IN THE SUPREME COURT OF FLORIDA

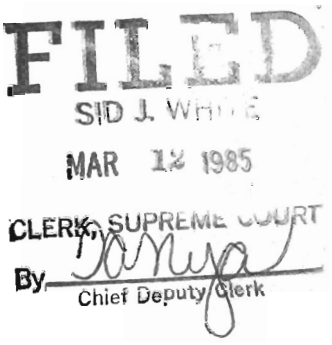
WILLIAM HAROLD KELLEY,

Appellant,

v. CASE NO. 65,134

STATE OF FLORIDA,

Appellee.



BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE

Appellee accepts Appellant's statement of the case but adds the following. On April 2, 1984, the trial judge filed his written findings of fact in support of the death penalty. (R 1238 - 1245) He found three statutory aggravating circumstances: prior conviction of a violent felony; homicide committed for pecuniary gain; and homicide committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (R 1240 - 1241) As a nonstatutory mitigating circumstance he found that Appellant was the only participant in the murder to receive punishment. (R 1244)

STATEMENT OF THE FACTS

Appellee accepts Appellant's statement of the facts with the following additions.

Cottie Mae Baggett testified that on October 3, 1966, she was working for the Carltons who lived across the street from the Maxcy residence. (R 536 - 573) Between 4:30 and 5:00 p.m., she saw a large car quickly drive through the Maxcy's circular driveway. (R 539 - 540, 542) She saw one man in the car. (R 540) Her impression was that the car was two toned, black over bronze. (R 539 - 540) It was not Maxcy's car. (R 540)

Katherine Higgins testified that between 5:00 and 5:30 p.m. on October 3, 1966, she saw Von Maxcy driving his car toward his house. (R 456) Vee Vee Stiles testified that shortly after 5:30 p.m. Von Maxcy passed her in his car. (R 468 - 469) He was proceeding in the direction of his home at a fast rate of speed. (R 469) As she passed the Maxcy house around 5:39 she thought she heard one gunshot. (R 470 - 471) The only car she saw parked at the house was Maxcy's. (R 470)

Jacqueline Davis, formerly Jacqueline Carlton, testified that Maxcy drove a late model, white Ford. (R 545) Between 6:30 and 6:45 p.m. on October 3, 1966, she saw Maxcy's car leave the Maxcy driveway. (R 546, 561) There were two large figures in the car, presumably two men. (R 546) The lights in the Maxcy house were off although it was dusk and the car's headlights were on. (R 546 - 547) Ms. Davis and the Maxcys met John Sweet a couple of years before the murder. (R 547) Sweet and the Maxcys were frequently seen together. (R 547) The week after the murder, Sweet was at the

Maxcy residence most of the time. (R 548)

Sweet testified that before the murder he met with Von Etter in Daytona. (R 581 - 583) Von Etter said he wanted to go to Sebring to look at the Maxcy residence. (R 583 - 584) A few days later Von Etter drove to Sebring. (R 584) An elderly man was with him. (R 584 - 585) Sweet was told that the man lived upstairs from Von Etter. (R 584) The man stayed in the parking lot of the Publix shopping center while Sweet drove Von Etter to the Maxcy home. (R 584 - 585) The day of the murder, Von Etter and Appellant arrived at the shopping center around 4:00 or 4:30. (R 587) They were in a car with a dark top and a yellow base. (R 587) It was not the same car Von Etter had had when he previously came to Sebring. (R 587) Two or three weeks after the murder Sweet met with Bennett and Von Etter in Massachusetts. (R 596) He paid them $15,000, all in $100 bills and $50 bills. (R 596 - 597) Several years after his own trials Sweet contacted Appellant in Massachusetts. (R 602) In describing what had happened inside the Maxcy home Appellant said, "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." (R 604)

Annette Abrams, Von Etter's widow, testified that in October of 1966 she and Von Etter lived at 19 Evelyn Street in Mattapan, Massachusetts. (R 722) Von Etter owned Wayland Food Market. (R 722, 724) He also worked at Walter Bennett's TV store in Roxbury. (R 723) In late summer of 1966 she noticed that Von Etter had a gun as he was packing to go on a trip. (R 734) In late September or early October of 1966 she, her husband, her son and a Mr. Campbell went to

Daytona Beach. (R 723 - 724) Mr. Campbell was in his sixties, and he lived over Von Etter's grocery store. (R 724) Ms. Abrams did not know why Von Etter had invited him. (R 722) One morning Ms. Abrams saw Von Etter talking to a man on the beach. (R 725) Von Etter and Mr. Campbell were gone for several hours one afternoon. (R 726) When they returned Von Etter did not say where they had been. (R 726) When Von Etter flew back to Massachusetts for a court date Mr. Campbell went with him. (R 727) Von Etter returned to Daytona Beach with Bill Kelley and his girlfriend, Jennie Adams. (R 728 - 729) They had a black and white car. (R 728) Von Etter might have mentioned that Kelley worked for Bennett also. (R 729) Kelley and Von Etter left Monday morning and returned after dark. (R 729) Von Etter said that they had had some business to take care of. (R 730) The next day Von Etter suddenly told her to pack because they were leaving. (R 731) Around that time Von Etter's financial condition was poor. (R 732 - 733) Nonetheless, in late 1966 or in January of 1976 Von Etter gave her ten $100 bills to pay off a credit card bill. (R 733) He said Walter Bennett had given him the money. (R 733) After Von Etter died, Ms. Abrams learned that her rent had been paid in advance for the following three months. (R 733) Walter Bennett paid $600 of Von Etter's burial expenses. (R 7330 Bennett also began paying Ms. Abrams $200 per week, saying that he owed Von Etter the money. (R 733) The payments lasted for six weeks until Bennett disappeared. (R 734)

Kaye Carter testified that in 1966 her parents managed the Daytona Inn in Daytona Beach. (R 679 - 680) In October of 1966 she met Mrs. Von Etter at the motel's swimming pool and they became

friends. (R 680) Later Von Etter, Appellant and Appellant's wife arrived at the motel. (R 681) They were in a yellow Chevrolet Super Sport which had a black vinyl top. (R 681) On October 3, Appellant and Von Etter were gone all day. (R 682) They were supposed to be back at 8:00 p.m. to go out to dinner. (R 682) They returned shortly before 8:30 p.m. (R 682) The group left Daytona Beach on October 4. (R 681)

Telephone records showed that on July 20, 1966, Sweet received a collect call on his unlisted phone number in Sebring. (R 706 - 707) The call originated from the Corner Store, 706 Dudley Street, Dorchester, Massachusetts. (R 706 - 707) On July 29, 1966, Sweet called Walter's TV, 710 Dudley Street, Dorchester. (R 706 - 707) On September 21, 1966, Sweet received a collect call which originated from the Puritan Drive-in, 739 Morrissey Road, Dorchester. (R 706 -707)

Records from the King's Inn in Daytona Beach showed that J.J. Sweet was registered there September 2 - 5, 22 - 23, and 27 - 28, 1966. (R 704) Records from the Hertz Rental Agency showed that on September 27, 1966, Sweet rented a car in Daytona Beach and returned the car in Sebring. (R 706)

