IN THE SUPREME COURT OF FLORIDA

SAM WILSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 67204

APPELLEE'S BRIEF ON THE MERITS

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INTRODUCTION

There are two orders which the Appellant is appealing to this Court. The first is the trial court's granting of the State's motion to strike those claims in the motion for post-conviction relief which could and should have been raised on direct appeal (Appendix C). This matter will be addressed in Point I of the Appellee's brief. In Point II, Appellee will address the ineffective counsel claim which was raised in the motion for post-conviction relief and denied on its merits (Appendix D). To the extent these claims were intertwined in the Appellee's motion, they will be addressed separately as described herein.

The Appellee will discuss the correctness of the trial court's denial of the motion for continuance and stay of execution in Point III.

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court.

Attached to the brief are appendices containing conformed copies of the pleadings filed and orders entered below. These appendices are labeled A through E and will be referred to in that manner. The symbol "T" will be used to designate the transcript of the hearing held by the trial court on June 19, 1985. The symbol "R" will designate the record filed on direct appeal, case no. 61,365.

STATEMENT OF THE CASE AND FACTS

The Appellant, Sam Wilson, Jr., was convicted following a jury trial of two counts of first degree murder and one count of second degree murder. Following a jury's advisary recommendation, the trial judge inspired sentences of death for the two murders and a term of imprisonment for the other offense.

The Appellant filed an appeal in this Court, which concluded with affirmance of the judgments and sentences. Wilson v. State, 436 So.2d 908 (Fla. 1983). In its opinion, this Court recounted the facts as follows:

> Appellant, Sam Wilson, Jr., twenty-eight, was visiting in his father's, Sam Wilson, Sr.'s, home. Appellant apparently became enraged when his stepmother, Earline Wilson, told him not to take food from the refrigerator. Appellant grabbed a hammer and attacked the stepmother. Her cries for help brought the father from the next room and he too was beaten with the hammer. During the struggle between the two men, a five-year old cousin, Jerome Hueghley, was stabbed in the chest with a pair of scissors by the appellant. Appellant then procured a gun and shot his father in the head. He next pursued Earline Wilson, who was now hiding in a closet, and emptied the pistol at her through the locked door, inflicting multiple wounds. Appellant hastened to a friend's house where he showered and changed clothes. He then went to his brother's home and he and his brother returned to the father's

> house. Sam Wilson, Sr. and Jerome Heughley were dead from their wounds. After the police arrived, Earline Wilson came out of hiding and after being asked "Who did this," pointed at appellant and said "Sam, Jr." Appellant eventually told the police three versions of the event, finally admitting the homicides but contending that they were accidental.

On May 31, 1985, the Governer of Florida signed a death warrant for the Appellant and his execution has been set for Monday, June 24, 1985. The Appellant filed a Motion for Post-Conviction Relief at approximately 2:00 p.m. on June 19, 1985, in the Circuit Court. (Appendix A) The Motion was accompanied by a memorandum of law in support of a Motion for Stay of Execution (Appendix B). The Motion was heard by the trial judge at 3:00 p.m. The Appellant was tranported from prison and was personally present at the hearing. (T. 2-3).

At the circuit court hearing, the State made an cre terus motion to strike all grounds contained in the motion which could or should have been raised on direct appeal. (T. 4-6). The trial court entered an order granting the motion, striking all allegations which did not pertain to the issue of ineffective counsel (Appendix C; T. 8-9).

Appellant's counsel moved for a continuance and a stay of execution on the ground that he was unable to have all of his witnesses present. He stated he would like to have a psychologist, Dr. Zager, to testify, based on a report counsel had obtained from Appellant's trial counsel.

(T. 9). The State stipulated it was willing for the court to receive Dr. Zager's report, which is attached to the Motion for Post-Conviction relief, into evidence, and the Court accepted this stipulation (T. 10). The Appellant's counsel stated he had two other witnesses, Johnny May Wilson and Bobby Wilson, for whom he had submitted affidavits, but that Johnny May was ill and had to go to a doctor (T. 10). Bobby Wilson was available (T. 15). The State stipulated it would accept the signed affidavit of Johnny May Wilson and also pointed out this witness had testified at the Appellant's sentencing (T. 16). The trial court denied the request for a continuance and directed counsel to proceed (T. 17). Dr. Zager's report and Johnny May's affidavit (a copy is attached to the Motion, Appendix A), were received (T. 19-20).

Appellant's present counsel called his original trial counsel, Evan Baron, as a witness. (T. 20). Mr. Baron was admitted to the Florida Bar in 1978 and in 1981, he was Chief Assistant Public Defender in Broward County (T. 21). In his representation of the Appellant, he was assisted by a legal intern, but the intern did not actually participate in the trial (T. 44-45). Mr. Baron's strategy of defense was to show there was no premeditation so the Appellant would be convicted of second and not first degree murder (T. 36-37). During his preparation, Mr. Baron talked to both Bobby and Johnny May Wilson and Johnny May testified at the sentencing

phase (T. 40). She was not called at the guilt phase because she had no relevant information. (T. 41). Bobby did not want to testify at the sentencing phase because he was upset that his father was dead and his brother convicted of murder. (T. 47-48).

During the early stages of his representation, Mr. Baron had the Appellant examined by Dr. Zager, with a view to a potential insanity defense (T. 42). The Doctor concluded the Appellant was sane. As a result, Mr. Baron did not call Dr. Zager at the sentencing phase because the only information in his report, the Appellant's alleged remorse, could have been successfully refuted by the state (T. 42-43).

Mr. Baron considered motioning to suppress the Appellant's statements, but concluded there was no legal ground for such a motion. (T. 46).

In the sentencing phase, Mr. Baron presented non-statutory mitigating evidence designed to show that the death of the five-year old victim was an isolated event and the Appellant got along well with children. (T. 47). He did not call the Appellant to testify because he did not feel he would be a good witness, since the Appellant continued to maintain that he wasn't responsible for the murders (T. 49-50).

