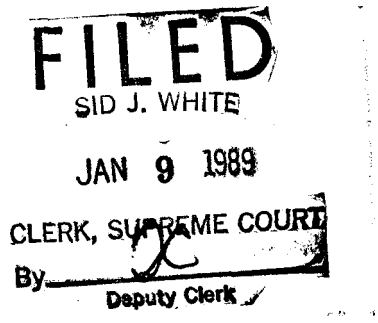
IN THE SUPREME COURT OF FLORIDA



JOHN D. FREEMAN, :

Appellant, :

v. : CASE NO. 71,756

STATE OF FLORIDA, :

Appellee. :

REPLY BRIEF OF APPELLANT

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

PAULA S. SAUNDERS
FLORIDA BAR NO. 308846
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JOHN D. FREEMAN,	:	
Appellant,	:	
VS.	:	CASE NO. 71,756
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

I PRELIMINARY STATEMENT

This brief is submitted in reply to Issues I, 11, 111, IV, VII, IX, and X of the Answer Brief of Appellee. Appellant will rely upon his initial brief as to the remaining issues.

Appellee's answer brief will be referred to herein as "AB" followed by the appropriate page number in parenthesis. All other references will be as set forth in the initial brief.

II 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."

The thrust of appellee's argument on this point is that appellant was in custody for two murders, thus his attempt to allude prosecution concerns both murders. This is a gross oversimplification of the issue. The relevance, and admissibility, of so-called flight evidence depends upon its probative value of consciousness of guilt for the crime for which he was being tried. That appellant was also in custody for another murder, for which he had been indicted, positively identified and signed a written confession, undermines the probative value of the flight evidence as indicia of consciousness of guilt for this murder.

Appellee finds it "inconceivable" (AB 7) that evidence of appellant's attempted escape from the county jail would be admissible for the unrelated Collier murder but not for the Epps' murder. Under this theory, the two murders could have been consolidated for trial. Cf. Paul v. State, **385** So.2d **1371** (Fla.1980)(consolidation of multiple offenses based on similar but separate episodes, separated in time and connected only by similar circumstances and the accused's alleged guilt, improper). Simply because appellant was in custody for both crimes does not automatically render the evidence admissible in the

prosecution for each crime. The flight evidence here was not mutually supportive of an inference of consciousness of guilt as to both murders, especially given the strong and obvious motive for flee created by the overwhelming evidence in the Collier case and the relatively weak circumstantial evidence existing at the time in the present case.

As noted by this Court in Bundy v. State, 471 So.2d 9, 21 (Fla.1985), quoting, United States v. Borders, 693 F.2d 1318, 1325 (11th Cir. 1982);

> The interpretation to be gleaned from an act of flight should be made with a sensitivity to the facts of the particular case.

Appellee's argument lacks any sensitivity to the facts of this particular case. Obviously, the weight of evidence in the two murders was markedly differently, and appellant at all times denied his guilt in the instant crimes. Moreover, appellant could not rebut the improper inference created by the evidence of his escape without compounding its prejudicial effect by also introducing evidence of the collateral crime, which was properly excluded from the jury's consideration. Left unrebutted, the jury was unaware of the real impetus for the escape attempt. As in Merritt v. State, 523 So.2d 573 (Fla.1988), appellant was between a rock and a hard place once the court erroneously admitted the evidence of his flight.

Appellant contends that Merritt v. State, supra, controls the disposition of this case. 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.

At page 10 of its brief, appellee states that Ms. Hodges testified that appellant offered her $24,000 if she did not testify against him. That is what the state hoped her testimony would show, but this statement is not in accord with the actual testimony of the witness. Ms. Hodges testified at trial as follows:

> Q Did he talk to you at all about your testimony before court?
>
> A He told me he didn't want me to go to court, that his lawyer would tear me apart in the courtroom.
>
> Q Was anything offered to you?
>
> A He offered me $24,000.
>
> * * *
>
> Q How were you supposed to receive this money?
>
> A His brother Robert was supposed to bring it to me the next day.
>
> Q What were you supposed to do with the money?
>
> A I was supposed to go to California.
>
> Q What was he going to do?
>
> A He said that he would meet me in California.

(T 1621-1622). Ms. Hodges never affirmatively stated that the money was offered as a bribe for her not testifying. Rather, the money was to finance her trip to California, where Freeman intended to meet her.

