

IN THE SUPREME COURT OF FLORIDA

WILLIAM EARL SWEET,

Appellant,

v.

CASE NO. SC05-1374

STATE OF FLORIDA,

Appellee.

-----/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Appellant, WILLIAM EARL SWEET, appeals the denial of his second successive motion for post-conviction relief filed in the Circuit Court of the Fourth Judicial Circuit, Duval County, Florida. References to appellant will be to **ASweet@** or **AAppellant,@** and references to appellee will be to **Athe State@** or **AAppellee.@**

The two volume record on appeal in the instant case will be referenced as **A2SPCR@** followed by the appropriate volume and page number. References to Sweet's initial brief in this case shall be "IB" followed by the appropriate page number. The record on appeal from Sweet's direct appeal (SC60-78629) will be referenced as "TR" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

Sweet appeals the trial court's, June 11, 2005, summary denial of his second successive motion for post-conviction relief. (2SPCR Vol. II 353-358). In that motion, Sweet alleged the testimony of two witnesses presented by the State during the penalty phase of Sweet's capital trial violated his right of confrontation as outlined by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S.Ct 1354 (2004). (2SPCR Vol. II 280-307).

The relevant facts surrounding the June 26, 1990 murder of thirteen year-old Felicia Bryant are recited in this Court's opinion on direct appeal:

... On June 6, 1990, Marcine Cofer was attacked in her apartment and beaten and robbed by three men. She could identify two of the men by their street names. On June 26, 1990, she was taken by Detective Robinson to the police station to look at pictures to attempt to identify the third assailant. When Robinson dropped Cofer off at her apartment, William Sweet was standing nearby and saw her leave the detective. Unknown to Cofer, Sweet had previously implicated himself in the robbery by telling a friend that he had committed the robbery or that he had ordered it done. Cofer asked her next-door neighbor, Mattie Bryant, to allow the neighbor's daughters, Felicia, thirteen, and Sharon, twelve, to stay with Cofer in her apartment that night. Mattie agreed, and the children went over to Cofer's apartment around 8 p.m.

At approximately 1 a.m. that evening, Sharon was watching television in the living room of Cofer's apartment when she heard a loud kick on the apartment door. She reported this to Cofer, who was sleeping in the bedroom, but because the person had apparently left, Cofer told Sharon not to worry about it and went back to sleep. Shortly thereafter, Sharon saw someone pulling on the living room screen. She awakened Cofer. The two then went to the door of the apartment, looked out the peephole, and saw Sweet standing outside. Sweet called Cofer by name and ordered her to open the door.

At Cofer's direction, Felicia pounded on the bathroom wall to get Mattie's attention in the apartment next door, and a few minutes later Mattie came over. The four then lined up at the door, with Cofer standing in the back of the group. When they opened the door to leave, Sweet got his foot in the door and forced his way into the apartment. Sweet's face was partially covered by a pair of pants. He first shot Cofer and then shot the other three people, killing Felicia. Six shots were fired. Cofer, Mattie, and Sharon were shot in the thigh, ankle and thigh, and buttock, respectively, and Felicia was shot in the hand and in the abdomen. Sweet was convicted of first-degree murder, three counts of attempted first-degree murder, and burglary.

Sweet v. State, 624 So.2d 1138 (1993.)

During the penalty phase, the State called several witnesses including Detectives Lumpkin and Lee. Detective Lumpkin was called to testify about the events leading to Sweet's conviction for the robbery of William Bernard Smith. Detective Lee was called to testify about events leading to Sweet's conviction for possession of a firearm by a convicted felon.

It is the testimony of these two witnesses about which Sweet now complains. At trial, Sweet did not object to the testimony of these witnesses on confrontation grounds.

Detective Lumpkin testified he was a robbery detective with the Jacksonville Sheriff's Police Department. Detective Lumpkin told the jury that, on or shortly after October 31, 1987, he conducted an investigation into the alleged robbery of William Bernard Smith. In the course of his investigation, Detective Lumpkin interviewed Mr. Smith and presented him with a photo array. Sweet's photo was among the six photos in the array. Detective Lumpkin showed the same photo spread to two witnesses to the robbery.

Mr. Smith was not able to identify Mr. Sweet. The other two witnesses, however, identified Sweet as one of Mr. Smith's attackers. (TR Vol. XXVIII 1214-1219).

