IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 71, 756

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DEPARTMENT OF LEGAL AFFAIRS
THE *CAPITOL*
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-1778

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,

Appellant,

vs. CASE NO. 71, 756

STATE OF FLORIDA,

Appellee.

ANSWER BRIEF OF APPELLEE

PRELI STATEMENT

Appellee, State of Florida, was the respondent in the lower court and will be referred to in this brief as appellee or by State of Florida. Appellant, John D. Freeman, was the defendant and will be referred to as appellant.

The record on appeal consist of four volumes of pleadings and will be referred to herein a "RA" followed by the appropriate page number in parenthesis The transcript of proceedings in the court below is contained in 39 volumes, consecutively numbered, and will be referred to a "TR", followed by the appropriate page number in parenthesis. Appellant's initial brief will be referred to herein as "AB".

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement *of* the Case and Facts as set out in the Initial Brief *of* the Appellant.

SUMMARY OF ARGUMENT

Appellant raises ten issues on direct appeal, seven of which relate to the guilt phase of his trial. He first contends that the trial court erred in allowing the evidence of an escape attempt from the county jail to be presented to the jury and a subsequent flight instruction provided the jury with regard to said incident. Appellee would submit that as to Issue I, there was a clear nexus between appellant's attempt to escape and the prosecution for the crime sub judice. Moreover, the flight instruction was appropriate in light of Bundy v. State, 471 So.2d 9 (Fla. 1985).

Issue II raises the specter that reversible error occurred because the state introduced evidence that a large sum of money was offered his girl friend not to testify and that appellant asked his brother to retrieve "the money" hidden near appellant's home. Contrary to appellant's assertion, the jury at no time was apprised where and how appellant obtained this money, rather, the focus properly before the jury was that appellant affirmatively took action to dissuade his girl friend from testifying at trial. Ms. Hodges testified that on the day of the murder she saw appellant in possession of property taken during the Epps murder. Clearly she was an important witness for the state and one appellant would rather have not seen testify.

Issues III and IV are closely related in that appellant next argues that it was error for the trial court to declare Doug Freeman, appellant's brother, a hostile witness and permit the state to use prior consistent statements in the state's redirect.

Appellee would disagree that any error occurred and submits that a clear showing was demonstrated that Doug Freeman was indeed a hostile witness. Based on the insinuation by Mr. Freeman that not all his testimony was truthful because he was coerced by the state, demonstrable evidence was presented to support the use of "prior consistent statements" by the state on redirect.

Appellant argues in Issue V that the trial court erred in allowing the hair analysis expert to testify about studies and other facts in order to help bolster her testimony. Appellant extensively cross-examined the hair analysis expert and based on her detailed testimony, the record reflects that at no time did her references to other studies represent the underpinnings for her conclusion. Issue V is without merit.

Issue VI and VII are also related in that they both deal with whether the trial court erred in denying appellant's motion for new trial. Appellant argued that based on newly discovered evidence concerning the whereabouts of Billy McMillion in October 1986, a new trial should have been granted. A hearing was held on appellant's motion and the trial court denied all relief. A review of said hearing reflects that at best, the "newly discovered evidence" could have been used to impeach Billy McMillion. Moreover, appellant failed to overcome his burden of demonstrating how this was "newly discovered evidence". Appellant also argued in a second motion for new trial that false testimony was presented at trial and he was therefore entitled to a new trial. The false testimony was bottomed on the fact that there was some evidence presented at trial that Billy McMillion,

when he first arrived in Tulsa, Oklahoma, applied for food stamps. Appellant is asserting that because there was not tangible evidence that he in fact did apply for food stamps, the state used false evidence. Appellee would disagree.

Issues VIII, IX and X concern the applicability of the death penalty in the instant case. Appellant challenges the propriety of the trial court's finding that appellant had a prior violent felony as an aggravating factor; that the trial court improperly overrode the jury's recommendation of life; and that the death penalty is unwarranted based on proportionality. All three issues are without merit.

ARGUMENT

ISSUE I

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN THE TRIAL COURT ALLOWED INTRODUCTION OF EVIDENCE OF APPELLANT'S ESCAPE AND INSTRUCTED THE JURY ON "FLIGHT"?

Appellant first argues that the trial court erred in admitting into evidence the fact that he had attempted to escape from confinement. Moreover, he asserts that the flight instructions presented to the jury constitutes reversible error because although said evidence was relevant to the Collier murder, "it was misleading and highly prejudicial to use evidence of the escape attempt to infer consciousness of guilt in the instant cause." (AB-49). Appellee would disagree and would submit that this court's decision in Bundy v. State, 471 So.2d 9, (Fla. 1985), controls.

Relying heavily on this court's decision in Merritt v. State, 523 So.2d 573 (Fla. 1988), appellant contends that his attempted escape was only germane and admissible in the Collier case and not for the instant murder. In his motion in limine to preclude the introduction of the "flight" evidence, appellant conceded that the evidence was admissible for the Collier murder but challenged the validity of this evidence herein because "the only evidence linking him to these charges was his possession of recently stolen property." (AB-48). The record reflects that at the time appellant attempted to escape from the Duval County jail, on January 14, 1987, he had already been indicted for first

degree murder in the Collier case on December 4, 1986, and was charged by information with second-degree murder and burglary with assault on December 5, 1986, for the Epps case. At the time of his attempted escape, appellant was in a holding cell of the Duval County jail awaiting further proceedings of a traffic infraction.