No other witnesses were called. After hearing argument, the trial court denied the motion, finding that the Appellant was not denied the effective assistance of counsel (T. 725); Appendix D). The Appellant thereupon filed a notice of appeal and related appellate pleadings.

POINTS INVOLVED

POINT I

WHETHER THE TRIAL COURT CORRECTLY GRANTED THE STATE'S MOTION TO STRIKE ALL ISSUES WHICH COULD HAVE BEEN RAISED ON DIRECT APPEAL?

POINT II

WHETHER THE APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL?

POINT III

WHETHER THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTIONS FOR A CONTINUANCE AND FOR STAY OF EXECUTION?

SUMMARY OF THE ARGUMENT

The Appellant's motion for post-conviction relief contained numerous grounds which were known at the time of trial and could have been raised on direct appeal. The trial court therefore properly granted the State's motion to strike all the allegations except those pertaining to ineffective assistance of counsel. None of the Appellant's claims come within the exception to the rule announced in Witt v. State, 387 So.2d 922 (Fla. 1980). Likewise, the Appellant has failed to show cause and prejudice to excuse his procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977).

The trial court, after an evidentiary hearing, properly found that the Appellant's trial counsel rendered effective assistance. The Appellant has not met his burden under Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to show otherwise. The alleged errors committed by counsel fall within the realm of trial tactics, and do not establish deficient performance. Appellant has made no showing of prejudice, for he has not shown that any of the alleged errors have the effect of undermining confidence in the outcome of the trial.

The trial court properly denied the Appellant's motions for continuance and a stay of execution, as the motion for post-conviction relief was set down for a hearing and determined to lack merit.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY GRANTED THE STATE'S MOTION TO STRIKE ALL ISSUES WHICH COULD HAVE BEEN RAISED ON DIRECT APPEAL.

Introduction

It is axiomatic in Florida that issues which were known at the time of trial and either were or could have been raised on direct appeal are not cognizable grounds on a motion for post-conviction relief.[1] At the hearing below, the State made an ore tenus[2] motion to strike those portions of the Appellant's motion which addressed such issues. The trial court ruled the only claim properly before it was the allegation of ineffective assistance of trial counsel (T 8-9) and it entered an order granting the State's motion (Appendix C). In so ruling, the trial court followed well settled Florida law, for the procedural default rule serves the State's valid interest in the finality of judicial proceedings. Witt v. State, 387 So.2d 922 (Fla. 1980); Wainwright v. Sykes, 433 U.S. 72 (1977).

In Witt v. State, supra, this Court held the only

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[1] See, e.g., Adams v. State, 449 So.2d 891 (Fla. 1984); Jackson v. State, 452 So.2d 533 (Fla. 1984); McCrae v. State, 437 So.2d 1388 (Fla. 1983).

[2] The motion was served at 2:00 p.m. on June 19, 1985, and the hearing was at 3:00 p.m.; the State did not have an opportunity to file a written motion.

exception to the procedural default rule will be when there is a constitutional change in the law, emanating from this Court or the United States Supreme Court, which is a development of fundamental significance. Nonconstitutional, evolutionary developments in the law are not cognizable. Id. Appellee maintains the Appellant's claims do not come within the exception described in Witt; hence, they are procedurally barred.

As this Court noted in its recent decision in Tafero v. State, 459 So.2d 1034, 1036 (Fla. 1984), the federal courts have held state procedural defaults are barred from habeas corpus review unless there is a showing of cause and prejudice. To the extent the Appellant seeks to blame his procedural default on ineffective counsel at the trial and/or appellate levels, this cannot be deemed sufficient "cause" under the rule of Wainwright v. Sykes, 433 U.S. 72 (1977); Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir. 1977); Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), for such a holding would completely undermine the procedural default rule. Compare, Anderson v. State, ___ So.2d ___, 10 FLW 975 (3DCA, op. filed April 18, 1985) [Failure to object to otherwise reversible error does not render counsel ineffective for such a holding would undermine contemporaneous objection rule.]

Likewise, the Appellant cannot show prejudice, for, as Appellee will demonstrate, the Appellant's claims

are without merit. The Appellee will address each defaulted claim, referring to the claims as they are numbered in the Appellant's motion (Appendix A).

A. Instructions on Mitigating Circumstances (Claim I, Page 9, Appendix A)

It is well settled in Florida that any objections to jury instructions must be timely made in order to preserve the matter for direct appeal. Fla. R. Crim. P. 3.390(d). Certainly then, the Appellant's failure to object at trial or to raise the issue on appeal bars collateral review. The Appellant cannot rely on the limited Witt exception, for the case on which his claim is based, Lockett v. Ohio, 438 U.S. 586 (1978), was decided three years before his trial.

Moreover, the Appellant was not prejudiced, for he presented evidence of nonstatutory mitigating circumstances (R 693-703). The jury was instructed at the outset of the advisory sentencing phase that the evidence they would hear would be relevant to their recommendation (R 683-684). In his closing argument, defense counsel argued that the Appellant did not purposely kill the child victim and he was kind to children (R 713). The jury instructions limited the aggravating circumstances (R 715), but placed no such limitations on the mitigating circumstances (R 717). The instructions given in this case have been approved as not limiting the mitigating factors. Alvord v. Wainwright,

725 F.2d 1282, 1299 (11th Cir.), cert. den., ___ U.S. ___, 83 L.Ed.2d 291 (1984).

Thus, in view of the unrestricted presentation of evidence in the advisory sentencing phase and the giving of constitutionally correct instructions, the Appellant's claim is unfounded.

B. Trial Court's Consideration of Mitigating Circumstances (Appellant's Claim II, Page 11, Appendix A)

The Appellant has failed to show cause for failure to raise his claim on direct appeal that the trial court limited its consideration of mitigating factors. He likewise cannot show prejudice, for the record does not support his claim. The trial court did not restrict the defense presentation of evidence in mitigation. It did not give unconstitutional instructions. The trial court entertained argument from defense counsel prior to sentencing, and in the argument, defense counsel pointed out there was no restriction on the mitigating circumstances (R 743-745). Finally, in its sentencing order, the trial court stated ". . . that as of the nine aggravating circumstances, three were applicable in this case," and then "as to the mitigating circumstances, none applied . . ." (R 749, 1266). The court went on to state its "additional opinion that no mitigating circumstances exist . . ." (R 749, 1266). The

trial court thus clearly refers to the nine statutory aggravating factors while making no such limiting references to mitigating factors.

