FILED

IN THE SUPREME COURT OF FLORIDA

AUG 11 1988

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KENNETH ALLEN STEWART,
A/K/A KEITH A. KIRKLAND,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. 70,245

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

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

References to the record on appeal are designated with the prefix "R." The supplemental record is designated with the prefix "SR." References to the record on appeal in Stewart v. State, Case No. 70, 015, also pending in this Court, are designated with the prefix "OR." This Court granted Appellant's Motion to Rely on Specific Portions of the Record on Appeal in Stewart v. State, Case No. 70, 015, on June 16, 1988.

STATEMENT OF THE CASE

On June 5, 1985, a Hillsborough County grand jury indicted the Appellant, KENNETH ALLEN STEWART, a/k/a KEITH A. KIRKLAND, for first-degree murder. (R. 908-09) On June 26, 1985, the State filed an information in the Thirteenth Judicial Circuit Court in and for Hillsborough County, Florida, charging Stewart with second-degree arson. (R. 990-91) Both incidents occurred on December 6, 1984. (R. 908, 990) The trial court granted the State's Motion to Consolidate the two offenses for trial. (R. 937, 1014-15)

Kenneth Stewart was tried by jury September 22 through 24, 1986, and was found guilty as charged. (R. 966, 1016) The penalty phase of the trial was held the following day. (R. 550) The jury recommended aeath by a vote of ten to two. (R. 779, 967)

On October 3, 1986, at a consolidated sentencing proceeding, the trial court judge sentenced Stewart to death by electrocution for the first-degree murder. (R. 803, 972-73) The guidelines scoresheet, which reflected all the non-capital offenses for which Stewart was sentenced, recommended a 2'7 to 40-year sentence. (R. 1017-18) Stewart was sentenced to the statutory maximum of 15 years in state prison for the second-degree arson conviction, consecutive to any life sentence imposed if the death penalty should be vacated. (R. 804, 1072-73) On December 15, 1986, the court denied the Appellant's Motion for New Trial (R. 1051-55), Renewed Motion f'or Acquittal (R. 1056), and Motion for Arrest of Judgment. (R. 889-91, 1057)

On January 9, 1987, Appellant filed a timely Notice of Appeal in each case to the Second District Court of Appeal,

Lakeland, Florida. (R. 975, 1024) On March 18, 1987, the Second District transferred the appeal to this Court for lack of jurisdiction over the death penalty case. (R. 984) Appellant filed an Amended Notice of Appeal to this Court on March 19, 1987. (R. 1066) On March 23, 1967, trial counsel's motion to withdraw was granted and the court appointed the Public Defender for this appeal. (R. 985, 1033)

Kenneth Allen Stewart appeals to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Rule 9.030(a)(1)(A)(i) of the Florida Rules of Appellate Procedure.

STATEMENT OF THE FACTS

A. Guilt Phase

Shortly after midnight on December 6, 1984, Daniel Clark, who lived on Whitaker Road in Lutz, Florida, heard two gunshots, just a "split second or two" apart. (R. 218) He got out of bed, looked out the window, walked to the road and looked both directions, but saw nothing. (R. 218-19) At about 12:45 or 1:00 that same morning, Linda Drayne, who also lived in Lutz, was driving home along Whitaker Road when she spotted a body lying perpendicular to the road on the south side. (R. 221) She reported the incident at the sheriff's office. (R. 222)

Deputy Ronald Chancey of the Hillsborough County Sheriff's Department was dispatched to Whitaker Road to investigate the incident. (R. 223) He arrived there at approximately 1:15 a.m. on the morning of' December 6, 1984. He found the body of a white Latin male lying perpendicular to Whitaker Road. There appeared to be a wound in the temple area of the head. (R. 225) Deputy Chancey observed tire tracks and what appeared to be acceleration marks on the road. (R. 225, 232)

Detective David Luis, also employed by the Hillsborough County Sheriff's Department, testified that he collected a pair of nail clippers, a nail file, a beer can, a soda straw, and a broken vehicle antenna at the scene. (H. 245, 250-51) He found a cocaine straw in the front coat pocket of the decedent. (R. 250) He testified that the victim had no identification or wallet. (R. 246) Detective Luis transported the above items to the FDLE laboratory to be tested for latent fingerprints. (R. 252, 254-55, 272) An FDLE crime lab analyst later testified that he found no

fingerprints of value on any of the items. (R. 424-29)

Deputy Charles Blitch of the Hillsborough County Sheriff's Department testified that sometime after midnight on December 6, 1964, he was traveling home via Interstate 275. Near the Busch Boulevard exit, he spotted a vehicle on fire behind the Goodwill trailer in tne Floriland Mall. (R. 325-26) He contacted the sheriff's office by radio dispatch and reported the burning vehicle. The car was a maroon over white Ford Thunderbird. (R. 328) Mechy Wright of the Tampa Fire Department testified that she investigated the fire and determined that it was set deliberately with flammable liquids, from the passenger's side, front door and seat. (R. 340-42)

Dr. Charles Diggs, the medical examiner, testified that he performed an autopsy on the body of the victim, Ruben Dario Diaz. (R. 278) He observed that there were two gunshot wounds on the body. One wound was located on the front left aspect of the head and the other behind the right ear. (R. 280) He was not able to tell which wound occurred first. Although Diaz was alive when both wounds were inflicted, either wound would have rendered him immediateiy unconscious. (R. 282, 285-87) Dr. Diggs was able to determine that the gun was fired from close range, probably a foot or less. (R. 289)

Dr. Diggs testified that the wounds were consistent with Diaz being shot while lying face down. (R. 287, 290) On cross-examination, however, he testified that the wounds were also consistent with Diaz having been in "a charging position, crouched, coming at someone in an attacking stance." (R. 293)

The wounds could not have been self-inflicted because either of them would have immediately incapacitated Diaz. (R. 291)

Dr. Diggs found cocaine in the victim's blood plus "metabolites of cocaine," which is cocaine that is already metabolized. (R. 297-98) He also found evidence that Diaz used nose drops. He testified that nose drops are often used to combat the congestion produced by snorting cocaine. (R. 298-99)

The sister of Ruben Diaz, Caridad Figueredo, testified that she was very close to her brother. They both lived with their parents at the time of Diaz's death. (R. 299-302) Prior to his death, she saw him in possession of a small vial of white powder. (R. 302) When defense counsel asked the witness if, as a result of their relationship, she had discovered that her brother dealt in large quantities of cocaine, the trial court sustained the prosecutor's objection based on relevancy and did not permit the jury to hear the testimony.' (R. 303-306, 312)

The State's key witnesses were Randall Bilbrey, a homosexual, and Terry Smith, a convicted felon. Both were former associates of Stewart to whom he allegedly confessed that he committed tne murder of Ruben Diaz. Bilbrey was twenty years old at the time of the trial and lived kith his parents in Virginia. He testified that ne had lived in Tampa, Florida, from June until

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The witness testified in proffer that her brother dealt in large amounts of cocaine, was working as a runner for a cocaine dealer between Miami and Tampa, and had at one time picked up roughly eight thousand dollars in cash. Near the time of his death, he told her that ne was in financial trouble. (R. 307-08) Defense counsel argued that the testimony was relevant because people such as Diaz who deal in large amounts of cocaine are subjact to naphazard violent crimes. (R. 306, 312-13)

December of 1984, during which time he worked at Holmes Gardens, a nursery in the Lutz area. (R. 361) He met Kenneth Stewart, known to him as Keith Kirkland, at a convenience store in Tampa on December 9, 1984 (about three days after the murder). (R. 362)

Bilbrey testified that he was talking to his mother on the telephone when Stewart walked up to him and asked to borrow some small change to make a phone call. (R. 363) When it turned out that Stewart was collecting money to buy beer, Bilbrey lent him the money. Stewart purchased the beer and they both went to Bilbrey's trailer, within walking distance of the 7-Eleven, to drink it. (R. 365-67)

The two men stayed at Bilbrey's trailer from December 9 through December 19, 1984. (R. 367) Although at first Bilbrey thougnt they were lovers, the relationship eventually dwindled down to friendsnip. (R. 368-69) Bilbrey testified that, on the first night, after consuming several cans of beer, Stewart started crying and saying that he "didn't have the right to take anybody's life." (R. 370) According to Bilbrey's testimony, Stewart initially told him that he killed someone a couple years earlier but later said it was only two weeks earlier. (R. 370-71)

According to Bilbrey's testimony, Stewart told him that he and another guy had recently gotten out jail and were short of' money. 'They went looking for someone to rob and spotted "a big expensive-looking car, like, a Cadillac or Lincoln or something like that" outside of a bar. (R. 371) They entered the bar to find out who owned the car. Although he did not want to at first, the owner of the car finally agreed to take them somewhere.

Stewart, who sat in the back seat, pulled a gun on the driver and told nim to drive toward Lutz. (R. 372)

Stewart and the unnamed accomplice allegedly made the driver "take a right onto a dirt road in a big wooded area." Bilbrey testified that Stewart described the driver as a Cuban or Mexican wearing a white suit with a black pin-striped belt and a silver necklace. (R. 376) They made him pull over, get out of the car, lie face down on the ground, and put his hands above his head. They took his billfold containing $50.00 and a small glass flask of cocaine. (R. 373)

Stewart was "holding the gun on the fellow." The person he was with was yelling, "Kill him. Kill him." The other man was yelling, "Don't kill me. I will give you anything you want. . . . I won't tell anybody." According to Bilbrey's testimony, Stewart said that the guy he was with "was yelling at him and yelling at him, and tnat he just pulled the trigger." (R. 373) Because Stewart was not sure if he hit the man just right the first time, he shot him again. (R. 374)

Bilbrey further testified that Stewart told him they drove the victim's car to the Floriland Mall, poured gasoline on both the inside and outside of the car and burned it. (R. 374) Stewart then joined a bunch of bums at the Winn-Dixie. He used the cocaine and drank witn the bums until he passed out. When he awoke the gun was gone. (R. 375)

On cross-examination, defense counsel was able to elicit testimony from Bilbrey showing that he knew a lot of details about the murder. (R. 381-83) Defense counsel established that although Bilbrey was a homosexual, Stewart was not.

(R. 383) He suggested that it was Bilbrey rather than Stewart who lured Ruben Diaz into a remote wooded area and killed him and that Bilbrey related the facts to Stewart. Bilbrey denied it. (R. 383) Through a series of questions, defense counsel elicited testimony that Stewart "broke Bilbrey's neart," thus suggesting a motive for Bilbrey to testify falsely against Stewart. (R. 384-88) Bilbrey also testified that during the time the two men lived together, Stewart drank about twenty six-packs of beer every day. (R. 389)

The State's second key witness was Terry Lyn Smith who had been incarcerated in the Hillsborough County Jail since his arrest on April 19, 1985. (R. 394-95) Mr. Smith admitted to having been convicted of seven felonies. (R. 395) He was awaiting sentencing on five felonies -- two armed robberies, one attempted armed robbery and two aggravated batteries -- at the time of the trial. (R. 411) He testified that he had not yet been sentenced on some of the felonies because he was "awaiting chis trial" to see how he testified. (R. 411) He at first denied having been promised that the judge would be more lenient in exchange for his testimony, but stated that it "[s]eems only natural that for my cooperation he would be." (R. 411) He then testified that although the State Attorney had not promised him leniency, Detective Novak and Detective Marsicano had done so. (R. 412) He "knew" from his Knowledge of the legal system that the State Attorney's Office could not sentence him. (R. 415)

Smith testified that he met Stewart around November of 1984. (R. 397) Commencing in early April of 1985, he lived at

Stewart's apartment in Tampa, with Stewart and a woman named Margie Kirkland. (R. 400) Smith related that Stewart told him a man picked him up while he was hitchhiking on Nebraska Avenue in Tampa. Stewart allegedly told the guy to pull the car over "just north of Fowler on some road," to get out of the car, and to lie down on the ground, face down. He walked up behind the guy and "shot him once or twice." Then he got back in the car "and he took off, spinning the tires." (R. 402-03) Smith said that Stewart told him he got about two grams of cocaine out of the man's glove compartment and about $50 out of his pocket. (R. 404) Smith said that Stewart later pointed out to him the location where he burned the car at the Floriland Mall. (R. 405-08)

Smith testified that he had never heard of' Randall Bilbrey although Stewart had told him about a former associate who was a homosexual. (R. 408) On cross-examination, defense counsel attempted to get Smith to admit that Stewart actually told him that Bilbrey had committed the murder. Smith denied it. (R. 416) The State objected. (R. 416)

At bench conference, the prosecutor argued that it was unethical for defense counsel to make such assertions unless "somebody is going to take the stand and make some stab at substantiating his last two statements, and, for that matter, many of the statements he made to Bilbrey. . . ." (R. 416) He offered to withdraw his objection if defense counsel assured them that he planned to call the defendant to the stand to so testify. Defense counsel declined to make any representation. (R. 417)

The court sustained the State's objection, finding the questions improper. (R. 419) Defense counsel objected to the

court's ruling on the basis that it shifted the burden to the defendant to prove his innocence. (R. 419-20) At the close of Smith's testimony, he moved for a mistrial, alleging that the State's attempt to intimidate and harass him by implying ethical violations constituted a Sixth Amendment violation of Stewart's right to effective representation through cross-examination. (R. 422) The trial court denied the motion. (R. 424)

Detective John Marsicano, who participated in the investigation of the homicide for the Hillsborough County Sheriff's Department, testified that he and Detective Dennis Novak interviewed Terry Lyn Smith on April 19, 1985, at the Tampa Police Department. He said that Smith had been under arrest for ten or twelve hours but had not been interviewed prior to this time. (R. 448-51) Without telling Smith any facts aboui the homicide, they asked him if Kenneth Stewart (known to Smith as Keith Kirkland) had made any statements to him about a homicide. Defense counsel objected to the anticipated hearsay. (R. 451-52)

The prosecutor argued that Smith's prior consistent statement was not hearsay.[2] He asserted that the statements were offered to rebut defense counsel's earlier attempt to impeach Smith's credibility by suggesting that he was testifying in exchange for a more lenient sentence, thus implying improper

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[2] A statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . [c]onsistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication. §90.801(2)(b), Fla. Stat. (1985).

motive and recent fabrication. (R. 455-65) Defense counsel responded that the prior consistent statement did not rebut a charge of recent fabrication because the circumstances which existed at the time of Smith's earlier statement were identical to the present circumstances; Smith was facing the same charges. Because Smith had already testified that he told the same story to Marsicano, Marsicano's repetition of the story would only be cumulative and prejudicial. (R. 465-6'7) The court allowed the testimony. (R. 468)

Marsicano testified that 'Terry Lyn Smith told him he had a conversation with Stewart about a week to a week and a half before his arrest. Stewart allegedly told Smith he got into the car with the victim; they drove to the Hillsborough County line in the area of Lutz; the victim "was made to get out of the car and lay face down" and was shot twice, one time possibly in the back of the head; two grams of cocaine and $50 were taken; and tne vehicle was torched at the Floriland Mall. (R. 469) On cross-examination, Detective Marsicano admitted that Smith told him he had previously talked to someone at the Tampa Police Department but Marsicano had not attempted to verify this or to determine whether the story was any different.[3] (R. 474)