It is inconceivable that appellant can argue that said evidence would be admissible for the Collier murder but not for the Epps murder. He was incarcerated for both offenses and while one might have carried a more serious penalty, his attempt to allude prosecution concerns both murders. The this case falls squarely on this court's decision in Bundy v. State, supra, wherein this court observed:

> The probative value of flight evidence as circumstantial evidence of guilt has been analyzed by the Fifth Circuit Court of Appeals as depending 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; (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977). These criteria have also been applied by the Eleventh Circuit Court of Appeals in United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982), cert. denied, 461 U.S. 905, 103 S.Ct. 1875, 76 L.Ed.2d 807 (1983). In Borders the court noted that the cases in which flight evidence has been held inadmissible have contained particular facts which tend to detract from the probative value of such evidence. For instance, the probative value of flight evidence is weakened: 1) if the suspect was unaware

at the time of the flight that he was the subject of a criminal investigation for the particular crime charged, **United States** v. **Beahm,** 664 F.2d 414, 419-20 (4th Cir. 1981); 2) where there were not clear indications that the defendant had in fact fled, **Myers,** 550 F.2d at 205) 1049-50; or 3) where there was a significant time delay from the commission of the crime to the time of flight. See, e.g. **United States** v. **Howze,** 668 F.2d 322,324-25 (7th Cir. 1982); **Myers; United States v. White,** 488 F.2d 660, 663 (8th Cir. 1973). The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case. **Borders,** 693 F.2d at 1325.

We see no defects which would render the evidence presented in this case inadmissible. When Bundy was apprehended in Pensacola after fleeing from the officer who had stopped him, it was only six days after the Leach girl had disappeared. The disappearance had attracted much publicity and we feel it is a reasonable inference to make that Bundy fled from the officer as a result of consciousness of guilt on his part for the Leach crime. Likewise, it was two days after the Leach crime when Bundy fled from Officer Dawes after Dawes spotted the license tag on the floorboard of the car which Bundy was apparently using. It is reasonable that a jury could infer such circumstantial evidence to be evidence of guilt. Accordingly, we hold that the two instances of flight were properly admitted as relevant evidence which a jury could use as circumstantial evidence of guilt. (Cites omitted.) The judge's instruction to the jury concerning the evidence of flight was also proper. **Proffitt** v. **State,** 315 So.2d 461,465-66 (Fla. 1975), **affirmed,** 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

471 So.2d at 20-21.

See also Harvey v. State, 529 So.2d 1083, 1086 (Fla. 1988), and Mackiewicz v. State, 114 S.2d 684, 689 (Fla. 1959), cert. denied, 362 U.S. 965 (1960).

Clearly, the reliance by appellant on Merritt v. State, supra, wherein this court found that there was insufficient evidence to support that Merritt fled to avoid prosecution for the Davis murder and burglary is distinguishable herein.

Based on the foregoing, appellee would urge this court to affirm Issue I on appeal.

ISSUE II

WHETHER THE INTRODUCTION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF MONEY FROM AN UNRELATED CRIME DEPRIVED APPELLANT OF A FAIR TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

Appellant next argues that evidence regarding money not obtained in the instant murder was inadmissibly presented to the jury thus "the inevitable effect of the improperly admitted evidence here was to insinuate in the minds of the jury that appellant was guilty because he stole the money from the Epps residence and offered the money to Mrs. Hodges to not testify against him. The admission of the misleading and prejudicial evidence was harmful error and the state should not be heard to contend otherwise." (AB-55). Appellee would submit that first, and foremost, the admission of said evidence was proper, however, should this court conclude otherwise, any error was harmless error beyond a reasonable doubt.

The record clearly reflects that although a great deal of evidence was presented through the proffered testimony of Robert

Jewell, appellant's brother, (TR 1472-1484), the only evidence testified to by Robert Jewell concerning a large sum of money was that appellant had asked his brother to retrieve a large sum of money which was contained in a bank bag from a location near appellant's residence. (TR 1486-1487). On cross-examination Mr. Jewell testified that his brother never asked him to give the money to anyone and that although his brother told him not to discuss the case over the phone with appellant, appellant at all times denied any knowledge of the Epps murder. (TR 1489-1490). Missy Hodges testified that she had been living with appellant for approximately a year and a half, and in October of 1986, had observed several items stolen during the Epps murder in appellant's possession. (TR 1616-1619, 1620-1621). Ms. Hodges testified that appellant offered her $24,000.00 if she didn't testify and that she understood that she was suppose to get the money from Robert Jewell, appellant's brother. She indicated that appellant told her to go to California with the money and that he would meet her there. (TR 1622). On cross-examination, Ms. Hodges clarified her statement by stating that appellant told her that if she went to court his lawyer would tear her apart. (TR 1626).

