IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The Appellant, KENNETH ALLEN STEWART, relies on the arguments and authorities presented in his Initial Brief to respond to the Answer Brief of tne State of Florida, except for the following additions:

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 COMMITTED THE MURDER.

The emphasis of Appellee's argument is that defense counsel's questions on cross-examination were asked and answered before the prosecutor objected. In support of this argument, Appellee cited our statement that "[t]he jurors heard the evidence and were capable of deciding whether the defense theory had any merit or created reasonable doubt." (Brief of Appellee at 13) Although the jurors heard the questions and the answers elicited, they did not near the evidence that might have been elicited had defense counsel been allowed to complete his cross-examination. For example, the witnesses might have altered their earlier testimony or expressed doubt about their recollection of what Stewart actually told them. We will never know.[1]

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[1] A proffer is unnecessary where the substance of the excluded testimony is apparent from the context within which it was offered. §90.104(1), Fla. Stat. (1985). Additionally, a proffer is unnecessary where the court indicates the proffer would be unavailing. Reaves v. State, 13 F.L.W. 2182 (Fla. 5th DCA Sept. 22, 1988).

The statement was quoted out of context. We directed the statement, in our initial brief, to the judge's restriction of defense counsel's closing argument. By sustained the prosecutor's objection to defense counsel's theory of the case twice during closing argument, the judge suggested to the jurors that they should not consider counsel's argument.

This compounded the earlier error. Defense counsel had no evidence to argue in closing because the trial court did not permit him to elicit evidence to support his theory. Nevertheless, the possibility that one of the state's witnesses committed the murder was a natural inference from the evidence and counsel should have been allowed to argue it to the jury. The judge dismissed Stewart's theory of defense by sustaining the objection each time defense counsel started to argue it.

We are of course 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). There was as much connection between Bilbrey and the crime and between Smith and the crime as there was between Stewart and the crime. There was no evidence against Stewart other than the inconsistent testimony of these two state witnesses -- allegedly based on what Stewart told them.

Marrero v. State, 478 So.2d 115% (Fla. 3d DCA 1985), cited by Appellee (Brief of Appellee at 11), is distinguishable from the case at hand. In Marrero, the prosecutor's questions implied that the witness made a prior inconsistent statement at the prosecutor's office. Here, defense counsel was trying to get the witnesses to admit that they lied, may have been mistaken, or misunderstood what Stewart told them. This was error.

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.

Appellee's argument that defense counsel tried to get Terry Smith to admit that Stewart told him Bilbrey killed Diaz does not make Marsicano's testimony admissible. (Brief of Appellee at 16) Smith had the same motive to testify falsely against Stewart (rather than Bilbrey) when he and Stewart were arrested following an attempted convenience store robbery as he had at trial. Thus, this case is distinguishable from those cited by Appellee. (Brief of Appellee at 16-17)

'Terry Smith identified Stewart during penalty phase as the gunman at the convenience store. (R. 631-633) He admitted to knowing how the legal system works. (R. 415) He 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) Certainly, he knew that he could get an even better deal if he provided information and testifed against Stewart at a trial for another crime.

The error was not harmless. The only evidence implicating Stewart other than the testimony of Detective Marsicano was the testimony of two state witnesses -- a convicted felon and a homosexual. Adding the testimony of Marsicano "had the immediate effect of putting a cloak of credibility" upon Smith's testimony. Lamb v. State, 357 So.2d at 437, 438 (Fla. 2d DCA 1978)(error in admitting corroborating testimony of law enforcement officer cannot be harmless).

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.

It is ridiculous to suggest that the Appellant failed to "join in" counsel's motion to withdraw. (Brief of Appellee at 19) Motions are made by counsel for and in behalf of their clients. A defendant does not "join in" a motion made in his behalf by his own trial counsel.