The State rested. (R. 475) Following various motions, the defense also rested. (R. 480) During closing argument, defense counsel theorized that it was really Randall Bilbrey who

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[3] During his earlier cross-examination, Smith testified that he first reported the shooting incident to Officer Ed Batson of the Tampa Police Department in early April, shortly before his arrest. (R. 409-410)

committed the murder (R. 497-501) and that Stewart repeated to Terry smith what Bilbrey had told him about the murder. (R. 501) The State objected. Although defense counsel submitted that it was a natural inference that could be drawn from the facts, the court sustained the State's hearsay objection. (R. 501-02)

During the rebuttal portion of his closing argument, defense counsel again attempted to argue that Bilbrey committed the murder. Again the State objected on the basis of hearsay, urging that counsel was arguing things not in evidence. The court sustained the State's objection. (R. 514-15)

The jury found Appellant guilty of first-degree murder and second-degree arson, as charged. (R. 539)

B. Penalty Phase

Before the penalty phase started, defense counsel moved to withdraw and requested that the court appoint new counsel to represent Stewart during the penalty phase. (R. 563) He argued that because his defense was that Stewart did not commit the murder of which the jury had found him guilty, he had lost all credibility with the jury. (R. 563-64) In support of his motion, defense counsel called Brian Donerly, an assistant public defender who handles many death cases. Donerly testified that the preferred method of defense in a capital case is to have separate counsel for each phase. (R. 564-71)

The trial court judge denied defense counsel's motion. He told defense counsel tnat his argument that one of the State's witnesses committed the murder was a proper argument and that he

did not think that the jury "would in any way reflect on you for making that argument at all." (R. 571-72)

The prosecutor advised the court that he intended to call as witnesses two victims of subsequent violent crimes of which Stewart had been convicted prior to this trial. (R. 574-75) He said that be also intended to call Terry Lyn Smith to identify Stewart as the perpetrator of one of the other crimes. (R. 575) Defense counsel objected, arguing that the certified copies of judgments that the State intended to introduce were sufficient to prove 'chat Stewart had been previously convicted of another capital felony and of felonies involving the use of threat or violence to the person. (R. 580-81) Defense counsel also argued that the proposed testimony should be excluded under section 90.403 of the Florida Evidence Code because the probative value of the testimony would be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and needless presentation of cumulative evidence. (R. 582) However, the court allowed the testimony. (R. 604-05)

Michelle Acosta testified that on April 13, 1985, she and a friend, Mark Harris, picked up a hitchhiker on Nebraska Avenue in 'Tampa. She identified Stewart as the hitchhiker. (R. 618-20) When they stopped to let Stewart off, he said, "Don't move. i have a knife." (R. 622) Ms. Acosta testified that, after hesitating a moment, she put her foot on the gas pedal. She immediately heard a gunshot, felt pain in her head, and heard two more gunshots. Stewart dragged Mark Harris out of the car and pulled Ms. Acosta out of the car by her wrist. She was shot in the back. (R. 623-24) Mark Harris eventually died. (R. 624)

James Harville, assistant manager of a 7-Eleven, testified that on April 18, 1985, two men entered his store. (R. 627-29) One of them said, "This is a holdup," and almost instantly shot him between the eyes. (R. 629) Mr. Harville said that he could not identify the triggerman but identified Terry Lyn Smith as the other robber. (R. 629-30)

Terry Lyn Smith identified Kenneth Stewart as the man who shot Mr. Harville. (R. 631-32) He testified that, as far as he knew, Stewart shot Harville intentionally rather than accidentally. (R. 634) He and Stewart were arrested shortly after the incident. (R. 633)

Defense counsel called Stewart's uncle, James Hayward, who testified about Kenneth Stewart's family history. (R. 639-46) He said that "Kenny" was born in 1963, that his mother committed suicide, and 'chat his closest living relatives were his maternal grandmother, Mrs. Estelle Berryhill, and his father's sister, who was Hayward's wife. (R. 640) Kenny's other two paternal aunts and the nine-year-old son of one of them were killed in an automobile accident on October 2, 1969, while en route to Georgia to escape prosecution for child abuse and neglect. (R. 614)

Hayward testified that Kenny's natural father was murdered on December 11, 1971, at a Tampa bar following a dispute over a pool game. (R.641-43) In the midst of his description of the events leading up to the murder, the State objected based on relevancy. (R. 643) The court sustained the objection, noting that "[w]e need to move this case along." (R. 644) Hayward testified that Kenny lived with them for about a month in 1977

during a "custody battle." (R. 645) Kenny "seemed to be a very mixed-up kid" and was very concerned about who murdered his father. (R. 645)

Bruce Scarpo, Stewart's stepfather, testified that Kenny's mother worked for him when Kenny was an infant. (R. 646-47) When the court was going to take Kenny away from his mother because of neglect, he married her so that she would be able to keep the child. (R. 648) After the marriage he learned that she had been in a school for girls, that her aunt and uncle made her do strip-tease dancing in night clubs when she was fourteen to sixteen years old, that she had been a prostitute and was a heavy drinker. (R. 649) To escape her past, they moved to Charleston, South Carolina. (R. 649) Scarpo testified that during their marriage, Kenny's mother would beat, abuse, and otherwise mistreat Kenny whan Scarpo was not around to prevent it. (R. 650-51)

When the marriage broke up after three years, Kenny's mother left, taking Kenny with her. She traveled around the country for seven months, during which time Scarpo frequently sent her money. (R. 652-64) When she finally returned Kenny to Bruce Scarpo, he was unkempt and was eighteen to twenty pounds underweight, according to the pediatrician. (R. 655)

Kenny remained with Scarpo who remarried a year later.[4] Mrs. Scarpo, Kenny's stepmother, also testified during penalty phase. (R. 683-90) She and Scarpo raised Kenny with her three children until he was thirteen years old. (R. 659-660, 673-74).

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[4] Stewart's natural mother committed suicide when Kenny was about five years old. (R. 673)

Throughout this period, Kenny believed that Scarpo was his natural father and "idolized" him. (R. 676-77, 685) At the age of thirteen, Kenny learned that Scarpo was not his real father. He ran away to the home of his natural grandmother, Estelle Berryhill, in Tampa. (R. 660-61) There, he learned about the deaths and tragedies in his natural family. (R. 685) He was also told that Scarpo was somehow implicated in his biological parents' deaths. (R. 676-77, 685-86)

His entire personality changed. He became very bitter and would not talk to anyone. He no longer respected his step-father and family. (R. 663) At the age of fourteen, Kenny got in trouble in Tampa, the grandmother no longer wanted him, and custody was returned to Scarpo. Kenny stayed with the Scarpos about five months during which he had a short period of counseling. (R. 664-65) He disappeared one day and returned to Tampa. (R. 665-66) From this point on he went continually downhill. (R. 668)

Defense counsel asked Kenny's grandmother, Estelle Berryhill, if she was aware of an incident in which Kenny received cigarette burns. She testified that she recently received a phone call from Kenny's aunt on his father's side. (R. 692) At this point, the State objected. (R. 692) The court permitted defense counsel to proffer the testimony.[5] The judge sustained the objection because he found the hearsay "so speculative in

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[5] In proffer, Mrs. Berryhill testified that Kenny's aunt in Brandon told her that, when Kenny was about two years old, her sister had seen cigarette burns on his body. She did not know how many burns there were or who put them there. (R. 695-700)

nature as to the cause of it, that I think it would be just overwhelmingly prejudicial to the State, much more so than its probative value in establishing he was an abused child." (R. 702)

Dr. Sidney Merin, a clinical psychologist arid neuropsychologist, testified for the defense. (R. 703) He said that he saw Stewart for the first Lime that morning. (R. 707) He found no evidence of psychotic thinking or neurosis. (R. 707-08) He did find a behavior disorder known as antisocial personality. (R. 708) He testified that Stewart's behavior since the age of thirteen suggested a "long term insidious form or' suicide where he would virtually destroy himself." (R. 709)

Dr. Merin testified that Stewart had little recall of the particular day of the killing. He normally drank as much as a gallon of liquor a day, along with some beer. Stewart suspected that he had also smoked marijuana that day because he usually did during that pariod of time. (R. 712)

Early on the day of the Killing, Stewart went to his mother's graveside with a gun and a bottle of whisky. (R. 712, 723) He told Dr. Merin that he had done so about once a month since age twelve when his stepfather first took him to his mother's grave. Until then he had doubted her death. (R. 712-15) Between the ages of seven and nine he had nightmares of running away and searching for his mother. He would find her in a line at an airport and run to her. Just before reaching her, he would awaken. (R. 714) After he lost hope that his mother was alive, he began drinking alcohol from his stepfather's bar, sometimes even taking it to school. (R. 715)

That same year he overheard a conversation indicating

that Scarpo was not his natural father. (R. 716) He left through the bedroom window and traveled to the home of his grandmother, whom he had never met, in Tampa. She told him 'chat his biological father had been in prison and was later shot and killed in a barroom fight. She also told him she believed that his stepfather had his real father and mother killed. At that time he believed it. This created a conflict in him because he loved his stepfather but also wanted revenge. (R. 717)

He began committing burglaries and abusing himself through drugs and alcohol. He was finally arrested and sent to a state school where he remained for two years. He returned to work for his stepfather at age seventeen. (R. 719) When his stepfather found out about his use of drugs, Stewart returned to Florida and continued committing burglaries. He spent nine months in jail. Within three months of his release, he violated his probation and spent two and a half years in prison. (R. 719)

Stewart told Dr. Merin that by age nineteen, "[t]his thing with my mother became an obsession and I had so much hate inside of me." He lived for two and a half years with a forty year old woman, still harboring ill feelings toward his stepfather whom he continued to believe killed his parents. (R. 719-20) In his recurring fantasy, he would revenge his parents' deaths, then return to his mother's grave where he would kill himself or arrange a gunfight with the police so that they would kill him. He felt that he was on a suicide mission. (R. 720)

Dr. Merin testified that Stewart had a "distinct emotional and behavioral impairment?? caused by the anger,

hostility, and destructiveness which remained an obsession with him since he was twelve or tnirteen years of age. In Dr. Merin's opinion, Stewart's inappropriate, illegal and destructive behavior stemmed from his fantasies of revenge, based on the poor and inadequate information he had obtained and which was not corrected for years. He continued to hate, eventually deciding not only to avenge his anger by "taking it out on everybody but ultimately, to take it out on himself." (R. 721)

Dr. Merin testified that Stewart developed this condition because of circumstances beyond his control. He believed that, at the time of the murder of Ruben Diaz and the events leading up to it, Stewart was acting under the influence of "mental and emotional disturbance as a consequence of a long-term formulation of' anguish, of pain, of disruption, of' inappropriate behavior, which was practiced over and over again, particularly, the practicing of the rage and fury that he had experienced ever since age twelve." (R. 723)

Although Dr. Merin characterized Stewart as acting under mental and emotional disturbance, he did not feel that it was "extreme." He said that Stewart's background and general thinking were disturbed which affected his capacity to conform his conduct to the requirements of the law to a limited extent. He said that Stewart's capacity was impaired to the extent that alcohol reduces conscious control over behavior, that "the effects of the years of anger and hate did its damage," but that, in his opinion, it was not enough to "completely reduce" Stewart's capacity to conform his behavior. (R. 723-24)

On cross-examination, Dr. Merin testified that Stewart

indicated to him that he shot Ruben Diaz. (R. 724) His opinion was that Stewart's capacity to conform his conduct to the requirements of law was not "substantially" impaired. (R. 728) He believed it would take years of consistent and persistent help in a structured environment to rehabilitate Stewart. (R. 725)

Joy Engle testified that she met Kenneth Stewart through a friend at the jail nine or ten months earlier. They became very good friends, very close, even romantically involved, through her visits at the jail. (R. 731) She testified that Stewart cried and asked forgiveness from God for his crimes. He told her he was sorry and would "have it on his conscience the rest of his life." (R. 733)

Just before closing arguments, defense counsel advised the court that the defendant gave him a letter he had written to the parents of Mark Harris, the victim in another murder for which Stewart had been convicted. The letter, which counsel had not yet read, purported to be a letter of remorse and sympathy. With no discussion, the court refused to allow counsel to "put it in at this stage of the proceedings." (R. 753)

The trial court rejected tne State's request for the "heinous, atrocious and cruel" aggravating factor (R. 593) but, over defense objection, gave the "cold, calculated and premeditated" aggravating factor. (R. 594, 740) Thus, the jurors were instructed that they could consider as aggravating factors that (1) the defendant had previously been convicted of a felony involving the use or threat of violence (reciting the various felonies); (2) the crime was committed while the defendant was

engaged in the commission of a robbery; and (3) the crime was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification. (R. 738-39, 751, 773)

The court gave as mitigating factors (1) the age of the defendant and (2) any other aspect of the defendant's character or record and any circumstances of the offense. (R. 773-74) It rejected defense counsel's request for the statutory mitigating factors that (1) the defendant was an accomplice in the capital felony and his participation was relatively minor (R. 595, 744); (2) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (3) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. (R 740-43)

Defense counsel first requested that the modifiers "extreme" and "substantial" be deleted from the second and third of the above statutory mitigators based on Dr. Merin's testimony. The judge ruled that he must abide by the legislature's inclusion of' the modifiers, characterizing them as "highly important words." He refused to give the two mitigators at all. Defense counsel then requested they be given in full. This too was denied.[6] (R. 741-43)

The jury recommended death by a vote of ten to two. (R. '7'79, 967) Sentencing was set for October 3, 1986. (R. 782)

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[6] Defense counsel maintained that after hearing the evidence, the jury could still infer that the factors existed --that it was a reasonable interpretation of the facts. (R. 741)

C. Sentencing

On October 1, 1986, two days before sentencing, a hearing was held during which the prosecutor argued that the death penalty should be imposed. (R. 870-72) In support of his argument, the prosecutor reminded the court that Dr. Afield, in connection with the earlier murder case arising out of the death of Mark Harris, found that Stewart was "a psychopath, a sociopath, and absolutely beyond rehabilitation." (R. 873) Victoria and Renee Diaz, brother and sister of the victim, testified that they thought Stewart should be sentenced to death. (R. 876-78)

On October 3, 1986, Stewart was sentenced at a consolidated sentencing for the murder of Ruben Diaz, the murder of Mark Harris, and various non-capital felonies. (R. 786-813) All of the offenses occurred between June 8, 1984, when Stewart walked away from his county jail trustee position, and April 19, 1985, when he was apprehended. (R. 787) The court sentenced Stewart to death by electrocution for each first-degree murder. (R. 803-09)

In support of the death penalty in this case, the trial judge orally found as aggravating factors that (1) the defendant had previously been convicted of a felony involving the use or threat of violence; and (2) the crime was committed while the defendant was engaged in the commission of a robbery. (R. 801-02) He found Stewart's age to be the only mitigating factor. (R. 802) The record on appeal contains no written findings.[7] (SR. 1236)

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[7] Appellate counsel requested the trial court's written findings of fact to supplement the record. The Clerk's certificate that the record contains no written findings is dated July 14, 1988, approaching two years from sentencing. (SR 1234-36)

In imposing the death penalty for the murder of Mark Harris, the trial court found the same two aggravating factors. (R. 805-06) In mitigation, however, ne considered not only the age of the defendant, but also that (2) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (3) the capacity of the defendant to appreciate the criminality of' nis conduct or conform his conduct to the requirements of law was substantially impaired. The judge stated, however, that he gave slight weight to the second two factors. (R. 806-07) The court recited some of' the non-statutory mitigation presented by defense counsel but it is unclear whether he gave any weight to it. (R. 807-08)

SUMMARY OF THE ARGUMENT

ISSUE I: Stewart was precluded from exercising his sixth amendment right during the cross-examination of Terry Smith because the trial court sustained the State's objection to defense counsel's inquiry whether Stewart told Smith that Bilbrey committed the murder. Smith's testimony was highly probative and was essential to his affirmative defense that someone else committed the crime. Defense counsel was twice precluded from arguing this same theory of defense during closing argument. Stewart was therefore deprived of an opportunity to develop a viable theory of defense to submit to the jury. The exclusion was clearly prejudicial and requires reversal for a new trial.