Finally, Appellant's citation to Herzog v. State, 439 So.2d 1372 (Fla. 1983) involves the entirely different matter of review of a trial court's override of a jury recommendation of life. In the present case, the jury recommended death, and the trial court, after a careful review of the aggravating and mitigating factors, followed its recommendation. Herzog has no bearing on the present claim.

C. Instructions to Capital Sentencing Jury, on its Role in Capital Sentencing (Appellant's Claim IV, Page 17, Appendix A)

Appellant has initially conceded that his present claim, that the trial court's instructions to the jury diminished the importance of the jury's role in capital sentencing, so as to violate his Eighth Amendment rights to an individualized sentencing determination, was not raised before his Rule 3.850 motion. Appendix B, at 12. Although Appellant claims that the recent decision in Caldwell v. Mississippi, ___ U.S. ___ (35 Cr.L.R. 3089) (June 11, 1985), alleged support of this claim, is "new law," so as to have permitted consideration of the claim for the first time, on his Rule 3.850 motion, this position lacks merit, under the relevant case law.

In Witt v. State, 387 So.2d 922 (Fla. 1981), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), this Court mandated that a claim would not be cognizable under Rule 3.850, for the first time, unless it was the result of a "change in the law" or "jurisprudential upheaval" that either placed an individual beyond the power of the State to punish, or was of such magnitude as to require retroactive application. Witt, supra, at 979. The decision in Caldwell, supra, cannot even be characterized as a "change in the law." At most, such decision represents the application of a rule of law--the requirement for fairness, reliability and individualized determinations in capital sentencing proceedings--that existed prior to Caldwell,[3] to a different set of factual circumstances. Caldwell, 37 Cr.L.R., at 3090, 3092. Such a decision thus did not involve any ground-breaking precedent, or amount to a "clean break with the past," so as to qualify under the Witt exception. Witt, at 929; Reed v. Ross, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 1, 15-16 (1984).

This Court determined that the very enunciation of the principle that a criminal defendant had a right to an individualized sentencing determination, based on particular offender and offense characteristics, was not a sufficient change in the law to be encompassed within the

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[3] See Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). Caldwell, at 3090.

Witt exception. State v. Washington, 453 So.2d 389, 392 (Fla. 1984). This determination is particularly significant, since the claim therein concerned allegations that prosecutorial comments had created a risk that the defendant's death sentence had not been the result of a fair, individualized determination, in accordance with Eighth Amendment rights. Washington, supra, at 391. Since the nature of the claim in Caldwell was extremely similar, and the Florida Supreme Court has rejected the application of the Witt exception to the announcement of the right, which the defendant sought to apply in Caldwell, the Caldwell decision cannot be said to have permitted the trial court to consider Appellant's present claim, for the first time, in collateral proceedings. Witt; Washington; Reed, supra.

It is further evident that Caldwell has no effect on the power of the State to punish Appellant for his criminal act, or is of such magnitude that it should be retroactively applied. Witt, at 929. Therefore, Appellant's claim was properly held not to be cognizable, by the trial court. Appendix C.

Similarly, Appellant's present claim cannot be considered a "novel" one, so as to constitute "cause," under the "cause and prejudice" analysis to be applied to federal habeas corpus. Engle v. Isaac, 456 U.S. 107, 102-1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The

genesis for such a claim, in the present case, as in Caldwell--namely, the defendant's right to an individualized sentencing determination, based on the particulars of the offense and the offender, were clearly recognized as early as 1976, Woodson v. North Carolina, supra, and reiterated in 1978, Lockett v. Ohio, 438 U.S. 586 (1978). Thus, because there was a reasonable legal basis for asserting such a claim, at the time of Appellant's 1981 trial, and his subsequent appeal, Appellant has not demonstrated "cause," and is thus federally barred from raising his present claim, by failing to comply with state procedural requirements in not raising this claim at trial or on direct appeal. Reed, 82 L.Ed.2d, supra, at 14; Sykes, supra.

Additionally, Appellant has not demonstrated that he suffered "actual prejudice," by the failure to object or challenge the jury instructions, regarding the role of the jury in capital sentencing. Engle, supra; Sykes, supra; Ford v. Strickland, 696 F.2d 804, 817 (11th Cir. 1983); Buckelew v. United States, 575 F.2d 515, 519 (5th Cir. 1978). The standard jury instructions given by the trial court, at sentencing (R 714-721), see Penalty Proceedings--Capital Cases, Florida Standard Jury Instructions in Criminal Cases (2nd Ed. 1975), at 75-81, reflected the actual statutory roles, assigned to the judge and jury, by statute. §921.141(2)(b), Fla. Stat. (1972). This statutory scheme,

which directs that the jury recommend an advisory sentence, and that the judge has the ultimate decision in imposing sentence, has been consistently upheld and approved against constitutional challenges. Proffitt v. Wainwright, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Thompson v. State, 456 So.2d 444 (Fla. 1984); Booker v. State, 397 So.2d 910 (Fla. 1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); State v. Dixon, 283 So.2d 1 (Fla. 1973); Dobbert v. Strickland, 532 F.Supp. 545 (M.D. Fla. 1982), affirmed, 718 F.2d 1518 (11th Cir. 1983).

Pursuant to this valid scheme, the instructions given to the jury accurately portrayed the jurors' role in sentencing as advisory, and in no way inferred that said role was meaningless or superfluous, as Appellant contends. Said instructions informed the jury of their duty, to advise the court as to the nature of the appropriate punishment (R 714); stated that the majority finding requirement should not be an invitation to "act hastily or without due regard to the gravity of these proceedings" (R 719), and further impressed upon the jury the relevance and significance of their deliberations and decisions, in accordance with standard jury instructions, by advising that "Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment"

upon the issue of whether to recommend death or life imprisonment (R 719) (emphasis added).

