IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,509

STATE OF FLORIDA,

Appellant,

-vs-

ROY ALLEN STEWART,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

The Appellant, the State of Florida, will hereinafter be referred to as the State. The Appellee, Roy Allen Stewart, will be referred to by name or as the defendant.

The symbol "R" refers to the one (1) volume record on appeal herein. "R1" refers to the record on direct appeal, Fla. S. Ct. Case No. 57,971. The symbol "T1" refers to the trial transcripts in said case. The symbol "R2" refers to the record on appeal of the denial of the defendant's first motion for post conviction relief, Fla. S. Ct. Case No. 66,005. The symbol "R3" refers to the record on appeal of the defendant's second motion for post conviction relief, Fla. S. Ct. Case No. 69,387. The symbol "R4" refers to the record on appeal of the defendant's third motion for post conviction relief, Fla. S. Ct. Case No. 78,498. Pursuant to Fla. Stat. 90.202, the State hereby requests that this Court take judicial notice of its own records above.

STATEMENT OF THE CASE AND FACTS

The defendant was charged by indictment with the first degree murder of Margaret Haizlip; the armed robbery of Margaret Haizlip; the sexual battery of Margaret Haizlip with force likely to cause serious injury; and armed burglary of a conveyance. After a trial by jury, the defendant was convicted as charged. The jury recommended a sentence of death and the trial judge sentenced the defendant to death on July 26, 1979. (R1. 1182-86).

The trial judge found five aggravating circumstances and no mitigating circumstances. The aggravating factors were: 1) the defendant was under sentence of imprisonment when he committed the murder; 2) the defendant had previously been convicted of a felony involving the use or threat of violence to a person (attempted armed robbery in South Carolina); 3) the murder was committed during the commission of a sexual battery; 4) the murder was committed for pecuniary gain; and 5) the murder was especially heinous, atrocious and cruel.

The historical facts of the murder are detailed in he trial court's sentencing order as follows:

> The victim, Margaret Haizlip, a woman of small physical stature, in her late seventies, was a pioneer of South Florida living in a small home across from Stewart's temporary residence. At about 10:00 p.m. Mrs. Haizlip was out on

her porch and saw Stewart. She waived (sic) to him, invited him into her home and fixed him a sandwich. Shortly thereafter he went into her bathroom and stole a gold watch from the medicine cabinet. Mrs. Haizlip, after going into the bathroom confronted the defendant, apparently about the stolen watch, whereupon Stewart beat and pummeled Mrs. Haizlip unmercifully about her ribs, face and head. While so doing, the defendant was tearing the clothing and ultimately the underwear from her body. As she lay on the floor, bleeding from her face, moaning and making noises, the defendant forcibly had sexual intercourse with her in a manner so vicious so as to tear her vagina. The defendant thereupon fastened a cord with an iron attached to it around her neck, pulled tightly on the cord and thereby strangled her leaving a ligature mark on her neck.

The medical examiner testified the victim suffered eight broken ribs, multiple contusions, and her larynx was broken. A bite mark was identified on her thigh, and what appeared to be a bite mark was on her breast. There was blood stains and disarray in the living room and bedroom area of her house, indicating the victim was fighting and running for her life. The defendant left the victim at the scene with blood on his hands.[1]

(R1. 1884-85).

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[1] The cavalier and sanguinary attitude of Stewart toward the victim is apparent from his actions of leaving the victim's home with blood on his hands, trying to steal her car, then washing his hands off at a nearby service station and thereafter going to a nearby pub for "last call for drinks."

The defendant appealed his convictions and sentence of death to this Court, which affirmed same on August 26, 1982. Rehearing was denied on November 9, 1982. Stewart v. State, 420 So.2d 862 (Fla. 1982). The United States Supreme Court denied certiorari on April 18, 1983. Rehearing was denied on June 13, 1983. Stewart v. Florida, 460 U.S. 1103, 103 S.Ct. 1802 (1983).

A. First State Post-Conviction Proceedings

After a death warrant was signed by the Governor of Florida, on March 16, 1984, the defendant filed his first Motion for Post-Conviction Relief, alleging as his only ground that counsel provided ineffective assistance at the penalty stage. Stewart claimed that counsel had devoted too much time in proving him innocent, in view of the overwhelming evidence of guilt. The trial court granted a stay of execution, and after an evidentiary hearing, denied the defendant's motion. The lower court found trial counsel's performance to be deficient, because:

> At an early stage of the representation, defense counsel should have come to the inescapable conclusion that all hope of obtaining a verdict of not guilty should have been abandoned and substantial time should have been expended preparing for the penalty phase.

(R1. 896).

The defendant appealed, and on December 19, 1985, this Court affirmed the trial court's order, having noted that the evidence presented at the evidentiary hearing was cumulative of that presented at trial. The Court also found that, "we see no reasonable probability that the jury and judge's recommendation and conclusion regarding this brutal murder would have been altered." Stewart v. State, 481 So.2d 1210, 1212 (Fla. 1985). Rehearing was denied on February 20, 1986.

B. Second State Post-Conviction Proceedings

On September 19, 1986, the Governor signed a second death warrant. On the same date, the defendant filed a Petition for a Writ of Habeas Corpus and Other Relief in this Court, contending for the first time that the death penalty was arbitrarily and therefore improperly applied, based on the race of the victim. On September 25, 1986, this Court rejected the defendant's claim, finding that it was improperly filed in this Court. Stewart v. Wainwright, 494 So.2d 489 (Fla. 1986).

