IN THE SUPREME COURT OF FLORIDA

CLARENCE EDWARD HILL,

Appellant,

vs. CASE NO. 68,706

STATE OF FLORIDA,

Appellee.

_____/

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Clarence Edward Hill, the capital criminal defendant and appellant in Hill v. State, 477 So.2d 553 (1985) and the subject of the instant resentencing ordered therein, will be referred to as "appellant." Appellee, the State of Florida, the prosecuting authority and appellee in Hill v. State, will be referred to as "the State."

References to the twelve-volume record on appeal for appellant's original trial and sentencing will be designated "(OR:)." References to the five-volume record on appeal for appellant's resentencing will be designated "(R:)."

For the sake of clarity and exposition, the State will take the liberty of discussing appellant's six issues on appeal in the procedurally chronological order in which they arose below.

All emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The State reluctantly rejects appellant's "statement of the case" and "statement of the facts," plus those factual passages contained in his discussions of his various issues, because these statements are incomplete and because, at times, they improperly fail to present the legal occurrences and the evidence adduced below in the light most favorable to the State as the prevailing party. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982). The State therefore substitutes its own statement of the case and facts necessary for purposes of resolving the narrow legal issues presented upon appeal, as follows:

On November 2, 1982, an indictment was filed in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, charging appellant with the first degree murder of Pensacola Police Officer Stephen Alan Taylor (Count I), the attempted first degree murder of Pensacola Police Officer Larry Doulgas Bailly (Count II), the armed robberies of Melanie Morris, Tina Neese, and Patricia Devlin as custodians of funds belonging to the Freedom Savings and Loan Association of Pensacola (Counts III-V), and the possession of a firearm during the commission of these felonies (Count VI), all crimes said to have occurred on October 19. Cliff Anthony Jackson was charged as a co-defendant under the first five counts (R 722-723). The guilt phase of appellant's trial began on April 25, 1982 (OR: 1), and concluded

on April 29 with the jury finding, inter alia, appellant "guilty of both first degree premeditated murder and felony murder" as to Count I (OR: 1160). The sentencing phase began later on April 29 with the jury recommending death by a 10-2 vote (OR: 1165), and concluded on May 17 with the trial judge following this recommendation (OR: 1680-1692). Upon appeal, this Court affirmed appellant's capital conviction against various and sundry challenges which included the claim that the trial judge improperly "allow[ed] the state to introduce testimony concerning irrelevant collateral crimes" involving the theft of a pistol from Shanavian Robinson and the armed theft of an automobile from Janet Pearce in Mobile the morning of the murders, but excluded any claim that the evidence was insufficient to support the jury's finding of premeditation, Hill v. State, 477 So.2d 553, 554. This Court reversed appellant's capital sentence due to the improper processing of a juror with a predisposition as to penalty and ordered a resentencing, declining in the process to pass upon appellant's claim that the judge's finding that the murder was unsupported by sufficient evidence, id. The State filed an unsuccessful Fla.R.App.P. 9.330 motion for rehearing concerning the penalty remand, but appellant filed no similar motion for clarification concerning the propriety of instructing his new penalty phase jury of the original jury's unchallenged finding of premeditation.

Appellant did file an unsuccessful motion in limine with the trial judge to preclude his second jury from learning of his first jury's finding of premeditation prior to the commencement of resentencing on March 26, 1986 (R 820-821; 259-262; 289). During voir dire, defense counsel informed the prospective jurors without objection that a mere finding of premeditation concerning a murder would not alone suffice to establish that the murder was also committed in a "cold, calculated and premeditated [fashion], without any pretense of moral or legal justification" for purposes of aggravation (R 90-91).

The jurors eventually selected were informed by the judge right out of the gate that "[w]hat the lawyers say is not evidence, and you're not to consider it as such" (R 263). Shortly thereafter, the prosecutor represented without objection in his opening address that the evidence would show that appellant had eschewed his opportunity for a clean getaway and sought to help his co-defendant escape the clutches of the police by shooting Officer Taylor because Jackson "had the keys [to their car] in his pocket" (R 272). During his own opening, defense counsel unsuccessfully sought to inform the jury of Jackson's life sentence for committing the same first degree murder of Officer Taylor vicariously (R 280).

