IN THE SUPREME COURT OF FLORIDA

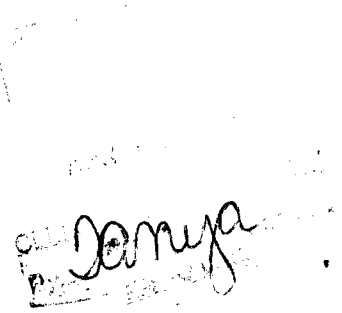
JOHN EDWARD MERRITT,

Appellant,

v. CASE NO. 69,353

STATE OF FLORIDA,

Appellee



INITIAL BRIEF OF APPELLANT

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I PRELIMINARY STATEMENT

Appellant, John Edward Merritt, was the defendant in the trial court and will be addressed as appellant or by his proper name. Appellee was the prosecuting authority for the Third Judicial Circuit, Columbia County, and will be addressed as the State.

This is a first degree murder appeal in which the death penalty was imposed. Circuit Judge Wallace Jopling heard various pretrial motions and Circuit Judge L. Arthur Lawrence was the trial and sentencing judge.

The record on appeal consists of eleven consecutively numbered volumes of transcripts and pleadings to which reference will be by "R" and the appropriate page number in parentheses.

II STATEMENT OF THE CASE

Pursuant to the Interstate Agreement on Detainers, sections 941.45 - 941.50, Florida Statutes (1985), the state sought custody of appellant in September of 1985 on an information, 85-178-CF, alleging armed burglary, two counts of aggravated assault, and two counts of armed kidnapping (R-1069-79). On December 3, 1985, appellant was removed from Staunton Correctional Center, Staunton, Virginia and ultimately returned to Columbia County, Florida (R-1054-55).

A Columbia County Grand Jury returned a seven count indictment, 86-203-CF, against appellant on March 13, 1986. Count I, Murder in the First Degree, in Violation of section 782.04(1)(2), Florida Statutes (1985), and Count II, Burglary While Armed, in violation of section 810.02, Florida Statutes (1985) relate to the instant case. The remaining five charges, originally those in 85-178-CF, were severed from the first two (R-1065-67, 1103).

After the State filed a Notice of Intent to Offer Evidence of Other Crimes, Wrongs, or Acts (R-1098-1102), appellant successfully obtained an order excluding the collateral evidence from trial (R-1140-41, 1153). The State then filed a second Notice (R-1154) to which appellant filed a second Motion in Limine (R-1155-56).

On August 12, 1986, appellant proceeded to a two day trial by jury (R-1-943) resulting in guilty verdicts on both First Degree Murder and Burglary While Armed (R-937, 1162). After the penalty phase on August 14, 1986, the jury recommended a life sentence (R-971, 1165). At sentencing Judge Lawrence overrode

the jury's recommendation and sentenced appellant to death on the murder charge and to life imprisonment on the armed burglary count, consecutive to the death sentence (R-982, 1166-70). A subsequent written order listed three statutory aggravating factors and no mitigating factors (R-1171-74).

Appellant's Motion for New Trial (R-1174-75) was denied (R-1178). A timely Notice of Appeal was filed (R-1177) and the Public Defender was appointed to pursue Mr. Merritt's appeal (R-1186).

III STATEMENT OF THE FACTS

Around 9:30 a.m. on March 1, 1982, Clinch Edenfield arrived at Darrell Davis' residence in Columbia City to pick up a fertilizer distributor. A short time later Ed Gibson arrived. Earlier Mr. Gibson had attempted to telephone Mr. Davis to find out why he had not come to work that day. Davis' pickup truck was still at the house. Believing something might be wrong, Mr. Edenfield and Mr. Gibson went inside through the back kitchen door. About ten to fifteen feet from the door Mr. Edenfield saw Darrell Davis facedown on the floor. His hands were loosely tied behind him with a belt. Finding no pulse, Mr. Edenfield instructed Ed Gibson to call the Sheriff's Department (R-556-61).

Forensic pathologist Bonifacio Floro conducted an autopsy on Darrell Davis on "March 2nd, of 1986" (sic R-566, probably 1982). In his opinion Mr. Davis died from either of two gunshot wounds to the skull and brain. He identified various autopsy photographs and bullet fragments he recovered from the victim (R-563-72).

Florida Department of Law Enforcement crime scene analyst Naola Darby testified she arrived at Mr. Davis' residence approximately 3:30 p.m. on March 1, 1982. She had taken the photographs of the crime scene and explained the layout of the house to the jury. Apparently someone broke a window to gain entrance to the house. Near the victim's body she found some cartridge casings which she gathered as evidence. Various other photographs depicted some disarray throughout the house as if someone had been searching for valuables. Altogether Ms. Darby

spent approximately twelve hours processing the crime scene. She collected thirty-five items, including various latent fingerprints and hair and fiber samples which were sent to the crime lab for analysis (R-578-612).

The only crime lab witness produced by the state was Don Champage, a firearms examiner. He received two .25 calibre cartridge cases and spent bullets from Naola Darby. In his opinion the bullets could have come from 14 or 15 different models of .25 calibre pocket semi-automatic pistols of which there are probably millions in existence (R-618-30).

The victim's daughter, Patricia Davis Gamble, known as Trish, met John Merritt in 1980 when she was fourteen. One evening he and several others came by her house when she was having a slumber party. Later that night her parents returned home and everyone was introduced to her folks. Subsequently Mr. Merritt and friends briefly stopped by the house a couple of times. Although Greg Hopkins had never been by the house, she knew him to be a friend of Merritt's and seen him at her girlfriend's house (R-631-44).

Gerald Hopkins testified he met John Merritt in 1981 when they were living in Lake City. They became close friends. In April of 1982, he, Merritt, and his wife Belinda went to Virginia where Merritt had relatives. The three lived together for a couple of months (R-645-49).

Then the prosecutor elicited this exchange:

> Q: Mr. Hopkins, did there come an occasion, after you had been in Virginia for a short period of time, that Mr. Merritt made any

mention of a murder that had taken place in Columbia City, Florida?

A: Yes, on two different occasions.

Q: The first time that this happened, would you tell the jury, first of all, please, how long after you had moved to Virginia did Mr. Merritt make the first statement in regards to a homicide in Columbia City?

A: It was a very short time, the exact amount of time, I couldn't say, but I would say about a month - a month and a half.

Q: Okay. It could have been a little bit more, or it could have been less?

A: It could have been a little more or a little less.

Q: Okay. Would you describe to the jury, please, under what circumstances did Mr. Merritt make a statement to you in regards to a homicide in Columbia City, Florida?

A: Yes. Myself, John, his brother, and a friend of ours named [Norman] we had just left the bar, we was shooting some pool... we were leaving, John was in the front seat with his brother, and myself and Norman was sitting in the back seat, and John broke down in tears and said that he had killed someone.

Q: I'm going to ask you to speak up louder, Mr. Hopkins. If you need to, speak up into the microphone, that's on right now.

A: Myself, John, and his brother were sitting in the car, his brother was driving, and John was sitting in the passenger seat, and I was in the back with Norman, and John broke down in tears, and I asked him what was wrong, what was the problem, and he said had he had killed someone, and we... you know, it surprised all of us, and we asked him how, and why, and he said that he had broke into someone's house, and when he broke into the house, the owner, I guess, surprised him, and he said that he tied him up in a hallway, in the kitchen, and he continued to search through the house, I guess he didn't find anything, and he

went back and shot the man twice in the base of the skull.

Q: Did he indicate to you how he tied him up, or where he had tied him up?

A: Yes, he tied him up in the hallway in the kitchen, and he tied him up with his arms behind his back, and he shot him in the base of the skull with a .25.

Q: Did he specifically mention to you a .25 caliber?

A: Yes, it was his gun, I knew he had it, but he said he had to throw it away.

Q: I'm sorry, what did he say he had done with the weapon?

A: He had thrown it into a body of water.

Q: Okay. How long did this conversation take place, where Mr. Merritt made these statements to you in regards to this homicide?

A: About 10 to 15 minutes long.

Q: Sometime after that did Mr. Merritt also bring up that same subject matter and make any other statements to you regarding a killing in Columbia City?

A: Yes, he did.

Q: Would you tell the jury, please, under what circumstances the next statement would have been made?

A: Yes. We were sitting in our living room, me and John, getting ready to smoke some marijuana, and he... I could see he was feeling bad, and I asked him what was wrong, and he said that he was thinking about what had went on, he said he was thinking about when he killed someone, and I said, I told him, "Try to forget it," and he said... that's when he told me that it was Trish's father, and that's when I realized who it was, until that point I had no idea who it was (R-649-52).

