IN THE SUPREME COURT OF FLORIDA

SAMUEL FRANCIS WILLIAMS,

Appellant,

v. CASE NO. 88,745

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Samuel Francis Williams, relies on the Initial Brief to reply to the State's Answer Brief with the following additions regarding Issue I and II.

ARGUMENT

ISSUE I

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE OF THE DEFENDANT'S COMMITMENT TO AND ESCAPE FROM A JUVENILE FACILITY IN LOUSIANNA AS RELEVENT TO PROVE THE UNDER SENTENCE OF IMPRISONMENT AGGRAVATING CIRCUMSTANCE, IN INSTRUCTING THE JURY ON THIS AGGRAVATING CIRCUMSTANCE BASED SOLELY ON THIS EVIDENCE, AND IN FINDING AND WEIGHING THIS FACTOR IN THE COURT'S SENTENCING DECISION.

The State's argument on this point is based on a faulty premise -- that anyone who commits the crime of escape necessarily was under sentence of imprisonment for purposes of the aggravating circumstance provided for in Section 921.141(5)(a) Florida

Statutes. Answer Brief at 45. This argument blurs the distinction between "confinement" generally and "imprisonment as the result of a criminal sentence" which is a specific and legally precise form of confinement. The State's position ignores the fact that an escape can be committed by leaving forms of confinement other than imprisonment as the result of a criminal sentence. See, State v. Ramsey, 475 So.2d 671 (Fla. 1985)(legal confinement for escape begins with arrest); Wilson v. Culver, 110 So.2d 674 (Fla. 1959) (in jail awaiting trial on pending charges); Naylor v. State, 250 So.2d 660 (Fla. 2d DCA 1971)(in jail awaiting trial on pending charges); Ducksworth v. Boyer, 125 So.2d 844 (Fla. 1960) (in jail on civil contempt). Under the State's theory, anyone who committed an escape by leaving the above forms of confinement would be under sentence of imprisonment for purposes of the aggravating circumstance.

Section 39.061, Florida Statutes, which provides for punishment for escapes from secure juvenile detention or residential commitment facilities, does not lend support to the State's argument. In fact, it contradicts the State's position. The State overlooks the reason for the existence of Section 39.061 which is to proscribe escape from the particularized forms of juvenile confinement. See, Ferguson v. State, 395 So.2d 1182 (Fla.

4th DCA 1981); Prince v. State, 360 So.2d 1161 (Fla. 4th DCA 1978); In Re F.G., 349 So.2d 727 (Fla. 4th DCA 1977). Section 944.40 Florida Statutes does not apply to escapes from confinement a juvenile residential commitment facility since it is not a penal institution. Ibid. Section 944.40 proscribes only escapes of "prisoners confined in any prison, jail, road camp, or other penal institution."

ISSUE II

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT TO DEATH SINCE A DEATH SENTENCE IS DISPROPORTIONATE.

Initially, the State argues that the prosecutor did not contend that the homicide took place during an attempted robbery after the victim resisted the attempt. State's Brief at 55-57. However, the record shows: (1) the prosecutor presented evidence that the victim "bucked" or resisted the robbery attempt (T 10:679; T 9:565-566, 597); (2) the prosecutor argued this evidence to the jury in his closing argument (T 11:948, 958, 968); and (3) the trial judge relied on this evidence in his finding of fact to conclude the murder occurred during an attemped robbery (R 5:975)

As the State noted in its Answer Brief (at 56), the prosecutor presented the testimony of Roman Chadwick Johnson who testified to a statement Williams allegedly made that the victim "bucked", meaning "resisted", when Williams attempted to rob him. (T 10:679) Johnson testified as follows:

> Q. What did he[Williams] tell you?
>
> A. He told me that he went out to rob somebody and he was walking and he went by a house and seen a dog and he seen Mr. Burke come out of his house. He tried to rob him. Mr. Burke bucked.
>
> Q. Let me interrupt you, if I can. What does the term buck mean?

A. To resist when you don't want to do something,

(T 10:679) In his closing argument, the prosecutor argued this testimony to the jury:

> He told Roman Chad Johnson that he was involved in the murder and that it was a robbery attempt, that he grabbed the victim by the arm, and that the victim resisted, bucked, there's that word again, bucked.

(T 11:968)

On pages 56-57 of the Answer Brief, the State references the grand jury testimony of Nate Moorer in which he allegedly related a statement Williams made to him. Two problems exist with the State's use of this grand jury testimony. First, the State materieally misquotes the grand jury testimony. Second, the grand jury testimony was not substantive evidence in this case.