The defendant then refiled his claim of racial discrimination in the application of the death penalty, as a second motion for post-conviction relief under Fla.R.Crim.P. 3.850. The trial court summarily rejected the claim as procedurally barred and as an abuse of the writ under state law.

On appeal, this Court affirmed the trial court's order on October 1, 1986. Stewart v. State, 495 So.2d 164 (Fla. 1986).

The defendant then sought to stay his execution pending his application for a writ of certiorari in the United States Supreme Court based upon the foregoing claim of racial discrimination. On October 3, 1986, that Court rejected the defendant's application and denied any stay of execution. See Stewart v. Wainwright, 478 U.S. 1050, 107 S.Ct. 41 (1986).

C. Federal Habeas Corpus Proceedings

The defendant subsequently filed a federal petition for a writ of habeas corpus in the United States District Court in and for the Southern District of Florida. He, inter alia, argued ineffective assistance of trial counsel. On October 5, 1986, the United States District Court entered an order denying the petition for writ of habeas corpus. The defendant appealed the denial of the petition to the Eleventh Circuit Court of Appeals.

On June 27, 1989, the Eleventh Circuit Court of Appeals affirmed the district court's denial of the petition for writ of habeas corpus. Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989). That Court, having noted the "overwhelming"

evidence of guilt herein,[2] however, rejected the claim of deficient performance by Stewart's trial counsel:

> Trial counsel made a strategic decision that in light of the atrocious nature of the offense, Stewart's only chance of avoiding the death penalty was if some seed of doubt, even if insufficient to constitute reasonable doubt, could be placed in the minds of the jury. This Court has repeatedly recognized the impact such an argument may have upon a jury. [citations omitted]. Every court which has ruled upon Stewart's claims has recognized that under the circumstances of this rape and murder, defense counsel had little with which to work in arguing against death. Trial counsel can not be faulted for attempting to make the best of a bad situation.
>
> Defense counsel presented a logical and well-constructed argument inviting the jury to believe that the defendant left the victim alive and another party, said to be a dope addict, committed the murder. This was a classic attempt to create lingering doubt in the mind of jurors as to Stewart's guilt. [citations omitted]. Counsel was not constitutionally deficient for devoting his resources, both in terms of argument time and pretrial investigation, to such a strategy.

Stewart v. Dugger, supra, 877 F.2d at 856. The Court of Appeals also rejected the prejudice prong of Stewart's claim of ineffectiveness. Id. The defendant's petition for writ of certiorari in the United States Supreme Court was denied on May

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[2] Stewart v. Dugger, supra, at 855.

29, 1990. Stewart v. Dugger, 495 U.S. 962, 110 S.Ct. 2575 (1990).

D. Third State Post-Conviction Proceedings

On June 12, 1990, the Governor signed a third death warrant. On July 7, 1990, the defendant filed his third motion for post-conviction relief.

D.1. Course of Events in the Lower Court

The defendant, initially raised six (6) issues in the third motion. He claimed, inter alia, that his sentencing jury had been improperly instructed on the "Especially Heinous, Atrocious or Cruel" (HAC) aggravator, in violation of Maynard v. Cartwright, 108 S.Ct. 1853 (1988) and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). (R4. 500-16).

The lower court, after conducting an evidentiary hearing on other claims, found five of the claims in the third motion, including the improper HAC instruction issue, to be procedurally barred. The remaining claim in said motion (cruel and unusual punishment due to a malfunction in the electric chair) was denied on the merits. (R4. SR.1).

The lower court, however, then granted the defendant a period of 45 days to amend the third motion to vacate, with a claim of "factual innocence." (R4. 2523). The defendant then filed an "Amendment," raising said claim, without any factual support, other than that which was initially "proffered" and not ruled upon the the lower court. (R4. 1833-57).

Stewart also added another claim, ineffective assistance of trial counsel, in the Amendment. (R4. 1833-43). The defendant argued that despite now claiming factual innocence, based upon what trial counsel had argued at trial in 1979, and found to be deficient for, the lower court should "revisit" the prejudice prong of his 1984 ineffective assistance of counsel claim. (R4. 1833-34, 1838-43).

Six months thereafter, the lower court conducted another evidentiary hearing, on both the claim of factual innocence and ineffective assistance of counsel. (R4. 2525, et seq.). The court then denied both claims in the Amendment as insufficient and without merit. (R4. 2032-33).

D.2. Course of Events on Appeal to this Court

The defendant then appealed to this Court. On November 12, 1992, he served his initial brief, and raised, inter alia, the above claim of ineffective assistance of

counsel. See initial brief of Appellant, case no. 78,498, at pp. 34-40. The defendant also argued that the penalty phase jury instructions at his trial violated Espinosa v. Florida, 112 S.Ct. 2926 (1992), as follows:

> ARGUMENT IV
>
> ESPINOSA V. FLORIDA, ESTABLISHES THAT MR. STEWART'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.
>
> A. THE JURY INSTRUCTIONS GIVEN
>
> B. PROCEDURAL HISTORY
>
> C. ESPINOSA V. FLORIDA IS A CHANGE IN LAW
>
> D. HEINOUS, ATROCIOUS OR CRUEL
>
> E. THE DOUBLING OF AGGRAVATORS
>
> F. PECUNIARY GAIN
>
> G. UNDER SENTENCE OF IMPRISONMENT
>
> H. THE AUTOMATIC AGGRAVATOR
>
> I. GREAT RISK OF DEATH, AVOIDING ARREST, AND COMMITTED TO DISRUPT THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTIONS
>
> J. PREJUDICE

See initial brief of Appellant, at pp. 41-60. The defendant argued that in light of the mitigation presented, the vague penalty phase jury instructions prejudiced Mr. Stewart. Id. at 59-60.

