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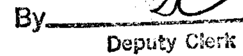
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IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART, :

Appellant,

vs. Case No. 70,015

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Kenneth Allen Stewart, Appellant, was charged by information with two counts of attempted murder in the first degree, two counts of armed robbery and arson - second degree on May 13, 1985 (R857-8). When one of the victims, Mark Harris, subsequently died, a Hillsborough County grand jury returned an indictment on May 22, 1985 accusing Stewart of first degree murder (R920). A superseding information charged Stewart with attempted first degree murder, armed robbery and arson - second degree in regard to offenses against the person and vehicle of Michelle Acosta (R874-5). The cases were consolidated for trial (R1024-5).

In a pre-trial competency proceeding, Stewart was found competent to stand trial (R1031-3,768-90). A motion to suppress intercepted statements was heard and denied on August 25, 1986 (R988-9,20-30). A motion in limine to preclude eye-witness identification of Stewart by Michelle Acosta was also heard and denied at the same hearing (R990-1,8-20).

Trial was before the Honorable John P. Griffin and a jury on August 25 through 27, 1986 (R33-763). Defense counsel objected to having Stewart shackled because of the impression it would give the jury (R33). The trial judge referred to "allegations" made in the past that Stewart might "attempt to run" (R33). He rejected the request to remove the shackles, saying "if they [the jury] are going to see them, they are going to see them" (R33-4). After presentation of the state's case, defense counsel moved for a mistrial based upon

the jurors observation of the shackles (R502). The motion for mistrial was denied (R503). The defense motion for judgment of acquittal was also heard and denied (R503-5).

The jury returned verdicts of guilt to first-degree murder (felony specified), attempted second-degree murder with a firearm, robbery with a firearm and arson-second degree (R582, 1011,904-6).

During the subsequent penalty trial, defense counsel's objection to calling the bailiff to testify as a state witness was overruled (R619-21). Defense counsel's proposal that the court instruct the jury on all of the aggravating circumstances was rejected (R590-3). Eleven special penalty phase instructions were requested by the defense; eight of which were denied (R996-1009,612-4). The defense objection to instructing the jury that Stewart could be released on parole after serving a 25 year mandatory sentence if a life sentence were imposed was denied (R616-9).

The jury was instructed on the aggravating circumstances of prior conviction of violent felony and commission during the course of a robbery (R748). The mitigating circumstances placed before the jury were emotional disturbance, impaired capacity, age and the open-ended mitigation instruction (R748-9). After the jury had retired for deliberations, they sent a request for a "list of mitigating and aggravating circumstances" (R753). The court denied the jury request but repeated his oral instructions on the previously given aggravators and mitigators (R754-5).

The jury returned an advisory recommendation of death (R756-7).

On September 30, 1986, the court heard and denied Stewart's motion for new trial (R797-804). The victim's father addressed the court and requested imposition of a death sentence (R809-10). The court continued sentencing to a later date (R811).

A sentencing proceeding held October 3, 1986 included other offenses for which Stewart had been convicted (R813-42). The court weighed two aggravating factors against three statutory mitigating factors and the non-statutory mitigating evidence (R834-7). A sentence of death was imposed (R837-8). On the armed robbery count, the court departed from the guidelines and imposed a life sentence (R839). Consecutive sentences of fifteen years each were imposed on the attempted second-degree murder and second-degree arson convictions (R839-40).

Appellant's notice of appeal was filed October 14, 1986 (R1079). An amended notice of appeal to this Court was later filed on October 27, 1986 (R1084). Court-appointed trial counsel was permitted to withdraw and the Public Defender appointed as appellate counsel (R1091).

Pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Fla.R.App.P. 9.030(a)(1)(A)(i), Kenneth Allen Stewart, Appellant, now takes appeal to this Court.

STATEMENT OF THE FACTS

A. Pre-Trial Motions

At the hearing on Stewart's Motion in Limine regarding tainted eyewitness identification, the State agreed that selection by the deceased victim, Mark Harris, of Stewart's photo from a photopack could not be presented at trial (R8). The court accordingly granted that portion of Stewart's Motion in Limine (R8,990).

Defense counsel argued that Michelle Acosta's identification of Stewart was also tainted. When Acosta first selected Stewart's photo from the photopack, she said that she was not positive (R8). She admitted seeing Stewart only briefly in the darkened car (R8-9). Subsequently, Acosta saw a news telecast where Stewart was wearing, according to Acosta, the same clothes as on the night of the incident (R9). She then became positive that Stewart was her assailant (R9,19). Later, on May 17 in a preliminary hearing, Acosta identified Stewart in-court (R10,13).

Detective George Lease testified that he was present at the preliminary hearing (R15). There were five or six prisoners present including Stewart (R15). Detective Lease said that all were white males wearing jail clothes (R15). Acosta looked at the group and pointed out Stewart (R16-8). The detective did not know whether Acosta's identification was based upon her previous viewing of the photopack and television newscast (R17).

The court ruled that the eyewitness identification was not *so* tainted that it should be kept from the jury (R20).

Relying on Article I, section 12 of the Florida Constitution, Stewart moved to suppress his statements during a telephone conversation which were intercepted by Detective Lease (R20-30,988-9). While Stewart was in custody on this charge, Detective Lease went to the Berryhills' (Stewart's grandparents) residence on April 25, 1985 in the course of his investigation (R20-1). By coincidence, as Detective Lease knocked on their door, the telephone rang and Mr. Berryhill announced that it was Stewart calling (R21,23). Detective Lease testified that he asked the Berryhills if they had an extension phone and if he could listen in on the conversation (R23). Both of them gave permission for Detective Lease to listen in on the extension phone (R23). Mrs. Berryhill then questioned Stewart about the incident and he made incriminating statements (R23).

Defense counsel also argued a violation of Stewart's Miranda rights as an alternative ground for suppressing his intercepted statements (R25-6). He contended that Mrs. Berryhill was acting as a police agent when she questioned Stewart about the offense (R27). The trial judge ruled that Stewart's statements were purely voluntary and that he had no reasonable expectation of privacy in the conversation (R30). The motion to suppress was therefore denied (R30).

B. Trial-Guilt or Innocence Phase

The homicide victim, Mark Harris, was shot in the back on April 14, 1985 (R318-20). The bullet struck Harris's backbone, bruising the spinal cord and causing paralysis (R427-8). While confined in the hospital, Harris developed pneumonia and died May 12, 1985 (R422,431-2). The medical examiner gave his opinion that the cause of death was the gunshot wound which weakened the body (R430-2).

Michelle Acosta was an eyewitness to the shooting of Harris and victim of the attempted murder and robbery charges. She testified that she and Mark Harris went to Ben T. Davis beach on April 13, 1985 in her 1978 Chevrolet Monte Carlo (R289-90). They drank a six-pack of beer and left around midnight to take Harris to his apartment (R291-2). While driving on Nebraska Avenue in Tampa, Acosta stopped to pick up a hitchhiker (R292-3). The hitchhiker had "slurred speech" and was probably drunk or "on something" (R296,311). As they approached Harris's residence, telling the hitchhiker that the ride was over, the hitchhiker asked them if they could take him back to 15th Street (R297). Harris and Acosta agreed to do this (R297-8). They were driving on 15th Street when the hitchhiker said they could let him off in the parking lot of an elementary school (R298). Acosta turned in and stopped her car (R298).

At this point, the hitchhiker said "don't move; I have a knife" (R298,312). She froze for a few seconds and then stepped on the accelerator, hoping to make the hitchhiker lose his balance (R299). The hitchhiker hit her head with the butt

of his gun (R299). Then he fired three shots, hitting both her and Harris (R299-300).

The hitchhiker exited on the passenger side of the car and dragged Harris out (R300). He was yelling "get out of the car" (R300,308). Acosta got out; the hitchhiker jumped in and drove off in her automobile (R300).

Acosta testified that the hitchhiker never indicated that he was going to rob them (R309). She was wearing a watch and necklace but the hitchhiker made no attempt to take thse or anything from Harris (R309-11).

The witness pointed out Stewart as the person she had picked up hitchhiking (R293-4). She also testified that she previously selected his photo from a photopack and pointed him out in a previous courtroom hearing (R294-5).

Terry Lyn Smith testified that he was living on the streets in Tampa when Appellant invited him, around the end of March 1985, to stay in his apartment (R354-5). A woman named Margie resided there also (R355). In the early morning hours of April 14, 1985, Smith was drinking at the Starlight Lounge on Nebraska Avenue when Margie entered and signaled him to come outside (R356-7). Outside, he saw Stewart sitting in the driver's seat of a Chevrolet Monte Carlo (R357). Smith got in and they proceeded to the apartment where Stewart opened the trunk of the car (R357).

Smith testified that he helped Stewart take two tennis rackets, a baseball glove, a CB radio and other items from the car into the apartment (R357-8). Then the two men rode around in the car.

In response to Smith's question about how he got the car, Stewart replied that he was picked up hitchhiking by a man and a woman (R360). When they got near an apartment complex on 15th Street, Stewart told the driver to pull the car over (R361). When the car didn't pull over, Stewart shot both the man and the woman (R361). He forced both of them out of the car and drove away (R361-2). Smith testified that after driving for a while, Stewart stopped at a gas station and filled up a two liter bottle with gasoline (R363). Stewart and Smith proceeded to Floriland Mall, where Stewart doused the automobile with the gasoline and ignited it (R363-4). According to the witness, Stewart burned the car to destroy any possible fingerprints (R364).

The testimony of the State witnesses Acosta and Smith was corroborated by additional evidence. When Stewart was arrested by Tampa Police patrolman Francisco Pijuan, a revolver and ammunition were also seized (R336-7). FBI agent Robert Sibert examined the bullet removed from Harris's body and concluded that it could have been fired from the revolver seized from Stewart (R471-3). Elemental analysis of the bullet showed that three of the cartridges seized from Stewart had exactly the same elemental compostion (R495).

At the time of his arrest, Stewart gave a written consent to search his apartment (R398-9). The search of the apartment yielded two tennis rackets, a CB radio, a baseball glove and ball, and a barbeque grill (R400). Acosta identified these items as having been in the trunk of her car (R302-3,305).

