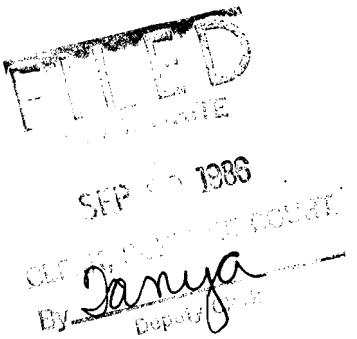
69387

IN THE SUPREME COURT OF FLORIDA

CASE NO.



ROY ALLEN STEWART,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida

and

ROBIN H. GREENE
Special Assistant Public Defender
Suite 1109
2655 LeJeune Road
Coral Gables, Florida 33134
(305) 444-0213

Counsel for Appellant

TABLE OF CONTENTS

INTRODUCTION.....1

STATEMENT OF THE CASE AND FACTS.....2

QUESTIONS PRESENTED.....18

SUMMARY OF ARGUMENT.....19

ARGUMENT

I

THE TRIAL COURT ERRED IN SUMMARILY DENYING THE DEFENDANT'S SECOND MOTION FOR POST-CONVICTION RELIEF AND IN DENYING THE DEFENDANT'S MOTION FOR STAY OF EXECUTION WHERE THE ALLEGATIONS WERE SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING, AND THE DEFENDANT'S CLAIM COULD NOT HAVE BEEN ADEQUATELY PLEADED AT THE TIME OF HIS FIRST MOTION.....20

A. The Allegations In Support Of Stewart's Claim Are Not Subject To Summary Dismissal.....20

B. The Failure Of Stewart To Assert This Claim Does Not Constitute An Abuse Of Procedure.....28

II

THE TRIAL COURT'S APPLICATION OF THE NEW SUCCESSOR BAR TO THIS CASE VIOLATES THE EX POST FACTO CLAUSE.....32

CONCLUSION.....35

CERTIFICATE OF SERVICE.....36

TABLE OF CITATIONS

CASES	PAGES
BAZEMORE v. FRIDAY 106 S.Ct. 300 (1986)	23, 24
BLACKLEDGE v. ALLISON 431 U.S. 63, 97 S.Ct. 1621, 53 L.Ed.2d 136 (1977)	20
CHRISTOPHER v. STATE 489 So.2d 22 (Fla. 1986)	32, 33
FORD v. STRICKLAND 734 F.2d 538 (11th Cir. 1984)	29
GRIFFIN v. WAINWRIGHT 760 F.2d 1505 (11th Cir. 1975)	29
GOMILLION v. LIGHTFOOT 364 U.S. 339 (1960)	22
HITCHCOCK v. WAINWRIGHT 106 S.Ct. 2888 (June 9, 1986)	29
McCLESKEY v. KEMP 753 F.2d 877 (11th Cir. 1985) (en banc)	23, 28, 29
McCRAE v. STATE 437 So.2d 1388 (Fla. 1983)	32, 33
MACHIBRODA v. UNITED STATES 368 U.S. 487, 82 S.Ct. 511 (1962)	21
MEEKS v. STATE 382 So.2d 673 (Fla. 1980)	20
PAPRSKAR v. ESTELLE 612 F.2d 1003 (5th Cir. 1980)	29
PRICE v. JOHNSTON 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed 1356 (1948)	31
SANDERS v. UNITED STATES 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)	29, 30, 31
SPINKELLINK v. WAINWRIGHT 578 F.2d 582 (5th Cir. 1978)	25, 28
STATE v. WILLIAMS 397 So.2d 663 (Fla. 1981)	33

SULLIVAN v. STATE
441 So.2d 609 (Fla. 1983).....28

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE
450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).....21, 23

TURNER v. MURRAY
___ U.S. ___, 106 S.Ct. 1683 (1986).....26, 27

VILLAGE OF ARLINGTON HEIGHTS v. METROPOLITAN HOUSING DEVELOPMENT CORP.
429 U.S. 252, 97 S.Ct. 535, 50 L.Ed.2d 450 (1977).....22

WEAVER v. GRAHAM
450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).....33

WITT v. STATE
465 So.2d 510 (Fla. 1985).....28

YICK WO v. HOPKINS
118 U.S. 356, 6 S.Ct. 1064 (1886).....22

OTHER AUTHORITIES

FLORIDA RULES OF CRIMINAL PROCEDURE

Rule 3.850.....20, 28, 34

BOWERS, THE PERVASIVENESS OF ARBITRARINESS AND DISCRIMINATION UNDER POST-FURMAN CAPITAL STATUTES, 74 Crim. O. & Criminology 1067.....25

FOLEY and POWELL, THE DISCRETION OF PROSECUTORS, JUDGES, AND JURIES IN CAPITAL CASES, 7 Crim. Just. J. 16.....25

GROSS and MAURO, PATTERNS OF DEATH: AN ANALYSIS OF RACIAL DISPARITIES IN CAPITAL SENTENCING AND HOMICIDAL VICTIMIZATION, 37 Stan. L. Rev. 27 (1984).....23

GROSS, RACE AND DEATH: THE JUDICIAL EVALUATION OF EVIDENCE OF DISCRIMINATIONN IN CAPITAL SENTENCING, 18 U.C.D. L. Rev. 1275 (1985).....22

IN THE SUPREME COURT OF FLORIDA

CASE NO.

ROY ALLEN STEWART,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INTRODUCTION

This is an appeal from the trial court's order summarily denying defendant Roy Allen Stewart's second motion for post-conviction relief. In this brief, the symbol "A." refers to the appendix to this brief; the symbol "App." refers to the appendix attached to Stewart's motion for post-conviction relief, which contained the same pleadings as those attached to his petition for writ of habeas corpus; and the symbol "T." refers to the transcript of the hearing on the motion. The transcript was not available for record references at the time this brief was prepared.