Mr. Hopkins had met a Trish, last name unknown, who had been Mr. Merritt's girlfriend for a while, but he had never been to her home. Before John Merritt made statements to him, the witness had no knowledge that a Darrell Davis had been murdered.

While in Virginia,Gerald Hopkins went to prison. Neal Nydam from the Columbia Sheriff's Department came to the prison and questioned him about some Columbia County burglaries. During the questioning, Mr. Hopkins said he had some information about someone who had been shot in the skull. A few days later the investigator took some hair and fingerprint samples from him (R-654-56).

Ultimately he entered into a plea bargain to do 364 days in the county jail followed by fifteen years probation for a Columbia County burglary in return for his testimony. He admitted on cross-examination that he original charges were armed burglary and two counts of armed kidnapping,[1] and that he brought up the murder to Neal Nydam to get leniency. In fact Nydam got him a job after he got out of jail (R-657-60).

Mr. Hopkins admitted that his ex-wife was Gerald Skinner's sister. When he was arrested in Virginia, she returned to Columbia County to live with their children and her grandmother. During his imprisonment they wrote and talked on the telephone forty or fifty times.

In the three years since he gained information about the murder, he did not talk to anyone about it. Investigator Nydam

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[1] He was a co-defendant with appellant on the five severed charges.

came to question him about the burglary based upon a tip he got from Gerald Skinner. Because he did not want to do any more time, he decided to tell Nydam what he knew. Greg Hopkins admitted he had five felony convictions (R-658-70).

After a proffer on the Williams Rule and flight testimony (R-675-743), discussed in Issues I and II, infra, Mr. Hopkins continued his testimony about the death pact. While he, Skinner, and Merritt were walking down a road in Virginia at an unknown time looking for places to burglarize, both Merritt and Skinner admitted shooting someone in the past. They agreed to kill anyone who caught them in a burglary (R-744-50).

Gerald Skinner testified he met John Merritt in Chesapeake, Virginia in 1982. While Hopkins and the two of them were contemplating a burglary, Merritt told them they don't want to leave any witnesses. Once someone had come in on Merritt in a burglary, and he killed him (R-751-53).

On cross-examination Mr. Skinner acknowledged he had kept the information to himself for three years. During that time he was a fugitive from a warrant for aggravated battery and shooting at an unoccupied vehicle. Only when he was caught and in the Suwannee County Jail did he give Neal Nydam the information. Prior to that he had spent six months in the state hospital at Chattahoochee and was on medication while he was testifying (R-754-63).

Neal Nydam spoke with Gerald Skinner at the Suwannee County jail and subsequently interviewed Greg Hopkins at the St. Bride's Correctional Facility in Chesapeake, Virginia. When Hopkins said he had some information about a homicide, Investigator Nydam obtained a search warrant for body hairs and fingerprints of appellant in April, 1985. He voluntarily obtained the same items from Mr. Hopkins. Evidence from both men were submitted to FDLE but nothing could be linked to evidence found at the crime scene (R-766-83).

Prison Transport employee Dorothy Skidmore testified she picked up appellant on December 3, 1985, to transfer him from prison in Virginia to Florida. About 12:30 p.m. the following day, Mr. Merritt was one of two prisoners who escaped from the transport van in McDonough, Georgia (R-785-88).

The state rested (R-792), and appellant moved unsuccessfully for a judgment of acquittal (R-792-93). He then testified on his own behalf, denying the murder and the burglary and denying he made any statements about a murder to either Hopkins or Skinner. When he escaped from prison transport, appellant was not facing a murder charge but an entirely different matter (R-794-801).

On cross-examination Mr. Merritt acknowledged he knew Trish Davis and that he had been to her house. He admitted to seventeen prior felonies and that the April, 1985, search warrant was for investigation of the murder of Darrell Davis (R-802-18).

Belinda Ferman, Gerald Skinner's sister and Greg Hopkins' ex-wife, was the final witness. She was present at the time when

appellant allegedly stated to Hopkins that he killed Trish's father, and she did not hear such a confession. At another time she did hear appellant say he had killed a man (R-819-27).

After a charge conference, closing arguments, and jury instructions, appellant was convicted as charged (R-831-937).

The following day the Court conducted the advisory penalty phase. The state did not present any evidence (R-942). Appellant's aunt and cousin testified as to his non-violent nature, his rough childhood, and their belief in his innocence (R-948-52). John Merritt discussed his good adjustment to prison and his prior drug problems (R-953-57). The state argued three aggravating circumstances: murder during the commission of a burglary, avoiding lawful arrest, and cold, calculated and premeditated (R-959-61). However the prosecutor conceded a life recommendation would keep appellant in prison forever (R-961). The jury recommended life (R-971, 1165). On August 15, 1986, Judge Lawrence imposed a death sentence (R-1166-70), subsequently entering a written order finding the three aggravating factors argued by the state and no mitigating factors (R-1171-73).

IV SUMMARY OF ARGUMENT

Guilt Phase

In issue one appellant will argue that the trial court committed reversible error in allowing irrelevant and highly prejudicial testimony about a "death pact" under the guise of Williams Rule evidence. He also argues in that issue and issue two that flight testimony and a jury instruction on flight similarly were irrelevant and highly prejudicial because the state could not establish the escape was for the purpose of avoiding prosecution on the murder.

In issue three appellant contends as a matter of law there was insufficient evidence to sustain a conviction for murder and burglary as he was not proven to be the perpetrator.

Lastly appellant will argue in issue four that the trial judge reversibly erred in not submitting written instructions to the jurors, especially when they requested them on the murder charge and on reasonsble doubt.

Penalty Phase

Appellant contends in issue five that the trial court erred in finding section 921.141(5)(e), Florida Statutes (1985) as an aggravating circumstance. The state did not prove witness elimination beyond a reasonable doubt. Similarly in issue six he argues that the state did not demonstrate "heightened premeditation" to support a finding under section 921.141(5)(i), Florida Statutes (1985). Alternatively, in issue seven, appellant contends the court improperly doubled these factors as the judge used the same aspect of the crime to justify the findings.

In issue eight appellant argues that the trial judge erroneously overrode the jury's life recommendation in violation of the Tedder v. State, 322 So.2d 908 (Fla. 1975), standard.

Lastly appellant seeks a clarification that count two is a sentence of life with the possibility of parole.

V ARGUMENT

ISSUE I

THE TRIAL COURT REVERSIBLY ERRED IN PERMITTING THE STATE TO INTRODUCE IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF COLLATERAL BAD ACTS AND CRIMES, THEREBY DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The state filed a Notice of Intent to Introduce Collateral Crime Evidence of several burglaries occurring subsequently to the murder (R-1098-1102). Appellant filed a Motion in Limine challenging their relevancy (R-1140-41). On June 27, 1986, Judge Jopling entered an order granting the Motion in Limine and excluding evidence of the burglaries (R-1153).[2] The state filed another Notice of Intent to offer evidence of other crimes, wrongs or acts on July 16, 1986, seeking to introduce evidence that:

> between April 1, 1982, and August 30, 1982, a better date unknown to the State Attorney, John Edward Merritt did conspire and agree with Greg Hopkins and Gerald Skinner that should anyone come in on them during a burglary then John Merritt and or one of his co-conspirators would kill the person that came in on them during the burglary. This "death pact" agreement was suggested by John Edward Merritt, said John Edward Merritt stating that he had killed someone before who had come in on him during a previous burglary (R-1154).

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[2] This matter was also considered in the trial of the burglary/kidnapping charges severed from the instant case. Circuit Judge Wallace Jopling ruled on this with respect to the murder case as well. The burglary/kidnapping charges are concurrently on appeal to the First District Court of Appeal under Docket Number BO-175.

At trial the state proffered testimony from both Hopkins and Skinner on the "death pact." In April of 1982 appellant and Greg Hopkins drove to Virginia where they resided together for a couple of months (R-647-48). At some unspecified date while in Virginia, Hopkins testified,

> John, myself, and Gerald Skinner were walking down the road . . . and we were all in the thing together, and John had mentioned a death pact which . . . between me, Gerald, and John, and we all agreed upon, if anybody had broke into . . . if we broke into a home or something, if somebody was to catch us, walk up on us, be in the house, and if they had seen our faces, that we would kill them.
>
> PROSECUTOR: All right, who brought up this death pact, as you called it?
>
> HOPKINS: John Merritt.
>
> PROSECUTOR: What specifically do you recall him telling you in regards to this plan, if anyone came in on you?
>
> HOPKINS: Yes, Gerald said that he had already shot someone before, and John said that he had already killed someone before, that there was nothing to it, and if they had to, they would do it, and I agreed upon it, also, I said that if somebody had seen us that I would also shoot them . . . (R-676-77).