Estelle Berryhill testified that she received a telephone call from Stewart, her grandson, and that Detective Lease listened to their conversation on the extension phone (R382-3). She couldn't remember exactly what was said but knew that Stewart admitted shooting someone and said Terry Smith burned the car (R384,387). Detective Lease testified about the same conversation and said that Berryhill asked Stewart if he had shot "that guy and girl'' (R402). Stewart admitted shooting them (R402). In response to her question about why he had shot them, Stewart replied "I guess to rob them" (R403).

Detectives Roo and Lease confirmed that Michelle Acosta had tentatively identified Stewart from the photopack and made a positive identification at a preliminary hearing (R407,420). An arson investigator gave an expert opinion that Acosta's car had been set on fire with assistance from a flammable liquid (R333).

The defense presented no testimony or evidence. In closing argument, defense counsel conceded that Stewart had done the shooting (R512). He contended that Stewart had no intention to rob Acosta and Harris (R521-2). The shooting of Harris was called at most a second-degree murder (R528).

The jury's verdict specified that Stewart was guilty of felony murder in the first degree (R1011). The shooting of Acosta was found to be attempted second degree murder with a firearm (R904).

C. Trial-Penalty Phase

The State's evidence in penalty phase consisted of judgments of guilt for the crimes of attempted murder in the first degree, attempted armed robbery and aggravated assault entered against Stewart on June 9, 1986 (R626). The bailiff, Anthony Marone, testified that he put the fingerprints on the judgments and identified Stewart as the same person who had been adjudged guilty of the offenses (R628-9).

Bruce Scarpo, Stewart's stepfather, recounted Stewart's upbringing (R634-73). He first met Appellant when he was 18 months old (R635). Stewart's mother worked for Scarpo part-time and was in danger of having the child taken away by court order (R635). Scarpo decided to marry Stewart's mother in order to prevent loss of young Kenny Stewart (R635).

In order to get away from the drunkenness and violence in the mother's family, Scarpo moved to Charleston, South Carolina with Kenny Stewart and his mother (R636). However, Kenny's mother started to drink and left with Kenny when he was three years old (R637). She and Kenny traveled around the country with her boyfriend who claimed to rob convenience stores for a living (R637-8). Eventually the relationship broke up and Kenny's mother left him with Scarpo in Charleston (R640).

When Scarpo attempted to testify to incidents of abuse which Kenny reported suffering while traveling with his mother and her boyfriend, the State's objection to hearsay was sustained (R641-4). The court ruled that Stewart would have to testify himself in order for this evidence to come in (R644).

Scarpo was remarried to a woman with three children and Kenny was raised with them (R640,645). Kenny fit in but had an especially strong attachment to Scarpo who he believed was his natural father (R653-4). He had no major problems before the age of thirteen (R646-7).

At this age, Stewart found out that Scarpo was not his natural father (R648-9). He ran away from home, choosing to live with his grandparents in Tampa (R647-51). Stewart learned that his real father had been killed in a barroom fight but Scarpo had never told him (R649).

Kenny had never had problems with the law before this time (R651). While in Tampa he was arrested for an attempted burglary and placed on probation in juvenile court (R650). The grandparents no longer wanted custody of Kenny *so* he returned with Scarpo to Charleston (R650-1).

When Kenny returned, he was a changed individual (R651). Before he was an average student in school; afterwards, he skipped school and was suspended (R653). Finally the family tried psychological counseling (R654-5). Photographs from the family album were introduced to show that before age **13,** Kenny was very clean and had a cheerful personality (R658). Afterwards, his hygiene went downhill and he developed a sullen personality (R658,662). Scarpo testified that Kenny felt a lot of turmoil because he believed that Scarpo had been instrumental in his real father's death (R652,664).

The witness said that none of his other children ever had criminal problems (R664). He asked the jury to recommend

life because he believed that Stewart could benefit from education and psychological counseling in the prison system and could be an asset to the community (R665).

On cross-examination, the witness was asked if he was aware of Stewart's convictions that had been introduced into evidence as well as those crimes for which Stewart was convicted in the guilt or innocence phase of this trial (R667-9). Then, the prosecutor asked if Scarpo was aware of other convictions (R669). Defense counsel's motion for mistrial was denied (R669-70).

James Hayward testified that Stewart resided with him for two to three months in 1977 (R675). At that time, Hayward told Stewart about his mother's suicide in 1968 (R675). He also told Stewart that his father had gotten into an argument during a pool game in a barroom and was shot to death in 1971 (R675-6). Other members of the Stewart family who met violent deaths included his uncle who was murdered in 1968 and two aunts who perished in an automobile accident while fleeing charges of child abuse (R676).

Dr. Walter Afield, a psychiatrist, testified that Stewart was suffering from a mental disease which was difficult to label (R688). He noted that Stewart was chronically depressed (R688). Afield called his upbringing "a textbook case on how to raise a sociopath" (R688) amplified by a "postgraduate course in how to be a psychopath" (R690).

Dr. Afield testified that the first five years are critical in human development (R688-9). When a child is badly abused, he develops into an adult who cannot be rehabilitated

(R690-2). Afield concluded that while Stew rt could appreciate the criminality of his conduct, his ability to conform his conduct to the requirements of law was impaired (R694). Afield said that Stewart had been "programmed from day one ... [t]o either kill himself or kill somebody else" (R695).

On cross-examination, Afield agreed that Stewart was not rehabilitatable and would always be a danger to society (R700).

Joyce Engle, a rehabilitative services worker, testified that she first met Stewart while he was in jail (R701). Since then, they have become very close (R701). She testified that Stewart showed a great deal of remorse for this shooting (R702).

When defense counsel tried to el cit testimony from Engle that Stewart had a ritual of going to his mother's grave and drinking before he would commit a crime, the State objected (R702-3). The court sustained the objection on the basis that the testimony would be hearsay (R703).

Engle concluded by stating that Stewart had a lot of emotional problems and was aware of this (R704). Stewart had asked for help and deserved to be given some (R704).

Cowboy actor Lash LaRue testified that he had visited with the Scarpos when Kenny Stewart was growing up (R705-7). When Stewart was about 8 years old, the witness showed him about popping whips (R705). Stewart was a normal young boy and didn't seem to have any problems (R706).

Later on when Stewart was 13 or 14, LaRue noticed a change in attitude (R706). He mentioned the change to Bruce Scarpo who told him that Kenny hadn't adjusted to learning that Scarpo wasn't his natural father (R706-7).

LaRue asked the jury to allow Stewart to live so that he could have an opportunity to learn about religion (R707-8).

By agreement of the parties, the deposition of Susan Alice Berg Medley, Stewart's stepsister, was read into evidence (R713-23). The witness said that Stewart was mischievous as a child but never got into any serious trouble before he was 13 (R715-8). When he found out that he was not related by blood to Bruce Scarpo, he was grief stricken (R717). He got into trouble for shoplifting and stealing a CB radio; then he ran away (R717-8).

Medley testified that she thought that hurting somebody would be out of character for Stewart (R722). She said she thought that he could become a productive member of society (R721).

Joanne Scarpo, Stewart's stepmother, testified in the same vein as the other family members. Kenny Stewart was a "jovial little boy" who was very attached to his stepfather, Bruce Scarpo (R724-5). When he turned 13 and became aware that Scarpo was not his natural father, Stewart became very troubled and brooded constantly (R725-6). He never got into trouble with the law before this age (R726).

Joanne Scarpo also testified that Stewart was very remorseful about the shootings (R727-9). Stewart had corresponded with the family pastor from Charleston and was developing religious awareness (R727-9).

In closing argument, the prosecutor asked the jury:

> How much longer is that man going
> to be allowed to run the streets or

have the chance of getting out
and continue?

(R735)

The jury returned a death recommendation (R756-7,1012).

D. Motion for New Trial Hearing

At the hearing on Stewart's motion for new trial, defense counsel again argued the prejudice caused by requiring Stewart to stand trial while wearing shackles (R798-801). Counsel particularly noted that the defense table was open and the shackles clearly observable from the jury box (R798-9). When Stewart was subsequently tried on another murder charge, the judge placed additional security in the courtroom rather than requiring shackles (R800).

The trial judge commented that he considered Stewart an escape risk (R803). He had been informed by bailiffs that Stewart had been able to slip his hands free of handcuffs placed on him (R803).

The trial judge also noted that he made observations during the trial and the shackles were unobtrusive (R804). If the jurors had looked closely, they could have seen the shackles but the defendant was not required to walk in the presence of the jury (R804). The court denied the motion for new trial (R804).

Arguments were then held on sentencing (R804-9). The victim's father addressed the court and asked for a death sentence (R809-10). He showed the judge some photographs of the victim and said that he had always told his son not to pick up hitch-

hikers (R809-10). The court put off imposition of sentence until a later date (R811).

E. Sentencing Hearing

A consolidated sentencing hearing was held where Stewart was sentenced for several other offenses in addition to the convictions in this case (R815-42). All of the offenses occurred during the period between June 8, 1984 when Stewart walked away from his county jail trustee position and April 19, 1985 when he was apprehended (R816).

On the Harris first-degree murder conviction, the sentencing judge made oral findings that two aggravating circumstances were proved; prior convictions of violent felonies and committed during the course of a robbery (R834-5). The judge further found three statutory mitigating circumstances; extreme mental or emotional disturbance, impaired capacity, and age of the defendant (R835-6). The court also noted the testimony about Stewart's childhood and emotional trauma at age 13 as non-statutory mitigating evidence (R836-7). The judge found that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death (R837-8).

On the armed robbery, attempted second-degree murder and second-degree arson convictions, the judge decided to depart from the guidelines and imposed statutory maximum consecutive sentences (R838-40). Oral reasons for departure were listed as (1) defense witness Dr. Afield's testimony that Stewart was unable to be rehabilitated and (2) that the offenses were committed during a crime spree (R839).

SUMMARY OF ARGUMENT

Detective Lease should not have been permitted to testify about the telephone conversation between Stewart and his grandmother which the detective intercepted on the extension telephone. The interception was a violation of Stewart's rights under the Florida Constitution, Article I, section 12 (search and seizure) and Article I, sections 9 and 16 (due process and right to counsel). The questioning without Miranda warnings also violated the United States Constitution, Amendments V and VI.

Stewart was denied due process by being tried in shackles without a clear showing of necessity. He was not even given a hearing to contest the judge's order that he be shackled in the courtroom. He was prejudiced in the penalty phase of the trial as well as the guilt or innocence phase because the jury could have inferred that he must be especially dangerous if he needed to be shackled.