The parties are referred to as they stood below.

STATEMENT OF THE CASE AND FACTS

Defendant Roy Allen Stewart was sentenced to death on July 5, 1979 following his conviction for first-degree murder, robbery, sexual battery and burglary. (A. 1). This Court affirmed the judgment and sentence. Stewart v. State, 420 So.2d 862 (Fla. 1982), cert. denied, Stewart v. Florida, 462 U.S. 1124 (1986).

Stewart's first motion for post-conviction relief was filed on March 16, 1984. It was denied on September 11, 1984 after an evidentiary hearing. (A. 2). This Court affirmed the order denying Stewart's claim that he received ineffective assistance at the penalty phase of trial on December 19, 1985. Rehearing was denied on February 20, 1986. Stewart v. State, 481 So.2d 1210 (Fla. 1986).

On September 10, 1986, the Governor of the State of Florida signed a death warrant directing Stewart's execution. His execution is scheduled for 7:00 a.m. on October 7, 1986. (A. 16).

On September 16, 1986, Stewart filed a motion for stay of execution and a petition for writ of habeas corpus in this Court, claiming that because the State of Florida has applied its capital sentencing statute in an arbitrary and capricious manner by allowing race to determine, in significant part, who will receive the death penalty, his sentence was imposed in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States. Stewart supported his petition with a detailed proffer of statistical evidence based, in principle part, on a study conducted by Professors Samuel R. Gross and Robert Mauro

and published as Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicidal Victimization, 37 Stan. L. Rev. (Nov. 1984). Stewart raised this claim in this Court under the misapprehension that it was foreclosed to him in the trial court and because recent developments in the law called for this Court's reconsideration of its prior rulings.

On September 25, 1986, this Court denied relief, holding that Stewart's claim is cognizable in the trial court in post-conviction proceedings and that Stewart is procedurally barred from raising it for the first time in a habeas corpus proceedings.

Stewart therefore placed the issue before the trial court by filing a motion for post-conviction relief on the date of this Court's decision. The motion was supported by the same statistical proffer and appendices, and it alleged that Stewart did not know and could not have known of the facts supporting his claim at the time he filed his first motion for post-conviction relief. (A. 2-12). Stewart also filed a motion for stay of execution and a memorandum of law in support thereof. (A. 16-34). The state opposed the motion for stay of execution on the grounds that Stewart's claim should have been raised on direct appeal and that the second post-conviction motion was an abuse of the writ. (A. 37). The state has not addressed the merits of Stewart's claim, the factual basis of which was alleged follows.

In support of his claim, Stewart presented, among other studies, the following findings of a multivariate statistical analysis conducted by Professors Samuel R. Gross and Robert Mauro

and published as Patterns Of Death: An Analysis Of Racial Disparities In Capital Sentencing And Homicidal Victimization, 37 Stan. L. Rev. 27 (1984):

a. The study by Professors Gross and Mauro focused upon all homicides in Florida and seven other states during the 5-year period, 1976-1980. The data for the study was drawn from two sources: Supplementary Homicide Reports (SHR's) that local police agencies file with the Uniform Crime Reporting Section of the FBI, and Death Row, U.S.A., a periodic publication of the NAACP Legal Defense and Educational Fund (LDF) which has become the standard reference source for current data on death row inmates. The Supplementary Homicide Reports provide data on virtually all homicides which occurred during the 1976-1980 period -- 3501 homicides -- while Death Row U.S.A. provided data on homicides for which someone was eventually sentenced to death -- 130 death sentences. Florida's reporting rate for known homicides was over 98% for this period. The process by which the researchers matched the homicides as reported to the FBI with those for which death sentences were imposed is described in 37 Stan. L. Rev. at 50-54.

b. Initially, Gross and Mauro found that 43.3% of the victims of homicides in Florida during this period (1683 out of 3486) were black, but only 10.9% of the death sentences (14 out of 128) were imposed for black-victim homicides. Id. at 55. To determine whether non-racial factors might explain this extreme correlation between white victim homicides and death sentences, Gross and Mauro examined the data to determine whether any non-

racial factor might explain the strength of this relationship.

c. Six non-racial factors were examined for their individual and cumulative impact upon the death sentencing determination: (a) the commission of a homicide in the course of another felony; (b) the killing of a stranger; (c) the killing of multiple victims; (d) the killing of a female victim; (e) the use of a gun; (6) the geographical location of the homicide. While five of these six factors were correlated in varying degrees of strength with the imposition of the death sentence, none explained away the consistently high correlation between white victims and death sentences. Regardless of the presence of one or more of the non-racial factors highly correlated with the death sentence, the homicides which involved, in addition, white victims, were much more likely to result in death sentences.

(1) The commission of a separate felony accompanying the homicide was highly predictive of an eventual death sentence: 22.0% of felony homicides resulted in death sentences, while only 0.9% of non-felony homicides resulted in death sentences. The felony circumstance thus increased the likelihood of a death sentence by a factor of nearly 24. Within either of these categories of homicide, however, white victim homicides were far more likely to result in death sentences. Of the felony homicides involving white victims, 27.5% resulted in death sentences, while only 7.0% of such homicides involving black victims resulted in death sentences. Of the non-felony homicides involving white victims, 1.5% resulted in death sentences, while only 0.4% of such homicides involving black victims resulted in

death sentences. Thus, whether the homicide involved a felony or not, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

(2) The killing of a stranger was highly predictive of a eventual death sentence: 9.7% of the homicides in which the defendants and victims were strangers to each other resulted in death sentences, while only 2.3% of the homicides in which the defendants and victims were acquainted with each other resulted in death sentences. The "stranger" factor thus increased the likelihood of a death sentence by a factor of four. Within either of these categories, however, white victim homicides were far more likely to result in death sentences, particularly when the "stranger" factor was present. Of the "stranger" homicides involving white victims, 14.5% resulted in death sentences, while only 1.2% of such homicides involving black victims resulted in death sentences. Of the "nonstranger" homicides involving white victims, 3.7% resulted in death sentences, while only 1.0% of such homicide involving black victims resulted in death sentences. Thus, when the "stranger" aggravating factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing a black victim. When the "stranger" factor was not present, a person killing a white victim was nearly four times more likely to be sentenced to death than a person killing a black victim.