Records from the Daytona Plaza Hotel in Daytona Beach showed that a David Evans of 19 Evelyn Street, Mattapan, Massachusetts, was registered there September 22 - 24, 1966; that Mr. Evans was representing the Whalen Food Market of Roxbury, Massachusetts; that he was driving a 1966 Impala; and that on September 22, he called Sweet's unlisted Sebring phone. (R 704 - 706)

Records from the Daytona Inn Hotel in Daytona Beach showed that

Andrew Etter of 19 Evelyn Street, Mattapan, Massachusetts, was registered in room 323 from September 23 to 28, 1966; that Annette Von Etter of the same address was registered in the same room from September 28 through October 4, 1966; that Alfred Campbell was registered in room 322 from September 25 to 28, 1966; and that Mr. and Mrs. William Kelley of 19 Carson Street, Dorchester, Massachusetts, were registered in room 322 from October 2 to 4, 1966, driving a Chevrolet with Massachusetts license plate number G-99077. (R 705)

Former Massachusetts State Police Officer John J. Kulik testified that before his disappearance in April of 1967 Walter Bennett owned Walter's TV and Realty Store and Walter's Lounge. (R 746 - 747) Bennett also had an interest in Casallies' Corner Variety Store. (R 746) All three businesses were located on Dudley Street in Roxbury, Massachusetts. (R 746) Andrew Von Etter became a homicide victim in February of 1967 in Bedford, Massachusetts. (R 747) Before that time, Officer Kulik had seen Von Etter with Bennett at Bennett's business establishments. (R 747) In 1966 Officer Kulik also had seen Appellant in Bennett's business establishments. (R 748) Further, Officer Kulik had frequently seen Appellant with one Jennie Adams. (R 748 - 749) Additionally, he had seen Appellant and Jennie Adams operating a Chevrolet with Massachusetts license plate nubmer G-99077. (R 749 - 751) The car was cream colored with a black top. (R 752 - 753) It was registered to Jennie Adams. (R 752)

FBI Agent Roth Davis testified that he arrested Appellant at the Holiday Inn in Tampa, Florida, on June 16, 1983. (R 75) Appellant had on his person three driver's licenses, each being a

different alias. (R 760) When told he was being charged with the Maxcy murder Appellant said that the case must be seventeen or eighteen years old; that it was the case in which Sweet and Walter Bennett were involved; that he thought all the witnesses were dead; and that the State would never make a case. (R 760 - 761)

SUMMARY OF THE ARGUMENT

ISSUE I

The State only had a duty to preserve evidence that: (1) possessed an exculpatory value that was apparent before the evidence was destroyed, and (2) was of such a nature that the defendant would be unable to obtain comparable evidence by other means. None of the items of evidence destroyed in this case met this test. Therefore, the State had no duty to preserve the evidence.

ISSUE II

State witness Sweet made out-of-court statements to one Abe Namia before Sweet's first trial for Maxcy's murder. The statements were admitted at trial to rehabilitate Sweet who had been impeached by the inference of a recent motive to fabricate. The statements were admissible as prior consistent statements even though: (1) there were minor discrepancies between Sweet's prior statements and his trial testimony; (2) Sweet did not testify at trial that he made prior consistent statements; and (3) the prior statements referred to nonprejudicial facts which were extrinsic to Sweet's trial testimony.

ISSUE III

During deliberations the jury developed a question regarding Sweet's immunity agreement and motive for testifying. The trial judge responded by informing the jury that it could have testimony read back if it wished. The judge's response was entirely proper. A trial judge is not required to answer a question of fact. Nor is he required to read back testimony.

ISSUE IV

The trial judge acted within his discretion in permitting the jury to take notes and to use them during deliberations. Further, he adequately instructed them on the proper use of notes.

ISSUE V

Appellant's post-arrest statements were not taken in violation of Miranda v. Arizona. First, Miranda is not applicable here since the statements were not a product of interrogation. Second, Appellant waived his Miranda rights before making the statements. The record does not show that he was so intoxicated that he could not make a knowing and intelligent waiver.

ISSUE V(A)

The language of the verdict urging instruction given was not coercive. Further, the instruction did not have a coercive effect since the jury did not render a verdict shortly after receiving the instruction. Last, Appellant's failure to object to the instruction constituted a waiver of the issue for purposes of appeal.

ISSUE V(B)

Appellant's claim of ineffective assistance of trial counsel should not be considered on direct appeal because the record on appeal is an insufficient basis upon which to evaluate counsel's performance. Assuming the claim is properly before the court, Appellant has not demonstrated that the alleged deficiencies of counsel affected the outcome or reliability of the trial.

ISSUE VI

A.

The trial court did not double the statutory aggravating circumstances murder for pecuniary gain and cold, calculated and premeditated. Rather, it used different aspects of the murder for hire to support each circumstance.

B.

The trial court did not commit reversible error by permitting the prosecutor to argue that the aggravating factor felony murder applied since: (1) the defense did not object; (2) the prosecutor had a tenable basis for his argument; and (3) any error was harmless.

C.

Contrary to Appellant's contention, the trial court did consider the nonstatutory mitigating circumstances advanced by the defense.

D.

The trial court properly refused to find as a statutory mitigating factor that Appellant's participation in the murder was relatively minor. Sweet's testimony established that Appellant was the actual murderer. His testimony was corroborated by circumstantial evidence showing that Von Etter considered Appellant a necessary participant in the murder.

E.

The trial court did not commit reversible error by permitting the prosecutor to argue that the aggravating circumstance heinous, atrocious or cruel applied since: (1) the defense did not object; (2) the murder was especially heinous, atrocious or cruel; and (3)

any error was harmless.

F.

The term heinous, atrocious or cruel has not become unconstitutionally vague and overbroad because of the wide variety of situations in which it has been applied.

G.

Appellant's allegations are insufficient to show that the death penalty in Florida unconstitutionally discriminates based on the race of the victim.

H.

It did not violate the Constitutional prohibition against ex post facto laws to sentence Appellant under Florida's current death penalty statute for a murder which occurred before Florida's previous death penalty statute was declared unconstitutional.

I.

Appellant's contention that death by electrocution is cruel and unusual punishment has been rejected many times.

J.

This court has rejected Appellant's contention that the Governor of Florida selects those who are to die in an arbitrary and capricious manner.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE INDICTMENT OR BAR PROSECUTION BECAUSE OF THE STATE'S FAILURE TO PRESERVE EVIDENCE.

In California v. Trombetta, __ U.S. __, 81 L.Ed.2d 413, 104 S.Ct. 2528 (1984), the Supreme Court unanimously held that any duty the government may have to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense. The Court held that to meet this standard of constitutional materiality the evidence must: (1) possess an exculpatory value that was apparent before the evidence was destroyed, and (2) be of such a nature that the defendant would be unable to obtain comparable evidence by other means. 81 L.Ed.2d at 422.