The State then established over a defense objection predicated on Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959) that appellant and Jackson had stolen

a 1978 Buick Regal automobile from Janet Pearce in Mobile, Alabama, at gunpoint earlier on the day the crimes charged had occurred (R 298-301; OR 1056-1061). The State proceeded to prove that appellant and his co-defendant drove Ms. Pearce's car to the Freedom Savings and Loan Association of Pensacola on the early afternoon of October 19, 1982, and that when they entered the bank at midday wearing sunglasses at Jackson's suggestion appellant alone was armed with a pistol (R 460-462; 575; 582; 612).

Inside the bank with his pistol drawn, appellant did most of the talking for the pair, demanding money from the tellers and threatening to blow the heads off of anyone who made a false move (R 316; 330; 359-360; 373; 324-325; OR 711-723; 753-771). After they obtained some $4,000.00 in cash, the still unarmed Jackson left the bank via the front door, where he was immediately apprehended by Officer Larry Bailly of the Pensacola Police Department (R 392-394). Appellant left the bank via the back door, undetected (OR 717). Appellant saw that Bailly and Officer Stephen Taylor of the Pensacola Police Department, who had just arrived on the scene, had Jackson on the ground and were trying to handcuff him (R 614-615; 333; 368; 391-394; 415; 430-431; 439-441). Appellant then casually snuck up behind the trio and without a warning began firing his pistol at the officers (R 333-335; 361-362; 378; 396; 415; 431-432; 441). Officer Taylor, who was struck in the back and chest from a distance of one foot,

staggered a short distance, fell and died (R 335; 404-405; 418-419; 480-488). Officer Bailly, who was skinned in the neck, returned fire, striking appellant five times as he ran away (394-397; 443; 454-4; 616). Jackson then began grappling with Bailly and tried to flee, only to be shot by Officer T.C. Miller of the Pensacola Police Department (R 397; 406-407). Appellant was apprehended by Officer Paul Muller of the Pensacola Police Department after travelling a short distance on foot (R 455).

After the State had rested, Jackson testified at the behest of the defense that he had pled for a life sentence for these crimes, perhaps because unlike appellant he had had no prior offenses and had been unarmed (R 572-573; 582-584). Jackson further testified that he was 18 at the time of these offenses (R 584) (to appellant's 23 - R 546); that appellant had handled the gun during the Pearce auto theft earlier that day (R 586); that the two had used cocaine around this time (R 573); and that although he had made the decision to rob the bank and had given appellant a "signal" to jump behind the tellers' counter once they were inside, and had told appellant to "get" two of the tellers (R 574-577), appellant had handled the gun throughout the robbery-murder and that "whatever we did, we did together" (R 582; 578). Appellant, testifying in his own defense, agreed that "we did it together" and that neither Jackson nor himself "was a leader at all" (R 633-634). Appellant admitted coming back to help his friend get away from the police, but denied that he

intended to shoot if necessary (R 614-616). He could not explain why only asprin and not cocaine was found in his blood shortly after the incident (626; 649).

The defense also presented five character witnesses besides appellant's parents in mitigation, two by prior recorded testimony (R 526-528; OR 1349-1357; 1364-1371). The essence of this testimony was that, at various points in his life, appellant was a "nice man" and "real pleasant" (R 535; 532). By the fifth witness, the judge below felt that this testimony was becoming cumulative, for he sustained a State objection on this score (R 542-543; 561-563). The judge thereafter declined to permit appellant's mother to testify that she had cared for the children of her sister when appellant was growing up, and also declined to permit appellant's admittedly "disabled" father to testify that if he appeared listless on the stand it was because he was recovering from a heart attack (R 547; 557; 558, 561-564). A psychologist testified for the defense that appellant was "implusive," but was not insane at the time of his offenses and was not mentally ill (R 511-512).