The State called Mr. Smith to tell the jury about the attack. Mr. Smith testified that, on October 31, 1987, he was assaulted by four men. He described being hit, first, in the face with pieces of concrete he saw one of the men breaking up just before he was attacked. Mr. Smith told the jury the men beat him with their fists and knocked him to the ground. Mr. Smith testified that as he was lying on the ground, the men

began kicking him. The men directed the kicks to Mr. Smith's face. As he lay there, Mr. Smith thought "this is a terrible way to die." (TR Vol. XXVIII 1210). Mr. Smith told the jury he was taken to the hospital and treated for a fractured right cheek bone, a black eye, rib injuries, and a bruised left thigh. (TR Vol. XXVIII 1211).

Detective Lee testified that on April 20, 1988, he responded to the scene of an aggravated battery involving an Alvin Reeves and his sister. Upon arrival, Mr. Reeves told him that Sweet had intervened in the altercation and had struck him with a sawed-off shotgun. Mr. Reeves advised Detective Lee he could find Sweet near the LA Lounge on 8th Street.

Detective Lee went to that location and observed Sweet coming from an alleyway and entering the LA Lounge. Inside the bar, Detective Lee observed Sweet try to pass an object to a man in the bar. When the man refused, Sweet threw the object under a table. Subsequently, Detective Lee found three shotgun shells under the table. Detective Lee also recovered a sawed-off shotgun from the same alleyway in which he had first observed Sweet. The shotgun contained one shell identical to the three Detective Lee saw Sweet throw under the table in the LA Lounge.

Detective Lee testified that Reeves identified both Sweet and the weapon. (TR Vol. XXVIII 1223-1227).

The State also called Donald Tillie. Mr. Tillie is a fingerprint examiner with the Jacksonville Sheriff's Office. Mr. Tillie compared the known prints of Mr. Sweet (he took them himself) and fingerprints on three judgments and sentences of convictions for prior violent felonies the State sought to introduce in aggravation, including a conviction for the robbery of Mr. Smith and a conviction for possession of a firearm by a convicted felon. Mr. Tillie testified the fingerprints he took from Sweet and the prints on each of the three judgments and convictions were made by the same person. (TR Vol. XXVIII 1201-1207).

After Mr. Tillie testified, the State offered Sweet's judgments of conviction and sentences into evidence. Sweet posed no objection. (TR Vol. XXVIII 1207).

At the conclusion of the penalty phase, the jury recommended Sweet be sentenced to death by a vote of ten to two (10-2). The trial judge found the following aggravating factors: (1) Sweet had previously been convicted of several violent felonies, including robbery, possession of a firearm by a convicted felon, riot, resisting arrest with violence and the contemporaneous

attempted murders and burglary; (2) the murder was committed to avoid arrest; (3) the murder was committed during a burglary; and (4) the murder was cold, calculated, and premeditated.

The court found no statutory mitigating circumstances, but found nonstatutory mitigation. The court gave slight weight to the fact Sweet lacked true parental guidance as a teenager. The trial judge followed the jury's recommendation and sentenced Sweet to death. Sweet v. State, 624 So.2d at 1139, 1142.

Sweet appealed his convictions and sentences raising issues as to both the guilt and penalty phases of his trial. Sweet did not challenge the testimony of any witness on confrontation grounds. This Court affirmed Sweet's conviction and sentence to death.¹ Sweet filed a Petition for Writ of Certiorari in the United States Supreme Court. The United States Supreme Court denied review on February 28, 1994. Sweet v. Florida, 510 U.S. 1170 (1994). On August 1, 1995, Sweet filed a motion for post-conviction relief. Sweet filed an amended motion on June 30, 1997 raising twenty-eight (28) claims. ² After a Huff hearing,

¹ This Court found the trial court erred in imposing consecutive fifteen-year minimum mandatory sentences for the burglary and attempted murder convictions and directed the minimum mandatory aspects of these sentences to run concurrently. Sweet v. State, 624 So.2d, 1138, 1143 (Fla. 1993).