The State's answer brief was served on February 23, 1993. The State argued that defendant's ineffective assistance of counsel claim was procedurally barred, because it was untimely and successive. Brief of Appellee, case no. 78,498, at pp. 59-61. The State also argued that said claim was without merit based upon the evidence presented at the evidentiary hearing below. Id. at pp. 62-65.

With respect to the Espinosa claim, the State argued that the HAC jury instruction issue was procedurally barred, as it was not objected to, on constitutional grounds, at trial, nor raised on direct appeal. Id. at pp. 67-70. The State also argued that any error with respect to the HAC instructions was harmless beyond a reasonable doubt, because the result would have been the same had this factor been properly defined in the jury instructions. Id. at pp. 70-73. As to the claims of vagueness and impropriety with respect to the remainder of the penalty phase instructions, the State argued that same had not been presented in the lower court and were thus procedurally barred. Id. at p. 66. The State also argued that, even if said claims had been raised in the lower court, they would still be procedurally barred because the instructions complained of: a) had never been held to be improper, and, b) were not objected to at trial, nor raised on direct appeal. Id. at 66-67.

On April 28, 1993, the defendant served his reply brief, arguing that the State had mischaracterized the objections to the HAC jury instruction at trial. Reply Brief at p. 19. The defendant also argued that, if the complained of instructions had not been properly objected to at trial and raised on direct appeal, then trial and appellate counsel were ineffective. The defendant attached two affidavits by trial and appellate counsel, respectively. On May 17, 1993, the State served objections, and moved to strike the attached affidavits from the reply brief, because same were not part of the record. See Objections To and Motion to Strike Attachments to the Reply Brief and Any Reliance Thereon, at pp. 2-3.

On June 9, 1993, the defendant then served a "Motion to Relinquish Jurisdiction and Hold Appeal in Abeyance." Stewart requested relinquishment of jurisdiction from this Court to the lower court, in order to file the present Fourth Motion to Vacate, at issue in the instant appeal. A copy of said Fourth Motion to Vacate was attached to the motion to relinquish. A copy was also simultaneously filed in the lower court.

The State then served "Appellee's Response and Objections to Appellant's Motion to Relinquish Jurisdiction and Hold Appeal in Abeyance," on June 25, 1993. The State argued that jurisdiction should not be relinquished, because, the

issues in he Fourth Motion to Vacate were: "(1) ruled upon by the lower court and fully briefed herein by the parties, or (2) not the proper subject matter of a rule 3.850 motion, and are successive and time barred." See Appellee's Response and Objections, at p. 7.

On June 24, 1993, this Court entered an order granting the State's motion to strike Stewart's reply brief. On July 19, 1993, this Court entered an order denying Stewart's request for relinquishment of jurisdiction to file the Fourth Motion to Vacate.

On July 7, 1993, Stewart filed a reply brief without the affidavits of trial and appellate counsel. In this reply brief, however, Stewart again argued that, pursuant to James v. State, infra, counsel were ineffective, if this Court deemed that they had not properly objected to the jury instructions at the penalty phase, and/or properly raised same on direct appeal. See reply brief, dated July 7, 1993, at pp. 20-22.

On December 9, 1993, this Court entered its opinion on appeal of the denial of Stewart's third motion to vacate. Stewart v. State, 18 Fla. L. Weekly S629 (Fla. Dec. 9, 1993). Stewart's claim that the prejudice prong of the ineffective assistance of trial counsel claim should be revisited, was found to be procedurally barred:

> Now, Stewart argues that he is "innocent of the death penalty" and that the prejudice part of the test for ineffectiveness should be reconsidered. This is reargument of the claim of ineffectiveness, which is not proper in successive post-conviction motions.

Id.

With respect to the Espinosa issue, this Court found Stewart's claim to be procedurally barred, because the HAC instruction was not objected to, on vagueness grounds, at trial. This Court also found that even if the issue were not procedurally barred, it was harmless beyond a reasonable doubt:

> The trial court also correctly found the issues in the original third 3.850 motion meritless or procedurally barred, and only one of those issues needs to be discussed now. Espinosa v. Florida, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), invalidated the former standard jury instruction on the heinous, atrocious, or cruel aggravator, and Stewart relies on Espinosa to argue that he should be resentenced. Stewart, however, objected at trial to the applicability of that aggravator to the facts of this case, not to the vagueness of the aggravator's instruction. This issue therefore, has not been preserved for review. Thompson v. State, 619 So.2d 261 (Fla.), cert. denied, no. 93-5621 (U.S. Nov. 8, 1993); Happ v. State, 618 So.2d 205 (Fla. 1993); Gaskin v. State, 615 So.2d 679 (Fla. 1993). Even if the issue were not procedurally barred, we would find it to have no merit because, under any

> definition of the terms, this murder was heinous, atrocious, or cruel beyond any reasonable doubt. Therefore, we affirm the trial court's denial of relief.