The parties rested, and the judge conducted a jury charge conference (R 644; 657-663). The defense successfully requested an instruction that if the jury were to find that appellant was an accomplice and his role in the crime was relatively minor this could be considered in mitigation, but unsuccessfully requested an instruction that if appellant was under the "substantial

domination" of Jackson this could be similarly considered, the judge ruling that the evidence was insufficient to support such a charge (R 658; 661-663; 705-706). The judge indicated without objection that he would instruct that if the jury found the murder to have been committed in a cold, calculated and premeditated fashion such could be considered in aggravation (R 659; 705; 711). The defense did not request that this instruction be augmented with an explanation that the mere fact that a murder was premeditated would not automatically translate into a finding in aggravation that it was also committed in a cold, calculated and premeditated fashion without pretense of moral or legal justification (R 659; 705; 711). Defense counsel in closing did draw this distinction for the jury's benefit without objection (R 696).

The prosecutor in closing repeated his claim from opening argument that appellant had come to help Jackson escape because Jackson had the keys to their car, although no hard evidence had been introduced to support this inference (R 672-673). The prosecutor also dealt with the life sentence appellant's co-defendant had received via plea bargain for committing the same crimes for which he sought appellant's execution - a subject originally broached by the defense - by explaining the factual disparaties between their two cases and then suggesting that the jury "not...give to somebody who has contested his guilt and who has contested the appropriateness of the death penalty the same

thing that a co-defendant who entered a plea got, life in prison" (R 673-674). The prosecutor closed by suggesting that if appellant had committed his crimes 150 years ago he would have been "strung...up from the nearest tree that day," and that though times and procedures had changed death was still the appropriate punishment (R 682-683). Defense counsel failed to object to any of the foregoing comments.

In his closing instructions the judge again informed the jury that they were to look "to the evidence introduced upon this trial, and to it alone," in rendering their recommendation (R 708). By an 11-1 vote the jury recommended reimposition of the death sentence (R 714), a recommendation which the judge followed on April 2 (R 866; 870-873). The judge found 6 enumerated statutory aggravating factors, including that the murder was committed in a cold, calculated and premediated fashion without pretense of moral or legal justifiction (R 835-839). The judge also found that of the profferred mitigating circumstances only appellant's age was possibly established as a factor, and that of only modest and nondispositive significance (R 839-842). After an unsuccessful general objection to the sentence (R 867), appellant perfected a timely appeal to this Court (R 874).

SUMMARY OF ARGUMENTS

The judge below properly informed the jury that appellant's original jury had found that the murder of Officer Taylor was premeditated. This Court's affirmance of appellant's capital conviction in Hill v. State, when final, established this unchallenged finding as the law of this case.

The judge also properly admitted collateral fact evidence that appellant and his co-defendant had stolen an automobile at gunpoint earlier on the day of the murder. This evidence was relevant to put appellant's actions in context; to show preparation, plan and facilitation; and to help prove the contraverted issue of appellant's heightened premeditation in committing the murder. Moreover, this Court's prior affirmance of appellant's capital conviction in the face of a challenge to the admission of this same basic evidence essentially became the law of this case as to penalty.

The judge further properly excluded cumulative and/or irrelevant character evidence offered by the defense in mitigation, as such exclusion did not deprive appellant of his Lockett v. Ohio, infra, right to present mitiating evidence.

The judge further properly refused to declare a mistrial sua sponte due to alleged "prosecutorial misconduct" in closing argument, considering the minimal impact of the now-disputed comments and the lack of a contemporaneous objection thereto.

The judge also properly refused to instruct the jury on the

statutory mitigating circumstance that appellant acted under extreme duress or under the substantial domination of another person in committing the murder. Appellant's "evidence" on this score was so anemic that only an irrational finder of fact could have credited it.

The judge properly found as an aggravating factor that the murder was committed in a cold, calculated and premeditated fashion without pretense of moral or legal jusitification. The evidence showed that appellant executed Officer Taylor in cold blood. Moreover, if this factor had been improperly found by the initial sentencing judge on the same essential evidence, this Court surely would have so noted in remanding for resentencing.

ISSUE I
(Appellant's Issue V)

THE RESENTENCING JUDGE PROPERLY INFORMED THE JURY THAT APPELLANT'S ORIGINAL JURY HAD FOUND THAT THE MURDER WAS PREMEDITATED.

