IN THE FLORIDA SUPREME COURT

JOHN EDWARD MERRITT,

Appellant,

vs. CASE NO. 69, 399

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CONTENTS
(CONT)

TABLE OF CITATIONS

TABLE OF CITATIONS (CONT)

TABLE OF CITATIONS (CONT)

TABLE OF CITATIONS (CONT)

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JOHN EDWARD MERRITT,

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STATE OF FLORIDA,

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellee accepts the Preliminary Statement set forth in the Initial Brief.

STATEMENT OF THE FACTS

Appellee accepts the Statement of the Facts set forth in the Initial Brief.

SUMMARY OF ARGUMENT

I. The test for admission of other crimes or bad acts is relevancy to a material issue of fact, not necessity. The "death pact" was admissible to establish Merritt's consistent willingness or intent to eleminate witnesses. The evidence of escape tendered to prove guilty knowledge.

II. Escape raises an inference of consciousness of guilt. The jury could decide the weight of the conflicting inferences. The instruction on flight was proper.

III. Confession of crime to friends constitutes direct evidence and circumstantial evidence rule is inapplicable.

IV. Failure to provide jury with written instruction is not fundamental error and absent objection will not be reviewed on appeal.

V. Evidence showed that the victim knew his assailant and defendant's admission to friends proved he killed for this reason.

VI. The execution of a defenseless victim is cold calculated and premeditated even under the heightened premeditation requirement. Two shots in the base of the skull is heightened premeditation.

VII. There was no improper doubling of factors as proof of eyewitness elemination does not necessarily prove cold calculated and premeditation. One fact concerns what the victim knew and the other goes to the state of mind of defendant.

VIII. A jury override based on the three aggravating factors and no mitigating factors is proper where the jury has been mislead at the penalty phase and improper mitigation was presented.

IX. This is a pre-guidelines case.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF APPELLANT'S PARTICIPATION IN A DEATH PACT AND APPELLANT'S ADMISSION THAT HE HAD KILLED SOMEONE IN THE COMMISSION OF A BURGLARY.

Appellant argues for the first time in this appeal that the admission of other bad acts, the death pact and escape deprived him of a fair trial under the federal constitution. The Appellee notes for purposes of state and federal collateral review that the claim was presented to the trial judge as strictly a state law question regarding the admission of evidence and the federal constitutional aspects of the claim could have and should have been presented at trial and properly preserved before being raised on direct appeal. See Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Requiring defendant to state specific grounds for objection to preserve claim and Silver v. State, 188 So.2d 300 (Fla. 1966) holding constitutional basis for claim must be presented in some form to trial court before it will be considered on appeal. Trushkin v. State, 425 So.2d 1126, 1130 (Fla. 1983).

However, the claim is properly before this court as presented below as to relevancy under the Florida Code of Evidence. It is axiomatic that evidence of other bad acts is admissible in a criminal prosecution if it satisfies the

threshold test of relevancy i.e., does the evidence tend to prove on issue of material fact Williams v. State, 110 So.2d 654 (Fla. 1959). The testimony of Greg Hopkins and Gerald Skinner concerning the "death pact" must tend to prove a material fact at issue. Here the evidence tends to prove the state's position that Merritt murdered Darrell Davis for the same reason he proposed the subsequent death pact. Merritt deliberately entered homes to commit burglary and armed himself in order to eliminate surprise visitors who might disrupt his crime or eleminate witnesses. This proposed crime "death pact" tendered to prove Merritt's modus operandi was involved in the killing of Darrell Davis. The question is not whether the evidence was necessary or cumulative but simple relevancy. Craig v. State, 12 F.L.W. 269 (Fla. May 28, 1987). The trial court did not abuse his discretion by allowing the jury to hear this evidence. In fact, it could be argued that the conflict between the statements lent a general air of incredulity to the overall testimony of these state witnesses.