In California v. Trombetta, each of the respondents was stopped in California for driving while intoxicated. Each submitted to an Intoxilyzer breath test which indicated a high blood-alcohol level. Each respondent unsuccessfully moved to suppress the Intoxilyzer test on the ground that the arresting officers had failed to preserve samples of respondents' breath. Respondents each claimed that preservation of a breath sample would have enabled him to impeach the incriminating Intoxilyzer results. The California Court of Appeal ruled in favor of respondents. In reversing, the United States Supreme Court found it significant that the California authorities did not destroy the breath samples to circumvent the disclosure requirements established by Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), and its progeny. 81

L.Ed.2d at 422. The Court found it more significant that the chances were extremely low that preserved samples would have been exculpatory. Id. Further, the Court found it highly significant that even if it were to assume that the Intoxilyzer results were inaccurate and that the breath samples might therefore have been exculpatory, respondents were not without alternate means of demonstrating the unreliability of the results.

Here, as in California v. Trombetta, there was no indication that the government destroyed evidence in bad faith. Maxcy was murdered October 3, 1966. (R 446 - 51, 468 - 71, 499) Although Appellant was considered a suspect in 1966 and 1967, the State Attorney's office determined that there was insufficient evidence against him to seek an indictment. (R 82, 84) The State preserved evidence of the murder for more than nine and a half years. (R 1169) With authorization from a circuit judge, the State exhibits introduced at Sweet's second trial were finally destroyed because the clerk of the court needed more storage space.[1] (R 47, 68 - 69, 83) Defense exhibits introduced at Sweet's trial were not destroyed. (R 47) Copies of the documentary evidence which was destroyed was made available to Appellant. (R 68 - 69)

Under the standard of constitutional materiality set forth in California v. Trombetta, the State had no duty to preserve the evidence. Appellant was not under indictment when the evidence was destroyed. (R 82, 84) The case had been inactive for more than

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[1] The appendix to this brief contains that part of the index to the transcript of Sweet's second trial that lists the trial exhibits.

nine and a half years. As the case was for all intents and purposes closed, the evidence could not possibly have possessed an apparent exculpatory value.

In his briefs Appellant has attempted to show that prejudice resulted from the destruction of certain of the items. Two of these items are a section of Maxcy's shirt and the sheet found in the hallway of the Maxcy house. (R 485) Although the sheet was not on Maxcy's body (R 482 - 83), it had type "O" human blood on it. (R 707) It also contained four 3" X 8" cuts or slits. (R 707 - 708)

Appellant claims that the sheet and shirt section had an exculpatory value since if they had been preserved they may have supported the defense's position that the killers would have gotten blood on themselves. (Initial Brief for Appellant 20 - 21) Such a tenuous exculpatory value certainly would not have been apparent before the sheet and shirt were destroyed. Further, the defense was able to obtain comparable evidence to support its theory. Deputy Murdock testified that there was considerable blood in the bedroom and hallway, indicating that a struggle had occurred. (R 493 - 94) The medical examiner testified that Maxcy sustained four deep stab wounds before he was paralyzed by the gunshot (R 512 - 516); that Maxcy's body had skin abrasions on it (R 518); that Maxcy was in motion when stabbed (R 516); that he would have been able to struggle for minutes after being stabbed (R 516); and that his heart would have continued to pump blood during the struggle. (R 518)

Appellant has also attempted to show that prejudice resulted from the destruction of a tire. The only exculpatory value Appellant can articulate for the tire is that it may have aided the

defense in cross-examining Sweet or Namia. (Initial Brief for Appellant 22) Such an exculpatory value is not clear now and certainly would not have been apparent before the tire was destroyed. Moreover, the defense could have obtained whatever information the State had about the tire by deposing the State's law enforcement witnesses. At trial, the defense did not even attempt to cross-examine State witnesses about the tire.

Appellant has also tried to show that he was prejudiced by destruction of the .38 caliber bullet or slug that killed Maxcy. Appellant claims that the defense had information that Sweet possessed a .38 caliber revolver. He further claims that if the bullet had been preserved the defense could have conducted ballistics tests on Sweet's gun. (Initial Brief for Appellant 22) Initially, Appellant's claim that he had information that Sweet possessed a .38 caliber revolver is completely unsubstantiated. Although defense counsel vigorously cross-examined Sweet, he ever asked him if he had a .38 caliber revolver. Nor did the defense introduce registration records or testimony concerning ownership or possession of such a weapon. Moreover, a defendant's claim that testing might have produced exculpatory evidence does not establish that the evidence had an exculpatory value that was apparent before it was destroyed. California v. Trombetta; United States v. Martinez, 744 F.2d 76, 79 - 80 (10th Cir. 1984).

Further, Appellant has tried to show that he was prejudiced by destruction of two statements relating to Sweet's negociations with the State. Appellant claims that had the statements been preserved, the defense may have been able to use them for impeachment.

(Initial Brief for Appelant 23) This claim is based purely on speculation and conjecture. Further, the defense was able to obtain considerable impeachment evidence by other means.

Last, in his supplemental brief Appellant argues that failure to preserve the brake pedal and floor mats of Maxcy's car, a bloody carpet, blood and hair samples, fingernail scrapings, wall scrapings, latent prints and certain test results could have prejudiced him. (Supplemental Brief for Appellant 17 - 18) Initially, Appellant has not preserved this argument. Appellant's motion to bar the prosecution or to dismiss the indictment was based on the destruction of the State exhibits introduced at Sweet's second trial. (R 1175 -1179) None of these particular items was introduced at that trial. Moreover, as stated above, a defendant's claim that destroyed evidence might have been exculpatory does not establish that the evidence had an exculpatory value that was apparent before it was destroyed.

B.

This court has not yet adopted California v. Trombetta's standard of constitutional materiality of evidence. Instead, where evidence has been destroyed or lost by the State this court applies the balancing test announced in State v. Sobel, 363 So.2d 324 (Fla. 1978). Under Sobel, if the loss or destruction was not done with the intent to prejudice the defendant, the trial court must determine if the defense has been prejudiced by the loss. The burden is on the State to demonstrate that no prejudice occurred. If the State fails to meet its burden the trial court has broad discretion in determining what, if any, sanctions should be imposed against the

State.

Here, the trial judge found that no bad faith was involved in the destruction of evidence. (R 79) His comments indicate that he was satisfied that Appellant had not been prejudiced by the destruction of evidence. (R 79) As his findings have substantial support in the record, the denial of Appellant's motion to dismiss the indictment was proper.

ISSUE II

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING STATE WITNESS NAMIA TO TESTIFY TO A CONVERSATION WITH SWEET IN 1967.

Under Florida and federal law, the statement of a witness which is consistent with his testimony is not hearsay if it is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. Sosa v. State, 215 So.2d 736 (Fla. 1968) (Ervin, J., concurring specially); Van Gallon v. State, 50 So.2d 882 (Fla. 1951); §90.801(2)(b), Florida Statutes (1983); Fed. R. Evid. 801(d)(1)(B). Questions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating a witness who has been impeached by the inference of a recent motive to fabricate are addressed to the sound discretion of the trial court. United States v. Brantley, 733 F.2d 1429, 1438 (11th Cir. 1984); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980); United States v. Lombardi, 550 F.2d 827 (2d Cir. 1977); United States v. DeVore, 423 F.2d 1069, 1073 (4th Cir. 1970); 215 So.2d at 744. Where the prior consistent statements refer to facts which are new or extrinsic to the testimony of the witness being rehabilitated, reversible error occurs only if the potential probative force of the additional facts is highly incriminating or critical to the establishment of an ultimate fact in issue. Sosa v. State.

