IN THE SUPREME COURT OF FLORIDA

JIM ERIC CHANDLER, Appellant,

v.

STATE OF FLORIDA, Appellee.

CASE NO. 69,708

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ANSWER BRIEF OF APPELLEE

On Appeal from the Circuit Court
Of The Nineteenth Judical Circuit,
in and for St. Lucie County, Florida
(on change of venue from
Indian River County, Florida).

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<u>PRELIMINARY STATEMENT</u>

Appellant, Jim Eric Chandler, was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judical Circuit, in and for St. Lucie County, Florida, Case #84-1329-CF which was a resentencing pursuant to the reversal of the appellant's initial sentence of death in Case #80-233-CF as ordered by this Court in <u>Chandler v. State</u>, 442 So.2d 171 (Fla. 1983), Case No. 60,790.

Appellee, the State of Florida, was the prosecuting authority in the trial court. The Honorable William G. Tye, Circuit Judge, presided over the resentencing.

The parties will be referred to herein as they appear before this Honorable Court, and by proper name.

The symbol "R" refers to the documents which are contained in volumes I and II.

The symbol "T" denotes the motion and trial proceedings contained in volumes III through VIII.

The symbol "JT" denotes the jury selection portion of the resentencing which is contained volumes IX through XIII.

The symbol "RI" denotes the record on appeal in Nineteenth Judical Circuit case #80-233-CF which was previously before this Court as Florida Supreme Court Case #60,790.

All emphasis in this brief is supplied by appellee unless otherwise indicated.

STATEMENT OF THE CASE

In Chandler v. State, 442 So.2d 171 (Fla. 1983), this court affirmed appellant's two convictions for first degree murder. However, appellant's two sentences of death were reversed and remanded for a new sentencing phase proceeding to be conducted before a jury.

After remand, the parties stipulated to a change of venue from Indian River County (the site of the original trial) to St. Lucie County. The penalty proceeding was conducted before a new jury during September of 1986. The jury returned unanimous advisory sentences of death against appellant for the first degree murder of Harold Steinberger, and his wife, Rachel Steinberger. (R297, 298).

The trial court entered its findings in support of the death sentence specifying the following aggravating circumstances:

(a) The capitol felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capitol felony or of a felony involving the use or threat of violence to some person.

(c) The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

(d) The crime for which the Defendant is to be sentenced was committed for financial gain.

(e) The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(f) The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The trial court found no mitigating circumstances to be present. (R327-330). The trial court sentenced appellant to death by electrocution upon both counts. (R299-303).

STATEMENT OF THE FACTS

The Indian River County Grand Jury returned an eight count indictment charging appellant with two counts of first-degree murder, two counts of robbery with a deadly weapon, three counts of trafficking in stolen property, and one count of aggravated assault. The charges arose from the robbery of an elderly couple and their death by bludgeoning. The victims, Harold and Rachel Steinberger, were found lying face down, Mr. Steinberger's hands bound behind him, in a wooded area behind their residence. Each victim had also been stabbed numerous times in the back. The jury found appellant guilty of all counts and recommended the death penalty. The trial court concurred with the jury's advisory sentence. In addition, the appellant received three ten-year sentences for trafficking in stolen property and a five-year sentence for aggravated assault. This court affirmed the convictions, but vacated the sentences of death imposed below and remanded this case for resentencing, to include an advisory verdict to be rendered by a jury chosen in compliance with this court's opinion. See, Chandler v. State, 442 So.2d 171 (Fla. 1983).

A THE VOIR DIRE

Appellee accepts appellant's statement of the facts regarding voir dire with the additional fact that appellant was present when defense counsel asserted peremptory challenges of potential jurors Mellin, Bergstrom and Ruggirello. (JT414-415).

B THE RESENTENCING PHASE

Detective Phil Redstone testified at the resentencing hearing. (T186-363). He was called in on this case by Chief Cummins of the Sebastian Police Department. (T187). He met Cummins at the victims' house. (T187). With Cummins and other officers was appellant. (T189). Appellant said he found the bodies. (T189). Redstone conferred with Cummins. (T190). Appellant's counsel objected to Redstone testifying as to what Cummins told him. (T191). Appellant's counsel admitted he had had the opportunity to depose Cummins but moved to have all of Redstone's testimony voir dired. (T191). The motion was denied. (T193). Appellant reported finding the bodies of the victims. (T193). The bodies were 150 feet back in a wooded lot. (T194). No one had disturbed the bodies. (R195). The bodies were described. (T195-196). Mr. Steinberg's hands were tied behind his back with a red dog leash. (T196). The back of this shirt had seven tear marks. (T196). He had been stabbed in the back seven times. Mrs. Steinberger also was stabbed in the back seven times. (T225).