With the exception of the referenced statements above, the jury had no knowledge of where the $24,000.00 came from, there was no suggestion that any money was taken during the Epps murder, nor was the jury in any way put in a position where it was mislead as to how the money related to the crime charged. The sole purpose for introducing Robert Jewell's testimony and

Missy Hodges' testimony was to show that appellant in speaking with Robert Jewell and Missy Hodges asked Robert Jewell to recover some money and told Missy Hodges that she should not come to court and that she should take the $24,000.00 and meet him later in California. Said evidence was relevant and admissible to demonstrate appellant's attempts to "bribe a state witness from testifying that she saw appellant in possession of stolen property from the Epp's murder contemporaneous to the time of the murder". The admission of said evidence is not contrary and does not run afoul of Section 90.403, Florida Statutes, nor is the case controlled by Jones v. State, 385 So.2d 1042, (Fla. 1st DCA 1980). In Jones v. State, supra, reversal was mandated because on redirect examination the prosecutor insinuated that a witness had been threatened without connecting said threat to the defendant. That is not the circumstance sub judice. See Coon v. State, 513 So.2d 1253 (Fla. 1987); Manuel v. State, 524 So.2d 734 (Fla. 1st DCA 1988); and Goodman v. State, 418 So.2d 308 (Fla. 1st DCA 1982), wherein the court observed:

> Clevinger and Sanders testified for the state, and in addition to detailing the events of the night of the burglary Clevinger testified that appellant had threatened him while they were in the Clay County jail prior to trial. Clevinger stated that he heard appellant's voice through the vent in his cell, telling him he should think hard on his testimony at the trial because it could cause trouble for his wife and relatives. Appellant contends that this testimony should have been excluded. . .
>
> . . . Thus the statement is patently dictum and the opinion does not indicate the Williams rule applied in

> that case. In any event, we conclude that the law applying to alleged threats made by the defendant in this case is accurately treated in **Jones** v. **State,** 385 So.2d 1042 (Fla. 1st. **DCA** 1980), in **Jones,** this court stated:
>
> > An attempt by a defendant or third person to induce a witness not to testify or to testify falsely is admissible on the issue of defendant's guilt, provided it is shown that that attempt was made with the actual participation, knowledge, or authorization of the defendant. **Duke** v. **State,** 106 Fla. 205, 141 S0.886 (1932).
>
> Id. at 1043. Since the threat in this case was attempt by the defendant to induce a witness to testify falsely, and was shown to have been made with actual participation of the defendant, the testimony was properly admitted.
>
> 418 So.2d at 309.

A similar result should obtain herein.

Moreover, assuming that this court finds "error" in the admission of testimony concerning the money, appellee would urge that any error is harmless error beyond a reasonable doubt. See Manuel v. State, 524 So.2d at 736. See also Coon v. State, supra, and State v. DiGuillio, 491 So.2d 1129 (Fla. 1985).

Based on the foregoing, appellee would urge this court to deny relief to appellant on Issue II.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DECLARING DOUG FREEMAN A HOSTILE WITNESS AND PERMITTING THE'STATE TO IMPEACH ITS WITNESS WITH PRIOR STATEMENTS WHEN THE WITNESS WAS NOT ADVERSE?

Appellant next argues that the trial court erred in declaring Doug Freeman, appellant's brother, a hostile witness because of the inconsistent statements concerning the time when Doug Freeman and appellant went to cash one of appellant's checks the morning of the Epps murder.

The record before this court reflects that Douglas Freeman took the stand and testified, in detail, about his whereabouts on October 20, 1986, and the whereabouts of his brother. (TR 1254-1292). Cross-examination lasted from (TR 1292-1371). Redirect examination by the state commenced at (TR 1372-1378), when, in response to an inquiry as to whether threat or coercion had been used with regard to any of the earlier statements he had given to either the state or the defense, Mr. Freeman stated that there was a "story behind that." (TR 1378). At that point, the jury was removed and proffered testimony presented which reflected that Mr. Freeman was concerned about being charged with "some Mickey Mouse crime or them finding something to charge me for if I didn't, you know, tell them what they wanted to hear". (TR 1379). As a result of further discussion between the Court, the witness and the state, the court recessed the proceeding concluding that at this stage Mr. Freeman might be in jeopardy of a perjury charge and appointed counsel to assist him. (TR 1383). When the proceedings recommenced, following preliminary

discussion, the state requested that Mr. Freeman be declared a hostile witness and that the state be permitted to ask him leading questions. (TR **1391-1392**). The request was bottomed on two grounds. First, that Mr. Freeman had testified that his earlier sworn statements to the state were made under pressure and second, that his testimony was inconsistent with regard to the time spent with his brother the morning of the murder. (TR **1392**). The state specifically stated that it was only asking that Mr. Freeman be declared a hostile witness although the state also believed he was adverse. The state argued:

> The hostile witness is a lesser step, your Honor. The first step is a lot more discretionary with the Court to declare one a hostile witness, that is when I can lead him. And that is referring to a witness that has been reluctant or recalcitrant, and the Court has discretion to declare him hostile, and he can be led. The second thing is an adverse witness, and that's when a witness said something that is materially damaging to the party calling that witnesses' case. When that happens, the party can impeach him. At this point, I am only that he be declared a hostile witness so I can lead him. And as things go along, I may be asking you to have him declared adverse.

(TR **1393**).

Following further argument, the court concluded:

> It appears to me that it goes without saying, I would not have recessed the trial at a quarter till four yesterday and appointed an attorney for Mr. Doug Freeman if there were not at least indications that he may be presenting difficulties for himself in a manner in which he is testifying.
>
> At this time, I am going to find that

> he is hostile and allow the State to proceed with leading questions.

