IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN, :

Appellant, :

VS. : CASE NO. 71,756

STATE OF FLORIDA, :

Appellee. :

_____ :

INITIAL BRIEF OF APPELLANT

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MISCELLANEOUS

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I PRELIMINARY STATEMENT

Appellant, JOHN D. FREEMAN, was the defendant in the lower court and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecuting authority.

The record on appeal consists of four volumes of pleadings and will be referred to herein as "R" 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 as "T."

II STATEMENT OF THE CASE AND FACTS

A. Pretrial Proceedings

John Freeman was indicted on April 23, 1987, by the Grand Jurors of Duval County for first degree murder of Alvin Epps on October 20, 1986. Counts II and III of the indictment charged appellant with burglary of the dwelling of Alvin Epps with an assault and with robbery with a deadly weapon (R 143-145).

The state filed a Notice of Similar Fact Evidence and supporting memorandum, seeking to introduce evidence that on November 11, 1986, appellant committed a residential burglary and premeditated murder of Leonard Collier (R 18, 45-52, 141). Appellant filed a motion in limine to prohibit the introduction of the collateral crime evidence (R 23-24; 54-140). Several witnesses testified at a hearing on the motion, following which the court granted appellant's motion in limine (R 153-157; T 42-117, 123-227).

The state filed a second notice of similar fact evidence relating to appellant's attempted escape from the Duval County Jail on January 14, 1987 (R 212). Appellant responded with a motion in limine to exclude the evidence, arguing, inter alia, that appellant was under indictment for the first degree murder of Leonard Collier and was charged by information with second degree murder in the instant case on January 14, 1987; that the potential penalty at the time of the escape attempt was death in the Collier case and a term of years under the guidelines in the present case; that the Collier case was the impetus for the

escape attempt, and that appellant would have no opportunity to rebut the inference created by evidence of his flight without reference to the Collier murder (R 258-269). Appellant further moved to suppress his statements to sheriff's deputies upon his apprehension following the attempted escape (R 270-272). After a hearing, the trial court denied appellant's motion in limine and granted the motion to suppress statements (R 276, 277; T 370-372, 438-458).

Appellant also moved in limine to prohibit the state from eliciting testimony at trial that John Freeman hated blacks and wanted to "kick some niggers ass." Appellant contended that evidence of his racial attitudes lacked any legal and logical relevance; that there was no indication that the murder of Mr. Epps was racially motivated, and that such testimony was highly prejudicial and inflammatory (R 213-215). Appellant proffered that the statements were made six or seven weeks prior to the Epps' murder following an attack on Freeman by three black men. The trial court denied the motion in limine (R 234; T 267-293).

Appellant was tried by jury before Honorable Bill Parsons on September 29-October 9, 1987. Prior to the testimony, the trial court agreed to admonish the witnesses not to mention the death of Leonard Collier or the circumstances of the Collier case (T 958a-958c) and instructed the state's witnesses accordingly (T 1000, 1210-1211, 1253, 1423-1424, 1472, 1614, 1780).

A summary of the evidence presented at trial follows.

B. Trial

Alvin Epps was murdered in his home on October 20, 1986. He had been stabbed six times (T 1015, 1085). Time of death was placed between 8:30 a.m. and 12:30 p.m. (T 1153). Mr. Epps was last seen alive in his driveway by a neighbor between 8:55 and 9:00 a.m. on October 20, 1986 (T 1160-1162). His body was found at 4:30 p.m. in the master bedroom. His left front pants pocket was pulled out (T 1003, 1011, 1171, 1173). There was blood on the baseboard in the bedroom and on the bedspread, but no trail of blood (T 1015-1016, 1986, 1988-1990).

Entry to the residence was gained through a secluded rear bathroom window; the screen and windowpane had been removed. A rag was lying on a bush outside the window and the bushes were trampled. There were leaves on the bathroom floor, but no footprints were found outside the house (T 1009-1010, 1038-1039, 1068-1069). Inside, the house was ransacked. A dresser drawer was found empty on the bed in the master bedroom; doors that were normally kept shut were open; closets were pilfered, and items were strewn on the bedroom and hall floors (T 1011-1013, 1172-1174). Several personal items, including a camera, Puegot car radio, fishing reel, clothing, an Indian blanket, jewelry and pennies, were missing from the residence (T 1176-1191, 1215-1226, 1245-1248).

The murder weapon was never found, although an empty leather knife case was recovered at the scene. Investigators also recovered six ounces of marijuana, a set of scales and two

handguns in the victim's bedroom closet, as well as a straw with a trace of cocaine on the floor outside the bedroom (T **1037-1038, 1040, 1979,** 1990-1991**.**

On the day before the murder, Neal Kluepfell, a friend of Alvin Epps, had been at the house helping Epps paint the master bedroom. Mike Rizzo was helping Epps move. Craig Brantley also came to the house on the night before the murder and had words with Epps. Epps was looking for a Mr. HOW bag, which he never found. Mr. Brantley returned to the house later that evening. Following the murder, Deangelo Epps advised Detective Moneyhun about Craig Brantley and the Mr. HOW bag. Moneyhun instructed FDLE crime analyst, Steven Leary, to look for the Mr. HOW bag, but it was never located. Leary said Moneyhun thought the bag might contain drugs (T **1062-1063, 1196-1202, 1236-1237, 1996).** The Epps' residence was the object of another burglary earlier in **1986.** The same bathroom window was removed and gold chains and pennies were stolen (T **1203, 1233-1234, 1240).**

The medical examiner, Dr. Bonafacio Floro, was qualified as an expert in forensic pathology. He performed the autopsy on Alvin Epps on October **21, 1986.** Mr. Epps received six stab wounds, one in the neck, four on the chest and one on the right thigh, and a small cut on the right ring finger. The wound on the neck would have caused immediate paralysis and unconsciousness within seconds or minutes. Dr. Floro opined that this was the last wound inflicted because of the immediate paralysis. One stab wound in the lower back entered the lower lobe of the left lung. A third stab wound in the chest entered the heart.

The wound on the right side of the chest entered the abdominal cavity and into the liver. Each of these wounds would have been fatal and would have caused death within minutes. A fourth chest wound and the injury to the thigh were superficial. The wounds were consistent with a double edged knife, although two of the wounds could have been inflicted with a single edged blade (T 1080-1104, 1142, 1145-1149).

Several witnesses placed appellant in possession of the victim's property near the time of the murder. Mary Hodges was living with appellant in October, 1986. During that month she saw a gold bracelet and chain, new clothes and Indian blanket. She knew John did not have money and could not afford those clothes. Mary gave the clothes and blanket to John's mother. She and her mother, Nancy Yorton, later turned over the chain and bracelet to Detective Moneyhun. John told Mary that he got the property from Work Release. After his arrest, he said he got the items from Darryl McMillion (T 1616-1621, 1647, 1656).

Appellant's stepbrother, Douglas Freeman, testified that John came to his trailer early on the morning of October 20 and asked Doug to take him to cash a check. Doug saw John a second time around 9:30 a.m. Doug was not certain of the time, but he remembered that Kathy was making breakfast and he was watching TV. Around 10:30 a.m. Doug and John left the trailer in Doug's car. John told his stepbrother that he bought a camera, radio, and fishing reel that morning from a man at work and took Doug to his house to show him the three items. John gave Doug the car radio, which Doug put in his car and later turned over to

Detective Moneyhun. Doug peeled three initials off the back of the camera with a folding knife he borrowed from John. There was no blood on this knife. Doug put the camera away when he couldn't buy film for it. He claimed he also saw the fishing reel that morning at John's house and said that John gave the reel to his father in repayment for money he borrowed. Doug was positive he saw the items on the day of the Epps' murder (T **1255, 1262-1271).** Doug later turned over the camera, reel and articles of clothing to Detective Moneyhun. He first saw the clothing at John's house around October **20** (T **1282-1284, 1290-1292, 1356, 1359, 1646-1649).**

Sometime before the murder Doug gave John a double-edged, five inch buck knife (T **1272).** Doug never saw it again after he gave it to his brother (T **1367-1368).**

Doug Freeman testified that he and his wife, Kathy, lived in a trailer a few houses down from John. Kathy's parents, Tom and Betty Mixon, lived next door to John. John was living with Mary (Missy) Hodges at the time of the murder. Doug was paying John's rent (T **1257-1260).** Doug recalled that Mr. Epps died on a Monday or Tuesday because he was off work on those days and Doug and John were building a porch that day (T **1300).** Kathy's parents had purchased a new TV a few days before and gave Doug and Kathy their old television and antenna. Doug and John installed the antenna on Doug's trailer the same afternoon. Doug remembered hearing sirens in the neighborhood and later that evening he and John drove by the Epps' residence. They

got out of the car and talked to some of Doug's friends on the street. John was not acting or saying anything peculiar (T 1273-1280).

Freeman remembered cashing the check for John at Harold's IGA Food Store on Lem Turner Boulevard on the morning of the murder. John came by Doug's trailer at 7:00 or 7:30 a.m. and they went by the American Bank to cash the check. The bank was closed, so they went up the block to Harold's IGA. The check, from Coleman Construction, was issued on October 13, 1986, one week before the murder. After cashing the check, Doug dropped John off at his house. Doug estimated the time to be shortly after 8:00 a.m. Doug saw John again 45 minutes to an hour and a half later. They visited at Doug's trailer and then went to John's house at approximately 9:50 a.m. Doug saw the camera, radio and fishing reel at that time. They put the radio in Doug's car and took the fishing reel to their parents' house, then went to K-Mart to buy film for the camera. After making several trips to purchase lumber and borrow tools, the brothers spent the rest of the day working on the porch (T 1335-1354).

Doug was arrested for burglary after he first talked to Detective Moneyhun about this case. The prosecutor met Doug at the jail 30 minutes after his arrest. The charges were later dropped (T 1284-1287).

Doug testified that appellant called him several times while he [appellant] was in jail. The prosecutor asked Doug whether appellant ever mentioned a sum of money, and Doug said no (T 1288). Appellant objected to the line of questioning on

the grounds that the money related solely to the Collier case. The state attorney agreed that the money related to the other case, but argued:

> He [appellant] also called Mrs. Mary Hodges and offered her $24,000. And I think that might have been the Collier money, too. But, that certainly goes to offering a witness money.
>
> I just wanted to corroborate what we were talking about, a large sum of money.

(T 1289). The court sustained appellant's objection (T 1289).

Doug further testified that he talked to the investigator, prosecutor and Public Defender numerous times during the case (T 1256-1257). On cross-examination, Doug testified that in their initial meeting, the prosecutor, Mr. Stetson, urged him to confess (T 1294-1295). Doug was released from jail a half hour after the prosecutor came to see him. Stetson later told Doug that he "better be glad that he . . . got me out of jail, or something like that, because he didn't want one of his witnesses in jail" (T 1295-1297). Freeman admitted telling the prosecutor things which were not true because he thought that was what Stetson wanted to hear. Doug was secretly taping his conversations with people; he was told it was illegal, but he was never charged for doing it (T 1298).

Freeman could not recall the date or day of the week that Mr. Epps died. In his deposition he said Epps was killed in November (T 1300-1301). Freeman consistently maintained that he cashed a check for John very early that morning. He thought the check was from Coleman Construction; he did not know of any

other company John worked for in October. Doug endorsed his driver's license number on the back of the check. He identified Defendant's Exhibit No. 1, a check from Coleman Construction issued October 13, 1986. He stated that John came to his trailer at 7:00 or 7:30 a.m. They first stopped at the American Bank about 7:45, but it was closed. They then drove half a mile up the road to Harold's IGA, arriving between 7:50 a.m. and 8:00 a.m., and asked the manager to cash the check. The manager told them they would have to buy something to cash the check. John bought cereal and cookies. He thought the store was open before 9:00 a.m., but said his times could be off if the store did not open until 9:00. He later said he was sure that they were at the store before 9:00. He did not know if the bank was closed because it was Columbus Day (T 1301-1302, 1335-1344, 1418-1419).

After cashing the check, Doug took John home and then returned to his trailer. John came back 45 minutes to an hour and a half later. John could have come back to the trailer as early as 9:15. Doug did not see any blood on John's clothes or hands. The brothers visited for 30 to 45 minutes, then stopped at John's house and left again after 10:00 a.m. They bought supplies and ran errands and returned to John's. They finished working on the porch about 4:00 p.m. (T 1341-1352). John's mother came by about that time with an empty cooler box to put scraps in. They heard sirens at the Epps' house about the same time. Doug was certain these events occurred on the day of the Epps' murder (T 1353-1355, 1419-1420).

Doug took pictures with the camera that morning. One of the pictures showed Doug sitting on the rail of the front porch at John's house. The left side of the picture was torn. The missing portion would have shown whether or not the front rails had been built (T **1356-1358).**

Doug did not personally know Alvin Epps. On the night of the murder, Doug spoke to several people in the neighborhood. Defense counsel inquired if the decedent had a reputation for dealing in drugs. The state's objection was sustained. Doug testified on proffer that Alvin Epps had a reputation in the community for being involved with drugs. This testimony was excluded (T **1359-1364).**

On redirect examination, Doug said that he gave four sworn statements. In response to appellant's objection that the state was attempting to impeach its own witness, the state insisted that it was rehabilitating the witness after appellant inferred that Freeman was threatened or coerced. In his sworn statement on November 25, **1986,** Doug said he appeared voluntarily and was not under subpoena. The prosecutor asked Freeman whether that refreshed his recollection as to whether he was threatened or coerced in any way by the state, to which the witness replied, "Yes, sir, it was also a story behind that" (T **1372-1378).**

On proffer, Freeman stated that after he turned over the property, he was asked, off the record, to confess. He said he made the statements under **a** lot of pressure and was telling the State Attorney what he wanted to hear (T **1378-1379).** The state asked Doug whether he was telling the truth when he said his

brother had the victim's property of the day of the murder, and Doug replied affirmatively. The prosecutor then asked:

> Q What was -- you say you were under pressure, what was untrue about what you said?
>
> A Well, when I told you he hated all niggers, you know, he had a dislike for the guys that had jumped him previously, you know. And there's been a few others. I had them marked down in my statements, but I ain't got them with me.
>
> * * *
>
> Q What did Detective Moneyhun tell you? Did he tell you he wanted you to tell the truth or not?
>
> A Yeah, he wanted the truth, but that was after y'all tried to get me to confess to being a part in the crime.
>
> * * *
>
> THE WITNESS: I wasn't going to sit there and tell you y'all was threatening me. And I believe that would have gave you a good chance to get me with something, if I sat there and telling you: You're threatening me.