Stewart v. State, supra, 18 Fla. L. Weekly at S630. Stewart's motion for rehearing was denied on February 25, 1994.

E. Fourth State Post-Conviction Proceedings

The lower court obtained jurisdiction to consider the fourth motion to vacate, which had been filed prior to this Court's denial of relinquishment in the above proceedings, upon issuance of mandate by this Court, on February 25, 1994. On March 9, 1994, the Governor signed a fourth death warrant. The warrant period commences at noon, April 19, 1994 and ends at noon on April 26, 1994. Execution was scheduled for 7:00 a.m., April 20, 1994.

The fourth motion to vacate raised the following claim:

> FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING FACTORS WAS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, AND THIS INFIRMITY WAS NOT CURED IN MR. STEWART'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS, AND THUS THE JURY'S DEATH RECOMMENDATION, WHICH WAS ACCORDED GREAT WEIGHT BY THE TRIAL JUDGE, WAS TAINTED BY CONSIDERATION OF UNCONSTITUTIONALLY

VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

(R. 4). Specifically, Stewart, in accordance with his prior initial brief in this Court, case no. 78,498,[3] alleged that the jury did not receive proper limiting instructions on the following aggravating circumstances: 1) heinous, atrocious or cruel; 2) pecuniary gain; 3) under sentence of imprisonment; 4) great risk of death to many people; 5) the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law; and 6) the crime was committed for the purpose of avoiding or preventing lawful arrest. (R. 7-21, 32-39). The defendant also alleged that it was unconstitutional for the State to use the underlying felony for the first degree murder charge, as an aggravating factor (R. 21-30); as well as that the trial court erred in refusing to instruct the jury not to consider separately the two aggravating factors that the homicide was committed while he was engaged in the crime of robbery and was committed for financial gain. (R. 30-32).

The State filed its Response on March 11, 1994. (R. 52-67). It argued that the above claims of jury instructional error were procedurally barred, because they were, a) untimely,

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[3] See initial Brief of Appellant, at pp. 41-60.

b) successive, c) found to be procedurally barred by this Court, and, because d) the complained of instructions were not objected to at trial on constitutional grounds, nor raised on direct appeal. (R. 61-4). The State also argued that the claims were without merit. (R. 64-66).

On March 29, 1994, the lower court heard arguments on the fourth motion to vacate. (R. 147-189). Stewart first argued that, he was entitled to an evidentiary hearing on an ineffective assistance of trial and appellate counsel claim, because counsel had improperly failed to object, preserve, and present the vagueness of the HAC instruction claim:

> They [trial and appellate counsel] did predict Espinosa. They knew that the Florida Supreme Court was wrong. They knew that they wanted to preserve the issue. That isn't the question of their ineffectiveness. Their ineffective [sic] is because they knew all that stuff. They made a strategic issue to present it, and they didn't carry it out because they didn't know how or otherwise failed to present a jury instruction claim. And that's a big issue. That's something that the Florida Supreme Court has been real clear on. That's something that if counsel does wrong, they are ineffective. . . . I submit that this thing needs to be set down for an evidentiary hearing, . . .

(R. 178).

Second, Stewart argued that the unobjected-to jury instructions on three (3) of the remaining aggravators herein (pecuniary gain, under sentence of imprisonment, and during commission of a sexual battery) are vague. The defendant argued that the lower court should decide this issue, despite the lack of any decision from any appellate court to this effect:

> Clearly, those instructions are vague. Even if no appellate court has made that decision yet, it's incumbent on this Court to decide whether those instructions are vague, because no court has rendered a decision on the issue.

(R. 175).

On March 30, 1994, the lower court denied the fourth motion to vacate. (R. 71-2). With respect to the Espinosa issue, the lower court found that it could not consider Stewart's argument, "in light of the decision in Stewart [18 Fla. L. Weekly S 630]." (R. 72).

On April 1, 1994, the defendant filed a motion for rehearing of the above order. In said motion, the defendant argued that this Court's aforecited opinion, "could not have resolved the issue of counsel's ineffectiveness in relation to the preservation and presentation of the Espinosa issue," because, that "issue was not presented to the Florida Supreme

Court." (R. 74). The defendant again argued that he is entitled to an evidentiary hearing, in order to show deficient performance by both trial and appellate counsel on the Espinosa issue. (R. 75).

Thereafter, the defendant added that the State has the burden of proving the Espinosa error "harmless beyond a reasonable doubt," because, this Court's holding on the issue was: (1) "dicta," and (2) erroneous. The defendant argued that this Court's harmless error analysis was wrong because, it did not take into consideration "the evidence of mental health mitigation," which was presented at the evidentiary hearing on the first, 1984 motion to vacate, due to ineffective assistance of counsel. Id. On April 7, 1994, the post-conviction court heard argument on the motion for rehearing. (R. 128-40).

On April 11, 1994, the lower court issued an order granting the motion for rehearing, and ordered a "full" evidentiary hearing, "to be scheduled by either party as soon as possible." (R. 144-45). The lower court stated:

> This court has concluded that the Defendant is entitled to a full hearing upon his fourth 3.850 motion to determine whether the matters raised in that motion, notably the Espinosa attack upon the aggravator heinous, atrocious or cruel, when taken in conjunction with the matters raised in Defendant's prior motions are sufficient to grant relief to the Defendant.

(R. 144) (emphasis added).

The lower court also stayed Stewart's execution, "pending further order" of that court. (R. 145).