2 These claims were: (1) Sweet was denied access to public records; (2) the one-year time limitation for filing a rule 3.851 motion for postconviction relief violates Sweet's due process and equal protection rights; (3) the "felony murder" statutory aggravating circumstance constitutes an unconstitutional "automatic statutory aggravating circumstance"; (4) the "avoid arrest" statutory aggravator was inapplicable in this case and the jury was erroneously instructed regarding this aggravator because the trial court improperly failed to further instruct the jury that the aggravator can only be found where it is the "dominant or only" motive for the defendant's commission of the murder; (5) the trial court's jury instruction on the "cold, calculated, and premeditated" aggravator was erroneous because it failed to instruct the jury that this aggravator required "heightened premeditation" and the evidence failed to establish the necessary heightened premeditation necessary to support this aggravator; (6) the Jacksonville Sheriff's Office destroyed all of the evidence in this case, depriving Sweet of his right to conduct an independent analysis of this evidence using his own experts; (7) ineffective assistance during the guilt phase by: (a) failing to conduct an adequate pretrial investigation and preparation of Sweet's case; (b) failing to investigate other possible sources who would have had a motive to kill Marcine Cofer; and (c) failing to properly cross-examine Marcine Cofer and Solomon Hansbury; (8) ineffective assistance by failing to investigate and prepare available mitigation evidence regarding Sweet's background; (9) Sweet was denied his right to a fair trial as a result of his jury being subjected to improper influences; (10) the jury was given inadequate instructions on the "prior violent felony," "great risk," "avoiding arrest," and "cold, calculated, and premeditated" aggravators; (11) Rule Regulating the Florida Bar 4- 3.5(d)(4), which prohibits attorneys from interviewing jurors, caused his postconviction counsel to render ineffective assistance of counsel; (12) Sweet is innocent of first-degree murder and innocent of the death penalty; (13) the record fails to show his presence or his counsel's presence at five sidebar conferences and counsel rendered ineffective assistance by failing to object; (14) improper prosecutorial comments during the penalty phase in arguing that the jury should not be sympathetic towards Sweet and ineffective assistance in failing to object to this comment and in failing to request a "mercy instruction"; (15) alleged omissions in the record on appeal deprived him of

the trial court granted an evidentiary hearing on four of Sweet's claims and denied the rest. (PCR. Vol. VI 1077).³ On

meaningful appellate and postconviction review and trial counsel rendered ineffective assistance in failing to ensure a complete record; (16) the trial court's failure to ensure that Sweet had a complete record on appeal deprived him of a proper direct appeal; (17) Sweet received a fundamentally unfair trial due to the sheer number and types of errors committed; (18) the penalty phase jury instructions improperly shifted the burden to Sweet to show that death was not the appropriate sentence for the jury to recommend; (19) the State's misleading evidence and improper argument deprived Sweet of a fair trial; (20) Sweet's contemporaneous felonies were improperly used to support the prior violent felony aggravator; (21) the State failed to prove that Sweet "knowingly" created a great risk of causing the death of other persons given that his mental state at the time of the murder prevented him from knowing this fact; (22) the trial court improperly used a prior possession of a firearm by a convicted felon conviction as a statutory aggravator because the conviction was unconstitutionally obtained; (23) Florida's death penalty statute is unconstitutional on its face and as applied; (24) the trial court erred in failing to consider nonstatutory mitigating circumstances; (25) the State's introduction of and argument regarding nonstatutory aggravators deprived Sweet of a fair sentencing recommendation; (26) the State's closing argument and the jury instructions during the penalty phase improperly diminished the jury's sense of responsibility in the sentencing process; (27) trial counsel failed to provide the two court-appointed mental health examiners with sufficient background information to allow them to adequately evaluate Sweet's competency to stand trial; and (28) the mental health officials that examined Sweet failed to render adequate mental health assistance.

³ The trial court granted an evidentiary hearing on Sweet's claims that (1) trial counsel failed to investigate and present evidence of other suspects; (2) counsel failed to present, as potentially mitigating evidence, Sweet's background history; (3) trial counsel failed to present background information to the mental health experts; and (4) the mental health experts

March 30, 2000, the trial court denied Sweet's motion for post-conviction relief. (PCR. Vol. VI 1075-1097). Sweet appealed the denial of his post-conviction motion to this Court, raising six issues.⁴ Sweet also filed a petition for a writ of habeas corpus, raising four claims.⁵

conducted an inadequate evaluation. (PCR. Vol. VI 1076).