(T **1379-1381**). The court expressed concern that the witness was about to state he perjured himself under oath, and with the consent of counsel, the court took a recess to appoint counsel to advise Doug Freeman of his rights (T **1381-1383**).

When the proceedings resumed, the state moved to have Doug declared a hostile witness, thereby allowing the state to ask him leading questions. The state argued that since the witness testified that his statements were made under pressure, there

was an inference that his entire testimony was false. The prosecutor further claimed that the witness gave inconsistent testimony on cross-examination when he said that John showed up at 9:15 a.m. (T 1391-1393, 1396-1397). Appellant objected and refuted the state's contention that Doug made any inconsistent statements. Appellant did not object, however, to the state asking leading questions with regard to any threats or coercion (T 1394-1396, 1398). The court declared Doug a hostile witness and allowed the state to lead the witness (T 1398).

Upon further redirect examination, Freeman testified that John came back to his trailer sometime between 9:00 and 10:00 a.m. He was not sure of the exact time. His cross-examination testimony that he saw John the second time at 9:15 was a rough estimate and it could have been as late as 9:45 (T 1400-1402). Doug reaffirmed his previous statements that appellant was in possession of the victim's property on the day Mr. Epps died. He was not sure whether the check from Coleman Construction was the one he cashed the same day (T 1404-1406). Freeman was told in his sworn statements to tell the truth and that if he did not, he could be prosecuted for perjury (T 1414-1415).

Freeman's burglary charge was dropped at a hearing the same day he was arrested. The state did not make any offers with regard to that charge in exchange for his trial testimony. Freeman first called Pat McGuinness, appellant's lawyer, when he got to jail. Defense counsel told Freeman he could not help him because he was representing John. The prosecutor came to the jail later to talk to him (T 1407-1409, 1416). Freeman

turned over tape recordings and the torn picture to the Public Defender and his investigator, even though the state had been asking for the photograph (T **1409-1410**).

Kathy Freeman, Doug's wife, testified that John came to the house around **9:45** a.m. on October **20, 1986**. She recalled the day because Doug and John were working on the porch, and they moved a television and an antenna from her parents' house to the trailer. Kathy's mother, Betty Mixon, sold her the TV because she purchased a new one on October **18** (T **1425-1428, 1461-1462, 1459-1462, 2113-2117**). That afternoon Kathy saw a bracelet in appellant's possession. She saw the camera and radio that night. Appellant told her he got the jewelry and some clothes from Work Release. After his arrest, John told her he bought the items from Darryl McMillion (T **1428-1433**).

Ms. Freeman testified on cross-examination that she was threatened by the prosecutor during the investigation. She and Doug were under subpoena and Mr. Stetson said if they gave him false information, Doug and Kathy would go to prison and the State would take her two children. The court reporter and Investigator Moneyhun were also present (T **1433-1436**).

John gave his father, Charles Freeman, the fishing reel on the same day that he and Doug were building the porch. John owed his father money. Charles credited John with **$17** for the reel. Appellant told his father he got the reel from someone at work (T **1464-1467**).

Robert Jewell, appellant's brother, testified that he had talked to his brother numerous times after appellant's arrest.

Robert asked John five or six times where he got the property of Mr. Epps. Appellant said the property was given to him. John also said he and Doug were buying supplies and building a screen porch on the day of the murder. Over the objections of the defense (T 1454-1458, 1479-1483, 1491), Robert testified that John asked him to retrieve a large sum of money in a bank bag located between the house and the dock. Robert did not know what John wanted him to do with it (T 1485-1487).

Jewell testified on cross-examination that in all of his conversations with appellant, John consistently denied being involved in the Epps' murder. Jewell was never asked to give any money to anyone connected with this case (T 1489-1490).

Mary Hodges testified that John did not want her to go to court and he said that his lawyer would "tear me apart in the courtroom'' (T 1622). Over appellant's objections, Ms. Hodges testified that John offered her $24,000, and said his brother, Robert, would bring her the money the next day. Appellant said he would meet her in California (T 1622).

On cross-examination, Mary testified that she planned to go to California, where her sister lived, after John's arrest. John never asked her not to testify nor did he offer her the $24,000 for that reason. Mary was working on the day that John and Doug worked on the porch. John usually walked Mary to and from work, but he missed walking her home on the day he worked on the porch. She saw the victim's property when she got home from work on a day that John came and picked her up at work. Mary never saw blood on John or his clothes (T 1624-1628).

Darryl McMillion testified that he was living at the Duval County Jail, having been sentenced to 21 months in prison on a robbery charge. He was originally charged with armed robbery, but pled to a reduced charge. He had a violation of probation pending in Polk County. Prior to his plea, McMillion gave a sworn statement to Detective Moneyhun. He was not represented by counsel at the time. McMillion was arrested in August in North Carolina and waived extradition to Florida (T 1524-1528).

McMillion stated that he grew up in the same neighborhood with appellant and they rode the school bus together. He last saw appellant two or three years ago. McMillion said he was in Tulsa, Oklahoma, on October 20, 1986. He applied for a job at McDonald's that afternoon and had his orientation three days later. He arrived in Tulsa on October 11 or 12, 1986, and was staying with Gary Cohen and Cohen's girlfriend, Jackie Wilson. He was in Minneapolis until October 8, when he left for Tulsa (T 1528-1529, 1541, 1546, 1549, 1597). He stayed in Tulsa one month, and as soon as he got his paycheck, he took a bus to Virginia. He was on his way back to Florida when he ran out of gas in North Carolina and was arrested on a fugitive warrant (T 1547-1548). He left Jacksonville on July 5, 1986, because he knew of warrants for his arrest and did not want to go to jail. He was not in Florida again until August 7, 1987 (T 1544-1545).

McMillion identified a check cashing card from Hennepie County, Minnesota. The card was issued 9/23/86. He testified that he received public assistance from Camden County and used

his last welfare check to buy a tent and sleeping bag before hitchhiking to Tulsa (T **1550-1552).**

On cross-examination, McMillion admitted using the alias Darryl McMann to avoid being arrested. McMillion and Johnnie Beach, his co-defendant, forced their way into a man's house and robbed him of drugs and money. They were wearing gloves and masks. The victim was a friend of his brother, William. Darryl, William and Beach fled to Tulsa, Oklahoma, after the robbery. McMillion was stopped in Oklahoma for driving Cliff Richardson's car. He appeared in court once but fled back to Florida before his next court appearance. He financed their return trip with checks forged on Cliff Richardson's account (T **1552-1558, 1573, 1581-1582).**

On his job application at McDonald's, McMillion used the name McMann; he also falsified information pertaining to his education and employment history and other facts. He signed and dated the application (T **1574, 1577-1579).** Darryl denied seeing John Freeman in Jacksonville in October or robbing and stabbing Mr. Epps (T **1584).** When he was apprehended in North Carolina, McMillion had a knife. He last saw the knife in the possession of a detective when he got off the plane in Jacksonville (T **1586-1588).** He gave a sworn statement to Detective Moneyhun upon his return. In the statement, Darryl said he arrived in Tulsa on October **2** and started work at McDonald's the first or second week of October. He left Tulsa without picking up his last paycheck (T **1589-1592).** He claimed he applied for food stamps when he first got to Tulsa (T **1595).**

Jackie Wilson lived with Gary Cohen in Tulsa, Oklahoma. She testified that Darryl McMillion stayed in their apartment in October, 1986. He arrived the first week of October and left the first or second week of November (T 1781-1784).

Lynette Gibbs was the assistant manager of McDonald's in Tulsa on October 20, 1986. She hired Darryl McMillion when he applied for a job on that date. McMillion came into the store at 3:00 p.m. He used the name Darryl McMann. McMillion came in for orientation on October 23 (T 1826-1840).

Detective Moneyhun interviewed Darryl McMillion on August 10, 1987. McMillion told the officer he left Jacksonville on July 5, 1986, and was in Tulsa, Oklahoma, on October 10, 1986. McMillion knew appellant and knew where he lived (T 1721, 1730-1731). Over appellant's objections (T 1732-1736), Moneyhun stated that Doug Freeman was certain that appellant was in possession of Mr. Epps' property on the morning of the murder. Before taking Doug's sworn statement on November 25, Moneyhun and Stetson told Freeman to tell the truth and explained the law of perjury. Freeman said he did not feel threatened or coerced (T 1737-1739). On November 26, 1986, Moneyhun took a sworn statement from Kathy Freeman. He explained the law of perjury to her as well. He denied threatening her in any way. Moneyhun took a second sworn statement from Kathy at the State Attorney's Office on December 10, 1986, and again explained the perjury law to her. He was certain no one ever said anything to Kathy about taking her children away from her (T 1743-1745).

In one statement to Detective Moneyhun, Doug Freeman said he worked on the screen porch on October 13 and his mother came by with the cooler box that day. The receipt for the cooler was dated October 13, 1986 (T 1793-1794).

Assistant State Attorney Howard Maltz prosecuted Darryl McMillion on the armed robbery charge. Mr. Maltz dropped the charge against McMillion's codefendant, Johnnie Beach, due to insufficient evidence. Maltz stated there were a number of problems with the case: when the police arrived on the scene after the robbery, the home was locked and they could not enter to obtain fingerprints or photograph the scene; there were also discrepancies in the evidence, and the victim was unavailable (T 1912-1914). McMillion pled to the reduced charge on August 24, 1987, at arraignment. He scored in the three and a half to four and a half year range on the sentencing guidelines for the armed robbery charge, but pled to the unarmed robbery for a 21 month sentence. The plea offer was not linked to McMillion's testimony in the instant case. Maltz agreed to the sentence because of the insufficient evidence in the case (T 1915-1916).

On cross-examination, Maltz stated that McMillion's court-appointed attorney, Mr. Collins, did not take any depositions or file any motions in the case. Maltz had sworn statements from the victim, David Johnson, police officers and McMillion's brother, who was the get-away driver (T 1919-1924, 1960-1961). Maltz did not consult with the victim prior to the disposition of the case. He prepared the sentencing guidelines scoresheet; he scored one of McMillion's three prior felony convictions; he

did not score legal status although McMillion was on probation, and he forgot to score victim injury, even though the victim was cut in the throat. He did not oppose the sentence running concurrent to McMillion's Polk County sentence on the probation violation. The trial judge was not aware of the inaccurate scoresheet (T 1933-1940, 1946).

Timothy Collins represented McMillion in August. Darryl gave his sworn statement to Detective Moneyhun on August 10, and Collins was appointed on August 19. The sworn statement did not factor in to the plea bargain (T 1951-1959).

Crime lab analyst Steven Leary lifted six fingerprints from the Epps' residence: four lifts from a lamp on the bed in the master bedroom; one from a closet doorknob, and one from a glass jar on a dresser in the master bedroom. He did not find any prints around the bathroom window. The lifts were sent to Ernest Hamm for identification; Hamm compared the latent prints to inked prints of appellant, Darryl McMillion, Doug Freeman, Neal Kluepfell, Jerry Brantley and members of the Epps family. He did not identify any prints of appellant, Doug Freeman or Darryl McMillion. He identified the latent prints on the lamp as those of Epps and his son, Deangelo; he could not identify one of the prints on the lamp or the prints on the doorknob or glass jar (T 1971-1974, 2025-2032, 2034-2037, 2048). There were no fingerprints or foot impressions inside the bathroom or on the disassembled window (T 1983, 2015, 2037).

The body was not examined for hair or other trace evidence before it was moved. The body was carried into the hallway and placed on the floor (T **1991-1992**). Linda Jones processed the victim's clothing for trace evidence at the FDLE. She found a strand of hair on the victim's pants leg (T **2060-2070**). Several officers arrived at the scene prior to Detective Moneyhun, and several people had access to the autopsy room in the medical examiner's office (T **1045-1047, 1156-1157, 2138-2139**).

Pat Miles, an investigator with the State, obtained hair samples from appellant on March **27, 1987**, and delivered them to the FDLE crime lab (T **1867-1870**).

Linda Hensley was qualified as an expert in hair analysis. She testified that she compared two Caucasian head hairs from the victim's clothing with head hair standards from appellant (T **2193-2209**). After performing both visual and microscopic examinations, Ms. Hensley concluded that the two hairs from the victim's clothing had the same microscopic characteristics as appellant's hairs. She testified that her hair comparison was not a positive identification, but it would be unusual to find two hair standards that are the same (T **2213-2217, 2235-2237, 2319-2321**).

Over appellant's objection (T **2183-2192**), Ms. Hensley told the jury that she was aware of published studies involving hair comparisons of identical twins, although these studies did not form the basis for her opinion in this case. She said the hair of identical twins could be distinguished by hair comparisons such as she did in this case (T **2217-2220**). The court permitted

Ms. Hensley to testify, over objection, that she trained others in hair comparisons and set up training exercises using similar hair standards to teach students to differentiate between them. In her training exercises, Hensley never found two hairs from different individuals that were microscopically the same. In thousands of hair examinations, she never found an unknown hair that matched more than one standard (T **2220-2224**).