The prosecutor used Moorer's grand jury testimony in an attempt to impeach Moorer during his trial testimony. (T 9:564-566, 597-598) In questioning Moorer, the prosecutor confronted Moorer with questions and answers from the grand jury testimony. (T 9:564-566, 597-598) Reading from the grand jury testimony, the prosecutor related the pertinent statement **as** follows:

> **Q**. . . . . Question, now, did he tell you that he shot the man? Answer, yes, he didn't say shot. He said bucked, he bucked him. Question, now, this is important, Nate. I need for you to tell the members of the grand jury the exact language, I don't care how bad you may think it is, the exact language that Sam told you that morning, What did he **say** to you exactly? Answer, he said, I had to

> buck that cracker. I bucked that cracker last night. I'm the one that did it....

(T 9:565) The statement attributed to Williams in the grand jury testimony was "I had to buck that cracker." (T 9:565) In the Answer Brief, that State wrote, "I bucked that cracker." Answer Brief at 56. In ommitting the "I had to" from the statement, the State changed the meaning. The "I had to" words makes this statement consistent with the statement from Roman Johnson's testimony that the victim resisted in some way prompting the shooting.

The grand jury testimony of Nate Moorer was not sustantive evidence. Although grand jury testimony may be considered as substantive evidence when used to impeach inconsistent testimony a witness gives at trial, Sec. 90.801(2) Fla. Stat.; Moore v. State, 452 So.2d 559 (Fla. 1984), Nate Moorer never gave inconsistent testimony at trial on this point. (T 9: 563-564) When asked about hearing a statement from Williams, Moorer testified he did not remember:

> Q. Did you have any more conversation with the defendant that morning after the murder?
>
> A. No.
>
> Q. Do you remember testifying -- your answer's no, is that correct?
>
> A. I do not remember having a conversation with him at all.

> Q. Did you ever tell anybody that you had a conversation with the defendant on the morning following the murder?
>
> A. Not that I remember.

(T 9:563) The prosecutor asked Moorer if he had made statements to various investigators on this point and Moorer testified he did not remember. (T 9:563-564) Then, the prosecutor confronted Moorer with the questions and answers from the grand jury testimony. (T 9:564-565) Moorer testified that he did not remember those questions and answers. (T 9:565) Moorer's trial testimony **was** not inconsistent, and the grand jury testimony **was** not substantive evidence.

Finally, the trial judge heard the evidence the prosecution presented. In his sentencing order, the judge made a finding of fact that Williams made the statement that the victim resisted the robbery attempt prompting the shooting:

> The Defendant, subsequent to his arrest, made statements indicating that his intention was to rob the victim, the victim "bucked him" and that he therefore had to kill him.

(R 5:975)

On pages 59-62 of the Answer Brief, the State argues as fact several matters which are not supported by proof in this record. First, on page 59, the State claims Williams had pleaded as a juvenile to 15-20 armed robberies. The record reference, appearing in the Answer brief at pages 8 and 43, indicates the source of this

information to be comments the prosecutor made while arguing an unrelated point to the trial judge. (T 10:753) Second, on page 59 of the Answer Brief, the State alleges that Williams was to face an attemted murder charge in New Orleans. Again, the source of this information is another comment from the prosecutor to the trial judge. Answer Brief at 43, (T 13:57) Third, also on page 59 of the Answer Brief, the State claims that Williams **was** a "ruthless criminal" before the homicide in this **case** and references, at footnote 23, another alleged shooting incident. However, the State acknowledges that it never charged Williams with this offense and it also abandoned the use of this offense **as** collateral crimes evidence. Answer Brief at 59, note 23.

On page 61 of the Answer Brief, the State claims that Williams "killed Mr. Burke so he could join a local gang." There is no proof supporting this claim. Clinton Dowling testified that Williams told him in July of 1994, that he was involved in a gang in Crestview which required members to shoot someone and steal something of value. (T 10:657) The homicide in this case occured on September 27, 1994. (T 8:306-309) Other than Dowling's testimony, there was nothing linking Williams to a gang. The trial judge had this evidence presented as a basis for the State's request for an instruction on the cold, calculated and premeditated aggravating

Circumstance. (T 13:1065-1066) However, the court rejected the request for the instruction because there was insufficient evidence. (T 13:1066)

CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Samuel Francis Williams asks this Court to reverse his sentence of death with directions that a life sentence be imposed.

Respectfully submitted,

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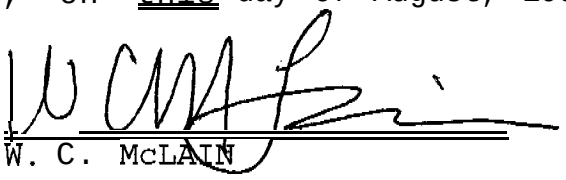
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by delivery to Mark S. Dunn, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301, on this 26 day of August, 1997.



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