ARGUMENT

Appellant alleges that the judge below first reversibly erred at resentencing by informing the jury that his original jury had found that the murder of Officer Taylor was premeditated. The State disagrees.

As noted, the guilt phase of appellant's original trial began on April 25, 1983 and concluded on April 29 with the jury finding appellant "guilty of both first degree premeditated murder and felony murder." Upon appeal, this Court affirmed appellant's capital conviction against various and sundry challenges which excluded any claim that the evidence was insufficient to support the finding of premeditation. Hill v. State. Appellant did not move this Court to clarify whether his new penalty phase jury at the resentencing it ordered could be appropriately infomed of the original jury's unchallenged finding of premeditation, although he did file an unsuccessful motion in limine with the resentencing judge seeking to preclude such action. Apparently, appellant feared that his new jury would translate the original jury's finding that the murder was premeditated into a finding that it must have also been committed in a cold, calculated and premeditated fashion without pretense

of moral or legal justification for purposes of aggravation under § 921.141(5)(i), Fla. Stat., for defense counsel several times cautioned the jury against drawing this conclusion without objection. However, counsel did not even request that the judge augment the standard jury instruction concering this aggravating factor with an explanation to this effect.

Under these circumstances, the State cannot believe that the judge below erred. The original jury's finding that the murder was premeditated was not disturbed by this Court upon appeal and hence became the "law of the case" which the judge below had no right to abrogate or conceal, see generally Preston v. State, 444 So.2d 939, 942 (Fla. 1984). The issue of appellant's premeditation would have been joined below only if this Court had reversed for a new trial in addition to a new senencing. Moreover, even if the judge's informing of the jury of the original jury's finding can somehow be contorted into error, it was clearly invited by the failure of the defense to ask this Court to direct suppression of this finding at the procedurally approrpiate time, cf. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974), cert. denied, 428 U.S. 911 (1976), and was clearly harmless in view of the fact that, as will be explained, abundant evidence was indeed introduced below that appellant aggravatedly killed Officer Taylor with heightened premeditation. Compare Teffeteller v. State, ____ So.2d ____ (Fla. 1986), 11 F.L.W. 435 (no error in informing capital defendant's second sentencing jury that original sentence had been death).

ISSUE II
(Appellant's Issue I)

THE RESENTENCING JUDGE PROPERLY ADMITTED COLLATERAL FACT EVIDENCE.

ARGUMENT

Appellant alleges that the judge below secondly reversibly violated Williams v. State at resentencing by admitting collateral fact evidence that he and his co-defendant had stolen an automobile from Janet Pearce in Mobile, Alabama at gunpoint earlier on in the day the murder was committed. The State disagrees.

As noted, in the prior appeal this Court affirmed appellant's capital conviction against various and sundry challenges which included the claim that the original judge violated Williams v. State by admitting the aforedescribed evidence, with the added tidbit that appellant had thieved the pistol from Shanavian Robinson. Hill v. State. The State is fully confident that if this Honorable Court had felt that the first jury's tacit consideration of this collateral fact evidence at sentencing was improper despite its relevance to guilt, it would certainly have said so in ordering resentencing to prevent needless recurrence of the same "error" notwithstanding that such would not have been technically necessary. Compare Huff v. State, 437 So.2d 1087 (Fla. 1983) (Court reverses capital conviction on one basis but notes additional error to prevent recurrence).

Even if appellant is corrct when he disingenuously argues

that this Court's prior ruling affirming the admissibility of the aforedescribed collateral fact evidence at the guilt phase is not effectively the law of this case, he is incorrect when he argues that his evidence was improperly admitted at resentencing. As this Court stated in Teffeteller v. State, 11 F.L.W. 435:

> Section 921.141(1), Florida Statutes (1985), provides in pertinent part that in capital sentencing proceedings, "evidence may be presented as to any matter that the court deems relevant to the nature of the crime." We find that the photograph [of the victim] in question here clearly comes within the purview of the statute [against appellant's claim]...that the photograph was not relevant to prove any aggravating or mitigating factor and should, thereafter, not have been admitted....We hold that it is within the sound discretion of the trial court during resentencing proceedings to allow the jury to hear or see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. We cannot expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum.