On cross-examination, Ms. Hodges explained that appellant never asked her not to testify:

> Q Had John ever told you any harm would come to you if you testified today?
>
> A He just told me that his lawyer would tear me apart in the courtroom, but that's all.
>
> Q Had he threatened to physically harm you or have anyone physically harm you?
>
> A **No.**
>
> Q He's never even asked you not to testify; has he?
>
> A **No.**
>
> Q He's never offered you any money not to testify; has he?
>
> A He never said: Here's $24,000 for not testifying; no.

(T 1626)[Emphasis added].

In Manuel v. State, 524 So.2d 734 (Fla. 1st DCA 1988), cited by appellee in its brief, the district court held that it was error to introduce a telephoned threat to a witness, where the witness did not explicitly connect the voice of the caller with the defendant. The appellate court held that by failing to unambiguously connect the defendant's voice to that of the caller, the prosecution did not lay a proper predicate for the admissibility of the evidence. The court nonetheless found the

error harmless in light of the overwhelming evidence of guilt, including eyewitness testimony and the defendant's own admissions.

Here, the state failed to unambiguously prove that the $24,000 was offered as a bribe to the witness. The evidence was just as susceptible to an inference that the money was intended to finance appellant's and his girlfriend's rendezvous in California in lieu of any trial whatsoever. Unlike Manuel v. State, supra, this is not a case of overwhelming evidence, and, in fact, there was no direct evidence linking appellant to the crimes below. The error here cannot be deemed harmless.

Appellee concedes that the jury had no knowledge of where the $24,000 came from, and claims there was no suggestion that the money came from the Epps' murder, nor was the jury in any way misled as to how the money related to the crime charges. Appellee fails to explain how the evidence of the money was in any way related to the crime charged, thus proving appellant's point: evidence of the money was simply not relevant, and its admission was prejudicial by inferring that the money was somehow related to the Epps' burglary/murder. To the extent the jury had no knowledge where the money came from, the evidence could only infer that it came from this offense or from some other criminal activity, which latter insinuation was equally devastating.

As argued initially, evidence which insinuates that a bribe is offered, which insinuation is not proved, constitutes reversible error. Smith v. State, 414 So.2d 7 (Fla. 3d DCA

1982); see also, Castillo v. State, 466 So.2d 7 (Fla. 3d DCA 1985), approved in part, quashed in part, State v. Castillo, 486 So.2d 565 (Fla.1986). The testimony of Robert Jewell and Ms. Hodges was an overkill tactic which tainted the fairness of appellant's trial. Johnson v. State, 432 So.2d 583 (Fla. 4th DCA 1983)(inference by prosecutor that defendant was involved in fights in prison had no basis in the record and constituted an overkill tactic); Marsh v. State, 202 So.2d 222 (Fla. 3d DCA 1967)(insinuation by prosecutor on cross-examination of defendant that defendant had bragged about the crime to a barmaid harmful error where state did not introduce barmaid's testimony to establish the statements). In Marsh v. State, the district court noted that the damaging effect of the state's cross-examination on the jury was apparent since the questioning must have led the jury to believe such a statement was made when in fact it was not proved. The court held that the damage was not undone by the cautionary instruction to the jury to disregard the questions. Similarly, here, the evidence must have led the jury to believe that the money came from the instant crimes and was offered as a bribe to a witness, which inference was false and misleading and highly prejudicial.

As noted by the First District Court of Appeal in Simmons v. Wainwright, 271 So.2d 464, 465 (Fla. 1st DCA 1973):

> The prosecution is not permitted to adduce every description of evidence which according to their own notions may be supposed to elucidate the matter in dispute.

The evidence of the hidden money and appellant's offer of the $24,000 to Ms. Hodges was not relevant and its admission was misleading and prejudicial. Appellee's harmless error argument must fail.

ISSUE III

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

Appellee contends in Issue III that the trial court did not err in declaring Doug Freeman a hostile witness, although appellee cites no cogent authority, statutory or case law, to support its position. Rather, appellee asserts merely that a trial court has wide latitude in permitting parties to ask leading questions of reluctant witnesses who are either being difficult or recalcitrant in responding to inquiry. There is no suggestion in the record below that Doug Freeman was either unwilling to testify or belligerent in his responses, and appellee's authorities are inapposite to this case.