ISSUE PI: The trial court improperly allowed the prosecutor to bolster Terry Smith's credibility by admitting his prior consistent statement to Detective Marsicano concerning Stewart's alleged confession. Because Smith's credibility was crucial, the error was not harmless and requires reversal.

ISSUE III: Between the guilt and penalty phases, defense counsel moved to withdraw and for the court to appoint new counsel to represent Stewart. Because he had maintained that Stewart was innocent throughout guilt phase, and the jury found him guilty, counsel submitted that he had lost all credibility with the jury. The trial court's denial of the motion constituted state interference and created ineffective assistance of counsel. Prejudice is assumed and a new penalty phase mandated.

ISSUE IV: The trial court erred in allowing Michella Acosta, James Harville, and Terry Smith to testify during penalty phase about the details of other violent felonies of which

Stewart had been convicted. Although, generally, such testimony is permitted by this Court, in the case at hand it was misleading and became the main feature of the proceeding. This denied Stewart a fair penalty trial.

ISSUE V: During penalty phase., the trial court curtailed the testimony of Stewart's uncle concerning the murder of Stewart's natural father in a Tampa bar. He also disallowed the testimony of Stewart's grandmother concerning cigarette burns on Stewart's body when he was an infant. Third, the judge refused to admit a letter of remorse written by Stewart to the family of Mark Harris, the victim of another homicide of which Stewart had been convicted. The exclusion of this mitigating evidence constituted reversible error.

ISSUE VI: Over objection of defense counsel, the trial court instructed the jury on the "cold, calculated and premeditated" aggravating factor. The facts of the homicide did not prove beyond a reasonable doubt that this factor *was* applicable. Therefore, it was error for the court to so instruct the Jury.

ISSUE VII: The judge refused to instruct the jurors on two important statutory mitigating factors -- that Stewart was under extreme emotional disturbance at the time of the offense, and that his ability to appreciate the criminality of his conduct was substantially impaired. Both the judge and the jury must consider all mitigation established by the evidence. There was a myriad of evidence showing that both of these mitigators were applicable. Accordingly, the trial court erred in failing to instruct the jury on them.

ISSUE VIII: At sentencing, the victim's sister and brother testified that they thought the death penalty was appropriate in this case. In Booth v. Maryland, 482 U.S. —, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court found the admission of victim impact evidence reversible error. Although defense counsel did not object, he did not have the benefit of Booth. Therefore, this Court should reverse its ruling in Grossman v. State, 525 So.2d 833 (Fla. 1988), and remand for a new sentencing.

ISSUE IX: The trial court in the case at hand failed to support his imposition of the death penalty with written findings of fact as required by statute. This Court has encountered numerous cases in which trial judge's have entered written findings in an untimely fashion, and has dealt with such problems based on the situation and. the tardiness of the filing. In Grossman, 525 So.2d 833, this Court distinguished cases in which the written findings were filed prior to certification of the record, requiring a new sentencing, from cases such as Van Royal v. State, 497 So.2d 625 (Fla. 19861, in which the trial court was ordered to impose a life sentence. Because there are still no written findings in the instant case, it should be remanded for the imposition of a life sentence.

ISSUE X: A new penalty trial with a new jury is required when the original jury recommendation is invalid. Because of the exclusion of mitigation evidence, the errors in instructing the jury, and other errors discussed in this brief, if this Court does not remand for imposition of a life sentence, it should remand for a new penalty trial with a new jury.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF 'TERRY SMITH AND IN SUSTAINING THE STATE'S OBJECTION TO HIS CLOSING ARGUMENT THAT IT WAS RANDALL BILBREY WHO ACTUALLY COMMI'I'TED THE MURDER.

The right to develop and present a theory of defense is a fundamental constitutional right. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 279 (1973); Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). The accused has a basic right to introduce evidence in his defense to show tnat someone else committed the crime. *See* e.g., Chambers 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 279; Pettijohn ~~v. Hall~~, 599 F.2d 476 (1st Cir. 1979); United States v. Robinson, 544 F.2d 110, 112 (2d Cir. 1976). Florida nas also long recognized that one accused of a crime may show his innocence by proof of the guilt of another. See Lindsay v. State, 69 Fla. 641, 68 *So.* 932 (1915); Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982); Barnes v. State, 415 So.2d 1260, 1284 (Fla. 2d DCA 1982)(Grimes, J., dissenting). The purpose of the evidence is not to prove the guilt of the other person but to generate a reasonable doubt as to the defendant's guilt. State v. Hawkins, 260 N.W.2d 150, 158-59 (Minn. 1977). In the case at nand, the trial court's restriction of defense counsel's cross-examination of Terry Smith, combined with its restriction of his closing argument that Bilbrey committed the crime, deprived Stewart of his constitutional right to present a meaningful defense.

A. Cross-Examination

Terry Smith, a key prosecution witness, testified that Stewart confessed to him that he committed the murder. On cross-examination, defense counsel asked Smith whether Stewart actually told him that Randall Bilbrey committed the murder. The prosecutor objected, arguing that it was unethical for defense counsel to make such assertions unless "somebody is going to take the stand and make some stab at substantiating his . . . statements . . . . " (R. 416) Defense counsel properly refused to represent whether the defendant would testify. (R. 417)

The court sustained the State's objection, finding the questions improper. (R. 419) At the close of Smith's testimony, defense counsel moved for a mistrial. He argued that the State's attempt to intimidate and harass him by implying ethical violations restricted his cross-examination, and thus violated Stewart's sixth amendment right to effective representation. It is elementary that the court may not deprive the defendant of his right to cross-examine a witness wno testifies against him. See Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The right to cross-examination is implicit in the Sixth Amendment right of confrontation and helps to assure ene "accuracy of' the truth-determining process." Chambers, 410 U.S. at 295, 35 L.Ed.2d at 309 (citations omitted). It is an essential and fundamental requirement for a fair trial. Id.

This is particularly true in a criminal case when the defendant is charged with first-degree murder. Coxwell v. State, 361 So.2d 148 (Fla. 1978). Denial of fair and full cross-examination concerning subjects covered in the witness's direct

examination constitutes "harmful and fatal" error. Coco v. State, 62 So.2d 892, 894-95 (Fla. 1953); see also Coxwell v. State, 361 So.2d 14d (Fla. 1978); Williams v. State, 386 So.2d 25, 27 (Fla. 2d DCA 1980)(because defendant's right to cross-examination is carefully guarded in a capital case, limiting cross-examination on any matter plausibly relevant to the defense may constitute reversible error). There is no question but that the identity of the murderer was the subject of both Smith's direct examination and defense counsel's attempted cross-examination.

Coxwell is precisely on point. In that case, the trial court curtailed defense counsel's cross-examination of a key witness concerning whether he killed the defendant's wife pursuant to a plan he had made earlier with the defendant. Defense counsel was attempting to elicit testimony to support his theory of defense that, although the witness and the defendant had discussed various plans to kill the defendant's wife, it was the defendant's girlfriend who actually procured the wife's murder. 361 So.2d at 150.

Reversing for a new trial, this Court found that "the court's curtailment of defense inquiry at this crucial juncture constituted a deprivation of his absolute and fundamental right to cross-examine a witness who testifies against him, as guaranteed by the sixth amendment of the federal constitution." Id. (footnote omitted). The court noted that the erroneous ruling forestalled the development of the defense theory that the defendant's girlfriend nad procured nis wife's death, as to which the witness who did the actual killing would have first-hand

information.[8] The Coxwell court concluded that the unwarranted restriction of cross-examination of a key prosecution witness "may easily constitute reversible error." 361 So.2d at 152 (footnote omitted).

We are well aware that there must be a connection between the third person and the crime. Cikora v. Wainwright, 661 F.Supp. 813 (S.D. Fla. 1987). Mere speculation is not sufficient. See Hawkins, 260 N.W.2d at 159; Barnes v. State, 415 So.2d 1280, 1284-86 (Fla. 2d DCA 1982). It is not enough merely to show that someone else had a motive. Siemon v. Stoughton, 440 A.2d 210, 214 (Conn. 1981)(cited in Barnes, 415 So.2d at 1285 (Grimes, J., dissenting)). In Cikora, for example, tne court found no error in the trial court's denial of defense counsel's request that the jury be permitted a "view" of an inmate that Cikora met in the county jail who looked like him and also lived in the neighborhood of the crime. The court noted that the defendant demonstrated no connection or nexus between the inmate and the burglary. He did not specify now the inmate more closely resembled the burglar's description; the court haa no information concerning whether the inmate was in jail at the time of the burglary; and the court could not be sure that the inmate actually lived in the same neighborhood. 661 F.Supp. at 824.

In the case at hand, however, we do not have merely motive and speculation. Stewart's counsel brought out during

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[8] Although the State argued that no proffer was made in this case, the court determined that it was reversible error nonetheless. Coxwell, 361 So.2d at 151-52.

Bilbrey's cross-examination that he knew minute details about the murder, including the clothes Diaz was wearing and the color of his car. If Bilbrey committed the crime, he most certainly had a motive to testify against Stewart. His knowledge of the details alone was sufficient to connect Bilbrey to the crime, especially in light of the fact that the State presented no evidence aside from the hearsay testimony of Bilbrey and Smith to connect Stewart to the crime. But this was not the only nexus.

In a footnote, the Coxwell court noted that Coxwell's effort to implicate his girlfriend as the principal could be supported by the fact that she knew the victim, knew details of the crime, had a motive for hating the victim, and was convicted of conspiring to kill the victim on another occasion. 361 So.2d at 151 n.9 In our case, as noted above, Bilbrey also knew the details of the murder and had a motive to testify falsely. He had a potential motive to kill Diaz -- a homosexual relationship. Even more incriminating in nature was the fact that Bilbrey quit his job and left the state shortly after the murder. Additionally, Bilbrey did not report the murder; he only told the story to detectives when they came to Virginia to question him, presumably as a result of information obtained from Terry Smith.

Unlike Coxwell, Stewart was not attempting to call a defense witness to testify that someone else committed the crime. He wanted only to cross-examine a key prosecution witness. More latitude must be permitted when defense counsel attempts to elicit testimony during cross-examination of a key prosecution witness. See United States v. Williams, 592 F.2d 1277 (5th Cir.

1979) (cross-examination of witness in matters relevant to credibility should be given wide scope to delve into witness's story, to test witness's perceptions and memory, and to impeacn witness). Limiting the scope of cross-examination in a manner which keeps from the jury relevant facts bearing on crustworthiness of crucial prosecution testimony is improper, especially where directed at a key prosecution witness. Mendez v. State, 412 So.2d 965, 966 (Fla. 2d DCA 1982)(citations omitted). It did not matter whether defense counsel's goal was to uncover an intervening principal or to establish a foundation for subsequent impeachment. Coxwell, 361 So.2d 152 (citing Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed. 447 (1953) (trial judge should be inclined to afford greater latitude on cross-examination when object is to impeach key prosecution witness)). Perhaps, if defense counsel had been allowed to continue his cross-examination, Smith might have conceded that he could have been mistaken as to whether Stewart said he or someone else committed the crime, or whether he said that he and an accomplice committed the murder.

The identity of the murderer was the only factual issue at trial. As in Coxwell, therefore, "the defendant in a capital case was denied the opportunity to elicit testimony from a key prosecution witness as to the most critical factual issue in the case -- identification." See also Pettijohn, 599 F.2d at 482 (where identification of robber was only key issue, exclusion of identification testimony was necessarily harmful error).

B. Closing Argument

During his closing argument, defense counsel attempted to further his theory that it was really Randall Bilbrey who committed the murder and that Stewart only repeated to Terry Smith what Bilbrey had told him about the murder. (R. 497-501) The State objected because there had been no evidence presented that Bilbrey committed the murder. Defense counsel argued that it was a natural inference that could be drawn from the facts. When defense counsel attempted to make the same argument during rebuttal, the State objected on the basis of hearsay, urging that counsel was arguing things not in evidence. Both times the court sustained the State's objection. (R. 501-02, 14-15)

Oddly enough, the State's earlier objection and the trial court's ruling which precluded defense counsel from thoroughly cross-examining Smith may have been the reason there was no evidence Bilbrey committed the crime. Had defense counsel been allowed to continue his cross-examination, he might have elicited some evidence which he could then have argued to the jury in closing. Even a little doubt as to whether Stewart was the perpetrator might have resulted in a different verdict.

It is ironic that, although the trial court judge agreed with the prosecutor's argument that defense counsel's tneory and line of questioning were "unbelievable" (R. 422), he later found the theory to be a "proper" argument. When defense counsel moved to withdraw and for the appointment of new counsel for penalty phase [see Issue III], alleging that his defense -- that someone other than Stewart committed the crime -- had destroyed his credibility with the jury, the trial court stated to

defense counsel as follows:

> "I recall your statements, your opening comment about, you would have the words from the killer or murderer's mouth themselves. And I know you were referring to one of the witnesses that was called by the State. And you toucned on that same argument in your final argument.
>
> I think it was a proper argument under your theory of the case. I don't see where the jury would in any way reflect on you for making that argument at all. " (R. 572)

This was the same argument that the judge characterized as "unbelievable," refused to allow defense counsel to explore during cross-examination of a key prosecution witness, and twice refused to allow defense counsel to argue to the jury during his closing argument.