The State filed its Notice of Appeal from said order on the same date. (R. 146). The State's Application for Writ of Prohibition and/or Expedited Appeal, and/or Motion to Vacate Stay of Execution, was also filed on April 11, 1994.

Thereafter, Stewart scheduled an evidentiary hearing for April 21, 1994. However, on April 12, 1994, Stewart also filed a "Supplement to Motion to Vacate Judgment of Convictions and Sentence with Special Request for a Hearing and Leave to Amend and/or Supplement."[4] The "Supplement," first, formally amended the fourth motion to vacate to include Stewart's arguments of ineffective assistance of counsel for failure to properly preserve alleged jury instructional error on HAC and pecuniary gain aggravators. However, the Supplement also includes a claim that Stewart's execution be further stayed, pending receipt of clemency investigatory files, which are the subject of a dispute in a class action law suit, initially filed

[4] A copy of said Supplement and the State's Response thereto have been filed with this Court, but not included in the record on appeal.

in the Second Judicial Circuit Court, in and for Leon County, and now pending in this Court.

SUMMARY OF ARGUMENT

The lower court's grant of an evidentiary hearing and stay of execution based upon ineffective assistance of trial and appellate counsel for failure to properly object to and preserve HAC jury instruction error, pursuant to Espinosa, must be reversed. This Court, less than two months ago, specifically rejected that claim of Espinosa error, as procedurally barred and harmless beyond a reasonable doubt. This Court's holdings were binding upon the lower court, and constitute the law of the case herein.

This Court's holding was neither "dicta," nor erroneous. It was based upon the well established and binding evidence presented at the 1979 trial herein, and was clearly designed to forestall further litigation of the Espinosa issue, such as that which has occurred below.

As Stewart's fourth motion to vacate is untimely and successive, and presents no colorable issues and no potential basis for relief, this Court should itself deny the fourth motion in its entirety, vacate the stay of execution, and dispense with the procedural formality of directing the trial court to enter an order in the State's favor, in accordance with State v. Henry, infra.

ARGUMENT

THE LOWER COURT'S GRANT OF AN EVIDENTIARY HEARING AND STAY OF EXECUTION, BASED UPON ESPINOSA V. FLORIDA, SUPRA, MUST BE REVERSED, AND THIS COURT SHOULD DENY STEWART'S FOURTH MOTION TO VACATE IN ITS ENTIRETY, AS SAME IS UNTIMELY AND SUCCESSIVE.

The lower court has granted an evidentiary hearing, scheduled for April 21, 1994, because it concluded that:

> The Defendant is entitled to a full hearing upon his Fourth 3.850 Motion to determine whether the matters raised in that motion, notably the Espinosa attack upon the aggravator heinous, atrocious, or cruel, when taken in conjunction with the matters raised in Defendant's prior motions [ineffective assistance of trial counsel claims in 1984 and 1990] are sufficient to grant relief to the Defendant.

(R. 144).

This Court, in Stewart v. State, supra, mandate issued February 25, 1994, determined that the above referenced "Espinosa attack" upon the HAC aggravator was procedurally barred for failure to properly preserve same at trial:

> Stewart, however, objected at trial to the applicability of that aggravator to the facts of this case, not to the

> vagueness of the aggravator's instruction. This issue, therefore, has not been preserved for review. Thompson v. State, 619 So.2d 261 (Fla.), cert. denied, no. 93-6201 (U.S. Nov. 8, 1993); Happ v. State, 618 So.2d 205 (Fla. 1993); Gaskin v. State, 615 So.2d 679 (Fla. 1993).

Stewart, supra, 18 Fla. L. Weekly at S630. This Court also added, "Even if the issue were not procedurally barred, we would find it to have no merit because, under any definition of the terms, this murder was heinous, atrocious, or cruel beyond any reasonable doubt. Id. (emphasis added). Finally, this Court also found Stewart's attempt to raise new instances of ineffective assistance of counsel to be successive and procedurally barred. Id. at S629. ("This is reargument of the claim of ineffectiveness which is not proper in successive post-conviction motions.").

Stewart's request, and the lower court's grant of an evidentiary hearing, on deficient performance by trial and appellate counsel for failure to properly object and pursue HAC jury instructional error, pursuant to Espinosa, supra, are in clear contravention of this Court's above, recent holdings.

It is well established that lower courts must follow the law of the case as decided by the highest court hearing the case. See Brunner Enterprises v. Department of Revenue, 452

So.2d 550, 552 (Fla. 1989) ("lower courts cannot change the law of the case as decided by this Court or, alternatively by the highest court hearing a case. [citation omitted]. We are the only court that has the power to change the law of the case established by this Court."); Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973); Eutzy v. State, 536 So.2d 1014, 1015 (Fla. 1988) (proper course of action in lower court is summary rejection of claims which can be construed as attacks or criticisms of this Court's decision.).

As this Court has held the alleged Espinosa error to be "harmless beyond any reasonable doubt," Stewart cannot meet the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). This is because Stewart cannot show that, but for counsel's failure to object, there is a reasonable probability that the outcome of the sentencing proceeding would have been different.

The State respectfully submits that this Court's alternative holding of harmless error was clearly meant to forestall all further litigation of this issue in any form. See Occhicone v. Singletary, 618 So.2d 730, 731 (Fla. 1993) (on petition for writ of habeas corpus, this Court noted that on direct appeal it should have held the Espinosa claim to be procedurally barred because of no objection at the trial level. This Court then added, "[T]o forestall all further litigation,

however, we find that any misinstruction as to the heinous, atrocious, or cruel aggravator was harmless error." (emphasis added)). The lower court has thus exceeded its jurisdiction in allowing relitigation of the Espinosa issue and ordering an evidentiary hearing on this matter.