Merritt also complains about the admission of the testimony of Prison Transport employee Dorothy Skidmore which explained the details of his escape from custody while enroute to Florida to face separate criminal charges. (R 785-88). The admission of this evidence is judged by the same appellate standard argued above. The jury was aware through the testimony of Investigator Neal Nydam that Merritt knew he was the subject of the Darrell

Davis murder investigation. (R 802-818). This Court held in Straight v. State, 397 So.2d 903 (Fla. 1981) that the attempt to escape or desire to evade prosecution is admissible as "being relevant to the consciousness of guilt which may be inferred from the circumstances." Id., at 908.

likewise in Bundy v. State, 455 So.2d 330 (Fla. 1984) the defense objected to the jury instruction on flight on grounds that Bundy "since his motivation for fleeing may have been avoidance of prosecution for a different crime of which the jury was unaware, citing United States v. Myers, 550 F.2d 1036 (5th Cir. 1977)." Id., at 348. This is the same argument advanced by Merritt. Merritt claims he was escaping because of the charges stemming out of the April 18, 1982 armed burglary and kidnapping which ostensibly proceded the pending charges in his order to transport. The defense could have argued that point to the jury but otherwise the trial judge did not abuse his discretion in allowing the jury to make the inference from Merritt's flight.

The possibility of two inferences arising from flight is analgous to the inference which arises out of the possession of stolen property. See State v. Young, 217 So.2d 567 (Fla. 1968). Appellant's footnote 3 at p.19 is unpersuasive because not all evidence of other crimes or bad acts tends to prove identity. For example, the fact that a defendant once stole a car in Georgia does not tend to prove he raped a woman in Miami five years later.

ISSUE II

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT.

Appellee renews the objection to characterizing this claim as federal constitutional claims when there was no such characterization of the claim in such terms made to the trail court. Merritt is not permitted to call his claim a state claim in the trail court and a federal claim on appeal. Appellee again notes that for purposes of state and federal collateral renew this claim is one which could have and should have been raised on at trail and only if properly preserved on direct appeal. Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987).

Appellee also denies that Appellant's trial counsel properly preserved the claim because he made no objection to the flight instruction during the recorded charge conference and made no specific objection to the instructions as given. Trial counsel did preserve objections noted on the record. (R 922). This objection was made prior to introduction of the testimony concerning Merritt's escape and the argument advanced by trial counsel was that Merritt had never been arrested for this murder of Darrell Davis and "so how can he escape for a charge that he's never. . . . he was never arrested for." (R 741). Appellee submits that this Court's ruling in Bundy, supra, at 348 addresses this point and this court should affirm for the same reason. The case of United States v. Myers, 550 F.2d 1036 (5th Cir. 1972) was dismissed in Bundy as readily destinguishable.

ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

Appellee rejects Merritt's characterization of this case as a circumstantial evidence case[1] The evidence of identity was entirely direct and in fact involved no circumstantial evidence whatsoever. See Michaels v. State, 437 So.2d 138, 141 (Fla. 1983) affirming conviction based on confession to cellmate. This court held a confession to inmates "constitutes direct evidence of the crime making the circumstantial evidence rule inapplicable." Id. The evidence of identitiy was the testimony of Greg Hopkins that Merritt confessed to him on two separate occasions that he killed a man in Columbia City who was Trisha's dad. (R 649-652). This reference to Trisha's father was what identified the victim to Hopkins (R 652).

The testimony of such an undesirable citizen as Greg Hopkins is clearly sufficient to support a conviction on the same basis that a prostitute's testimony may convict a rapist. The jury weighs the evidence and here they chose to believe Greg Hopkins and his testimony relative to the corroborating physical

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[1] Appellee also rejects the chargacterization of this claim as a violation of the fourteenth amendment of the federal constitution for the reasons advanced in issues I and II.

evidence. Hopkins correctly identified the victim, the manner, the motive and the type of weapon used (R 650-51). This is the essence of the jury's role as stated in State v. Smith, 249 So.2d 16, 18 (Fla. 1971) and this Court should not reverse their finding because of a difference of opinion. The role of this court is to determine whether a rational trier of fact could have convicted Merritt of premeditated murder beyond a reasonable doubt. Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986). The physical evidence that Davis was bound and shot twice in the base of the head leaves no doubt that the state proved corpus deliciti. State v. Allen, 335 So.2d 823, 826 (Fla. 1976). Neither this court nor the jury were confronted with the hypothesis that Davis either was not really dead (Judge Crater) or that his death was accidental. Driggers v. State, 164 So.2d 200 (Fla. 1964). Appellee submitted direct proof that Merritt killed Davis and this conflict created a question for the jury as trier of fact. They resolved the conflict against Merritt. See Buenoano v. State, 478 So.2d 387 (Fla. 1st DCA 1985) approved Buenoano v. State, 504 So.2d 762 (Fla. 1987).