The credibility of any witness or theory rests with the jury. Coxwell, 361 So.2d n.9. The right to present a defense is fundamental. "No matter how credible this defense, our system of justice guarantees the right to present it and be judged by it." Pettijohn, 599 F.2d at 483. Even without any direct evidence of Bilbrey's complicity, defense counsel should have been permitted to argue his theory of defense to the jury. There was no direct evidence against Stewart either. In light of Bilbrey's apparently accurate testimonial description of the crime, there was enough circumstantial evidence to suggest that he may have committed it himself'. ~~See Pahl,~~ 415 So.2d at 43 (where State relies substantially on circumstantial evidence to connect accused with crime and there is independant evidence connecting another person with the crime, defendant may also by circumstantial evidence

attempt to prove that someone else committed the act in question). The jurors heard the evidence and were capable of deciding whether the defense theory had any merit or created reasonable doubt. The fact that the court sustained the prosecutor's objection to defense counsel's theory of the case twice during closing argument suggested to the jurors that the judge did not believe it and that they should not consider it.

C. Harmless Error Analysis

Whether "rooted directly" in the Due Process Clause of the Fifth and Fourteenth Amendments or in the Confrontation or Compulsory Process clauses of the Sixth Amendment, the Constitution guarantees the defendant in a criminal case a meaningful opportunity to be heard and to present a complete defense. See Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636, 645 (1986); Chambers, 410 U.S. 264. When an error affects a constitutional right, the reviewing court may not find it harmless unless it is shown beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Palmes v. State, 397 So.2d 648, 654 (Fla.), cert. denied, 454 U.S. 682, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). The burden of proof is on the State. Chapman, 386 U.S. at 26; DiGuilio, 491 So.2d at 1139.

The right to confrontation is also a fundamental constitutional right guaranteed by the Sixth Amendment. The Coxwell court held that an abuse of discretion by the trial judge in curtailing cross-examination of a key prosecution witness

regarding matters germane to the witness' testimony end plausibly relevant to the defense may "easily constitute reversible error. 361 So.2d at 152; accord Palmes, 397 So.2d at 653; Pait v. State, 112 So.2d 380, 385, 388-89 (Fla. 1959) (error in capital case must be carefully scrutinized before written off as harmless).

In Chapman, 386 U.S. at 23, the United States Supreme Court cautioned against giving too much Emphasis to "overwhelming evidence" of guilt where constitutional error affects substantial rights. Accord DiGuilio, 491 So.2d at 1136-39. Even if that were the test, however, the evidence in the instant case, comprised entirely of hearsay, was far from overwhelming. Although defense counsel introduced no concrete evidence as to his theory, it may have been correct. It is possible that both Bilbrey and Smith lied as to the identity of the murderer, especially if one of' them was the perpetrator or an accomplice.[9] The State offered no physical evidence that Stewart committed the crime. Thus, the State cannot show beyond a reasonable doubt that the errors, and the resulting inability of' defense counsel to present a viable theory of defense, did not affect the verdict.

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[9] Bilbrey's version of the murder included an accomplice who could have been Bilbrey or, even more plausibly, Smith who was Stewart's accomplice in another robbery. If Bilbrey committed the crime, he would naturally blame Stewart when contacted by detectives. Smith, who expected a more lenient sentence because of his testimony against Stewart, also had a motive to testify falsely. Stewart might actually be innocent of this crime because the only indication that he committed the murder was testimony during penalty phase tnat he "indicated" to Dr. Merin that he did it. This could have been a misinterpretation by Dr. Merin or a false confession resulting from Stewart's hopelessness after the jury's guilty verdict the previous day and his earlier conviction for another killing.

ISSUE II

THE TRIAL COURT ERRED BY PERMITTING THE STATE TO ELICIT HEARSAY EVIDENCE OF TERRY SMITH'S PRIOR CONSISTENT STATEMENT TO DETECTIVE MARSICANO TO BOLSTER SMITH'S CREDIBILITY.

A prior consistent statement may not be introduced to corroborate or bolster the credibility of the witness. Jackson v. State, 498 So.2d 906, 909 (Fla. 1986); Van Gallon v. State, 50 So.2d 882 (Fla. 1951). Section 90.801(2)(b), Florida Statutes (1985), provides an exception to the general rule. It allows a prior consistent statement to be used to rebut an express or implied charge of improper influence, motive or recent fabrication.[10] it is essential, however, that the prior consistent statement have been made prior to the existence of the reason to falsify. Jackson, 498 So.2d at 910; Preston v. State, 470 So.2d 836, 837 (Fla. 2d DCA 1985); Quiles v. State, 13 F.L.W. 1050 (Fla. 2d DCA April 27, 1988). In the case at hand, Smith's prior inconsistent statement to Detective Marsicano was not made prior to the existence of that reason.

Over defense objection, the court allowed Detective Marsicano to repeat to the jury what Terry Smith told them concerning Stewart's confession to the crime at the time of Smith's arrest. Marsicano testified that Smith told them at the time of his arrest that Stewart had confessed to the crime. He said that

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[10] Section 90.801(2)(b) provides that "[a] statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . [c]onsistent with his testimony and is offered to rebut an express or implied charge against him of improper influence, motive, or recent fabrication."

Stewart told him he got into the car with the victim, made him drive out near Lutz, get out of the car and lay down, and that he shot the victim twice. Smith also testified that Stewart said he robbed the victim of cocaine and $50 and "torched" his car at the Floriland Mall. (R. 468-69)

Terry Smith had a reason to falsify at the time of his arrest. He had been convicted of felonies before. He admitted to knowing how the legal system works. (R. 415) When first asked by defense counsel whether he had received promises of' leniency in exchange for his testimony, Smith said that while no promises had been made, it seemed "only natural" that the judge would reward him for his cooperation by imposing a more lenient sentence.'' (R. 411)

Smith later testified that the only persons who told him he would benefit from his cooperation were Detectives Novak and Marsicano.[12] (R. 412) Ironically, these were the same two officers to whom he made the prior inconsistent statement. If Marsicano and Novak promised leniency, this may have been Smith's incentive for making the statement to Marsicano and Novak at the time of his arrest as well as for testifying against Stewart at

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One of the felonies with which Smith was charged was the convenience store robbery of April 18, 1985, concerning which he testified at penalty phase. (R. 627, 31-32) James Harvilie, the victim of that robbery, testified during penalty phase of this trial that he could identify Smith but not Stewart. (R. 629-30) Smith testified that he and Stewart were arrested shortly after the incident. (R. 633) Thus, Smith's testimony against Stewart was probably his only hope of a lenient sentence.

[12] Althougn Marsicano testified that they did not promise Smith anything to elicit his statement, Smith testified that they did. (R. 451-52, 412)

trial. In either event, he had the same motive when he made the prior consistent statement that he had when he testified in court -- to get a better deal for himself.

In Jackson, 498 So.2d at 910, the defendant allegedly confessed the crime to a co-prisoner who testified against him. As in the case at hand, defense counsel attempted to impeach the credibility of the prosecution witness. Nevertheless, this Court found that the witness already had a motive to testify falsely -- from the moment he first heard about the robbery. Therefore, his prior consistent statements were made after, rather than before, the alleged motive to falsify arose and the exception to the hearsay rule was not applicable. Id.

The same is true in the case at hand.. Although defense counsel questioned Terry Smith concerning promises of leniency by law enforcement officers and the State Attorney, Smith had a motive to falsify even before any promises were made. His testimony intimated that he was ready to use the information allegedly obtained from Stewart to his own benefit almost as soon as he heard it.[13]

It is not unusual nor improper for detectives and prosecutors, when investigating a homicide and preparing the case for trial, to promise a state witness a more lenient sentence in exchange for testimony against a codefendant or other defendant.

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[13] Smith's unsubstantiated testimony 'chat he told the story to an officer of the Tampa Police Department just prior to his arrest has nothing to do with the prior consistent statement to Marsicano. It suggests, however, that even then, when his arrest was imminent, he was setting the stage to testify in exchange for a lenient sentence.

The law is firmly established, however, that when a prosecution witness has criminal charges, is under investigation, or has been granted immunity in exchange for testimony, the person against whom the witness testifies has an absolute right to cross-examine him to impeach his credibility by showing bias, prejudice or interest, particularly where the witness is crucial to the case. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); Fulton v. State, 335 So.2d 280 (Fla. 1976). Denial of the Sixth Amendment right to confrontation cannot be cured by a showing of lack of prejudice. Davis v. Alaska.

in the case at hand, Stewart was afforded that right. He was punished for exercising his constitutional right, however, by the trial court's ruling which allowed the prosecutor to introduce the state witness's prior consistent statement, made to a law enforcement officer, to bolster his testimony after the attempted impeachment. We are not suggesting that a prior inconsistent statement should not be admitted in accordance with the rule if it were made prior to a motive to fabricate. It seems too easy, however, for a trial judge to admit such testimony merely because defense counsel attempted to impeach the witness, as was his right, based upon promises made to him by law enforcement officers. It is not unusual for promises to be made to a witness who already has a motive to testify. That, we submit, was the case here.

In Allison v. State, 162 So.2d 922 (Fla. 1st BCA 1964), the court pointed out that the the rule against the use of prior consistent statements is apparent upon reflection. Without the

rule, a witness's testimony could be blown up out of proportion by telling the same story out of court to a group of reputable citizens who would then "parade onto the witness stand and repeat the statement time and again until the jury might easily forget that the truth of the statement was not backed by those citizens." The Allison court noted that the danger is particularly acute when the out-of-court statement is repeated to the jury by law enforcement officers. 162 So.2d at 924.

In Lamb v. State, 357 So.2d 437, 438 (Fla. 2d DCA 1978), the trial court permitted an investigating officer to testify regarding statements made by the victim which were consistent with the victim's testimony at trial. The Lamb court reversed,[14] noting that the law enforcement officer's testimony "had the immediate effect of putting a cloak of credibility" upon the testimony of the witness. 357 So.2d at 438; ~~see also~~ Perez ~~v. State~~, 371 So.2d 714, 717 (Fla. 2d DCA 1979)(when corroborating witness is law enforcement officer who is generally regarded by jury as disinterested, objective and therefore highly credible, danger of improperly influencing jury becomes particularly grave and error cannot be harmless).

In the case at hand, the erroneous introduction of the prior consistent statement was not harmless. The repetition of

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[14] The Lamb court also found the statement was not part of the res gestae and that the witness had time to reflect while awaiting the arrival of the police at her apartment after the crime occurred. In the instant case, Marsicano testified that Smith had been incarcerated ten or twelve hours before anyone asked him about the incident. He had ten or twelve hours to reflect on his situation and contemplate what he would tell the officers when they came to question him.

Smith's story by a law enforcement officer placed a "cloak of credibility" upon what might otherwise have been an incredible story. Terry Smith's credibility was severely impeached. He had been convicted of seven prior felonies and admittedly expected a more lenient sentence because of nis testimony against Stewart. Furthermore, his account of the incident differed significantly from that of the only other key witness. Smith's testimony was even more crucial than Bilbrey's because Smith testified that Stewart acted alone, in contrast to Bilbrey's earlier testimony tnat Stewart's accomplice insisted he kill Diaz.[15]

This hearsay, used by the prosecutor Lo bolster Smith's testimony, was extremely prejudicial. The purpose of the exception is to allow certain nearsay to be admitted when it would weaken or destroy the force of the impeaching evidence. Carroll v. State, 497 So.2d 253 (Fla. 3d DCA 1985). In the case at hand, it did not serve that purpose bscause Smith already had the motive to falsify when *he* made his first statement to the police. Instead, it served to bolster Smith's testimony through repetition by a law enforcement officer which "cloaked it" with undeserved credibility. When the credibility of the witness is crucial, as it was in this *case*, the improper admission of such testimony violates the defendant's right to confrontation as surely as if' he had been denied the right to cross-examine the witness to impeach his credibility. It is reversible error.

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[15] Bilbrey said that Stewart and an accomplice *met* Diaz in a bar and convinced him to cake them somewhere. Smith testified that Stewart was hitchhiking alone when Diaz picked him up.

ISSUE III

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION TO WITHDRAW AND TO APPOINT NEW COUNSEL TO REPRESENT APPELLANT AT THE PENALTY TRIAL.

Before the penalty phase started, defense counsel moved to withdraw and requested that the court appoint new counsel to represent Stewart during the penalty phase. He argued that because his defense was that Stewart was innocent of the murder of which the jury had found him guilty, he had lost his credibility with the jury. In support of his motion, defense counsel called an assistant public defender who handled many death cases. He testified that the preferred method of defense in a capital case is to have separate counsel for each phase. (R. 563-71)

In denying his motion, the judge told defense counsel that his argument -- that one of the State's witnesses committed the murder -- was a proper argument and that he did not think the jury "would in any way reflect on you for making that argument at all."[16] (R. 571-72) As discussed in Issue I of this brief, however, the trial court had earlier sustained the prosecutor's objection to this argument on several occasions. This suggested to the jury that defense counsel's argument was improper, inappropriate or, perhaps, incredible.[17]

During penalty phase, Dr. Merin testified that Stewart

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[16] See trial judge's exact comments, supra p. 35.

When the judge sustained the prosecutor's objection to defense counsel's cross-examination of Terry Smith, he agreed that defense counsel's theory (that Bilbrey committed the crime) and line of questioning were "unbelievable."

"indicated" to him that morning that he killed Diaz. (R724) We do not Know whether Dr. Merin meant that Stewart came right, out and said he did it, vaguely admitted to having been involved, failed to deny it, or just talked as though he were the perpetrator. In any event;, defense counsel reported to the judge during his sentencing argument that, wnen Dr. Merin made that response to the prosecutor's question, he noticed that four or five of the jurors "looked directly at me with their arms folded, with a frown, their eyebrows knitted, and shook their head[s] at me." (R. 876) This suggests that nearly half of the jurors believed that defense counsel had intentionally attempted to deceive them during the guilt phase of the trial. This loss of credibility tainted the entire penalty proceeding, rendered defense counsel completely ineffective and resulted in an unfair penalty trial. The jury's sentencing advisory opinion was likewise tainted and should not have been relied on by the trial court in sentencing.

In a long line of cases, the United States Supreme Court has recognized that the Sixth Amendment right to counsel is necessary to protect the fundamental right to a fair trial. Although the United States Constitution guarantees a fair trial through the due process clause, it defines the basic elements of a fair trial largely through the Sixth Amendment which includes the right to counsel. Strickland v. Washington, 466 U.S. 668, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In Strickland, the United States Supreme Court adopted a "reasonably effective assistance" standard for assessing the performance of counsel. Pursuant to Strickland, ineffective assistance of counsel requires a showing that (1) counsel made

errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) the deficient performance prejudiced the defense. 466 U. S. at 687; Bush v. Wainwright, 505 So.2d 409, 411 (Fla. 1987)(following Strickland test). The Strickland court held that the same standard applies to a capital sentencing proceeding such as that provided by Florida law. Counsel's role at a penalty phase proceeding is to ensure that the adversarial process works to produce a just result. 466 U.S. at 667.