4 (1) whether counsel was ineffective during the guilt phase for failing to investigate and present evidence of other suspects; (2) whether counsel was ineffective during the penalty phase; (3) whether the trial court erred in failing to consider the cumulative effect of the newly discovered evidence concerning Sweet's innocence with the evidence that was not presented due to trial counsel's ineffectiveness; (4) whether counsel was ineffective regarding Sweet's competency evaluation by a mental health expert; (5) whether the trial court erred in summarily denying a hearing on Sweet's claims related to trial counsel's ineffectiveness and the State's misconduct that must be considered for their cumulative effect on the outcome of the guilt and penalty phases; and (6) whether the record on appeal is so incomplete that Sweet cannot meaningfully raise claims in this appeal.

5 (1) whether the rule prohibiting Sweet's lawyers from interviewing jurors to determine if error occurred at his trial is unconstitutional; whether the rule denied Sweet adequate assistance of counsel in pursuing his postconviction remedies; and whether appellate counsel was ineffective in failing to raise these claims in Sweet's direct appeal; (2) whether the penalty phase jury instructions improperly shifted the burden to Sweet to prove that death was an inappropriate sentence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, and whether appellate counsel was ineffective in failing to raise this claim in Sweet's direct appeal; (3) whether Sweet received inadequate instructions regarding the avoid arrest aggravator in violation of the Eighth and Fourteenth Amendments, and whether appellate counsel was

On January 31, 2002, this Court affirmed the trial court's denial of Sweet's motion for post-conviction relief. Sweet v. State, 810 So.2d 854 (Fla. 2002). Mandate issued on March 4, 2002. On June 13, 2002, this Court denied Sweet's petition for writ of habeas corpus. Sweet v. Moore, 822 So.2d 1269 (Fla. 2002).

On November 18, 2003, Sweet filed his first successive motion for post-conviction relief, alleging his conviction and sentence to death violated the dictates of the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). After a Huff hearing, the trial court summarily denied Sweet's Ring claim. The trial court ruled the motion was both untimely filed and facially sufficient. (SPCR 95-97). The trial court also ruled that Sweet's claim must be denied, in any event, because two of the aggravators found to exist were that Sweet had been convicted of a prior violent felony and the murder was committed in the course of a felony (burglary). (SPCR 96).

ineffective for failing to raise this claim in Sweet's direct appeal; and (4) whether Sweet was denied a reliable and individualized capital sentencing because the jury was not instructed that it must find proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors before sentencing Sweet to death.

Sweet appealed. On December 20, 2004, in cause number SC04-514, this Court affirmed the denial of Sweet's successive motion for post-conviction relief.

On March 7, 2005, Sweet filed a second successive motion for post-conviction relief raising a Crawford claim and the State filed

a response. (2SPCR Vol. II 280-306). On July 11, 2005, the trial court summarily denied Sweet's motion. (2SPCR Vol. II 353-358).

This is Sweet's appeal from the denial of his Crawford claim.

SUMMARY OF THE ARGUMENT

The trial court correctly concluded Sweet's Crawford claim was time barred. Sweet filed his second successive motion more than one year after his conviction and sentence became final and failed to establish any exception to the one-year limitations period provided for in Rule 3.851(d)(2), Florida Rules of Criminal Procedure.

Sweet's claim is procedurally barred. Sweet posed no objection to the testimony of Detectives Lumpkin and Lee on the grounds it violated his Sixth Amendment right to confrontation.

Accordingly, Sweet failed to preserve this issue. Because Sweet waived this issue by failing to object at trial, he cannot

resurrect his claim in a second successive motion for post-conviction relief.

Sweet's claim, pursuant to Crawford v. Washington, 124 S.Ct. 1354 (2004), also fails because Crawford has no retroactive application to Sweet's judgment and conviction, already final before Crawford was decided. Further, Sweet's Crawford claim fails on the merits because none of the testimony about which Sweet complained constituted a violation of the United States Supreme Court's ruling in Crawford v. Washington. Should this Court find a Crawford violation, however, any error in this case was harmless.

ARGUMENT

WHETHER THE TRIAL JUDGE ERRED IN DENYING SWEET'S SECOND SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF.

A. SWEET'S CLAIM IS TIME BARRED

On February 28, 1994, when the United States Supreme Court denied Sweet's petition for a writ of certiorari, Sweet's conviction became final. Sweet v. Florida, 510 U.S. 1170, 114 S.Ct. 1206, 127 L.Ed.2d 553, 62 USLW 3574 (1994).⁶ Sweet filed his second successive motion on March 7, 2005.