The much-misunderstood "Williams Rule" itself is simply that "evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion." Williams v. State, 110 So.2d 654, 663; see also § 90.404(2)(a), Fla. Stat. As the First District recently stated:

> **Williams** Rule evidence is often referred to as "similar fact"

> evidence. . . .Indeed, Section 90.404(2)(a) uses that descriptive phrase. Such can be misleading for it is clear that some kinds of evidence admissible under **Williams** Rule and under that statute--i.e. evidence indicating that the accused has committed other crimes or reflecting adversely upon the accused's character--may not necessarily entail any factual similarities with the crime charged or with any other facts involved in the case

Mitchell v. State, 491 So.2d 596, 598 (Fla. 1st DCA 1986), review pending (Fla. 1986), Case No. 69,194. Compare Smith v. State, 424 So.2d 726, 731 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983), wherein this Court held that collateral evidence that a defendant had stolen gasoline to facilitate his commission of the factually dissimilar robbery-murder charged was admissible as probative of a financial motive. Moreover, "[t]he test for admissibility of ["Williams Rule"] evidence is relevancy, not necessity," Ruffin v. State, 397 So.2d 277, 279 (Fla. 1981), cert. denied, 454 U.S. 882 (1981), and its erroneous admission may constitute harmless error in the face of overwhelming alternative evidence as to the points upon which it was submitted, see Clark v. State, 378 So.2d 1315 (Fla. 3rd DCA 1986). Finally, "where it is impossible to give a complete or intelligent account of the crime charged without referring to the other crime," evidence of the related crime is admissible, Nickles v. State, 106 So. 479, 489 (Fla. 1925), and such admission does not present a "Williams Rule" type of problem, see United States v. Kloock, 652 F.2d 492, 494 (5th Cir. 1981).

Under the foregoing standards, the State would submit that the admission of the noncrucial evidence that appellant thieved the Pearce automobile in Mobile shortly before he murdered Officer Taylor in Pensacola at his resenencing for the latter offense was not reversibly erroneous. This evidence put appellant's actions in context; showed preparation, plan and facililation; and also helped prove the contraverted issue of appellant's heightened premeditation to murder the officer, since it is logically although not conclusively inferrable that one who drives a stolen car to the scene of a bank he plans to rob with a pistol is more likely to have contemplated killing someone in the process than someone who did not so act. Cf. Gordon v. State, 288 So.2d 295, 296-297 (Fla. 4th DCA 1974), cert. denied, 293 So.2d 360 (Fla. 1974). Any error in said admission would assuredly not be reversible considering the multitude of aggravating factors found by the judge below without reference to this disputed evidence.

ISSUE III
(Appellant's Issue II)

THE RESENTENCING JUDGE PROPERLY EXCLUDED CUMULATIVE AND/OR IRRELEVANT CHARACTER EVIDENCE OFFERED BY THE DEFENSE IN MITIGATION.

ARGUMENT

Appellant alleges that the judge below reversibly erred at resentencing by excluding character evidence offered by the defense in mitigation, predictably citing to Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). The State once more disagrees.

As noted, the defense presented five character witnesses besides appellant's parents in mitigation, two by prior recorded testimony. The essence of this testimony was that, at various points in his life, appellant was a "nice man" and "real pleasant." By the fifth witness, the judge felt that such testimony was becoming cumulative, for he sustained a State objection on this score. The judge thereafter declined to permit appellant's mother to testify that she had cared for the children of her sister when appellant was growing up, and also declined to permit appellant's admittedly "disabled" father to testify that if he appeared listless on the stand it was because he was recovering from a heart attack.