(TR 1398).

Redirect recommenced (TR 1400), at which time the state inquired of Mr. Freeman with regard to the time and circumstances the day of the murder he accompanied his brother. (TR 1401-1403). The state then inquired of Mr. Freeman with regard to other aspects of his testimony based on direct and cross examination and Mr. Freeman's testimony ultimately ended with Mr. Freeman's statement that on the day Mr. Epps died, his brother had Mr. Epps' possessions and that is why Mr. Freeman ultimately called the police. (TR 1422).

There can be little doubt that the trial court did not err in declaring Mr. Freeman a hostile witness sub judice. Albeit, there is a dirth of caselaw with regard to what constitutes a hostile witness as opposed to an adverse witness, caselaw indicates that a hostile witness is a reluctant witness who is either being difficult or recalcitrant in responding to inquiry. As such, the trial court has latitude in allowing the parties to ask leading questions of such a witness. Erp v. Carroll, 438 So.2d 31, 36-37 (Fla. 5th DCA 1983); Caldwell v. State, 243 So.2d 422 (Fla. 1st DCA 1971); Williams v. State, 353 So.2d 956 (Fla. 1st DCA 1978) and Rowe v. State, 174 So. 820, 824 (Fla. 1937), wherein the Court, citing to Coker, et al., v. Hayes, 16 Fla. 368, observed:

> A leading question should be permitted only when it appears essential to justice; where a witness is persistently unwilling, or biased, or there exists some like reason, the court should allow it. In some cases

> a party may and should be permitted to lead his own witness. This matter, however, is in the discretion of the court. It is not ground of error, and appellate courts universally refuse to review such exercise of discretion.
>
> **174** So. at **824.**

While an adverse witness might be subject to impeachment, appellee would submit that the only finding **sub judice** was that Mr. Freeman was a hostile witness not based on his inability to recall times accurately but rather because of his insinuations that the State somehow coerced him into testifying a certain way. Clearly, in the instant case, the State had the right to ask leading questions of Mr. Freeman. Moreover, Appellee would argue if any error occurred based on the evidence and nature of the case **sub judice,** said error would be harmless beyond a reasonable doubt. Appellant'sreliance on the decision in Jackson v. State, **451** So.2d **458** (Fla. **1984),** is misplaced in that Jackson, supra., simply dealt with a lack of memory which was insufficient to render a witness adverse and therefore subject to impeachment. Herein, the trial court did not declare Mr. Freeman an adverse witness but merely exercised its discretion in allowing the State to ask leading questions. See Rowe v. State, supra., and **890.608,** Florida Statutes.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE DOUG FREEMAN'S PRIOR CONSISTENT STATEMENTS TO BOLSTER THE WITNESSES CREDITABILITY?

The thrust of appellant's fourth issue is that the state's "redirect examination was to reaffirm Doug's prior sworn statement." (AB 63). Citing to three instances during the redirect when appellant objected to the state's inquiry, appellant concludes " . . . although Doug was impeached on cross-examine, appellant maintained that the witness was confused on the dates from the time of his very first statement. Indeed, if Doug's testimony that he was threatened by the detectives were believed, he always had the motive to lie, and there could be no impeachment based on recent fabrication." (AB 66). Appellee would disagree. The inquiries made on redirect with regard whether Doug Freeman had made similar statements on prior occasions, were the proper subject of inquiry because of the impeachment resulting from appellant's cross-examination of Mr. Freeman. Moreover, since the trial court was correct in allowing the state to ask leading question of Mr. Freeman, said inquiry fell well within earlier questions tendered of Mr. Freeman by the defense.

Section 90.801(2)(b), Florida Statutes, provides that "a statement is not heresay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: consistent with his testimony and it offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrications; . . ."

Herein, the record is replete with evidence that on cross-examination, Mr. Freeman may or may not have had a legitimate reason to testify for the state against his brother. Inquiry was made regarding whether Mr. Freeman was a police buff (TR 1370), whether he had a police scanner in his car and home, whether he ever attempted to get assistance from a State Attorney's office to have charges filed against another person (in particular his ex-wife) (TR 1371) and whether he was making secret tapes of people without their knowledge. (TR 1371). Earlier Mr. Freeman had been extensively questioned with regard to the time frame surrounding the cashing of a check with his brother and whether the fact the check cashing incident occurred on the day of the murder. He was also inquired of as to whether on the day of the murder or some period thereafter, he saw appellant in possession of property belonging to Mr. Epps. On redirect, prior to Mr. Freeman evidencing some concerns about whether he was going to be charged with the crime and being declared a hostile witness, the state was able to inquire of him with regard to prior inconsistent statements based on his cross-examination testimony. (TR 1374-1378).

In Van Gallon v. State, 50 So.2d 882 (Fla. 1951), the court opined:

> We recognize the rule that a witness' testimony may not be collaborated by his own prior consistent and the exception that such as statement may be come relevant if any attempt is made to show a recent fabrication The exception is based on a theory that once the witnesses story is undertaken, by imputation, insinuation, or direct evidence, to be assailed as a recent

> fabrication, the admission of an earlier consistent statement rebuts the suggestion of improper motive and the challenge of his integrity.