Rule 3.851(d), Florida Rules of Criminal Procedure, requires

⁶ Rule 3.851(d)(1)(A), Florida Rules of Criminal Procedure.

any motion to vacate judgment of conviction and sentence be filed within one year after the judgment and sentence become final. The rule provides for an exception to this one year time limit, if the fundamental constitutional right asserted was not established within one year from the date the conviction becomes final and this right has already been held to apply retroactively.⁷ At the time Sweet filed his successive motion, some eleven years after his conviction became final, neither the United States Supreme Court nor this Florida Supreme Court had held that Crawford may be retroactively applied. Accordingly, the trial judge correctly ruled the successive motion was time barred. Dixon v. State, 730 So.2d 265, 268 (Fla. 1999) (noting that if defendants file claims pursuant to Rule 3.850 before the issue of retroactivity has been decided, their claims may be summarily denied).

B. SWEET'S MOTION IS PROCEDURALLY BARRED

⁷ If both of these criteria are met, a defendant would ordinarily have one year from any announced fundamental change in law to file a successive 3.851 motion. This time period begins to run from the date the Florida Supreme Court announces the new rule may be retroactively applied to final convictions rather than the date of the initial decision announcing the change of law. Dixon v. State, 730 So.2d 265, 268-269 (Fla. 1999). This principle comports with rule 3.850/3.851, but also provides a reasonable time period for all eligible petitioners to file their claims, including those whose claims were rejected

Even if the motion was not time barred, this claim is procedurally barred. Sweet waived this substantive claim when he did not preserve this issue at trial. Sweet did not object to the testimony of Detectives Lumpkin and Lee on the grounds it violated his rights under the Confrontation Clause of the United States Constitution.

The United States Supreme Court in Coy v. Iowa, 487 U.S.1012 (1988), ruled that confrontation clause violations do not rise to the level of fundamental error but are, instead, subject to a harmless error analysis. This Court has ruled that constitutional errors which are not fundamental in character are waived unless timely and properly objected to at trial. Ray v. State, 403 So.2d 956, 960 (Fla. 1981). Additionally, the objection at trial must be on the same specific grounds as those raised on appellate review. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982).⁸

before the decision on retroactivity was announced.

⁸ Sweet cannot excuse his failure to pose an objection at trial by an assertion Crawford was not decided until well after his capital trial commenced. An objection to "hearsay" evidence on the confrontation clause grounds has always been available to Sweet. See Bousley v. United States, 523 U.S. 614, 622-23 (1998)(noting that even claim based on a change in law may be barred when not raised below where basis to raise claim was reasonably available); Walton v. State, 847 So. 2d 438, 445 (Fla. 2003)(to claim retroactive application of Espinosa v.

Sweet failed to preserve an alleged confrontation clause violation by making a specific objection at trial and then raising this specific claim on direct appeal. Sweet may not use these post-conviction proceedings to resurrect this unpreserved claim or as a second appeal. Finney v. State, 831 So.2d 651, 657 (Fla. 2003) (ruling that post-conviction motions are not to be used as second appeals and that issues that could have been or should have been raised on direct appeal are not cognizable in post-conviction proceedings).⁹

C. CRAWFORD IS NOT APPLICABLE RETROACTIVELY TO SWEET'S CASE

Even if the claim was not time and procedurally barred, Sweet would not be entitled to relief because Crawford does not apply retroactively. This Court in Chandler v. State, 916 So.2d 728 (Fla. 2005) ruled that Crawford v. Washington may not be retroactively applied so as to disturb convictions and sentences already final at the time Crawford was decided. As Sweet's conviction and sentence were final, on February 28,

Florida, 505 U.S. 1079 (1992), issue must have been raised at trial and on direct appeal).

⁹ Unlike the case in Evans v. State, 838 So.2d 1090, 1097 n.5 (Fla. 2002), Sweet did not raise even a specter of the confrontation clause when posing a hearsay objection to the testimony of Detectives Lumpkin and Lee.

1994, ten years before Crawford was decided, Crawford has no application to Sweet's case on collateral review.