In a proffer of Gerald Skinner's testimony, the witness stated he knew appellant in 1982, that he met him in Virginia (R-697). The following testimony was then elicited by the prosecutor:

> Q. While you were in Virginia, do you recall an occasion wherein you were looking for a house to burglarize with Greg Hopkins and John Merritt, and John Merritt would have made any statements to you in regards to what to do with any witness that may come in on you?

A. Yes

Q. Would you tell the Court, please what were the circumstances, and what you recall John Merritt stating at that time?

A. Well, we were . . . we found a house, you know, nobody was at home, and I went. As a matter of fact, this was the first burglary that we had done together, with me in it, and I went and checked it out, and nobody was there, and I came back to the car, and John said, 'Well, y'all know that if anybody sees us, that we're going to kill them, do y'all agree to that?' and we all agreed to it . . . Me and John were at the store buying a six pack of beer, and we were just talking, and I brought the subject (sic), I said, 'Have you ever killed anybody?' and he said, 'yeah,' he said a man came in on him one time when he was doing a burglary and he killed him. (R-697-98).

Additionally the state proffered testimony, not relating to the Notice of Intent to Introduce Collateral Crimes, but which definitely involved a collateral bad act. Investigator Neal Nydam went to Virginia to serve a search warrant on appellant on April 17, 1985, while he was incarcerated in the Virginia prison system in an effort to secure possible evidence in a homicide investigation (R-683-84).

Dorothy Skidmore, an employee of Prison Transport, proffered that she went to a prison in Staunton, Virginia, in early December of 1985. Her assignment was to bring appellant to Lake City on what she believed were charges of first degree murder, armed robbery, and kidnapping. On December 4 while in McDonough, Georgia, appellant escaped (R-687-94).

Investigator Nydam clarified that the warrants he had on John Merritt stemmed from a kidnapping/burglary incident involving

a victim, Silvers. There were no pending charges of murder when Prison Transport had custody of appellant (R-702-04). Ultimately the state stipulated to that fact (R-707).

After the proffers the state argued the evidence was relevant, that its prejudicial value did not outweigh its probative value, that it was "not being introduced solely for the purpose of propensity of crimes" (R-726-27), and that "flight" testimony was proper circumstantial evidence (R-730-31). Defense counsel argued that the "death pact" testimony was not proper Williams Rule material (R-734), and the flight testimony was not relevant (R-735).

The judge ruled:

> of course, Williams Rule evidence requires a great deal of close scrutiny. More times than not, I find that it does not meet the test, but in this instance I'm convinced that it does meet the test, and I find that it is admissible (R-743).

He also allowed the evidence on flight (R-740-41). The jury then heard the previously proffered testimony of Hopkins, Skinner, Nydam, and Skidmore (R-744-91).

Florida has consistently held evidence tending to show an accused was arrested, suspected, charged, or convicted of crimes for which the accused was not on trial to be inadmissible on the theory that jurors would be unfairly prejudiced due to their knowledge of the unrelated crime. E.g. Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977); Kelly v. State, 371 So.2d 162 (Fla. 1st DCA 1979). An exception, of course, if found in Williams v. State, 110 So.2d 654 (Fla. 1959), as now codified in section 90.404(2)(a), Florida Statutes (1985) which provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

As the statute and case law have noted, the test for admissibility of collateral offenses is relevancy. Hall v. State, 403 So.2d 1321 (Fla. 1981). Unless the evidence has substantial relevance, it should be excluded. Ingram v. State, 379 So.2d 672 (Fla. 4th DCA 1980). Accord, Drake v. State, 400 So.2d 1217 (Fla. 1981). The acts must cast light upon the character of the crime for which the accused is being prosecuted. Ruffin v. State, 397 So.2d 277 (Fla. 1980). Upon objection the state has the burden to show the evidence is relevant to identity, plan, common scheme, or design. Franklin v. State, 229 So.2d 892, 894 (Fla. 3d DCA 1970).

> [T]he guilt or innocence of the accused should be established by the evidence relevant to the alleged offense being tried, not because the jury may believe the defendant to be a person of bad character or because he committed a similar offense. U.S. v. Taglione, 546 F.2d 194, 199 (5th Cir. 1977).

See, also Michelson v. U.S., 335 U.S. 459 (1948); Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981).

Further, the evidence of collateral crime must be clearly and substantially relevant to the case as being tried:

> This is not to say that by our holding here we mean to lay down an abstract concept that in all cases similar fact evidence is admissible, merely because it has some degree of relevancy, however slight, to the

> facts in issue being tried. If the asserted relevance is illusory, fancied, suppositi-tious, or unsubstantial, the extraneous evidence should not be admitted because the inherent danger to the defendant on trial before a jury is too acute to allow his fate to rest upon such a slender thread of admissibility. Headrick v. State, 240 So.2d 203, 205 (Fla. 2d DCA 1970).

Secondly, the evidence must tend to establish a material or essential element of the crime charged. Duncan v. State, 291 So.2d 241 (Fla. 2d DCA 1974). If it is offered to prove an issue not contested by the accused, then that evidence is inadmissible. Marion v. State, 298 So.2d 419 (Fla. 4th DCA 1974).[3]

Finally, even if collateral crimes evidence meets these tests, considerations of due process and the right to a fair trial preclude introduction of such evidence from becoming a feature, rather than an incident, of the trial. Williams v. State, 117 So.2d 473 (Fla. 1960).

Neither in its Notice nor during the proffer did the state specify which material fact in issue would be proved by either the death pact or the escape from prisoner transport. The prosecutor merely tracked the language of section 90.404(2)(a), Florida Statutes, enumerating all possible bases for relevancy (R-727). Appellant contends this falls woefully short of the

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[3] By pleading not guilty the accused technically contests every element of a charge offense. Such technicality is insufficient to have raised an issue for Williams Rule purposes. See e.g. U.S. v. Ring, 513 F.2d 1001 (6th Cir. 1975). Were it otherwise, Williams Rule evidence would be admissible in every case as the perpetrator's identity and intent are always issues the state has to prove.

state's burden to demonstrate relevance.

Normally Williams Rule evidence involves the same crime. The Courts then look for some similarity in the operation and scheme of the crimes, Marion v. State, supra at 422, particularly those committed in an "unusual or unique manner," Duncan v. State, supra at 243, which "must have some special character or be so unusual as to point to the defendant." Drake v. State, supra at 1219; see, also Peek v. State, 488 So.2d 52 (Fla. 1986); Thompson v. State, 494 So.2d 203 (Fla. 1986). Then, too, the collateral crimes are ordinarily prior acts.[4]

The statement that appellant had killed before and that he, Hopkins, and Skinner should be prepared to kill again if someone witnesses their burglary was reminiscent of previous statements deemed reversible error.

In Green v. State, 190 So.2d 42 (Fla. 2d DCA 1966), Ms. Smith, a friend of Green's, testified that subsequent to his

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[4] The sponsor's notes on section 90.404 provide that, "[t]he other crimes, etc., may be both prior and subsequent to the crime at issue," citing Talley v. State, 36 So.2d 201 (Fla. 1948), and Andrews v. State, 172 So.2d 505 (Fla. 1st DCA 1965). In Talley this Court specified that the subsequent crimes must be inseparably interwoven and cautioned against remoteness. Compare Sierra v. State, 429 So.2d 832, 833 (Fla. 3d DCA 1983) [statements of accused expressing an intent to kill, followed not too remotely by the act of killing, may be evidence of premeditation] with Townsend v. State, 420 So.2d 615 (Fla. 4th DCA 1982) [subsequent stabbing/strangulations of prostitutes in a specific part of town five years after crime in question admissible]. Cases which consider subsequent acts admissible almost always turn on the fact the acts explain the context of the crime or demonstrate a prolonged criminal episode. See e.g. Smith v. State, 365 So.2d 704 (Fla. 1978); Heiney v. State, 447 So.2d 210 (Fla. 1984); Parnell v. State, 218 So.2d 535 (Fla. 3d DCA 1969); Tumulty v. State, 489 So.2d 150 (Fla. 4th DCA 1986).

arrest for robbery of a Seven-Eleven Food Store, she had a conversation with him "related to a robbery of a Seven-Eleven" but not "identified as this particular robbery for which Green was on trial," Id. at 44 [emphasis by the Court]. After analyzing the Williams Rule exceptions, the Second District found Ms. Smith's testimony was:

> not relevant to prove any fact or facts in issue before the jury, and its sole purpose and effect could only have been to show the bad character of the defendant when he had not put his character into evidence, and his propensity for committing the robbery in question.

Id. at 47.