Appellant told Redstone he first saw Mr. Steinberger two days before the bodies were found. He had a conversation with the old man and was invited to his home where he met Mrs. Steinberger. (T203). Appellant said he would mow their yard, and would come back two days, rather than one day, later, with 15 year old Jim Tibbetts to help him. (T203-204). Appellant later said he used Tibbetts as part of his alibi. (T235-236). The

victims were living in the home while a new home was being constructed for them. Appellant's family had lived in the same home under similar circumstances a few months before the victims moved in. (T204).

Appellant told Redstone that a television set was missing from the victims' home. (T210). Appellant had sold the television set to David Dunham. (T214).

A calculator from the victims' home was sold by appellant to Morrell Copp the day before appellant said he found the bodies. (T217-220). Mr. Copp purchased the calculator at about 1:30 to 2:00 p.m. on July 22, 1980. The time of the victims' deaths was between 10:00 a.m. and 2:00 p.m. on July 22, 1980. (T220).

On Tuesday, July 22, appellant gave his girlfriend, Bridgette Morelli, State's Exhibit 15P, a clock radio. (T237-238). It belonged to the Steinbergers. The victims' credit cards and wallet were found near the baseball bat in the canal. (T239-241). Mr. Steinberger's crested onyx ring was sold by appellant to Nancy Doyle, a bartender, on July 22, 1980, at about noon. (T241-242). Mrs. Steinberger's wedding band and diamond engagement ring, with the victims' initials inside, were also sold by appellant to Nancy Doyle at that time. The total price was $50.00, $30.00 down and the rest to be paid to appellant later. This was within two or three hours of the murders. (T243-245).

A dog was barking from the victims' home. (T212). Appellant was able to quiet the dog after warning the officers the dog would bite strangers. (T213).

Cigarette butts of appellant's cigarette brand were found in the victims' home. (T220-221).

No fingerprints other than those of the victims were found. However, gloves were found in the house. (T223).

Appellant was very cool and deliberate when talking with Redstone. (R224). Appellant was asked what he thought happened to the murder weapons. He replied, "I didn't do it," but then he said to Redstone that if he had done it he would have used gloves like those on the kitchen counter to avoid leaving fingerprints, then he would have cleaned the weapon and taken it with him and disposed of it somewhere. (T229-230).

The victims owned a baseball bat. It was used to murder the Steinbergers. (T230-231). The bat was recovered from a canal a mile away. (T231).

Appellant told Redstone that Mrs. Steinberg was sickly and bent over but Mr. Steinberger was in good health. Redstone remarked it was unusual there was no struggle. Appellant, coldly, told Redstone that if your wife had a knife to her throat you wouldn't do anything either. (T232).

Appellant told Redstone the knife used in the murders was in the river and "the bat was in a body of water that had no tide and no current." (R233). Knives found in the victims' home were not used in the murder. (T234-235, 343). The knife used to

stab the victims was a long thin bladed knife four to six inches long and one-half to five-eights inches wide. (T233).

After appellant found out the police had linked him to the murders through Mr. Copp, appellant called Redstone and said he knew they were keeping him under surveillance, that he wouldn't go back to prison and that appellant would kill Detectives Hamilton and Redstone. (T336-338).

Appellant said he was armed with a 16 gauge shotgun, a 9mm pistol and a rifle. (T338). He said if anyone followed him he would "waste" them. (T339).

When Detective Hamilton approached appellant's truck, appellant fled, displayed a rifle, pointed it at Hamilton, and was only stopped by a roadblock. (T339-340).

Appellant's mother told Redstone that appellant owned a fish filet knife with a long thin blade. It was a Christmas present from her to him. The sheath was in appellant's bedroom but the knife was missing. The knife's description was consistent with the type of knife which was used to stab the victims. (T354-355)

Doctor Franklin Cox, the medical examiner, testified at the resentencing hearing. (T384-403, 413-437). He was qualified as an expert (T387) and testified as to his findings at the autopsies of the victims.

Mrs. Steinberger had seven stab wounds. Her scalp, head, skull and brain were damaged by blunt trauma from a heavy club-like object which caused her death. (T390). The stab wounds were likely post-mortem. (T391).