Such instructions cannot be compared or equated, in any way, with the prosecutor's argument and comments, that was held to amount to "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." Caldwell, at 3092. In said decision, the United States Supreme Court's primary concern and basis for overturning the defendant's conviction was that by virtue of statements by the prosecutor that the jury's decision was "automatically reviewable" by the state supreme court, the defendant was deprived of a determination as to the appropriateness of his death sentence, except on appeal for the first time. Id. The court found that such a process would effectively prevent consideration of the individual offender and offense characteristic, by "sentencers who were present to hear the evidence and arguments and see the witnesses," and would thus render the sentencing process unconstitutionally unreliable and biased, in violation of the Eighth Amendment rights discussed in Woodson and Lockett, supra. Id.

Appellant has attempted to equate express pronouncements by a State prosecutor (agreed to by the judge as correct, see Caldwell, at 3099), to a jury that it should not regard itself as bearing responsibility for capital sentencing, with the giving of standard jury instructions

which accurately define the respective statutory responsibilities of judge and jury. Informing a jury that their sentence is advisory in nature is not tantamount to urging upon the jury an ultimate lack of responsibility in capital sentencing. Since the Florida statutory scheme, which was accordingly followed herein, has been held to appropriately direct the "sentencers" (judge's) discretion, allow for consideration of individualized considerations, and afford the trial court the ultimate sentencing decision by carefully weighing aggravating and mitigating circumstances, after hearing and viewing the evidence, Herring v. State, 446 So.2d 1049, 1056 (Fla. 1984); Proffitt, supra; Dobbert, supra, the underlying facts and premises of Caldwell have no application herein. Since the Caldwell decision offers no support for Appellant's claim of an Eighth Amendment violation, Appellant obviously offered no "actual prejudice" as a result of the trial court's instructions for deliberation to the jury at sentencing. Sykes; Ford.

D. Adequacy of Jury Instructions and Sufficiency of Evidence as to Intent to Kill (Appellant's Claims VII, VIII, Pages 23-24, Appendix A)

Appellant has raised, for the first time, the adequacy of instructions, and sufficiency of evidence, as to Appellant's intent to kill, in light of Enmund v. Florida,

458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). It is apparent that Appellant's present claim satisfies the "change in the law" and/or "cause" threshold requirements, and was therefore cognizable in state and federal collateral proceedings despite the failure to raise the claim previously. Tafero v. State, 459 So.2d 1034, 1035 (Fla. 1984); Witt, supra; Reed, supra. However, it is evident that Appellant was not placed beyond the reach of the State, to punish with the death penalty, as a result of Enmund, supra; Witt, at 929. Appellant additionally cannot be said to have suffered actual prejudice in examining his claim in the context of Enmund. Sykes; Ford, supra.

The Supreme Court concluded in Enmund, in focusing upon the relative involvement and culpability of the parties therein that the death penalty could not be imposed upon an individual who did not kill, attempt to kill, intend to kill, or use lethal force, or aid or facilitate the killing. Enmund, 73 L.Ed.2d, at 1152; Ross v. Kemp, 756 F.2d 1483, 1487 (11th Cir. 1985); Bush v. State, 461 So.2d 936 (Fla. 1984); Copeland v. State, 457 So.2d 1012 (Fla. 1984). The record evidence clearly demonstrates that Appellant was the sole participant, who actively and personally killed Sam Wilson, Sr. and Jerome Hueghley, and attempted to kill Earline Wilson. Thus, the Enmund analysis has absolutely no application to Appellant,

who cannot in any way be characterized or viewed as being improperly sentenced to death, as with the getaway driver in Enmund. Because of the irrelevance of Enmund, Appellant's claim is not cognizable in state or federal court. Witt, at 929; Reed, supra. Examination of the record reveals overwhelming evidence of Appellant's culpability, and intent to kill, such that no violation of Appellant's Eighth Amendment rights was caused by imposing the death penalty upon Appellant. Enmund, supra; Ross, supra, at 1488-1490; Bush, supra.

Appellant has additionally attempted to apply Enmund to prevent imposition of the death penalty when there is a killing based on transferred intent. Such a position is ludicrous, since the Enmund decision discusses evidence of a killing, attempted killing, or intent to kill, without regard to qualifications or exceptions, in cases of transferred intent. Enmund, supra. Since the polestar of Enmund is the existence of evidence demonstrating active participation, perpetration, or attempt or intent to perpetrate a killing, consideration of the identity of the actual victims are irrelevant. Furthermore, according to Florida law, the doctrine of transferred intent encompasses proof of a premeditated intent to kill, which is "transferred" to the actual victim and constitutes first-degree murder. §782.04(1)(a)(1), Fla. Stat. (1980); State v. Pforr, 461 So.2d 1006 (Fla. 1DCA 1984);

Lee v. State, 141 So.2d 257 (Fla. 1962).

Finally, Appellant's allegations that a special jury instruction or finding of intent to kill was required has been specifically and expressly rejected by this Court and the Eleventh Circuit. Tafero, supra, at 1035-1036; Ross, supra, at 1488. Therefore, Appellant's claim is additionally barred from consideration on this basis. Witt, at 929; Ford, supra; Sykes, supra.

E. Admission of the Appellant's Statements.

(Claim IX, p. 25, Appendix A)

The Appellant gave three statements to the police. The first was at the scene of the crime, wherein he denied involvement and claimed an unknown intruder committed the crimes. Defense counsel moved to suppress this statement (R. 1136-1137). The trial court denied the motion after a hearing (R. 68-69). On direct appeal, this Court affirmed the ruling and noted that "Appellant did not object at the suppression hearing to the taped confessions of Appellant taken at the police station." Wilson v. State, 436 So.2d 908, 911 (Fla. 1983). At the hearing below, trial counsel explained he did not challenge the two statements taken at the police station because he decided there was no legal basis for a motion to suppress (T. 45-46). Thus, it is evident that there is a clear and deliberate procedural default with respect to the present attempt to challenge the admissibility of the statements.