In Van Gallon, the court reversed because there was insufficient evidence upon which the state relied to demonstrate a basis to invoke the exception. Certainly, this is not the case **sub judice.** See Gardner v. State, 490 So.2d 91, 93 (Fla. 1985). And, unlike Jackson v. State, 498 So.2d 906, 909-910 (Fla. 1986), the prior consistent statements were made before, not after the alleged motive to falsify had arisen. It was Doug Freeman who went to the police to inform them that he had observed his brother in possession of Mr. Epp's property the day of the murder. (TR 1422). Mr. Freeman made several statements to both the state and defense with regard to if, when and who these statements were made. (TR 1372-1381).

Even assuming for the moment that the state somehow violated the prohibition of use of prior constituent statements to "put a cloak of creditability on the witnesses testimony", the testimony forthcoming from Mr. Freeman affirming that he had made such statements on a prior occasion can be nothing more then harmless error. See State v.DiGuillio, supra, and Teffeteller v. State, 439 So.2d 840, 842-843 (Fla. 1983), wherein this court observed on a similar issue:

> Even if the trial court's ruling were error, we find that it was harmless. 'A judgment will not be reversed unless the error was prejudicial to the substantial right of the appellant.' **Palmes** v. **State,** 397 So.2d 648, 653 (Fla.), **cert. denied,** 454 **U.S.** 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).

> 'In determining whether an erroneous ruling below caused harm to the substantial rights of the appellant, an appellate court . . . inquires generally whether, but for the erroneous ruling, it is likely that the result below would have been different.
>
> 439 So.2d at 842-843.

A similar result must obtain herein.

ISSUE V

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE HAIR ANALYSIS EXPERT TO TESTIFY ABOUT STUDIES AND OTHER FACTS WHICH DID NOT FORM THE BASIS FOR HER EXPERT OPINION AND ONLY SERVE *TO* BOLSTER HER TESTIMONY?

The crux of this issue is whether reversible error occurred because references were made to publish studies by others and to training exercises conducted by Ms. Linda Hensley, a senior crime analyst from FDLE. Specifically, appellant argues that the testimony by Ms. Hensley that in her training exercises with students and in her experiments with thousands of hair comparisons, she had never found an unknown hair that matched more than one standard, suggested conclusive proof that the unknown hairs belonged to appellant based on mathematical statistics. Albeit, appellant's counsel objected at trial to Hensley's testimony with regard to her studies; (TR 2221-2222). the Court permitted Ms. Hensley to explain her training exercises (TR 2223), and permitted, on cross examination, detailed exploration of the studies and the theories she utilized. (TR 2254-2256). Ms. Hensley also was permitted to explain how she created her standard hair samples and how the only slide that compared favorably was that of the appellant. (TR 2320).

In Jent v. State, 408 So.2d 1024, 1028-1029 (Fla. 1982), the court on a similar point concerning hair analysis concluded:

> The general rule, the problem presented to a trial court is whether scientific tests are *so* unreliable and scientifically unacceptable that admission of those tests results constitutes error. (Cites omitted). This court has recognized that

> testimony regarding hair analysis can be admitted into evidence in a criminal trial. **Peek** v. **State,** 395 So.2d 492 (Fla. 1980). A trial court has wide discretion concerning the admissibility of the evidence, and, in the absence of an abuse of discretion, a ruling regarding admissibility will not be disturbed. (Cites omitted). We find no abuse of discretion in regards to allowing hair analysis testimony in the instant case, nor do we find that the substance of that testimony out of order. The technician repeatedly stated that she could not positively identify the unknown hair as being evidence. Determining what weight to accord this testimony was within the jury's province and no error occurred in permitting the jury to hear this testimony.

Jent v. State, 408 So.2d at 1029.

Even assuming for the moment this Court concludes to the contrary, appellee would submit that the studies permitted to be testified to by Ms. Hensley were also the subject matter of extensive cross-examination. As such, the determination as to what weight should be accorded the testimony was still within the jury's province. Any error that may have occurred was harmless beyond a reasonable doubt. State v. DiGuillio, supra.

ISSUE VI

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL BASED ON NEW AND MATERIAL EVIDENCE?

Appellant, in a post-trial hearing on his motion for new trial, (TR 3228-3376) presented the testimony of several witnesses who testified that in October 1986, they saw Billy McMillion in Jacksonville, Florida. Appellant argued this information was newly discovered evidence that could not have been uncovered prior to trial through the use of due diligence and that it goes to the merits of the case, is not cumulative and if presented to the jury would have resulted in a different verdict. See McVeigh v. State, 73 So.2d 694 (Fla. 1954). Appellee would disagree. At best the testimony presented by appellant at the motion for new trial was an attempt to impeach the testimony of Billy McMillion and at worse, it was information that was readily available and could have been uncovered prior to trial. Moreover, whether Billy McMillion was indeed in Jacksonville or in Tulsa, Oklahoma, in October 1986, should provide little pause in that (1) testimony was presented that Billy McMillion was in Tulsa, Oklahoma on October 20, 1986; (2) the State witnesses saw appellant in possession of the property of Mr. Epps the day of the murder; (3) appellant gave at least three different versions of how he obtained Mr. Epps' property; (4) Billy McMillion's hair standard did not compare with the hair samples found on Mr. Epps' body, and (5) appellant's hair sample did compare favorably to the hair samples retrieved from Mr. Epps' body.