The case at hand, however, is not a case like Strickland, in which the defendant alleged that counsel did not conduct a thorough penalty phase investigation, or like Holsworth v. State, 522 So.2d 348 (Fla. 1988), in which defense counsel failed to prepare for the penalty phase of the trial. We do not know to what extent defense counsel prepared for the penalty phase in the case at hand. He did, however, present family members, a psychologist, and other witnesses who testified about Stewart's childhood abuse and emotional disturbances.

In the instant case, Stewart received ineffective assistance of counsel because of state interference with the ability of counsel to render effective assistance. See, e.g., United States v. Cronic, 466 **U.S.** 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (young lawyer with real estate practice who had never conducted a jury trial appointed to represent defendant in mail fraud case, with only 25 days for pretrial preparation although it had taken government over 4½ years to investigate case); Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d

592 (1976) (bar on attorney-client consultation during overnight recess). In such a case, the government violates the right to effective assistance when it interferes with the ability of counsel to make independent decisions about how to conduct the defense. Strickland, 466 U.S. at 686.

State interference with counsel's assistance raises a presumption of prejudice. In such circumstances, prejudice is so likely that case by case inquiry into prejudice is not worth the cost. Strickland, 466 U.S. at 692; Cronic, 466 U.S. at 658. The presumption that counsel's assistance is essential requires the conclusion that a trial is unfair if the accused is denied counsel at a critical stage of his trial. The Supreme Court has uniformly found constitutional error when counsel was totally absent or prevented from assisting the accused during a critical stage of the proceeding. Cronic, 466 U.S. at 658 & n.25.

Constitutional error also results when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Cronic, 466 U.S. at 658. 'There may be circumstances of such magnitude that although counsel is available to assist the accused, the likelihood that even a competent lawyer could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct. See e.g., Davis v. Alaska, 415 U.S. 306, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974)(defendant denied right of effective cross-examination); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)(court appointed unprspared Tennessee lawyer in highly publicized capital of'fense "with whatever help the local bar could provide," to represent young, illiterate defendants).

Although perhaps not of the magnitude of the above examples, the case at hand presents a similar situation. Although defense counsel was there to assist Stewart throughout the penalty phase, the action of the trial court in failing to appoint new counsel rendered defense counsel's assistance totally ineffective. Because the jury no longer believed in defense counsel's integrity or credibility, nothing that he presented, did, or said subjected the State's case for death to a meaningful adversarial testing. The prejudice created by his guilt phase argument that Stewart was innocent, coupled with the court's rulings sustaining the prosecutor's objections to his argument, and aggravated by Dr. Merin's assertion during penalty phase that Stewart had admitted to the killing, was such that no lawyer in defense counsel's position, no matter how competent, could provide effective assistance.

Showing actual prejudice in a case such as this is unnecessary because the conduct of counsel does not cause the prejudice. The prejudice arose from the circumstances that put counsel in the position of representing a convicted defendant at penalty phase the day after he proclaimed his innocence during guilt phase. Had the trial court granted defense counsel's motion to withdraw, and appointed new counsel for penalty phase, the prejudice could have been avoided.

We are aware that, because defense counsel's motion was made on the morning of penalty phase, appointing new counsel would have inconvenienced the court, the prosecution, the jurors, and the witnesses. We assume that defense counsel did not

realize before the trial commenced that he would be in this position. The majority of the inconvenience might have been avoided, however, if the trial court had appointed a lawyer who could step right in without much preparation to conduct the penalty phase. Because Stewart had been tried for another capital offense only a month earlier, his court-appointad counsel in that trial could possibly have taken over with little preparation. He had just conducted a similar penalty phase trial with the same defendant, same family witnesses, same prosecutor, and same judge.[18] Alternatively, the court might have appointed the assistant public defender who testified concerning the preferred method of trying death cases, if no conflict existed. Neither of these alternatives was explored. Even though a continuance would have been necessary, Stewart's right to a fair penalty trial far outweighed this minor inconvenience.

Defense counsel's concern over his credibility was not imaginary. In the recent case of Jones v. State, 13 F.L.W. 403, 405 (Fla. June 23, 1988), defense counsel had the same concern. At the evidentiary hearing on the defendant's Rule 3.850 motion alleging ineffective assistance, defense counsel justified not putting the psychiatrist on the stand during penalty phase because it would have been contrary to his theory of the case. As in the case at hand, he had spent the entire trial saying that the defendant did not commit the murder. To tell the jury during penalty phase that the defendant committed the crime because he

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[18] See "Statement of the Facts -- D. Sentencing," supra p. 23-24.

was paranoid would have destroyed any credibility he might have had with the jury. This Court found his decision not to call the psychiatrist a reasonable tactical decision. Id.

The Strickland Court noted that it is not enough that a person who happens to be a lawyer is present at trial alongside the accused. The Sixth Amendment envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. 466 U.S. at 685. Accordingly, the right to counsel has been recognized to be the right to "effective" counsel. The purpose of the requirement is to assure that the defendant will have a fair trial. Thus, the criteria for judging an ineffective assistance claim is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland, 466 U.S. at 686.

In the case at hand, there is no assurance that counsel's assistance produced a just result. The jury recommended death by a 10 to 2 vote despite the mitigation presented. A key aspects of the penalty phase proceeding is that the sentence be individualized. Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It cannot be individualized if the jurors are reacting to their distrust for defense counsel rather than making a rational decision based on the evidence and the law. Thus, the jury's advisory opinion was tainted and should not have been relied upon by the trial court in sentencing. A new penalty phase with a new jury is required.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING THE STATE TO INTRODUCE, THROUGH VICTIM TESTIMONY, SPECIFIC FACTS AND DETAILS OF APPELLANT'S PRIOR CONVICTIONS.

Prior to penalty phase, defense counsel objected to the State's introduction during penalty phase of testimony concerning the specific facts and details of the offenses for which Stewart had been previously convicted. (R. 580-81) Specifically, defense counsel objected to testimony of Michelle Acosta concerning the details of the incident resulting in Stewart's conviction for the first and second-degree murder, the testimony of James Harville that Stewart shot him while robbing the convenience store where he worked, and Terry Smith's identification of Stewart as the triggerman in 'chat incident. Defense counsel argued that the certified copies of judgments that the State intended to introduce were sufficient to prove that Stewart had been previously convicted of another capital felony and of felonies involving the use of threat or violence to the person. (R. 580-81) He did not object to the jury instruction on the section 921.141(5)(b) aggravating factor. Defense counsel also argued that the proposed testimony should be excluded under section 90.403 of the Florida Evidence Code because the probative value of the testimony would be outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and needless presentation of cumulative evidence. (R. 582) The court allowed the testimony. (R. 604-05)

Michelle Acosta testified that on April 13, 1985, she and a friend, Mark Harris, picked up Kenneth Stewart who was

hitchhiking on Nebraska Avenue in Tampa. (R. 618-20) When they stopped to let Stewart off, he said "Don't move. I have a knife." (R. 622) Ms. Acosta testified that, after hesitating a moment, she put her foot on the gas pedal. She immediately heard gunshots and felt pain in her head. Stewart then dragged Harris out of the car and pulled Acosta out of the car by her wrist. Acosta was shot in the back and Mark Harris died. (R. 623-24)

James Harville, assistant manager of a 7-Eleven, testified that on April 18, 1985, two men entered his store. (R. 627-29) One of them shot him between the eyes. (R. 629) Harville said that he could not identify the triggerman but identified Terry Lyn Smith as the other robber. (R. 629-30) Terry Smith then identified Kenneth Stewart as the man who shot Harville. (R. 631-32) He testified that, as far as he knew, Stewart shot Harville intentionally rather than accidentally. (R. 634) He and Stewart were arrested shortly after the incident. (R. 633)

This court has held that the prosecution may introduce evidence of a particular offense to establish that a defendant was under sentence at the time of the offense, Jackson v. State, 13 F.L.W. 305, 306 (Fla. May 5, 1988), or to establish that the defendant had been previously convicted of a violent felony, Mann v. State, 453 So.2d 784, 785 (Fla. 1984). In the case at hand, however, Stewart was not under sentence at the time of the offense and the State had already introduced the prior convictions for violent felonies through the testimony of the bailiff, another deputy, and the clerk of court. (R. 607-61) Moreover, defense counsel did not object to the court's instruction that Stewart had previously been convicted of a capital felony and

other violent felonies. Thus, the testimony of Acosta, Harville, and Smith was unnecessary for either of these purposes.

We recognize that this Court has also found such testimony admissible to show propensity to commit violent crimes and as a part of the character analysis of the defendant. Elledge v. State, 346 So.2d 998 (Fla. 1977). The Elledge court reasoned that such testimony could contribute to sentencing decisions, leading to uniform treatment and the elimination of " 'total arbitrariness and capriciousness in [the] imposition' of the death penalty." Id. at 1001 (citing Proffitt v. Florida, 96 S.Ct. at 2969). Although this may be true in some cases, in the case at hand, the testimony actually did the reverse. Instead of eliminating arbitrariness, it created an unacceptable risk that the jury imposed the death penalty in an arbitrary and capricious fashion, based upon the emotion-creating testimony of Acosta and Harville. We submit that our conclusion is borne out by the United States Supreme Court's recent opinion in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).[19]

Our Supreme Court held in Booth v. Maryland, that the Eighth Amendment precludes a capital sentencing jury from considering victim impact evidence because the personal characteristics of the victim and its impact on the victim's family are irrelevant to a capital sentencing decision. The Court found that the introduction of such evidence created too great a risk

[19] The Elledge court did not have the benefit of the Supreme Court's ruling in Booth. We believe that the Booth holding might have altered this Court's decision in Elledge.

that the sentencing jury would impose the death penalty in an arbitrary and capricious manner.

In the case at hand, the trial court created a situation much like that prohibited by Booth, when Michelle Acosta was allowed to testify about separate crimes for which Stewart had been convicted a month earlier. (R. 756; OR. 904, 1011) The sentencing jury heard testimony concerning the impact of the attempted second-degree murder (OR. 904) on the victim, Michelle Acosta, through her own testimony. Through the same testimony, the jury heard and observed evidence of the impact of the death of Mark Harris (OR. 1011) on his girlfriend, Michelle Acosta. If victim impact testimony is reversible error when it concerns the impact of the crime for which the accused is being tried, victim impact testimony about a totally unrelated crime is even more erroneous and prejudicial.

To compound the error, the version of the facts recited by Michelle Acosta gave the jurors a distorted view of the crime. The jury heard Michelle's account of what happened without hearing the rest of the testimony in that case. Listening to her testimony at this trial, one would believe that Stewart was guilty of premeditated murder as to Harris and of attempted first-degree murder as to Acosta. Instead, Stewart was convicted of the felony murder of Mark Harris (the jury foreman wrote "felony" on the verdict form) and attempted second-degree murder (with a firearm) of Michelle Acosta. (OR. 904, 1011)

The jurors also heard and observed evidence of the impact of another attempted murder on the victim, James Harville, who testified about the facts of that offense. (R. 790-92) Terry

Smith then testified that Stewart shot Harville and that, "as far as he knew," the shooting was intentional rather than accidental. Thus, the jury heard Smith's conjecture as to Stewart's state of mind at the time of that shooting. The record indicates that Stewart pled nolo contendere to attempted first-degree murder with a firearm, aggravated assault with a firearm, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. (R. 790-91) A plea of nolo contendere is not an admission of guilt. The jurors did not have the benefit of this information, however, because it is contained only in the sentencing record. (R. 790-91)

We have not overlooked the fact that the jury heard a recitation of the list of violent crimes of which Stewart had been convicted during the court's instruction on the section 921.141(5)(b) aggravating factor. (R.773) The judge instructed the jury that Stewart had previously been convicted of a violent felony and that the crimes of first-degree murder, attempted second-degree murder, and attempted first-degree murder were all violent felonies. (R. 773) Even if the jurors attempted to connect these convictions with the crimes that they heard about during penalty phase, they could not have known whether the attempted first-degree murder conviction was for the attempted murder of Michelle Acosta or James Harville. Similarly, they could not have known whether the attempted second-degree murder was for the attempted murder of Acosta or Harville. In fact, they might have thought that one of the attempted murder convictions was for the attempted murder of Mark Harris because Michelle

Acosta's testimony indicated that he did not die immediately after he was shot. (R. 623-24)

The prosecutor further compounded this error by arguing to the jury during his closing penalty phase argument that the jurors need not speculate as to the facts of the prior murder conviction because they heard them. He told the jurors that because they heard the facts of the other offenses, they need not "wonder whether or not, maybe, maybe that was a self-defense situation. Maybe, maybe he came home and found somebody in bed with his old lady or whatever." (R. 756) The problem with this argument is that the jury heard only selected facts -- not the whole story.

After the judge overruled defense counsel's objection, the prosecutor argued that, to reward Acosta and Harris for their kindness in picking him up as a hitchhiker, he shot them: "Boom. Boom. Like swatting two flies. Like crushing two bugs. That is all they were to him. And he . . . drug them out of the car, and he drove off, leaving them in the dirt. And Mark Harris is dead. Michelle Acosta is lucky to be alive." (R. 757) Similarly, the prosecutor argued as to the attempted murder of James Harville, that Stewart said "Give me all the your motherfucking money now. Boom. Like he was a bug."[20] (R.758)

These excerpts from the prosecutor's closing argument suggest another reason why the court's admission of the testimony

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[20] This was the language used by Terry Smith, who testified that he was with Stewart (R. 632), rather than of Harville who testified that Stewart said "This is a holdup," prior to shooting him. (R.629)

was error. The introduction of the testimony may be likened to the Williams Rule problem created when similar fact evidence of an unrelated crime becomes the main feature of the trial. See Williams v. State, 117 So.2d 473, 475-76 (Fla. 1960). In Stano v. State, 473 So.2d 1282, 1289 (Fla. 1985), this Court applied that aspect of Williams in a penalty phase trial, finding that the testimony concerning the details of Stano's prior capital felony convictions, introduced by the State, "approached the outermost limits of propriety.

It is well settled that a jury's discretion to impose the death sentence must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Booth, 96 L.Ed.2d at 448 (citations omitted). "[A] jury must make an 'individualized determination' of whether the defendant in question should be executed, based on 'the character of the individual and the circumstances of the crime.'" Id. (citations omitted) (emphasis in original). The concern, of course, in the case at hand, was that the jurors may have based their death recommendation on Stewart's other offenses and the impact of those crimes on their victims, rather than weighing the aggravating and mitigation factors as required by Florida law. The combined testimony of Acosta and Harville became the main feature of the State's case and created a constitutionally unacceptable risk that the jury imposed the death penalty in an arbitrary and capricious manner. For this reason, Kenneth Stewart should be granted a new penalty phase trial with a new jury, excluding the testimony of Acosta, Harville, and Smith.

ISSUE V

THE TRIAL COURT IMPROPERLY EXCLUDED RELEVANT EVIDENCE IN MITIGATION OF SENTENCE IN VIOLATION OF FLORIDA'S DEATH PENALTY STATUTE AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A defendant in a capital case has the constitutional right to present virtually unlimited evidence in mitigation. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The United States Supreme Court has held that the sentencer may not refuse to consider any evidence presented in mitigation in a capital case. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Hitchcock v. Dugger, 481 U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). A sentence of death imposed where the sentencer has erroneously failed to consider relevant mitigating evidence violates the Eighth and Fourteenth Amendments. Lockett, 438 U.S. at 608.