The Appellant cannot show prejudice, for his claims that the admission of the statements violated his Fourteenth, Fifth and Sixth Amendment rights cannot withstand scrutiny. The first statement was given at 5:36 a.m. on October 8, 1980, (R. 469). The Appellant was re-advised of his Constitutional rights (R. 472-474), and stated he was giving the statement of his own free will (R. 474). At one

point in the statement, the Appellant asked, "can you cut that off for a minute?" (R. 485). The reply was no, but the officer added, "If you don't want to say anything else you don't have to. We can't cut it off until we get done" (R. 485). The Appellant continued to speak.

The police questioned the Appellant the following day, October 9, in order to clarify some of what he had said in the first statement and give him the opportunity to read it (R. 491). Prior to the second taped statement, the Appellant signed a rights waiver form and reviewed and made changes in his previous statement (R. 492). At the outset of the tape, the Appellant acknowledged he had been advised of his rights and was giving the statement of his free will (R. 500).

The Appellant now complains that the admission of these statements was error because he was told by the officers "he would get 'the chair' unless he talked, thereby promising him his life if he talked." (Appellant's Memorandum of law, Appendix B, p. 24). This allegation is based on Detective Moody's deposition at page (R. 803) which merely states:

> Q Did you memtion the electric chair, trying to scare him?
>
> A I wouldn't say that we were trying to scare him, but I would say that in trying to convince him to tell us the truth, after he said other conflicting things, I'm pretty sure that I or Jones would have mentioned premeditated murder and the chair, but not to scare him.

Q Did you indicate he would be better off coming forward and being truthful?

A Yeah, we usually say that.

The record does not support the Appellant's allegation. First, an admonition to an accused to tell the truth does not render a confession involuntary. United States v. Vera, 701 F.2d 1349 (11th Cir. 1983); Frazier v. State, 107 So.2d 16 (Fla. 1959). Second, any mention of premeditated murder and the electric chair was in fact an accurate recitation of the serious situation the Appellant was in. There is no evidence the Appellant's statement was induced by promises or threats, so it was not involuntary. Hawkins v. Wainwright, 399 So.2d 499 (4th DCA Fla. 1981); see also, United States v. Barfield, 507 F.2d 53, 56 (5th Cir. 1975). From the totality of the circumstances, the Appellant's statements were clearly voluntary and admissible.

The Appellant next argues the police failed to honor his right to discontinue questioning. As previously stated, the detectives told the Appellant they could not turn off the tape recorder until the statement was done, but the Appellant did not have to say anything more (R. 485). The Appellant then responded to the previously asked question without any prompting from the police:

Detective: If you don't want to say anything else, you don't have to. We can't cut it off until we get done.

Appellant: It was a derringer.

It is obvious there was no request for counsel in this exchange so the Appellant's citation to cases such requests, e.g., Blasingame v. Estelle, 604 F.2d 893 (5th Cir. 1979), are not on point. The officers complied with Constitutional requirements by reading the Appellant he did not have to say any more; it was he who chose to continue Michigan v. Mosley, 423 U.S. 96 (1975).

Finally, concerning the October 9 statement, Appellant claims it was taken in violation of his Sixth Amendment right to counsel because it occurred after the Appellant had been to his first appearance and the public defender was appointed to represent him. Wilson did not request counsel prior to giving the statement. He had been advised of his rights and he knew the public defender had been appointed. He chose to waive his right to counsel and to talk to the police. See State v. LeCroy, 461 So.2d 88, 92 (Fla. 1984). The Appellant never made any statement such as what occurred in Brewer v. Williams, 430 U.S. 387 (1977), where the accused said he would be glad to talk to the police after he met with his attorney. No Sixth Amendment violation has been demonstrated.

Therefore, the Appellant has shown neither cause nor prejudice to excuse his procedural default so striking of this ground from the motion was proper.

F. Lack of Statutory Mitigating Circumstances.

(Claim X, p. 27, Appendix A)

The Appellant's claim that the trial court should have found the statutory mitigating circumstance of Fla. Stat. 921.141(6)(c), of victim participation in the conduct as to the murder of Sam Wilson, Sr., has been decided on direct appeal. As to this issue, it was held, "we cannot say it was error for the trial court not to have found this factor, especially in light of the fact that the elder Wilson in no way instigated the criminal episode and apparently was murdered as he tried to defend his wife from Appellant's attack." Wilson v. State, 436 So.2d 912 (Fla. 1983). The Appellant has alleged nothing new and he is not entitled to relitigate the matter.

The Appellant also asserts a contention not raised in his direct appeal; he alleges the mitigating circumstances of emotional disturbance and acting under duress were also apparent from the evidence. Fla. Stat. 921.141(6)(b) and (e). On the contrary, the record does not show these circumstances: the Appellant attacked Earline Wilson without provocation and when his father came to her aid, attacked him as well, also killing his young cousin. On these facts, neither the trial court nor this Court was compelled to find the mental mitigating factor. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) [defendant's

claim he was "high" and didn't want anyone to get killed insufficient to find statutory mental mitigating circumstances]; Jennup v. State, 453 So.2d 1109, 1115-1116 (Fla. 1984).

POINT II

THE APPELLANT RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Appellant alleged in his Motion for Post-Conviction Relief that his counsel was ineffective at both the guilt and penalty phases of his trial. After a full evidentiary hearing the trial court denied the motion. The Appellee maintains the trial court's ruling was correct, for it comports with the standards enunciated by the United States Supreme Court in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981).

In Strickland v. Washington, supra, the United States Supreme Court held that there are two parts in determining a defendant's claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
>
> 80 L.Ed.2d at 693.

In explaining the appropriate test for proving prejudice the court held that "[t]he defendant must show that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 80 L.Ed.2d at 698.