Here, Sweet testified on direct examination that at Irene Maxcy's insistence he made arrangements to have Maxcy killed; that the arrangements were made through Walter Bennett of Boston; that Appellant and Von Etter came to Sebring and met with him; and that he drove Appellant and Von Etter to the Maxcy house where they

committed the murder. (R 579 - 594) Defense counsel's cross-examination of Sweet raised an express or implied charge of recent fabrication or improper motive. (R 611 - 676) Appellant does not contend otherwise.

To rehabilitate Sweet, the State presented the testimony of Abe Namia. (R 765 - 772) Namia testified that before Sweet's first trial Sweet told him that Irene Maxcy asked him if anyone in the Boston area would be interested in doing some work in Florida; that he related this to Wimpy Bennett; that from that time forward Irene and Bennett talked directly to each other; that unknown assassins came to Florida twice to kill Maxcy but aborted their plans; that eventually Appellant and Von Etter came to Sebring and met with Sweet; and that Sweet drove them to the Maxcy house. (R 770 -772)

Appellant first argues that discrepancies between Sweet's prior statements to Namia and his trial testimony rendered the prior statements inadmissible. However, the prior statements were substantially consistent with his trial statements. As any discrepancies were minor, it cannot be said that the trial court abused its discretion in admitting Namia's testimony.

Second, Appellant argues that the State was required to lay a foundation for Namia's testimony by eliciting Sweet's testimony that he had made prior consistent statements. Appellant stresses that on cross-examination Sweet stated that he could not recall ever having told anyone that he hired someone to kill Maxcy. (R 672 - 673) However, Namia did not testify that Sweet told him he hired the killers. (R 770 - 772) Rather, he testified that Sweet told him that after he made the first contact with Bennett, Irene began to

communicate with Bennett directly. (R 770 - 772) More importantly, Appellee has cited no cases holding that the witness sought to be rehabilitated must testify that he has made prior consistent statements.

Appellant's reliance on United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970), is misplaced. There, the trial court excluded rehabilitative testimony relating to a specific incident because the witness being rehabilitated had not testified to the same incident. The Fourth Circuit found the trial court's view of rehabilitative evidence too narrow. It stated that the testimony was admissible as a prior consistent statement designed to corroborate the witness's entire story. However, because the court could not say that the trial judge's ruling constituted an abuse of discretion, it affirmed the judgment. Id., at 1073.

Last, Appellant argues that Sweet's prior statements should have been excluded because they, unlike his trial testimony, referred to the fact that unknown assassins had twice traveled to Florida to kill Maxcy. Since this new matter was not prejudicial to Appellant, its admission was not improper. See Sosa v. State. Further, Appellant's objection to all of Namia's testimony (R 764 - 765, 769 - 770) did not preserve for review the admissibility of specific portions of the testimony. Id., at 746.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ANSWER A QUESTION BY THE JURY DURING ITS DELIBERATIONS AS TO WHETHER JOHN J. SWEET RECEIVED IMMUNITY IN FLORIDA FOR MURDER AND PERJURY.

Sweet's Testimony Regarding Immunity and Police Protection

On direct examination, Sweet testified that about four years before the current trial his son-in-law, a police officer, contacted the Massachusetts State Police Department on his behalf. (R 605) Sweet gave the State Police information about numerous Massachusetts crimes, as well as information about the Maxcy murder. (R 606 - 607) The department told him that upon verification of the information he provided, he would be given "protection." (R 607) He found out a day or so later that they had granted him immunity for, among other things, hijacking and loansharking. (R 606) A few weeks later, Assistant State Attorney Hardy Pickard and some other men from Florida arrived. (R 608) Sweet agreed to testify in Florida in the Maxcy case, just as he had agreed to testify in Massachusetts about the other crimes. (R 608) Direct examination ended with the following questions and answers (R 608):

> "Q. [Prosecutor Pickard]: Were you given an immunity deal in Florida?
>
> A. [Sweet]: Not at the time I gave you my story, no, sir.
>
> Q. Later were you given an immunity agreement?
>
> A. Well, yes. I believe my lawyer made a letter that I brought down.
>
> A. Your lawyer worked that out for you?
>
> A. Yes, sir.

On cross-examination, Sweet testified that after his Florida trials he eventually began selling marijuana for Appellant in Massachusetts. (R 666 - 668 - 671) He was afraid of Appellant. (R 666) At some point, an Arthur Raoul stole some of the marijuana. (R 668 - 669) Appellant apparently thought Sweet had stolen it. (R 669) Appellant beat Sweet up and would have killed him but his companion stopped him by saying, "Bill, no killings tonight. Everyone knows you're here." (R 669) At some point, Appellant called Sweet and said, "We are going to Providence, Rhode Island, for Arthur Raoul." (R 667) Appellant told Sweet to bring a pistol. (R 667) At that point, Sweet panicked and called his son-in-law. (R 667)

On cross-examination, defense counsel also brought out that Florida had granted Sweet immunity for the Maxcy murder and for perjury committed at his own two trials. (R 613 - 614) Further, he brought out that Massachusetts had granted him immunity for numerous offenses. (R 614 - 632) Sweet said, however, that he had not asked for immunity. (R614) Defense counsel did not ask exactly when he was granted immunity. Further, defense counsel elicited Sweet's testimony that he went into the Federal Witness Protection Program and that he was still in the program at the time of the current trial. (R 633, 648 - 652)

Jury's Question, Ensuing Discussion, and Judge's Response

During deliberations the jury sent the judge a note, asking the following two part question (R 925):

> "As the Jury, we would like to know if John J. Sweet received immunity in Florida for first degree murder and perjury before he gave information on the Maxcy trial, and if he had anything to gain by his testimony."

In the ensuing discussion among the judge and the attorneys, defense counsel proposed specific answers to the question. (R 927 - 928) The judge expressed reluctance to give an answer to the question since formulation of an answer would require him to interpret Sweet's testimony. (R 926 - 935) Several times the judge expressed his inclination to read back testimony. (R 927, 931 - 932) Defense counsel, as well as the prosecutor, discouraged this way of handling the question. (R 931) Eventually, the judge decided to give the jury an invitation to have testimony read. (R 934) As selection of the portions of the testimony to read back could be interpreted as a comment on the evidence, he wanted the jury itself to designate the testimony it wanted to hear. (R 934) He therefore instructed them as follows (R 935 - 936):

> . . . The bottom line, I regret to advise you I cannot answer your question. I think that needs some explanation.
>
> First of all, the Court cannot comment on the evidence. That is the full burden of the Jury and it would be improper for the Court to do that. Any question that cannot be answered except on the evidence, it can be answered by the Court.
>
> I think in fairness I should advise you that you do have the right to request that portions of the testimony be read back either by designating a witness by name or if it was a witness on the stand for some time and you don't require it all, if you clearly identify the portions of the testimony you want you can have it read back.
>
> I should caution you should designate it in a way that the Court can find it.
>
> If the markers you give for what you want to hear is such that I couldn't make the selection then without feeling like I had commented on it.
>
> That is a fairly convoluted statement, but anything that would require the Court to comment on

> the evidence, I wouldn't be able to help you. But I can have testimony or you can request testimony be read back if it's not too lengthy. Otherwise, I will advise you how long it would take to read back and you could decide whether you want to do it.
>
> I wish I could answer your question, but you will have to rely upon your memory for that.