The trial court did not err in denying appellant's motion for new trial based on newly discovered evidence, since appellant has failed to show entitlement to a new trial.

ISSUE VII

WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S AMENDED MOTION FOR NEW TRIAL BASED ON THE INTRODUCTION OF FALSE EVIDENCE?

Appellant next contends that he was entitled to a new trial because of the introduction of false evidence at trial. Specifically, appellant argues:

> . . . Darrell McMillion testified that he filed for food stamps when he first arrived in Tulsa (T **1594-1595**). McMillion never mentioned applying for food stamps in his sworn statement or deposition and no documentary evidence existed to support this claim. In fact, the State had tried to verify the food stamp application and knew that none existed. (T **3330-3334**).

(AB-76).

The issue before this Court is whether the trial court erred in denying appellant's motion for new trial based on this particular piece of evidence. Appellee would submit that appellant has failed to demonstrate that an abuse of discretion has been evidenced by the denial of said motion. Whether Billy McMillion did or did not apply for food stamps in Tulsa, Oklahoma when he first arrived in **1986,** is not a falsehood of such significance or any import to overturn the conviction of appellant for the first degree murder of Mr. Epps. Moreover, to suggest that the state attorney in some fashion withheld information from the defense is highly suspect in that what the

State knew was that they could not verify whether McMillion applied for food stamps. Certainly, that was well within the ability of appellant's counsel to also discern. Appellant has cited no authority which would support a conclusion that a motion for mistrial should have been granted on this point. See Dames v. State, 314 So.2d 171 (Fla. 3rd DCA 1975).

ISSUE VIII

WHETHER THE TRIAL COURT ERRED IN FINDING AS *AN* AGGRAVATING CIRCUMSTANCE THAT APPELLANT HAD A CONVICTION FOR A PRIOR VIOLENT FELONY?

The trial court found three statutory aggravating factors applicable herein. One, that the murder was heinous, atrocious and cruel; two, that the murder was committed while Freeman was engaged or was an accomplice in the commission of or an attempt to commit a burglary in Mr. Epps' home and three, that Freeman was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

Appellant only challenges the third aggravating factor found. Specifically, he asserts that albeit the trial court found that the threat to Mr. Osborne during the attempted burglary is a felony involving the use or threat of violence to a person, he, Appellant, was not charged with or convicted of aggravated assault and therefore the threat did not accompany the attempted burglary. Appellee would disagree. The circumstances of the crime for which Appellant was convicted for attempted burglary were neither too remote in proximity to the attempted burglary nor outside the realm of consideration in regard to the factors making up the attempted burglary. The trial court, in his order concluding that this was an appropriate aggravating factor and detailed the plight of Mr. Osborne as he observed on October 26, 1981, appellant attempted to burglarize the home of Ernest Dunbar. Mr. Osborne interrupted Appellant's efforts to break-in and gave chase to Appellant. At that point, Appellant

pulled out a knife and waived it at Mr. Osborne in a threatening manner. The trial court concluded that:

> The threat to Mr. Osborne with a knife during the attempted burglary in case 81-9547-CF is a felony involving the use or threat of violence to the person.

(TR 586).

In Johnson v. State, 465 So.2d 499 (Fla. 1985), this court, faced with a similar issue and citing to Mann v. State, 453 So.2d 784 (Fla. 1984), held:

> Thus, whether a previous conviction of burglary constitutes a felony involving violence under Section 921.141(5)(b), Florida Statutes (1981), depends on the facts of the previous crime. Those facts may be established by documentary evidence, including the charging or conviction documents, or by testimony, or by a combination of both. . . .

465 So.2d at 505. See also Perri v. State, 441 So.2d 606, 607 (Fla. 1983).

The trial court did not err in concluding that this particular aggravating circumstance was proper in Appellant's case. Even assuming to the contrary, based on the uncontested two valid statutory aggravating factors and the absolute lack of any mitigating evidence, either statutory or nonstatutory, death is the appropriate sentence in the instant case.

ISSUE IX

WHETHER THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT TO DEATH, OVERRIDING THE JURY'S RECOMMENDATION OF LIFE IN PRISON IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION?

The jury in the instant case recommended a life recommendation. A review of the penalty phase provides absolutely no support for such a recommendation. Contrary to Appellant's assertions that there were both statutory and non-statutory mitigating factors, Appellee would urge this Court to support the trial judge's finding that death was an appropriate sentence.

A brief summary of the "mitigation" presented by Appellant reflects that he was born November 5, 1963 in Homerville, Georgia. (TR 3123). He never knew his father because his father was in prison and Appellant's mother was left to raise the children on her own. (TR 3124). Appellant's mother did re-marry a Charles Freeman who disagreed with Appellant's mother as to how the children should be raised and disciplined. (TR 3126). Mrs. Freeman testified that she felt that Charles was a bit too hard on the children and didn't display too much affection. (TR 3126). Although Appellant had not lived at home for quite awhile, she loved her son and her son loved her. (TR 3126-3127).