Reversible error, indeed. Lockett v. Ohio does state that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's

character...that the defendant offers as a basis for a sentence less than death." Id., 438 U.S. 586, 604. However, the opinion goes on to note that nothing included therein "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character," id., 438 U.S. 586, 604, note 12, language which essentially comports with the §§ 90.402 and 90.403, Fla. Stat. authorizations for judicial exclusion of both irrelevant and needlessly cumulative evidence. The proffered evidence concerning the character of appellant's parents was properly excluded as irrelevant, and that concerning his statuts as a "nice guy" properly excluded as cumulative under the aforecited authorities.

Contextually, in Lockett v. Ohio and Eddings v. Oklahoma, our Supreme Court struck down capital sentencing proceedings in which the sentencing judge was statutorily precluded from considering in his deliberations significant mitigating factors bearing upon the defendant's character and past, and the nature of the offense. In Lockett the excluded evidence encompassed the defendant's "character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime," 438 U.S. 586, 597, while in Eddings the excluded evidence encompassed the youthful defendant's recent brutalized upbringing. These exclusions obviously dwarf in magnitude and kind those under debate here, and the State trusts that this Court will not beguiled into holding otherwise.

ISSUE IV
(Appellant's Issue IV)

THE RESENTENCING JUDGE PROPERLY DECLINED TO DECLARE A MISTRIAL SUA SPONTE DUE TO ALLEGED "PROSECUTORIAL MISCONDUCT" DURING CLOSING ARGUMENT.

ARGUMENT

Appellant alleges that the judge below fourthly reversibly erred at resentencing by declining to declare a mistrial sua sponte due to alleged "prosecutorial misconduct" during closing argument. The State once more disagrees.

As noted, the jurors were informed by the judge right out of the gate that "[w]hat the lawyers say is not evidence, and you're not to consider it as such." The prosecutor represented without objection in his opening address that evidence would show that appellant eschewed his opportunity for a clean getaway and sought to help his co-defendant escape the clutches of the police by shooting Officer Taylor because Jackson "had the keys [to their car] in his pocket." During his own opening, defense counsel unsuccessfully sought to inform the jury of Jackson's life sentence for committing the same first degree murder of Officer Taylor vicariously. However, Jackson later testified at the behest of the defense that he had pled for a life sentence for his crimes, perhaps because unlike appellant he had had no prior offenses and had been unarmed. The prosecutor in closing repeated his claim from opening argument that appellant had come to help Jackson escape because

Jackson had the keys to their car, although no hard evidence had been introduced to support this inference. The prosecutor also dealt with the life sentence appellant's co-defendant had received via plea bargain for committing the same crimes for which he sought appellant's execution by explaining the factual disparaties between their two cases and then suggesting that the jury "not...give to somebody who has contested his guilt and who has contested the appropriateness of the death penalty the same thing that a co-defendant who entered a plea got, life in prison." The prosecutor closed by suggesting that if appellant had committed his crimes 150 years ago he would have been "strung...up by the nearest tree that day," and that though times and procedures had changed death was still the appropriate punishment. Defense counsel failed to object to any of the foregoing comments. In his closing instructions the judge again informed the jury that they were to look "to the evidence introduced upon this trial, and to it alone," in rendering their recommendation.

Defense counsel's failure to contemporaneously object to any of these now-challenged prosecutorial comments absolutely precludes appellate review of their propriety, insofar as none were "such as to undermine the fundamental fairness of the [proceeding] and contribute to a miscarriage of justice." United States v. Young, 470 U.S. _____, 84 L.Ed.2d 1, 13 (1985). Counsel's silence can be interpreted three ways. One,

he did not hear any of the now-challenged comments, which is highly unlikely. Two, he heard the comments but tactically decided they were counter-productive and would not prejudice his client, which is probable. See Henderson v. Kibbe, 431 U.S. 145, 154, note 12 (1977). Third, he heard the comments and felt that they were arguably prejudical, but decided not to object so as to have an appellate insurance policy against an untoward outcome, which is unlikely insofar as it would probably be unethical, see State v. Jones, 204 So.2d 515, 518 (Fla. 1967). Under none of these scenarios would appellate consideration of appellant's current claims be judicially appropriate.