ISSUE IV

THE TRIAL COURT DID NOT ERR IN PROVIDING WRITTEN INSTRUCTIONS TO THE JURY.

Appellant argues that the trial court erred in not providing the jury with written instructions in absence of a request for them from defense counsel and in spite of counsel's failure to object to the court's refusal after the jury asked for them. In fact the record reveals that trial counsel said "okay, that's fine." (R 929). The position of appellee is not harmless error but no error at all because Merritt is bound by the acts of trial counsel. Castor v. State, 365 So.2d 701 (Fla. 1978) and Lucas v. State, 376 So.2d 1149-1151-2 (Fla. 1979).

In Nibert v. State, 12 F.L.W. 225 (Fla. May 7, 1985) this Court reaffirmed its prior decision in McCaskill v. State, 344 So.2d 1276 (Fla. 1977). The Court held:

> the trial court's failure to provide the jury with written instructions cannot be deemed fundamental error. Thus because this issue was not properly preserved below, it was waived, and may not be raised on appeal.

Nibert at 225.

Indeed it may be a matter of sound trial strategy to not have the jury receive written instructions especially where confusion would work to the defendant's advantage. Of course

this is a matter to be resolved at a later date. Appellant's argument would rest this strategic choice in the bounds of the jury, instead of the bench or bar. The jury cannot make this decision anymore than they can request the accused to take the stand.

ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING LAWFUL ARREST.

Appellant argues that this execution-type killing was not committed to avoid or prevent a lawful arrest because the fact that the victim could identify him is insufficient. Appellant relies principally on Rembert v. State, 445 So.2d 337 (Fla. 1984); Doyle v. State, 460 So.2d 353 (Fla. 1984) and Caruthers v. State, 465 So.2d 496 (Fla. 1985) as cases where the victim was not a law enforcement officer and the state failed to prove this factor beyond a reasonable doubt.

In Rembert, the victim was beaten and left to die. This Court found that witness elimination requires the defendant to kill the victim before he flees because there is a possibility of a dying declaration which could identify the killer. Appellee has no real quarrel with this construction on the facts of Rembert. In Card v. State, 453 So.2d 17 (Fla. 1984) this Court affirmed a finding of witness elimination where the victim knew the defendant and could have identified him. In Card, he viciously slit the throat of the victim and almost decapitated her. The only evidence against Card was the testimony of his drug dealer girlfriend Vicky Elrod which was based on Card's confession to her. Here as in Card the defendant's admissions to his friends and the physical evidence at the murder scene comport

with a finding beyond a reasonable doubt that Merritt killed Davis for precisely the reasons found by the sentencer.

In Doyle, supra this Court found the rape frenzy motivated the killing and not the desire to avoid arrest or eliminate a witness. Here, Merritt admitted he was suprised by Davis, tied hi up, finished his burglary and then went back to the helpless victim and shot him twice in the base of the skull. (R 651-2). There is no struggle, no exchange of gunshots or any evidence at all that Merritt had any reason for killing other than to eliminate the man who had been introduced to him in this very house by his then 14 year old daughter Trish. When a 14 year old daughter introduces her father to a man in his early twenties who wants to go out with her a father is going to take notice.

In Caruthers, the defendant had no significant history of prior criminal activity. He once stole a bicyle. The physical evidence would at least be consistent to lead to the calculated choice to eliminate a witness. Here Merritt has an extensive criminal history including crimes involving use of a firearm in a robbery. (R 1142-1149). This murder was committed nearly five years to the day that he was sentenced to twenty years with three years minimum mandatory under Section 775.087(2) Florida Statutes. Merritt knew he was going to jail for a long time if he was caught for this armed burglary.

ISSUE VI

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER WAS COMMITTED IN A COLD CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Appellant asks this court to set aside the trial court's finding that this murder was cold calculated and premeditated due to insufficient evidence. This argument basically is asking that this Court delete Section 921.141(5)(1) Florida Statutes (1985) from Florida law.