(3) The killing of multiple victims was highly predictive of an eventual death sentence: 18.3% of the homicides

in which there were multiple victims resulted in death sentences, while only 3.2% of the homicides in which there were single victims resulted in death sentences. The multiple victim factor thus increased the likelihood of a death sentence by a factor of nearly six. Within either of these categories, however, white victim homicides were more likely to result in death sentences. Of the multiple victim homicides involving white victims, 20.4% resulted in death sentences, while only 11.1% of such homicides involving black victims resulted in death sentences. Of the single victim homicides involving white victims, 5.5% resulted in death sentences, while 0.7% of such homicides involving black victims resulted in death sentences. Thus, when the multiple victim aggravating factor was present, a person killing white victims was two times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

(4) The killing of a female victim was also predictive of an eventual death sentence: 7.2% of the homicides in which a woman was killed resulted in death sentences, while only 2.5% of the homicides in which a man was killed resulted in death sentences. The female victim factor thus increased the likelihood of a death sentence by a factor of nearly three. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the female victim homicides involving white victims, 19.8% resulted in death sentences, while only 1.6% of such homicides involving black

victims resulted in death sentences. Of the male victim homicides involving white victims, 4.4% resulted in death sentences, while 0.6% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide involved a female or male victim, a person killing a white victim was eight times more likely to be sentenced to death than a person killing a black victim.

(5) The killing of a victim in a rural county was also predictive of an eventual death sentence: 5.1% of the rural homicides resulted in death sentences, while only 3.4% of the urban homicides resulted in death sentences. The geography factor thus increased the likelihood of a death sentence by a factor of nearly two. Within either of these categories, however, white victim homicides were far more likely to result in deaths sentences. Of the rural homicides involving white victims, 8.5% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the urban homicides involving white victims, 5.8% resulted in death sentences, while 0.8% of such homicides involving black victims resulted in death sentences. Thus, where the rural factor was present, a person killing a white victim was 12 times more likely to be sentenced to death than a person killing black victims. When this factor was not present, a person killing a white victim was seven times more likely to be sentenced to death than a person killing a black victim.

(6) Unlike the other non-racial factors, the killing of a person with a gun was not predictive of an eventual

death sentence: 3.0% of the homicides in which the victim was killed with a gun resulted in death sentences, while 5.1% of the homicides in which the victim was killed by another means resulted in death sentences. The "gun" factor thus made it somewhat less likely for the defendant to be sentenced to death. Within either of these categories, however, white victim homicides were far more likely to result in death sentences. Of the "use of a gun" homicides involving white victims, 5.3% resulted in death sentences, while only 0.7% of such homicides involving black victims resulted in death sentences. Of the "other means" homicides involving white victims, 8.7% resulted in death sentences, while 1.1% of such homicides involving black victims resulted in death sentences. Thus, whether the homicide was committed by use of a gun or other means, a person killing a white victim was nearly eight times more likely to be sentenced to death than a person killing a black victim.

d. In order to determine whether the racial disparities might be explained by a combination of the highly predictive, non-racial aggravating factors acting together, Gross and Mauro undertook two additional investigative steps involving multivariate analysis. Id. at 66-69.

(1) First, they examined Florida death cases for the cumulative effect of these variables by using a "scale of aggravation." Id. at 70-75 (categorizing all homicide cases by number of the major aggravating factors present; 0, 1, or 2-3). This scale examined the cumulative effects of the three aggravating factors which the professors had found must predictive of

death sentences: commission of the homicide in the course of a felony; commission of the homicide against a stranger, the commission of a multiple victim homicide. While this analytical step explained the race-of-suspect disparity, the race-of-victim disparity persisted just as strongly. "Controlling for level of aggravation ... essentially eliminates any independent race-of-suspect effect. [The data] reveal[] only small and inconsistent differences in death sentencing rates between blacks who killed whites and whites who killed whites, at each level of aggravation." Id. at 71. Their findings on the "scale of aggravation" were also of extraordinarily high statistical significance. Id. at 74. Gross and Mauro report the overall level of statistical significance as $p < .001$, and explain the concept of statistical significance (in terms of the "p-value") and the meaning of it at 71 n. 118. While the Court is familiar with the meaning of statistical significance, its prior decisions have discussed significance in terms of "two or three standard deviations." See e.g. Castaneda v. Partida, 430 U.S. 482, 496-97 n. 17 (1977) ("As a general rule for ... large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," that difference can be properly deemed not due to chance but instead to the operation of the factor tested for). Professors Baldus and Cole have explained that a rule requiring two or three standard deviations "is essentially equivalent to a rule requiring significance [in terms of "p-value] at a level in the range of below 0.05 or 0.01." D. Baldus & J. Cole, Statistical Proof of Discrimination, 295-97

(1980). Thus the overall level of statistical significance reported by Gross and Mauro for the "scale of aggravation" analysis, p <.001, is ten times stronger than the level of significance required by the Court in Castaneda to support an inference of discrimination.