The purported statement that appellant had killed before was similar to the statement in Jackson v. State, 451 So.2d 458, 560 (Fla. 1984), in which Jackson's murder conviction was reversed when the state offered evidence that Jackson said "he was a killer . . . a thoroughbred killer."

Finally, as will also be argued in Issue II, infra, the state failed to show the relevance of the escape/flight occurring more than three years after the murder. See Plasencia v. State, 426 So.2d 1051 (Fla. 3d DCA 1983).

Introduction of improper prejudicial evidence in this case requires reversal of appellant's conviction and a remand for a new trial. Admission of evidence merely demonstrating bad character or propensity to commit crime is presumed harmful error due to the inherent danger that a jury will take it as evidence of guilt of the crime charged. Straight v. State, 397 So.2d 903, 908 (Fla. 1981). The nebulous "death pact" and an escape while

appellant was being extradited on several very serious felonies simply does not fit into the Williams Rule exceptions. As appellant will argue in Issue III, infra, the evidence against him is hardly overwhelming, so these collateral acts cannot be harmless. Keen v. State, ___ So.2d ___, 12 FLW 138, 141 (Fla. 1987).

ISSUE II

THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE JUDGE ADMITTED "FLIGHT" TESTIMONY AND ERRONEOUSLY INSTRUCTED THE JURY ON "FLIGHT."

As discussed in Issue I, supra, appellant's transfer from Virginia to Florida in December of 1985 was pursuant to outstanding warrants for burglary, kidnapping, and aggravated assault, not murder (R-702-04). To that the state stipulated (R-707). Appellant admitted that he had been served with a search warrant in April, 1985, on a homicide investigation (R-722-23).

Appellant argued that evidence of flight and a jury instruction of the matter were improper. He noted that the grand jury did not even indict him on the murder charge until March of 1986 (R-736), that he never had been arrested on such a charge until after his return to Florida (R-741). The Court permitted the jury to hear the evidence (R-742).

At the state's request Judge Lawrence instructed the jury:

> When an accused in any manner attempts to escape or evade prosecution by flight or resistance to lawful arrest, that circumstance may be considered by the jury in arriving at a determination of the guilt or innocence of the accused. Flight is considered to exist where an accused departs or attempts to depart from the vicnity of the crime under circumstances such as to indicate a sense of fear or guilt or to avoid arrest. If you find that the Defendant attempted to escape or evade prosecution for the murder of Darrell Davis and/or the armed burglary of the dwelling of Darrell Davis, through flight or resistance to lawful arrest, you may consider this circumstance along with all the other testimony and evidence in

> deciding the guilt or innocence of the Defendant. (R-1164, 916-917) [Emphasis supplied].

Flight instructions have generally been approved where the evidence convincingly displays the fact of flight. Proffitt v. State, 315 So.2d 461 (Fla. 1975); Batey v. State, 355 So.2d 1271 (Fla. 1st DCA 1978); Martinez v. State, 346 So.2d 1209 (Fla. 3d DCA 1977).

Appellant notes that the murder took place in March of 1982 and appellant fled from prison transport in Georgia in December of 1985. This hardly is flight from the scene at or near the time of the offense. Appellant contends any relevance is so negligible and the prejudice so outweighs such relevance to render this evidence harmful to his right to a fair trial.

That a person flees from police, standing alone, has no relevance. As the Supreme Court noted:

> it is not universally true that a man, who is conscious that he has done a wrong, "will puruse a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper," since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that "the wicked flee when no man pursueth, but the righteous are as bold as a lion." Alberty v. U.S., 162 U.S. 499, 511 (1896).

This Court recognizes that flight alone is no more consistent with guilt than with innocence. Whitfield v. State, 452 So.2d 548, 555 (Fla. 1984). The state carries the burden to establish clearly that a defendant fled to avoid detection or capture.

Shively v. State, 474 So.2d 352 (Fla. 5th DCA 1985); see also Barnes v. State, 348 So.2d 599, 601 (Fla. 4th DCA 1977). Normally "flight" exists only when an accused departs from the vicinity of the crime scene [emphasis supplied]. Noeling v. State, 40 So.2d 120, 121 (Fla. 1949); Martinez v. State, supra, Bradley v. State, 468 So.2d 378, 379 (Fla. 1st DCA 1985). It is prejudicial error to give a flight instruction when the evidence does not establish that the individual did anything indicating an intent to avoid detection. Williams v. State, 378 So.2d 902, 903 (Fla. 5th DCA 1980); see also Barnes v. State, supra.

The Fifth Circuit Court of Appeals recognized that the probative value of flight as an indicia of guilt:

> depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt of the crime charge. U.S. v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977).

The state may not pyramid inference upon inference to support the conclusion that John Merritt escaped from prison transport because he was guilty of first degree murder. Diecidue v. State, 131 So.2d 7, 15 (Fla. 1961); Jenner v. State, 159 So.2d 250, 252 (Fla. 1st DCA 1964); G.C. v. State, 407 So.2d 639 (Fla. 3d DCA 1981). Instead the prosecution must establish the basic inference "to the exclusion of any other reasonable theory which might be drawn from it," Voekler v. Combined Ins. Co. of America, 73 So.2d 403, 407 (Fla. 1954); that is, "the basis of the pre-

sumption must be a fact." Jefferson v. Sweat, 76 So.2d 494, 499 (Fla. 1954).

Where a defendant may have other pending crimes, the Fifth Circuit questioned whether the third inference in Myers could be met:

> Because of the inherent unreliability of evidence of flight, and the danger of prejudice its use may entail . . . a flight instruction is improper unless the evidence is sufficient to furnish reasonable support for all four of the necessary inferences. U.S. v. Myers, supra at 1050.

Flight as a circumstance of guilt becomes even more speculative when the evidence does not demonstrate intentional flight immediately after the crime. Its "admission, especially followed by a jury instruction, should be regarded with caution." U.S. v. Jackson, 572 F.2d 636, 640 (7th Cir. 1978) [flight instruction error when flight occurred 3 1/2 months after crime]; see U.S. v. White, 488 F.2d 660, 662 (8th Cir. 1973)[error when 5 months lapsed]. "The immediacy requirement is important . . . [as] the instinctive or impulsive . . . behavior . . . that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses." U.S. v. Myers, supra at 1051.

The prosecutor conceded that appellant was being brought to Florida on separate charges (R-707). The detainer forms and supporting documents admitted at pretrial hearings all showed armed burglary, kidnapping, and aggravated assault as the sole Columbia County charges (R-1069, 1075, 1079). Since those offenses can hardly be considered inconsequential or minor (three were punishable by life), it is quite reasonable at any escape

attempt could infer guilt, if at all, as to those charges not the uncharged murder.

On May 27, 1986, the Court heard appellant's motions to dismiss the burglary, kidnapping, and aggravated assault counts. Previously these charges had been included in the murder indictment. The state agreed that the former charges were unrelated to the Davis matter, and the court severed the cases (R-1016-17). The primary issue at the May 27th hearing was whether the McDonough escape waived appellant's speedy trial rights under sections 941.45(3) and (4), Florida Statutes (1985), concerning interstate extradition (R-1024-27).

At that time the state's position was:

> Judge, I would agree, that they are severed [the murder and the kidnap/burglary incidents], but more importantly, I don't think that these motions should be addressed to counts 1 and 2, [the Davis murder and burglary] because counts 1 and 2 were not pending informations or indictments at the time that the defendant was transferred down from the state up north. When he was in Virginia, the indictment for first degree murder and burglary of Darrell Davis' residence had not been returned by the grand jury, so this wouldn't be pending, and I think, that these motions shouldn't be addressed to it, but I will also agree, that they have been severed (R-1028).

Here the state assumed contradictory positions, arguing the escape was relevant to guilt of murder and that it had no bearing on the murder which was not even pending when a speedy trial issue arose in the severed offenses,[5] a "heads, I win; tails, you lose" scenario.

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[5] The escape/speedy trial issue is a critical issue raised in BO-175. The state never argued flight in that case.

This Catch-22 practice, referred to as "gotcha" litigation, "ambush tactics," and "having one's cake and eating, too," have repeatedly been condemned. Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337, 1339 (Fla. 3d DCA 1979); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980); State v. Anders, 388 So.2d 308, 309 n.4 (Fla. 3d DCA 1980); Heimer v. Traveler's Ins. Co., 400 So.2d 771 (Fla. 3d DCA 1981); Sobel v. Jefferson Stores, Inc., 459 So.2d 433, 434 (Fla. 3d DCA 1984); Lugo v. Fla. East Coast Rwy. Co., 487 So.2d 321, 324 (Fla. 3d DCA 1986).