It was error to permit the bailiff, Anthony Morone, to testify as a prosecution witness over Appellant's objection during penalty phase. The bailiff's shift from a role of neutrality to a member of the prosecution team was totally unncessary and may have contributed to the jury's death recommendation.

Defense counsel requested a special penalty phase instruction to clarify that the State retains the burden to prove that the aggravating circumstances outweigh the mitigating.

As given, the standard jury instructions may be reasonably interpreted by a juror to shift the burden to the defendant to prove by a preponderance of the evidence that the mitigating factors outweigh the aggravating factors if these aggravating factors are otherwise sufficient to support a death recommendation.

Defense counsel's request that the jury be instructed on all of the statutory aggravating circumstances *so* that he could argue to the jury that the aggravators present in this case were insufficient to require a sentence of death should have been granted. The doctored standard jury instruction actually given deprived Stewart of due process and the right to a jury determination of guilt or innocence as to each aggravating circumstance. The jury was also effectively instructed to weigh Stewart's conviction for second-degree arson under the prior conviction of violent felony aggravating factor.

Over defense counsel's objection, the trial judge instructed the jury that if given a life sentence, Stewart would be eligible for parole in 25 years. This was an inaccurate statement of the law because the legislature has abolished parole for all offenders sentenced after October 1, 1983. When combined with the prosecutor's improper argument which featured speculation on the threat Stewart would pose if released on parole, the faulty instruction constitutes reversible error.

Two evidentiary rulings during the penalty phase of Stewart's trial were prejudicial error. The State's objection to hearsay was sustained to prevent Bruce Scarpo from testifying

to acts of child abuse which Stewart reported to him as a young boy. Also, the State was permitted to question Scarpo concerning his knowledge of Stewart's convictions for non-violent crimes not otherwise in evidence.

Contrary to the United States Supreme Court decision in Booth v. Maryland, the victim's father testified before the sentencing judge about the exemplary personal characteristics of the victim. Appellant asks this Court to recede from prior precedent requiring a contemporaneous objection because there was sufficient cause to excuse the procedural default.

Finally, contrary to statute, written findings to support a sentence of death were never filed by the sentencing judge. Where written findings are not filed prior to certification of the record, this Court should vacate the sentence of death and remand for imposition of a life sentence. When imposing guidelines departures sentences on the non-capital felonies, the sentencing judge did not consider an accurate scoresheet nor did he provide written reasons for departure.

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS INCRIMINATING STATEMENTS MADE BY STEWART DURING A TELEPHONE CONVERSATION WITH HIS GRANDMOTHER WHICH DETECTIVE LEASE INTERCEPTED.

Prior to trial, Stewart moved to suppress oral statements he had made which were intercepted by police detective George Lease (R988-9,20-30). The surrounding circumstances show that while Stewart was being held in custody on these charges, he telephoned his grandparents from Hillsborough County Jail on April 25, 1985[1/] (R21). By coincidence, as the phone rang, Detective Lease was at the Berryhills' mobile home for the purpose of latent investigation (R21). When Mr. Berryhill announced that Kenny Stewart was calling, Detective Lease asked if he could listen in on the conversation on their extension telephone (R21, 23). Both Berryhills gave their permission (R23).

Mrs. Berryhill then had a conversation with Stewart while Detective Lease listened in (R23). Without prompting from the detective, Stewart's grandmother questioned Appellant about the shooting (R23). Stewart admitted the shooting during their conversation (R23).

After the motion to suppress was denied, at trial, Estelle Berryhill testified about the telephone conversation and agreed that both she and her husband consented to Detective Lease's listening on the extension phone (R383-4). She could not, however, remember

1/ Stewart was arrested and taken into custody April 19, 1985 on these charges (R848,335). His first appearance hearing was held April 23, 1985 (R1330).

exactly what Stewart said to her about the shooting (R384).

Detective Lease was then permitted to testify to his memory of the conversation (R402-3). Detective Lease testified at trial:

> Q. How did Mrs. Berryhill refer to him?
>
> A. And she, she first said, "Kenny?" And he said, "Yes, Grandma." Then the conversation proceeds.
>
> Q. Did she ask him anything?
>
> A. Yes. She asked him, "Did you shoot that guy and the girl"?
>
> Q. What was his response?
>
> A. "Yes." Said, "Yes. I did it." He admitted doing it.
>
> Q. Did she ask him why he had done it?
>
> A. Yes.
>
> Q. What did he say?
>
> A. He said, "I guess to rob them." Then he told her that, "They are in the hospital. And they are'going to be all right."

(R402-3)

The most prejudicial aspect of Detective Lease's testimony was not Stewart's admission to the shooting (this was not contested at trial), but his admission of robbery as a motive. In closing argument, defense counsel emphasized that no money or jewelry was taken from the victims (R518). He argued that Stewart might have become apprehensive when Acosta stopped the car in a dark parking lot (R521). Michelle Acosta, herself, had testified that Stewart never said or did anything to indicate

a robbery (R309,518). It wasn't until she had stepped on the accelerator and the shots had been fired that Stewart pushed Acosta and Harris out of the car (R518,521-2).

In the light most favorable to the verdict, the jury must have concluded that Stewart never formed an intent to rob the victims of the automobile until after he shot Michelle Acosta. Otherwise, they would have found him guilty as charged of attempted first-degree felony murder in the shooting of Acosta instead of attempted second-degree murder. Had Stewart's statement admitting robbery as a possible motive been suppressed, there is a reasonable likelihood that the jury would have found Stewart guilty of the lesser crime of second-degree murder in the death of Harris instead of first-degree felony murder (R1011). Hence, the admission of the intercepted admissions cannot be deemed harmless error.

As authority for suppressing the intercepted statements, Stewart relied in the trial court upon Article I, section 12 of the Florida Constitution and also on violation of his right to counsel by interrogation without giving Miranda warnings (R24-7). These constitutional grounds for suppression will be argued separately below.

A) Interception of Stewart's Telephone Conversation Violated Article I, section 12 of the Florida Constitution.

At the suppression hearing, the State contended that there was no interception of the telephone conversation within the meaning of Section 934, Florida Statutes (1985) (R26,29). The prosecutor argued that an interception occurs only when there is

a wiretap or similar electronic device employed and not where a standard extension telephone is the instrument (R26).

Justice Musmanno of the Supreme Court of Pennsylvania emphatically dismissed a similar attempt to distinguish between wiretapping and extension telephones. The outspoken justice wrote:

> An extension telephone is not like a seashell that anyone may pick up and listen to. It is not like a wishing well into which anyone may shout. It is not like a deep chasm into which one may cast a stone and then listen for the echo.
>
> * * *
>
> Listening in on a telephone extension, without authorization, on a person's private telephone conversation, is just as morally reprehensible, as well as legally improper, as tapping his telephone wire. It is all part of what Oliver Wendell Holmes, illustrious jurist and renowned patriot, designated as "dirty business." Eavesdropping which amounts to trespassing is an invasion of privacy protected by the organic law of the land.

Commonwealth v. Murray, 423 Pa. 37, 223 A.2d 102 at 109 (1966).

At bar, the trial judge did not rely upon the State's argument in his ruling. He looked to see if the constitutional rights of Stewart "to be secure in his conversation to his grandmother'' were violated (R30). The judge concluded that under the circumstances, Stewart "had no expectation of privacy in that conversation" (R30).

An adequate constitutional analysis must start with the recognition that both parties to a private telephone conversation have a reasonable expectation that the conversation will not

be intercepted. Katz v. United States, 389 U.S. 347 (1967). The question presented at bar is whether one party to the conversation can defeat the other's expectation of privacy by consenting to the intercept.

Defense counsel in the trial court relied exclusively upon Article I, section 12 of the Florida Constitution, which provides:

> SECTION 12. Searches and seizures.--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right: shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

There are two significant facets to Article I, section 12 in relation to the issue presented here: 1) Unlike the 4th Amendment, United States Constitution, Article I, section 12 specifically prohibits "unreasonable interception of private communications by any means" and 2) This constitutional right is to be construed in conformity with decisions of the United States Supreme Court regarding the scope of the Fourth Amendment.

In her dissenting opinion to State v. Hume, 512 So.2d 185 (Fla. 1987), Justice Barkett noted the express guarantee of Article I, section 12 against interception of private communications and concluded that the Florida exclusionary rule should not be limited by United States Supreme Court decisions applicable to electronic surveillance despite the conformity amendment. Regarding the conformity amendment, she wrote in her dissent to Bernie v. State, Case No. 67,535 (Fla. Jan. 7, 1988)[13 FLW 17]:

> If the intent of the amendment was to provide Floridians with only the search and seizure protections of the federal constitution, this goal could have been accomplished more easily by simply repealing article I, section 12. This, however, was not done. On the contrary, the amendment left intact the original provisions of article I, section 12, pertaining to search and seizure, including those provisions that differ from, and are more restrictive than, the fourth amendment.*
>
> * E.g., article I, section 12 includes as an express provision the right to be secure "against the unreasonable interception of private communications by any means."

13 FLW at 23.

Although the majority opinions in Hume and Bernie did not use Article I, section 12 of the Florida Constitution to extend guarantees of the Fourth Amendment, United States Constitution, neither did this Court declare Article I, section 12 to be a dead letter. It is not inconsistent with the conformity amendment for this Court to apply Article I, section 12

to search and seizure questions which have not been directly resolved by the United States Supreme Court. Particularly when an express provision such as "unreasonable interception of private communications" is implicated, this Court should read United States Supreme Court precedent narrowly.

The decision of the United States Supreme Court which is closest to the facts present at bar is that of United States v. White, 401 U.S. 745 (1971). In White, a government informant engaged in conversations with the defendant and transmitted these conversations by a radio transmitter concealed on his person. In rejecting the defendant's claim that this warrantless intrusion on his expectation of privacy in conversation violated the Fourth Amendment, the White plurality wrote:

> ... If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.
>
> *　　*　　*
>
> It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure.

401 U.S. at 752-3.

Considered in light of the facts at bar, it is evident that Stewart's grandmother acted as a police agent. Her conversa-

tion with Stewart was, in effect, transmitted to Detective Lease via the extension telephone.