In Perry v. State, 395 So.2d 170, 174 (Fla. 1980), this Court held that "a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record ... which might justify a reduction of a death sentence to life imprisonment." Accord Simmons v. State, 419 So.2d 316 (Fla. 1982). Thus, the trial court may not exclude from consideration as a possible mitigating factor any evidence "reasonably related" to an element of a defendant's character. Simmons, 419 So.2d at 320. The consideration of background information is a constitutionally indispensable part of the capital sentencing process. Eddings, 455 U.S. at 112; Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Over defense objection, in the

case at hand, the trial court excluded relevant evidence of Stewart's character and background, including:

(a) testimony of Stewart's uncle, James Hayward, about the death of Stewart's father in a barroom shooting (R. 644);

(b) proffered testimony from Stewart's grandmother, Estelle Berryhill, relating to cigarette burns observed on Stewart's body when he was an infant (R. 692-702); and

(c) a letter of remorse written by Kenneth Stewart to the family of Mark Harris, victim of another shooting of which Stewart was previously found guilty. (R. 753)

A. Hayward's 'Testimony

Stewart's uncle, James Hayward, testified about Kenny's family history. (R. 639-46) He related to the jury that Kenny's biological father was murdered on December 11, 1971, outside of a Tampa bar following a dispute over a pool game. (R. 641-43) In the midst of his description of the events leading up to the murder, the State objected based on relevancy. (R. 643) The court sustained the objection, noting that "[w]e need to move this case along." (R. 6443

The testimony of Stewart's uncle as to the details of the murder of Stewart's biological father outside a barroom was relevant to Stewart's background and character. Prior to this time he believed that Bruce Scarpo was his natural father. He admired and worshipped Bruce Scarpo. Because the other three children in the family were born to Mrs. Scarpo during a prior marriage, Kenny believed that he was Scarpo's only natural child. This distinguished him from his three step-siblings who were

natural brothers and sisters.

At the same time that he learned that Scarpo was not his natural father, he also learned of his natural father's death in a barroom shooting. Even worse, he was told that Bruce Scarpo had "something to do with" his father's death. (R. 676-77, 685-86) Suddenly, Kenny in effect lost both his natural father and his step-father. This was one of the traumatic tragedies that Kenny learned about for the first time at the age of thirteen. According to the penalty phase testimony, this knowledge totally transformed his life and resulted in his leaving home, engaging in criminal activities, and becoming a sullen and uncooperative child. Because of its effect on Kenny's personality, the testimony was important.

Additionally, there was no reason for the exclusion of this testimony. Certainly, "moving the case along" was not so important that the court could not permit Hayward to finish the story. He testified that Kenny "seemed to be a very mixed-up kid" and was very concerned about who murdered his father. (R. 645) Thus, the details of the murder, told to Kenny at the age of thirteen, were important in understanding the impact these events had on Stewart's mental process. Instead of hearing the rest of the story of the murder of Kenny's father, however, the jury was left floating midstream. When the court sustained the State's relevancy objection, the jurors were invited to conclude that not only the details of the murder, but its impact on Stewart's life and mental processes, were irrelevant. This was very misleading and, therefore, prejudicial.

B. Cigarette Burns

Direct evidence of Stewart's impoverished and abusive childhood, as evidenced by the cigarette burns on his body, was extremely relevant mitigation. See Eddings v. Oklahoma, 455 U.S. at 112 (reversing death sentence where trial court refused to consider evidence of defendant's difficult childhood as mitigation). Stewart's grandmother testified in proffer that his aunt, who lives in Brandon, had informed her recently that another aunt had told her that when Kenny's mother brought him to her house as an infant, he had cigarette burns on his body. (R. 695-700)

The State argued that this testimony was hearsay. The court found the evidence "too speculative" because the witness did not know how the burns got there or who was responsible. Although defense counsel insisted that it did not matter who was responsible, because it showed that Kenny was abused, the judge did not alter his ruling. He observed tnat the evidence would be "just overwhelmingly prejudicial to the State." (R. 700-02)

Although the trial court's exclusion of the evidence was not expressly grounded on the State's hearsay objection, if this objection formed any part of the court's basis for the ruling, this basis was erroneous. Section 921.141(1), Florida Statutes, expressly provides that the formal rules of evidence do not apply at penalty proceedings.[21] This Court has expressly

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[21] "Any such evidence 'chat 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. Fla. Stat. §921.141(1) (1985).

held that hearsay evidence is admissible under the statute at capital sentencing proceedings. Swan v. State, 322 So.2d 485, 488 (Fla. 1975) (report admissible under §921.141(1) despite hearsay objection). As has been stated by this Court, "there should not be a narrow application of the rules of evidence in the penalty hearing, whether in regard to relevance or to any other matters except illegally seized evidence." State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). This statutory interpretation is mandated by constitutional requirements. The United States Supreme Court held that state hearsay rules cannot be applied to exclude evidence in mitigation in a capital case without violating the Eighth Amendment. Green v. Georgia, 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (reversing death sentence where mitigating evidence excluded on hearsay grounds).

Apparently, the judge reasoned that because of the lack of details and the hearsay problems presented by the evidence, there was a risk that the testimony was untrue or perhaps that the jurors might speculate that it was worse than it actually was. Accordingly, the State would be prejudiced. What the judge failed to recognize was that, if the jurors had heard the proffered testimony, they would have been aware of its hearsay nature and lack of documentation. They could then have accorded it whatever weight they felt it deserved.

The judge's assertion that the evidence would be overwhelmingly prejudicial to the State supports its importance to Stewart. Obviously, if the State would be prejudiced by its admission, the evidence might have affected the jury's recommendation of death. Accordingly, its exclusion was not harmless.

C. Letter of Remorse

Just before closing arguments, defense counsel advised the court that Stewart had given him a letter he had written to the parents of Mark Harris, the victim of another murder for which Stewart had been recently convicted. The letter, which counsel had not yet read, purported to be a letter of remorse and sympathy. With no discussion and without giving any reason, the trial court refused to allow counsel to "put it in at this stage of the proceedings." (R. 753) Thus, we do not know exactly what the letter said, when it was written, or why it was excluded. We do know that its exclusion was error.

Evidence of remorse is a recognized mitigating factor. Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983). Stewart's letter of remorse would have supported defense counsel's argument that imprisonment, rather than death, is an appropriate sentence and that the crime did not reflect his true character or future potential. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); McCampbell v. State, 421 So.2d 1072, 1075-76 (Fla. 1982); Simmons, 419 So.2d at 320 (rehabilitative potential unquestionably is valid mitigating evidence).

The exclusion of this evidence was especially harmful in light of the prosecutor's closing argument that Stewart "rewarded" Acosta and Harris for their kindness by "swatting them like flies, crushing them like bugs."[22] (R. 757) In Skipper, 476 U.S. at 9, the Court reversed the state supreme court affirmance

[22] See prosecutor's exact language, p. 56, supra.

of the death penalty because the trial court excluded the testimony of two jailers about the defendant's good behavior in jail. The prosecutor had argued in closing that the defendant would rape inmates and pose a danger in prison. Thus, the testimony would have rebutted this argument. Similarly, Stewart's letter of remorse would have rebutted the prosecutor's closing argument that, to Stewart, Acosta and Harris were like flies or bugs.

Because the judge did not even bother to read and consider admitting the letter, we do not know its exact content; therefore, there is no way of knowing to what extent it might have affected the outcome of the jury's deliberations. Accordingly, we cannot conclude that it would not have altered the advisory opinion. Its exclusion was therefore prejudicial.

D. Cumulative Error

It is a well established principle of Florida law that, although errors at trial, standing alone, may not be cause for reversal, their cumulative effect can substantially prejudice a defendant, thereby warranting a new trial. See Douglass v. State, 135 Fla. 199, 184 So. 756 (Fla. 1938) ("so much transpired that was out of harmony with proper procedure . . . that we are impelled to the conclusion that justice demands a new trial"); Duque v. State, 498 So.2d 1334 (Fla. 2d DCA 1986); Perkins v. State, 349 So.2d 776 (Fla. 2a DCA 1977); Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978). Finding that the defendant was denied his constitutional right to a fair trial, the Perkins court stated that, "[w]hile a defendant is not entitled to an error-free trial, he must not be subjected to a trial with error compounded

upon error." 349 So.2d at 778.

In this case, perhaps one omission would not have been sufficient to threaten the validity of the advisory opinion. The three together, however, substantially impaired Stewart's right to a fair penalty phase trial. All statutory and non-statutory mitigation must be considered by the jury. Skipper, 476 U.S. at 9. As was the case in Skipper, the jury was deprived of essential information needed to render a constitutionally reliable sentencing recommendation.[23] See id. Moreover, the court's instructions failed in critical respects to properly guide the jury in their weighing of aggravating and mitigating circumstances, as discussed in Issues VI and VII of this brief. A jury recommendation returned under such circumstances is invalid and cannot be relied upon by the sentencing court. Tne Florida death penalty statute and the Eighth and Fourteenth Amendments to the United States Constitution mandate that Stewart's death sentence be reversed.

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[23] In Skipper, the jury actually imposed the death sentence pursuant to South Carolina law. 476 U.S. at 5.

ISSUE VI

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY TO CONSIDER THE AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

Over defense objection, the trial court instructed the jurors that they could consider the factor that the homicide was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification. (R. 594, 740, 751, 773) Although the trial judge made no written findings in support of his imposition of the death penalty, he orally cited the other two aggravating circumstances upon which he instructed the jury. He made no mention at all of the "cold, calculated and premeditated" aggravating factor. (R. 805-06) It would appear therefore that the judge ultimately determined that the homicide was not "cold, calculated and premeditated," as that factor has been defined in the decisions of this Court.

This Court has repeatedly held that a finding of the "cold, calculated and premeditated" aggravating factor requires that the State prove, beyond a reasonable doubt, a "heightened" premeditation substantially greater than that necessary to sustain a conviction for premeditated murder. See, e.g., Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987)("cold, calculated and premeditated" aggravating factor reserved primarily for execution or contract murders or witness elimination killings); Nibert v. State, 508 So.2d 1 (Fla. 1587)("cold, calculated and premeditated" aggravating factor requires cold-blooded intent to kill that is more contemplative, more methodical, more controlled than that

necessary to sustain first-degree murder conviction). Therefore, a jury finding of guilt as to premeditated murder is insufficient to prove the heightened premeditation required for the "cold, calculated and premeditated" aggravating factor. Compare Preston v. State, 444 So.2d 939 (Fla. 1984)(although victim, who had witnessed convenience store robbery, was marched TOO feet at knife point, nearly decapitated by fatal slash across throat, and stabbed numerous times, "cold, calculated and premeditated" factor unsupported) ~~with~~ Bolender v. State, 422 So.2d 833 (Fla. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (factor upheld where defendant held victims at gun point for hours, made them strip, and beat and tortured them).

In Preston, 444 So.2d at 946, this Court described the type of murder to which the "cold, calculated and premeditated" factor applies as a "particularly lengthy, methodical or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator." In Herzog v. State, 439 So.2d 1372 (Fla. 1983), the defendant first attempted to smother the victim with a pillow. When this failed, the defendant strangled the victim to death with a telephone cord. The body was then taken to a remote location and disposed of by drenching it with gasoline and setting it on fire. Even this did not establish the "cold, calculated and premeditated" aggravating factor.

A plan to rob, alone, does not establish the necessary mental state. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwich v. State, 461 So.2d 79 (Fla. 1984). Even an intent to kill does not by itself establish this factor. Brown v. State, 444 So.2d 939 (Fla. 1984); Peavy v. State, 442 So.2d 200 (Fla.

1983). In Rogers v. State, 511 So.2d 526 (Fla. 1967) (receding from Herring v. State, 446 So.2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984)), this Court concluded that "calculation" consists of a careful plan or prearranged design. While sufficient evidence was presented to support simple premeditation, there was an utter lack of evidence that Rogers had a careful plan or prearranged design to kill anyone during the robbery. Id. The same is true in our case.

Unrebutted testimony showed that Stewart was drinking excessively at the time of the crime. (R. 375, 389, 712, 723) He may have intended to commit a robbery but no evidence showed that he intended to commit a murder. The conduct of Appellant, as described by Randall Bilbrey who allegedly heard Stewart's account of the murder just a few days after it occurred, showed that Stewart did not act from a cold and calculated intent to commit a murder. According to Bilbrey's testimony, Stewart pulled the trigger only because an accomplice was repeatedly yelling "kill him, kill him." (R. 374) This negated any possibility that the homicide was anticipated in advance. Bilbrey testified that Stewart cried in remorse, expressing the sentiment that he "had no right to take a life," which suggested that he later realized what he had done and regretted his spontaneous act.

There is no certainty about what happened. No eyewitness testimony was presented. In fact, the two prosecution witnesses gave completely different versions of the crime. Although Bilbrey testified that Stewart shot Diaz in the back of the head, this was only a hearsay statement based on Stewart's

alleged confession nearly two years earlier. The coroner testified that the gunshot wounds were also consistent with the victim having been shot as he ran toward the gun.

Even Terry Lyn Smith's version, allegedly confessed by Stewart more than four months after the killing, shows no cold or calculated intent to kill. His testimony did not suggest any heightened premeditation. No one suggested that Stewart planned or threatened to kill Diaz at any time prior to the shooting.

Thus, the manner of the shooting is unknown. Any finding of an "execution-style" murder would be pure speculation. The facts support a reasonable conclusion that the murder occurred during a robbery either because Stewart became overly anxious and succumbed to his accomplice's repeated urging that he kill Diaz or because Diaz ran toward him. The jury may have found Stewart guilty of felony murder.

In numerous cases, this Court has overruled a finding of the "cold, calculated and premeditated" factor where the victim was found murdered, even "intentionally and deliberately," in the course of a burglary or robbery, because the record failed to establish the required evidence of heightened premeditation. See, e.g., Thompson, 456 So.2d 444 (attendant killed during hold-up); Gorham v. State, 454 So.2d 556 (Fla. 1984) (victim found in warehouse bathroom shot during "cold and calculated" robbery); Rembert v. State, 445 So.2d 337, 340 (Fla. 1984) (victim found bludgeoned to death with club during burglary of his store); Maxwell v. State, 443 So.2d 967, 971 (Fla. 1983) (intentional and deliberate murder of robbery victim). A murder committed during a burglary or robbery is "susceptible to other conclusions than

finding it was committed in a cold, calculated and premeditated manner." Peavy v. State, 442 So.2d 200, 202 (Fla. 1983).

The burden is upon the State to prove, beyond a reasonable doubt, affirmative facts establishing the heightened degree of premeditation necessary to sustain this factor. Thompson, 456 So.2d at 446; Peavy, 442 So.2d at 202; Williams v. State, 386 So.2d 538, 542 (Fla. 1980). The burden is not on the defendant to prove that he acted in panic or unjustifiable self-defense or for any other unknown reason.