Ms. Hensley also compared the unknown hairs to head hair standards from Darryl McMillion and Douglas Freeman. The hair standards were visually and microscopically different from the two hairs recovered from the victim's clothing. (T **2226-2229, 238-2239**)

On cross-examination, Ms. Hensley testified that she could not tell the gender or age of a person from her examination of the hairs, although she could determine if hairs were characteristic of human head hair or Caucasian hair. The two hairs from the victim's clothing were different and from a comparison of the two, she could not determine if they came from the same person (T **2240-2242**). Hensley explained that trace evidence such as hair could easily be transferred from one source to another on contact (T **2242-2244**). She compared the hair debris in this case to only three known standards (T **2244-2245**). She did not receive hair standards from Neal Kluepfell, Mike Rizzo, or any of the personnel at the scene (T **2247-2250**).

On redirect examination, Hensley stated that although the two hairs on the victim's clothing were different, there were hairs present in the known standard that demonstrated the same

microscopic characteristics as the two hairs recovered from the debris (T 2326-2327).

Detective Moneyhun first interviewed appellant on November 19, 1986, and arrested him on November 26, 1986 (T 2337-2341). After a proffer and Richardson inquiry (T 2341-2385), Moneyhun testified that he explained the nature of the interrogation and appellant agreed to talk to him. John said he knew of the Epps family, he knew Deangelo Epps, having been raised in the same neighborhood, but he had never been in the Epps' house. When Detective Moneyhun asked appellant about his involvement in the crime, John's attitude changed; he became belligerent, leaned back in his chair and said, "If you think I did it, prove it" (T 2385-2387). Appellant was evasive about his whereabouts on October 20, 1986, claiming he could not remember where he was that day or that morning. Moneyhun advised appellant he had reason to believe he was at the crime scene that afternoon and appellant admitted going to the scene with Doug (T 2387-2388).

Moneyhun interviewed appellant a second time on November 26, 1986, after he recovered the property. Appellant again waived his rights. When confronted with the fact that the detective had recovered the property from appellant's family and girlfriend, John said he bought the property from Darryl McMillan, not McMillion, at Betty's Tavern on Lem Turner toward the middle of October in the afternoon. Appellant said he met McMillion on the day he bought the property. He described McMillion as a white male: he did not know where Moneyhun could find him (T 2388-2397). John said he paid $20 for all of the

property and claimed his father gave him the money. After the interview, Moneyhun placed appellant under arrest for burglary and murder (T **2397-2399).**

After talking to appellant, Moneyhun attempted to locate Darryl McMillan. He said it took several months to find out McMillion's true identity (T **2401-2401).** Moneyhun also tried to find other checks beside the one dated October **13,** but he ran into a stalemate (T **2402-2403).**

Moneyhun stated on cross-examination that he could not locate Darryl McMillion's knife (T **2422-2423).**

Appellant renewed his motion to exclude evidence of the escape attempt prior to its admission. The motion was denied (T **2441).** John Colgrove is a bailiff for the Sheriff's Office. On January **14, 1987,** he saw appellant alone in a locked holding cell in the courthouse. The cell was made of cement block with a plywood ceiling. Colgrove was in the bailiff's office eating lunch when he saw appellant enter the courtroom. Four bailiffs chased appellant and caught him at the back doors of the courtroom (T **2442-2449).** After appellant was apprehended, Colgrove examined the holding cell and discovered a hole in the ceiling. The door was locked. There was a second hole in the ceiling in the corridor between the courtrooms (T **2449-2450).**

Following this testimony, the state rested (T **2451).**

Appellant's motion for judgment of acquittal was denied (T **2455-2463).** The defense witnesses testified as follows.

Margaret Murray, of the Salvation Army Probate Department, was working in her office outside the courtroom on January **14,**

1987, when she heard bumping noises. She walked toward the courtroom and the noises stopped. She next heard knocking on the door and, thinking one of the bailiffs did not have a key, she unlocked the door and pushed it open. A hand came around the other side and pulled the door open. Ms. Murray then found herself face-to-face with appellant. She asked him what he was doing and appellant responded that he had to get out, he had to see his wife. She told him he could not get out that way and led him through the courtroom. She noticed the hole in the ceiling and debris on the floor and knew that something was wrong. She said appellant seemed disoriented, but he did not grab or strike her or attempt to take her hostage. Appellant followed Murray down the corridor, through the locked door to a holding room and into the courtroom. She entered the bailiff's office and yelled (T 2465-2468, 2501-2504). She saw John run across the courtroom to the front door. There was a scuffle at the door. Murray did not see John strike anyone and he never threatened her (T 2504- 2505).

Jerry Brantley was the victim's girlfriend. She was with Mr. Epps on Saturday, October 18. They were supposed to have lunch together at 1:00 the following Monday. She never heard from him that day (T 2510-2512, 2515-2520).

Audrey Coleman and her husband own Coleman Construction Company. She identified appellant's payroll card, which was admitted into evidence without objection. The payroll card indicated that appellant worked for Coleman Construction for one day on October 10, 1986. Ms. Coleman paid appellant by

check on Monday, October 13. John came by her office at 8:00 a.m. that day to pick up the check. She testified that the drive-through window at the American Bank on Lem Turner was open at 7:00 a.m. (T 2521-2526).

John Avery, vice president of the American National Bank, testified that the bank was closed on Monday, October 13, in observance of Columbus Day. The bank on Lem Turner opened at 7:00 a.m. for the drive-in and the lobby opened at 9:00 a.m. Monday through Friday. The drive-in would have been open at 7:00 a.m. on October 20, 1986 (T 2530-2532).

The manager of Harold's IGA, John Hanley, testified that the store opened at 9:00 a.m. Monday through Saturday. It was not possible for someone to cash a check at the store between 7:30 and 9:00 a.m. The store had its account at Barnett Bank. Deposits were on Tuesdays and Fridays. If a check was cashed on Monday, it would be in the Tuesday's deposit. Mr. Hanley identified appellant's check from Coleman Construction and his initials and deposit stamp on the back of the check. Hanley did not recognize appellant (T 2533-2538, 2541-2542).

At the request of the State Attorney's Office, Roberta Redshaw, manager of the research department for Barnett Bank, searched the account of Harold's IGA for a check payable to John Freeman and deposited by the store on October 21, 1986. She personally went through the account, check by check through 197 checks, and could not find one payable to or endorsed by a Mr. Freeman. Appellant's check from Coleman was deposited by Harold's IGA on October 14, 1986 (T 2543-2546).

Mary Freeman, appellant's mother, purchased a cooler at Service Merchandise on October 13 at 3:07 p.m. She stopped at John's house on her way home and left the cooler box for John to use for scraps of lumber. John was working on his porch that day (T 2547-2550, 2561-2562). After her son's arrest, Ms. Freeman located appellant's wallet. She identified the wallet and its contents and stated it was in substantially the same condition as the day she found it (T 2551).

B.J. Walker is a brick mason subcontractor. In the latter part of 1986, Walker had three or four appointments with an oral surgeon on Dunn Avenue. On one such occasion, Walker met a young man who asked him for work. Walker gave the man a business card with his employer's name and phone number. The man wrote down Walker's home phone number on the back of the card. Walker stated that he used a company truck to pick men up for work. The man told Walker he lived off of Lem Turner. Walker could not remember on which of the appointment days he met this man, but he recalled that it was in the morning (T 2579-2583, 2594-2595). Walker identified the business card, with his phone number and initials on it, inside appellant's wallet (T 2586-2591).

Walker testified on cross-examination the he had no specific memory of the man to whom he gave his card. Walker's first appointment was on October 20, but he did not think he gave the card to the man then. He thought he gave the card to the man on his second visit, Friday, October 24 (T 2605-2610).

James Barsamian is an oral surgeon on Dunn Avenue. He treated B. J. Walker on October 20, 1986 at 10:00 a.m. (T 2618-2621). Walker had another appointment on Friday, October 24, 1986, but it was rescheduled for the following Monday, October 31. Walker did not show up for his appointment that day and came in for treatment again on November 3 at 8:30 a.m. He had a final visit on November 7 at 2:00 p.m. (T 2622-2623).

Allen Miller was qualified as an expert in blood spatter analysis. He responded to the Epps' home on October 20, 1986, and photographed the interior and exterior of the house. One photo taken of the hallway in the master bedroom depicted six or seven spatters of blood on the wall. The spatters were of a medial velocity-type, indicative of an object being thrust into a bloody object, like a hammer hitting a pool of blood. The stains were six inches above the floor. There was a trail of blood on the floor and bloodstains on the bed (T 2634-2646). Based on the pattern of the blood spatters on the wall, Miller expressed his opinion that the victim was on the floor in the hallway when he sustained one of his wounds (T 2647, 2649).

After photographing the room, Miller and Detective Japour picked up the body and carried it to the hallway at the threshold of the master bedroom and placed it on the floor. The rug in the hallway was a thick shag type rug, the kind likely to retain trace evidence, including hair. Miller did not have any opinion as to whether the victim had been moved after his death (T 2648-2650).

Steven Leary recovered the straw from the floor of the master bedroom in the Epps' house and transported it to the crime lab. He found plant material and a small scale in a carrying case in the master bedroom closet and a Triple Beam Balance scale in the same closet (T **2656-2661**). The straw contained cocaine residue. The plant material had a characteristic smell of marijuana (T **2698-299**).

David Johnson was the victim of an armed robbery on March **6, 1986**. Two masked men pushed their way into Johnson's house and demanded money. During the struggle that ensued, Johnson was cut in the neck and hand with a butcher knife. The robbers took **$600**, a pistol and marijuana. **As** they fled, the robbers removed their masks. Johnson chased them and recognized the two men as Darryl McMillion and Johnnie Beach (T **2701-2706**). Johnson reported the incident to the police. Johnson appeared for a deposition but was never contacted before the disposition of the case. He got a letter from the State Attorney after one of the robbers was sentenced to 21 months in prison for unarmed robbery (T **2705-2706**). Johnson knew McMillion's brother, Bill. Bill McMillion was at Johnson's house earlier that day and was with his brother that night (T **2706-2708**).

On cross-examination, Johnson stated that he had automatic locks on his doors and when he chased the robbers, his key was locked inside. He denied refusing to let officers go into his house. He also denied getting any notes from the State Attorney while the case was pending. He had lived at the same address

continuously since February of 1986. He told officers the names of the robbers and described their car (T 2712-2718).

The defense rested (T 2749).

On rebuttal, Officer J.A. Wilson testified that he talked to David Johnson at the scene and filed the Incident Report. Johnson reported the robbers' first names but said he could not remember their last names. Johnson described the robbers' car. Three or four other officers were present (T 2750-2752).

The state rested its case in rebuttal (T 2753). Appellant renewed his motion for judgment of acquittal, which was denied (T 2754).

Following closing arguments (T 2758-2857) and instructions on the law (T 2932-2956), the jury returned a special verdict finding appellant guilty of first degree felony murder in Count I and guilty of burglary with an assault and armed robbery as charged in Counts II and III (R 399-401; T 2963-2964).

C. Penalty Phase

The penalty phase was conducted on October 13, 1987. Prior to testimony, the court heard arguments and denied appellant's motion to prohibit evidence to establish the aggravating factor of prior violent felony (R 405-409, 419; T 2988-2997). The court granted appellant's motions to exclude jury consideration of the aggravating factors of cold, calculated and premeditated murder (R 410-411, 420; T 2972) and avoiding or preventing lawful arrest (R 417-418, 424; T 2978-2986, 3016-3017).

Four witnesses testified for the state.

Ernest Hamm compared inked fingerprints of John Freeman with fingerprints on the judgment for attempted burglary of a dwelling in Case No. 81-9457-CF. The defendant in that case was John DeWayne Freeman (T 3046-3048, 3059).

George Osborne lives at 8981 Carbondale Drive, next door to Ernest Dunbar. On October 29, 1981, Osborne was working on his dock at 10:45 a.m. when he saw someone at Dunbar's back door. As he ran into his neighbor's yard, he saw John Freeman walking around the side of the house toward the street. He stopped John and asked whom he was looking for. John said he came by to do some work for the neighbors. Osborne told Willie Haynes to get his [Osborne's] wife to call the police while Osborne talked to John. Osborne's wife and parents came over and they talked while waiting for the police. Suddenly, John shoved Osborne and started running (T 3092-3098). John ran about 30 yards with Osborne pursuing him, reached in his pocket and pulled out a pocket knife. He turned towards Osborne and shook the knife at him as he was running. Osborne could see the blade of the knife. Osborne chased appellant about a block when John picked up a stick beside the road. He lost appellant in the woods. The police later brought John back to the scene for Osborne to make an identification (T 3098-3100). After the incident, Osborne looked at the Dunbar's back door. The screen was cut and there were pry marks on the door (T 3095-3096).

On cross-examination, Osborne said appellant had run at least a block and a half before he picked up the stick. John

was 30 yards away from Osborne when he shook the knife at him; he was running away from Osborne at the time (T 3106-3107).

Ernest Dunbar lives at 9009 Carbondale Drive with his wife and two children. He did not invite anyone to his house on October 29, 1981, and did not offer appellant any work (T 3110-3112). Nothing was missing from his house and no one in the household was harmed (T 3112).

Dr. Floro testified that the wound on the back of the victim's neck split the spinal cord; it would cause immediate paralysis but would not cause immediate unconsciousness. He believed this was the last wound sustained because of the paralysis and limited amount of blood on the victim's collar. He explained that if the victim was stabbed in the chest first, there would be a significant loss of blood either internally or externally and the victim would lose consciousness within a minute or two. Any wound inflicted after that time would not bleed as severely. None of the wounds sustained would have caused immediate unconsciousness, although unconsciousness would occur in one or two minutes. The period of consciousness is consistent with the victim being stabbed in the doorway of the bedroom, running 10 or 15 feet to the bed, being stabbed in the neck and back and dying by the bed (T 3114-3116).