However, there are also distinctions between the facts at bar and those in White. The interception of the conversation was originally proposed by Detective Lease; Mrs. Berryhill simply acquiesced to his suggestion. Thus, the police initiated the violation. Secondly, Detective Lease's investigation did not involve gathering information to stop ongoing criminal activity because Stewart had already been arrested. Lease was merely hoping to overhear incriminating statements to assure a conviction at trial.

These circumstances are sufficiently distinguishable from the facts in White that this Court should not be bound by the White plurality holding. The provision of Article I, section 12 against the "unreasonable interception of private communications by any means" should be given effect by limiting the risk that "the uninvited ear of the state is an unseen and unknown listener to every private conversation."[2/] Detective Lease should not have been permitted to testify to his eavesdropping on Stewart's conversation with his grandmother.

2/ State v. Sarmiento, 397 So.2d at 645 (Fla. 1981).

B) Interception of Stewart's Conversation Violated His Right to Counsel Under the United States Constitution, Amends. V, VI and XIV and the Florida Constitution, Article I, sections 9 and 16.

In Massiah v. United States, 377 U.S. 201 (1964), the accused and his co-defendant had a conversation concerning their charges in the co-defendant's automobile. Unbeknownst to the accused, his co-defendant had arranged to transmit their conversation through a concealed radio device to a government agent. The United States Supreme Court held that the defendant's incriminating statements could not be used as evidence against him at trial.

The Massiah decision rests on the Sixth Amendment, United States Constitution right to counsel. Incriminating words deliberately elicited from an indicted accused in the absence of his counsel by a police agent cannot be used against the accused at trial. This rule applies with equal force to "indirect and surreptitious interrogations as well as those conducted in the jailhouse". 377 U.S. at 206.

At bar, there is no doubt that Estelle Berryhill acting as an agent for Detective Lease deliberately elicited Stewart's confession to the shooting and his motive of robbery. Although the trial judge found that Detective Lease did not "pose any questions to her to ask the defendant" (R30), this is not the determinate factor. In United States v. Henry, 447 U.S. 264 (1980) the Court found an interference with the 6th Amendment right to counsel where the police specifically told the undisclosed informant not to question the accused about the offense.

It was enough that the government "intentionally creat[ed] a situation likely to induce Henry to make incriminating statements without assistance of counsel'' 447 U.S. at 274. ~~See also~~, Maine v. Moulton, 474 U.S. 159 at 176 (1985)(6th Amendment violation where the State obtains incriminating statements by knowingly circumventing the right to have counsel present during a confrontation between the accused and a state agent); Malone v. State, 390 So.2d 338 (Fla. 1980) (indirect surreptitious State action eliciting incriminating statements in absence of counsel and without Miranda warnings violates 6th Amendment).

The remaining question is whether Stewart's constitutional right to counsel had attached when the incriminating statements were elicited. Stewart was arrested and taken into custody on April 19, 1985 on these charges (R848,335). His first appearance hearing was held April 23, 1985 [3/] (R1330), two days prior to the telephone conversation.

The United States Supreme Court has stated that the Sixth Amendment right to counsel attaches at the "initiation of adversary judicial proceedings" such as indictment or arraignment. Michigan v. Jackson, 475 U.S. 625 (1986). A state cannot, however, defeat a defendant's right to counsel

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3/ As a supplement to the record on appeal, Appellant ordered a transcript prepared of the first appearance hearing as well as any documents in the court file reflecting request for or appointment of counsel. The court reporter certified that notes were taken at the first appearance hearing but they were misplaced (R1330). The Clerk of Circuit Court certified that there were no further documents relating to appointment of counsel (R1332). Unless the court reporter's notes turn up at some point, it may be necessary to return this case to the trial court for reconstruction of the record.

by postponing arraignment. The accused in Jackson, for instance, was arraigned two days after he was taken into custody on an unrelated charge. 475 U.S. at 628.

In Sobczak v. State, 462 So.2d 1172 (Fla. 4th DCA 1984), rev.den. 469 So.2d 750 (Fla. 1985), the Fourth District specifically declined to decide whether the federal Sixth Amendment right attached when the defendant was ordered to participate in a lineup. Instead, the court held that under Article I, section 16 of the Florida Constitution, a Florida defendant's right to counsel attaches at the time of first appearance. The court noted Fla. R.Cr.P. 3.111(a)(regarding provision of counsel to indigents) and Fla.R.Cr.P. 3.130(b) which provides:

> (b) Advice to Defendant. Upon the defendant's first appearance the magistrate shall immediately inform him of the charge and provide him with a copy of the complaint. The magistrate shall also adequately advise the defendant as follows:
>
> (1) That he is not required to say anything, and that anything he says may be used against him.
>
> (2) If he is as yet unrepresented, that he has a right to counsel, and, if he is financially unable to afford counsel, that counsel forthwith will be appointed.
>
> (3) That he has a right to communicate with his counsel, his family, or his friends, and that, if necessary, reasonable means will be provided to enable him to do so.

Further indication that this Rule is intended to implement a constitutional right to counsel is found in subsection (c)(4)

which req ires a waiver of counsel at first appearance to be in writing, signed and dated by the defendant.[4/]

The facts at bar are strikingly similar to those of another case from the Fourth District where the court relied on Article I, section 16 of the Florida Constitution to affirm a suppression order. In State v. Douse, 448 So.2d 1184 (Fla. 4th DCA 1984) a police officer posing as a friend of a co-defendant telephoned the defendant two days after his arrest and one day following his first appearance. The incrimininating statements elicited were held to be violative of the defendant's state constitutional right to assistance of counsel.

Even if this Court concludes that Stewart had no right to counsel within the purview of the Sixth Amendment or Florida Constitution, his statements must still be suppressed as elicited in violation of the Fifth Amendment, United States Constitution. It is undisputed that no procedural safeguards pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) were employed. Stewart's statements were not volunteered; they were a product of express questioning. Stewart was in custody at the time. Although his grandmother rather than Detective Lease asked the questions, the format was still the functional equivalent of police interrogation. Cf., Rhode Island v. Innis, 446 U.S. 291 (1980).

According, Stewart's conviction should be reversed and a new trial held where Detective Lease may not testify about the statements he intercepted on Estelle Berryhill's extension telephone.

4/ No written waiver of counsel appears in the record at bar.

ISSUE II

THE TRIAL COURT ERRED BY FORCING STEWART TO STAND TRIAL IN SHACKLES WITHOUT CONDUCTING AN EVIDENTIARY HEARING OR CONSIDERING ALTERNATIVE SECURITY MEASURES.

This Court has long recognized that forcing a criminal defendant to stand trial in shackles is a denigration of the presumption of innocence and sometimes sufficient reason for reversal. See Shultz v. State, 131 Fla. 757, 179 So. 764 (1938). In Illinois v. Allen, 397 U.S. 337 (1970), the United States Supreme Court declared that "no person should be tried while shackled ... except as a last resort ....the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold" 397 U.S. at 344. Later in Holbrook v. Flynn, 475 U.S. 560 (1986), the Court characterized shackling as an "inherently prejudicial practice" permissible "only where justified by an essential state interest" 475 U.S. at 568-9.

A) The Trial Court Ordered Stewart To Be Shackled At Trial Without Holding An Evidentiary Hearing to Determine The Need for Shackles

Immediately prior to commencement of jury selection, defense counsel requested that the leg shackles be removed from Stewart (R33). The following transpired:

> MR. BARBAS: (defense counsel) It gives a false impression to the jury that, in fact, he is already under some type sentence, is another reason.

THE COURT: I disagree that it gives a false impression he is under sentence. I think the fewer comments made is the better procedure here. The Court has had problems with this particular defendant in the past, where there has been allegations he may attempt to run. I am having him shackled in the courtroom.

MR. SKYE: (prosecutor) Maybe it would not bring more attention if you didn't ask him to stand, like you normally do.

THE COURT: I would prefer to have him standing. His feet are wide enough apart. If they are going to see them, they are going to see them.

(R33-4)

After the close of the State's evidence, defense counsel moved for a mistrial based upon his observations of the jurors looking at the shackles on Stewart's feet (R502). It was noted for the record that the shackles were visible from the jury box (R502). The trial judge denied the motion for mistrial without comment.(R503).

The trial court erred when he summarily decided to have Stewart shackled in the courtroom based upon undisclosed "allegations he may attempt to run". Due process requires at a minimum that a defendant have the opportunity to contest the necessity of shackling. Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on rehearing, 833 F.2d 250 (11th Cir. 1987); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976)(record of reasons for shackling and opportunity to controvert these reasons required). At bar, the trial judge ignored the prejudice caused to the defendant and showed total indifference to whether the jurors saw the shackles.

The facts here are parallel to those in Elledge v. Dugger, supra. In Elledge, the trial judge ordered shackles upon hearing from a law enforcement officer that the defendant planned to assault the courtroom bailiff. Defense counsel and the defendant were not allowed an adequate opportunity to challenge this report of a planned assault. In reversing, the Eleventh Circuit noted that the record did not show how the defendant would have responded to the allegations because the trial judge did not hold an evidentiary hearing.

At bar, the record is even less developed because the trial judge was relying not on specific information but a vague reference to "allegations he may attempt to run" (R33). Stewart was given no chance to test these allegations. In fact, the trial judge even disagreed with defense counsel's assertion that Stewart would be prejudiced by being tried in shackles.

B) The Trial Judge Failed to Consider Anv Alternative Security Measures Prior to Orderine Stewart Shackled.

Preventing an accused from escaping the courtroom during his trial is, of course, the type of essential state interest that might outweigh the prejudice caused by trying the accused in shackles. See, Holbrook v. Flynn, 475 U.S. 560 at 568-9. However, the trial judge must consider less drastic security measures before ordering a defendant shackled. In Kennedy v. Cardwell, 487 F.2d 101 (6th Cir. 1973), the court wrote:

> only upon a clear showing of necessity should shackles ever be employed. One element of such necessity it that less drastic

> security precautions to prevent
> escape, even at some additional
> cost to the state, will not pro-
> vide the needed protection.

487 F.2d at 111. (e.o.)

The trial judge at bar, however, ordered Stewart shackled as a matter of convenience rather than as a last resort. When Stewart's motion for new trial was heard about one month after these proceedings (September 30, 1986), defense counsel noted that Stewart was subsequently tried on another first-degree murder charge before the same judge and was not shackled (R800,803). Additional security personnel were placed in the courtroom as an alternative (R800,803)[1/]

Clearly additional security personnel was a feasible alternative to shackling in this trial as well. The trial judge erred by refusing to consider this (or any other alternative) before ordering Stewart to stand trial in shackles. Nor did he poll the jurors or give a cautionary instruction - safeguards which other courts have required when a defendant is tried in shackles. See Elledge v. Dugger, 823 F.2d at 1452.