For the reasons and cases cited, appellant contends he was denied his right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution. He seeks a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE BECAUSE THE STATE FAILED TO ESTABLISH THE IDENTITY OF APPELLANT AS THE PERPETRATOR OF THE BURGLARY AND THE MURDER IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In order to withstand a motion for judgment of acquittal, the state must introduce sufficient evidence as to each element of the offenses to sustain a guilty verdict. Downer v. State, 375 So.2d 840, 845 (Fla. 1979). The state must establish beyond a reasonable doubt that the accused was the perpetrator of the charged offense. Owen v. State, 432 So.2d 579 (Fla. 2d DCA 1983); Ivester v. State, 398 So.2d 926 (Fla. 2nd DCA 1981); Ponsell v. State, 393 So.2d 635 (Fla. 4th DCA 1981).

Appellant submits that his motion for judgment of acquittal should have been granted because the state failed to establish beyond a reasonable doubt his identity as the perpetrator of the burglary and the murder (R-792-93). The evidence to establish identity was entirely circumstantial. When the evidence is circumstantial:

> the circumstances, when taken together, must be of a conclusive nature and tendency, leading, on the whole to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of and be consistent with guilt.

Hall v. State, 90 Fla. 719, 720, 107 So.246 (1925). Accord, Stewart v. State, 30 So.2d 489 (Fla. 1947); Mayo v. State, 71 So.2d 899 (Fla. 1954).

"[A] conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." McArthur v. State, 351 So.2d 972, 976 (Fla. 1977); Jaramillo v. State, 417 So.2d 257 (Fla. 1982). Accord, Wilson v. State, 493 So.2d 1019, 1022 (Fla. 1986).

> A circumstantial evidence case should not be submitted to the jury unless the record contains competent, substantial evidence which is susceptible of only one [Court emphasis] inference and this inference is clearly inconsistent with the defendant's hypothesis of innocence. Evidence that leaves room for two or more inferences of fact, at least one of which is consistent with the defendant's hypothesis of innocence, is not legally sufficient to make a case for the jury [footnotes omitted]. Fowler v. State, 492 So.2d 1344, 47-48 (Fla. 1st DCA 1986).

Further, a criminal conviction cannot be based upon suspicion, Davis v. State, 90 So.2d 629, 631 (Fla. 1956), or speculation, Straughter v. State, 384 So.2d 218 (Fla. 3d DCA 1980), for "the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational fact finder of guilt beyond a reasonable doubt." Tibbs v. Florida, 457 U.S. 31, 45 (1982), following Jackson v. Virginia, 443 U.S. 307 (1979).

Appellant's conviction rested solely on speculation that his alleged statement he had killed someone was proof positive that he killed Darrell Davis. Such a comment was never put in context (i.e. when and where was the remark made and what specific details were given). At best the state improperly sought to pyramid inferences. See Weeks v. State, 492 So.2d 719 (Fla. 1st DCA 1986).

Both Hopkins and Skinner were interviewed in jail cells, both were related to one another and had contacts with Columbia County, both were convicted felons facing new charges, both knew appellant had been in trouble before, both kept the vital information about the murder concealed for three years until they used it as their "Get out of Jail Card."

This was an unsolved murder of a white man in a small, rural North Florida community. That many people had a general idea about the crime is not unusual. The alleged admission hardly bore the specifics that only the killer would know, the remark was nebulous. No direct or scientific evidence corroborates the state's reliance upon the inconsistent and sparse stories of felons and fugitives that John Merritt was the one out of millions of .25 calibre gun possessors to have shot Darrell Davis three years ago.

As a matter of law appellant argues there was wholly insufficient circumstantial proof that he was the killer, and he seeks a discharge from further prosecution.

ISSUE IV

THE TRIAL COURT ERRED IN NOT PROVIDING WRITTEN INSTRUCTIONS TO THE JURORS PURSUANT TO FLA. R. CR. P. 3.390 AND 3.400.

Florida Rule of Criminal Procedure 3.390(b) provides in part:

> Every charge in a jury shall be orally delivered and charges in capital cases shall also be in writing.[6]

Obviously the court's instructions are a significant part of any jury trial.

> The sole purpose of a trial court's instructions to the jury is to advise them of the law applicable to the case being tried before them in order that the verdict which they reach shall be in conformity with the law. Without such instructions the most precious and fundamental concept in our civilization today - the rule of law - would be impossible of attainment in jury trials. Kimmons v. State, 178 So.2d 608, 611-12 (Fla. 1st DCA 1965).

In capital trials the instructions are of utmost importance. As Justice Overton, then writing for the Fourth District Court of Appeal observed:

> The purpose [of the requirement for written instructions] is to establish a procedure which insures that instructions in capital cases are as correct as possible by having them reduced to writing, and thereby requiring their prior preparation before presentation to the jury. [citations omitted]. It also provides an unquestioned verbatim record of the charge to the jury. Matire v. State, 232 So.2d 209, 210 (Fla. 4th DCA 1970).

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[6] This was adopted verbatim from former section 918.10(2), Florida Statutes.

By incorporating the historic requirement of written instructions in capital trials into Fla. R. Crim. P. 3.390(b), this Court reiterated the necessity for accuracy. Then, too, this practice facilitates meaningful appellate review. Not only would the court reporter's transcript of the trial judge's charge appear in the record, but also the written instructions would be available in the record to double check the accuracy of the jury charge.

Florida Rule of Criminal Procedure 3.400 states in part:

> The Court may permit the jury, upon returning for deliberation, to take the jury room:
> (c) any instructions given . . .

Defense counsel never asked that the oral instructions be reduced to writing, and none appear in the record. Although this Court has held such an omission to be harmless in the absence of objection,[7] appellant argues in the instant case the harm is apparent.

The jury obviously focused on the critical issue, did the state prove John Merritt committed first degree murder? Its request for a copy of the law of "reasonable doubt" and "murder first degree" (R-926,1163) indicated the panel sought to apply the law to the evidence during the deliberations. Appellant concedes that his trial counsel never asked that the jury receive a copy of the charge. However nothing in Fla. R. Cr. P. 3.400 mandates that the defendant make such a request before the trial judge exercises his discretion. Here the jury asked for them,

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[7] McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

and the judge never acknowledged he even had the authority to grant such a request.

No doubt the state will claim all of this is harmless. Yet, if the ultimate purpose of a trial is to have the jury reach a well-reasoned conclusion based upon application of the correct law to the facts adduced, then it is critical that the jury have the written charge.[8] To claim otherwise places form over substance.

> The sending of written instructions with the jury for use in its deliberations can be a valuable aid in the jury's understanding of the applicable law, particularly in complex situations, and should be used when at all possible and practical. Matire v. State, supra, at 211.

Rule 3.390(b) is mandatory - "charges in capital cases shall be in writing." It is axiomatic that "shall" is mandatory not permissive. S.R. v. State, 346 So.2d 1018 (Fla. 1977); Florida Tallow Corp. v. Bryan, 237 So.2d 308 (Fla. 4th DCA 1970); United Bonding Insurance Co. v. Tuggle, 216 So.2d 80 (Fla. 2d DCA 1968).

When the jurors asked for written instuctions, everyone, including the judge, was placed on notice of the panel's uncertainty of the law on murder and reasonable doubt. Even if the judge in a split-second mental decision exercised discretion

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[8] The jury may examine documents and tangible evidence admitted. Normally testimony may be reread, perhaps without all the flavor of live testimony. Jurors may even take notes during the presentation of evidence.

in not providing written instructions pursuant to Fla. R. Cr. P. 3.400, he had no option under Fla. R. Cr. P. 3.390(b). It is mandatory.

Unless that rule is construed to mean what it says, it would be meaningless and accomplish nothing. According to Fla. R. Cr. P. 3.010, the purpose of those rules is to govern the procedure in all criminal proceedings throughout the courts in this state. The rules do not serve their purpose if they can be regularly ignored at will or followed only when a trial court desires to follow them.

Unlike Tascano v. State, 393 So.2d 540 (Fla. 1981), the court is not faced with qualifying language as in former Fla. R. Cr. P. 3.390(a):

> The presiding shall charge the jury only upon the law of the case at the conclusion of argument of the case at the conclusion of argument of counsel and upon request of either the State or the defendant the maximum and minimum sentences which may be imposed (including probation) for the offense for which the accused is then on trial. [Emphasis supplied].

Unless there is an appellant remedy of reversal for a new trial when a trial court fails to follow a clear directive to place instructions in writing in capital cases and fails to consider sending those written charges to the jurors who specifically ask for them, the rules would be meaningless.[9]

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[9] Indeed, when the jurors "retire," it is the judge and lawyers with time on their hands. The jurors then begin the raison d'etre, deciding the verdict. Again to say it must be the lawyer to trigger the request at this point is absurd. If jurors are (cont.)