Correctness of Judge's Response

The judge answered the jury's question in a manner within his discretion. Initially, he cannot be faulted for refusing to formulate a specific answer. As he noted, formulation of an answer would have required him to interpret Sweet's testimony and to have made a judgment as to Sweet's motivation. Jury questions involving questions of fact do not have to be answered by the trial judge. State v. Ratliff, 329 So.2d 285 (Fla. 1976).

Further, the judge cannot be faulted for failing to read back Sweet's testimony. Under present Florida Rule of Criminal Procedure 3.410, it is within the trial court's discretion to determine whether testimony should be read back to the jury upon request. DeCastro v. State, 360 So.2d 474 (Fla. 3 DCA 1978). Therefore, even if the jury had specifically requested to hear Sweet's testimony, the judge would not have abused his discretion by refusing the request.

Moreover, defense counsel discouraged the judge from reading back testimony. (R 931) An appellant may not take advantage of an error which he induced or promoted. Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1102, 59 L.Ed.2d 63, 99 S.Ct. 881 (1979). Therefore, even if failing to read back testimony were error, Appellant would be in no position to complain.

Appellant's reliance on LaMonte v. State, 145 So.2d 889 (Fla. 2 DCA 1962); Penton v. State, 106 So.2d 577 (Fla. 2 DCA 1958); and Furr v. State, 9 So.2d 801 (Fla. 1942), is misplaced. Current Florida Rule of Criminal Procedure 3.410 became effective February 1, 1973. In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972). Therefore, the above cases were decided before the effective date of the rule which gives a trial judge discretion to refuse a jury's request to hear testimony.

ISSUE IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE JURORS TO TAKE NOTES DURING THE TRIAL AND BY FAILING TO GIVE AN INSTRUCTION CONCERNING THE PROPER USE OF NOTES.

It is within the sound discretion of the trial judge to allow the jury to take notes during trial and to use them during deliberations. United States v. Rhodes, 631 F.2d 43 (5th Cir. 1980); United States v. Pollack, 433 F.2d 967 (5th Cir. 1970). Failure to explain to the jury the proper use of notes is not fundamental error. United States v. Rhodes.

Here, the judge furnished the jurors note pads and pencils and instructed them that they could take notes or not as they wished. (R 412) He also instructed them that the bailiff would take custody of the note pads at the end of each day. (R 412) Further, he stated (R 412):

> I would instruct you that a person who takes notes has no more authority than any other juror. Some jurors remember better by leaning back and listening, and others do by taking notes. But they don't give anyone any more authority than any other person on the jury.

Defense counsel did not request an additional instruction. (R 412, 421 - 424)

Clearly, the judge was within his discretion in permitting note-taking. If defense counsel thought the judge's instructions on note-taking were inadequate they could have requested an additional instruction.

Appellant's reliance on United States v. Standard Oil Company, 316 F.2d 884 (7th cir. 1963), is misplaced. There, the court stated that a trial court should inform counsel before voir dire of its

plans to permit note-taking. However, the court found no reversible error in the trial court's failure to do so. Id., at 897.

V.

WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE APPELLANT'S POST-ARREST STATEMENTS TO FBI AGENTS IN VIOLATION OF HIS MIRANDA RIGHTS.

Initially, Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), does not apply. Miranda only applies where the prosecution seeks to use statements stemming from custodial interrogation. Rhode Island v. Innis, 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1683 (1980), defined interrogation as any statements or actions of the police which are designed or can reasonably be expected to elicit an incriminating response.

Here, FBI agents arrested Appellant on a North Carolina warrant. (R 109) During their book-in procedure they learned he was wanted in Highlands County, Florida, for murder. (R 110, 19) Agent Davis told Appellant, "I'm certainly sure that Highlands County is going to place a detainer on you once they know that you have been arrested in Florida." (R 111, 119) Appellant then volunteered statements about the Florida murder. (R 111, 119)

It was reasonable for Agent Davis to tell Appellant about other outstanding warrants during the book-in procedure. Merely telling a defendant of outstanding warrants would not be expected to elicit incriminating responses. Therefore, Appellant's statements were not a product of interrogation.

Further, the evidence at the suppression hearing did not show that Appellant was so intoxicated at the time of his arrest that he could not make a knowing and intelligent waiver of his rights. Appellant was arrested at a Holiday Inn in Tampa. (R 107, 118) At first he denied that he was William Kelley. (R 108) Before being

transported to the FBI office, Appellant told the agents that he would like to get $1,500 which he had in his jacket. (R 108) During book-in, Agent Ross handed Appellant a Miranda warnings form. (R 109 - 110) Appellant looked at the form fifteen to twenty seconds, said he knew his rights and put the form on the desk. (R 100, 118) At some point, Appellant indicated he wanted to call his wife. (R 116) He told the agents several times that he did not want to talk to a lawyer. (R 116) These are not the actions and statements of an intoxicated person. Moreover, Agent Davis testified that although Appellant had been drinking, he seemed fairly lucid. (R 112)

ISSUE V(A)[2]

WHETHER THE TRIAL COURT ERRED IN GIVING A JURY DEADLOCK INSTRUCTION WHERE THE INSTRUCTION WAS NOT COERCIVE, HAD NO VISIBLE IMPACT ON THE JURY AND WAS NOT OBJECTED TO BY THE DEFENSE.

Background

At 9:25 a.m. on March 30, 1984, the jury retired to deliberate. (R 1227) At some unspecified time thereafter, the jury informed the trial judge that it was deadlocked. (R 923) The judge then gave Florida Standard Jury Instruction (Crim.) 3.06, the standard jury deadlock instruction approved by this court. (R 923 - 924) The judge appended the following to the approved charge (R 924 - 925):

> "I would ask that you give it your full consideration. It is an important case.
>
> If you fail to reach a verdict, there is no reason to believe the case can be tried again any better or more exhaustibly [sic] than it has been.
>
> There is no reason to believe there is any more evidence or clearer evidence [that] could be produced on either side. And there is no reason to believe the case could be submitted to twelve more intelligent and impartial people than you are.
>
> In the future a jury would be selected in the same manner that you were.
>
> Therefore, I would ask that you retire at this time and consider whether you wish to consider the matter further.
>
> It has taken us a week to get this far, and I would ask that you retire and consider the case further.
>
> The jury may step down."

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[2] Issue II of Supplemental Brief of Appellant.

Following the charge the jury retired. (R 925) At some unspecified time thereafter, the jury sent a written question to the judge concerning John Sweet's immunity agreement with the State.[3] (R 925) The judge and counsel discussed at length the appropriate answer to the question. (R 925 - 935) The jury then returned to the courtroom, received the judge's response to its question and retired again. (R 935 - 936) At 5:33 p.m., March 30, 1984, the jury returned with its guilty verdict. (R 936, 1227, 1231)

Propriety of Content of Instruction

This court has approved the practice of giving a properly confined verdict urging instruction to a deadlocked jury. Spaziano v. State, 393 So.2d 1119 (Fla. 1981), cert. denied, 454 U.S. 1037, 70 L.Ed.2d 484, 102 S.Ct. 581 (1981); State v. Bryan, 290 So.2d 482 (Fla. 1974). In addition, the practice of giving such an instruction has been approved by the United States Supreme Court, Allen v. United States, 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154 (1896), and the Fifth Circuit Court of Appeals. United States v. Thomas, 567 F.2d 638 (5th Cir. 1978); United States v. Solomon, 565 F.2d 364 (5th Cir. 1978); United States v. Bailey, 480 F.2d 518 (5th Cir. 1973).