As will be seen below, none of the claims raised in the fourth motion to vacate are colorable issues, and none afford any potential basis for relief. The State thus respectfully requests that this Court itself, pursuant to State v. Henry, 456 So.2d 466, 468-69 (Fla. 1984), deny Stewart's fourth motion to vacate as procedurally barred in its entirety, and vacate the stay of execution granted below. As noted in State v. Henry, supra, at 469:

> . . . This Court encourages holding evidentiary hearings whenever a colorable issue is raised under Rule 3.850. Nonetheless, we find the claim to be only a variation on the theme we have rejected frequently and quite recently. . . . On these facts, there is no theory upon which Henry may proceed which would entitle him to relief. Therefore the motion for stay should not have been granted.
>
> Because we have had to consider the merits of this case as though every fact alleged had been proved in Henry's favor and find that even so, no relief is warranted, and because of the time constraints facing Henry in pursuing any federal relief, we dispense with the procedural formality of directing the trial court to enter an order in the

State's favor. . . . The motion to vacate the stay is hereby granted.

A) The lower court's order in light of this Court's finding of procedural bar

As noted previously, this Court found the Espinosa issue, upon which the lower court has granted an evidentiary hearing, to be procedurally barred, for failure to object to the vagueness of the HAC instruction at trial. "A procedural bar can not be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel." Kight v. Dugger, 574 So.2d 1066, 1073 (Fla. 1990).

The State notes that this Court also expressly held Stewart's prior attempts to obtain reconsideration of the prejudice prong of the 1984 ineffectiveness claim, to be successive and thus procedurally barred. Stewart, supra, at S629. The claim of ineffective assistance of counsel is thus still procedurally barred herein. Espinosa, supra, does not operate to lift this procedural bar. See also, James v. State, 615 So.2d 668, 669 (Fla. 1993) (("Hitchcock is not broad enough to lift the procedural bar on non-Hitchcock issues"), citing Davis v. State, 589 So.2d 896 (Fla. 1991)); see also, Tafero v. State, 561 So.2d 557, 559 (Fla. 1990) ("The Caldwell/ineffective assistance of counsel claim is procedurally barred. Because Tafero attacked his counsel's performance in his first 3.850

motion, we found the additional claims of ineffectiveness raised in his second posts-conviction motion procedurally barred. [citations omitted]. The same holds true for this, his third challenge to trial counsel's actions.").

The lower court's grant of an evidentiary hearing, on yet another ineffective assistance of counsel claim should thus be reversed. The lower court should not be allowed to circumvent this Court's finding of procedural bar. See, Hoffman v. Jones, Brunner v. Enterprises, supra.

B. The lower court's order in light of this Court's finding of harmless error

Stewart argued, and the lower court accepted, through its grant of an evidentiary hearing, that this Court's holding of harmless error with respect to the HAC/Espinosa issue, was either "dicta," or based upon an erroneous analysis of the law. (R. 75). The State respectfully submits that lower courts can not and should not be allowed to change the law of the case as decided by this Court. Brunner Enterprises, supra, at 552.

This Court's holding of harmless error was neither error, nor dicta. It was based upon the well established evidence and arguments presented at trial herein. The sequence of the initial brutal beatings administered to the victim, and

the fact that she was conscious and resisting during both that beating and the subsequent vicious rape and strangulation, were unrefuted. This evidence was established beyond a reasonable doubt based upon the defendant's three confessions and his own trial testimony.

The defendant, both in his trial testimony and in his pretrial confessions, admitted into evidence, stated that he initially punched the elderly victim several times, "hard," with his closed fists, in he chest or dorsal region. (T1. 1936-37, 1618, 1709-10). She then attempted to get up, when again with his closed fists, the defendant punched her in the face, head and dorsal region. (T1. 1936-7, 1619, 1710). She again fell. Id. The defendant then, in his confessions, stated that he began ripping the victim's clothes from her body and this time she fell just inside the bedroom. (T1. 1938, 1711). The defendant, "described that he was tearing her clothes off and that she was offering some resistance and that they made their way into the bedroom during this, and that she fell on the floor again." (T1. 1619).

The defendant then bent down to remove the victim's undergarments. (T1. 1620, 1712). At this time, the victim "was bleeding very badly -- heavily from the head area on the floor, and that she was moaning and making frightening strange moans." (T1. 1621; 1713-16). The defendant then engaged in sexual

intercourse, and "recalled having difficulty in making penetration. . . he recalled or described a tearing sensation with respect to Ms. Haizlip's vaginal region." (T1. 1621). The rape, according to the defendant, lasted between five and ten minutes. (T1. 1715).

The defendant also stated that during the sexual intercourse, the victim "was struggling and that she freed one of her arms during the course of the intercourse and reached up and tried to pull his hair." (T1. 1622, 1712; R1. 881). Stewart, at this point, reached for a cord lying nearby, and wrapped it around her neck, for the purpose of strangling her. (T1. 1622, 1714). The defendant stated "that shortly after the strangulation or pulling of the cord, he never heard her make any sound again." (T1. 1623). The defendant then took money from the victim's purse and attempted to steal her car. (T1. 1624, 1939).