There would be no way in which to determine whether the failure constitutes reversible error.

Appellant then seeks to have his case reversed and remanded for a new trial.

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9 (cont.)
given evidence and written instructions without their request, it is mere speculation that they will peruse these items. However should they request relevant and permitted items, surely they will study them. What can be more fundamental then knowing the proper burden of proof in a capital case?

ISSUE V

THE TRIAL COURT ERRED IN FINDING THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST.

The trial judge found as an aggravating circumstance that the capital felony was committed to avoid or prevent lawful arrest or effect an escape from custody. Section 921.141(5)(e), Florida Statutes (1985). As a factual basis the Court found:

> that the Defendant, by his own statement to two or more friends and confidantes, said that he had killed the victim because the victim had "surprised" him in the dwelling house and that he did not want to leave any witnesses to his crime of burglary. (R-1172).

Originally this circumstance only applied where the victim of the capital felony was a law enforcement officer. See e.g. Cooper v. State, 336 So.2d 1133 (Fla. 1976); Raulerson v. State, 358 So.2d 826 (Fla. 1977). However this Court expanded the circumstances to include execution-type killings of witnesses to crimes, saying:

> We caution, however, that the mere fact of a death is not enough to invoke this factor when the victim is not a law enforcement official. Proof of the requisite intent to avoid arrest and detection must be very strong in these cases. Riley v. State, 366 So.2d 19, 22 (Fla. 1979).

It must be:

> [c]learly shown that the dominant or only motive for the murder was the elimination of witnesses . . . . We cannot assume [the Defendant's] motive; the burden was on the state to prove it.

Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); Herzog v. State, 439 So.2d 1372, 1379 (Fla. 1983); Foster v. State, 436 So.2d 56,58 (Fla. 1983).

See also Clark v. State, 443 So.2d 973, 976 (Fla. 1984) ("Not even 'logical inferences' drawn by the trial Court will suffice to support a finding . . . when the state's burden has not been met").

The facts show that appellant and some friends came by the victim's house in 1980 and met the victim's teenage daughter and her friends. She introduced appellant to her father. Subsequently he and some friends came by the house a couple of times when Mr. Davis was present (R-634-37).

However, merely showing that the victim knew the defendant does not establish that the dominant motive for the murder was witness elimination. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984) (Defendant robbed and murdered shopkeeper he had known for many years); Doyle v. State, 460 So.2d 353, 358 (Fla. 1984) (Defendant raped and killed his neighboring relative); and Caruthers v. State, 465 So.2d 496, 499 (Fla. 1985) (Defendant robbed and killed clerk at store where he had been a customer).

There must be additional evidence of the motive to sustain such a finding. See e.g. Riley v. State, supra at 22, 26 (co-defendants robbed defendant's employers, bound and gagged them; someone expressed concern they might subsequently identify defendant, and they were shot); Vaught v. State, 410 So.2d 147, 148 (Fla. 1982) (victim shot after pulling off assailant's mask and telling him he knew who he was and where he lived); Clark v.

State, supra at 977. (Defendant confessed after robbing and shooting ex-employer, he killed invalid 74 year old woman who knew him because one of them could identify him); and Wright v. State, 473 So.2d 1277, 1282 (Fla. 1985) (Defendant had previously burglarized victim's residence and during second attempt she recognized him; he confessed he did not want to go back to prison).

That the victim is the sole eyewitness to any underlying felony does not alone sustain a finding of witness elimination. Griffin v. State, 474 So.2d 777, 781 (Fla. 1985). There must be some showing other than that the victim might be able to identify the assailant. Bates v. State, 465 So.2d 490, 492 (Fla. 1985) (Defendant confessed that rape victim threatened to call police); Johnson v. State, 442 So.2d 185, 188 (Fla. 1983) (After they robbed and killed gas station attendant, defendant told his girlfriend "dead witnesses don't talk"); Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984) (Defendant told detective he shot store clerk a second time to prevent him from being a witness against him); and Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (After robbing and killing hitchhiker, defendant told companion "dead men can't talk").

In the present case there was no evidence that the killing was motivated solely or dominantly by a desire to avoid arrest. During the advisory sentencing phase, the state put on no evidence, relying solely upon evidence presented during the guilt phase (R-942). The prosecutor's entire argument on this factor was:

> I think it's clear that the reason this murder took place was that Mr. Merritt did not want to be identified. He knew someone, he knew the man that he was burglarizing that house (sic). He realized that man could identify him at a later time, and that certainly gave him the means, motive, and reason for taking that man's life in a very cold-blooded calculated fashion. (R-959-60).

Should the state now argue the so-called "death pact" supplied sufficient proof beyond a reasonable doubt to uphold the court's finding, appellant counters it was mere inference. At an unknown time, subsequent to the killing, Greg Hopkins, Gerald Skinner, and John Merritt were walking down a road somewhere in Virginia and discussing what would happen if someone caught them burglarizing a residence. John suggested and "we all three decided" we would kill them "if anyone sees us." (R-744-5, 752). Even coupled with an admission "he had done it before" (R-745), the speculation about future activity does not demonstrate the dominant motive was witness elimination. See Dufour v. State, 495 So.2d 154, 163 (Fla. 1986) (fact defendant told his girlfriend he planned to pick up a homosexual at a bar and kill him, did so, and told an associate, "anybody hears me voice or sees my face has got to die" was insufficient to establish a finding of witness elimination).

Therefore a finding of avoidance of arrest or witness elimination was erroneous.

ISSUE VI

THE TRIAL COURT ERRED IN FINDING THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In imposing the death penalty on John Merritt, the trial court found that the offense was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Florida Statutes (1985). His order, in part, read:

> [T]he Court finds that when the victim returned to his home and surprised the Defendant during the course of the burglary, the Defendant, while armed with a .25 caliber automatic pistol, tied the victim's hands behind his back and forced him to lay face down on the floor of his home, then the Defendant fired two bullets into the base of the victim's head, causing him immediate death. It was obvious that the victim was not any threat to the Defendant except for the possible placement of the bullets indicates that this murder was in effect an execution performed with exacting and precision implementation (R-1172-73).

This finding cannot stand because the evidence was insufficient as a matter of law to establish a cold, calculating, and premeditated (CCP) circumstance.

> The level of premeditation needed to convict in the [guilt] phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i).

Jent v. State, 408 So.2d 1024, 1032 (Fla. 1981). See also Herzog v. State, supra at 1380. Proof of CCP "requires a showing of a state of mind beyond that of the ordinary premeditation required for a first degree murder conviction."

Maxwell v. State, 443 So.2d 967, 971 (Fla. 1984). See also Washington v. State, 432 So.2d 44, 48 (Fla. 1983).

Then, too, CCP "ordinarily applies to those murders which are characterized as executions or contract murders." McCray v. State, 416 So.2d 804, 807 (Fla. 1982). See also Cannady v. State, 427 So.2d 723, 730 (Fla. 1983); Bates v. State, supra at 493.

Premeditation inherent in another felony committed during the course of the murder is inapplicable to a finding of CCP. Gorham v. State, 454 So.2d 556 (Fla. 1984); Hardwick v. State, 461 So.2d 79 (Fla. 1984); see also Jackson v. State, 498 So.2d 906 (Fla. 1986) (mere fact defendant armed himself in preparation of a robbery and then shot victim is insufficient to show CCP). Rather, the evidence must demonstrate beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). See also White v. State, 446 So.2d 1031, 1037 (Fla. 1984); Rembert v. State, supra at 340.

> The facts must show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpertrator. Preston v. State, 444 So.2d 939, 946 (Fla. 1984).

In the case sub judice Mr. Davis' body was discovered in his house around 10:00 a.m. (R-557-59). The state theorized that Mr. Davis interrupted the burglary in progress and was killed (R-536-37). The court's order used the phrase "surprised the Defendant during the course of the burglary." (R-1172). The state's evidence did not show that appellant formulated a plan to kill Mr. Davis nor was there any indication of a substantial

period of time for reflection or heightened premeditation. In fact the prosecutor did not even attempt to argue heightened premeditation. His only comment was, "I would submit to you that there was not the first legal or moral justification for John Merritt to take the life of Darrell Davis." (R-960).