In Knight v. State, supra, 394 So.2d at 1011, the Florida Supreme Court adopted four principles as a standard to determine whether an attorney has provided reasonably effective assistance of counsel:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel . . . .
>
> Third, the defendant has the burden to show that the specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings . . . .
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the State still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact.

In reviewing Strickland v. Washington, this Court has held that the Strickland test does not differ

significantly from the Knight standard. Jackson v. State, 452 So.2d 533 (Fla. 1984). See also Clark v. State, 460 So.2d 886 (Fla. 1984); Downs v. State, 453 So.2d 1102 (Fla. 1984).

At the hearing below, Mr. Baron testified with respect to his performance in handling Appellant's case; it is evident from Mr. Baron's testimony that he rendered effective assistance.

Mr. Baron testified that he has been practicing law since 1978 and was the Chief Assistant Public Defender at the time he represented the Appellant on these charges (T. 20-21). Mr. Baron had handled approximately twenty-five to thirty felony trials prior to handling the instant case (T. 35). Mr. Baron testified that he thought he and Appellant got along very well and that Appellant freely discussed the case with him (Baron) and was actively involved in his defense (T. 35). Mr. Baron discussed all the possible defenses which could have been raised below with Appellant and whether or not Appellant would testify at trial (T. 35-36, 48-49). Mr. Baron met with Appellant numerous times and they discussed the case at length (T. 36). Mr. Baron testified that he believed deposed "just about anybody and everybody in this case." (T. 32). Mr. Baron testified that while self-defense was a portion of his theory of defense, (T. 36, 59), the main thrust of his defense was that there was

no premeditation, thus the murder was more of a second degree murder, and that Appellant concurred in this tactic (R. 36-37, 59).

Thus, the evidence presented below clearly established that Mr. Baron presented the defense the Appellant wanted to have presented, and his manner of presenting it was based on strategic decisions made after an investigation. It is well settled that matters of trial tactics and strategy cannot serve as the predicate for a finding of ineffective assistance. United States v. Beasley, 479 F.2d 1124 (5th Cir.), cert. den., 414 U.S. 924 (1973); Williams v. Wainwright, 681 F.2d 732 (11th Cir. 1982). As this Court held in Songer v. State, 419 So.2d 1044 (Fla. 1982), "We will not use hindsight to second-guess counsel's strategy, and so long as it was reasonably effective based on the totality of the circumstances . . . it cannot be faulted." Id. at 1047. Most importantly, however, Appellant has wholly failed to show that "but for counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, 80 L.Ed.2d at 698.

A. Trial Judge And Jury Consideration of Non-Statutory Mitigating Circumstances

Appellant asserted his trial counsel was ineffective by failing to object to the trial court's instructions to the jurors regarding the mitigating circumstances which they

could consider in sentencing the defendant (See Appendix A, Claim I) and in failing to object to the mitigating factors considered by the trial court in sentencing Appellant (See Appendix A, Claim II).

Appellant initially asserts the trial court's instructions to the jury regarding their consideration of mitigating factors limited their consideration to only those statutorily enumerated mitigating factors and prevented the jury from consideration of non-statutory mitigating circumstances.

With respect to the jury instructions on mitigating factors, defense counsel did not have any basis for objecting to them since it has been definitively held the instructions that were given in this case do not restrict consideration of the mitigating circumstances. Straight v. Wainwright, 422 So.2d 827, 831 (Fla. 1981); Alvord v. Wainwright, 725 F.2d 1282, 1299 (11th Cir. 1984) [same exact jury instructions upheld].

At the hearing on Appellant's Rule 3.850 motion, Mr. Baron discussed his reasons for not requesting the trial court utilize the jury instructions promulgated by the Florida Supreme Court in April, 1981 (T. 29-30). Mr. Baron testified that he believed that under the newer instructions, the trial court would make a decision as to which aggravating and mitigating circumstances could be presented to the jury

and that he (and the prosecutor) decided they would rather be able to argue all the aggravating and mitigating circumstances as opposed to having the trial judge make a determination of which could be presented (T. 29-30). Hence, trial counsel's decision regarding presentation of mitigating circumstances did not stem from ignorance nor lack of preparedness; rather, it was a tactical choice. The decision was therefore one within counsel's discretion. Brown v. State, 439 So.2d 872 (Fla. 1983); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). See also, Adams v. Wainwright, 769 F.2d 1443 (11th Cir. 1983); Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983) affd. 733 F.2d 788 (11th Cir. 1984).

Further, a review of the trial transcript clearly reveals defense counsel did present witnesses testimony and did argue to the jury non-statutory mitigating circumstances which were consistent with his defense (R. 692-704, 709-714). At sentencing defense counsel called Eva Mae Rawls, who testified that Appellant had lived with her and her four children, that he had been very good to her and the children, and had never acted violently toward them (R. 692-695). Laura Mae Johnson testified that she knew the Appellant through their work, that he had never been violent to her or her child and that he had always been good to her child (R. 696-698). Johnnie Mae Wilson, Appellant's sister-

in-law, testified that she had known the Appellant since they were children, that Appellant and his father (a victim) got along sometimes, and not others, that Appellant and the five-year old victim got along well, that Appellant and her children played together, that Appellant was kind to her, her children, and everyone else she knew, and was never violent to her or her children (R. 699-702). Jimmie Wilson testified that he had known Appellant for twenty years, that they were good friends, that Appellant was the godfather of his child, that he thought Appellant was level-headed and easy-going, and that Appellant was good to him (R. 702-704).

Thus, as defense counsel testified at the Rule 3.850 hearing, he was not limited in his presentation of evidence or argument to merely statutory mitigating circumstances (T. 46-47). Clearly the jury was presented, and had an opportunity to consider non-statutory mitigating circumstances at sentencing.

Additionally Appellant argued that the trial court did not consider the non-statutory mitigating circumstances in making his sentencing decision, thus trial counsel was ineffective for failing to object to these "restricted" factors.