Mr. Steinberger also received massive blunt trauma to his head, fracturing his skull and bruising and lacerating his brain. He also had seven stab wounds. (T392).

The blunt trauma was consistent with blows from the baseball bat. (T394). Each was struck multiple times, by two or more savage hard blows (T436), resulting in fractures like dropping an egg. (T416-417).

The stab wounds were consistent with the size and shape of the filet knife appellant received as a Christmas present. (T414). They were made rapidly. (T418).

The blunt trauma could have resulted from the victims being struck from behind. (T422). In redirect examination, the prosecutor asked if it could also be consistent with the victims' being on their knees. (T434). Appellant's counsel objected, stating there were no facts to support such a hypothetical question. (T434). In response, the prosecutor noted there was, similarly, no evidence to support defense counsel's earlier question because only the appellant, himself, knew the facts. (T435). The defense objected. It was overruled. Then Dr. Cox said the injuries were not consistent with the victims being on their knees. (T436). The jury soon recessed and a curative instruction was given when they reconvened. (T443).

Lillian Messer, appellant's mother, was called by the State and testified she bought appellant a fishing filet knife for Christmas in 1979. (T405). After the murders, the police asked her about the knife. She could not find it. (T406). The

knife in court was the same in appearance as the one she bought appellant, but the handle of the knife she purchase was of a lighter wood. (T407-408).

David Roux testified he was a builder and rented the victims the home they were living in until they were murdered. (T445). Appellant lived in the home before the Steinberger's did. (T446-447). The locks had never been changed until after the murders. (T447).

Lynn Meyers, an asphalt paver, testified appellant did not come to work as expected on July 21, 1980, or anytime during the week. (T453).

Nancy Doyle, a bartender, testified she knew appellant as a frequent customer. (T456). She saw him at about noon on July 22, 1980. He was sweating. He said he had fixed a flat tire. (T457). Appellant showed her three rings and asked for $100.00. She didn't have the money, and gave appellant $30.00 for the rings which she believed were worth more than $100.00. (T459). She testified she considered she could owe him the remaining $70.00. (T460). Appellant said he needed the money so he couls recoup some cash after bailing his brother out of jail in Fort Lauderdale. (T461). He didn't want her to say anything about where she got the rings. (T461). Appellant then sat at the bar and drank a beer in a normal manner. (T462).

Morrell Copp, the owner of a lounge four blocks from Nancy Doyle's bar, bought a calculator from a collection of items appellant said he was selling to raise money for his brother who

was in jail in Fort Lauderdale. (T468-469). Among the items in appellant's trunk were a calculator which Copp purchased for $25.00 and a television set and a clock radio, which he identified in court. (T469-470). Appellant said he was in a hurry, but sat and had a beer. (T472).

David Dunham testified he saw appellant showing the items to Mr. Copp. (T481,489). He then saw Bridgette Morelli, at her apartment while on a date with her. She had all the items appellant had had in his trunk. He took the television and paid appellant fifteen dollars cash. (T491).

Bridgette Morelli testified appellant went out to dinner with her several times. (T494). Appellant brought some items into her apartment, including a television, State's exhibit 15P, a clock radio, a hair dryer and a watch chain. Appellant said the items belonged to his brother. (T505-506). Appellant gave no reason for leaving the items at her apartment. (T508).

John Karasek, a former neighbor of the victims, testified they were loners and seldom let strangers into their home. (T514). Mrs. Steinberger injured her spine and could no longer walk well. (T515). Her maiden name was Muetchler and her initials would have been R.M. (T521).

Matthew McCormick, Jr., testified he had been a probation officer for appellant while appellant was on parole from the State of Texas for a kidnapping offense for which he was sentenced to serve 20 years imprisonment. (T523 . Appellant was paroled on May 16, 1979. (T528).

Lillian Messer returned to the witness stand and testified her other son has never been in jail. (T529-530).

Lowell Wolfe, the victim of appellant in the Texas kidnapping crime, testified that in 1973 appellant was with another man who put a knife to him, they told him to get into his car, and appellant sat in the passenger seat. (T549-555). Apellant ordered him to drive toward Dallas. (T556). They ordered him to pull off, they ordered him into a clearing in a wooded area, tied his hand behind him with his own necktie, took his watch and money, credit cards, etc. Then after appellant was asked by the other man if appellant wanted him to stab him, Wolfe turned and was knocked unconscious by a pipe or pool cue swung from behind. (T557-566). He awoke on a road where a farmer helped him. (T566). His car was gone, as was his wallet, watch, money and credit cards. (T567). He was in and out of consciousness for 15 days and in the hospital for several weeks with a broken neck and stitches from three separate blows. He still suffers from the injuries because his optic nerves were damaged. Also his one ear drains constantly. (T568-571). Appellant was the ringleader of the two. (T572).