Although use of the standard jury deadlock instruction is preferred, it is not error per se to give a different instruction. State v. Bryan. Generally, a verdict urging instruction should make plain to the jury that each juror has a duty to conscientiously adhere to his own opinion and that it is not improper for a juror to

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[3] At 4:25 p.m., March 30, 1984, the trial judge ordered that the jury's written question be included in the court's file. (R 1230)

cause a mistrial. United States v. Prentiss, 446 F.2d 923 (5th Cir. 1971). On the other hand, a verdict urging instruction should not: (1) set coercive deadlines; (2) threaten marathon deliberations; (3) pressure for surrender of conscientiously held minority views; or (4) imply a false duty to decide. United States v. Cheramie, 520 F.2d 325, 331 (5th Cir. 1975).

Here, the approved deadlock instruction was given. (R 923 - 924) The carefully measured language of that instruction plainly informs jurors that they can honorably fail to reach a verdict and avoids words which could be interpreted as coercive. See Florida Standard Jury Instruction (Crim.) 3.06.

Turning to the added remarks of the trial judge, they in no way suggested a coercive deadline or threatened marathon deliberations. Nor did they direct a juror to distrust his own judgment if he found a majority of the jurors taking a view different from his. Compare Green v. United States, 309 F.2d 852 (5th Cir. 1962). The only question, then, is whether they coerced a verdict by implying a false duty to decide.

The Fifth Circuit has upheld substantially similar instructions. In United States v. Dixon, 593 F.2d 626 (5th Cir. 1979), the following charge was upheld:

> " . . . I want to charge you additionally at this time that this, like any case, is an important case. All trials are expensive. Your failure to agree upon a verdict will necessitate another trial equally as expensive.
>
> . . . You should consider that this case must at some time be decided; that you were selected in the same manner and from the same source from which any future jury must be selected and that there is no reason to suppose that this case

> will ever be submitted to jurors more intelligent, more impartial or more competent to decide it than are you . . ."

In United States v. Williams, 447 F.2d 894 (5th Cir. 1971), the trial judge gave a charge almost identical to that in United States v. Dixon. The jury, however, had not indicated it was deadlocked. As the Fifth Circuit reversed on other grounds, it did not decide whether the charge coerced a verdict. Nonetheless, the court commented that the substance of the charge was probably not prejudical. Id. at 899 - 900. Further, the Court noted that it was more concerned with the timing of the instruction than with its content. Id., at 900.

In United States v. Zicree, 605 F.2d 1381 (5th Cir. 1981), the trial judge gave a verdict urging charge in which he remarked that a new trial would be expensive and exhausting to the litigants. The Fifth Circuit upheld the charge.

In contrast, instructions found to have coerced a verdict have used language much more forceful than that here. For example, in Jenkins v. United States, the judge told a deadlocked jury that "You have got to reach a decision in this case." Similarly, in Lincoln v. State, 364 So.2d 117 (Fla. 1 DCA 1978), the trial judge told the jury to "get back in there and arrive at a verdict."

In Kozakoff v. State, 323 So.2d 28 (Fla. 4 DCA 1975), during voir dire the judge told a prospective juror:

> " . . . We are in the decision-making business. We have to make decisions. Can you make a decision?
>
> . . . See, my problem is when I get through with the trial and when the case gets cranked up there has to be a decision made down the line

somewhere. There are a lot of decisions to be made, but basically I want a verdict, I want people to go back there and have them make their minds up on something." (emphasis added)

The Fourth District reversed. It determined that these statements during voir dire constituted an improper verdict urging instruction. The court reasoned that by demanding that the jury reach a verdict, the judge prejudiced the defendant's right to a hung jury by communicating a false duty to decide.

Nelson v. State, 438 So.2d 1060 (Fla. 4 DCA 1983), relied on by Appellant, is distinguishable. There, unlike here, the trial judge's comments to the jury indicated that he would regard their failure to agree on a verdict as a reflection on their intelligence, common sense or integrity. He went so far as to tell the jury, "If you all cannot arrive at a verdict then something is wrong." Further, he implied a duty to decide by telling the jury, "We look to you for resolution of this case. It is that pure and simple." Here, rather than demanding a verdict, the judge said, "I would ask that you retire at this time and consider whether you wish to consider the matter further." (R 925)

In sum, the language used in the instant case was not coercive.

Effect of Instruction on Jury

In determining whether a verdict urging instruction had a coercive effect, the reviewing court should examine the facts and circumstances of the particular case. Jenkins v. United States, 380 U.S. 445, 13 L.Ed.2d 957, 85 S.Ct. 1059 (1965); United States v. Williams, 447 F.2d 894, 900 (5th Cir. 1971). In Webb v. United States, 396 F.2d 727 (5th Cir. 1968), the court determined that an

Allen charge had no impact on the jury since an hour and a half after the charge the jury was still deadlocked.

Here, the verdict was not rendered shortly after the challenged charge. At some unspecified time after receiving the charge, the jury sent a written question to the judge. (R 925) The judge and counsel discussed at length the appropriate answer to the question. (R 925 - 935) The jury then returned to the courtroom, received the judge's response to the question and retired again. (R 935 - 936) Eventually, the jury returned its guilty verdict. (R 936, 1227, 1231) It is clear from this record that the jury was not impressed by the charge. Accordingly, any error was harmless.

Failure to Preserve

Generally, a defendant's failure to object to a verdict urging instruction constitutes a waiver for purposes of appeal. Tejeda - Bermudez v. State, 427 So.2d 1096 (Fla. 3 DCA 1983); Sayan v. State, 381 So.2d 363 (Fla. 4 DCA 1980); Armstrong v. State, 364 So.2d 1238 (Fla. 1 DCA 1977), cert. denied, 373 So.2d 456 (Fla. 1979); but see Rodriguez v. State, No. 83-2066 (Fla. 3 DCA Jan. 15, 1985)[10 F.L.W. 199](a manifestly coercive deadlock charge is fundamental error). As Appellant did not object to the trial judge's instruction, he failed to preserve this issue.

ISSUE V(B)[4]

WHETHER APPELLANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Appellant claims that one of his trial attorneys, Mr. Kuntsler, provided ineffective assistance by: (1) sending another attorney to a pretrial motions hearing; (2) failing to object to an Allen charge given at trial; and (3) failing to object to the trial judge's response to a question asked by the jury during deliberations.

Generally, ineffective assistance of trial counsel is not reviewable on direct appeal but is more properly asserted in a motion for post-conviction relief. Perri v. State, 441 So.2d 606 (Fla. 1983); State v. Barber, 301 So.2d 7 (Fla. 1974). This rule is applicable to capital cases. Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978). This rule is necessary because the record on appeal is usually insufficient for purposes of evaluating counsel's performance. United States v. Lopez, 728 F.2d 1359 (11th Cir. 1984).

