes claims that the killings were unexpected and not pursuant to a common scheme OK goal. Like there, Hughes was not entitled to an independent act instruction. Moreover, the evidence in Parker was stronger for the instruction than here, where Hughes did not claim that he was coerced into cooperating with an accomplice and where he was not a friend of any of the victims. A fortiori, Hughes assisted in bringing deadly force to the scene and intended that it be

used for the concerted purpose of the robbery/burglary, then, after its obvious use, participated in transporting the robbed property and dividing the booty.

Similarly, Lovette v. State, 636 So. 2d 1304 (Fla. 1994), applied felony-murder doctrine to a situation where the defendant as a "principal to the store's robbery, . . . was guilty of felony murder," Id. at 1307. As here, Lovette was a knowing participant in the attempt to rob a victim, thereby making him responsible for the victim's death. Lovette rejected an argument that a defendant must know of a co-felon's impending killing to be held responsible for it. As an active and knowing participant in the robbery and burglary, Hughes is responsible for co-robber Jones shooting the victim. Accord Goodwin v. State, 405 So. 2d 170 (Fla. 1981)(defendant participated in kidnaping, making him a principal to the homicide); Hall v. State, 403 So. 2d 1321 (Fla. 1981)(emphasized Hall and Ruffin's actions in robbery together; "even if Hall did not pull the trigger, he was a principal to the crime of murder"; "aider and abettor is responsible for all acts committed by his accomplice in furtherance of the criminal scheme"). See generally, Enmund v. State, 399 So. 2d 1362, 1369-70 (Fla. 1981)(discussion of principals; defendant as principal by "waiting to help robbers escape with the . . . money") reversed on other grounds 458 U.S. 782 (1982).

Accordingly, it was insignificant that the shot was fired as the robbers/burglars were leaving the premises. Parker v. State, 641 So. 2d 369, 376 (Fla. 1994)(robbery occurred in restaurant;

victim chasing killer in street when killer shot victim), controls:

> There is no merit to Parker's claim that a killing during flight from the commission of a felony is not felony murder. The purpose of the felony-murder statute
>
> > is to protect the public from inherently dangerous situations caused by the commission of the felony. *State v. Hacker,* 510 So.2d 304, 306 (Fla. 4th DCA 1986). Therefore, '[i]n the absence of some definitive break in the chain of circumstances beginning with the felony and ending with the killing, the felony, although technically complete, is said to continue to the time of the killing.' *Mills v. State, 407* So.2d **218, 221 (Fla.** 3rd DCA 1981).
>
> *Parker v. State,* 570 So.2d 1048, 1051 (Fla. 1st DCA 1990). No definite break in the chain of circumstances occurred between the robberies and the killing in this case.

As this Court's Parker (1994) rejected flight as a factor in felony murder, any assertion of flight as a basis of an independent-act should be rejected here. Even though the standard jury instruction requirement that the "death occurred as a consequence of **and** while Maurice Williams was engaged in . . . or escaping from the immediate scene ..." (VIII 874; I 58) covered Hughes' purported defense, the trial court gratuitously added language lifted from Bryant.

A fortiori, here Jones shot the victim while Jones and Hughes were still inside the victims' home.

Therefore, the evidence established that Hughes intended to participate in the alternative "underlying felonies," Robbery and Burglary. Hughes

> was thus clearly liable for any acts, whether he knew of them ahead of time or not, committed by an accomplice in furtherance of that offense, . . . the ... unexpected use of a gun in the robbery [even if the decedent unexpectedly used the gun] was not an 'intervening act' as a matter of law. *** The requested instruction [on independent act] was therefore properly refused.

Diaz v. State, 600 So. 2d 529, 529-30 (Fla. 3d DCA 1992). Accord Lovette, 636 So. 2d at 1306 (Lovette had stated that he thought accomplice was going to lock victims in closet; instead, accomplice shot victims).

In sum, under the circumstances of this case, where Hughes' counsel actively sought and used the special instruction in a manner reasonably calculated to benefit Hughes, where the attorneys for both sides put the special instruction in the context of the proper felony-murder instruction, and where evidence of guilt of textbook felony murder was overwhelming, the danger of the instruction misleading the jury into acquitting Hughes was not realized.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the opinion of the District Court of Appeal should be disapproved, the judgment entered in the trial court should be reversed based on Issue I alone, and the case should be remanded for a new trial without the option of Hughes invoking the right to counsel at that stage.

Respectfully submitted,

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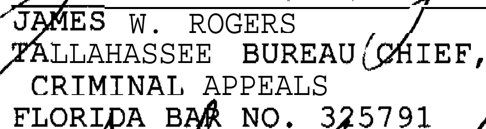

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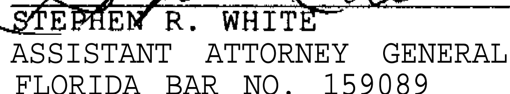

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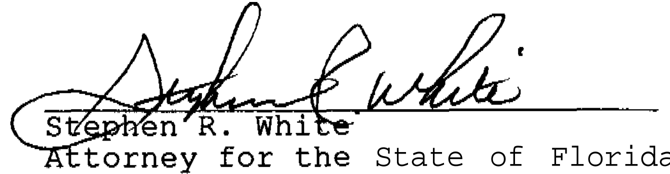
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to Glen P. Gifford, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 28th day of April, 1997.



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