Speculation regarding a defendant's unproven motives cannot support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984). In Thompson, this Court declined to speculate about possible reasons for the hold-up killing.[24] The Thompson court stated that:

> No evidence was produced to set the murder apart from the usual hold-up murder in which the assailant becomes frightened or for reasons unknown shoots the victim either before or during an attempt to make good his escape. None of the numerous witnesses testified or even suggested that the discussions they held with the appellant concerning the robbery contemplated the murder of the station attendant.

456 So.2d at 446. The fact that a defendant murders his victim instead of simply fleeing is not sufficient, in itself, to prove

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[24] Dr. Merin's testimony does not show that Stewart was a cold-blooded killer but, rather, that ne was totally out of control and on a mission of self-destruction. This evidence does not suggest that Stewart would plan and commit a murder but that he didn't care what happened to him anymore and would be likely to shoot at someone without any forethought. As this Court observed in Thompson, 456 So.2d at 445-46, discussing Dr. Merin's testimony in that case, "even with this insight we can only speculate as to why appellant chose to fire the shotgun."

beyond a reasonable doubt that the murder was cold, calculated and premeditated. Id; accord Hardwick v. State, 521 So.2d 1071, 10'75 (Fla. 1988) (each aggravating factor requires proof beyond reasonable doubt, not mere speculation derived from equivocal evidence or testimony).

Harmon v. State, 13 F.L.W. 333 (Fla. May 19, 1988), is similar to the case at hand. The Harmon court found that the "cold, calculated and premeditated" aggravating factor was not established where the defendant shot the victim through the back of the head at close range, "in a manner the court characterizes as an execution of the victim." 13 F.L.W. at 335. The murder occurred during a robbery and was susceptible to conclusions other than that it was committed in a cold, calculated, and premeditated manner. For example, Harmon's cellmate testified that Harmon told him that the co-defendant spoke his name during the robbery and he became frightened and shot the victim.[25] Id.

The court has carefully defined the "cold, calculated and premeditated" factor to apply only in specific factual situations. The case at hand did not involve a contract murder. There was no evidence that it was a witness elimination killing.

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[25] In reversing the judge's override of a life recommendation, this Court relied in part on the fact that the codefendant pled to second-degree murder and got 15 years probation. The majority determined that "the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision." In the case at hand, if one believes the version related by Randall Bilbrey, Stewart had an accomplice who "egged him on." The identity of the accomplice was undetermined and no one else was prosecuted. Under Harmon, this would be mitigation.

It was not an organized crime or underworld killing.[26]

The judge's decision that the "cold, calculated and premeditated" instruction was warranted constituted a finding that the evidence legally supported an instruction on the factor. The trial court made an erroneous decision as a matter of law because there was no proof beyond a reasonable doubt that the homicide was committed with heightened premeditation.

The trial court's instruction on the "cold, calculated and premeditated" aggravating factor invited the jury to speculate about what happened. It suggested that the judge thought the murder was cold, calculated and premeditated. This was apparently not the judge's conclusion, however, because he failed to mention the factor when he imposed the death penalty. 'Therefore, he encouraged the jurors to base their advisory recommendation on an inapplicable aggravating factor. His erroneous instruction violated the limits imposed by this Court, expanding the definition of the factor and rendering it unconstitutionally overbroad as applied. Godfrey v. Georgia, 446 U.S. 420 (1980).

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[26] The prosecutor continually called the killing an execution even during voir dire when he referred to the victim as the "man who was executed," apparently attempting to persuade the jury that this was the case. (R. 96, 123, 134) The prosecutor who handled the voir dire portion of the trial was Bill James, the elected State Attorney for the Thirteenth Judicial Circuit. The judge introduced him So the jury as "Your elected State Attorney, Mr. Bill James." (R.10) Defense counsel moved to dismiss the entire panel because the introduction would improperly influence the jury to give the State more credence, putting the office of the State Attorney and Bill James personally behind the case. The motion was aenied. (R. 17) On voir dire, some of the jurors said they voted for Bill James and others knew who he was. (R. 52-53) Because the prosecutor's status was elevated by the court, his characterization of the homicide as an "execution" took on added credibility although it was only an unproven theory.

ISSUE VII

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE "EMOTIONAL DISTURBANCE" AND "IMPAIRED CAPACITY" MITIGATING FACTORS.

Although there was abundant evidence to support them, the judge refused to instruct the jury on the statutory mitigating factors that (1) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance, §921.141(6)(b), Fla. Stat. (1985); and (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, §921.141(6)(f), Fla. Stat. (1985). (R. 740-43) Thus, the court usurped the jury's function by precluding the jury from considering and weighing relevant mitigating evidence. Kenneth Stewart's sentence of death was unconstitutionally imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Songer v. State, 365 So.2d 696 (Fla. 1978); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

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

> 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 advise would be preconditioned by the judge's view of what they were allowed to know."

497 So.2d at 1216. That is exactly what happened in this case.

Defense counsel first requested that the modifiers "extreme" and "substantial" be deleted from the "emotional disturbance" and "impaired capacity" statutory mitigators, based on Dr. Merin's testimony. The judge believed, however, that he was bound by the legislature's inclusion of the modifiers. Defense counsel then requested they be given in full. This too was denied.[27] (R. 741-43)

The trial court made no written findings. (SR. 1236) in orally imposing the death penalty, however, the judge cited two statutory aggravating factors. His only mitigating instruction was the age of' the defendant. (R. 801-02) In imposing the death penalty for the murder of Mark Harris, at the same sentencing proceeding, the trial court orally found the same two aggravating factors. (R. 805-06) In mitigation, however, he considered not only (1) the age of the defendant; but also that (2) the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance; and (3) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. (R. 806-07) The jury was also instructed

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[27] Defense counsel maintained that after hearing the evidence, the jury could still infer that the factors existed -- that it was a reasonable interpretation of the facts. (R. 741)

on these two mitigators during the penalty phase of that trial. (OR. 748-49) Stewart's counsel in that case also requested that the modifiers "extreme" and "substantially" be deleted. (OR. 610-11, 1002-03) Although the trial judge refused to delete the modifiers in the other case, as well (OR. 614, 1002-03), he instructed the jurors on the two statutory mitigators without modification. (OR. 748-49) It seems unlikely that those factors applied in one case and not the other because the evidence indicated that Stewart was in the same mental condition and was continually intoxicated at the time of both murders.

The two crimes were committed four or five months apart. The trial judge presided over both trials and sentenced Stewart for both murders at the same sentencing. His discussion of the mitigation testimony at sentencing showed that it was much the same in both cases. (R. 786-813) The prosecutor even urged the court to impose the death penalty in the case at hand because Dr. Afield, tne defense psychologist in the Mark Harris trial, thought Stewart was beyond rehabilitation.[28] (R. 871) The fact that the judge instructed the jury on the two mitigators and even considered them himself in sentencing for the other homicide shows that they should have been given to the jury in this case.

The trial court based his denial of the two statutory mitigating factors on the testimony of Dr. Merin, the defense psychologist. Dr. Merin testified that in hi3 opinion Stewart suffered from emotional disturbance, but not "extreme" emotional

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[28] Dr. Merin, the defense psychologist in the instant case, believed that Stewart could be rehabilitated. (R. 725)

disturbance, and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired, but not "substantially" impaired. Dr. Merin talked to Stewart for the first and only time on the morning of penalty phase. He conceded that he based his opinion on that one interview and the background information provided to him by defense counsel. (R. 707) The jurors heard the testimony of various other witnesses about Kenny's childhood abuse and neglect, his various family tragedies, and his disturbed emotional state during adolescence. The judge should have permitted the jurors to decide, based on all the evidence, whether the "emotional disturbance" and "impaired capacity" mitigators applied.

The evidence, during both guilt and penalty phase, showed clearly that Stewart was intoxicated most of the time. He told Dr. Merin he drank a gallon of alcohol a day, together with some beer, and that he usually smoked marijuana. (R. 712) Bilbrey testified that Stewart drank about twenty six-packs of beer a day during the two weeks following the homicide. (R. 389) Evidence of impairment through drug or alcohol abuse must be considered in mitigation. Hardwick v. State, 521 So.2d 1071, 1076 (Fla. 1988). The jurors were competent to evaluate the impairment caused by Stewart's alcohol and drug consumption.

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court found that the trial court should have considered uncontroverted testimony that the defendant was a good husband, father, and provider as a mitigating factor. 511 So.2d at 535 (citing Lockett, 438 U.S. at 604-05). The Rogers court also found that the "effects produced by childhood traumas . . . indeed would

have mitigating weight if relevant to the defendant's character, record, or the circumstances of the offense." 511 So.2d at 535; See also Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979) (evidence tending to establish two mitigating circumstances -- no significant history of prior criminal activity and capital felony committed while defendant under influence of extreme mental or emotional disturbance -- should nave been considered).

The record of the penalty phase testimony in the instant case contains much convincing and uncontroverted evidence of childhood trauma. Stewart's step-parents, step-sister, other relatives and a family friend all testified about Kenny's childhood history and traumas during his formative years. Additionally, Dr. Merin testified that Stewart's childhood traumas caused his antisocial personality and that he could not help turning out the way he did. (R. 723) This mitigation should have been considered by the jury in determining Stewart's sentence.

Robinson v. State 487 So.2d 1042 (Fla. 1986), is very much like the case at hand. The trial judge in Robinson refused to give the statutory mitigators that (1) the defendant was an accomplice and his participation relatively minor; and (2) his capacity to appreciate the criminality of his conduct was impaired. 487 So.2d at 1042. This Court found sufficient evidence presented to warrant instructing the jury on these two mitigators. In discussing the second of the two, the Robinson court observed that, although the judge may not have believed the evidence, "others might have, and it, too, was adequate at least to instruct the jury on." 487 So.2d at 1043. The Court

reiterated that the jury must be allowed to consider any evidence presented in mitigation. It noted that "[t]he statutory mitigators help guide the jury in its consideration of a defendant's character and conduct." Id.

Although the judge did instruct the jurors that they could consider any other aspect of Stewart's character, this instruction carries little weight compared to the other statutory mitigators. The jurors were instructed on three statutory aggravating factors, one of which the judge did not even mention when orally sentencing Stewart to death (the "cold, calculated and premeditated" factor). They were instructed on only one statutory mitigating factor (Stewart's age), other than the "catch-all" instruction. Had the jury been told that there were two additional mitigating circumstance which rose to the level of the statutory aggravators -- that is, to the level of statutory, rather than nonstatutory, mitigators, this might have altered the outcome of the jury advisory recommendation. Although the jury was properly instructed that the weighing is not a counting process, the fact that the statutory aggravators and mitigators were equal would have assured that the jury did not recommend death merely because the judge instructed on one more aggravating than mitigating factor.

The trial judge was probably attempting to follow the Florida Standard Jury Instructions. Notes to the trial judge direct that instructions should be given only upon the mitigating circumstances "for which evidence has been presented." Fla. Std. Jury Inst. at 80. However, the trial court failed to properly follow the directions. Evidence of mitigating circumstances

existed. Just because Dr. Merin did not consider the emotional disturbance to be "extreme," or the impaired judgment "substantial," did not mean there was no evidence to support these two mitigators. The jurors might have found them both "extreme" and "substantial" and valid mitigating factors. This might have changed the jury recommendation from death to life. A life recommendation would have materially changed the sentencing decision. See, e.g., Walsh v. State, 418 So.2d 1000 (Fla. 1982); Tedder v. State, 322 So.2d 908 (Fla. 1975).

It was not within the judge's authority to instruct only upon those mitigating circumstances which he believed were established. Just as a defendant has the right to any theory of defense instruction which is supported by the evidence, see, e.g. Bryant v. State, 412 So.2d 347 (Fla. 1982), he is also entitled to an instruction on mitigating circumstances supported by any evidence. A trial judge cannot, by denying a jury instruction, substitute his opinion for that of the jury and deprive the defendant of the jury's consideration of these mitigators.

In Lockett v. Ohio, 438 U.S. 586, the United States Supreme Court determined that the Eighth Amendment to the United States Constitution requires that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. In Riley v. Wainwright, 517 So.2d 656 (Fla. 1988), this Court held that Lockett applies equally to the jury's recommendation of sentence. 517 So.2d at 657-659. The Riley court based its holding in part on Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1921, 95 L.Ed.2d 347 (1987), in which the Court found a

Lockett violation even though the judge and jurors heard the mitigating evidence because their consideration was restricted to only the statutory mitigating factors.

The instant case is even worse. Although the jurors heard the mitigation testimony and were told that they could consider nonstatutory mitigation, they were not told that they could consider two important statutory mitigators. The court's refusal to instruct on the two most important mitigators in this case led the jury to believe that these mitigating factors should be accorded less weight than the statutory aggravating factors.

In Rogers, 511 So.2d 526, although the court found error, it did not reverse. The trial court had found five aggravating factors and no mitigating factors. 511 So.2d at 533. This Court upheld two of the aggravating circumstances -- a prior violent felony and that the murder occurred during flight after an attempted robbery -- and held that the court may have found that the defendant was a good husband, father, and provider. Because it was unlikely that the trial court would have concluded that the one mitigating factor outweighed the aggravating factors, this Court found the error harmless. 511 So.2d at 535.

In our case, although we also have two aggravating factors, we have much more mitigation. The trial court found Kenny's age a mitigating factor. Additionally, the court should have found two other statutory mitigating factors (emotional disturbance and impairment), plus the non-statutory mitigation.

Furthermore, the prosecutor used the trial court's error to his advantage during penalty phase closing argument. He said, "The judge is going to instruct you on the mitigating

factors. There are going to be two." (R. 759) This reinforced the jury's misconception that there were fewer mitigating factors than aggravating factors. The jury should have been instructed on four mitigators. Had the numbers been reversed, the jury might have made a recommendation of life.

In deciding whether to instruct as to statutory mitigators, the trial judge should err on the side of caution and instruct on the requested factors rather than being too restrictive. Robinson, 487 So.2d at 1043. This allows the jury to fulfill its statutory function of making a valid advisory opinion. It was error for the trial judge to rely only on the opinion of one psychologist when there was other evidence of these mitigators, particularly when, only a month before, he heard another psychologist testify substantially differently.

Due process requires that the jury be instructed on all mitigating circumstances. Limiting instructions to those mitigating factors which the trial judge deems appropriate distorts the death penalty sentencing scheme. Cooper, 336 So.2d at 1140. The sentencing scheme was distorted in this case and Stewart's death sentence should be reversed with directions that he be afforded a new penalty trial with a new jury.

ISSUE VIII

IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE STATE PRESENTED TESTIMONY BY THE VICTIM'S SISTER AND BROTHER URGING THAT STEWART BE SENTENCED TO DEATH.