The state rested (T 3118).

Appellant's mother, Mary Freeman, testified that John was born on November 5, 1963, in Homerville, Georgia. His father's name was Charles Jewell. Jewell was sent to prison when John was six weeks old and John did not see his natural father until

a few years before the trial. Mrs. Freeman raised her children alone for three years before she married Charles Freeman. Her husband never adopted her children. Mary and Charles disagreed on disciplining the children. She felt he was too hard John and he did not show much affection. Mrs. Freeman testified that she loves John and knows that he loves her (T 3122-3126).

Robert Jewell, age 25, is appellant's older brother. He testified that he disliked his stepfather. When Jewell was 11 or 12 years old, Charles Freeman tied Robert to his bed and beat him with a belt until he was black and blue. Freeman once chased Robert under the house and threatened him with a gun. He threatened Robert with a knife, too, and would beat Robert and John with a switch or his bare hands when they were young. One time Freeman hit John in the face and gave him a black eye for some minor infraction (T 3128-3132, 3134). Robert ran away from home frequently during his childhood and was put in foster homes. He was trying to get away from his stepfather. He said Freeman never gave any affection to the brothers and was always putting them down (T 3133). Robert identified photographs of John as a child, which were admitted without objection (T 3131, 3134-3135). Robert said he was not around much to give any guidance to his brother (T 3136).

Samuel Sorrells went to school with John Freeman and they were good friends. Sorrells saw marks on John's back one time after John was beaten with a belt or strap. One time John was hit in the face and his cheek was swollen. John did carpentry

work and was a hard worker. He enjoyed being around children and was very attached to a girlfriend's two year old son (T **3139-3142).**

Jamie Wendt met appellant while visiting a friend in the county jail. John sent her pictures he drew after they met. The pictures were admitted into evidence (T **3147-3149).**

Dr. Louis Legum was qualified as an expert in the field of forensic psychology. He interviewed appellant on July **7, 1987.** In intelligence testing, John scored at the bottom end of the adult normal range of intellectual ability. John tested very poorly in the achievement testing. He achieved a fourth grade level, or in the first percentile, on the performance tests. Dr. Legum explained that the IQ and performance scores are generally consistent and offered two hypotheses for the great divergence between appellant's scores. He opined that John's poor performance on the achievement tests was a function of limited formal education and the fact that John never acquired the usual academic skills, or it could manifest a learning disability, although Dr. Legum could not conclusively establish a learning disability based on the testing he conducted. John could not spell four and five letter words. Although John can distinguish right from wrong, he would not react as quickly or think of alternatives in stressful situations. The witness explicated that John's problems as an adult were indicative of someone exposed to violence or physical abuse in childhood **(T 3152-3165).**

On cross-examination, the prosecutor asked Dr. Legum if he was aware that appellant tried to escape. Appellant objected and argued that the escape charge could not be considered in the penalty phase. The objection was sustained (T 3166-3169).

The defense rested (T 3171).

During its final arguments to the jury, the prosecutor argued that appellant was a menace whether he's in or out of prison because he tried to escape. Appellant's objection was sustained and his motion for mistrial denied (T 3196-3197).

The jury recommended by a vote of nine to three that the court impose a sentence of life imprisonment (R 441; T 3223). The court rejected the jury's recommendation and sentenced appellant to death, finding three aggravating factors: that the murder was especially evil, wicked, atrocious or cruel; that the capital felony was committed in the course of a burglary, and that appellant was previously convicted of a felony involving the use or threat of violence. The court found no statutory or non-statutory mitigating circumstances. Appellant was sentenced in accordance with the sentencing guidelines to concurrent terms of 17 years on Counts II and III (R 566-599; T 3399-3416).

D. Motion for New Trial

The trial court heard appellant's motion for new trial on November 20, 1987. Seven witnesses testified at the hearing.

The first defense witness was Valarie Allen. Ms. Allen lives at 9156 Third Avenue, next door to Doug and Kathy Freeman

(T **3237**). She was sitting on the porch with Doug and Kathy one evening in October **1986,** when Doug called out to a man walking by the house. Doug introduced the man to Valarie as Darryl. Ms. Allen identified a photograph of Darryl McMillion as the man she met that night. She remembered the night because the Jacksonville Agricultural Fair was being held at the Gator Bowl. There was a midnight madness every Friday night of the fair and the meeting occurred either the night before or the night of the first midnight madness. Ms. Allen met Darryl again a few days later at a game room near her home. Darryl was shooting pool with Bill McMillion. Ms. Allen had known Bill for three years (T **3238-3243**).

On cross-examination, Ms. Allen stated that she knew Tony Meyers and William Dorman. She met John Freeman a few times. Doug Freeman asked her to say that she was at Tony Meyers' house during the fair. She agreed at first but after talking to her mother, she decided she could not lie. Ms. Allen called Mr. McGuinness and told him she had lied (T **3243-3245**). On the night she met Darryl, she was sitting on the porch with Doug and Kathy smoking marijuana. They were all high. Doug did not mention Darryl's last name, but he later identified the man as Darryl McMillion. She talked to William Dorman about the case behind K-Mart one morning on the way to work. Dorman said he also knew that McMillion was in town because he and Tony were with Darryl at midnight madness. Dorman's wallet was missing and he thought Darryl took it. Ms. Allen gave Dorman's name to the Public Defender (T **3246-3249**).

In response to questions by the court, Ms. Allen stated that her relationship with Doug Freeman was bad ever since she told defense counsel that she could not lie. She said she was angry at Doug for asking her to lie. She learned that Doug's brother was a suspect in the case late in 1986, but she never discussed the case with Doug. Doug came to her and asked her to lie after John was convicted. She was previously on good terms with Doug (T 3253-3257).

Robert (Tony) Meyers was acquainted with John Freeman but had not spoken to John since his arrest. Meyers was friends with Bill McMillion. Meyers testified that he left Jacksonville in 1986 and did not return until August of that year. He saw Darryl McMillion in Jacksonville sometime after he returned in August. He was at Bill's house and William Dorman was present. He could not remember the exact date but he thought it was on the weekend early in the day (T 3259-3264).

William Dorman knew John and Doug but had not spoken to either about the case. Dorman was friends with Bill McMillion and knew Darryl through his brother. He last saw Darryl in October 1986, on a Saturday morning after the first midnight madness. He recalled the event because it was the first time he was with Robert Meyers since Meyers returned to Jacksonville. After the fair, they went to Bill McMillion's house: Bill was there with Darryl and Ricky Gillis and some other people. He was certain he saw Darryl that Saturday morning (T 3270-3275).

On cross-examination, Dorman said he got involved in the case after the conversation with Valarie Allen behind K-Mart.

Valarie brought up the subject of Darryl McMillion and asked Dorman if he saw McMillion in town during the time of the fair in **1986.** She also said she had talked to the Public Defender. After talking to Valarie, Dorman talked to Robert Meyers. It was then that he became positive that he saw Darryl in October **1986.** Dorman and Meyers were up all night at the fair drinking and smoking marijuana (T **3278-3282, 3286-3288).** He distinctly remembered that Darryl was joking about cutting off Charlie Starke's duck tail at the party (T **3290-3294).**

The state and defense stipulated that the Saturday after the first midnight madness was October **18, 1986** (T **3300-3301).**

Carrol Sellers works as a cashier at K-Mart. She grew up with Darryl McMillion. She also knows his brother Bill. She last saw Darryl in October around the time of the fair when he was mowing his lawn. She remembered the date in relation to her husband's birthday. She also saw Darryl in the fall of **1986** sitting on his front porch. She can tell Darryl and Bill apart because one is tall and muscular and the other is short (T **3308-3310).**

Ms. Sellers knows appellant and his family. After she read about John's conviction, Ms. Sellers was talking to his sister, Deena, and told her that she had seen Darryl McMillion in Jacksonville. After this conversation, Mr. McGuinness came to see Ms. Sellers at work (T **3311-3312)**

On cross-examination, Ms. Sellers stated that she worked with Deena and Kathy Freeman. She did not talk to any family members about the case until after John's conviction. She told

Deena that she saw McMillion in October and Deena asked how she knew it was October. Carrol said it was starting to get cold and the fair was in Jacksonville. Deena did not suggest the October date to her. She said she never saw Bill and Darryl McMillion together on these occasions in October. Darryl did not have a beard at the time and the brothers looked somewhat alike. She could not swear that it was Darryl sitting on the porch each time, but she was positive that she saw Darryl, not Bill, cutting the lawn (T 3313-3315).

The final defense witness was Patrick McGuinness. The state's objection to defense counsel testifying was overruled (T 3318-3320). Mr. McGuinness was attorney of record for John Freeman. He testified about the efforts taken by his office to locate Darryl McMillion from the time of appellant's arrest until McMillion was apprehended, including deposing Detective Moneyhun and interviewing Doug Freeman, checking McMillion's arrest records and motor vehicle registration, and interviewing Johnnie Beach, McMillion's co-defendant. McGuinness also filed a motion requesting that the state furnish any information pertaining to McMillion's aliases and current whereabouts. During the pre-trial investigation, Mr. McGuinness inquired of each of the witnesses as to their knowledge of McMillion and spoke with McMillion's neighbors. Although defense counsel gathered additional information about McMillion, he did not learn where McMillion was or whether he was in Jacksonville in October 1986 (T 3320-3326).

After McMillion's arrest in August, McGuinness received a sworn statement in which McMillion said he was working in Tulsa on October 2, 1986. McGuinness then initiated an investigation in Oklahoma (T 3326-3327). He contacted an investigator there to verify the claims in McMillion's sworn statement and subsequently traveled to Oklahoma, to interview witnesses, former employers and the landlord where McMillion purportedly stayed. He checked civil records, credit records and criminal records both in Oklahoma and Florida (T 3334-3336, 3339-3340).

In his sworn statement and deposition, McMillion never mentioned that he applied for food stamps in Oklahoma. He made that claim for the first time at trial. At the conclusion of the guilt phase, McGuinness contacted the department of human services in Oklahoma regarding the food stamp application and learned that no application was made by either Darryl McMillion or Darryl McMann. Defense counsel discussed this finding the prosecutor and was advised that the state had also investigated McMillion's claim and could not verify that McMillion applied for food stamps in Oklahoma (R 3332-3334).

The names of Valarie Allen, Robert Meyers, William Dorman and Carrol Sellers never came up during the discovery process prior to trial. Doug Freeman indicated where McMillion lived and that he had a brown car, but he did not know whether Darryl was in town in October 1986. On October 12 or 13, 1987, Doug called defense counsel and said he talked to Valarie Allen and may have information about McMillion's whereabouts. McGuinness contacted Ms. Allen, who furnished the names of other parties.

He talked to William Dorman the following day. He had never met or heard of Dorman prior to that. Dorman advised defense counsel how to locate Mr. Meyers and a week later McGuinness learned of Carrol Sellers (T **3336-3339).**

On cross-examination, Mr. McGuinness testified that he talked to appellant, his brother, Doug, and Kathy Freeman on numerous occasions prior to trial. He met Bill McMillion after the guilt phase when he interviewed Mr. Meyers. He also knew from Johnnie Beach that McMillion's family had assisted Darryl in concealing his whereabouts in the past. He contacted four other individuals, Bobby Woodward, Robert Shreeves, Charlie Starke and Danny Johnson, who attended a party at which Darryl McMillion was allegedly present (T **3340-3345).**

William McMillion testified for the state that he was arrested on July **8, 1986,** as an accessory after the fact in a case where his brother, Darryl, and Johnnie Beach were charged with robbery. He was placed in a juvenile shelter and released eight days later. He did not see his brother in Jacksonville after his release on July **16, 1986.** He said his brother was not present at a party at his parents' house in September **1986** or on October **18, 1986.** To his knowledge, Darryl was either in Oklahoma or Virginia during that time. The witness recalled a party at his house where Charlie Starke was ribbed about his duck tail. Bobby Woodward, Robert Shreeves, Danny Johnson, Ricky Gillis and his brother, Darryl, were present. The party took place before his arrest on July **8, 1986** (T **3350-3354).**

McMillion testified on cross-examination that he would not know where his brother was if Darryl was in Jacksonville. He last saw his brother on the day he was arrested. Darryl was staying at the Motel 6 when they returned from Oklahoma. The police came to the house looking for Darryl and Beach, but Bill did not tell the police where they were staying. Darryl left the motel and went to Lakeland. Ricky Gillis was arrested at the McMillion's house: Bill thought Gillis was working in Lakeland. McMillion said he loved Darryl as a brother but did not think much of him as a human being. He knew that Darryl used aliases but did not know any of the names (T 3354-3360).

On redirect examination, McMillion stated that the party which his brother attended could have taken place in October of 1985 around the time of the Jacksonville fair. He was sure that the party was not after July 1986 (T 3360).

Detective Moneyhun interviewed Carrol Sellers the previous week before the hearing. Ms. Sellers advised the investigator that she passed by McMillion's house several times and saw an individual in the yard she thought was Darryl. She stated that Darryl and Bill look so much alike when they were not together that she could not swear which brother she saw cutting the grass and sitting on the porch (T 3365-3366).

The trial court denied appellant's amended motion for new trial and motion for new trial based on new and material evidence after the evidentiary hearing (R 453-457, 468-4788, 492-497, 498; T 3330).