The defense presented Doctor Sheldon Rifkin, an expert clinical psychologist, who testified that he had examined appellant in 1981 (T581). He diagnosed appellant with explosive personality features. (T604). He reexamined appellant in 1984. (T607). The same personality characteristics were present. (T618-619). The doctor testified appellant would "not be a

danger to himself or to others" in prison. (T620-621). The doctor was familiar with an escape attempt by appellant in 1987 but he was not aware of the details. (T630-631). The escape attempt did not alter the doctor's opinion that appellant was _not_ a risk to himself or others. (T655).

Jeral Minor Testified. She is appellant's sister. (T656). She testified he had a difficult childhool. (T658). His stepfather paddled him with a paint paddle. (T659).

Jeff Chandler, appellant's brother, testified he was his brother's only real friend. (T663). He also testified he was never in jail in Fort Lauderdale. (T671).

Ernest Messner, appellant's second stepfather testified he told appellant to get out and get a job or join the Army. Appellant was discharged for making a false statement on his recruitment application. (T678). His work history was checkered. (T679-680).

Lillian Messer, appellant's mother, testified about appellant's childhood. (T697-738). She briefly mentioned he was in a Texas prison. (T738). She described his work failures, (T739-740) and his artistic endeavors. (T741-746). She read a number of letters. (T746-762).

The defense and State rested. (T780).

SUMMARY OF THE ARGUMENT

POINT I: The admission of hearsay, pursuant to §921.141(1) Fla. Stat. (1985), in the sentencing phase of a capital case is constitutional if the evidence is relevant and is fairly susceptible to rebuttal. Here, the hearsay evidence passes the test. The hearsay declarants had testified at the trial on the issue of guilt and there was no indication they were not available to the defense.

POINT II: The issue of voluntariness of an incriminating statement is not a proper matter for consideration by a sentencing jury, therefore, an instruction of this issue to such a jury would be improper. Further, there was no evidence of coercion to support the giving of the instruciton.

POINT III: Appellant had already been found guilty of committing the murders. Logically, because appellant was the murderer, and there were no surviving witnesses, no one but appellant could know what happened. This single comment, for which a cautionary instruction was issued, was harmless.

POINT IV: Appellant's voluntary absence during voir dire of three veniremen continued into the time his counsel made challenges for cause based upon the veniremen's responses. However, because the trial judge denied the challenges for cause, and appellant returned for the peremptory, the issue of his absence is moot and is harmless because there can be no prejudice.

POINT I

FLORIDA STATUTE §921.141, CAPITAL FELONY SENTENCING PROCEEDINGS, IS CONSTITUTIONAL BECAUSE IT ACCORDS THE DEFENDANT A FAIR OPPORTUNITY TO REBUT ANY HEARSAY STATEMENTS WHICH WERE PROPERLY ADMITTED AT THE DISCRETION OF THE TRIAL COURT.

A witness's testimony's status as hearsay does not itself require exclusion from the jurors' consideration in the context of the penalty phase of a capital trial. §921.141(1), Fla. Stat. (1985); Muehleman v. State, 503 So.2d 310, 315 (Fla. 1987).

The admission of hearsay in the sentencing phase of a capital case is not unconstitutional. Florida Statute §921.141 has passed constitutional muster on this issue. Alvord v. State, 332 So.2d 533, 538-539 (Fla. 1985), certiorari denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226, rehearing denied, 429 U.S. 874, 97 S.Ct. 195, 50 L.Ed.2d 157 (1976); Perri v. State, 441 So.2d 606, 607-608 (Fla. 1983); Tompkins v. State, 502 So.2d 415, 419-420. See, also Foster v. Strickland, 517 F.2d 597 (U.S.D.C. No. Dist. Fla. 1981), reviewing §921.141(1). In Muehleman this Court recently reaffirmed the proposition that "the bottom line concern in questions involving the admissiblity of evidence is relevance." Id. There is no question that the complained of hearsay was relevant to the issues of premeditation and appellant's probation violation. (Appellant admits this in his initial brief at 16-19).