The body was found with the arms bound in a defenseless position and shot twice in the base of the skull. In Rembert, supra this court rejected a finding of this factor because the witness was left alive. Rembert could have finished the job. In Nibert this court held:

> that application of this aggravating factor requires a finding of Heightened premeditation; i.e., a cold-blooded intent to kill that is contemplative, more methodical, more controlled than that necessary to sustain a conviction for first degree murder.

Id., at 226.

The Court concluded the factor was not proven where the defendant and victim had been drinking together and the victim was still alive. Merritt obviously did as much as possible to calmly assure himself that Darrell Davis would not be alive when

he left the home he was burglarizing. The crime scene showed that items from the Davis home were arranged in piles which was consistent with the court's finding that a burglary was in progress. In Herring v. State, 446 So.2d 1049 (Fla. 1984) this court approved a finding of this factor where the defendant shot the store clerk because of a threatening gesture and then performed the coup de gras by shooting the victim in the head. These facts were found sufficient to support the heightened premeditation necessary for application of this factor.

ISSUE VII

THE TRIAL COURT DID NOT ERR IN FINDING THE MURDER WAS COMMITTED TO AVOID ARREST (WITNESS ELIMINATION) AND COLD CALCULATED AND PREMEDITATED (WITNESS RENDERED DEFENSELESS AND SHOT EXECUTION STYLE).

In Herring, supra this Court approved the trial court's finding that there was witness elimination to avoid arrest and cold calculated and premeditated. These factors do not involve the same aspect of a capital murder for it is obvious that you can kill a victim who could not identify you in a cold calculated and premeditated manner i.e., murder of a six month old baby after extensive torture, by decapitation or the standard multiple stabbings where the victim is left alive. Nibert; WaterHouse v. State, 429 So.2d 301, 307 (Fla. 1983).

In Provence v. State, 337 So.2d 783 (Fla. 1976) the doubling of one aspect of the murder was the robbery and the motive of pecuniary gain. In Francois v. State, 407 So.2d 885 (Fla. 1982) the trial court doubled up witness elimination and hindrance of law enforcement and the robbery and pecuniary gain cited in Provence. In Richardson v. State, 437 So.2d 1091 (Fla. 1983) the doubling occrred over the burglary and percuniary gain. These are all circumstances where proof of one necessarily proves the other and any defendant would approach the sentencing process with two strikes against him. The facts of this case are clearly

distinguishable as proof of one factor witness elimination does not necessarily prove the other cold calculated and premeditated, Water House. This Court should reject this argument as without merit.

ISSUE VIII

THE TRIAL COURT PROPERLY OVERRODE THE JURY'S ADVISORY RECOMMENDATION OF LIFE AFTER FINDING THREE VALID FACTORS IN AGGRAVATION AND NO VALID MITIGATION.

Appellant correctly states the test as enunciated in Fedder v. State, 322 So.2d 908, 910 (Fla. 1975). The trial court clearly gave "serious consideration" to the jury's recommendation. Thompson v. State, 328 So.2d 1 (Fla. 1975). The court stated at sentencing:

> Mr. Merritt, I have given a great deal of consideration to what would be a proper sentence in this case. As a matter of fact, since last Thursday afternoon when this trial concluded probably not one hour has passed, that I haven't thought about this case, because, it has represented, as any in a capital case, a serious decision, but this one has caused me to wrestle even more with what I feel should be a proper sentence in this case.
>
> On the one hand, there are three clear aggravating circumstances and no mitigating circumstances, which cry for the death penalty. On the other hand, the jury has recommended life imprisonment. There were 12 very conscientious jurors, at least six of them voted to recommended life or mercy and a jury's recommendation is to be given great weight. It should not be deviated from, unless there is a clear and distinct feeling that some other punishment is warranted.
>
> After having considered in depth what a proper sentence should be, I searched my conscience and feel that

> the sentence that I am about to impose is the approprite one and consistent with the circumstances in this case.

(R 982-983).