Previously this Court has held in similar "burglary in progress" murders that the facts do not support a heightened degree of premeditation needed for CCP. Richardson v. State, supra, at 1094 (victim beaten to death with fence post in his home); Blanco v. State, 452 So.2d 520, 526 (Fla. 1984) (armed burglar surprised when dwelling occupant attempted to take the gun away from him); and Floyd v. State, 497 So.2d 1211, 1214 (Fla. 1986) (that defendant stabbed victim twelve times rather than simply fleeing her home demonstrated no heightened premeditation for a finding of CCP). Compare Herzog v. State, supra at 1380 (that defendant previously threatened to kill victim, that the two had a series of arguments, that defendant bound and gagged victim and unsuccessfully tried to sufficate her with a pillow until he finally strangled her with a telephone cord did not show CCP); Thompson v. State, 456 So.2d 444, 446-7 (Fla. 1984) (armed robber, upon learning the gas station had no cash, became frightened and shot attendant while other would be robbers fled); and Brown v. State, 473 So.2d 1260, 1268 (Fla. 1985) (that eighty-one year old woman was bound, sexually battered, and killed by asphyxiation does not show heightened premeditation), with Jent v. State, supra (CCP found where evidence showed lenghty series of events including beating, transporting, raping, and

setting victim on fire); Bolender v. State, 422 So.2d 833 (Fla. 1982) (CCP upheld where defendant held victims at gunpoint for hours, ordered them to strip, and beat and tortured them before death); Middleton v. State, 426 So.2d 548 (Fla. 1983) (CCP upheld where defendant's confession indicated he sat with a shotgun in his hands for an hour waiting for sleeping victim to awaken and then shot her); Mills v. State, 462 So.2d 1075 (Fla. 1985) (CCP upheld where beaten and bound victim escaped and was hunted in the underbrush, then killed); Lara v. State, 464 So.2d 1173 (Fla. 1985) (CCP upheld where defendant raped, bound, gagged, and stabbed his girlfriend, then went to neighbor's apartment and shot a woman four times who was to be a witness against him in a pending sexual trial, and reloaded his gun, threatening to kill others); Phillips v. State, 476 So.2d 194 (Fla. 1985) (CCP upheld where defendant waited for his parole officer to leave work, stalked him in the parking lot, confronted him, and killed him); and Huff v. State, 495 So.2d 145 (Fla. 1986) (CCP upheld where defendant armed himself prior to planned ride with victims and waited to shoot them until they arrived at a wooded area with which he was personally familiar).

Based on the authorities cited, the trial court's finding of CCP was clearly erroneous.

ISSUE VII

THE TRIAL COURT ERRED IN FINDING AS ALTERNATIVE AGGRAVATING CIRCUMSTANCES THAT THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST AND THAT IT WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his sentencing order the trial judge reasoned that appellant "did not want to leave any witnesses to his crime of burglary" (R-1172) and that "the victim was not any threat to [him] except for the possible purpose of identification" (R-1173) to support the aggravating circumstances of avoiding or preventing a lawful arrest and cold, calculated, and premeditated manner without any pretense or moral or legal justification, respectively.

Assuming arguendo that the state proved these circumstances beyond a reasonable doubt, the trial judge improperly used the same aspect of the offense to find the presence of these two distinct statutory aggravating circumstances. Separate consideration of factors essentially based on the same aspect is error. Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Francois v. State, 407 So.2d 885, 891 (Fla. 1982); Richardson v. State, supra at 1094.

Aggravating and mitigating factors are to guide the Court in analyzing the character of the defendant and the circumstances of the crime. Lockett v. Ohio, 438 U.S. 586 (1978). The factors are weighed by the judge in imposing sentence rather than merely counted. Dixon v. State, 283 So.2d 1, 10 (Fla. 1973). When a judge gives undue weight to one aspect of the crime by using the

same factual basis to support separate, this weighing process which the state has defended as constitutional[10] becomes tainted.

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[10] See e.g. Proffitt v. Florida, 428 U.S. 242 (1976); Dobbert v. Florida, 432 U.S. 282 (1977); Barclay v. Florida, 463 U.S. 939 (1983); and Spaziano v. Florida, 468 U.S. 447 (1984).

ISSUE VIII

APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE ABSOLUTELY NO CONSIDERATION WAS GIVEN TO THE JURY'S LIFE RECOMMENDATION, WHICH EVEN THE STATE RECOGNIZED WAS REASONABLE, AND BECAUSE LITTLE WEIGHT WAS GIVEN TO THE UNREBUTTED NON-STATUTORY MITIGATING EVIDENCE.

This Court has repeatedly held that a jury's recommendation of life imprisonment must be given great weight. The test for evaluating an override was provided by Tedder v. State, 322 So.2d 908, 910 (Fla. 1975):

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Such a recommendation "must be given serious consideration or there would be no reason for the legislature to have placed such a requirement in the statute." Thompson v. State, 328 So.2d 1, 5 (Fla. 1976). Indeed, the jury's opinion "represents the judgment of the community," Odom v. State, 403 So.2d 936, 942 (Fla. 1981), as "the conscience of the community," that advisory opinion "should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, supra at 1095.

In the years since Tedder was decided, this Court has "not waivered from the Tedder test" and has "consistently applied it to the facts and circumstances on review where the trial judge has overriden a jury recommendation of life imprisonment." Thompson v. State, 456 So.2d at 447. See e.g. Rivers v. State,

458 So.2d 762 (Fla. 1984); Barclay v. State, 470 So.2d 691 (Fla. 1985); Huddleston v. State, 475 So.2d 204 (Fla. 1985), Amazon v. State, 487 So.2d 8 (Fla. 1986); Brookings v. State, 495 So.2d 135 (Fla. 1986); Irizarry v. State, 496 So.2d 822 (Fla. 1986); Vallee v. State, ___ So.2d ___, 12 FLW 51 (Fla. 1-5-87); and Wasko v. State, ___ So.2d ___, 12 FLW 123 (Fla. 3-5-87).

Because the death penalty is so qualitatively different from any other sentence, such difference "calls for a greater degree of reliability when the death sentence is imposed," Lockett v. Ohio, supra at 604, for such punishment is a "unique and irreversible penalty." Woodson v. North Carolina, 428 U.S. 280, 287 (1976).

By overriding the jury's recommendation, the trial judge simply disagreed with the conclusion reached by a death-qualified jury. These jurors were instructed on all the statutory aggravating circumstances (R-964-66) ultimately found by the judge and were given incomplete instructions on mitigation (R-966).[11]

Defense counsel did not argue "some matter not reasonably related to a valid ground for mitigation . . . such as through emotional appeal, prejudice, or similar impact." Thomas v. State, 456 So.2d 454, 460 (Fla. 1984). There was no vivid or lurid description of an electrocution, White v. State, 403 So.2d

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[11] Although this was erroneous, defense counsel did not object or request any specific instructions.

331 (Fla. 1981), or a highly emotional religious appeal, Francis v. State, 473 So.2d 672 (Fla. 1985), justifying an override.

The sentencing presentation was simple but unrebutted. Appellant's aunt testified he had had a "rough" time growing up, his mother had been an alcoholic, he was not a violent person, and she did not believe he killed Mr. Davis (R-948-49).[12]

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[12] Appellant recognizes this court has rejected a "residual doubt" argument as recently as Aldridge v. State, ___ So.2d ___, 12 FLW 129 (Fla. March 12, 1987). Previously the Court held defendant "cannot be a little bit guilty," and that it "is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and then, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981) cert. den. 454 U.S. 1163 (1982), quoted in Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985). But see Burr v. Florida, ___ U.S. ___, 106 S.Ct. 201, 203 (1985) (Marshall, J. dissenting from denial of certiorari): "'reasonable doubt' . . . attains neither certainty on the part of the fact finders nor infallibility,"; and Heiney v. Florida, 469 U.S. 920, 921-22 (1984) (Marshall, J. dissenting from defense of certiorari):

> There is certainly nothing irrational - indeed, there is nothing novel-about the idea of mitigating a death sentence because of lingering doubts as to guilt . . . The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.

Under Lockett v. Ohio, supra at 604-05, residual doubt should be a valid non-statutory mitigating factor. See also Smith v. Balkcom, 660 F.2d 573, 580-82 (5th Cir. 1981), modified 671 F.2d 858 (1982), cert denied, 459 U.S. 882 (1982); People v. District Court of State, 586 P.2d 31, 35 (Colo. 1975) and Model Penal Code, section 201.6(1)(f) (Proposed Official Draft, 1962) and (1980 Revised Comments, at 134).

This Court has recognized other logical inconsistencies in jury fact-finding. E.g. there is a difference between "mere" premeditation needed to sustain a first degree murder conviction and "heightened" premeditation to sustain a finding of CCP. (cont.)

His cousin also testified he was not a violent man (R-951). Speaking on his own behalf, Johm Merritt noted, and the State later argued (R-961), that with a life sentence he would be 54 years old before being considered for parole. Yet he doubted if he would realistically be paroled before he was an old man (R-953-54). Although he could not pinpoint drug abuse as the cause of his criminal activities throughout his lifetime, he had been doing drugs such as crack, speed, acid, quaaludes, and marijuana in the period of 1980 and 1982. Since his incarceration in the Virginia prison system, he spent a year in group therapy and several months in substance abuse therapy (R-954-56).