The photographs at the scene, depicting locations of blood and garments, corroborated the defendant's statements that the victim was alive, conscious and resisting throughout the course of the attack. (R1. 1185). Likewise, the medical examiner, at the penalty phase, testified that every blow to the victim's body was administered while she was alive and conscious, as evidenced by contusions, bruising and subdural hemorrhage around the wounds. (T1. 2316-2323). The victim had

suffered through 8 broken ribs, a fractured larynx, and a torn vagina in the course of the attack. Id.

Finally, at trial, the defendant testified that, pretrial, he had told his doctors that he "didn't remember" the attack. The statements were untrue, and Stewart, at trial, testified that he did in fact have a "specific recollection of the whole thing." (T1. 1999-2000).

In sum, this Court's finding that, "under any definition of the terms this murder was heinous, atrocious, or cruel beyond any reasonable doubt," was entirely correct as seen from the above facts. This Court's holding was also clearly designed to "forestall further litigation" such as that which has occurred below. The lower court should not be allowed, under the guise of a successive ineffective assistance of counsel claim, to overrule this Court's holding. Hoffman v. Jones; Brunner Enterprises; Tafero v. State; Kight v. Dugger, supra.

C. The lower court's order with respect to the remaining claims in the fourth motion to vacate

The lower court's grant of an evidentiary hearing did not expressly address Stewart's remaining claims that, a) Fla. Stat. 921.141 is unconstitutionally vague and overbroad; b) the

jury also did not receive proper limiting instructions on the following aggravating circumstances: 1) pecuniary gain; 2) under sentence of imprisonment; 3) great risk of death to many people; 4) the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law; and 5) the crime was committed for the purpose of avoiding or preventing arrest; c) that it was unconstitutional for the state to use the underlying felony for the first degree murder charge, as an aggravating factor; and d) that the trial court erred refusing to instruct the jury not to consider separately the two aggravators that the homicide was committed during a robbery and was committed for financial gain.

The State submits that all of the above claims are untimely, and were improperly raised in this successive fourth motion to vacate. Initially, the State would note that neither the Florida Statute, nor any of the remaining aggravators or jury instructions thereon, have ever been held to be vague or unconstitutional by any court addressing Florida law. For the lower court to consider such claims, at this juncture, and make any rulings of unconstitutionality in this regard, would be in clear violation of this Court's ruling in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). See State v. Washington, 453 So.2d 389, 392 (Fla. 1984), where this Court stated:

> In Witt, we reiterated our adherence to the very limited role for post-conviction proceedings even in death penalty cases. We emphasized that only major constitutional changes of law which constitute a development of fundamental significance, . . . [citations omitted], may be raised for the first time under rule 3.850. . . . We also expressly held that only this Court and the Supreme Court of the United States could adopt a change of law sufficient to precipitate a post-conviction challenge to a final conviction and sentence.

(emphasis added).

Moreover, this Court has expressly held the above claims to be procedurally barred in post-conviction motions. See Johnson v. Singletary, 612 So.2d 575, 576 n. 1 (Fla. 1993) ("The other issues raised are unquestionably barred. They are: (1) that Florida's Statute setting forth aggravating factors is unconstitutionally vague; (2) that the jury's recommendation was tainted by the consideration of other invalid factors, including the 'witness elimination' factor, and (3) that Johnson's penalty was automatically aggravated in violation of the constitution."); Smith v. Dugger, 565 So.2d 1293, 1294 n. 2 (Fla. 1990) (claim of improper limiting instructions as to prior violent felony and pecuniary gain aggravators was procedurally barred); Correll v. Dugger, 558 So.2d 422, 425 n. 1 (Fla. 1990) (claim of improper limiting instruction on during-commission-of-a-felony aggravator was procedurally barred); Hill v. Dugger,

556 So.2d 1385 (Fla. 1990) (claim that jury not properly instructed on doubling of aggravators found procedurally barred).

Finally, as will be seen below, the above claims of vague jury instructions, in addition to not being objected to at trial, are also without merit.

C.1. Pecuniary gain aggravator

The jury instruction on this aggravator was not objected to at trial. With respect to this claim, Stewart in his fourth motion argued that based upon Peek v. State, 395 So.2d 492 (Fla. 1980); Simmons v. State, 419 So.2d 316 (Fla. 1982); Rogers v. State, 511 So.2d 526 (Fla. 1987); and Scull v. State, 533 So.2d 1137 (Fla. 1988), pecuniary gain must be the sole or primary motivation for the crime. (R. 19-20). None of said cases mandate that said factor must be the "sole" motive for murder. On the contrary, all of said cases involve situations where there was insufficient evidence, that the victim "was murdered to facilitate the theft, or that appellant had any intention of profiting from his illicit acquisition." Peek, supra, at 499; Simmons, supra, at 318 ("There was not, however, sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonabale doubt."); Rogers, supra, at 533. ("[K]illing occurred during flight and thus was not a

step in furtherance of the sought-after gain."); Scull, supra, at 1142 ("As in Peek v. State [citations omitted], it is possible that the car was taken [after the murder] to facilitate escape rather than as a means of improving his [defendant's] financial worth.").

The cases relied upon by Stewart, thus, all involve sufficiency of the proof of this aggravator. In the instant case, Stewart had just stolen a gold watch from the victim's bathroom, when he was confronted by the victim, at which point, he then proceeded to unmercifully beat and pummel her around the ribs, face and head; all of which contributed to the victim's death.