This Court has repeatedly rejected the residual doubt non-statutory mitigating factor. Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Aldridge v. State, 12 F.L.W. 129 (Fla. March 12, 1987). Defense counsel below argued without objection by the State that

> I'd like for you to take into consideration, that even though you have found Mr. Merritt guilty, the basis of your verdict, and that is, if you didn't have a reasonable doubt in your mind, and obviously you didn't but if there is a doubt in your mind, then it must not be a reasonable one, that you resolve that with regards to your recommendation to the Court, with regards to a life sentence or death in the electric chair.
>
> I am asking you ladies and gentlemen, today to bring back a recommendation of life imprisonment.

(R 963-964).

Residual doubt is an unreasonable basis for the life recommendation. Any doubt which is unreasonable introduces a irrationality into the capital sentencing process which ignores the character of the defendant and the circumstances of the crime. See Booth v. Maryland, 41 CR.L. 3282 (June 15, 1987) which condemned the admission of victim impact statements in capital cases as irrational.

Appellant also makes much of the fact that the state would be arguing inconsistent positions in defending the trial court, the sole sentencer's decision. It is true the state presented a rather half-hearted argument at the penalty phase. The prosecutor stated without any basis for the claim that Merritt's criminal record would keep him in jail for the rest of his life. Merritt has one sentence to serve and that is from his Virginia crime. All his Florida cases are currently on appeal where he is challenging the sufficiency of the evidence to the conviction. The First District Court of Appeal has a very good track record in granting defendant's acquittal even where no self-respecting trial judge or jury would or did. Fowler v. State, 492 So.2d 1344 (Fla. 1st DCA 1986); Law v. State, 502 So.2d 471 (Fla. 1st DCA 1987). This Court does agree to revisit Fowler in State v. Law, Case No. 69,976. The prosecutors remarks were therefore incorrect advise to the jury and tainted their recommendation. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). This is precisely why the trial judge as sentencer was correct to override the life recommendation[2]

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[2] Appellee would also note that the Govenor has the power to pardon Merritt and he is eligible for parole on these sentences. Death sentences should be affirmed or reversed based on the order entered by the trial judge not the lawyer's performance.

Appellee is not arguing the prosecutor erred in seeking appellate relief. Appellee is only defending the propriety of the trial judge's override. It is unreasonable for a capital defendant to face death merely because the prosecutor consistently asked for death in one case and vacillated in another case. It is the overall fairness of the system that is at stake. The jury was not made aware of Merritt's prior conviction for robbery with a firearm five years before this murder even though this is a felony requiring the threat of violence. (R 1142). The jury was not told that Merritt received a parole from this robbery conviction after serving the three year mimimum mandatory. The trial court judge was aware of these very pertinent facts and acted accordingly to assure that similar defendants have some reasonable chance of receiving the ultimate penalty for the same type of murder based on the individual character of the defendant and the circumstances of the crime.

The court recently upheld a jury override in Engle v. State, Case No. 68,548 stating:

> Upon consideration, we conclude that the trial judge properly overrode the jury recommendation. There is ample support in the record for each of the aggravating circumstances. Appellant admitted his participation in the abduction. He acknowledged that he was with Stevens during the entire span of time within which Tolin was murdered. The evidence supports the conclusion that it was appellant's knife which caused the fatal stab wounds and that appellant returned

> home with some of the money from the Majik Market robbery. It would be unreasonable under these circumstances to conclude that appellant played no part in the brutal slaying. Hence, there was not a reasonable basis for the jury's recommendation of life imprisonment.

Here Merritt admitted to this execution and a life recommendation is unreasonable based on proportionality of sentencing. Accord Mills v. State, 476 So.2d 172 (Fla. 1985) where this court affirmed a finding tha murder committed in the course of a burglary warranted an override of a life recommendation. Justice MacDonald's dessent from the sentence in Mills raises the same arguments advanced by Merritt.

ISSUE IX

APPELLEE AGREES THIS IS A PREGUIDE-
LINES SENTENCE AND THERE IS NO
AFFIRMATIVE ELECTION IN THE RECORD.

Appellee argues with appellant's position as to this issue.

CONCLUSION

This Court should affirm the judgment and the trial court's decision to override the jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to Ann Cocheau, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302 this 25th day of June, 1987.

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