Further, section 921.141(1) provides that hearsay is admissible "provided the defendant is accorded a fair opportunity to rebut any hearsay statements." The hearsay evidence herein was certainly susceptible to any fair rebuttal, exactly as contemplated by the statute. The hearsay evidence admitted herein included factual evidence of what Detective Hamilton (T339-340), and Chief Cummins (T195) observed, which, had the defense elected to attempt it, could have been subjected to possible rebuttal by calling the declarants themselves, or by presenting rebuttal witnesses, if any existed. Opinion evidence contained in Detective Redstone's testimony could have been challenged by presenting defense experts to rebut the State expert whose statements were the subject of Detective Redstone's complained of hearsay comment at T342-343. This was not collateral character evidence which carries a potential for abuse, but rather was hearsay evidence of an expert's opinion which presented the defendant with a fair opportunity to rebut the hearsay statements. Cf., Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986).

Appellee submits the record of trial of the guilt phase of this case shows appellant would not have been successful had he attempted to rebut any of the complained of hearsay testimony at his resentencing.

Chief Cummins testified in the guilt phase of this trial (RI 2319-2331). He testified he did not move the victims' bodies before Detective Redstone arrived. (R2325-2326). The

objected to hearsay was that Cummins had told Detective Redstone "That none of the officers or Chandler who was there at the scene had disturbed the bodies." (T195).

Dan Nippes, a forensic chemist, testified in the guilt phase of the trial. (RI 2974-3015). He testified regarding knife-like cuts in Mr. Steinbergers' shirt and opined they were consistent with the victim being knifed after death. (RI 2995-2996). Similar testimony was presented regarding post-mortem knife-like cuts in Mrs. Steinbergers' robe and nightgown. (RI 2999). The cuts were made by a single-edged knife blade. (RI 3001). He examined the five knives which appellant's defense counsel asked him if he had received. (RI 3003). There was no blood, hair or physiological fluid of human origin on those knives. On recross examination by the defense, Mr. Nippes testified he did not believe further tests of those knives were warranted because of the negative results of the human traces tests. (RI 3013-3014).

The objected to testimony was testimony in which Detective Redstone stated what Mr. Nippes' opinion was. However, Detective Redstone also testified that an expert's opinion was not necessary to support the obvious fact that the holes in the victim's shirt were too small to have been made by the knives the prosecutor was then displaying. (T343).

Detective Hamilton also testified in the guilt phase of this case. (RI 3126-3139). He testified that, when he first spotted appellant, appellant was driving a truck, and Hamilton

followed him. Appellant picked up a rifle (State's Exhibit No. 19) and pointed the rifle at Hamilton. (RI 3128-3131). A high speed chase ensued, with Hamilton displaying his headlights and four-way flashers. Appellant was soon thereafter stopped by other law enforcement officers. (RI 3131).

The objected to testimony was that Hamilton displayed his blue lights (an error), a chase ensued, a roadblock was set up, appellant picked up a .22 calibre rifle and pointed the rifle at Hamilton, and the rifle in court was the same rifle. (T339-340).

Appellee submits the hearsay evidence admitted herein was relevant, and was susceptible to fair rebuttal. Appellant chose not to attempt to rebut Detective Redstone's testimony. The above references to the evidence presented at the guilt phase of trial show the declarants' own testimony was substantially the same as Redstone testified at resentencing. Attempts at rebuttal would likely only have highlighted the adverse testimony against appellant. Such highlighting would also likely have occurred had the State presented Nippes, Hamilton and Cummins in person at the resentencing hearing.

Finally, appellant argues the State made no showing that the hearsay declarants were "unavailable" for trial. (Appellant's initial brief at 25). Appellee submits that while this is true, there is, conversely, nothing to indicate the declarants were not available for appellant's use in "fair rebuttal" of Detective Redstone's testimony. See, Thompkins,

supra, where this court found any error harmless even after assuming the declarants were unavailable.

Under these circumstances an abuse of discretion by the trial court cannot be shown. The trial court's ruling on the appellant's objections to the admission of hearsay during the resentencing hearing should not be disturbed.

POINT II

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY DENYING APPELLANT'S REQUEST FOR A SENTENCING JURY INSTRUCTION UPON THE ISSUE OF VOLUNTARINESS OF AN INCRIMINATING STATEMENT.

The trial court refused to give the defense requested jury instruction which was the same as Florida Standard Jury Instruction 2.04(e) (R311) because it revisited a determination of fact made during the guilt phase of this case. The trial court agreed with the State's argument that the voluntariness of appellant's statements had been established during the guilt phase and was the law of the case for the penalty phase. (R789).