Additionally, the Appellee missed the point of our argument. Appellee asserted that defense counsel failed to take the position, during penalty phase, that Stewart committed the crime, and instead merely indicated that the jury believed the state witnesses and found Stewart guilty. Defense counsel's argument, and that espoused in our initial brief, was that, because he maintained that Stewart was innocent, defense counsel lost all credibility with the jurors when they found Stewart guilty. The jury obviously believed he misled them concerning Stewart's guilt and, therefore, would not believe anything he argued during penalty phase. That defense counsel never admitted Stewart's guilt during penalty phase is irrelevant. This loss of credibility tainted the entire penalty proceeding, rendering defense counsel ineffective and destroying the reliability of the jury's sentencing advisory opinion, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

Citing King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), Appellee asserted that "[a] defendant challenging a death sentence on ineffective assistance of counsel grounds must show

that without error the outcome would have been different." (Brief of Appellee at 22) This is an incorrect statement of the law.

> In establishing prejudice, appellant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 691-92, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); King v. Strickland, 748 F.2d 1462 (11th Cir. 1984), cert. denied, --- U.S. ---, 105 S.Ct. 2020, 85 L.Ed.2d 301 (1985).

Funchess v. Wainwright, 772 F.2d 683, 688 (11th Cir. 1983). Unlike the defendant in Funchess, Stewart's counsel tried to argue both innocence and mitigation. It was this inconsistent posture that caused the prejudice of which we now complain.

We agree that it would have been more timely had defense counsel anticipated this problem and made his motion earlier. Stewart should not be punished, however, for his counsel's lack of foresight and clairvoyance. Because there is no assurance that counsel's assistance produced a just result, 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 by the Eighth Amendment to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

ISSUE IV

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

Appellee contends that the testimony of Michelle Acosta concerning the details of Stewart's conviction for first and second-degree murder, the testimony of James Harville that Stewart shot him while robbing a convenience store, and Terry Smith's identification of Stewart as the triggerman in that incident, were not like the victim impact testimony which the Court found objectionable in Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). It is impossible to tell from the cold record on appeal whether Michelle Acosta was emotional during her testimony about the death of her boyfriend, Mark Harris. At the conclusion of her direct testimony, however, the prosecutor asked her, "Where is Mark now, Michelle?" Her response was, "Mark is in heaven right now." (R. 624)

Even if the witnesses did not create emotion impacting on the jurors, the prosecutor assured this emotion during his closing argument. He argued that Stewart shot Harris, Acosta, and Harville like "swatting flies" and "crushing bugs." (R. 757) He insinuated that Stewart had no conscious and felt no remorse. These are non-statutory aggravating factors which cannot be considered by the judge or jury under Florida's death penalty statute. See LeCroy v. State, 13 F.L.W. 628, 629 (Fla. Oct. 20, 1988).

In DuFour v. State, 495 So.2d 154 (Fla. 1986), cited by Appellee, the extensive details of the earlier murder were not

set out in the opinion. Similarly, in Jackson v. State, 13 F.L.W. 305, 306 (Fla. May 5, 1988), there are no facts to compare with the testimony in our case. We are not disputing the general rule that testimony concerning the details of a prior offense is admissible but argue instead that in this case, the evidence should have been excluded under section 90.403 of the Florida Evidence Code because the probative value of the testimony was outweighed by the danger of unfair prejudice, confusion of the issues, and needless presentation of cumulative evidence. Defense counsel did not contest the aggravating factor that Stewart had been convicted previously of a violent felony.

Acosta's testimony was particularly troublesome because her version of the facts gave the jurors a distorted view of the crime. One would think that Stewart was guilty of the premeditated murder of Harris and attempted first-degree murder of Acosta. Stewart was convicted only of the felony murder of Harris and attempted second-degree murder of Acosta. (OR. 904, 1011) Thus, her testimony was misleading. Combined with its characterization by the prosecutor during closing argument, this and other victim testimony became the main feature of the penalty phase. The jury recommendation was therefore unreliable in violation of the Eighth and Fourteenth Amendments. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

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. Hayward's Testimony

Appellee noted that the court sustained the objection to Hayward's testimony concerning the details of the murder of Stewart's biological father because the doctor who was to be called as an expert "would certainly cover these details . . . ." (Brief of Appellee at 30) Nevertheless, Dr. Merin's testimony did not cover the details of Kenny's father's murder. 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.