IV SUMMARY OF ARGUMENT

Appellant raises seven issues as to the guilt phase of the trial. In the first issue, appellant contends that the trial court erred in allowing evidence of appellant's escape from the county jail and in giving a "flight" instruction to the jury. Since appellant was under indictment for first degree murder of Leonard Collier at the time of the escape attempt, the flight inferred consciousness of guilt as to the extraneous offense, rather than the primary offense. Appellant could not rebut the state's improper implication that the flight was to avoid prosecution for this murder without compounding the prejudicial effect by introducing evidence of the unrelated murder. Left unrebutted, the jury was unaware of the real impetus for the attempted escape. [Issue I].

The state offered evidence at trial that appellant offered a large sum of money to his girlfriend and asked his brother to retrieve the money hidden near his and the Epps' homes. It was undisputed that this money came from the Collier murder and was unrelated to the instant crime. The evidence, however, implied that the money came from the Epps' burglary/murder and was offered as a bribe to Ms. Hodges, which insinuations were false and highly prejudicial. [Issue II].

Doug Freeman was a key state witness at trial. He was the only witness to place appellant in possession of the victim's property on the morning of the murder. Doug consistently said

at trial and in his pretrial statements that he saw appellant between 9:00 and 10:00 a.m. that morning. He also said he was under pressure and threatened by the prosecutor and detective when he gave his pretrial statements. The trial court granted the state's request to declare Freeman a hostile witness. At liberty to cross-examine its own witness, the state introduced Doug's prior statements, both consistent and alleged inconsistent statements, to impeach and bolster its witness. Appellant contends that the trial court erred in declaring Doug a hostile witness when his testimony was not adverse to the state and in allowing the state to introduce hearsay statements to bolster Doug's credibility. [Issues III and IV].

This was a circumstantial evidence case. A key piece of circumstantial evidence was hair found on the victim's clothes which, according to the state's expert, was microscopically similar to appellant's hair standards. The expert testified, over objection, that in thousands of hair comparisons, she never found an unknown hair that matched more than one hair standard. She further testified about studies involving hair comparisons of identical twins. These facts did not form the basis of her expert opinion in this case and only served to bolster her identification testimony by implying that her hair comparison was a positive identification. This was prejudicial error. [Issue V].

Appellant argues that the trial court erred in denying his motion for new trial based on new and material witnesses. Four witnesses testified that Darryl McMillion was in Jacksonville

in October 1986. This testimony was material to appellant's defense, went to the merits of the case and was not cumulative. In addition, the witnesses were not known to the defense prior to trial and could not have been discovered through reasonable diligence. Appellant is entitled to a new trial. [Issue VI].

In the final guilt issue, appellant contends he is entitled to a new trial based on the introduction of false testimony which the state new was false and allowed to go before the jury uncorrected. Darryl McMillion testified that he applied for food stamps in Oklahoma. The state tried to verify this claim and knew that Darryl did not apply for food stamps in that state, yet the state did not correct the false testimony. The introduction of this false testimony deprived appellant of due process of law and tainted the jury's verdict. [Issue VII].

Appellant's arguments as to penalty are (1) that the prior violent felony aggravating factor was improperly found [Issue VIII]; (2) that the trial court improperly overrode the jury's life recommendation [Issue IX]; and (3) that the death penalty is proportionally unwarranted in this case [Issue X].

V ARGUMENT

ISSUE I

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"

Flight evidence is admissible as relevant to a defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. Merritt v. State, 523 So.2d 573 (Fla.1988); Straight v. State, 397 So.2d 903 (Fla.1981). The relevance of flight evidence is predicated upon the inferential reasoning that specific criminal behavior served as the impetus for flight.

> It is the instinctive or impulsive character of the defendant's behavior, like flinching, that indicates fear of apprehension and gives evidence of flight such trustworthiness as it possesses. . . . The more remote in time the alleged flight is from the commission or accusation of an offense, the greater the likelihood that it resulted from something other than feelings of guilt concerning that offense.

United States v. Meyers, 550 F.2d 1036, 1051 (5th Cir. 1977).

In United States v. Myers, supra, the court 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 concerning the crime charged to actual guilt of the crime charged.

Id., 550 F.2d at 1049. Accord, United States v. Howze, 668 F.2d 322, 324 (7th Cir. 1982); United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982). If the prosecution wishes to offer evidence of flight to demonstrate guilt, it must ensure that each link in the chain of inferences leading to that conclusion is supported.

> 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.

United States v. Myers, supra, at 1050. Where a defendant has other unrelated charges pending, the third link in the chain of inferences cannot be supported.

In the present case, the evidence clearly suggests that the impetus for appellant's escape was an entirely different crime than one for which he was on trial. On January 14, 1987, when appellant fled from a holding cell in the courthouse, he was under indictment for the first degree murder of Leonard Collier; he was charged with second degree murder in the Epps case. Freeman was arrested in the Collier case on November 11, 1986, and was indicted on charges of first degree murder and burglary on December 4, 1986. On December 5, 1986, appellant was charged by information with second degree murder and burglary in the instant case. He was arraigned on both cases on December 8, 1986. He was in a holding cell waiting for a scheduled court appearance on traffic charges when he tried to escape (R 258-260).

In his motion in limine to preclude introduction of the "flight" evidence, appellant conceded that the evidence was admissible in the Collier case, but challenged the probative value of the evidence on these charges, arguing that the motive for his flight was the first degree murder charge and potential death penalty in the unrelated case. Defense counsel proved its contention by showing that appellant fled from the scene, concealed himself and provided a false name upon his apprehension for the Collier murder, all in close temporal proximity to the offense, whereas in the three weeks following the instant murder, John remained in his usual abode, frequented his usual haunts and pursued his customary pasttimes (R 263). Moreover, at the time of the escape attempt, Freeman had made inculpatory statements, signed a written confession, and was positively identified by eyewitnesses in the Collier case, whereas the only evidence linking him to these charges was his possession of recently stolen property. There were no fingerprints, eyewitnesses, concealment or confessions in the Epps murder. In fact, appellant had maintained his innocence in the Epps murder from the outset (R 264).

The only Florida case dealing specifically with the question of the admissibility of flight evidence where the flight could reasonably have been motivated by an intervening collateral crime which is itself inadmissible is Merritt v. State, 523 So.2d 573 (Fla.1988). In Merritt, the defendant was in custody in Virginia serving a sentence on an unrelated crime when the state received information implicating him in a three

year old murder. Six months later, in December 1985, Merritt escaped while being transported to Florida for prosecution of unrelated charges. He was not indicted for the murder until March 1986. The state introduced evidence of the 1985 escape in the murder trial. This Court reversed Merritt's conviction for first degree murder, finding insufficient evidence that Merritt fled to avoid prosecution for the murder as opposed to the other unrelated charges. This Court held that an inference that Merritt escaped because of a murder charge, for which he had not been indicted, "would be the sheerest of speculation." 523 So.2d at 574. The Court further recognized:

> Merritt was between a rock and a hard place once the court erroneously admitted the evidence. To rebut the state's improper implication that he escaped to evade prosecution for the Davis murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges. The court compounded the error by instructing the jury that an attempt to avoid prosecution through flight is a circumstance which may be considered in determining guilt. We cannot say beyond a reasonable doubt that these errors did not affect the jury's verdict. See DiGuilio V. State, 491 So.2d 1129 (Fla.1986).

Id.

This holding applies with equal force under the instant facts. Compared to the strong and obvious motive to flee created by the evidence in the Collier case, it was misleading and highly prejudicial to use evidence of the escape attempt to infer consciousness of guilt in the instant cause. Appellant could not rebut the improper inference without compounding the

prejudicial effect by informing the jury of the collateral crimes, which crimes were ruled inadmissible. Left unrebutted, the jury was unaware of the real motivation for the attempted escape. Appellant, like Mr. Merritt, was between a rock and a hard place. See United States v. Beahm, 664 F.2d 414, 420 (4th Cir. 1981)(recognizing it would be an "unconscionable burden" on a defendant to require him to offer "not only an innocent explanation for his departure but guilty ones as well in order to dispel the inference to which the government would apparently be entitled that an investigation calling upon defendant could have but one purpose, namely, his apprehension for the crime for which he is ultimately charged."

Appellant's escape, under these circumstances, was not probative of consciousness of guilt for this charge; it was just as likely, if not more so, the product of his consciousness of guilt of the Collier crimes, which crimes were properly excluded from evidence by the trial court. The evidence of appellant's desperate attempt to escape from the courthouse presented a misleading picture to the jury, since the most reasonable explanation for his flight was inadmissible, but the evidence of his flight was admitted. The error in admitting such evidence cannot be deemed harmless in a case such as this.

While appellant does not dispute that the circumstantial evidence was legally sufficient to overcome a motion for judgment of acquittal, it was a far cry from amounting to the "overwhelming evidence" necessary to properly invoke the harmless error doctrine. Chapman v. California, 386 U.S. 18,

25-26 (1967)(although the state presented a "reasonably strong circumstantial web of evidence" against defendants, evidence was not so overwhelming as to permit application of harmless error rule). Moreover, this Court cannot say beyond a reasonable doubt that the error did not affect the jury's verdict. State v. DiGuilio, 491 So.2d 1129 (Fla.1986); Merritt v. State, supra. Appellant is entitled to a new trial.

ISSUE II

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.

Prior to the testimony of Robert Jewell, defense counsel requested that the testimony be proffered because the witness was expected to testify about a large sum of money related to the Collier case. Counsel argued that the testimony about the money would create an improper inference that the money came from the Epps' home, which the defense could not rebut in light of the court's ruling on the Williams rule evidence and without implicating appellant's Fifth Amendment right to remain silent. Appellant further argued that there was no connection between Jewell's knowledge of the money and any inducement to another witness. The court agreed to a proffer of the testimony before ruling on its admissibility (T 1454-1458).

On proffer, Jewell testified that a week or two after his arrest, John asked his brother to retrieve a large sum of money located between the house and dock on the Trout River (T 1474).

Jewell stated that the money related solely to the Collier case and had nothing to do with Mr. Epps. John never asked Robert to give the money to anyone (T 1476-1477).

Following the proffer, appellant renewed his objection to the testimony, arguing that the money was unconnected to this case, but in light of the close proximity between the location of the money and the victim's residence, the jury would be left with the implication that the money was taken from Alvin Epps. The court overruled the objection, noted appellant's standing objection and denied the motion for mistrial (T 1479-1483). The trial judge likewise denied appellant's objection to Mary Hodges' testimony regarding the money, although the court had previously sustained appellant's objection to Doug Freeman's testimony on the same subject (T 1289, 1612, 1622).

The jury then heard that appellant asked his brother to retrieve the money by the river and that he offered $24,000 to his girlfriend.

Although it was undisputed that the money related solely to the Collier murder and had nothing whatsoever to do with the instant offenses, the evidence clearly implied that the $24,000 was stolen from the Epps' residence and offered as a bribe to Missy Hodges. The jury heard that drugs were found in Epps' bedroom closet and a Mr. HOW bag was missing; the contents of the Mr. HOW bag were undetermined, but a reasonable inference was that the bag contained drugs or a large quantity of money. The jury also knew that appellant lived only three blocks from the Epps' residence (T 1033, 1036-1037). To the

extent that the jury could infer that the money came from the Epps robbery/murder, the evidence would give rise to the misleading and devastating inference that appellant had more than just clothes and miscellaneous property linking him to the crime (since, as far as the jury was aware, there was no other apparent source of the money). See Perper v. Edell, 44 So.2d 78, 80 (Fla.1949)("[If] the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence - if it tends to obscure rather than illuminate the true issues before the jury - then such evidence should be excluded"). See also, Section 90.403, Florida Statutes: Tafero v. State, 403 So.2d 355, 360 n.3 (Fla.1981)(recognizing that even relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury). On the other hand, to the extent the jury might not draw this inference, the evidence that appellant was possessed of a large sum of money would give rise to an equally devastating inference that appellant, who was only sporadically employed, must have been involved in some other serious criminal activity. This is a classic violation of the Williams rule and is presumptively harmful error. See Straight v. State, 397 So.2d 903, 907 (Fla. 1981); Jackson v. State, 451 So.2d 458 (Fla.1984); Peek v. State, 488 So.2d 52 (Fla.1986). Furthermore, the evidence created the false impression that the money was offered as a bribe, despite the fact that Robert was never asked to give the

money to Missy and Ms. Hodges denied that appellant offered her the $24,000 for not testifying against him at trial.

As recognized by one court, the difference between a prosecutor's questions which insinuate impeaching facts, the proof of which is nonexistent, and questions which insinuate impeaching facts which, although said to exist, are not later proved, is one of degree only, and either interrogation is condemnable. Smith v. State, 414 So.2d 7 (Fla. 3d DCA 1982). See also, Harris v. State, 447 So.2d 1020 n.1 (Fla. 3d DCA 1984); Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978). Here, the state insinuated that the money derived from the Epps robbery/murder, which insinuation was positively false, and further that the money was offered as a bribe, which insinuation was never proved. The state argued below that Robert Jewell's testimony regarding the money was significant to corroborate Ms. Hodges' testimony that Jewell was supposed to deliver money to her at appellant's request (T 1480-1481). The problem with this logic is that the testimony about money had no relevance at all in this trial. Jewell was never asked to deliver the money to Ms. Hodges. The state did not proffer evidence sufficient to show that the money was offered as a bribe, and, most importantly, the evidence created a false and misleading picture that the money came from the Epps murder.

In a similar case, Jones v. State, 385 So.2d 1042 (Fla. 1st DCA 1980), the prosecutor insinuated during questioning of a state witness that she had been threatened by someone if she testified against Jones. Although the witness denied that she

was threatened, the questioning left a "clear impression . . . that appellant, or someone connected with him, had made threats against the witness to keep her from testifying against appellant." 385 So.2d at 1043. The district court reversed Jones' convictions, finding:

> There was no attempt to show appellant had either made such threats or was aware that threats had been made against the witness. Moreover, the evidence was presented in such a way as to insinuate in the minds of the jury that appellant was guilty because someone had threatened the witness. . . . [T]he admission of such evidence could only serve to create undue prejudice in the minds of the jury against the accused. [Citation omitted].

