

IN THE SUPREME COURT OF FLORIDA

1973-1974  
Jc  
RECEIVED

BOBBY LEE DOWNS,  
Appellant,

v.

CASE NO. 73,877

STATE OF FLORIDA,  
Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTH JUDICIAL CIRCUIT,  
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

BARBARA M. LINTHICUM  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

W. C. McLAIN  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 201170  
LEON COUNTY COURTHOUSE  
FOURTH FLOOR NORTH  
301 SOUTH MONROE STREET  
TALLAHASSEE, FLORIDA 32301  
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
PRELIMINARY STATEMENT	1
<u>ISSUE I</u>	
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OF DEFENSE WITNESSES RELEVANT TO DOWNS' STATE OF MIND AT THE TIME OF THE HOMICIDE, AND WHICH REBUTTED THE STATE'S PREMEDITATION THEORY, ON THE GROUND THAT THE TESTIMONY CONTAINED HEARSAY STATEMENTS WHICH DID NOT FALL WITHIN THE STATE OF MIND EXCEPTION TO THE HEARSAY RULE.	1
<u>ISSUE II</u>	
ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS FROM THE VICTIM THAT DOWNS HAD THREATENED HER IN THE PAST AND THAT SHE WAS AFRAID OF HIM ON THE THEORY THAT THE STATEMENTS QUALIFIED FOR THE STATE OF MIND EXCEPTION TO THE HEARSAY EXCLUSION RULE.	3
CONCLUSION	5
CERTIFICATE OF SERVICE	5

## PRELIMINARY STATEMENT

Bobby Lee Downs relies on his initial brief to reply to the State's answer brief, except for the following additions concerning Issues I and II:

### ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN EXCLUDING TESTIMONY OF DEFENSE WITNESSES RELEVANT TO DOWNS' STATE OF MIND AT THE TIME OF THE HOMICIDE, AND WHICH REBUTTED THE STATE'S PREMEDITATION THEORY, ON THE GROUND THAT THE TESTIMONY CONTAINED HEARSAY STATEMENTS WHICH DID NOT FALL WITHIN THE STATE OF MIND EXCEPTION TO THE HEARSAY RULE.

The State has seemingly taken the position that the prof-  
ferred state of mind evidence was not relevant because the State  
presented evidence from which the jury could have found preme-  
ditation. Downs is not disputing that some evidence tending to  
show premeditation existed. He merely wanted to present his  
defensive evidence which supported the opposite conclusion.  
The test for relevancy is not whether there is evidence to the  
contrary; resolving conflicting facts and inferences from facts  
is the jury's function. Downs' state of mind at the time  
offense and his motive for going to Nicole's house that morning  
were critical issues for the jury. His evidence illuminated  
those points, and he was entitled to have the jury's informed  
decision on those questions.

On pages 14 through 17 of the answer brief, the State  
contends that the evidence of Bobby's state to mind during the

early morning hours of the day of the shooting is too remote to be relevant. This position is untenable, particularly in view of the prosecution's reliance upon alleged statements Bobby made earlier, on the preceding day, as supporting premeditation. (Tr 1070-1071, 1077, 1086-1088) At the very least, Downs was entitled to present his evidence to show his state of mind after that time and before the shooting. (Tr 1086-1088)

The proffered testimony contained statements Bobby made within hours of the time of the offense. They reflected his state of mind and explained his later conduct in going the house the following morning. The trial court should not have excluded the evidence and deprived the Downs of an informed jury's verdict.

## ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS FROM THE VICTIM THAT DOWNS HAD THREATENED HER IN THE PAST AND THAT SHE WAS AFRAID OF HIM ON THE THEORY THAT THE STATEMENTS QUALIFIED FOR THE STATE OF MIND EXCEPTION TO THE HEARSAY EXCLUSION RULE.

The State contends that Downs invited the introduction of the hearsay testimony concerning the victim's state of mind. This argument is without merit.

According to the State, the first invitation was made when defense counsel elicited information about Nicole's contact with Bobby during separation. Contrary to the State's assertion (answer brief at 18), this information was not designed to mislead the jury about the status of Bobby and Nicole's relationship. Instead, this inconsistent conduct on Nicole's part was used to demonstrate Bobby's state of mind. He wanted the relationship to continue and Nicole's actions could have naturally lead to the confusion Bobby suffered. Nicole's mental state was irrelevant; her actions' impact on Bobby's mental state was the material point.

As a second alleged invitation, the State looks to a single, unsolicited comment Judith LeClerc made while being cross-examined. (Tr 480-481) Defense counsel asked LeClerc about specific instances during the separation when Nicole and Bobby were together. In response to a question, LeClerc made the unsolicited and unresponsive comment that Nicole was afraid

of Bobby. (Tr 480) The questions and answers proceeded as follows:

Q. And isn't it true that during this last separation Bobby and Nicole did go off places together with the children?

A. Not that I recall. She would --

Q. Do you recall --

A. I recall one incident. But she would not go off with him by herself because she was afraid of him.

(Tr 480) Counsel's questions were not designed to elicit information about the victim's state of mind. This does not, therefore, constitute and invitation to the introduction of the state of mind hearsay testimony.

CONCLUSION

For the reasons presented in the initial brief and this reply brief, Bobby Downs asks this Court to reverse his conviction for a new trial, or alternatively, to reduce his death sentence to life imprisonment.

Respectfully submitted,

BARBARA M. LINTHICUM  
PUBLIC DEFENDER  
SECOND JUDICIAL CIRCUIT

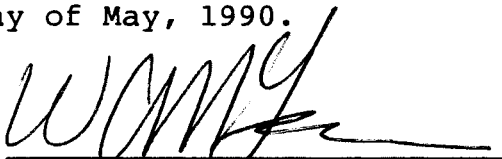


W. C. McLAIN #201170  
Assistant Public Defender  
Leon County Courthouse  
Fourth Floor, North  
301 South Monroe Street  
Tallahassee, Florida 32301  
(904) 488-2458

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by hand-delivery to Mark C. Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to Bobby Downs, #077853, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 25<sup>th</sup> day of May, 1990.



W. C. McLain