B. Cigarette Burns

Appellee's conclusion that the cigarette burns could not have affected Kenny because Mrs. Scarpo testified that he was "jovial, full of fun and a darling child," is belied by Dr. Merin's testimony that he developed an antisocial personality from the years of anger, hostility, and destructiveness. (R. 721) His anger and hostility developed from his experiences and fantasies regarding his mother, with whom he lived when he received the cigarette burns, and other members of his biological family.

C. Letter of Remorse

We are not, as suggested by Appellee, arguing that "lack of remorse" was considered. We argue only that the court should have admitted Stewart's purported letter of remorse because all nonstatutory mitigating evidence must be considered 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 v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

Remorse also shows potential for rehabilitation, another recognized nonstatutory mitigating factor. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). ~~See also~~ Lemon v. State, 456 So.2d 685, 887 (Fla. 1984) (trial court permitted counsel to read portions of psychological report submitted just thirty minutes before sentencing hearing for consideration as mitigation). A jury recommendation returned when nonstatutory mitigating evidence was excluded cannot be relied upon by the trial court in sentencing. Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. 1821, 45 L.Ed.2d 347 (1987).

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.

The record does not support Appellee's argument that the court instructed on the "cold, calculated and premeditated" aggravating factor in part because the murder "was committed in a wooded and secluded area in which the defendant felt safe.'! (Brief of Appellee at 36) The evidence shows only that Diaz was shot along the side of Whitaker Road in Lutz, Florida. (R. 225) A neighbor heard the shots and walked out to the road. (R. 218-19) A woman driving home spotted the body a short time later. (R. 221) Thus, Diaz was shot along a road on which people lived -- not a secluded wooded area where Stewart "felt safe."

In Cannady v. State, 427 So.2d 723 (Fla. 1983), cited by Appellee, the trial judge found that of the "cold, calculated and premeditated" aggravating factor was inapplicable despite the fact that the defendant took the victim to a remote wooded area and shot him. Appellee omitted this and other details of the case. (Brief of Appellee at 38) The trial judge did not believe the defendant's testimony that the victim jumped at him, because the victim was a quiet, unassuming minister and because the defendant shot him five times. Even these facts were insufficient to prove beyond a resonable doubt that the murder was committed in a cold, calculated and premeditated fashion. 427 So.2d at 730.

Similarly, there is no evidence that this was a "death ride." According to Bilbrey's testimony, Stewart shot Diaz only

because an accomplice was repeatedly yelling "kill him, kill him." (R. 374) That the robbery may have beeen premeditated is insufficient. Thompson v. State, 456 So.2d 444 (Fla. 1984). A murder during a 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 fact that we speculated in our initial brief about how the shooting occurred supports our position that; the "cold, calculated and premeditated" aggravating factor should not have been given. The jury cannot be permitted to speculate as to how the murder occurred when there is no clear evidence to support any particular theory. There were two versions -- both hearsay -- at trial. Dr. Diggs' testimony was inconclusive.[2] Speculation may not support the "cold, calculated and premeditated" aggravating factor. Thompson v. State, 456 So.2d 444 (Fla. 1984).