In an abundance of caution, the State turns alternatively to the merits. As for the prosecutorial references to the mystery keys, jurors are presumed to behave rationally, see Paramore v. State, 229 So.2d 855, 860 (Fla. 1969), modified on other grounds, 408 U.S. 935 (1972), so it must be presumed that they heeded the judge's instructions not to treat attorney arguments as evidence. As for the prosecutorial references to Jackson, appellant broached the subject of his co-defendant's allegedly more lenient treatment, hence the State was entitled to explore same, compare Ellison v. State, 349 So.2d 731 (Fla. 3rd DCA 1977), cert. denied, 357 So.2d 155 (Fla. 1978); moreover, in Bassett v. State, 449 So.2d 803 (Fla. 1984), a majority of this Court held that even a prosecutor's open

disparagment of that defendant's exercise of his right to a jury trial did not require a reversal of the sentence imposed. Cf. State v. Marshall, 476 So.2d 150 (Fla. 1985) (comment on defendant's exercise of his constitutional right to remain silent may be harmless error). The State trusts the dissenters in Bassett v. State will decline appellant's invitation to ignore stare decisis as established by the majority in that case, compare Wilkerson v. State, ___ So.2d ___ (Fla. 1986), 11 F.L.W. 489. As for the prosecutorial reference to the fact that appellant would have received the same sentence 150 years ago in a procedurally less refined manner, the State is hard pressed to understand how appellant can construe same as an invitation to "the jury to impose the death penalty as a modern-day version of a lynching" ("Initial Brief of Appellant," p. 36).

In the recent seminal case of State v. Murray, 443 So.2d 955, 956 (Fla. 1984), this Court held that even a prosecutor's highly improper closing argument at trial...

> ...does not warrant automatic reversal of a conviction unless the errors involved are so basic to the fair trial that they can never be treated as harmless. The correct standard of appellate review is whether "the error committed was so prejudicial as to vitiate the entire trial." Cobb v. State, 376 so.2d 230, 232 [Fla. 1979]. The appropriate test for whether the error is prejudicial is the "harmless error" rule set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and

> its progeny. We agree with the recent analysis of the Court in United States v. Hastings, ____ U.S. ____, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The supervisory power of the appellate court to reverse a conviction is inappropriate as a remedy when the error is harmless....[I]t is the duty of appellate courts to consider the record as a whole and to ignore harmless error, including most constitutional violations.

See also Bertolotti v. State, 476 So.2d 130 (Fla. 1985). Even if the propriety of the current prosecutorial comments was joined for appellate review, any error therein would surely be harmless under State v. Murray.

ISSUE V
(Appellant's Issue II)

THE RESENTENCING JUDGE PROPERLY DECLINED TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE THAT APPELLANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON IN COMMITTING THE MURDER.

ARGUMENT

Appellant alleges that the judge below fifthly reversibly erred at resentencing by declining to instruct the jury on the § 921.141(6)(e), Fla. Stat. statutory mitigating circumstance that he had "acted under extreme duress or under the substantial domination of another person" in committing the murder of Officer Taylor. The State again disagrees.

As noted, appellant had handled the gun during the Pearce auto theft. When the 23 year-old appellant and his 18 year-old co-defendant Jackson entered the bank, appellant was armed and Jackson was not. Appellant did most of the talking for the pair, demanding money from the tellers and threatening to blow the heads off of anyone who made a false move. Appellant eschewed his opportunity for a clean getaway and shot Taylor in an effort to help Jackson escape. Appellant testified that "we did it together" and that neither Jackson nor himself "was a leader at all," and Jackson corroborated that yes, "whatever we did, we did it together." Yet appellant, not satisfied that the judge instructed the jury on the impausible § 921.141(6)(d), Fla. Stat. statutory mitigating factor that appellant "was an accomplice in

the capital felony committed by another person and his participation was relatively minor," insists that the judge should have instructed upon § 921.141(6)(e) as well. Why? Because Jackson allegedly made the decision to rob the bank; because Jackson allegedly suggested that they wear sunglasses into the bank to disguise themselves; and because Jackson allegedly signalled appellant to jump behind the tellers' counter and "get" two of the tellers.