(2) Second, Gross and Mauro undertook a multiple regression analysis of the known variables affecting a Florida capital sentencing decision. Id. at 75-83. As Gross and Mauro described it,

> Multiple regression is a statistical technique for sorting out the simultaneous effects of several causal or "independent" variables on an outcome or "dependent" variable. Multiple regression analysis produces a mathematical model of the data that includes estimates of the effects of each independent variable on the dependent variable, controlling for the effect of the other independent variables. This technique can be used to test for racial discrimination in a set of sentencing decisions by designating the sentencing choice as the outcome variable in a model that includes the racial characteristic of interest as a causal variable along with the legitimate variables that might explain these decisions. If the racial variable has a statistically significant effect on the outcome variable in this model (that is, an effect that would be unlikely to occur by mere chance), that demonstrates that the racial characteristic is associated with these outcomes in a way that cannot be explained by the legitimate variables that are included in the model.

37 Stanford L. Rev. at 75-76. The results of the regression analysis confirmed in every respect the pattern previously shown by the data: "Multiple logistic regression (or "logit") analysis reveals large and statistically significant race-of-victim effects on capital sentencing in ... Florida. ... After controlling for the effects of all the other variables in our data set,

the killing of a white victim increased the odds of a death sentence by an estimated factor of ... about five in Florida. ..." Id. at 83.

e. To determine whether appellate review may have corrected the wide racial disparities found at the trial level, Gross and Mauro compared the racial patterns of death sentences that have been affirmed by this Court to the racial patterns of all reported homicides, controlling in the process for the most predictive non-racial aggravating factors. As with all reported homicides Gross and Mauro found the race of the victim emerged in just as strong a pattern among affirmed death sentences as it had among homicides for which death was imposed in the trial courts. As before, affirmed death sentences were far more likely for white victim homicides, 2.2% (39/1803), than for black victim homicides, 0.4% (6/1683) -- a ratio of nearly six to one. As before, this disparity persisted when controlling for three aggravating factors most highly predictive of death sentences. Appellate review has not eliminated, or even diminished in a significant way, the racially-based imposition of the death sentence in Florida.

f. Before reaching their conclusions on the basis of these findings, Gross and Mauro undertook two additional steps of analysis.

(1) First, they addressed the matter of "omitted variables." In this regard, they reasoned that in order for an omitted variable to change the findings to any significant degree, the variable would have to meet three conditions: "(1)

it must be correlated with the victim's race; (2) it must be correlated with capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis." Id. at 100. After analyzing several omitted variables in relation to these conditions, including the strength of the evidence of guilt and the defendant's criminal record, they concluded: "[W]e are aware of no plausible [omitted variable] that might explain the observed racial patterns in capital sentencing in legitimate nondiscriminatory terms." Id. at 102.

(2) Second, Gross and Mauro considered the findings of other research in order to assess the validity of their findings. The other research which they considered includes: Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Delinquency 563 (1980); Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976, 33 Stan. L. Rev. 75 (1980); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981); Radalet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am Soc. Rev. 918 (1981); Radalet & Pierce, Race and Prosecutorial Discretion in Homicide Cases [now published at 19 Law & Soc. Rev. 587 (1985)] 37 Stan. L. Rev. at 43-44, 102. They concluded that the findings of other research conducted in Florida "closely parallel" their findings showing a sizable race-of-victim-based disparity in capital sentencing. Id. at 102.

(3) Further, the findings of other research confirm "that the racial patterns in capital sentencing that we have observed from 1976 through 1980 have been stable phenomena in ... Florida. ..." Id.[1]

---

[1] This is so because the data analyzed in all of the other studies (except the Arkin study, 33 Stan.L.Rev. 75) was for the period 1972-1978 and was collected through a different process than that utilized by Gross and Mauro: It was collected by a field investigation method similar to that employed by Professor Baldus in Georgia. See Radalet & Pierce, 19 Law & Soc. Rev. at 595-96. The process of data collection and the kind of data collected were described in Foley & Powell, 7 Crim. Just. Rev. at 17-18:

> The information was gathered from court records by law students using a standard form. The data consisted of demographic information on the offender and victim, information concerning the trial and its outcome. The demographic information consisted of: age, race, sex, education (of defendant and victim), occupation (of defendant and victim -- unemployed, illegal occupation, unskilled, skilled, or professional), and prior convictions of defendant (none, misdemeanors, felony). Information collected on the offense included: crime as charged (every case studied was an indictment for first degree murder), additional offenses (whether or not there were any accomplices), county, and circumstances of the crime (spouse on spouse, parent on child, victim is other member of family, argument over money, argument while drinking, lovers quarrel, quarrel with someone other than lover, felony, possible felony), relationship between the defendant and victim (relative; lover; ex-spouse; estranged spouse or ex-lover; lover of spouse, ex-spouse, or present lover; friend; acquaintance; none), and weapons used (firearms, knives, other weapon, or hands). Information on the trial included: whether the trial was held or charges were dismissed, whether defendant pleaded guilty or not guilty, type of attorney (public defender, court appointed, or private), sentence recommended by jury, and sentence given by the judge.

g. Finally, the validity of the Gross-Mauro study is confirmed by the results recently made known in a study of the imposition of the death penalty in Georgia. Professors Baldus, Woodworth, and Pulaski have recently completed a massive study of a large sample of Georgia cases (1066) in which the defendants were convicted of murder or manslaughter. The Baldus study was the subject of an evidentiary hearing in the lower court in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985 (en banc)), cert. granted, 106 S.Ct. 3331 (July 7, 1986). This study examined the relation between more than 400 factors surrounding the defendants' and victims' backgrounds, the defendants' criminal records, the circumstances of the homicides, and the strength of the evidence of the defendants' guilt with the imposition of the death penalty. Professor Baldus and his colleagues found, as did Gross and Mauro in the Georgia part of their study, that the race of the victim was an extraordinary and strong determinant of death sentences. Two findings of the Baldus study in particular, provide strong confirmation of the validity of the study conducted by Gross and Mauro -- both in Georgia and in Florida. As reported by Gross and Mauro:

> First, the Baldus study establishes that data on the defendants' criminal records have little or no impact on the pattern of discrimination by race of victim in capital sentencing in Georgia. Second, the study demonstrates that the magnitude of the race-of-victim effect that we found in Georgia would not be reduced if we were able to control for additional variables concerning the level of aggravation of the homicides and the strength of the evidence against the defendants. The study reports a logistic regression model on the odds of a death sentence, which is comparable to several of our own, as

> well as many larger regression analyses that include numerous additional control variables. Comparisons between these larger models and the smaller one reveals two important facts: (1) the race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

37 Stan. L. Rev. at 103-04 (footnotes omitted).

h. On the basis of these analytical steps, Gross and Mauro concluded that "[t]he major factual finding of this study is simple: There has been racial discrimination in the imposition of the death penalty under [Florida's] post-Furman statute[]. ... The discrimination that we found is based on the race of the victim, and it is a remarkably stable and consistent phenomenon." ... Id. at 105.

A hearing on the defendant's motions was had on September 26, 1986 before the Honorable Mario Goderich, Circuit Court Judge. (T.). Defense counsel requested an evidentiary hearing, informing the court of the need for expert testimony and the names of three prominent experts who would be available to assist counsel in proving Stewart's claim. (T.). These experts are Professors William Bowers, Marvin Wolfgang and Hans Zeisel. (T.). The state agreed that if an evidentiary hearing was ordered, it would be impossible to prepare for it prior to Stewart's scheduled execution. (T.).

The trial court's order summarily denying Stewart's motions is a duplicate of the State's response. (A. 43-45). Notice of

Appeal was timely filed on September 26, 1986. (A. 46). This appeal follows.[2]

---

2 As in Stewart's petition for writ of habeas corpus and motion for post-conviction relief, much of the factual allegations and legal arguments are repeated verbatim from the pleadings attached in those appendices.

QUESTIONS PRESENTED

WHETHER THE TRIAL COURT ERRED IN SUMMARILY DENYING THE DEFENDANT'S SECOND MOTION FOR POST-CONVICTION RELIEF AND IN DENYING THE DEFENDANT'S MOTION FOR STAY OF EXECUTION WHERE THE ALLEGATIONS WERE SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING, AND THE DEFENDANT'S CLAIM COULD NOT HAVE BEEN ADEQUATELY PLEADED AT THE TIME OF HIS FIRST MOTION?

II

WHETHER THE TRIAL COURT'S APPLICATION OF THE NEW SUCCESSOR BAR TO THIS CASE VIOLATES THE EX POST FACTO CLAUSE?

SUMMARY OF ARGUMENT

Stewart's claim of arbitrary and discriminatory imposition of the death penalty should not have been summarily dismissed. The statistical analyses proferred in support of his claim demonstrates a large race-based disparity which, to a significant extent, has eliminated the most common nondiscriminatory reasons for it.

Stewart's action in raising this claim in a second post-conviction motion does not constitute abuse of procedure. The statistical study upon which he principally relies was not published until after his first post-conviction motion. Moreover, his claim has just recently received judicial recognition. These factors show that Stewart could not have adequately pleaded a non-frivolous claim at the time of his initial motion. The trial court should have exercised its discretion to entertain Stewart's claim on the merits; the ends of justice demand it.

The trial court's application of the new successor bar to this case violates the ex post facto clause. The amended provision of Rule 3.850 is both retrospective and disadvantageous. The amendment did not become effective until after Stewart's first motion for post-conviction relief was heard and denied, and under the the-prevailing law, Stewart's claim would nothave been barred as successive.

ARGUMENT

I

THE TRIAL COURT ERRED IN SUMMARILY DENYING THE DEFENDANT'S SECOND MOTION FOR POST-CONVICTION RELIEF AND IN DENYING THE DEFENDANT'S MOTION FOR STAY OF EXECUTION WHERE THE ALLEGATIONS WERE SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING, AND THE DEFENDANT'S CLAIM COULD NOT HAVE BEEN ADEQUATELY PLEADED AT THE TIME OF HIS FIRST MOTION.

A. The Allegations In Support Of Stewart's Claim Are Not Subject To Summary Dismissal.

Under Florida Rule of Criminal Procedure 3.850, a prisoner is entitled to an evidentiary hearing unless the motion and the files and the records in the case conclusively show, in light of the state's response to the allegations of the motion, that he is entitled to no relief. See Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). Stewart's claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida cannot be summarily dismissed when the statistical analysis proffered in support of the claim has shown a large race-based disparity, and to a significant extent, has eliminated the most common nondiscriminatory reasons for it.

A claim supported by factual allegations which, if proved, would establish the right to relief, may nevertheless be dismissed summarily if those allegations are "wholly incredible." Blackledge v. Allison, 431 U.S. 63 at 74, 97 S.Ct. 1621, 1629, 53 L.Ed.2d 136 (1977). "The critical question is whether [the] allegations, when viewed against the record ... [are] so 'palpably incredible,' ... so 'patently frivolous or false,' ... as

to warrant summary dismissal." 97 S.Ct. at 1630. (citations omitted). Factual allegations are not wholly incredible under this test simply because they may appear "improbable." Machibroda v. United States, 368 U.S. 487 at 495-96, 82 S.Ct. 511 at 514 (1962). Thus, if "the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible," 368 U.S. at 496, the claim which rests upon those allegations must receive appropriate evidentiary consideration.