The state recognized the reasonableness of life recommendation. During the closing arugment in the penalty phase, the prosecutor said:

> [N]o one is going to be disappointed in your recommendation to the Court, whatever it be.
>
> Mr. Merritt, at this time in his life has a criminal history of such that he will, by even a life recommendation, most likely will never walk out of the State prison system. So, he's not somebody who's going to be in society anymore. He's not somebody you're going to have to be concerned with being in society, by a recommendation of life imprisonment . . . . . (R-961).

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12 (cont.)
[Jent v. State, supra; Maxwell v. State, supra]. Similarly this Court has recognized the inherent power of a "jury pardon." Brown v. State, 206 So.2d 377 (Fla. 1968); Bailey v. State, 224 So.2d 296 (Fla. 1969); and Potts v. State, 430 So.2d 900 (Fla. 1982).

Appellant urges this Court to reconsider its position in Buford v. State, supra, in light of Lockett v. Ohio, supra. See Melendez v. State, 498 So.2d 1258, 1262-63 (Fla. 1986) (Barkett, J. special concurring opinion).

Despite the trial judge's finding that several aggravating and no mitigating circumstances exist, this Court has the obligation to reduce the death sentence to life if the judge unreasonably rejected the advisory opinion from the jury. McCray v. State, supra; Cannady v. State, supra; Richardson v. State, supra; Amazon v. State, supra.

Here a death qualified jury[13] in a county whose prior experiences with capital cases resulted in death recommendations[14] advised life as a proper sentence. Indeed, there has only been one other life recommendation from this Circuit.[15] As a largely rural and conservative part of the state, it can hardly be said that the jury was a fluke, a hotbed of fuzzy-headed liberals. Because murders were not daily front page events as in some urban areas, this trial was a "big event." The "conscience" of this community clearly distinguished this crime from other murders it had previously encountered.

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13 Jury selection took over half the time of the trifucated proceeding [Jury selection: (R-6-521). The trial and sentencing: (R-535-984)]. The state successfully challenged for cause six jurors due to their reservations about the death penalty (R-140, 244, 331, 406), pursuant to Witt v. State, 342 So.2d 497, 499 (Fla. 1977); Downs v. State, 386 So.2d 788, 790-91 (Fla. 1980); See also Witherspoon v. Illinois, 391 U.S. 510 (1968) and Lockhart v. McCree, ___ U.S. ___ , 106 S.Ct. 1758 (1986).

14 Manning v. State, 378 So.2d 274 (Fla. 1980); Foster v. State, 387 So.2d 344 (Fla. 1980); Foster v. State, 436 So.2d 56 (Fla. 1983); and Bundy v. State, 471 So.2d 9 (Fla. 1985).

15 Fead v. State, No 68, 341, pending (Madison County). Death recommendations: Meeks v. State, 336 So.2d 1142 (Fla. 1976) (cont.)

At the sentencing the prosecutor acknowledged the state:

> made a representation to the jury in this case, that we would abide by their recommendation to the Court and we will live with it and stand by the recommendation that we made to the jury, and we are not seeking the death penalty at this time (R-980).

Because the state agreed to comply with the jury's life recommendation, the state, now at the appellate level, cannot argue to this Court that the override was proper. The Courts have held "it is axiomatic that a party will not be allowed to maintain in consistent positions in the course of litigation." McKee v. State, 450 So.2d 563, 564 (Fla. 3d DCA 1984); see also McPhee v. State, 254 So.2d 406, 410 (Fla. 1st DCA 1971); and Irby v. State, 450 So.2d 1133 (Fla. 1st DCA 1984). Nor is the state exempt form this basic legal principle. Steagald v. U.S., 451 U.S. 204, 208-11 (1981); see also Finney v. State, 420 So.2d 639, 643-44 (Fla. 3d DCA 1982); (en banc) (Daniel Pearson, J. concurring); and Vaprin v. State, 437 So.2d 177, 178, n.2 (Fla. 3d DCA 1983). Since the prosecutor below conceded life was appropriate, the Attorney General cannot aruge in support of the life override.

As argued in Issues V, VI, and VII, supra, the trial judge improperly considered certain matters in aggravation. He made no

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15 (cont.)
(Taylor County); Johnson v. State, 442 So.2d 185 (Fla. 1983) (Madison County); Brumbley v. State, 453 So.2d 381 (Fla. 1984) (Taylor County); Livingston v. State, No. 68, 323, pending (Taylor County); Williamson v. State, No. 68, 800, pending (Dixie County).

attempt to explain why he could not follow the jury's life recommendation, why it was unreasonable, and why he could not give it great weight. This Court recognizes that a sentencer is held to a stricter standard when imposing a death sentence over a jury recommendation or life. Valle v. State, supra at 51.

Since the "imposition of death by a public authority is so profoundly different from all other penalities," that, to pass constitutional muster, a court must allow a defendant to introduce any aspect of his character, his record, or circumstances of the offense to seek a sentence less than death, Lockett v. Ohio, supra at 604-05, the override cannot be justified.

Although appellant was sentenced to death on August 31, 1986,[16] the trial judge did not enter written findings supporting that sentence until September 3, 1986 (R-117). At the sentencing proceeding the judge did not specify the aggravating circumstances or facts supporting his findings (R-982-84).

Appellant concedes this situation is not as procedurally egregious as that in Van Royal v. State, 497 So.2d 625 (Fla. 1986). However such a delay only demonstrates further the unreasonableness of the override. The "findings in regard to the death sentence should be of unmistakable clarity so that [this Court]

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16 The record is a little unclear. The court reporter notes that sentencing was September 23, 1986 (R-975). However after the penalty phase on August 14, 1986 (R-971), the judge set sentencing for "next Tuesday," (R-972) which would have been August 19, 1986. The judgment was filed with the Clerk on August 19 (R-1166-70). Appellant's Motion for New Trial (R-1174), Notice of Appeal (R-1176), and Amended Notice of Appeal (R-1177) refer to the August 19th date.

can properly review them and not speculate as to what [the trial judge] found." Mann v. State, 420 So.2d 578, 581 (Fla. 1982); See also Hall v. State, 381 So.2d 683 (Fla. 1980).

Appellant presented character evidence of non-violence, of a rough upbringing and drug abuse, of adaptation to prison and efforts to rehabilitate himself, and possible doubts of his guilt. The state conceded life was reasonable. Both sides argued John Merritt would probably never be released into society. Under Tedder, this life recommendation was reasonable. The trial judge erred in overriding the jury and the state. Appellant should have his death sentence reduced to life.

ISSUE IX

THE JUDGMENT AND SENTENCE IN COUNT TWO SHOULD BE CLARIFIED TO REFLECT A LIFE SENTENCE WITH THE POSSIBILITY OF PAROLE.

Although the instant case bears a 1986 case number, 86-203, the events occurred in March, 1982. The sentence in count two, Burglary while armed, is life (R-1169-70). However appellant did not affirmatively elect to be sentenced under the guidelines nor was a scoresheet prepared for this offense.

This Court stated:

> The sentencing guidelines adopted herein will be effective for all applicable offenses committed after 12:01 a.m., October 1, 1983, and, if affirmatively selected by the defendant, to sentences imposed after that date for applicable crimes occurring prior thereto.

In Re Rules of Criminal Procedure (Sentencing Guidelines, 439 So.2d 848, 849 (Fla. 1983).

Appellant does not seek a remand for resentencing on this count, only clarification that this is a preguidelines sentence. See Walker v. State, 499 So.2d 884, 885 (Fla. 1st DCA 1987) ("it was highly questionable whether appellant would have elected to be sentenced under the guidelines had he known he faced a mandatory life sentence with no possibility of parole.") When a defendant appears before the judge with an attorney, if there is no affirmative selection, he waives his right to claim a guidelines sentence. Johnson v. State, 453 So.2d 411 (Fla. 1st DCA 1984); Thrower v. State, 491 So.2d 1277 (Fla. 2d DCA 1985).

VI CONCLUSION

Appellant seeks a dismissal of charges under Issue III.

Alternatively he seeks a new trial under Issues I, II, and IV.

Finally, he seeks to have his death sentence reduced to life under Issues V, VI, VII, and VIII; and his burglary conviction be clarified as life with parole under Issue IX.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to Gary L. Printy, Assistant Attorney General, The Capitol, Tallahassee, Florida and mailed to appellant, John Edward Merritt, #058704, S-3-South-6, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 15th day of April, 1987.

ANN COCHEU