At sentencing, the victim's brother and sister testified in front of the trial court judge that they wanted Stewart to be sentenced to death for killing their brother. (R876-78) In Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that the Eighth Amendment precludes a capital sentencing jury from considering victim impact evidence. The Booth court recognized that the personal characteristics of the victim and the impact of the crime on the victim's family are irrelevant to a capital sentencing decision and reasoned that such evidence therefore creates "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 96 L.Ed.2d at 448. Because the judge imposes the sentence in Florida, the holding in Booth also precludes the judge from hearing such testimony. Grossman v. State, 525 So.2d 833 (Fla. 1988).

Although defense counsel failed to object to the introduction of this testimony, he did not have the benefit of the Booth decision. Failure to object in the sentencing proceeding of a capital trial "should not be conclusive of the special scope of review by this Court in death cases." Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). Because of the Court's special obligations in capital cases, the Court has repeatedly reviewed the record of sentencing proceedings even where no issue regarding the sentence was raised by counsel. Davis v. State, 461 So.2d

67, 71 (Fla. 1984)(counsel waived argument on sentencing issues for tactical reasons); Goode v. State, 365 So.2d 381 (Fla. 1979) (appellant admitted his guilt and sought to dismiss the appeal and go forward with his execution). Accordingly, even when the issue is not raised, "this Court must . . . examine the record to be sure that the imposition of the death sentence complies with all the standards set by the Constitution, the Legislature and the courts." Goode, 365 So.2d at 384.

Even if this were not a capital case, counsel's failure to object should not constitute a "procedural default" barring review because counsel could not have anticipated the change in the law that underlies the error. Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984). This Court recently determined that the United States Supreme Court's decision in Hitchcock v. Dugger, 482 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), that Florida's capital sentencing statute requires that the jury be instructed to consider nonstatutory as well as statutory mitigating factors, represents a sufficient change in the law to defeat the argument that a failure to object in the trial court constitutes a procedural default. See, e.g., Combs v. State, 525 So.2d 853, 855 (Fla. 1988); Zeigler v. Dugger, 524 So.2d 419, 420 (Fla. 1988); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987).

The change in the law made by the Booth decision also represents a substantial change in the law. This is especially true because a provision in section 921.143, Florida Statutes (1985), specifically authorizes the victim's next of kin to appear before the sentencing court. Defense counsel may well

have reasonably relied on this statutory provision, which had never been limited to noncapital cases, to believe that an objection was groundless. Accordingly, we submit that this Court should follow its holding in the numerous recent cases reversing because of Hitchcock error even when there was no objection at the trial court level.

We are aware that, in Grossman v. State, 525 So.2d 833 (Fla. 1988), this Court held that failure to object to victim impact evidence precluded appellate review of the issue. As in the case at hand, victim impact evidence in Grossman was presented only to the sentencing judge. The decision in Grossman was grounded on two separate rationales --procedural default and harmless error. As to the first rationale, section 921.143, Florida Statutes (1985), discussed above, provides sufficient reason for this Court to recede from its holding in Grossman that failure to object waives appellate review.

Considering the second rationale in Grossman, the victim impact evidence in Grossman was found to be harmless error because there were substantial aggravating circumstances to support the death recommendation and a lack of mitigating evidence. In the instant case, Stewart presented considerable mitigating evidence concerning his traumatic childhood. When imposing the death penalty, the trial court orally noted only two aggravating factors and one mitigating factor.[29] (R. 801-02) Accordingly, the victim impact evidence was not harmless.

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[29] There were no written findings. See Issue IX, infra.

Based on the above reasoning, we urge that this Court recede from Grossman and bold that Booth should be applied retroactively to all cases pending on direct appeal at the time the opinion was issued. A Booth violation affects the reliability of a capital sentencing proceeding in contravention of the Eighth Amendment to the United States Constitution. See Phillips v. Dugger, 515 So.2d 227 (Fla. 1987) (Barkett, J., concurring) (procedural bar resting on concept of waiver by default should not permit the courts of any state to affirm death sentence that bears indicia of unreliability). Because Stewart's death sentence is unreliable due to the prejudicial introduction of evidence concerning the impact of the homicides on the victim's brother and sister, Stewart's sentence of death should be vacated and a new sentencing ordered.

In Patterson v. State, 513 So.2d 1257, 1263 (Fla. 1987), this Court found a Booth error, apparently sua sponte, because the victim's niece, who was caring for the victim's two children, expressed her opinion to the judge at sentencing that the death penalty was appropriate. There is no indication that an objection was made at the trial court level. Nevertheless, the Patterson court found reversible error pursuant to Booth v. Maryland. In the case at hand, there are several other issues that also provide grounds for a resentencing (if not a new penalty phase or imposition of a life sentence). Thus, as in Patterson, this Court should find that the testimony of the victim's sister and brother constituted reversible error.

ISSUE IX

THE DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT FAILED TO SET OUT WRITTEN REASONS FOR IMPOSING THE DEATH PENALTY AS HEQUIREP BY SECTION 921.141(3), FLORIDA STATUTES.

Section 921.141(3), Florida Statutes (1985), requires that if the court imposes the death sentence, "it shall set forth in writing its findings upon which the sentence of death is based." The court's determination that death be imposed must be supported by specific written findings of fact based upon the aggravating and mitigating circumstances set out in the statute and the trial and sentencing proceedings. "If the court does not make the findings requiring the death sentence," the statute requires that the court impose a sentence of life imprisonment. §921.141(3), Fla. Stat. (1985).

The record on appeal in this case was received with no written findings of' fact to support the death sentence. This Court granted appellate counsel's request to supplement the record with these written findings. (R. 1235) The Clerk of Circuit Court of Hillsborough County subsequently certified that no "Written Findings of Fact Regarding Imposition of the Death Sentence" had been filed with his office, "up until time of receiving Supplemental Directions to Clerk." The certificate is dated July 14, 1988. (R. 1236) We therefore submit that a life sentence is required by statute.

'This interpretation of the statutory provision is supported by this Court's decision in Van Royal v. State, 497 So.2d 625 (Fla. 1986). In Van Royal, the court vacated the death sentence because the trial court judge failed to provide written

findings of fact to support the imposition of the death sentences until more than a month after the record on appeal was filed. Furthermore, the court remanded the case for imposition of life sentences in accordance with section 921.141(3).

Following Van Royal, this Court encountered a number of cases in which the timeliness of the trial court's written findings was at issue. Grossman v. State, 525 So.2d 833, 841 (Fla. 1988). For example, in Muehleman v. State, 503 So.2d 310 (Fla. 1987), the written findings were not contemporaneous with the imposition of sentence but were filed prior to the certification of the record. Because of the frequency of the problem, this Court imposed a "procedural rule" that all written orders imposing a death sentence must be prepared prior to the oral pronouncement of sentence for contemporaneous filing. Grossman, 525 So.2d at 841. Explaining this rule, the Grossman court stated:

> In Van Royal 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 Van Royal 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.

Id. The above excerpt from Grossman indicates that this Court distinguished cases in which a life sentence was not ordered on

remand from Van Royal, in which the trial court was ordered to impose a life sentence, because, in the distinguished cases, the written order was prepared and filed prior to certification of the record. In the instant case, a written sentencing order has never been prepared. Moreover, the oral imposition of sentence in this case was not made until approximately two weeks after Van Royal; thus, the trial court did have, or at least could have had, the benefit of Van Royal. Even if the decision was too recent at the time of sentencing, the trial court should have read it before certification of the record in this case. For these reasons, this case clearly falls under the Van Royal line of cases requiring the imposition of a life sentence.

We recognize that there are distinctions between this case and Van Royal. Most obvious, of course, is the fact that Van Royal involved a jury override. Additionally, the trial court's oral findings in Van Royal did not identify specific aggravating and mitigating factors. 497 So.2d at 629. In the case at hand, the trial judge discussed some of the statutory aggravating and mitigating factors, although the extent that he relied on them is unclear.[30] (R. 801-02)

On the other hand, there are several similarities

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[30] The judge noted that the jury was allowed to consider the defendant's age as a mitigating circumstance in making its recommendation. He said that he had also considered it. Concerning "other aspects of the defendant's character or record, he said that he had searched and could find nothing which would mitigate the killing. Whether he "searched" for evidence supporting the two statutory mitigators upon which he refused to instruct the jury -- emotional disturbance and impaired capacity -- or only for nonstatutory mitigation, is unclear.

between Van Royal and our case which support a remand for imposition of a life sentence. These are based on Van Royal's "three significant factors," which were that (1) the findings were not made until after the trial court surrendered jurisdiction to this Court; (2) the Florida death penalty statute mandates that death sentences be supported by specific findings which must be set out in writing;[31] and (3) the record was inadequate, not merely incomplete. 497 So.2d at 628.

In the case at hand, the trial court has surrendered jurisdiction to this Court. As to this factor, our case is even worse than Van Royal and other cases considered by this Court. Nearly two years after Stewart's trial and sentencing, there are still no written reasons. The record has been certified and supplemented. Therefore, under the Grossman distinction, discussed above, and the Van Royal factor -- surrender of jurisdiction to this Court, it is now too late for written findings.

This conclusion is supported by the second Van Royal factor -- that the statute mandates written findings. Even the court's oral findings are inadequate. The statute requires that the trial court expressly find "(a) That sufficient aggravating circumstances exist as enumerated in subsection (5)." §921.141 (3)(a), Fla. Stat. (1985). Although the trial judge orally weighed aggravating factors against mitigating factors and found that the aggravating factors outweighed the mitigating factors,

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[31] "A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it." 497 So.2d at 628.

as required in subsection (b), he made no express finding that "sufficient aggravating factors exist." Although he cited two aggravating factors, he did not mention the "cold, calculated and premeditated" factor upon which he instructed the jury. We do not know whether he found it inapplicable or just forgot about it.[32]

Third, Van Royal found that the record inadequate and not merely incomplete. Although the court's oral findings in this case were not as inadequate as those in Van Royal, they were still far from adequate. In Van Royal, the majority noted that it could order that the record be supplemented but that it was not inclined to do so. 497 So.2d at 628. Such is not the case here. A supplement was ordered and showed that there were no written findings. Because the statute requires written findings, this record is inadequate. Justice Ehrlich said, concurring, 'chat:

> While I eschew deciding a case other than on its merits, we have no alternative. The legislature has spoken and said that "if the [trial] court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082." The trial judge, for reasons not disclosed in the record, egregiously failed to perform his statutory duty in the sentencing process. We must do ours and vacate the death sentences and remand for the imposition of life sentences in accordance with section 921.141.

Accordingly, this Court should vacate Stewart's death sentence and order that a life sentence be imposed on remand.

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[32] Another indication that even his oral findings were inadequate was his finding in the other case for which Stewart was sentenced, that the emotional disturbance and impaired capacity mitigators applied. It seems unlikely that those factors applied in one case and not the other. The evidence showed that Stewart was in the same mental condition and was continually intoxicated at the time of both murders.

ISSUE 10

BECAUSE STEWART WAS DENIED HIS RIGHT TO A FAIR JURY ADVISORY OPINION, HE MUST BE GIVEN A NEW PENALTY PHASE TRIAL BY A PROPERLY INSTRUCTED JURY.

"Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury . . . . In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances. . . ." Floyd v. State, 487 So.2d 1211, 1215 (Fla. 1986)(citations omitted). Improper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence "does violence to the sentencing scheme and the jury's fundamental role in that scheme." Riley v. Wainwright, 517 So.2d 656, 658 (Fla. 1987); Floyd, 487 So.2d at 1215.

Resentencing without the benefit of a new jury recommendation is not always error but a new jury is required when the original jury recommendation is invalid. See Riley, 517 So.2d at 658; Lucas v. State, 490 So.2d 943 (Fla. 1986). The jury's recommended sentence is given great weight in our death penalty system. Where relevant mitigating evidence is excluded from the balancing process, the scale is more likely to tip in favor of death. Because the judge must comply with a stricter standard when overriding a jury recommendation of life, a defendant must be permitted to present all relevant mitigating evidence to the jury in an effort to secure such a recommendation.

In the case at hand, relevant mitigating evidence was excluded, namely testimony concerning the murder of Kenny's natural father, testimony concerning cigarette burns he received

as an infant, and a letter of remorse he had written to the family of Mark Harris. (See Issue V) This in itself would mandate a new sentencing jury.

In addition, however, the jury was improperly instructed. The trial judge denied the jury the opportunity to consider two statutory mitigators that were shown by an abundance of evidence during the penalty phase. He should have instead permitted the jurors, who heard all of the penalty phase witnesses, to draw their own conclusions from the evidence as to whether the "emotional disturbance'! and "impaired capacity'! mitigators applied. (See Issue VII) Had the jury been told that these two mitigating circumstance rose to the level of the statutory aggravators, it might well have recommended life instead of death. The error was exacerbated because the trial court erroneously instructed the jury on the "cold, calculated and premeditated" aggravating factor. (See Issue VI)

Other errors tainted the penalty phase trial. Because trial counsel's defense during guilty phase was that Stewart was innocent, once the jury found him guilty, the jurors obviously accorded defense counsel little credibility. Although he made a motion to withdraw and requested that the judge appoint new counsel for penalty phase, his motion was denied. (See Issue III) Additionally, the jurors heard misleading testimony from Michelle Acosta concerning a subsequent murder from which they may have erroneously concluded that Stewart was found guilty of premeditated murder and attempted premeditated murder when, in fact, he was convicted of felony murder and attempted second degree murder. (See Issue IV) All of these factors denied Stewart his

right to a fair advisory opinion.

The question is whether a death sentence may be imposed in reliance on a jury verdict infected with numerous constitutional and state law errors. Death is different. It is a unique punishment. State v. Dixon, 283 So.2d 1, 7 (Fla. 1973). Thus, its arbitrary and capricious imposition violates the United States Constitution and the Florida Constitution. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). Accordingly, this Court must examine the record of each case in which the death penalty is imposed to be sure that its imposition is constitutional and complies with the standards set by the legislature and the courts. Goode v. State, 365 So.2d 381 (Fla. 1979). Unless it is clear beyond a reasonable doubt that the errors did not affect the jury's recommendation, the defendant is entitled to a new jury recommendation on resentencing. Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987); see also State v. DiGuilio, 491 So.2d 1129, 1138 (Fla. 1986).

We submit that most of the errors that occurred during the penalty trial in this case mandate a new penalty phase in and of themselves. Even if none would alone require a new penalty trial, the accumulation of errors denied Stewart a fair penalty trial. Thus, the jury's advisory opinion should not have been relied on by the trial court in sentencing.

Because the trial judge made no written findings, a remand is required. (See Issue IX) Because of the other errors, the remand must include a new penalty trial with a new jury.

CONCLUSION

Appellant, KENNETH ALLEN STEWART, respectfully prays this Honorable Court to reverse his convictions and sentences and remand for a new trial. In the alternative, Appellant asks the Court to vacate his sentence of death and remand for imposition of a life sentence, or award him a new penalty trial before a new jury impaneled for that purpose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 8th day of August, 1988.

Robert F. Moeller for
A. ANNE OWENS

AAO :ddv