When fairly considered, Stewart's claim, based upon the Gross-Mauro study and other studies of Florida capital sentencing decisions, cannot be found "wholly incredible" when the statistical analysis alleged in support of his claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it. See Texas Department of Community Affairs v. Burdine, 450U.S. 248, 253-54, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

If discrimination can be shown by statistical evidence, a claimant's allegations must be "sufficient" in two respects in order to survive summary dismissal. First, the allegations must reveal racial disparities of a sufficient magnitude to permit the factfinder to infer that race has been a consideration in the imposition of death sentences. Second, the claimant's allegations must sufficiently eliminate the potential nondiscriminatory reasons for the racial disparities to permit the factfinder to infer that the disparities are "unexplainable on grounds other than race." Village of Arlington Heights v. Metropolitan Housing

Development Corp., 429 U.S. 252, 266, 97 S.Ct. 535, 50 L.Ed.2d 450 (1977). While significant racial disparities alone would be enough in some circumstances to permit the inference of discrimination, Id. at 266 & n. 13, these circumstances have been limited to cases involving "stark" disparities like those presented in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 1073 (1886) (ordinance excluding 100% of Chinese citizens and 0% of non-Chinese citizens from further conduct of laundry business) and Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (statute redefining the boundaries of Tuskegee, Alabama to "remove from the city all save four or five of its 400 Negro voters while not removing a single white voter"), and to jury composition cases which, though involving less extreme disparities, permit an inference of discrimination "(b)ecause of the nature of the jury-selection task. ..." Village of Arlington Heights, 429 U.S. at 266 n. 13. Neither of these circumstances is presented here, for the disparities are not as stark as those in Yick Wo or Gomillion,[3] and the jury selection task is far simpler than the capital sentencing task.[4] Accordingly, "a litigant who wishes to

---

3 In comparison to those cases, where the disparities were or nearly were 100 percentage points, the racial disparity in Florida' capital sentencing decisions is 32.4 percentage points (43.3% of homicide victims are black but only 10.9% of all the death sentences imposed are for black-victim homicides).

4 See Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C.D. L. Rev. 1275, 1309-10 (1985) (explaining why racial disparity alone can permit the inference of discrimination in jury-selection cases, since "no criteria other than eligibility are supposed to be considered," and in contrast, why racial disparity alone can-
(Cont'd)

prove racial discrimination in sentencing must also show that plausible nonracial factors do not explain any apparent racial disparity." Gross, 18 U.C.D. L. Rev. at 1310.

Stewart's allegations reveal that the magnitude of the race-based disparity in capital sentencing in Florida is virtually identical to the magnitude of the disparity revealed by the Baldus study in Georgia. After multiple regression analysis of the Florida data, Gross and Mauro found that the likelihood of receiving a death sentence in Florida for killing a white victim was 4.8 times greater than for killing a black victim. Using the same methodology, Baldus found a 4.3 times greater likelihood of death for killing a white victim in Georgia. McCleskey v. Kemp, 753 F.2d 877, at 897 (11th Cir. 1985)(en banc).[5]

While the statistical analysis must "eliminate[] the most common nondiscriminatory reasons" for the racial disparity, Texas Department of Community Affairs v. Burdine, 450 U.S. at 254, it is not required to eliminate every conceivable reason -- either for the claimant to survive summary dismissal or for the claimant to prevail in an evidentiary hearing. See Bazemore v. Friday, 106 S.Ct. 3000 at 3009 (1986). That there may be "many [other] factors go[ing] into" the allegedly discriminatory decisions does not defeat the prima facie case if it is otherwise sufficient to permit an inference of discrimination. Id. at 3010, n. 14.

---

not permit a similar inference in capital cases, since "many factors are supposed to be considered in sentencing").

5 The method for computing this expression of "odds" is described by Gross and Mauro, supra, 37 Stan. L. Rev. at 77.

While respondents may defend against a prima facie case on this basis in an evidentiary hearing, they cannot defeat it by simply "declar[ing] ... that many [other] factors go into" the decisions. Id. Rather, they must "demonstrate that when these [other] factors [are] properly organized and accounted for there [is] no significant disparity. ..." Id. (emphasis supplied). Accordingly, if the claimant's statistical analysis eliminates the most common nondiscriminatory explanations for discrimination, he or she is entitled to proceed to an evidentiary hearing, where all of the nondiscriminatory explanations deemed relevant by the parties can be presented, and in light of both parties' analyses, the trier of fact can determine whether "it is more likely than not that impermissible discrimination exists. ..." Id. at 3009.

Mr. Stewart's allegations plainly meet these threshold requirements. The studies by Gross and Mauro and other Florida researchers have explicitly taken into account the "most common" nondiscriminatory reasons for capital sentencing disparities based on race. As Gross and Mauro found, killing during the commission of a felony, killing multiple victims, and killing a stranger are all nondiscriminatory factors highly predictive of--that is, among the most common reasons for -- a death sentence. Yet when these factors are taken into account, the likelihood of a defendant receiving the death sentence remains almost five times greater if the victim is white instead of black.[6]

---

[6] It should be noted as well that Gross' and Mauro's accounting (Cont'd)

Moreover, the capital sentencing studies in Georgia and Mississippi by Baldus and Berk -- which have eliminated all or virtually all of the potential nondiscriminatory reasons for racial disparities in capital sentencing -- and the capital sentencing studies in Florida undertaken by Foley, Powell, and Bowers -- which have eliminated potential nondiscriminatory reasons for these racial disparities in addition to those eliminated by Gross and Mauro -- have led to identical findings concerning race-of-victim disparities. The disparities found by Gross and Mauro in Georgia, Mississississippi, and Florida have not been reduced or explained when additional explanatory factors have been taken into account. Thus, it is reasonable to infer, as Gross and Mauro have, that their Florida study is just as valid an assessment of sentencing decisions.