In short, Stewart was denied the fair trial guaranteed by the United States Constitution Sixth and Fourteenth Amendments and the Florida Constitution Article I, sections 9 and 16.

1/ This case is also currently on appeal to this Court; Stewart v. State, Case No. 70,245.

C) Stewart Was Denied His Eighth Amendment, United States Constitution, Right to a Reliable Capital Sentencing Proceeding.

In a non-capital case or the guilt or innocence phase of a capital trial, a shackled defendant is prejudiced primarily by the denigration of his presumption of innocence which the shackles reflect. In the penalty phase of a capital trial, guilt has already been established so the presumption of innocence is no longer relevant. Yet, as defense counsel noted in the trial court, Stewart may well have suffered more prejudice by being tried in shackles during the penalty phase (R801).

The reason why shackles are especially prejudicial to a defendant during a penalty trial is that the jury is likely to interpret the shackles as the court's opinion of the defendant. As counsel in the trial court put it, the shackles connote "possible abhorrence" of the defendant by the judge or "fear the Court has of this particular defendant" (R801). In regard to the prejudice caused a capital defendant during penalty phase, the Eleventh Circuit wrote:

> a jury might view the shackles as first hand evidence of future dangerousness and uncontrollable behavior which if unmanageable in the courtroom may also be unmanageable in prison, leaving death as a proper decision.
> Elledge v. Dugger, 823 F.2d at 1450.

In Florida, the possibility of future dangerousness is not a legitimate sentencing consideration. The statutory aggravating circumstances are exclusive; no others may be be utilized.

Purdy v. State, 343 So.2d 4 (Fla.), ~~cert. den.~~, 434 U.S. 847 (1977). Had the prosecutor introduced evidence of future dangerousness or argued it to the jury, a mistrial should have been declared. See, Robinson v. State, 487 So.2d 1040 (Fla. 1986); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. den., 465 U.S. 1074 (1984).

In effect, trying Stewart in shackles was equivalent to introducing evidence of a non-statutory aggravating factor. While there may be circumstances which would justify shackling a defendant during a capital sentencing proceeding, essential fairness would require a thorough examination of alternatives prior to ordering the shackles. The trial court should at least caution the jurors not to draw any conclusions from the shackling. Because the trial judge failed to recognize or attempt to mitigate the prejudice caused by Stewart's appearance before the jury in shackles, the jury's death recommendation is tainted. The scales may have been tipped in favor of death because the jury viewed Stewart as uncontrollable and dangerous. Accordingly, Stewart was denied his Eighth Amendment, United States Constitution, right to a reliable capital sentencing proceeding.

ISSUE III

THE TRIAL JUDGE ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE BAILIFF, DEPUTY MORONE, TESTIFYING AS A PROSECUTION WITNESS IN PENALTY PHASE.

In Turner v. Louisiana, 379 U.S. 466 (1965) the United States Supreme Court held that it was a violation of the due process clause of the Fourteenth Amendment to permit key prosecution witnesses to also serve as custodians of the jury. Although the record indicated that the deputies involved never discussed the case directly with the jury, the Turner court emphasized the relationship between the jurors and their official guardians during trial. Serving as bailiff allows a deputy

> an opportunity ... to renew old friendships and make new acquaintances among the members of the jury.

379 U.S. at 473.

At bar, defense counsel specifically mentioned "the particular relationship the bailiff, particularly, Mr. Morone developed with the jury over the last three days" as part of the basis for his objection to allowing Morone to testify as a penalty phase witness (R621). The trial court overruled the objection without comment (R621).

Bailiff Morone proceeded to testify that his signatures were on the judgments against Stewart and that he placed Stewart's fingerprints on them (R628-9). He identified Stewart in-court as the same person who had been adjudged guilty of the other offenses on June 9, 1986 (R629).

This Court has long recognized that it is "manifestly improper'' for a material witness for the prosecution to associate with the jury or serve as bailiff. Owens v. State, 68 Fla. 154, 67 *So.* 39 (1914). However, where the defendant does not object at trial and the bailiff gives non-material testimony, this Court has declined to reverse convictions. See Moseley v. State, 60 So.2d 167 (Fla. 1952); Rhone v. State, 93 So.2d 80 (Fla. 1957).

There are two significant aspects to Bailiff Morone's testimony which set this case aside from prior decisions. The first is that Moronewas a totally superfluous witness. The clerk had already presented the written judgments and identified Stewart as the convicted defendant (R625-6). There simply was no question raised as to the authenticity of the judgments or the identity of the convicted defendant. Therefore, the prejudice to Stewart arises solely from the association of the bailiff with the prosecution and not from the enhanced credibility which jurors might attribute to a bailiff's testimony.

Some courts from other jurisdictions have found reversible error where there was any possibility of influence exerted on the jury's verdict by interaction between a prosecution witness/bailiff and the jury. E.g., Chancellor v. State, 291 Ala. 413, 282 So.2d 242 (1973); People v. Butler, 23 Ill.App.3d 108, 318 N.E.2d 680 (1974). In State v. Mettrick, 305 N.C. 383, 289 S.E.2d 354 (1982), the Supreme Court of North Carolina declared:

> Whether the charges against the defendants were discussed or the credibility of the officers with the jury enhanced is irrelevant to the issue before us.

289 S.E.2d at 355.

The Mettrick court held that prejudice is conclusively presumed when a witness for the State also acts as a custodian of the jury. The appearance of a fair trial before an impartial jury is ample reason to require reversal. Otherwise, public confidence in the integrity of the jury trial system could be undermined.

The second aspect which distinguishes the bailiff's testimony at bar is that he was one of only two witnesses for the State during the penalty trial. Stewart's conviction for first-degree murder could not have been affected by the bailiff appearing as a witness. The jury could, however, have inferred that by appearing as a prosecution witness in the penalty trial, Bailiff Morone shared the State's view that death was the proper sentence.

Because of the qualitative difference between a sentence of death and a term of imprisonment, the Eighth Amendment requires a heightened need for reliability in the determination that death is the proper punishment. Woodson v. North Carolina, 428 U.S. 280 at 305 (1976). Unless a reviewing court can say that procedural prejudice "had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires". Caldwell v. Mississippi, 472 U.S. 320 at 341 (1985). Bailiff Morone's switch from a role of neutrality to a member of the prosecution team during penalty phase undermined the Eighth Amendment's requisite fairness and reliability in a capital sentencing proceeding.

A prior decision of this Court, Johnson v. State, 442 So.2d 185 (Fla. 1983), cert. den., 466 U.S. 963 (1984) dealt with the related issued of allowing a bailiff to assist the prosecution in jury selection. Although the Johnson court affirmed the defendant's conviction and sentence of death, analysis of the opinion exposes three reasons why the result should be different in the case at bar.

The first of these is that it is more prejudicial to the defendant when the bailiff testifies than when he helps select the jury. The Johnson court wrote:

> Unlike the situation where the bailiff testifies and his credibility is affected by his close and continual association with the jury, for the bailiff to assist in the selection of the jury does not necessarily have a direct bearing on any issue to be determined by the jury. Therefore prejudice cannot be inferred but must rather be proven.

442 So.2d at 187.

Indeed, the jury might not recognize assistance in jury selection as an abandonment of neutrality. Testifying for one of the parties, however, cannot be interpreted otherwise.

Secondly, the Johnson court noted the small size of Madison County and the Sheriff's staff where Johnson's trial was held. The sheriff himself often acted as bailiff during trials. By contrast, the site of the trial at bar was Hillsborough County with a large Sheriff's department. Clearly, another deputy could have acted as bailiff if the prosecutor wished to avoid the dual role of witness/bailiff. Just as

clearly, the bailiff was made a prosecution witness not because he made a significant factual contribution to the State's case, but because the prosecutor wanted to present a courtroom drama without neutral observers; one where everyone, including the judge's clerk[1/] and bailiff, played a role on one side or the other.

Finally, Justice McDonald joined by Justice Overton dissented from the Johnson decision in so far as it affirmed the death sentence. He wrote:

> ... we should unqualifiedly satisfy ourselves that the sheriff's acting as a bailiff affected neither the conviction nor the jury's recommendation on the sentences.
>
> * * *
>
> A sympathetic jury could logically have recommended life. I do not suggest that the sheriff intentionally subjected the jury to the views of the state, but I would be extremely surprised if the jury felt that it would be displeasing him if it recommended death.

442 So.2d at 191.

At bar, the case for a logical jury recommendation of life is even more compelling. The aggravating circumstances (prior conviction for violent felony and during the commission of a robbery) were actually outnumbered by the statutory mitigating circumstances (age, emotional disturbance and impaired capacity) (R834-6). In addition, there was extensive non-statutory mitigating

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1/ There was no objection to testimony by Deputy Clerk Anne Badstein regarding the official court records of prior judgments against Stewart (R621,624-6).

evidence concerning the devastating circumstances of Stewart's early ch ldhood and the traumatic revelation at age 3 that his stepfather was not his natural father. The only explanation for the jury's death recommendation is that they must have given exceptional weight to Stewart's prior violent felony convictions.

These, of course, were the subject of Bailiff Morone's testimony. Although Deputy Morone simply identified signatures, fingerprints and Stewart, his appearance as a witness may have contributed additional weight to this aggravating factor.

There is also evidence which would suggest that the jury did not find the penalty recommendation an easy decision. They requested a list of aggravating and mitigating circumstances and were reinstructed on those found applicable by the court (R753-5). There may have been several jurors wavering between life and death as a recommendation. These doubts may have been resolved by a vote to please Bailiff Morone.

Accordingly, if this Court finds that it was error for Bailiff Morone to testify as a prosecution witness, it should also find that the error was not harmless beyond a reasonable doubt. Stewart's penalty trial did not satisfy the requisites of the federal constitution, Eighth and Fourteenth Amendments.