Appellant has produced no authority to support the giving of his requested instruction upon voluntariness in the penalty phase of a bifurcated jury trial after a jury has previously received the instruction in the guilt phase (RI3650) and returned guilty verdicts (RI3659-3661) based upon all the evidence. The standard sentencing jury instructions, as presented to the first jury, do not include such an instruction. Cf., RI 3865-3871.

Denial of the requested instruction was even more compelling because the record herein shows no indication whatsoever that appellant was coerced by threats or promises of favorable treatment to make his statements. Instructions should not be given when there is no evidence to which the instruction can be applied. Butler v. State, 493 So.2d 451 (Fla. 1986); Buford v. Wainwright, 428 So.2d 1389 (Fla. 1983).

Contrary to appellant's suggestion in a note in his initial brief at 33, the trial court did not refuse to allow the appellant to explore the voluntariness of his statements. The record shows the trial court properly refused to allow appellant's counsel to make the sentencing phase a virtual retrial of the guilt phase, but the trial court in no way restricted the appellant's exploration of sentencing issues. (T163-166, 174-175, 813-814).

POINT III

COMMENT BY PROSECUTOR, DURING SENTENCING PHASE OF CAPITAL TRIAL, THAT "NO ONE KNOWS AT THIS POINT EXCEPT FOR MR. CHANDLER," CANNOT REASONABLY BE CONSIDERED A COMMENT UPON THE PRIVILEGE AGAINST SELF-INCRIMINATION BECAUSE MR. CHANDLER ALREADY STOOD CONVICTED, AND, COUPLED WITH A CURATIVE INSTRUCTION, THE SINGLE COMMENT WAS HARMLESS.

First, there is no doubt the specific comment complained of did not contribute to the verdict, therefore appellant's constitutional right to a fair trial was preserved. See, State v. DiGuilio, 491 So.2d 1129, 1136 (Fla. 1986). This appeal is from a resentencing hearing, not from a trial on the issue of guilt or innocence. Aggravating and mitigating factors alone are to be considered. §921.141(2) Fla. Stat. (1985).

Appellee submits that appellant already stood convicted before the jury at the time the prosecutor raised his objection to defense counsel's question which assumed facts not in evidence. (T433-435). Whether appellant struck his victim from behind or from the front would quite obviously be something known to appellant, therefore, appellee submits the prosecutor's statement:

> No one knows at this point except Mr. Chandler.

is nothing more than a very obvious statement of a fact previously determined by the jury in appellant's trial in 1981 and which this Court affirmed in Chandler v. State, 442 So.2d 171 (Fla. 1983).

Because the only purpose for holding a hearing during the sentencing phase of a capital case in Florida is to consider whether aggravating and mitigating factors exist, and to weigh them, and not to reweigh the guilt of the convicted murderer, appellee submits the prosecutor's comment was, at worst, an irrelevant but harmless restatement of fact made as part of an argument against an objection by a defense counsel to a hypothetical question (which was similar to a hypothetical question asked earlier by defense counsel). (T422).

Nevertheless, the trial court, in order to correct any error, instructed the jury to disregard the prosecutor's comment. (T443). This powerful tool used by the trial judge was sufficient to protect appellant's constitutional privilege to remain silent. Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978); Andrews v. State, 443 So.2d 78, 84 (Fla. 1983).

Finally, as to appellant's assertion the prosecutor's comment was reversible error based upon a theory of cumulative error, taken together with his complaint that hearsay evidence was admitted during the §921.141(1) hearing, appellee submits there cannot be cumulative error when there has been no error. (See Point I, *supra*).

CONCLUSION

The sentence of the trial court should be affirmed.

Respectfully submitted,

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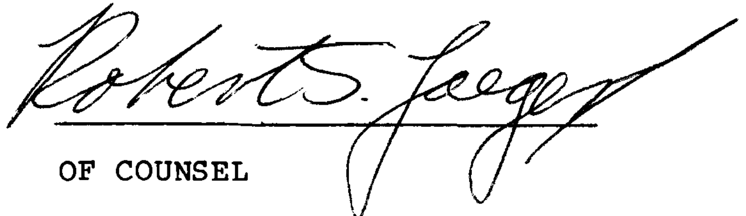
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to JEFFREY M. GARLAND, Esq., and MICHAEL J. KESSLER, Esq. 8507 South U.S. 1, Suite 7, Port St. Lucie, Florida 34952, this 10th day of August, 1987.



OF COUNSEL