Id.

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 Ms. 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. Appellant's constitutional right to a fundamentally fair trial was irreparably damaged; his conviction and sentence of death must be reversed and the case remanded for a new trial. Cf. Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981)(admission of evidence of a prior conviction which was irrelevant to the main charge was so prejudicial that it impaired defendant's right to a fundamentally fair trial).

ISSUE III

THE TRIAL 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.

On direct examination, the prosecutor asked Doug Freeman whether he saw his brother between 9:15 and 10:00 a.m. on the day of the murder. Doug testified that he saw John the second time around 9:30 a.m. (T 1262-1263). On cross-examination, Doug said he cashed a check for John and then took his brother home shortly after 8:00 a.m.; he saw John again 45 minutes to an hour and a half later (T 1341-1344), which would put the time between 8:45 and 9:30. Doug readily admitted that "I'm not exactly sure on the times. Like I say, they are going to be off a little bit" (T 1342).

Based on the alleged inconsistencies in Doug's testimony, the state asked that Freeman be declared a "hostile" witness. The state asserted that Doug's time frame on cross-examination provided an alibi and argued:

> When he [Doug] said 9:15 was when his brother showed up, since witnesses saw the victim alive at 9:00, there's precious little time for the murder to occur and things to happen that had happened in this case by 9:15, earlier. He already said 9:30, give or take a half an hour. So, at this point, we feel that he's certainly an adverse witness.

(T 1392). The prosecutor said that although Freeman was an adverse witness, he was asking only that he be declared a hostile witness. He suggested that a hostile witness is a

lesser step and "a lot more discretionary with the Court" than an adverse witness (T **1392-1393**).

Appellant disputed that Doug had made any inconsistent statements. Defense counsel noted that in Doug's November **25, 1986**, statement to the prosecutor, he claimed that John came to his trailer the second time about **9:00** or **9:15.** Doug admitted telling Detective Moneyhun in an earlier statement that John came over about **9:30** or **9:45** and then told Mr. Stetson that it was around **9:30,** "Give or take, you know, maybe **30** minutes or **so"** (T **1394-1395**). Appellant argued that Doug's testimony on cross-examination was neither adverse nor inconsistent, and, in fact, Doug maintained in his very first statement that John came over at **9:15,** consistent with his testimony on cross (T **1395-1396**). The trial court found Doug to be a hostile witness and allowed the state to ask leading questions over appellant's objections (T **1398-1399**). Not satisfied with merely leading the witness regarding the alleged threats, the state proceeded to impeach Doug's entire testimony on cross-examination **["So**, this [testimony on cross] is not necessarily accurate as far as the **9:15** is concerned?"; "You weren't taking notes at the time?"; "So, why did you put down **9:15** yesterday?"; "This is not necessarily accurate?"; "As a matter of fact, the **9:50** would be inaccurate, according to your earlier testimony?"](T **1400-1402**). The entire redirect examination continued in this same vein (T **1403-1410, 1414-1416**). See Issue **IV**, infra.

It is clear that the state cannot impeach its own witness, unless the witness' testimony proves truly adverse. Jackson v.

State, 451 So.2d 458 (Fla.1984); see also, Section 90.608(2), Florida Statutes. There is no hybrid "hostile witness" rule. A witness who is merely hostile may not be impeached by the party calling him. Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976). By urging the court to declare Freeman a hostile witness, the prosecutor was apparently laboring under the erroneous notion that Doug could be cross-examined as a court witness. Although Section 90.615(1), Florida Statutes, allows the court to call witnesses whom all parties may cross-examine if the witness' expected testimony conflicts with prior statements, this rule only applies to an eyewitness with firsthand knowledge of the facts. Jackson v. State, 498 So.2d 906 (Fla. 1986). Moreover, the witness' in-court testimony must prove adverse, that is, "actually harmful," to the impeaching party. Id. at 908. Doug was not an eyewitness and his testimony did not conflict with his prior statements. He therefore could not be called as a court witness.

Section 90.608(2), Florida Statutes provides:

> A party calling a witness shall not be allowed to impeach his character as provided in s. 90.609 or s. 90.610, but, if the witness proves adverse, such party may contradict the witness by other evidence or may prove that the witness has made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness. Leading questions may be used during any examination under this section.

[Emphasis added]. It is not enough that the witness fails to testify as he was expected to; the witness must give testimony prejudicial to the party producing him. Jackson v. State, 451

So.2d 458 (Fla.1984); Hernandez v. State, 156 Fla. 356, 22 So.2d 781 (1945); Austin v. State, 461 So.2d 1380 (Fla. 1st DCA 1984); Perry v. State, 356 So.2d 342 (Fla. 1st DCA 1978); Pitts v. State, 333 So.2d 109 (Fla. 1st DCA 1976).

The rule was clearly stated by this Court in Jackson v. State, supra, as follows:

> It is very erroneous to suppose that, under this statute [the precursor to s. 90.608(2)], a party producing a witness is at liberty to impeach him whenever such witness simply fails to testify as he was expected to do, without giving any evidence that is at all prejudicial to the party producing him. The impeachment permitted by the statute is only in cases where the witness proves adverse to the party producing him. He must not only fail to give the beneficial evidence expected of him, but he must become adverse by giving evidence that is prejudicial to the cause of the party producing him. When a party's witness surprises him by not only failing to testify to the facts expected of him, but by giving harmful evidence that is contrary to what was expected, then, as is the purpose of this law, he is permitted to counteract the prejudicial effect of the adverse testimony of such witness, by proving that he had made statements on other occasions that are inconsistent with his present adverse evidence. It never was the purpose of this statute to allow a party to put up a witness for the purpose of endeavoring to get from him beneficial evidence, and upon his simple failure to testify to the desired facts, to permit him to get the benefit of those expected facts, as substantive evidence through the mouth of another witness, under the guise of impeachment. Evidence adduced in this manner is nothing more than the veriest hearsay, and is inadmissible. Even where a witness is properly impeached by proof of conflicting statements made on other occasions, the conflicting statements as made to and detailed by the impeaching

> witness should not be considered as substantive evidence in sustenance of the party's cause who produced the impeached witness; but has weight only for the purpose of counteracting or annulling the harmful effects of the adverse testimony in the cause given by the impeached witness that is inconsistent with his statements testified to have been made on other occasions.

451 So.2d at 462, quoting, Adams v. State, 34 Fla. 185, 195-196, 15 So. 905, 908 (1894).

Here, the witness did not even fail to testify as he was expected to since his testimony on cross-examination was entirely consistent with his previous sworn statements to the prosecutor, and the witness qualified his testimony, both on direct and cross-examination, with the caveats: "Well, the times might be a little off" (T 1263, 1340); "I'm not exactly sure on the times. Like I say, they are going to be off a little bit" (T 1342). Moreover, the testimony was not prejudicial to the state. Although Freeman's time frame varied to some extent, he never wavered from his "9:30, give or take 30 minutes" testimony, which the state was bent on proving.

Contrary to the state's initial assertion, the testimony was not prejudicial in that it did not exculpate appellant by establishing an alibi. Cf. McNeil v. State, 433 So.2d 1294 (Fla. 1st DCA 1983). Doug claimed he took John home after cashing the check and he could not verify John's whereabouts for the next hour or so. The fact that there was "precious little time for the murder to occur" was established by the state on direct examination. The prosecutor may not have liked

that fact, but he should not have been allowed to manipulate the facts by impeaching his own witness.

The error in declaring Freeman a hostile witness cannot be deemed harmless under these circumstances. Doug was the only witness to place appellant in possession of the Epps' property on the morning of the murder. He remembered the day because he cashed the check and built the porch with his brother, although defense witnesses testified that the check was issued one week before and could not be cashed at the IGA before 9:00 a.m. The evidence of the tampered photograph and cooler receipt further suggested that the brothers may have built the porch the week before. Although Doug's credibility, both as to the time and day, was a key issue at trial, his testimony was not adverse and did not furnish the state grounds for doing what the court permitted. Appellant is entitled to a new trial. Jackson v. State, 451 So.2d **458** (1984).

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE DOUG FREEMAN'S PRIOR CONSISTENT STATEMENTS TO BOLSTER THE WITNESS' CREDIBILITY.

Once the court declared Doug Freeman a hostile witness, the state was at liberty to lead the witness, attacking and bolstering the witness at will, as the following colloquy illustrates:

> Q Now, didn't you tell the State and the defense whenever you were asked in previous sworn statements, in the four previous sworn statements, that the

defendant did show up between **9:00** and 10:00, basically?

A Yes.

* * *

Q And haven't you also maintained in your previous sworn statements and, in addition, and maintained to Detective Moneyhun on November 20th, **1986 --**

MR. McGuinness: Your Honor, I'd like to renew my objection. This is no longer merely leading the witness, he's testifying as to his perception of what prior statements may or may not have indicated.

* * *

THE COURT: I'll sustain it. I think you may take it statement at a time, if you wish, and ask him.

BY MR. STETSON:

Q Do you remember talking with Detective Moneyhun on the 20th of November, **1986,** and that would have been the day that you turned over some property to Detective Moneyhun.

A Yes.

Q And isn't it true that you told him on that day that your brother had come into the possession of some property the day Mr. Epps was killed?

A Yes.

Q And you were sure about that?

A Yes.

Q And have your ever said anything different in any of the sworn statements that you gave as far as that matter is concerned? Being positive the day Mr. Epps was killed, that the defendant **--**

* * *

Q Have you ever said anything different?

A No.

(T **1402-1406).** The thrust of the state's redirect examination was to reaffirm Doug's prior sworn statements. Three times during the examination appellant objected that the state was testifying and not merely leading the witness. The objections were overruled (T **1403-1404, 1405, 1407-1408).**

Appellant again objected on hearsay grounds when Detective Moneyhun testified that he talked to Doug on November 20 and 21 before the sworn statement was taken and Doug said he was sure appellant first came into possession of Mr. Epps' property on the morning of the murder. Appellant argued that Doug consistently maintained that he was sure of the date, and there was no suggestion of recent fabrication. The state countered that there was a suggestion of recent fabrication by virtue of the state putting pressure on the witness. The court overruled the objection (T **1731-1737).**

After eliciting the prior consistent statements to bolster Doug's testimony, the state next attempted to discredit Doug's claim that he was pressured by the state attorney. Moneyhun testified that Doug said he did not feel threatened or coerced when he gave the sworn statement on November **25,** and he understood that he was free to leave. Again, appellant's objections were overruled (T **1737-1743).** Moneyhun further denied making any threats to Doug's wife, Kathy (T **1743-1745).**

Clearly, the state was playing both sides against the middle. The prosecutor's questions had the effect of impeaching Doug's claim that he was threatened and thus dispelling any motive for fabrication on the one hand, and on the other hand, rehabilitating Doug by introducing his prior consistent statements on the basis of impeachment by recent fabrication. This was prejudicial error. Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984). The state turned its ploy on the defense in closing arguments, telling the jury:

> By the way, Doug, before we get off Doug Freeman, the defendant sort of wants their cake and eat it, too. . . . [T]hey want you to believe Doug on certain things that help him, but not believe things that hurt him. In other words, they want you to believe he was pressured to give a statement when he said that, but don't want you to believe that he's telling the truth when he says their client is in possession of Mr. Epps' property.

(T 2834).

The law is clear that a witness' prior consistent statements may not be used to bolster his trial testimony. Jackson v. State, 498 So.2d 906 (Fla. 1986); Van Gallon v. State, 50 So.2d 882 (Fla. 1951); Perez v. State, 371 So.2d 714 (Fla. 2d DCA 1979; Lamb v. State, 357 So.2d 437 (Fla. 2d DCA 1978); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Allison v. State, 162 So.2d 922 (Fla. 1st DCA 1964). The rationale prohibiting the use of prior consistent statements is to prevent "putting a cloak of credibility'' on the witness' testimony. Brown v. State, 344 So.2d 641, 643 (Fla. 2d DCA 1977). An exception to

the rule applies when an attempt is made to show a recent fabrication.

> The exception is based on the theory that once the witness's 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.

Van Gallon v. State, supra at 882.

Here, the claimed basis for introducing Doug's prior consistent statements was non-existent. Doug essentially broke the case when he first contacted Detective Moneyhun and turned over the stolen property on November 20 and 21. He confirmed, on redirect examination, that he told the same story at trial as in his first interview with the detective and in his four subsequent sworn statements; he never changed his position in any of these statements to the detective or the prosecutor, despite his feeling under pressure. Doug admitted that his arrest on the burglary charge occurred long after he gave his first sworn statement in the case and that the state did not make any promises in exchange for his trial testimony (T 1407). In addition, Doug and Kathy claimed the prosecutor threatened them when they gave their sworn statements on November **25** and **26,** respectively, five days after Doug first volunteered the information to Detective Moneyhun. Moneyhun denied threatening either witness. Under this state of facts, it is clear the state failed to establish the admissibility of the hearsay

statements based on recent fabrication. Section 90.801(2)(b), Florida Statutes.

Although Doug was impeached on cross-exam, 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 detective were believed, he always had the motive to lie, and there could be no impeachment based on recent fabrication. See Quiles v. State, 523 So.2d 1261 (Fla. 2d DCA 1988) (to be admissible, prior consistent statement must have been made before the existence of a reason to falsify arose), and Preston v. State, **470** So.2d 836 (Fla. 2d DCA 1985) (same). Doug's prior consistent statements did not fall within the hearsay exception and should not have been admitted.