The record on appeal clearly refutes this claim. Trial counsel specifically informed the trial court that he need not restrict his consideration to the statutory mitigating circumstances:

> Judge, as to the mitigating circumstances, I would just call to the Court's attention that as to mitigating circumstances, that the Court can consider any other aspects of the defendant's character and any other aspect of the record, and it's not restricted just to look at the list of circumstances contained within the jury instructions. (R. 743-744).

Clearly, defense counsel urged the trial court to consider the non-statutory mitigating circumstances, and to the extent the record does not reflect the trial court considered those circumstances (and the Appellee in no way concedes the trial court failed to do so), it was not through any failure of trial counsel and no claim of ineffectiveness can be predicated on this claim.

In sum there was no substantial deficiency by trial counsel in placing before the jury and trial court non-statutory mitigating circumstances which prejudiced Appellant's defense. Strickland, supra.

B. Counsel's Tactical Decision Not To Reveal The Animosity Between Appellant And His Stepmother To The Jury Was Based Upon Reasonable Assumptions In The Formulation Of A Reasonable Professional Strategy.

Appellant asserts trial counsel was ineffective in failing to investigate and present to the jury the Appellant's history of fighting with his stepmother and father. (See Appendix A, Claim III pp. 13-17; Appendix B, Claim III pp. 8-11).

Appellant's counsel's testimony at the Rule 3.850 hearing reveals that while counsel was aware of Appellant's history of prior altercations with his stepmother (T. 37-38, 53), he did not recall ever being aware of any prior altercations between Appellant and his father (T. 32-33, 36, 51, 53). Mr. Baron further testified that the physical evidence adduced at trial showed that Appellant's father had been shot from a distance of more than three feet (T. 58-59), and that evidence of prior fights between Appellant and his stepmother would have been harmful to Appellant's case in that it would have indicated long-standing hatred and prior violent acts between Appellant and his stepmother and destroyed Appellant's defense of no premeditation (T. 59-60). Hence, Mr. Baron's decision to delete from Appellant's taped statement, Appellant's admission that he had previously fought with his stepmother, was consistent with his strategy (See: R. 16), and clearly not ineffective. Songer, supra.

Appellant alleges that his brother, Bobby Wilson, could have and would have given testimony to support his claim of self-defense as to their father. However, Bobby did not give this testimony in his pre-trial deposition and despite Appellant's representations that Bobby was available to testify at the Rule 3.850 hearing (T. 16), he was not called to testify, nor was his affidavit moved into evidence before

the trial court. Thus with respect to those allegations as to what Bobby would have testified above and beyond his deposition testimony, they are pure speculation. Appellee would note that the allegation that Bobby was only once contacted by defense counsel is clearly refuted by Mr. Baron's testimony that he was certain he had spoken to Bobby on more than one occasion (T. 38-39), and that Bobby told defense counsel that he could not in good conscience testify favorably for Appellant at sentencing because Appellant had been convicted of killing their father (T. 47-48).

Likewise, contrary to Appellant's allegation that defense counsel only spoke with Johnnie Mae on a welfare fraud charge, that he spoke with her a lot, and that they were in constant communication throughout the trial (T. 40-41).

Further, contrary to Johnnie Mae's allegations in her affidavit, that Appellant's father was violent and had previously threatened Appellant, in her deposition she testified that although she had heard Appellant and his father argue about Appellant's problems with his stepmother, Johnnie Mae stated: "But it never went anywhere, just a little argument and Sam Jr., would leave the house and that was it." (R. 978). Clearly this was not sufficient to put trial counsel on notice that Appellant's father had previously threatened him. Nor can Johnnie Mae's deposition testimony that Appellant "and his father had a <u>little</u> run in once"

in Pompano, (R. 983), constitute sufficient notice such that defense counsel can now be deemed to have acted unreasonably in failing to properly investigate or develop this testimony.

Finally, despite Appellant's allegations that his father's prior threats would have substantiated his claim of self-defense, he was able to introduce evidence at trial that his father introduced the deadly force into the fray and that the gun went off accidentally as Appellant and his father struggled for it (T. 49, 60; R. 475, 478). Appellant also received jury instructions self-defense and justifiable use of force (R. 1200-1205). However, the evidence adduced at trial also revealed that Appellant's father received numerous blows to his head, back and arms consistent with those which would be made by a hammer (R. 540, 543, 544; T. 59) that the father was shot from a distance of at least three feet (R. 548, 559; T. 57-58), and that Appellant was not injured in the fray (R. 336- 364; T. 59). It is apparent the jury declined to believe Appellant's version of the events and Appellant has failed to show how his unsubstantiated allegations that Appellant's father had previously threatened him would have altered the outcome of the trial.

Clearly trial counsel's decision regarding the Appellant's prior altercations with his stepmother was a strategic decision, made after investigation and cannot

serve as a predicate for ineffective assistance of counsel. Beasley, supra; Williams v. Wainwright, supra; Songer, supra. In the absence of any showing by the defendant that his counsel had any reason to know of Appellant's father's prior threats, (if indeed they existed at all), and in the absence of any showing by Appellant that but for this alleged omission the result would have been different, Appellant has failed to show prejudice sufficient to meet the standard of Strickland, supra. State v. Bucherie, 10 F.L.W. 235 (Fla. April 25, 1985).

C. Appellant Was Not Denied Effective Assistance of Counsel Where A Certified Legal Intern Supervised By Defense Counsel Participated In His Defense.

Appellant asserts he was denied effective assistance of counsel when a certified legal intern participated in his case without his knowledge or consent.

At the hearing defense counsel testified that Mark Gaeta was an intern under his supervision when he (defense counsel took over Appellant's case (T. 23). Mr. Baron further states that he probably instructed Mr. Gaeta to go and talk with Appellant as soon as possible (T. 23), and that the interview sheet made out by the intern was likely not made out at the magistrates hearing but at an interview afterwards (T. 24). Mr. Baron further testified that Mr. Gaeta was present for the entire trial, just sitting at counsel table,

entered into discussions regarding jury selection, took notes, saw Appellant on occasion, perhaps handled an unimportant deposition, helped with research (T. 44-45).