D. SWEET'S CLAIMS FAIL ON THE MERITS

In his second successive motion for post-conviction relief and again in his initial brief, Sweet claimed that, without the testimony of Detective Lumpkin, the State would not be able to prove either the violent character of Sweet's prior robbery conviction or the identity of Mr. Sweet as the perpetrator. (2SPCR Vol. II 303; IB 32). Sweet alleged that, because the only testimony offered to establish both the nature of the crime and the identity of the perpetrator violated Crawford, the trial court was precluded, on constitutional grounds, from considering this conviction as a prior violent felony. (2SPCR Vol. II 303-305).

Sweet is mistaken when he claims that, without Detective Lumpkin, the State would have been unable to prove the violent nature of the crime. Detective Lumpkin did not provide any testimony about the violent character of the robbery. Rather, it was the victim of the robbery, William Bernard Smith, who testified to the violence of the robbery. (TR Vol. XXVIII 1209-1214). Even if Detective Lumpkin had testified about what the victim told him about the robbery itself, there would be no

Crawford violation because the declarant, Mr. Smith, was available at Sweet's trial and subject to cross-examination. The United States Supreme Court's decision in Crawford is not implicated when the declarant is available and subject to contemporaneous cross-examination.

Sweet is likewise mistaken when he alleges that without Detective Lumpkin, the State would not have been able to prove it was Sweet who perpetrated the robbery on Mr. Smith. While Detective Lumpkin did testify Sweet was identified as a suspect by two individuals who witnessed the robbery, Sweet's identity as the person convicted of the robbery was established by fingerprint expert, Donald Tillie. Mr. Tillie testified at the penalty phase of Sweet's trial subject to cross-examination. (TR Vol. XXVIII 1200-1208). Mr. Tillie compared the known prints of William Sweet with the fingerprints upon State's Exhibit 31, a judgment of conviction and sentence for the robbery of Mr. Smith. Mr. Tillie told the jury that Sweet's known prints matched the fingerprints on the judgment of conviction and sentence. (TR Vol. XXVIII 1206).

Finally, Crawford did not bar the testimony of Detective Lee. Detective Lee personally observed Sweet under circumstances giving rise to a conclusion that Sweet, a prior convicted felon,

actually possessed a loaded sawed off shotgun. Accordingly, the only issue is whether Detective Lee's testimony that Sweet used the shotgun to beat Alvin Reeves violated Crawford. Crawford does not preclude the testimony of a police officer, who takes the stand to testify about the circumstances of a prior violent felony conviction during the penalty phase of a capital trial.

The Florida Supreme Court has held that details of prior felony convictions involving the use or threat of violence to the victim are admissible in the penalty phase of a capital trial, provided the defendant has a fair opportunity to rebut any hearsay testimony. Rodriguez v. State 753 So.2d 29, 45 (Fla. 2000); Rhodes v. State, 547 So.2d 1201, 1204 (Fla.1989); Tompkins v. State, 502 So.2d 415, 419 (Fla.1986). Sweet makes no claim he was not granted a fair opportunity to rebut Detective Lee's hearsay testimony.

Moreover, at the time of trial, it is undisputed the Florida Supreme Court encouraged the State to call police officers to testify rather than the crime victims themselves in order to ensure that evidence of prior crimes did not become a feature of the penalty phase proceedings. The Florida Supreme Court has noted that because the details of prior violent felonies are admissible, it is generally beneficial to the defendant to hear

about those details from a neutral law enforcement official rather than from prior witnesses or victims. Finney v. State, 660 So.2d 674, 683- 84 (Fla.1995); Duncan v. State, 619 So.2d 279, 282 (Fla.1993)(stating that details of prior felony convictions should not be made a feature of the penalty phase proceedings); Stano v. State, 473 So.2d 1282, 1289 (Fla.1985) (same).¹⁰ Sweet is not entitled to relief.

E. ANY CRAWFORD VIOLATION WAS HARMLESS

Violations of the confrontation clause are subject to harmless error review. See e.g. Coy v. Iowa , 487 U.S. 1012, 1021, 101 L.Ed.2d 857, 108 S.Ct. 2798 (1988) (holding that denial of face-to-face confrontation is subject to harmless error review); United States v. Mills, 138 F.3d 928, 938 (11th Cir. 1998) (harmless error analysis applies to cases raising confrontation clause claims); Hopkins v. State, 632 So.2d 1372,

¹⁰ In addition, the Florida Supreme Court has noted that "the defendant's interest in cross-examining the witness is less compelling where the testimony concerns a prior felony conviction. The defendant previously had the opportunity to cross-examine fact witnesses during the trial for the prior felony. The transcripts of the prior trial are also available to rebut the hearsay testimony describing the prior conviction. This is analogous to cases allowing a penalty phase witness to summarize prior testimony because the defendant had the opportunity to cross-examine the declarant during the original proceeding." Rodriguez v. State, 753 So.2d 29, 45 (Fla. 2000).