Here, the record is an insufficient basis upon which to make a ruling. Counsel's actions may have resulted from tactical considerations. Accordingly, this issue is not properly raised here.

Moreover, under Strickland v. Washington, __ U.S. __, 80 L.Ed.2d 674, 104 S.Ct. __ (1984), to prevail on an ineffectiveness claim the defendant must show that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense.

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[4] Issue IV in Supplemental Brief of Appellant.

Appellant has not demonstrated that the alleged deficiencies of counsel affected the outcome or reliability of the trial. Therefore, assuming arguendo that the ineffectiveness claim is properly before this court, Appellant cannot prevail.

ISSUE VI

WHETHER FLORIDA'S DEATH PENALTY STATUTE WAS IMPROPERLY APPLIED TO APPELLANT AND WHETHER THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE.

A.

Whether the trial court improperly doubled the statutory aggravating circumstances murder for pecuniary gain and cold, calculated and premeditated.

Improper doubling occurs where the trial judge finds two aggravating circumstances based on the same evidence and the same aspect of the crime. Squires v. State, 450 So.2d 208, 213 (Fla. 1984); Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969, 53 L.Ed.2d 1065, 97 S.Ct. 2929, (1977). Here, the trial judge found that the murder was committed for pecuniary gain based on evidence that Appellant was paid to commit the murder. (R 1240) He found that the murder was cold, calculated and premeditated based on evidence that the murder was dispassionately conceived and planned. (R 1241) Since he used different aspects of the murder for hire and different evidence to find the two aggravating factors there was no improper doubling.

Similar reasoning was used in Squires v. State. There this court held that a trial judge may use separate aspects of the method of killing to support two aggravating factors. Squires shot the victim in the shoulder with a shotgun at close range. As the victim lay screaming in pain, Squires completed the task by firing five shots into the victim's head with a revolver. This court found that the circumstance heinous, atrocious or cruel was supported by the evidence showing that the murder was committed so as to cause the

victim unnecessary and prolonged pain. The court found that the circumstance cold, calculated and premeditated was supported by the evidence showing that Squires dispassionately fired the lethal shots at close range.

Similar reasoning was also used in Agan v. State, 445 So.2d 326 (Fla. 1983). Agan committed first-degree murder while in prison for a previous first-degree murder. The trial judge found the aggravating circumstances prior conviction of a violent or capital felony and murder committed while under sentence of imprisonment. This court upheld both findings. It reasoned that the two aggravating circumstances were not based on the same aspect of the crime or the defendant's character.

B.

Whether the trial court improperly allowed the jury to consider the State's claim that the murder occurred during the commission of a felony.

Appellant cannot prevail on this issue for three reasons. First, defense counsel did not object when the prosecutor argued to the advisory jury that the felony murder aggravating circumstance applied. (R 966) Appellant cannot raise this issue for the first time on appeal. Riley v. State, 413 So.2d 1173, 1174 (Fla. 1982).

Second, the prosecutor had a tenable basis for arguing that the murder occurred during a burglary. Burglary is now defined as the nonconsensual entering or remaining in a structure or conveyance of another with intent to commit an offense therein. Section 810.02, Florida Statutes (1983). Consent to entry is an affirmative defense to burglary. State v. Hicks, 421 So.2d 510 (Fla. 1982). In dicta

in McEver v. State, 352 So.2d 1213 (Fla. 2 DCA 1977), cert. denied, 364 So.2d 888 (Fla. 1978), the District Court of Appeal for the Second District expressed doubt that one could commit burglary by entering the marital domicile with the permission of one spouse for the purpose of committing a felony against the other. However, in K.P.M. v. State, 446 So.2d 723 (Fla. 2 DCA 1984), the Second District receded from its previous position. There, the court held that one could commit burglary by entering a family's residence with the permission of a juvenile occupant of the residence for the purpose of stealing property therein. The court reasoned that the juvenile had no legal or moral right to consent to entry into his family's home for the purpose of stealing property which did not belong to the juvenile. Further, the court reasoned that the defendant could not reasonably, and in good faith, believe that the juvenile had authority to permit him to enter the residence for the purpose of stealing the valuables of others. Id., at 724.

Here, the evidence showed that Irene Maxcy, through Sweet, gave Appellant permission to enter the Maxcy home for the purpose of killing Von Maxcy. (R 587) Under the reasoning of K.P.M. v. State, her consent was inoperative. Therefore, the prosecutor properly argued that the murder occurred during a burglary.

Third, Appellant cannot prevail on this issue because any error was harmless. At defense counsel's election (R 942 - 943, 946 - 947, 951), the jury was instructed on all statutory aggravating and mitigating circumstances. (R 978 - 981) Thus, the aggravating circumstance felony murder would have been before the jury for consideration whether the prosecutor argued for its application or not.

Further, Appellant was not prejudiced since the trial judge did not find the felony murder circumstance in aggravation. See Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982).

C.

Whether the trial court erred by refusing to consider nonstatutory mitigating circumstances.

Appellant contends that the judge failed to consider as a nonstatutory mitigating circumstance the difficulties posed to the defense as a result of the remoteness of the crime. However, at the sentencing hearing and in his sentencing order the judge specifically stated that he rejected the remoteness of the crime as a mitigating circumstance. (R 1005, 1244) He also stated that he rejected the destruction of evidence as a mitigating circumstance. (R 1006, 1244 - 1245) Mere disagreement with the force and effect given mitigation evidence is an insufficient basis for challenging a sentence. Porter v. State, 429 So.2d 293 (Fla. 1983); Quince v. State, 414 So.2d 185, 187 (Fla. 1982).

D.

Whether the trial court erred in not finding as a statutory mitigating circumstance that Appellant was an accomplice in the capital felony committed by another and that his participation was relatively minor.

The trial judge properly rejected the mitigating circumstance set forth in Section 921.141(6)(d), Florida Statutes (1983), since Sweet testified that Appellant was the actual killer. Sweet stated that Von Etter drove to Sebring from Daytona to locate the Maxcy residence. (R 584 - 585) However, instead of committing the murder

himself, Von Etter returned to Daytona, saying that he was waiting for someone to arrive. (R 585 - 587) The evening before the murder, Von Etter called Sweet. (R 586) He said his "partner" or "friend" had arrived and that the murder would take place the next day. (R 586 - 587) The following day, Appellant and Von Etter rendezvoused with Sweet in Sebring. (R 588 - 589) Appellant was carrying a satchel, and he told Sweet he was there to kill Von Maxcy. (R 589) When Sweet let Appellant and Von Etter out at the Maxcy residence, Appellant opened his satchel, displaying several knives and revolvers and a glove. (R 592 - 593) Appellant was wearing another glove. (R 593) Years later Sweet talked to Appellant about Von Maxcy's murder. (R 602 - 604) Appellant said, "Boy, [Maxcy] was a powerful guy. I stabbed him three or four times and he kept coming after us, so I had to shoot him in the head." (R 604)

In addition to Sweet's testimony, the State presented circumstantial evidence which showed that Von Etter considered Appellant a necessary participant in the killing. Annette Abrams, Von Etter's widow, testified that in late September or early October of 1966 she, her son, Von Etter and a Mr. Campbell stayed at the Daytona Inn. (R 723 - 724) One afternoon Von Etter and Mr. Campbell left for several hours. (R 726) Von Etter and Mr. Campbell flew back to Massachusetts on a Tuesday or Wednesday. (R 727) The following Sunday night Von Etter returned to Daytona with Appellant and Jennie Adams, Appellant's girlfriend. (R 728) Von Etter and Appellant were gone all day Monday. (R 729) They all left for Boston the next day. (R 731 - 732)

Further, motel registrations from the Daytona Inn showed that the Von Etters were registered at the Daytona Inn from September 23 to October 4, 1966. (R 705) However, a Mr. and Mrs. William Kelley registered at the motel the day before the October 3, 1966, murder and left the day after the murder. (R 705)

E.