The error in admitting the prior consistent statements cannot be deemed harmless. Doug was a key state witness and his credibility was crucial. Preston v. State, supra; McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980); Roti v. State, supra. That is precisely why the prosecution insisted on leading its witness on redirect and on presenting Moneyhun's testimony to corroborate Doug's story. The net effect of introducing the prior statements through Detective Moneyhun was to bolster and lend credence to Doug's detailed testimony. As recognized by one court:

> When a police officer, who is generally regarded by the jury as disinterested and objective and therefore highly credible, is the corroborating witness, the danger of improperly influencing the jury becomes particularly grave. Under the circumstances, the error in admitting this

hearsay testimony cannot be considered harmless.

Perez v. State, 371 So.2d 714, 717 (Fla. 2d DCA 1979).

In Jackson v. State, 498 So.2d 906, 911 (Fla.1986), this Court held that the combined prejudicial effect of improperly allowing the state to impeach its own witness as a hostile witness and to introduce prior consistent statements to bolster a witness' trial testimony denied Jackson his constitutionally guaranteed right to a fair trial. The same is true here. This Court must reverse appellant's convictions and death sentence and remand the case for a new trial.

ISSUE V

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 SERVED TO BOLSTER HER TESTIMONY.

The law is clear that hair analysis, like bite-mark testimony, is not conclusive identification evidence, such as fingerprints. The probative value of hair analysis testimony is for the trier of fact to determine. Jent v. State, 408 So.2d 1024 (Fla.1982); Horstman v. State, 13 FLW 1845 (Fla. 2d DCA August 5, 1988); Jackson v. State, 511 So.2d 1047 (Fla. 2d DCA 1987); Bradford v. State, 460 So.2d 926 (Fla. 2d DCA 1984).

In Jent v. State, supra, the technician who performed the microanalysis testified that an unknown hair found at the scene of the crime was microscopically the same as Jent's; she stated that while she could not positively identify the hair as being

the defendant's, it was "highly likely" that the hair belonged to Jent. 408 So.2d at 1029. This Court, relying on Peek v. State, 395 So.2d 492 (Fla.1980), held that the hair analysis testimony was admissible and that the weight to be accorded the testimony was within the jury's province.

The testimony presented in Jent and the testimony in this case are distinguishable. Here, the hair expert testified that the two hairs from the victim's clothing were microscopically the same as appellant's head hair, although she admitted that hair analysis is not a positive identification like a finger-print (T 2215-2216). The witness went on to testify, however, that she was aware of studies showing that even identical twins do not have the same hair characteristics (T 2217-2220). She further testified that in her training exercises with students and in her experience with thousands of hair comparisons, she had never found an unknown hair that matched more than one standard (T 2222-2224). This testimony suggested conclusive proof that the unknown hairs belonged to appellant based on mathematical statistics. The references to published studies by others and to training exercises conducted by the witness, which did not form the basis for her opinion in this case, served to bolster the witness' opinion testimony and invaded the province of the jury.

Section 90.704, Florida Statutes (1986), allows an expert to rely on facts or data which are inadmissible in evidence as the basis of an opinion, if the facts or data are of a type reasonably relied upon by experts in the subject to form the

opinion. This section does not permit an expert to testify as to facts or data which do not form the basis for the expert's opinion and which serve merely to bolster the witness' opinion. See Tallahassee Memorial Regional Medical Center v. Mitchell, 407 So.2d 601 (Fla. 1st DCA 1982).

The use of mathematical statistics in microscopic analysis of hair was condemned by the Circuit Court of Appeals in United States v. Massey, 594 F.2d 67 (8th Cir. 1979):

> Our concern over this evidence is with its potentially exaggerated impact upon the trier of fact. Testimony expressing opinions or conclusions in terms of statistical probabilities can make the uncertain seem all but proven, and suggest, by quantification, satisfaction of the requirement that guilt be established 'beyond a reasonable doubt.' Diligent cross-examination may in some cases minimize statistical manipulation and confine the scope of probability testimony. We are not convinced, however, that such rebuttal would dispel the psychological impact of the suggestion of mathematical precision, and we share the concern for 'the substantial unfairness to a defendant which may result from ill conceived techniques with which the trier of fact is not technically equipped to cope.'

594 F.2d at 861, quoting, State v. Carlson, 267 N.W.2d 170 (Minn. 1978).

The devastating impact of this testimony in the instant case is obvious. The state's case was wholly circumstantial, and the hair identification was a key link in the chain of circumstantial evidence: it was the only evidence placing appellant at the scene of the murder. By referring to other studies and to thousands of hair comparisons, which had no

relevance to the expert's opinion in this case, Ms. Hensley's identification testimony was converted from "it could have been him" to "it was him." See State v. Peek, Case No. 78-0445, slip op. at 3 (Cir.Ct. Nov. 2, 1983)(Appendix A). See also, Horstman v. State, supra at 1846 (recognizing that "certainty is not possible" in hair comparison analysis and disputing expert's testimony that the chances were almost nonexistent that hairs found on victim's body originated from someone other than the defendant).

In State v. Peek, supra, the Circuit Court vacated Peek's conviction and death sentence on the ground that the hair analyst's probability testimony was inaccurate and misleading and constituted fundamental error. The court reasoned that if the jury accepted the expert's identification, it had a devastating effect on the defense and converted the state's case from a weak one to an extremely strong one.

Here, as in Peek, identity was a major issue in the case. The expert's testimony was a critical factor in establishing appellant's identity and it may have played a substantial role in the jury's decision to convict appellant of first degree murder. The admission of this testimony cannot be deemed harmless error. State v. DiGuilio, 491 So.2d 1129 (Fla.1986). This Court should reverse appellant's convictions and death sentence and remand for a new trial.

ISSUE VI

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

Appellant timely moved for a new trial based on new and material evidence, pursuant to Florida Rule of Criminal Procedure 3.600(a)(3). At the hearing on the motion, the defense presented four witnesses who saw Darryl McMillion in October **1986** in Jacksonville, near the time of the charged offenses. Valarie Allen was introduced to McMillion on the night before midnight madness at the agricultural fair. Robert Meyers and William Dorman attended the first midnight madness and saw McMillion at a party at his brother's house the next morning, October **18, 1986.** Carroll Sellers grew up with the McMillion brothers and saw Darryl mowing the lawn and sitting on the porch in October of that year.

Appellant contends that this testimony was crucial to the defense and the trial court erred in denying his motion for new trial. There were no eyewitnesses or direct testimony linking appellant to the Epps' murder. The primary issue at trial was the validity vel non of appellant's statements to Detective Moneyhun that he purchased the victim's property from Darryl McMillion at Betty's Tavern on the day of the murder. The state emphasized, both in its case in chief and in opening and closing arguments, that these statements were false and went to great lengths to establish an alibi for Darryl McMillion. McMillion was a convicted felon and fugitive for over a year. He committed a drug related robbery in Jacksonville in March

1986, fled to Oklahoma, returned to Jacksonville and left again in July 1986, after learning that there was a warrant for his arrest. He testified that he did not return to Jacksonville again until his arrest in August 1987. He claimed he was in Tulsa from mid-October until mid-November and therefore could not have committed the crime or sold the property to appellant.

The state corroborated McMillion's story with an employment application dated by McMillion and signed in the name of Darryl McMann; with the testimony of the assistant manager at McDonald's where McMillion worked for a month beginning October 23, 1986, and with the testimony of Jackie Wilson, who claimed that McMillion stayed with her and her boyfriend in Oklahoma during the dates in question.

The newly discovered witnesses would have refuted Darryl McMillion's claim that he left Jacksonville in July 1986 and did not return until August of the following year. This was not merely impeachment evidence; it was crucial evidence in support of the theory of defense that McMillion was present in Jacksonville during the time of the murder and sold the Epps' property to appellant. The evidence went to the merits of the case and would have cast a reasonable doubt on the defendant's guilt. Douth v. State, 85 So.2d 550 (Fla.1956).

In addressing a motion for new trial based on new and material evidence, the trial court is governed by the following standard:

> [A] new trial will not be granted for newly discovered evidence unless such evidence was discovered after the former

> trial, that due diligence must be shown to have it at the former trial, that it must be material to the issue, it must go to the merits of the case, it must not be cumulative, and it must be such as would produce a different verdict.

McVeigh v. State, 73 So.2d 694, 698 (Fla.1954).

Applying this standard to the instant case, it is clear that the evidence was material, went to the merits of the case and was not cumulative. It is further apparent that defense counsel made prodigious efforts to investigate all potential witnesses and relevant evidence prior to trial, including a request for production of favorable evidence regarding Darryl McMillion (R 203-204).

The trial court's ruling was based in part on the fact that none of the witnesses saw McMillion in Jacksonville on October 20, 1986, the date of the murder. The court ruled:

> The proximity of the witnesses' alleged sighting of McMillion to the date of the murder probably would not have changed the outcome of the trial. Their testimony merely contradicts McMillion's claim that he was not in Jacksonville during October of 1986. Such impeachment evidence is cumulative and does not justify a new trial.

(R 496). This ruling was plainly wrong. There was no other evidence admitted at trial to corroborate appellant's statement that he purchased the property from McMillion on the date in question. The sighting of McMillion around the operative date did not merely contradict McMillion's claim that he was not in Jacksonville; it corroborated appellant's statement. Since there was no other testimony placing McMillion in Jacksonville

in October, the newly discovered evidence could not logically be deemed cumulative. This evidence could have been given considerable weight by the jury, and probably would have affected the outcome of the trial. Webb v. State, 336 So.2d 416 (Fla. 2d DCA 1976); Jones v. State, 233 So.2d 432 (Fla. 3d DCA 1970).

In Webb v. State, supra, the defendant was convicted of sale of marijuana to Officer Carnahan. Carnahan testified that the sale occurred in the parking lot of a bar at approximately 9:45 p.m. Webb denied making the sale and said he left the bar alone shortly after 9:00. Three other witnesses testified that that Webb and Carnahan were in the bar throughout the early evening and that Webb left the bar about 45 minutes before the officer. There were no other witnesses to the sale. After the trial, Webb filed a motion for new trial based on the testimony of two new witnesses who were undercover agents and had been in the bar on assignment with Carnahan until 9:45. The witnesses went to the parking lot without Carnahan at that time and stayed there until 10:00. They were certain that no sale took place in the parking lot during any of that time. The district court reversed the case for a new trial, finding that the new witnesses' testimony would have added greatly the defendant's case, especially when viewed in combination with that of the other witnesses. The court further held that the names of the new witnesses, who obviously were known or should have been known to the state, were not furnished to Webb in discovery and could not have been discovered through due diligence. While

the witnesses were known to a patron of the bar who testified for the defense, the court rejected the state's suggestion that Webb failed to exercise reasonable diligence in not asking the patron whether she knew of anyone else who could testify on Webb's behalf. The court reasoned that from counsel's point of view, this question would have led only to cumulative evidence.

Similarly, here, the new witnesses could not have been discovered through due diligence. Even if the witnesses could been discovered prior to trial, the due diligence requirement is not an inflexible one and must sometimes bend in order to meet the ends of justice. Jackson v. State, 416 So.2d 10 (Fla. 3d DCA 1982). Appellant contends on this record that, in the interest of justice, a new trial must be granted. Jones v. State, supra.

ISSUE VII

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

In Napue v. Illinois, 360 U.S. 264 (1959), the high court held that a conviction obtained through use of false testimony, known by the state to be false, must fall under the Fourteenth Amendment. The same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears. The principle that a state may not knowingly use false evidence does not cease to apply merely because the false testimony goes only to the credibility of the witness. Id., at 269. Accord, Porterfield v. State, 442 So.2d 1062 (Fla. 1st DCA

1983); Lee v. State, 324 So.2d 694 (Fla. 1st DCA 1976); Wolfe v. State, 190 So.2d 394 (Fla. 1st DCA 1966).

In the instant case, Darryl 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).

Appellant moved for a new trial based on McMillion's false testimony and the state's failure to disclose the impeaching information. At the hearing on appellant's motion, defense counsel testified that on the last day of trial he initiated an investigation of McMillion's claim, since he was surprised by the testimony and curious as to when the food stamp application was made. Mr. McGuinness discussed the matter with the assistant state attorney, who was certain that the state had verified records supporting McMillion's claim. Defense counsel requested a copy of the records and was told a few days later that the state, upon further checking, was unable to find any records verifying the food stamp application (T 3332-3334). At the hearing, appellant introduced a certified copy of a public record from Oklahoma verifying that Darryl McMillion a/k/a/ Darryl McMann never applied for food stamps in that state. The state acknowledged it was aware of that fact (T 3329).

Darryl McMillion's testimony was false. The state knew it was false and, although not soliciting the false evidence, the

state allowed it to go uncorrected. Appellant was unable to impeach McMillion's testimony that he applied for food stamps in Tulsa due to his lack of knowledge (based on the deposition and sworn statement) that McMillion would make such a claim. That the testimony came out in cross-examination, rather than in the state's case in chief, is immaterial. See Lee v. State, supra. Moreover,

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue v. Illinois, **360** U.S. at **269-270**, quoting, People v. Savvides, 1 N.Y.2d **554, 154** N.Y.S.2d **885, 887, 136** N.E.2d **853, 854-855.**

McMillion's whereabouts in October **1986** became a central focus of the trial and the alleged food stamp application tended to corroborate his alibi. The falsehood bore on the witness' credibility, but, more importantly, it bore on a material issue at trial. The state's failure to correct the false testimony constituted a deprivation of due process of law, tainted the verdict and entitles appellant to a new trial.