It is the State's burden 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. There was no proof beyond a reasonable doubt that the homicide was committed with heightened premeditation. The

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[2] Any inaccuracy in our description of Dr. Diggs' testimony concerning the gunshot wounds was unintentional. (R. 287-295) In our opinion, it is unclear whether one or both shots could have been fired when Diaz was in a crouched or attacking stance (R. 293) although Dr. Diggs testified that it would be normal for someone to stagger or fall almost immediately after the first of either of the shots. (R. 293-95) Dr. Diggs' testimony shows only that the wounds were consistent with several speculative theories. Any conclusion as *Lo* how the shooting occurred would be pure speculation.

jurors could not legally have found this factor to have been proven beyond a reasonable doubt. The trial court's instruction invited the jurors to base their advisory recommendation on an inapplicable aggravating factor in violation of Florida's death penalty statute and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983)(defendant has a right to jury advisory recommendation and a judge may not frustrate that important jury function).

ISSUE VII

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

Appellee urges, in effect, that Stewart cannot "have his cake and eat it too." In a footnote, Appellee accused the Appellant of failing to state that Dr. Afield, who testified at Stewart's trial in the Mark Harris case, opined that Stewart was beyond rehabilitation.[3] Appellee charged that we instead chose to address the "slightly more favorable testimony of Dr. Merin as to the appellant's ability for rehabilitation." (Brief of Appellee at 41, n.4) Stewart's potential for rehabilitation is irrelevant to this issue.

This is not a game where the result depends on each side's choice of players. The trial judge's failure to instruct the jury on the "emotional disturbance" and "impaired capacity" mitigators, §§921.141(6)(b) and (f), Fla. Stat. (1985), distorted the death penalty sentencing scheme, rendering the jury advisory recommendation unreliable. See Richardson v. State, 437 So.2d 1091 (Fla. 1983); Cooper v. State, 336 So.2d 1133 (Fla. 1976).

We are not arguing, as Appellee suggests, that the judge should have instructed on these two mental mitigators based on the evidence in the Mark Harris trial. (Brief of Appellee at 41) There was plenty of evidence in this case to mandate instructions on these mitigators. The trial court refused to

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[3] We did mention in our initial brief that the prosecutor argued this fact to the judge at sentencing in the instant case. (Initial Brief of Appellant at 75)

instruct as to these mitigators only because of Dr. Merin's opinion that, although Stewart suffered from emotional disturbance, it was not "extreme," and that Stewart's capacity to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was impaired, but not "substantially" impaired. Dr. Merin's conclusions were not determinative. The jurors should have been permitted to draw their own conclusions.

The necessity for an instruction on these two mitigators is supported by Rule 704 of the Federal Rules of Evidence and Section 90.703 of the Florida Statutes. Rule 704(a) of the federal rules provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The federal rule, after which Florida's Rule 703 was patterned, was created to permit opinion testimony when helpful to the trier of fact, even though the opinion was as to an ultimate issue which must be determined by the trier of fact. Moore's Federal Practice, ¶704.3, at 252-53 (Rules Pamphlet, Part 2, 1986).

Rule 704 was amended in 1984 by the addition of subsection (b) which provides that "[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Moore's Federal Practice, ¶704.4, at 253-54 (Rules Pamphlet, Part 2, 1986). This amendment would preclude Dr.

Merin's opinion on these ultimate issues altogether if the federal rules of evidence were applicable.

Under Florida law, expert opinion testimony concerning the mental mitigators would be permitted only to aid the jurors who have the ultimate responsibility for deciding how much weight to afford each mitigator. The evidence would still be subject to exclusion under section 90.403 of the Florida Evidence Code if the probative value of the testimony was outweighed by the danger of unfair prejudice and confusion of the issues. See United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) (as to Federal Rule 403 which is the federal equivalent of the Florida rule).

The apparent reasoning underlying the 1984 amendment to Rule 704 of the Federal Evidence Code is illustrative of the danger of even permitting the jury to hear the opinion testimony. In our case, the judge went even further, considering Dr. Merin's opinion dispositive and taking this issue from the jury.