ISSUE IV

THE TRIAL JUDGE ERRED BY REFUSING TO GIVE DEFENSE REQUESTED SPECIAL PENALTY PHASE INSTRUCTION NUMBER ONE BECAUSE THE STANDARD JURY INSTRUCTIONS ARE OTHERWISE SUBJECT TO INTERPRETATION IN AN UNCONSTITUTIONAL MANNER

In the penalty phase charge conference, defense counsel proposed several special instructions. Proposed instruction No. 1 was intended to clarify the burden of proof in capital sentencing to show that the State retains the burden to prove that aggravating circumstances outweigh the mitigating circumstance before a sentence of death can be recommended (R1006,1009,603-4).

Specifically, the requested jury instruction interjects the sentence

> no defendant can be sentenced to death unless the aggravating circumstances outweigh the mitigating circumstances 1/

into the Standard Jury Instructions in three places (R1006-7). This language was to replace the standard instruction which tells the jury that if sufficient aggravating circumstances are present, they must determine

> whether mitigating circumstances exist that outweigh the aggravating circumstances. (e.s.).

The trial judge denied the defense requested instruction No. 1 (R612).

Appellant recognizes that this Court has previously rejected attacks on this portion of the standard jury instructions

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1/ Case authority for this proposed instruction is Alvord v. State, 322 So.2d 533 at 540 (Fla. 1975) (R1009).

in Arango v. State, 411 So.2d 172 (Fla.), cert.den., 457 U.S. 1140 (1982) and Francois v. State, 423 So.2d 357 (Fla. 1982). However, these holdings should be revisited in light of evolving federal constitutional standards. It is also significant at bar that Stewart argued that the standard instruction was defective in the trial court. Therefore on appeal, he does not need to show that the standard instruction is fundamental error, but only that his proposed jury instruction more properly states the applicable law. See Smith v. State, 521 So.2d 106 (Fla. 1988).

The challenged language was given by the trial court as it appears in the standard jury instruction on three occasions:

> You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R623)[2/]

* * *

> ... it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient

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2/ Fla.Std.Jury Inst. (Crim.) (1987), p.77. (The trial judge repeated this instruction at R747).

> aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(R747)[3/]

* * *

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are:

(R748)[4/]

In Arango, supra, this Court held that these instructions did not shift the burden of proof to the defendant in violation of the Due Process Clause, Amend. XIV, U.S. Constitution. This Court wrote:

> A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

411 So.2d at 174.

3/ Id., p.78.

4/ Id., p.80.

Reliance upon "a careful reading of the transcript", however, is not the correct test to apply to a questionable jury instruction. The appropriate standard adopted by the United States Supreme Court is where there is a reasonable possibility that the jurors understood the instruction in an unconstitutional manner, reversal is required. See Francis v. Franklin, 471 U.S. 307 at 322 n.8 (1985).

At bar, a reasonable juror could understand the instruction given to mean that the State first has the burden to prove sufficient aggravating circumstances to justify a recommendation of death. If the State sustains this burden, the burden then shifts to the defense to establish mitigating circumstances which outweigh the aggravating circumstances by a preponderance of the evidence in order to win a life recommendation.

Indeed, the format of the instruction at bar closely resembles instructions on affirmative defenses where the defendant can exculpate himself or reduce his culpability if he can prove by a preponderance of the evidence certain facts (e.g. insanity, extreme emotional disturbance) once the State has proved the charged crime beyond a reasonable doubt. Placing the burden on the defendant to prove an affirmative defense in the context of a guilt or innocence trial does not violate the Due Process Clause. Patterson v. New York, 432 U.S. 197 (1977); Martin v. Ohio, __ U.S. __, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987). The unresolved question presented here is whether the Eighth Amendment's requirement of heightened reliability in capital sentencing proceedings permits an instruction which a reasonable juror might interpret as placing the burden on the defendant to

establish by a preponderance of the evidence that his factors in mitigation outweigh the aggravating circumstances in order to avoid the death penalty.

Recently in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), the Eleventh Circuit found constitutional error where the jury was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

837 F.2d at 1473.

While this instruction is more blatantly prejudicial than the one given at bar in that it established a rebuttable presumption of death, the rationale of the Jackson decision is equally applicable here. Both instructions tilt the scales "by which the jury is to balance aggravating and mitigating circumstances in favor of the state". 837 F.2d at 1474.

One need only imagine the situation where a juror concluded that the aggravating factors were weighty enough to make death a possible sentence yet the mitigating evidence was of equal weight. With only a general weighing instruction such as the standard

> You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

(R749)[5/]

5/ Fla.Std.Jury Inst. (Crim.) (1987), p.81.

the juror might conclude just as likely as not that a life recommendation should be returned. With the additional proviso however, that the mitigating circumstances must outweigh the aggravating, the same juror would feel a duty to return a death recommendation.

Accordingly, the portions of the standard jury instructions which were objected to do not satisfy the Eighth Amendment because they are skewed in favor of a death recommendation. Since counsel requested instructions which would have clarified the State's burden to prove that the aggravating factors outweigh the mitigating factors before a sentence of death could be recommended, this case should now be remanded for a new penalty trial before a new sentencing jury.

ISSUE V

THE JURY WAS IMPROPERLY INSTRUCTED BECAUSE DEFENSE COUNSEL'S REQUEST FOR INSTRUCTION ON ALL OF THE AGGRAVATING CIRCUMSTANCES WAS DENIED; THE JURY WAS TOLD THAT THE AGGRAVATING CIRCUMSTANCES WERE ESTABLISHED; AND THE JURY WAS INSTRUCTED TO WEIGH A NON-VIOLENT FELONY CONVICTION.

A) The Trial Court Erred by Refusing Defense Counsel's Request to Instruct the Jury on All of the Statutory Aggravating Circumstances.

During the penalty phase charge conference, defense counsel requested that the trial judge read all of the statutory aggravating circumstances to the jury (R590). He stated that he didn't want the jury to believe that the two aggravating factors proposed by the State were the only lawful aggravators and that he wanted to argue the absence of many statutory aggravators as a basis for a life recommendation (R590).

The prosecutor replied:

> MR. JAMES: No doubt, Your Honor. But the defendant is not entitled to every benefit that the resourceful or creative defense attorney can think of.

(R590)

The prosecutor also noted that the Standard Jury Instructions indicate that the judge should instruct the jury on only the aggravating circumstances for which evidence was presented.

The trial judge gave his opinion that to read all of the aggravating factors would mislead the jury into thinking that "in some way the State's case is lacking'' (R592). He ruled

that the only aggravators to be given are those present in the judge's opinion (R592).

In Floyd v. State, 497 So.2d 1211 (Fla. 1986), this Court indicated that "a trial judge should not be permitted in anyway to inject his preliminary views of a proper sentence into the jurors' deliberations" 497 So.2d at 1215. The Floyd court quoted from Cooper v. State, *336* So.2d at 1140 (Fla. 1976):

> If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

(e.o.) 497 So.2d at 1216.

The instructions at bar are subject to the same criticism of "preconditioning".

The proper role of the jury is set forth in Section 921.141 Florida Statutes (1985) as follows:

> (2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

Clearly, the first decision for the jury is whether the aggravating circumstances are sufficient. This finding depends not only on whether the facts support statutory aggravating factors but also on whether these aggravating factors are sufficient to require a sentence of death even if no mitigation is present.[1/]

Therefore, defense counsel should be permitted to argue to the jury that the aggravating circumstances are not sufficient to require death as a penalty. Necessary to this line of argument is the ability to inform the jury about all of the aggravating circumstances which the legislature deemed relevant to whether a sentence of death should be imposed.

At bar, the prosecutor agreed that this line of argument could be beneficial to a defendant. Yet, as quoted above, he maintained that a defendant "is not entitled to every benefit". This assertion is directly contrary to prior decisions of this Court and the Eighth Amendment jurisprudence of the United States Supreme Court.

In Lewis v. State, 398 So.2d 432 (Fla. 1981), this Court wrote that the sentencing jury:

> is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment.

398 So.2d 439.

1/ In Wilson v. State, 493 So.2d 1019 (Fla. 1986), this Court found a sentence of death disproportionate despite the existence of two aggravating circumstances and no mitigation. A jury could likewise find aggravators present which were insufficient to require death.

In Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), the United States Supreme Court relied upon its prior decisions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) to hold that the Eighth Amendment, United States Constitution requires that evidence which might serve "as a basis for a sentence less than death" not be excluded from the sentencer's consideration. 90 L.Ed.2d at 7.

When the trial judge at bar refused to instruct the jury on all of the statutory aggravating circumstances, he forclosed a reasonable avenue for the defense to argue for a life recommendation. Accordingly, the sentencing proceeding at bar violated the Eighth and Fourteenth Amendments to the United States Constitution.

B) The Trial Court Erred by Instructing the Jury that the Aggravating Circumstances Were Established by the Evidence.

The Standard Jury Instructions provide that the trial judge should instruct the jury as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. 2/

2/ Fla.Std.Jury Inst. (Crim.) (1987), p.78.

The instruction actually given to the jury was:

> The aggravating circumstances that you may consider are limited to the following that are established by the evidence.

(R748)

This instruction was repeated when the jury requested reinstruction (R754).

The deletion of the words "any of" from the standard instruction have the effect of converting the instruction into a direction to the jury that the aggravating circumstances have indeed been proven. The jury's province as a fact finder was effectively invaled. No matter what amount of evidence is presented, a trial judge cannot direct the jury to return a verdict of guilty in a criminal trial. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977).

This Court has said:

> The aggravating circumstances of Fla.Stat. §921.141(6)[sic] F.S.A. actually define those crimes ... to which the death penalty is applicable .... As such, they must be proved beyond a reasonable doubt before being considered by judge or jury. State v. Dixon, 283 So.2d 1 at 9 (Fla. 1973).

Since Stewart did not waive his right to a penalty jury, the jury should have made the finding whether the aggravating circumstances were "established by the evidence". Stewart was deprived of his right to a jury trial under the Sixth Amendment, United States Constitution as well as his corresponding right under the Florida Constitution Article I, section 16.

The altered instruction is further objectionable as a violation of due process. Jury instructions which have the effect of relieving the State of its burden of proof on an element of a crime violate the Fourteenth Amendment, United States Constitution. Sandstrom v. Montana, 442 U.S. 510 (1979). The appropriate inquiry for determining whether a constitutional violation has occurred is whether a reasonable juror could have interpreted the instruction in an unconstitutional manner. Id. 442 U.S. at 514.