Robert Jewell next testified in behalf of Appellant. (TR 3128). Jewell, Appellant's older brother, thought Appellant looked up to him. They both disliked Charles Freeman, their stepfather, and he recalled occasions when Charles would punish both Appellant and Robert. (TR 3129-3131). Sometimes Charles

would spank Appellant and Robert with his bare hand. (TR 3131). Mr. Jewell testified that there was never much affection nor encouragement from Charles because he kept calling them dumb and stupid. (TR 3133). Mr. Freeman always treated his natural children in a nice way, providing them with financial support, however, he never gave any money to Appellant or Robert. (TR 3133). When asked is Mr. Jewell had ever been convicted of a crime, he admitted that he had been convicted of crimes on three separate occasions. (TR 3136). On cross-examination, Mr. Jewell also admitted that although he had been convicted of three previous crimes, he had never been convicted of murder. (TR 3137). Mr. Jewell testified that the reason he and Appellant hated Charles Freeman, their stepfather, was because he was a hateful person and because he disciplined them. (TR 3137).

Samuel David Sorrells next testified that he was one of appellant's good friends. (TR 3140). He remembered occasions when appellant had been punished by his stepfather and recounted how appellant was kind to appellant's girl friend's little boy. (TR 3142). Mr. Sorrells on cross-examination testified that it didn't matter to him that appellant was a convicted murderer because he believed that appellant was a nice guy. (TR 3144).

Jamie Wendt was next called to the stand and testified that she met appellant while he was in jail and she was visiting his cell mate. (TR 3147). Although she testified she knew nothing about appellant's past, she considered him a friend because he mailed to her two pictures he had drawn in prison. (TR 3147-3148).

Lastly, appellant called Dr. Lewis Legum, a phychologist who testified he had interviewed appellant and had given him a number of psychological test. (TR **3151-3156).** Dr. Legum testified that appellant had a fourth grade education level and his mental capacity fell within the normal range of an adult, He further testified that appellant knew the difference between right and wrong and that the only way he could explain the disparity between appellant's IQ and his learning level was that he either had limited formal education or a learning disability. (TR **3159).** Appellant told Dr. Legum that he felt that he, appellant, was not smart, that he lacked experience to get a good job and that he wanted to have a child. (TR **3162).** Dr. Legum said that appellant was apparently not good with stress and that if in fact he had been abused by his stepfather he might not develop or adjust like a normal person would. (TR **3164-3165).** On cross-examination, Dr. Legum admitted that he knew nothing about the other charges pending against appellant nor did he know about appellant's escape attempt although he assisted in the preparation of a defense in the instant murder. (TR **3165-3166).** He reinforced the fact that appellant had normal/adult intelligence and testified that just because a person has a poor education does not mean that they will become a murderer. (TR **3170).** At this point, the defense rested its case.

The trial court in the sentencing order found none of the statutory mitigating factors applicable. (TR 579-583). The court concluded that because John D. Freeman was **22** years old when he burglarized the home of Alvin J. Epps and murdered Alvin

J. Epps, and because "John D. Freeman was well over the age of majority on October 20, 1986"; and because "John D. Freeman has lived and functioned on his own as an adult in society for several years prior to this murder"; and because "John D. Freeman had the capacity to earn an honest living through gainful employment when he wanted to do so"; and because "John D. Freeman's intelligence is placed by Dr. Lewis Legum in the dull/normal range"; and because "John D. Freeman is an adult both chronologically, emotionally, and intelligently"; he therefore concluded that "there is no mitigating circumstance under this paragraph". (TR 582-583).

With regard to nonstatutory mitigating circumstances the court concluded after detailing in minute detail the evidence presented at the penalty phase with regard to mitigation, that "there are no nonstatutory mitigating circumstances." (TR 583-585).

There is no rational basis upon which the jury could have concluded that life was an appropriate sentence. Indeed this court has recognized on a number of occasions that where there is no reasonable basis for the jury to recommend life, a trial court's override will be sustained. Such should be the case sub judice. See Burr v. State, 466 So.2d 1051 (Fla. 1985); Brown v. State, 473 So.2d 1260 (Fla. 1985); Echols v. State, 484 So.2d 568 (Fla. 1985) and Torres-Arbolego v. State, 524 So.2d 403 (Fla. 1988). Wherein this court observed:

> Under Florida's capital sentencing scheme, a jury's recommendation of life is entitled to great weight. Therefore, a override sentence of death will not be

> upheld unless the facts justifying a death sentence are so clear and convincing that no reasonable person could differ as to its appropriateness. **Tedder** v. **State,** 320 So.2d 908 (Fla. 1975); **Brookings** v. **State,** 495 So.2d 135 (Fla. 1986). As recently noted in **Ferry** v. **State,** 507 So.2d 1373(Fla. 1987), the **Tedder** standard has been "consistently inperpreted by this court to mean that when there is reasonable basis in the record to support a jury recommendation of life, an override is improper." 507 So.2d at 1376. In other words, where there are valid mitigating factors discernible from the record which reasonable people could conclude outweigh the aggravating factors proven in given case, an override will not be upheld. See **Echols** v. **State,** 484 So.2d 568 (Fla. 1985), **cert. denied,** ____ U.S.___, 107 S.Ct. 241, 93 L.Ed.2d 166 1986.
>
> 524 So.2d at 413.