---

for the relationship between the defendant and the victim has eliminated two of the four factors presented by the state in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), as the nondiscriminatory reasons for the race-of-victim disparity in Florida's capital sentencing decisions. "As a general rule, the State contended, murders involving black victims have not presented facts and circumstances appropriate for imposition of the death penalty [,] ... [such murders] hav[ing] in the past fallen into the category of 'family quarrels, lovers quarrels, liquor quarrels, [and] barroom quarrels.'" 578 F.2d at 612 & n. 37. Taking into account only homicides in which the defendant and the victim were strangers, however -- thus eliminating homicides arising from family quarrels or lovers' quarrels -- Gross and Mauro found that even in such circumstances, a death sentence was five times more likely to be imposed when the victim was white instead of black.

When Foley and Powell, and thereafter Bowers, controlled for the other two nondiscriminatory factors urged by the state -- "liquor quarrels and barroom quarrels" -- the race-of-victim disparities remained and were just as sizeable." See Foley and Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. Just. J. 16 at 18-22; Bowers, The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 74 Crim. L. & Criminology,1067 at 1073-75.

Having demonstrated racial discrimination of an unconstitutional magnitude and having eliminated the most common nondiscriminatory factors that might explain the racial disparities in Florida's capital sentencing decisions, Stewart's proffered statistics manifestly permit an inference of discrimination. Nothing more can be or should be required in order for a post-conviction claim to survive summary dismissal. There is, however, an additional compelling reason for this conclusion in Stewart's case: the "unique opportunity for racial prejudice to operate but remain undetected" in capital sentencing proceedings. Turner v. Murray, ___ U.S. ___, 106 S.Ct. 1683 at 1687 (1986).

As the Supreme Court recognized in Turner, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Id. Since "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence,' Id. at 1688, the Court was unwilling to tolerate that risk in a capital sentencing proceeding, even though it has been willing to tolerate it to a limited extent in non-capital trials. Id. at 1688, n. 8.

What is shown by Stewart's allegations is a far greater "risk of racial prejudice influencing ... capital sentencing proceeding[s]" than was shown in Turner. The only showing of this risk in Turner was that the defendant was black and the

victim white. Id. at 1694-95 (Powell, J., dissenting).[7] Here, in contrast, there are substantial and detailed factual allegations showing not only a greater risk of racial prejudice affecting capital sentencing, but also an actual, measurable (and measured) effect of racial prejudice upon capital sentencing proceedings during the very period within which Stewart was tried and sentenced.

The teaching of Turner is plain in relation to Stewart's claim. Because of the unique opportunity for racial prejudice to operate in capital sentencing proceedings, as well as the unique seriousness of its operation in this context, the Constitution requires greater attentiveness to the risk that racial prejudice may have been a factor in capital sentencing determinations. Where, as here, a methodologically-sound statistical analysis has found marked and systematic racial effects upon capital sentencing decisions, the claim drawn from that analysis is at least entitled to evidentiary consideration.

For these reasons, the denial of Mr. Stewart's claim without evidentiary consideration was improper.

---

7 Indeed Justice Powell indicated that the demonstration of this risk would have been stronger had Turner presented studies -- apparently similar to the Gross-Mauro study -- "purport[ing] to show that a black defendant who murders a white person is more likely to receive the death penalty than other capital defendants ... in Virginia." Id.

B. The Failure Of Stewart To Assert This Claim Does Not Constitute An Abuse Of Procedure.

Florida Rule of Criminal Procedure 3.850 now provides, in pertinent part:

> A second or successive motion may be dismissed ... if new and different grounds are alleged [and] the judge finds that the failure of the movant or his attorney to assert those grounds in a prior moton constituted an abuse of the procedure governed by these rules.

This rule is similar to Rule 9.(b), Rules Governing §2254 Cases in the United States District Court. 1984 Committee Note, Fla. R. Crim. P. 3.850; Witt v. State, 564 So.2d 510, 512 (Fla. 1985).

Stewart's claim of racial discrimination in the imposition of the death penalty statute was not raised in his first post-conviction motion because the claim could not have been adequately pleaded then. As Stewart alleged in his second motion, he did not know and could not have known about the facts supporting this claim at the time he filed his initial motion. This claim is based, in principle part, on a statistical analysis that was not published until November, 1984. Until very recently, the claim had been summarily rejected in numerous state and federal cases. See, e.g., Sullivan v. State, 441 So.2d 609 (Fla. 1983); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). It was not until McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc) that a court had given serious, plenary consideration to such a claim. In McCleskey, the court established new standards governing the evaluation of claims concerning the discriminatory application of the death penalty. The intervention of these new

standards prompted the Eleventh Circuit to remand a Florida case for reconsideration in light of the McCleskey standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir. 1975). The United States Supreme Court has granted certiorari in McCleskey and in Hitchcock v. Wainwright, 106 S.Ct. 2888 (June 9, 1986) (presenting the question whether summary dismissal of this claim is proper). Thus, if Stewart had presented his claim earlier, without the detailed statistical proffer addressing the purported weakness of earlier studies and in the absence of judicial recognition of his claim, the trial court would have been obliged to dismiss it as frivolous. See Ford v. Strickland, 734 F.2d 538 (11th Cir. 1984) (habeas corpus petitioner who first raised claim of insanity in second petition did not abuse the writ where there was no evidence to suggest that incompetency issue was available when he filed his initial petition).