The State would note that on direct appeal, the defendant specifically argued that there was insufficient proof of this factor: "it would seem highly unlikely that defendant under the circumstances of this case as determined by the jury verdict, was contemplating a pecuniary gain as he raped and strangled Ms. Haizlip. Certainly such a conclusion is not established beyond a reasonable doubt." See initial brief of Appellant, Florida Supreme Court Case No. 57,973, at p. 50. This Court specifically upheld the sufficiency of proof of this factor. See Stewart v. State, 420 So.2d 862, 865 (Fla. 1982). As the sufficiency of evidence of this factor was litigated on direct appeal, raising such argument in the successive rule

3.850 motion herein, is improper. Kight v. Dugger, supra. Again, the lower court can not now overrule the Florida Supreme Court. See Hoffman v. Jones; Brunner Enterprises; supra.

C.2. Under Sentence of Imprisonment

Again, the constitutionality of the jury instruction on this aggravator was not raised at trial. In the motion to vacate below, Stewart argued that the jurors were "not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping." (R. 20). There is simply no authority for the proposition that the jury must be instructed as to the weight of an aggravator. Stewart has not questioned that he was under a sentence of imprisonment at the time he committed the crimes. The fact that he left the jurisdiction when he was not supposed to, rather than break out of prison, does not diminish the applicability of the aggravator, or render it vague. The defendant was free to argue that this aggravator should be given less weight.

C. 3. Great risk of death, avoiding arrest, committed to disrupt the lawful execution of any governmental functions, and doubling of aggravators

Again, the jury instructions on the above three aggravators were not challenged on any grounds at trial.

Moreover, the jury was not even instructed on these latter aggravators.

The record reflects that prior to the presentation of the penalty phase, the trial judge, "[i]n order to give you [jurors] an overview," of the considerations and factors in a death penalty case, listed all of the aggravating circumstances in Fla. Stat. 9212.141. (T1. 2277). The trial judge had previously explained to the jurors that they would be "instructed on the factors in aggravation and mitigation that you may consider," at the conclusion of taking penalty phase evidence, and after argument of counsel. (R1. 2276). The State then presented additional evidence only as to HAC, under sentence of imprisonment, and prior violent felony (an aggravator not complained of herein). The State then specifically argued to the jury that the last three aggravators complained of herein - i.e., great risk of death, disrupting governmental function, and avoiding arrest - were not applicable to the defendant. (R1. 2402-4). Likewise, at the conclusion of the penalty phase evidence and argument, the trial judge instructed the jurors that they were "limited" to those aggravators argued by the State, and did not mention or instruct upon the last three aggravators complained of herein. (R1. 2443-4). Stewart's claim in this regard is thus entirely devoid of merit as the jury was not instructed to consider the three factors complained of herein. Even if the jury may be deemed to

have been instructed on said factors, any error was harmless beyond a reasonable doubt because no evidence or argument had been presented as to said factors. See Sochor v. Florida, 504 U.S. ___, 112 S.Ct. ___, 119 L.Ed.2d 326, 340 (1992) (a jury is presumed to disregard a factor simply unsupported by evidence).

Likewise, the defendant's claim that the jury was not instructed on the doubling of pecuniary gain and robbery, has no merit. Again, although the trial court initially mentioned both factors when giving an "overview" of the statute, the jury was not instructed on both aggravators. The State argued not that the murder was committed for pecuniary gain and during the course of a robbery and burglary, but that it was committed during the commission of a sexual battery. (T1. 2408). Likewise, the trial judge limited the aggravators to murder during the commission of a sexual battery, and pecuniary gain; she did not mention robbery. (T1. 2443-4). This Court has consistently held that these aggravators (sexual battery and pecuniary gain) do not double. Brown v. State, 473 So.2d 1260 (Fla. 1985); Provence v. State, 337 So.2d 783, 786 (Fla. 1976).

C.4. The automatic aggravator

The defendant's claim that the statute is unconstitutional in that it provides for an automatic aggravating factor, i.e, during the course of a felony, was

again not objected to at trial. Moreover, this claim has been rejected by the United States Supreme Court in Lowenfield v. Phelps, 489 U.S. 231, 108 S.Ct. 546 (1988), and this Court. See Parker v. Dugger, 537 So.2d 969, 973 (Fla. 1989); Bertolotti v. State, 534 So.2d 386, 387, n. 133 (Fla. 1988).

In sum, all of the claims discussed herein are procedurally barred, because they should have been preserved through objection, presented on direct appeal, and/or raised in prior collateral attacks. Francis v. Barton, 581 So. 2d 583 (Fla. 1991); White v. State, 511 So. 2d 984 (Fla. 1987); Witt v. State, 465 So. 2d 510 (Fla. 1985).

D. CONCLUSION

Stewart's claims, in his successive fourth motion to vacate, should have all been summarily rejected as procedurally barred. In accordance with State v. Henry, supra, the State thus respectfully requests that this Court, (1) reverse the lower court's grant of an evidentiary hearing; (2) vacate the lower court's stay of execution; and (3) enter an order denying Stewart's latest motion for post-conviction relief as procedurally barred, dispensing with the procedural formality of returning the case to the lower court, in view of the time constraints herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was hand delivered this 15 day of April, 1994, to STEVEN KISSINGER, Assistant Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301.

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