A reasonable juror could conclude from the instruction given at bar that the trial judge had already determined that the State met its burden of proof as to the two aggravating circumstances instructed on. Hence Stewart was denied due process of law under the Fourteenth Amendment, United States Constitution and Article I, section 9 of the Florida Constitution.

C) The Trial Court Erred by Instructing the Jury to Weigh a Conviction for a Non-Violent Felonv Within the Prior Violent Felony Aggravating Circumstance.

One of the aggravating circumstances which the jury was instructed on as "established by the evidence" was prior conviction of violent felony. During the charge conference, a question arose as to how the convictions at the instant trial would be handled. The following transpired:

> THE COURT: That is why I'm trying to get the wording properly, so we don't have any error when we start doing it.

> MR. SKYE: I have no objection to you in some fashion advising the jury that three are for convictions prior to today and two are the ones that they just conficted him of.
>
> THE COURT: I think that would be the simpler way to do it. Then let you all in your argument explain what they are and when they occurred.
>
> MR. SKYE: Whatever.
>
> THE COURT: There were three today.
>
> MR. BARBAS: One was not a violent crime; not considered.
>
> THE COURT: Okay. All righty. I will cover it that way.

(R597-8).

The jury, however, was instructed as to the aggravating factor:

> 1, the defendant has previously been convicted of felonies involving the use or threat of violence to some person.
>
> The convictions that were read into the record for which he was convicted on June 9, 1986, and the convictions that you have imposed today.

[R748,754 (reinstruction)]

The instruction as given is flawed because it directs the jury to consider all of the convictions for which they returned verdicts under the aggravating circumstance. Stewart was convicted of attempted murder in the second-degree, armed robbery and second-degree arson (R582,904-6). As both the prosecutor and defense counsel told the trial judge, only two

of the convictions (attempted second-degree murder and armed robbery) qualified as violent felonies. Yet the judge failed to compose an adequate instruction which would not mislead the jury.

Because the jury was directed to weigh all three of Stewart's convictions instead of only two, they must have given Stewart's second-degree arson conviction some weight as an aggravating circumstance. Because we cannot tell how much weight was given, the jury recommendation of death is tainted and a new penalty trial should be ordered.

ISSUE VI

THE TRIAL COURT ERRED BY FAILING TO MODIFY THE PENALTY INSTRUCTION AS REQUESTED TO INFORM THE JURY THAT STEWART WOULD NOT NECESSARILY BE ELIGIBLE FOR PAROLE IN TWENTY-FIVE YEARS IF A LIFE SENTENCE WERE IMPOSED.

At the penalty charge conference, defense counsel requested that the judge to note that under the current law, Stewart would probably spend the rest of his life in prison without becoming eligible for parole (R616). He accordingly asked the judge to modify the penalty instruction given to the jury so that they would not be misled into thinking that Stewart could be paroled in 25 years if given a life sentence (R618).

The court refused to modify the penalty instruction, noting that while the Parole Board was being terminated; it might later be reinstated (R618-9). The judge said a different instruction would "open up a Pandora's box at all kind of guesswork by the jury" (R619).

Accordingly, the jury was instructed before hearing evidence in penalty phase:

> The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years.

(R622).

This instruction was repeated after the close of evidence and argument, immediately prior to deliberations (R746). Additional mention of the possibility of parole after twenty-five years

was made on three occasions [R748,751 (twice)]. Indeed, the verdict form contained it (R751).

A) The Penalty Instruction Given The Jury Was An Inaccurate Statement of the Law

Section 921.001(8), Florida Statutes (1983), provides three methods of release for persons convicted of crimes committed on or after October 1, 1983, or persons sentenced under the sentencing guidelines. Such persons may be released from incarceration only:

> (a) Upon expiration of his sentence;
> (b) Upon expiration of his sentence as reduced by accumulated gain time; or
> (c) As directed by an executive order granting clemency.

The statute makes it clear that parole is no longer a method of release for persons convicted of crimes, any crime, Committed on or after October 1, 1983. The statute refers to crimes, and capital offenses are crimes. Sections 775.08 and 775.081(1), Florida Statutes. Even though capital offenses, like misdemeanors, are excluded from guidelines sentencing, the statute makes clear that Section 947.16, Florida Statutes, no longer applies to a person convicted of any crime committed after October 1, 1983. *See* 1984 Op. Att'y Gen. Fla. 084-5 (January 20, 1984).

As recognized by the Attorney General's opinion, the language of the statute is clear and unequivocal. By providing that Chapter 947, which determines who is eligible for parole, shall not be applied to persons convicted of crimes committed

after October 1, 1983, the legislature intended to abolish parole across the board, not just abolish parole for persons sentenced under the sentencing guidelines.

Section 775.082, Florida Statutes, establishes the penalties for a capital felony as death or life imprisonment. A person sentenced to life imprisonment "shall be required to serve no less than 25 years before becoming eligible for parole." Section 775.082(1), Florida Statutes. The statute, however, does not establish a right to parole eligibility if a sentence of life is imposed. Section 947.16, Florida Statutes, confers the right to parole and that latter section no longer applies to capital felonies committed after October 1, 1983, pursuant to Section 921.001(8).

It is noteworthy that Section 947.16 was not amended when Section 921.001(8) was enacted. The parole statute was left intact to provide parole for those still eligible, i.e., those persons whose crimes were committed prior to October 1, 1983, and who did not elect guidelines sentencing, and no exceptions were made in the statute for persons convicted of capital offenses, misdemeanors or persons sentenced as youthful offenders.

The intent of the legislature to abolish parole for all crimes committed after October 1, 1983, can be further gleaned from the 1985 session laws. When the sentencing guidelines were enacted, persons sentenced as youthful offenders were not given guidelines sentences. Yet, in 1985, the legislature clarified its intent to include youthful offenders within the category of

persons exempt from parole eligibility under Chapter 947.

Chapter 85-288 subsection 25, Laws of Florida, provides:

> The intent of the Legislature in the amendment to s. 921.001(8), Florida Statutes, pursuant to chapter 83-87, Laws of Florida, was to exempt from the provisions of chapter 947, Florida Statutes, every person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines, including persons sentenced under the provisions of chapter 958, Florida Statutes.

The legislature again plainly stated that "every person convicted of crimes committed on or after October 1, 1983," are exempt from Chapter 947, and the language could not be any clearer. Since the legislature said "every person," and did not provide any exceptions, this necessarily includes capital felons, as well as misdemeanants and youthful offenders.

B) Appellant Was Grossly Prejudiced by Being Precluded From Introducing a Relevant Mitigating Consideration and by the Prosecutor's Improper Argument Which Exploited the Inaccurate Penalty Instruction.

In McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), the United States Supreme Court reiterated the basic tenets of its Eighth Amendment death penalty jurisprudence. The Court wrote:

> ... States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

95 L.Ed.2d at 287

The fact that he might never be released on parole is certainly the type of relevant information which the defendant must be allowed to present. The jurors might well have believed that if Stewart were given a life sentence without parole the public would be adequately protected. On the other hand, if Stewart were released on parole after 25 years, he would still be in his forties. The jurors might have concluded that Stewart could still pose a threat to public safety if released on parole and, accordingly, recommended death.

An instruction to the jury that the governor had the power to commute a sentence of life imprisonment without parole to a lesser sentence was held relevant to the capital sentencing determination in California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). The Ramos Court wrote:

> By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society.

463 U.S. at 1003.

Since this is a legitimate capital sentencing concern, it follows that the jury should not be misled into thinking that a defendant is more likely to be released on parole than he really is. That is exactly what happened at bar when the jury was instructed on eligibility for parole in 25 years when Stewart may never be eligible for parole.

The error was particularly prejudicial to Stewart in light of the evidence presented in penalty phase and the prosecutor's argument. Dr. Afield repeatedly testified that Stewart could not be rehabilitated; that he would always be a danger to society (R691,696-7,700). The prosecutor exploited this theme in his closing argument. Referring to Stewart's prior convictions, he stated:

> How many does it take? Five, six, seven? How much longer is that man going to be allowed to run the streets or have the chance of getting out and continue?

(R735)

Then, anticipating defense counsel's argument, the prosecutor speculated:

> And he will tell you that, you know, the sentence, other than death, is life without possibility of parole for twenty-five years. He may never get out of jail. Well, good. Because Doctor Afield said that he can't be rehabilitated. That he won't ever be able to live among us and us be safe.
>
> * * *
>
> And Mr. Barbas will probably tell you that, you know, even, even twenty-five years is a long time.

(R738)

Finally, he closed:

> Society can say, "We have had enough of Kenneth Allen Stewart." And you by your verdict can recommend to Judge Griffin, "Enough."

(R739-*40)*

This Court recognized in Butler v. State, 493 So.2d 451 (Fla. 1986) that a misleading jury instruction combined with prosecutorial argument can constitute reversible error. Because Stewart's eligibility for parole became a feature of the prosecutor's penalty argument, it was crucial that the jury be correctly informed that Stewart would not definitely be eligible for parole in 25 years.

As it stand, Stewart was denied his Eighth and Fourteenth Amendment rights to a reliable capital sentencing proceeding. His sentence of death must be vacated and a new penalty trial held before a new jury.

ISSUE VII

THE TRIAL COURT ERRED BY EXCLUDING RELEVANT EVIDENCE IN MITIGATION AND ALLOWING STATE CROSS-EXAMINATION TO ESTABLISH A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

A) Exclusion of Testimony Concerning Abuse Suffered as a Child.

During Bruce Scarpo's testimony describing Stewart's upbringing, he started to mention what six-year old Kenny had said regarding abuse by his mother's boyfriend (R641). The prosecutor objected, calling the testimony "self-serving hearsay" (R641). Defense counsel argued that the testimony was reliable because it concerned a six year old child telling his father about another man beating him (R642). Counsel also noted that Scarpo could be cross-examined after the trial judge suggested that he was "making up these statements" (R642-3). The judge sustained the hearsay objection, indicating that Stewart could testify himself to these acts of abuse if he wanted (R644).

Florida's death penalty statute provides that during the penalty trial, evidence relevant to the character of the defendant shall be received. Section 921.141(1), Florida Statutes (1985) states in part:

> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Probative value is the key to admissibility; not whether a statement might otherwise have been excluded at the guilt or

innocence phase. While the defendant must be given a fair chance to rebut hearsay, the State does not have a similar guarantee.