"The 'abuse of the writ' doctrine is of rare and extraordinary application." Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir. 1980). The doctrine has developed as a result of the familiar rule of law that a denial of an application for habeas corpus is not res judicata with respect to subsequent applications. Sanders v. United States, 373 U.S. 1, 7, 83 S.Ct. 1068, 1072, 10 L.Ed.2d 148, 156 (1963). The Supreme Court has indicated that the inapplicability of res judicata to habeas has roots within our jurisprudential system based upon our concern that neither life nor liberty be deprived unconstitutionally:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government ... [is]

> always [to] be accountable to the judiciary for a man's imprisonment,' Fay v. Noia, supra (372 U.S. at 402), access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.

Sanders v. United States, 373 U.S. at 8, 83 S.Ct. at 1073.

In discussing what constitutes an abuse of the writ, the Court stated:

> To say that it is open to the respondent to show that a second or successive application is abusive is simply to recognize that 'habeas corpus has traditionally been regarded as governed by equitable principles. United States ex rel. Smith v. Baldi, 344 U.S. 561, 573 [73 S.Ct. 391, 397, 97 L.Ed. 549] (dissenting opinion). Among them is the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks. Narrowly circumscribed, in conformity to the historical role of the writ of habeas corpus as an effective and imperative remedy for detentions contrary to fundamental law, the principle is unexceptionable.' Fay v. Noia, supra [372 U.S. at 438 [83 S.Ct. at 848]). Thus, for example, if a prisoner deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings rather than one or for some other such reason, he may be deemed to have waived his right to a hearing on a second application presenting the withheld ground. The same may be true if, as in Wong Doo [v. United States, 265 U.S. 239, 44 S.Ct. 524, 68 L.Ed 999] the prisoner deliberately abandons one of his grounds at the first hearing. Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

373 U.S. at 17-18.

But, if a petitioner presents some "justifiable reason" explaining his actions, reasons which "make it fair and just for

the trial court to overlook" the allegedly abusive conduct, the court should address the successive opinion. Price v. Johnston, 334 U.S. 266 at 291, 68 S.Ct. 1049 at 1063, 92 L.Ed. 1356 (1948).

Finally, it is important to note that a judge always has the discretion -- and sometimes the duty -- to reach the merits of a claim. Sanders v. United States, 373 U.S. at 18-19.

In this case, Stewart has presented justifiable reasons for raising this substantial claim in his second post-conviction motion. The ends of justice demand that the trial court reach the merits of his claim.

II

THE TRIAL COURT'S APPLICATION OF THE NEW SUCCESSOR BAR TO THIS CASE VIOLATES THE EX POST FACTO CLAUSE.

Prior to January 1, 1985, Florida Rule of Criminal Procedure 3.850 provided in pertinent part: "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." This Court interpreted this provision to mean that the trial court may summarily dismiss those issues raised in a second motion for post-conviction relief that had previously been adjudicated on their merits; this Court further held that the court may not summarily dismiss a successive motion that raises issues that were either summarily denied or dismissed for legal insufficiency in the initial motion. McCrae v. State, 437 So.2d 1388 (Fla. 1983); Christopher v. State, 489 So.2d 22 at 24 (Fla. 1986).

The amendment to that provision of the rule is more restrictive, and it now provides:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

The trial court in this case used this new provision to summarily dismiss Stewart's second motion for post-conviction relief which raised a new ground not previously decided on its merits. The retroactive application of this provision to Stewart's case violates the constitutional prohibition against ex

post facto laws. Stewart disagrees with this Court's contrary decision in Christopher, supra for the following reasons.

Decisions by the United States Supreme Court "prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. ... A law need not impair a 'vested right' to violate the ex post facto prohibition." Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981) (citations and footnotes omitted). Accord State v. Williams, 397 So.2d 663 (Fla. 1981).

Both prongs of the Graham test are met here. The application of the successor bar would be retrospective, for the restrictive amendment did not become effective until January 1, 1985. Stewart's first motion for post-conviction relief was filed in March, 1984 and denied in September, 1984. And, the amendment would disadvantage Stewart because the prevailing law at the time of his first motion was that presentation of a new claim in a second motion was proper. See McCrae, supra. Under the pre-1985 amendment law, Stewart's discrimination claim could not have been barred as successive.

Some cases hold that no ex post facto violation occurs if the "change effected is merely procedural." Graham, 450 U.S. at 29, n. 12. "Alteration of a substantive right, however, is not merely procedural, even if the statute takes a seemingly procedural form." Id. In Weaver, the prisoner claimed that a statute enacted after the crime for which he was incarcerated and which

altered the method of gain-time computation affected him detrimentally and was therefore an ex post facto law. In a unanimous decision, the Court reversed this Court's summary denial of relief, rejecting this Court's reasoning that gain time allowance is an act of grace which may be withdrawn, modified or denied, rather than a vested right. Id.

Because application of the amendment to this case would be both retrospective and more onerous than the pre-1985 provisions of Rule 3.850, it violates the ex post facto clause. The trial court should be ordered to entertain Stewart's motion for post-conviction relief on the merits.

CONCLUSION

For these reasons, Stewart requests this Court to reverse the order of the trial court denying his motions for post-conviction relief and for stay of execution and to remand this case for an evidentiary hearing.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida

and

ROBIN H. GREENE
Special Assistant Public Defender
Suite 1109
2655 LeJeune Road
Coral Gables, Florida 33134
(305) 444-0213

BY: Robin H Greene
ROBIN H. GREENE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to CALVIN FOX, Assistant Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 29th day of September, 1986.

Robin H Greene

ROBIN H. GREENE
Special Assistant Public Defender