This case does not involve the trial court exercising its discretion in allowing a party to lead its witness. In fact, appellant did not object below to the state asking Doug Freeman leading questions with regard to alleged threats or coercion by the prosecution team (T 1394-1395). Appellant contends that the trial court erred in allowing the state to impeach its own witness with prior statements, where the statements were not inconsistent nor was the witness' testimony adverse. Appellee subverts the real issue at hand and ignores the controlling case law. Jackson v. State, 451 So.2d 458 (Fla.1984); see also Section 90.608(2), Florida Statutes.

ISSUES VI

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

ISSUE VII

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

Appellant relies on his initial brief with regard to these issues, but feels compelled to point out appellee's inaccurate references to Billy McMillion in its discussion of these two points (AB 23, 24). The newly discovered evidence addressed in Issue VI and the false evidence involved in Issue VII pertained solely to the whereabouts of Darryl McMillion in October, 1986, and had nothing to do with Darryl's brother, William, whose status on the operative dates was never in question.

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.

Appellee makes the bald assertion that a review of the penalty phase proceeding provides absolutely no support for the jury's life recommendation, but then proceeds to summarize the mitigating evidence presented below (AB 28-30), which "brief summary" (AB 28) obviously shows that the jury's recommendation was not "unreasonable." What appellee is asking this Court to do is to review appellant's death sentence, imposed pursuant to the trial court's override of the jury's life recommendation, exactly as if the jury had recommended death, contrary to the dictates of Tedder v. State, 323 So.2d 908 (Fla.1975). See Ferry v. State, 507 So.2d 1373 (Fla.1987).

This Court has on numerous occasions reversed a death sentence for imposition of a life sentence without parole for 25 years, in accordance with the jury's life recommendation, where there existed a reasonable basis for the jury's recommendation. See cases cited in the initial brief at pages 82-84. Even if the trial judge finds numerous aggravating factors and and absolutely nothing in mitigation, this Court is obligated to reduce the sentence to life, as recommended by the jury, if the judge has unreasonably rejected the jury's opinion as to the proper penalty. Amazon v. State, 487 So.2d 8 (Fla.1986); Richardson v. State, 437 So.2d 1091 (Fla.1983); Welty v. State, 402 So.2d 1159 (Fla.1981). Likewise, if the trial judge merely

disagrees with the jury's life recommendation, this Court must reject the life override. Rivers v. State, 458 So.2d 762 (Fla. 1984); Norris v. State, 429 So.2d 688 (Fla.1983).

Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable persons could differ on what penalty should be imposed renders the override here improper. Welty v. State, supra. Appellant's death sentence should be reversed and the case remanded with instructions to impose 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.

As recently reaffirmed by this Court in Banda v. State, 13 FLW 709 (Fla.Dec. 8, 1988), death is reserved only for the most aggravated of murders. This is not one of them. See Proffitt v. State, 510 So.2d 896 (Fla.1987); Richardson v. State, 437 So.2d 1091 (Fla.1983).

In stark contrast to those cases relied upon by appellee, see Parker v. State, 458 So.2d 750 (Fla.1984); Brown v. State, 473 So.2d 1260 (Fla.1985), and Echols v. State, 484 So.2d 568 (Fla.1985), this was not a premeditated or execution-style murder; rather, this case can best be described as a simple burglary gone bad. It is a classic example of a felony murder. Appellant was unarmed when he entered the Epps' residence, and there was a conspicuous lack of premeditation. Moreover, at the time of the murder, appellant had no significant history of prior criminal activity, and there were only two valid aggravating circumstances established. On the spectrum of cases this Court has reviewed, this one does not qualify for imposition of the death sentence. See Nibert v. State, 508 So.2d 1 (Fla. 1987); Rembert v. State, 445 So.2d 337 (Fla.1984); Norris v. State, 429 So.2d 688 (Fla.1983); Menendez v. State, 419 So.2d 312 (Fla.1982); Swan v. State, 322 So.2d 485 (Fla.1975).

Appellant's death sentence should be reduced to life.

III CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority, as well as that in the initial brief, appellant respectfully requests this Court grant the following relief: As to Issues I, II, III, IV, V, VI, 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,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

Paula S. Saunders

PAULA S. SAUNDERS
Fla. Bar No. 308846
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn M. Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, John D. Freeman, Inmate No. 072746, Florida State Prison, P.O. Box 747, Starke, FL 32091, this 9th day of January, 1989.

Paula S. Saunders

PAULA S. SAUNDERS