There was no mitigating evidence either statutory or nonstatutory. While not mindful of Tedder v. State, 323 So.2d 908 (Fla. 1975), appellee would submit that appellant's age could not be a reasonable basis upon which the jury found a life sentence was appropriate. Appellant had been (as the trial court found) on his own for a long period of time and had held jobs and was functioning as an adult. The psychologist who testified, Dr. Legum found that appellant was dull/normal in intelligence, not suffering from any brain damage or mental disease and basically a person who purportedly did not handle stress well. The "childhood trauma" appellant suffered at the hands of his stepfather was the same kind of trauma his brother, Robert Jewell, suffered and many other children suffer at the hand of a too strict stepfather. This was not the kind of case like Herring v. State, 244 So.2d 1049 (Fla. 1984), or Holsworth v. State, 522 So.2d 348 (Fla. 1988), or for that matter, Ferry v.

State, 522 So.2d 817 (Fla. 1988), where a number of factors in mitigation were presented which supported a jury's recommendation of life. Clearly, Amazon v. State, 487 So.2d 8 (Fla. 1986), is distinguishable from the instant fact pattern as is Huddleston v. State, 475 So.2d 204 (Fla. 1985), and Cannady v. State, 427 So.2d 723 (Fla. 1983) regarding appellant's "youth".

When a trial judge elects to override the jury and impose a death sentence, the justification must be clear and convincing and, under the circumstances, the jury's recommendation unreasonable. Burr v. State, supra. Where two of three statutory aggravating factors when unchallenged and there were no mitigating factors upon which the jury could reasonably base their recommendation of life, the judge's override must be sustained. See Parker v. State, 458 So.2d 750 (Fla. 1984); Thomas v. State, 456 So.2d 454 (Fla. 1984), and especially Brown v. State, 473 So.2d 1260, 1270-71 (Fla. 1985).

ISSUE X

WHETHER APPELLANT'S DEATH SENTENCE IS EXCESSIVE, INAPPROPRIATE AND NOT PROPORTIONATE IN LIGHT OF HIS CHARACTER AND BACKGROUND AND THE CIRCUMSTANCES OF THE OFFENSE?

Lastly, appellant argues that the death penalty imposed was inappropriate and that the jury's recommendation of life should be enforced. Appellant's authorities are not persuavsive in that each case is markedly distinguishable from the facts herein. The trial court in a rather lengthy conclusion as to why death was an appropriate sentence stated in part:

> . . . John D. Freeman has brought violence and terror into the very epicenter of our daily lives - - - the dwelling in which we live.
>
> The murder of Alvin J. Epps occurred during the burglary and subsequent theft of the following items of personal property; clothing, jewelry, a blanket, a camera, radio and fishing reel.
>
> The defendant and the members of his family were wearing the jewelry and clothes of Alvin J. Epps before his body was discovered by a son returning home from school.
>
> This court expressly finds that there is no mitigation involved in this case wherein the victim was brutally stabbed and allowed to slowly and painfully bleed to death on the floor of his own bedroom after having interrupted John D. Freeman perpetrating a burglary within his home.

(TR 594).

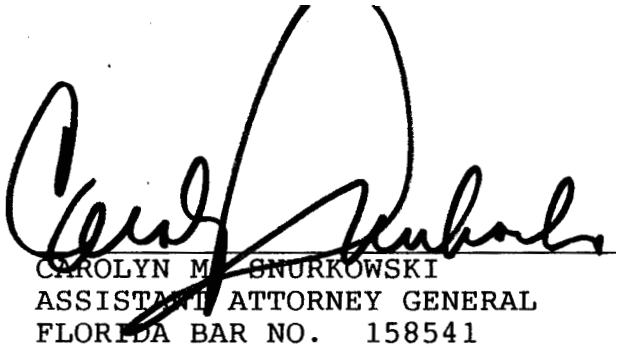
Where as here, there are three valid statutory mitigating factors and no mitigation and no rational basis upon which the jury could conclude that life was the appropriate sentence, this court should affirm the trial court's imposition of the death penalty. See Parker v. State, supra; Brown v. State, **473** So.2d at **1270-71**, and Echols v. State, supra.

CONCLUSION

Based on the foregoing appellee would urge this court to affirm the judgment and sentence entered.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



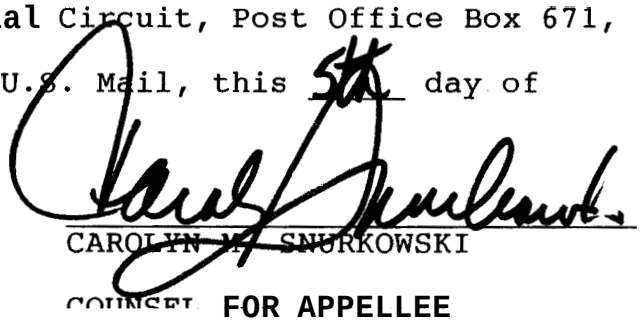
CAROLYN M. SNURKOWSKI
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 158541

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-1778

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing has been furnished to Paula S. Saunders, Assistant Public Defender, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida 32302 by U.S. Mail, this 5th day of December, 1988.



CAROLYN M. SNURKOWSKI

COUNSEL FOR APPELLEE