Construing this statute, this Court said in State v. Dixon, 283 So.2d 1 (Fla. 1973):

> a narrow interpretation of the rules of evidence is not to be enforced, whether in regards to relevance or to any other matter except illegally seized evidence.

283 So.2d at 7.

Moreover, the defendant's due process right to present evidence in mitigation outweighs a State's interest in enforcing the rules of evidence. In Green v. Georgia, 442 U.S. 95 (1979), the United States Supreme Court vacated the defendant's sentence of death where the trial court excluded relevant testimony in the penalty phase of the capital proceedings because it violated Georgia's hearsay rule. Citing Chambers v. Mississippi, 410 U.S. 284 (1973), the Green Court declared that "the hearsay rule may not be applied mechanistically to defeat the ends of justice" 442 U.S. at 97.

At bar, Stewart presently might well have been unable to remember acts of child abuse he suffered before the age of five. Scarpo was probably the only witness who could have related the acts of abuse which Stewart had complained about as a young child. To deprive the jury of this testimony also deprived them of a factual predicate for Dr. Afield's opinion. See, R688-90,692.

Recently the legislature changed the Florida Evidence Code to add a new exception to the hearsay rule for the statement

of a child sexual abuse victim. Section 90.803(23), Florida Statutes (1987). This legislation indicates a recognition that such statements are usually reliable. Stewart's statements as a child to Bruce Scarpo concerning the abuse suffered at the hands of his mother's boyfriend should also be presumed reliable.

The exclusion of this potentially mitigating evidence from Stewart's capital sentencing proceeding deprived him of due process of law, U.S. Const., Amend. XIV, and makes his sentence of death constitutionally unsound as unreliable. U.S. Const., Amend. VIII.

B) The Trial Court Allowed Improper Cross-Examination by the Prosecutor of Witness Bruce Scarpo.

At the close of the direct examination of defense witness Bruce Scarpo, Scarpo told the jury why he believed that a life sentence rather than death was appropriate for Stewart (R664-5). In this statement, Scarpo gave an opinion that Stewart could be helped while in prison and could become "an asset to this community or my community" (R665). The prosecutor seized on this language to claim that the defense had opened the door for cross-examination on Stewart's criminal history (R667).

The defense objection to cross-examination beyond the scope of direct being overruled (R667), the prosecutor proceeded to inquire of Scarpo whether he knew any of the facts and circumstances surrounding the crimes, judgments for which had been introduced by the State as penalty phase evidence (R667-9). Then the prosecutor asked Scarpo is he knew whether Stewart

had been convicted of any other offenses and how many times (R669).

Defense counsel objected and moved for a mistrial based upon the introduction of an improper non-statutory aggravating factor (non-violent convictions) (R669-70). The prosecutor claimed he was not presenting aggravating circumstances; he was just cross-examining Scarpo's opinion (R670). The trial judge denied the motion for mistrial but advised the prosecutor to avoid the subject (R670).

The factual situation presented here is really equivalent to what transpired in Robinson v. State, 487 So.2d 1040 (Fla. 1986). In Robinson, the prosecutor questioned defense witnesses about their knowledge of two crimes that the defendant had not been convicted of under the theory that this cross-examination was relevant to the witnesses' credibility.

This Court reversed Robinson's sentence of death, finding that the State's distinction was meaningless. Other alleged crimes which do not meet the standard of the prior conviction of violent felony aggravating circumstance are "excessively prejudicial." The method by which the State places the other offenses before the jury is immaterial.

Because the prosecutor was able to convey to the jury that Stewart had been convicted "more than once or twice" (R669) for crimes beyond the evidence before the jury, Stewart was denied a fair penalty trial. As in Robinson, his death sentence should be vacated and a new sentencing proceeding before a new jury ordered.

ISSUE VIII

THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE THE SENTENCING JUDGE HEARD TESTIMONY FROM THE VICTIM'S FATHER DESCRIBING THE CHARACTER OF THE VICTIM AND URGING A SENTENCE OF DEATH.

At the sentencing hearing of September 30, 1986, the father of Mark Harris testified before the court (R809-10). He asked the judge to impose a sentence of death, mentioning that a lot was said at trial about the character of Stewart but little about the victim (R 809). Mr. Harris showed the judge some photographs of Mark (R809-10). He noted that Mark was "always doing favors for people" and disregarded his advice to never pick up hitchhikers (R810).

This testimony about the personal characteristics of a homicide victim is the type of evidence which the United States Supreme Court held irrelevant to a capital sentencing decision in Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). The Booth court decided that the Eighth Amendment prohibits a capital sentencing jury from considering such victim impact evidence. Since the judge is the sentencer in Florida, such evidence should also be precluded from the court's consideration.

Appellant recognizes that in Grossman v. State, Case No. 68,096 (Fla. February 18, 1988) [13 FLW 127], this Court held that failure to object to victim impact evidence acts as a procedural bar to raising the issue on appeal. There was no objection to testimony of the victim's father at bar.

Nonetheless, Appellant maintains that Booth should be applied retroactively to all cases pending on direct appeal at the time the opinion was issued. Section 921.143, Florida Statutes (1985) providing for the victim's next of kin to appear before the sentencing court had never been limited by either the legislature or decision of this Court to non-capital proceedings.[1/] A lawyer could well rely on this statute to believe that any objection was groundless.

Accordingly, this Court should recede from the portion of Grossman which erects a procedural bar to consideration of victim impact evidence on appeal if not preserved by objection in the trial court. The existence of Florida Statute 921.143 and the lack of prior precedent is sufficient cause to excuse the procedural default. Stewart's sentence of death should be vacated and a resentencing proceeding held before a different judge.

1/ Compare Code of Laws of South Carolina 1976 §16-3-1550 (Lawyers Coop. 1985) (Victim Impact Statement to be presented at sentencing "excluding any crime for which a sentence of death is sought.")

ISSUE IX

THE SE JTENCE OF DEATH MUST BE VACATED BECAUSE THE SENTENCING JUDGE FAILED TO PREPARE WRITTEN FINDINGS AS REQUIRED. ALSO, HE FAILED TO PREPARE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHEN IMPOSING SENTENCE ON THE NON-CAPITAL FELONIES.

A) Failure to Provide Written Findings Supporting a Sentence of Death.

Appellate counsel received the record on appeal devoid of written findings of fact to support a sentence of death. He requested that the record be supplemented with these findings, if they existed (R1304). The Clerk of the Circuit Court certified that no "Written Findings of Fact Regarding Imposition of a Death Sentence" had been filed with his office (R1332).

Section 921.141(3), Florida Statutes (1985) provides in part:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

This Court in VanRoyal v. State, 497 So.2d 625 (Fla. 1986) vacated orally imposed sentences of death where the trial judge failed to provide written findings to support the death sentences

until over a month after the record on appeal was filed. The VanRoyal court remanded for imposition of life sentences in accord with subsection (3) of Fla.Stat. 921.141.

Subsequently, in Muehleman v. State, 503 So.2d 310 (Fla. 1987); Patterson v. State, 513 So.2d 1257 (Fla. 1987); and Grossman v. State, Case No. 68,096 (Fla. February 18, 1988) [13 FLW 127] this Court has considered defects in the written findings, but distinguished the cases from VanRoyal. In Muehleman, the written findings were not contemporaneous with imposition of sentence but were still filed prior to the certification of the record. In Patterson, this Court termed the sentencing order prepared by the prosecutor "erroneous" and ordered a new sentencing hearing before the judge. Finally, in Grossman, this Court wrote:

> Since VanRoyal issued we have been presented with a number of cases in which the timeliness of the trial judge's sentencing order filed after oral pronouncement of sentence has been at issue. In VanRoyal and its progeny, we have held on substantive grounds that preparation of the written sentencing order prior to the certification of the trial record to this Court was adequate. At the same time, however, we have stated a strong desire that written sentencing orders and oral pronouncements be concurrent. Patterson v. State, 513 So.2d 1257 (Fla. 1987); Muehleman. We recognize that the trial court here, and the trial court in other cases which have reached us or will reach us in the near future, have not had the benefit of VanRoyal and its progeny. Nevertheless, we consider it desirable to establish a procedural rule that all written orders imposing a death

> sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement. Accordingly, pursuant to our authority under article V, section 2(a), of the Florida Constitution, effective thirty days after this decision becomes final, we so order.

13 FLW 130-1.

The distinguishing factor between VanRoyal where a life sentence was ordered by this Court and the other cases where it was not is whether the written sentencing order was prepared prior to certification of the trial record. In the case at bar, a written sentencing order has never been prepared to this date. Moreover, the VanRoyal opinion issued September 18, 1986 or approximately two weeks prior to the oral imposition of sentence on Stewart.

Under the circumstances, this Court should now vacate Stewart's sentence of death and, as in VanRoyal, order a life sentence imposed on remand.

B) Failure to Consider an Accurate Guidelines Scoresheet and Give Written Reasons for Departure.

Immediately following pronouncement of a death sentence on Stewart, the judge proceeded to sentence him to life on the armed robbery with a firearm count and consecutive sentences of fifteen years each on the attempted second-degree murder conviction and the second-degree arson conviction (R839-40). The record does not reflect that the court considered a guidelines scoresheet prior to imposing these statutory maximum sentences.

This is error requiring resentencing. Doby v. State, 461 So. 2d 1360 (Fla. 2d DCA 1984).

In any event, even if the sentencing judge did consult the guidelines scoresheet which appears in the record on appeal, that scoresheet is grossly inaccurate (R914-5). The primary offense is listed as attempted first-degree murder with a fire-arm and the scoresheet compiled accordingly (R914). However, Stewart was convicted of the lesser included offense of attempted second-degree murder.

Finally, the guidelines departure sentences are also flawed because the sentencing judge failed to provide written reasons for departure as required by this Court's decision in State v. Jackson, 478 So.2d 1054 (Fla. 1985). Resentencing is required.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Kenneth Allen Stewart, appellant, respectfully requests this Court to grant him the following relief:

ISSUES I AND II - remand for a new trial

ISSUES III - VII - remand for a new penalty trial

ISSUES VIII AND IX - remand for resentencing before the trial court

Respectfully submitted,

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TENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 8th Floor, 1313 Tampa Street, Tampa, FL 33602; and to Kenneth Allen Stewart, Inmate No. 479774, Florida State Prison, Post Office Box 747, Starke, Florida 32091, by mail this 27th day of June, 1988.

DOUGLAS S. CONNOR