Appellee cited Roberts v. State, 510 So.2d 885, 894-95 (Fla. 1987), in support of this Court's recognition of the trial court's broad discretion in determining the applicability of a mitigating circumstance. (Brief of Appellee at 41) This refers, however, to the trial court's written findings made when imposing the death penalty which, in this case, were never made. It does not apply to the court's determination of whether to instruct the jury concerning the mitigators.

Roberts instead supports our conclusion that an expert's opinion is not dispositive. "In determining whether mitigating circumstances are applicable in a given case, the

trial court may accept or reject the testimony of an expert witness just as he may accept or reject testimony of any other witness." 510 So.2d at 894; see Bates v. State, 506 So.2d 1033 (Fla. 1987)(expert testimony not conclusive even where uncontradicted). Certainly, the same applies to the jury. Had the trial court instructed the jurors on the two mental mitigators, the jury might well have rejected Dr. Merin's conclusions in favor of the testimony of other witnesses.

In Toole v. State, 479 So.2d 731 (Fla. 1985), this Court remanded for a new penalty trial with a newly impaneled jury because the trial court failed to instruct the jurors on the extreme mental or emotional distress mitigator. Defense counsel in Toole presented evidence that Toole suffered from pyromania and a personality disorder, among other problems, and had a lower than average ability to cope and to process tension. Id. at 733. Citing Mines v. State, 390 So.2d 322 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981), in which the defendant was schizophrenic, the supreme court held that "subsections 921.141(6)(b) and (f) are the two statutory mitigating circumstances relating to a defendant's mental condition that should be considered when there is evidence of a defective mental condition . . . ." 479 So.2d at 733-34.

> The above-mentioned evidence might very well suggest to the jury that appellant suffers from mental or emotional disturbance. Had the jury been properly instructed that it could consider this specific mitigating factor, it might not have recommended death. . . . Appellant has been prejudiced by the trial court's refusal to give a proper instruction that might have led to a different jury recommendation.

479 So.2d at 734.

The case at hand is the same. Dr. Merin testified (as did Dr. Afield in the other trial) that Kenneth Stewart suffered from an antisocial personality disorder. The trial court's error in failing to instruct the jury on the two mental mitigators -- in effect, making a judicial determination that they were inapplicable -- rendered the sentencing proceeding "inconsistent with the Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment." Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). "It is a defendant's right to have a jury advisory opinion . . . and a judge may not frustrate this important function." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

This error also violated Stewart's Sixth Amendment right to a jury trial. Under Florida law, a defendant in a capital case is entitled by law to a penalty phase jury trial and a life or death recommendation. Richardson. 437 So.2d at 1095. By refusing to instruct on two important and well substantiated statutory mitigators, the trial court effectively denied Stewart his right to a jury trial.

The trial court also violated Stewart's due process rights. In fact, his sentence of death was unconstitutionally imposed in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Conszitution, in addition to Florida law.

ISSUE IX

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

Appellee noted that, in Van Royal v. State, 497 So.2d 625 (Fla. 1986), the oral pronouncement of findings was "found to be inadequate not merely incomplete." (Brief of Appellee at 45) We submit that incomplete findings are by definition inadequate under Florida's death penalty statute. The findings here were inadequate.

Of course the real problem here is the complete lack of any written findings. Written findings are required. If the trial court does not make the findings requiring the death sentence, the statute requires that this Court impose a sentence of life imprisonment. §921.141(3), Fla. Stat. (1985). We therefore submit that the imposition of a life sentence is required by statute.

CONCLUSION

For the above reasons and those in our Initial Brief, the Appellant, KENNETH ALLEN STEWART, respectfully requests this Court to reverse his conviction and sentence and to remand for a new trial. Alternatively, Appellant asks this Court to vacate his sentence of death and remand for the imposition of a life sentence, or to award him a new penalty trial before a jury impaneled for 'chat purpose.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Erica M. Raffel, Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, FL., 33602, by U.S. mail, this 14th day of November, 1988.

A. ANNE OWENS