Whether the trial court improperly allowed the jury to consider the State's claim that the murder was especially heinous, atrocious or cruel.

Appellant cannot prevail on this issue for three reasons. First, defense counsel did not object when the prosecutor argued to the advisory jury that the murder was especially heinous, atrocious or cruel. (R 967) Appellant cannot raise this issue for the first time on appeal. Riley v. State, 413 So.2d 1173, 1174 (Fla. 1982).

Second, the murder was especially heinous, atrocious or cruel. The State's evidence showed that Appellant and Von Etter lay in wait for Maxcy in Maxcy's own home. (R 587, 592 - 594) After Maxcy entered, a sheet was thrown over him. (R 482 - 485, 494 - 495, 707 - 708) He was stabbed in the back four times while moving. (R 512 - 514, 516) The stab wounds were deep and would have been painful. (R 514, 516) However, he would have been able to struggle for a considerable period of time, at least minutes. (R 516) Blood in the hall outside of the bedroom indicated that a violent struggle occurred there. (R 493 - 494) There were also skin abrasions on Maxcy's body. (R 518 - 519) Maxcy was eventually shot through the base of his skull. (R 514 - 515) Although his body was found in the bedroom, the sheet was found in the hall. (R 479, 485) The

sheet contained blood and knife holes but no gunshot hole. (R 482 - 483, 707 - 708) Apparently Maxcy managed to get out from under the sheet before he was shot.

This court has held that many of these circumstances justify finding the aggravating circumstance heinous, atrocious or cruel. In Harvard v. State, 414 So.2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128, 74 L.Ed.2d 979, 103 S.Ct. 764 (1983), the defendant shot his ex-wife, killing her instantly. The court found that the defendant's lying in wait for and stalking of his ex-wife, compounded by his previous harassment of her, justified finding the heinous, atrocious or cruel aggravating factor. In Proffitt v. State, 315 So.2d 461 (Fla. 1975), 428 U.S. 242, 49 L.Ed.2d 913, 96 S.Ct. 2960 (1960), and Breedlove v. State, 413 So.2d 1 (Fla. 1982), this court held that stabbing a victim in the victim's own home makes a murder especially heinous, atrocious or cruel. In Scott v. State, 411 So.2d 866 (Fla. 1982), heinous, atrocious or cruel was properly found where a violent struggle occurred between the victim and the killers as the victim moved from room to room in his own house. This court has recognized that evidence that the victim was blindfolded or otherwise rendered helpless will support a finding of heinous, atrocious or cruel. See Palmer v. State, 397 So.2d 648 (Fla. 1981), cert. denied, 454 U.S. 882, 70 L.Ed.2d 195, 102 S.Ct. 369 (1981); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937, 60 L.Ed.2d 666, 99 S.Ct. 2063 (1979). And, certainly, evidence that the victim was in pain before dying can make a killing especially heinous, atrocious or cruel. See Peek v. State, 395 So.2d 492 (Fla. 1981), cert. denied, 451 U.S. 964, 68 L.Ed.2d 342,

101 S.Ct. 2036 (1981); McRae v. State, 395 So.2d 1145 (Fla. 1980), cert. denied, 454 U.S. 1037, 70 L.Ed.2d 486, 102 S.Ct. 583 (1981).

Last, even if the prosecutor's argument were improper, any error was harmless. At defense counsel's election (R 942 - 943, 946 - 947, 951), the jury was instructed on all statutory aggravating and mitigating circumstances. (R 978 - 981) Thus, this aggravating factor would have been before the jury for consideration whether the prosecutor argued for its application or not. Moreover, Appellant was not prejudiced since the trial judge did not find this circumstance in aggravation. See 413 So.2d at 9.

F.

Whether the treatment by Florida courts of Section 921.141(5)(H), Florida Statutes (1983), has been so arbitrary as to render the statute unconstitutionally vague.

In Magill v. State, 428 So.2d 649 (Fla. 1983), cert. denied, __ U.S. __, 78 L.Ed.2d 173, 104 S.Ct. 198 (1983), this court rejected the argument that the term heinous, atrocious or cruel has become unconstitutionally vague and overbroad because of the wide variety of situations in which it has been applied.

G.

Whether the death penalty in Florida is unconstitutional in that it discriminates against capital defendants based on the race of their victims.

Appellant's allegations are insufficient to show that the death penalty in Florida unconstitutionally discriminates based on the race of the victim. Sullivan v. Wainwright, __ U.S. __, 78 L.Ed.2d 210, 104 S.Ct. __ (1983); Washington v. Wainwright, 737 F.2d 922

(11th Cir. 1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); Sullivan v. State, 441 So.2d 609 (1983).

H.

Whether sentencing Appellant under Florida's current death penalty statute for a murder which occurred before Florida's previous death penalty statute was declared unconstitutional violates the Constitutional prohibition against ex post facto laws.

Dobbert v. Florida, 432 U.S. 282, 53 L.Ed. 344, 97 S.Ct. 2290 (1977), controls this issue. Dobbert, like Appellant, committed first-degree murder before Florida's previous death penalty statute was declared unconstitutional. Like Appellant, he was sentenced to death after the enactment of Florida's current death penalty statute. The Court held that this was not an ex post facto violation since Appellant was on notice at the time he committed murder that his crime was punishable by death.

I.

Whether death by electrocution pursuant to Section 922.10, Florida Statutes (1983), constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and in violation of Article I, Sections 9 and 17, of the Florida Constitution.

Appellant's contention that death by electrocution is cruel and unusual punishment has been rejected many times. See Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 91 L.Ed 422, 67 S.Ct. 374 (1947); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S.976, 59 L.Ed.2d 796, 99 S.Ct. 1548

(1979); Booker v. State, 397 So.2d 910 (Fla. 1981), cert. denied, 454 U.S. 957, 70 L.Ed.2d 261, 102 S.Ct. 493 (1981).

J.

Whether the Governor of Florida selects those who are to die in an arbitrary and capricious manner.

Appellant's contentions were rejected by this court in Sullivan v. Askew, 348 So.2d 312 (Fla. 1977). See also Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 59 L.Ed.2d 796, 99 S.Ct. 1548 (1979).

CONCLUSION

For the reasons presented in Issues I through V(B), Appellee asks this Honorable Court to affirm the judgment of the lower court. For the reasons presented in Issue VI, Appellee asks this Honorable Court to affirm Appellant's death sentence.

Respectfully submitted,

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