ISSUE VIII

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

In order to establish the aggravating circumstance under Section 921.141(5)(b), Florida Statutes, that appellant was previously convicted of a felony involving the use or threat of violence to the person, the state introduced evidence of appellant's 1981 conviction for attempted burglary of a dwelling. The trial court found this aggravating factor based on the following:

> FACT:
>
> On Thursday, October 26, 1981 at 10:00 A.M., the Defendant attempted to burglarize the home of Ernest Dunbar, at 9009 Carbondale Drive, East. This burglary was thwarted when George Osborne, Jr., observed the Defendant breaking into the Dunbar house and gave pursuit. The Defendant in the process of this pursuit, pulled out a knife and waived it in the direction of Mr. Osborne in a threatening manner.
>
> The Defendant was arrested and subsequently convicted on January 18, 1982.
>
> The threat to Mr. Osborne with a knife during the Attempted Burglary in Case Number 81-9547-CF is a felony involving the use or threat of violence to the person.

(R 586).

Burglary is not per se a crime of violence. Barclay V. State, 470 So.2d 691 (Fla.1985); Oats v. State, 446 So.2d 90 (Fla. 1984); Mann v. State, 420 So.2d 578 (Fla.1982)(Mann I). Whether a previous conviction of burglary constitutes a felony

involving violence under Section 921.141(5)(b) depends on the facts of the previous crime. Those facts may be established by documentary evidence or testimony, or by a combination of both. Johnson v. State, 465 So.2d 499 (Fla.1985); Mann v. State, 453 So.2d 784 (Fla.1984)(Mann 11). The state bears the burden of proving the aggravating circumstance beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla.1973).

In Mann I, supra, this Court held that a prior conviction of a felony involving violence must be limited to one in which the judgment of conviction discloses that it involved violence. There, the defendant committed a burglary, during the course of which he committed a sexual battery, but he was convicted only of the burglary. The Court disapproved the finding of a prior violent felony where the record of Mann's burglary conviction, on its face, did not disclose a conviction of a crime of violence.

In Mann 11, supra, this Court held that the aggravating circumstance of a previous conviction of a violent felony was established by proof of documentary evidence and testimony. See Perri v. State, 441 So.2d 606, 607 (Fla.1983)(testimony about the details of a prior felony involving the use or threat of violence to the person is properly admitted). In Mann 11, the state introduced the indictment, judgment of conviction and victim's testimony to establish the violence in the course of the burglary.

In Johnson v. State, supra at 505, this Court held that where a robbery takes place during the course of the burglary, the burglary possesses

> some of the attributes that set robbery apart as an inherently violent crime. The burglary in question had a confrontational element in that it was accompanied by a robbery.

In Lewis v. State, 398 So.2d 432, 438 (Fla.1981), the Court explained that Section 921.141(5)(b) "refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim."

The previous felony conviction in question here did not involve a crime of violence under the foregoing authorities. While the state presented documentary evidence and testimony to establish this aggravating circumstance, the evidence failed to prove the confrontational element as required under Section 921.141(5)(b). Appellant was charged with and convicted of an attempted burglary of a dwelling. The dwelling was unoccupied and there was no evidence of commission of or intent to commit a crime of violence in the course of the burglary. Only after the attempted burglary was completed and John was confronted by a neighbor did he display a weapon. Mr. Osborne testified that when he came into the Dunbar's yard, John was walking around the side of the house toward the street. The crime was already completed by this time. Osborne stopped appellant and talked to him for an undetermined length of time when appellant pushed Osborne and ran. Appellant ran about 30 yards when he pulled out the pocket knife and waved it in Osborne's direction. This

was clearly not a "life-threatening crime in which the perpetrator comes in direct contact with a human victim." Lewis v. State, supra. Nor can it be said that the attempted burglary had a confrontational element in that it was accompanied by an assault. Appellant was never charged with committing an assault or battery on Osborne and any such additional offenses were too attenuated from the attempted burglary to elevate the felony to a violent crime. Cf. Johnson v. State, supra.

In the sentencing order, 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 the person. The problem with this finding is that appellant was not charged with or convicted of an aggravated assault and the threat did not accompany the attempted burglary: it succeeded it by several minutes and several yards. Whatever "violence" occurred was too remote in proximity to the attempted burglary to classify the attempted burglary as a violent felony. The trial court erred in finding this aggravating circumstance.

The improper consideration by the trial court of an unproven aggravating circumstance, coupled with the court's failure to accord any weight to the jury's life recommendation, See Issue IX, infra, requires reversal of appellant's death sentence.

ISSUE IX

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

The jury, by a vote of nine to three, recommended that the trial court sentence appellant to life imprisonment without possibility of parole for twenty-five years. The trial court overrode the jury's life recommendation, finding three factors in aggravation and no mitigation.

Despite the trial court's finding of no mitigation, the record discloses the existence of both statutory and non-statutory mitigation which provided a reasonable basis for the jury's life recommendation. John Freeman was twenty-two years old at the time of the offense. While the trial court does not have to accept age as a mitigating factor, clearly the jury could have done so. See, e.g., Perry v. State, 522 So.2d 817 (Fla.1988)(jury recommendation based on defendant's character, psychological stress and relatively young age of 21): Amazon v. State, 487 So.2d 8 (Fla.1986)(jury could have properly found defendant's age, 19, a mitigating factor): Huddleston v. State, 475 So.2d 204 (Fla.1985)(defendant was 23 at time of crime); Cannady v. State, 427 So.2d 723 (Fla.1983)(defendant's age of 21 could be considered by the jury as a mitigating factor).

Dr. Legum testified in the penalty phase that appellant fell within the dull normal intelligence range in native intellect and fell markedly below that in terms of performance, operating at approximately the fourth grade level. The

psychologist opined that while John could distinguish right from wrong, his judgment and ability to reason were impaired by virtue of his emotional immaturity and negative developmental experiences including lack of affection and physical abuse.

This Court has previously held that evidence of mental mitigation may be an entirely proper basis for a jury recommendation of life, and that when the sentencing judge ignores such evidence, the sentence must be reduced to life. See, e.g., Amazon v. State, supra (trial court found four aggravating circumstances and nothing in mitigation: jury recommended life: sentence reduced to life where jury's recommendation based on defendant's mental condition, including testimony that Amazon was an "emotional cripple" who had been brought up in a negative family setting and had the emotional development of a 13 year old); Cannady v. State, supra (although mental mitigation was not found by sentencing judge, Court found it to be a reasonable basis for life recommendation).

Freeman's background was documented by his mother and brother, Robert, who testified that John was abandonned by his natural father and suffered physical abuse and emotional deprivation at the hands of his stepfather. Although in some cases family background and personal history may be given little weight, it is well established that such evidence must be considered and will support a jury recommendation of life. Brown v. State, 521 So.2d 110 (Fla.1988)(four aggravating factors and one mitigating factor found; death sentence vacated and reduced to life); Holsworth v. State, 522 So.2d 348 (Fla.

1988)(childhood trauma, including physical abuse by stepfather, may have been a factor in jury's decision to recommend life).

In addition, the jury heard unrefuted testimony regarding John's love for his family, his qualities as a friend, his affection for children and his efforts to provide the love and attention he never had to the child of a former girlfriend. See, Fead v. State, 512 So.2d 176 (Fla.1987)(defendant's qualities as a hard worker and good provider constitute valid mitigation and could form basis for jury's recommendation of life); Thompson v. State, 456 So.2d 444 (Fla.1984)(testimony of appellant's mother and wife that he was a good son, husband and father who attempted to provide for the welfare of the family could have influenced jury's life recommendation); McCampbell v. State, 421 So.2d 1072 (Fla.1982)(life recommendation influenced by defendant's exemplary employment record, positive intelligence and personality traits and family background).

Each of these facets of John's background support this death-qualified jury's determination that death was not the appropriate sanction to impose. In fact, the advisory jury altered the verdict form to reflect the strength of their decision that death was inappropriate.

It is axiomatic that a jury recommendation of life in prison is entitled to great weight and should be overridden only where there is no rational basis for the recommendation and the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. Tedder v. State, 322 So. 910 (Fla.1975). Where there is any reasonable

basis for the jury's life recommendation, the trial court is not free to substitute his own judgment to override it. See Holsworth v. State, supra; Rivers v. State, 458 So.2d 762 (Fla. 1984).

In overriding the jury's recommendation, the trial judge stated:

> This Court is bound to give great weight to the Jury recommendation with regard to the imposition of a proper sentence. The Jury is required to consider mitigating factors both statutory and non-statutory, as is this Court.
>
> In considering the statutory and non-statutory mitigation, the Court determines and specifically finds that there are no statutory or non-statutory mitigating factors in this case.
>
> This Court finds the facts of this case to be so clear and convincing that no reasonable person could find a life sentence appropriate.

(R 593-593). Obviously, the jury did consider the statutory and non-statutory mitigating circumstances and found some to exist. Nine reasonable persons found a life sentence appropriate based on the mitigation presented and trial court improperly rejected their recommendation.

As stated by this Court in Smith v. State, 403 so.2d 933, 935 (Fla.1981):

> The trial judge did not articulate any reason for rejecting the jury's recommendation of a life sentence. The record does not show that he had anymore information that the jury did; the trial judge did not demonstrate how reasonable men would not differ on the matter of sentencing. Whatever his rational, we are unable to discern a basis which would be

sufficient to reject the life sentence recommendation.

This Court must reverse appellant's sentence of death and remand to the trial court for imposition of a life sentence in accordance with the jury's recommendation.

ISSUE X

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

This Court has previously recognized that proportionality review is an inherent part of the review process in all capital cases. Caruthers v. State, 465 So.2d 496, 499 (Fla.1985); Menendez v. State, 419 So.2d 312, 315 (Fla.1982). Death sentences must be reviewed "to insure that similar results are reached in similar cases.'' Proffitt v. Florida, 428 U.S. 242, 258 (1976). "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty is administered even-handedly." Fitzpatrick v. State, 527 So.2d 809, 811 (Fla.1988).

In cases similar to this, the Court has reversed death sentences even without jury recommendations of life. See, e.g., Fitzpatrick v. State, supra (trial court found five factors in aggravation and jury recommended death; sentence reduced to life based on substantial mitigation); Rembert v. State, 445 So.2d 337 (Fla.1984)(jury recommended death; trial court found four aggravating factors and nothing in mitigation; Supreme Court upheld only one aggravating circumstance and

reduced sentence to life): Caruthers v. State, supra (death sentence vacated and reduced to life where one aggravating circumstance established and one statutory mitigating factor and several non-statutory mitigating factors present, and jury recommended death). This Court has also vacated sentences of death where the jury has recommended life imprisonment and the trial court has validly found several aggravating factors. See Richardson v. State, 437 So.2d 1091 (Fla.1983)(residential burglary and murder: Supreme Court upheld four aggravating circumstances, but reduced sentence to life in accordance with jury recommendation: no mention in Court's opinion of any mitigating factors).

In Fitzpatrick v. State, supra, this Court noted that any review of the proportionality of the death penalty must begin with the premise that death is different and iterated that the legislature intended the death penalty to be imposed "for the most aggravated, the most indefensible of crimes." Id., at 811, citing, State v. Dixon, 283 So.2d 1, 8 (Fla.1973). The Court found especially compelling the evidence of the defendant's extreme emotional or mental disturbance, impaired capacity to conform his conduct and low emotional age, and the absence of the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated.

In comparison to other cases, the case sub judice does not warrant the death penalty. For example, in Proffitt v. State, 510 So.2d 896 (Fla.1987), this Court reversed a death sentence where the defendant, while burglarizing a house, stabbed the

occupant while the victim was lying in bed. There was no evidence that Proffitt possessed a weapon when he entered the premises and the victim was only stabbed once. In finding the death penalty disproportionate, this Court noted Proffitt's lack of significant history of prior criminal activity or violent behavior and reasoned:

> To hold, as argued by the state, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty.

510 So.2d at 898.

Here, the record reveals that appellant was similarly not armed when he entered the residence. He entered an unoccupied home and he was surprised by the victim in the course of the burglary. Moreover, the murder was not cold, calculated and premeditated. Finally, although appellant waived the mitigating circumstance of no significant history of prior criminal activity under Section 921.141(6)(a), Florida Statutes (R 412), he did not have a prior history of violent behavior. See Issue VIII, supra. As in Proffitt, the death penalty is excessive, inappropriate and not proportionate in this case.

In Wilson v. State, 493 So.2d 1019 (Fla.1986), this Court held that the death sentence was not proportionately warranted where the murders were the result of a heated, domestic confrontation. The trial court properly found two aggravating factors, that the crime was heinous, atrocious and cruel, and that the defendant had been previously convicted of a felony involving use of violence, while finding nothing in mitigating,

and the jury recommended death. While noting that the victim was brutally beaten while attempting to fend off the blows before he was fatally shot, this Court found it significant that the killing, while premeditated, was most likely upon reflection of short duration.

In Richardson v. State, supra, the victim discovered the defendant, a person known to him, committing a burglary in his home. The victim died from massive head injuries with multiple fractures caused by a large instrument wielded with great force. The trial court overrode the jury's recommendation of life imprisonment based on its finding of six aggravating circumstances and no mitigating circumstances. This Court struck two of the aggravating factors, including the finding that the murder was committed in a cold, calculated and premeditated manner, and vacated the death sentence.

Here, the murder was not premeditated, and while the trial court properly found two aggravating factors, the jury also recommended life. In comparison to the foregoing cases, the death sentence here is not proportionately warranted and should be reduced to life.

CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, appellant respectfully requests this Court grant the following relief: As to Issues I, 11, 111, IV, V, VI, and VII, reverse his convictions and sentences and remand for a new trial: as to Issue VIII, reverse the death sentence and remand

for resentencing by the trial court; as to Issues IX and X, reverse the death sentence and remand for imposition of a life sentence, without possibility of parole for twenty-five years.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Initial Brief of Appellant foregoing has been furnished by hand delivery to Ms. Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida; and by U. S. mail to John D. Freeman, Inmate No. **072746**, Florida State Prison, Post Office Box **747**, Starke, Florida **32091**, on this 2nd day of September, 1988.

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