Evidence that appellant acted under "extreme duress or under the substantial domination" of Jackson when appellant shot Officer Taylor in the back while the unarmed Jackson was being handcuffed, indeed! This Court may tell a lawyer to "speak up" at an oral argument and the lawyer will do so, but this does not mean that a rational jury, Paramore v. State, could possibly draw from this evidence the inference that the lawyer acted under "extreme duress or under the substantial domination" of the Court. By the same token, no rational jury could have drawn from the evidence adduced below the conclusion that the armed appellant acted under the overriding influence of the unarmed Jackson, even viewing the evidence on this score in the light most favorable to the defense. An irrational jury might have drawn such a conclusion, but a defendant has "no [constitutional] entitlement to the luck of a lawless decision maker." Strickland v. Washington, 466 U.S. 668, 696 (1984).

The State would analogize appellant's request for a duress

or domination instruction to those cases in which a defendant seeks a jury instruction upon the affirmative defense of voluntary intoxication merely because he has had a few beers. "[J]ury instruction regarding intoxication...need not be given in every case in which evidence has been adduced at trial that the defendant consumed" intoxicants, Jacobs v. State, 396 So.2d 1113, 1115 (Fla. 1981), cert. denied, 454 U.S. 933 (1982). The defendant must also present evidence "which would support a theory that he was intoxicated and unable to formulate the necessary intent to commit the offenses charged." Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985), cert. denied, ___ U.S. _____, 106 S.Ct. 1501 (1986). This defendant presented exceedingly meager evidence that he had perhaps a sip of "duress" or "domination," but no competent evidence whatsoever that such was "extreme" or "substantial" so as to overbear his mental independence. The instruction requested by appellant obviously pertains to situations like an abusive husband forcing his terrified wife to rob a liquor store when her gun then goes off with fatal results, and obviously does not pertain to every joint enterprise slaying where the defendants have merely exuded mutual cooperation.

ISSUE VI
(Appellant's Issue VI)

THE RESENTENCING JUDGE PROPERLY FOUND AS A STATUTORY AGGRAVATING FACTOR THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

ARGUMENT

Appellant alleges that the judge below lastly reversibly erred at resentencing by finding as a § 921.141(5)(i), Fla. Stat. statutory aggravating factor that the murder of Officer Taylor was "committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." The State disagrees.

As noted, this Court did not pass upon appellant's contention to identical effect in his prior appeal, Hill v. State. As is the case concerning the aforediscussed "Williams Rule" evidence, the State is totally confident that if this Honorable Court had felt that such a finding was unjustified by the evidence, it would have said so in ordering resentencing to prevent needless recurrence of the same "error" nothwithstanding that such would not have been technially necessary. Compare Huff v. State.

Turning alternatively to the merits, appellant's claim that the trial judge erred in finding that the murder was committed in a cold, calculated and premeditated fashion, and consequently in imposing the death sentence as the jury had recommended, is

highly uncompelling. WHAT could be more cold, calculated and premeditated than the act of an armed bank robber who, eschewing an opportunity for a clean getaway, sneaks up behind the officers who have apprehended his partner and murders one of them? Compare Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); O'Callaghan v. State, 429 So.2d 691 (Fla. 1983); Squires v. State, 450 So.2d 208 (Fla. 1984), cert denied, ___ U.S. ___, 83 L.Ed.2d 204 (1984); Way v. State, ___ So.2d ___ (Fla. 1986), 11 F.L.W. 492; Scott v. State, ___ So.2d ____ (Fla. 1986), 11 F.L.W. 505. A finder of fact is not required to credit a criminal defendant's blatantly unreasonable denial of evil intent in the face of conflicting circumstantial evidence, see e.g. Atkinson v. State, 247 So.2d 793 (Fla. 1st DCA 1971). Any error in the instant finding certainly would not be reversible in view of the five other unchallenged aggravating factors supporting appellant's death sentence.

CONCLUSION

WHEREFORE, the State of Florida submits that the sentence appealed from must be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing Brief of Appellee has been forwarded to Mr. Steven L. Bolotin, Assistant Public Defender, P.O. Box 671, Tallahassee, FL 32302, by hand delivery, this 13th day of October, 1986.

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