1377 (Fla. 1994).

Should this Court find the testimony of one or both of the detectives violated the confrontation clause, any error was harmless beyond a reasonable doubt. This is true for at least two reasons.

First, exclusion of this testimony would not have precluded the trial court from finding the prior violent felony aggravator. Even in the absence of evidence establishing that Sweet's prior conviction for possession of a firearm constituted a "violent" felony, the trial court properly found Sweet had been previously convicted of riot and battery on a LEO.¹¹ Additionally, the judgment and conviction for the robbery of William Smith, standing alone, was sufficient to establish the

¹¹ On direct appeal, Sweet challenged the trial judge's consideration of his prior conviction for possession of a firearm by a convicted felon in aggravation of this murder. The Florida Supreme Court ruled the trial court erred when it failed to instruct the jury it had to consider the individual circumstances of the crime in order to determine if it was violent before weighing it as a prior violent felony. In light of the fact there were several other convictions supporting the prior violent felony aggravator, the Court ruled this error was harmless. Sweet v. State, 624 So.2d 1138, 1143 (Fla. 1993). There is some conflict in the record of whether one of Sweet's prior convictions was for battery on a LEO or resisting with violence. In either event, the conviction qualified for a prior violent felony.

robbery as a prior violent felony.

Sweet's Crawford claim also has no impact on the trial judge's findings relating to Sweet's contemporaneous attempted murder and burglary convictions. Sweet v. State, 624 So.2d 1138, 1142 (Fla. 1993). These contemporaneous convictions, alone, would have supported a finding of the prior violent felony aggravator. See, e.g., Mahn v. State, 714 So.2d 391, 399 (Fla.1998) (concluding that although robbery conviction of homicide victim was improperly used as a prior violent felony conviction, contemporaneous convictions of two other homicides satisfied the aggravating circumstance); Pardo v. State, 563 So.2d 77, 80 (Fla.1990) (noting the court has consistently held that the contemporaneous conviction of a violent felony may qualify as an aggravating circumstance, so long as the two crimes involved multiple victims or separate episodes).¹²

Second, the trial court found the State had established three other aggravators beyond a reasonable doubt; (1) the murder was committed to avoid arrest; (2) the murder was

¹² In this case, Sweet was convicted of the attempted murder of three other occupants of the home in which he gunned down 13 year old Felicia Bryant. In addition to his conviction for the first degree murder of Felicia Bryant, Sweet was also convicted of the attempted murders of Marcine Cofer (the intended victim), Mattie Bryant, and Sharon Bryant and burglary. Sweet v. State, 624 So.2d 1138, 1139 (Fla. 1993).

committed during a burglary; and (3) the murder was cold, calculated and premeditated. The court found no statutory mitigating circumstances, but found as nonstatutory mitigation that Sweet lacked true parental guidance as a teenager. This mitigation was given slight weight.

Thus, even if Sweet's claim did, *arguendo*, prove to invalidate the prior violent felony aggravator, there is no reasonable possibility Sweet would have received a life sentence. 13 This is especially true in light of the three other serious aggravators and the dearth of mitigation. Accordingly, any error in admitting the detectives' testimony was harmless beyond a reasonable doubt.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm the denial of Sweet's second successive motion for post-conviction relief.

Respectfully submitted,

13 The State does not concede that invalidating these two convictions would have precluded a finding the prior violent felony aggravator. As noted above, even if the two convictions at issue should not have been considered, Sweet had been convicted of two additional prior violent felonies (riot and battery on a LEO) as well as three contemporaneous attempted murders and one count of burglary. These "unchallenged" convictions were sufficient for the trial court to find the prior violent felony aggravator.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Frank Tassone, Esq., Jacksonville Florida 32025 this 24th day of February 2006.

MEREDITH CHARBULA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

MEREDITH CHARBULA