Although Appellant asserts there is no documentation in the record that he gave his permission for Mr. Gaeta to work on his case, he has not alleged any deficiencies in Mr. Gaeta's performance, nor any prejudice which inured to him as a result of this participation.

This Court has held, where as here, an evidentiary hearing establishes the intern was properly supervised and the case is handled by a licensed attorney, an Appellant has not been denied effective assistance of counsel. Aldridge v. State, 425 So.2d 1132 (Fla. 1983). Further in the absence of demonstrable prejudice Appellant cannot prevail on this claim. Bucherie, supra.

D. Counsel's Decision Not Argue Remorse As A Non-Statutory Mitigating Factor Was A Reasoned Professional Decision.

Appellant asserts trial counsel was ineffective for failing to develop Appellant's remorse over the acts he committed as a non-statutory mitigating factor. (Appendix A, Claim VI, pp. 20-23; Appendix B, Claim VI, pp. 13-17).

At the hearing trial counsel testified that he didn't call the psychiatrist to testify regarding the Appellant's feelings of remorse because he thought the testimony would be more harmful than helpful due to the

defendant actions (efforts to hide his participation in the murders) after the murders (T. 42-44). Trial counsel further testified that by putting the psychiatrist on the stand he would allow the state to bring out on cross-examination the part of the psychiatrist's report which stated the Appellant had an explosive temper, which would have been damaging to his case (T. 54-55).

Thus, the evidentiary hearing sub judice clearly established defense counsel's performance at sentencing was the result of preparation and based on tactical decisions made by an experienced attorney after a full discussion with his client. The standards of effectiveness outlined in Strickland, supra, and Knight, supra, have been met. Further the prejudice showing was not met. Bucherie, supra.

E. Counsel Properly Declined To File A Motion To Suppress Where He Could Not In Good Faith Do So.

Appellant asserts he was denied effective assistance of counsel because his counsel did not file a motion to suppress any of his pretrial statements. (See Appendix A, Claim IX, pp. 25-27; Appendix B, Claim IX, pp. 23-29).

At the hearing, sub judice trial counsel testified that he thought long and hard about Appellant's statements but that he did not feel that in good faith he could move to suppress the statements (T. 45-46). Counsel further testified

that Appellant's version of the events were contained in the statements and that the use of the statements would obviate the need for Appellant to testify at trial which counsel was reluctant to do because of Appellant's prior record and counsel's assessment (concurred in by Appellant) that Appellant would not make a good witness (T. 48-50).

Clearly, counsel's assessment that a motion to suppress any or all of the Appellant's statements would be frivolous is clearly correct. See Point I, Claim E, infra. Counsel is not required to argue that which he is his reasoned judgment determines to be without merit. Magill v. State, 457 So.2d 1367 (Fla. 1984); Palmes v. State, 425 So.2d 5 (Fla. 1983); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983). Indeed an attorney in the State of Florida is ethically bound and may be disciplined for advancing a claim he knows is unwarranted under existing law. Fla. Bar Code Prof. Resp. E.C. 7-4, D.R. 7-102(A)2.

Counsel for Appellant did object to Appellant's statement made to the first officer on the scene that an unknown black male committed the crime (R. 68-69, 1136-1137). A hearing was held on the motion to suppress this statement and that motion was denied.

Clearly, counsel's decision was based upon reasoned professional judgment and in the absence of a showing of prejudice Appellant is not entitled to relief Bucherie, supra.

F. Counsel Rendered Effective Assistance of Counsel By Arguing Non-Statutory Mitigating Circumstances.

Appellant argues he was denied effective assistance of counsel by his counsel's failure to object to the trial court's failure to find some statutory mitigating circumstances.

As argued in Point 1, Claim F, infra, this issue has already been determined by this Court. Further as argued in Point II, Claim A, infra, counsel did argue numerous non-mitigating factors. Appellant has made no showing of prejudice with respect to this claim hence it does not entitle him to relief. Strickland, supra, Bucherie, supra.

POINT III

THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTIONS FOR A CONTINUANCE AND FOR STAY OF EXECUTION.

The trial court below set a time certain of 3:00 p.m. on June 19, 1985, for a hearing on any motion for post-conviction relief that the Appellant intended to file. This hearing was set on June 18, counsel were notified, and an order was signed directing that the Appellant be transported from prison so he could be present at the hearing. The motion for post-conviction relief and accompanying memorandum were not filed and served on opposing counsel until approximately 2:00 p.m. on the 19th. The death warrant for Appellant was signed May 31, 1985. At that time, the Appellant was represented by his present counsel, since a federal petition for habeas corpus was filed on his behalf in 1984.[4]

Thus, this case is yet another last minute attempt to obtain a stay where it appears delay has been used as a tactic. See, Arango v. State, 437 So.2d 1099, 1104 (Fla. 1983). The trial judge afforded the Appellant an opportunity to present whatever he chose to, and finding the claims to be without merit, properly denied the motions for post-conviction relief and a stay of execution.

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[4] The Attorney General's Office did not learn of the pending habeas corpus petition until the week of June 10, 1985.

CONCLUSION

Wherefore, based upon the foregoing reasons and authorities, the Appellee respectfully requests that the trial court's denial of the Appellant's motion for post-conviction relief be affirmed.

Respectfully submitted,

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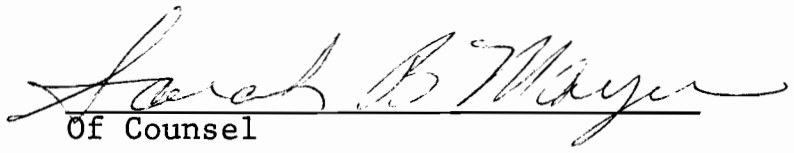
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appellee's Brief on the Merits will be hand delivered to Ronald A. Dion, Esquire, of ENTIN, SCHWARTZ, DION, & SCLAFANI, ESS Professional Building, 1500 Northeast 162nd Street, North Miami Beach, FL 33162, this 20th day of June, 1985.



Of Counsel