IN THE SUPREME COURT OF FLORIDA

CASE NOS. 83,507 AND 83,509

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL H. SALMON, JUDGE,

Respondent.

STATE OF FLORIDA,

Appellant,

v.

ROY ALLEN STEWART,

Appellee.

RESPONSE BRIEF OF ROY ALLEN STEWART,

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PRELIMINARY STATEMENT

This proceeding involves the appeal[1] of the circuit court's grant of Mr. Stewart's motion for rehearing of that court's order denying Mr. Stewart's motion for post-conviction relief and its grant of Mr. Stewart's motion for stay of execution. The initial motion was brought pursuant to Fla. R. Crim. P. 3.850.

The following symbols will be used to designate references to the record in this instant cause:

"R" -- Record on Direct Appeal to this Court;

"PC-R" -- Record on 3.850 Appeal to this Court;

"PC-R2" -- Record on Second 3.850 Appeal to this Court;

"PC-R3" -- Record on Third 3.850 Appeal to this Court;

"PC-R4" -- Record on Fourth 3.850 Appeal to this Court.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Stewart has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural

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[1]The State filed a notice of appeal in the circuit court. In this Court, the State filed its Application for Writ of Prohibition, and/or Expedited Appeal, and/or Motion to Vacate Stay of Execution, hereinafter "Application". Which of these apparently limitless avenues of appellate review the State has been chosen as its vehicle, and accordingly, which procedural rules govern the State's pleading (if indeed the State has any intention of abiding by any procedural rules) cannot be determined by the caption or content of its pleadings. This Brief is therefore intended as a response to whatever vehicle the State has chosen to utilize.

posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Stewart through counsel accordingly urges that the Court permit oral argument.

JURISDICTIONAL STATEMENT

This State has filed both a writ of prohibition and a notice of appeal. However, it has failed to elect on which it is proceeding even though they are mutually exclusive.

It is well established that, in order for an extraordinary writ such as prohibition or mandamus to be maintained, the petitioner must have "no other legal remedies available to him." Hatten v. State, 561 So. 2d 562, 563 (Fla. 1990) (mandamus); Southern Records & Tape Service v. Goldman, 502 So. 2d 413, 414 (Fla. 1986) (prohibition not available "if another appropriate and adequate legal remedy exists."). Yet, the State has filed an interloctury appeal. Because of the appeal, the instant proceeding should be dismissed. See State Dept. of Health & Rehab. v. Brooke, 573 So. 2d 363, 368 (Fla. 1st DCA 1991) (emergency petition for writ of prohibition dismissed, where petitioners maintained independent appellate action, as well).

However, Mr. Stewart respectfully asserts that the instant interloctury appeal is unauthorized; the issue of jurisdiction, of course, is subject to re-examination at any time. Cf. Ford Motor v. Averill, 355 So. 2d 220 (Fla. 1st DCA 1978).

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INTRODUCTION

In this unique case, there is no doubt that Roy Stewart received ineffective assistance of counsel at the penalty phase and that the penalty phase jury instructions were unconstitutional. Thus, there is no doubt Roy Stewart faces execution despite numerous constitutional infirmities in his death sentence. All that the circuit court has done is ordered an evidentiary hearing on an expedited basis and a stay of execution so that the court may determine the constitutionality of Mr. Stewart's death sentence. The circuit court has not abused its discretion and its order should not be disturbed.

STATEMENT OF CASE AND FACTS

On May 3, 1979, Mr. Stewart was charged by grand jury indictment with first degree murder, sexual battery, burglary and robbery. He pled not guilty. On July 2, 1979, the jury returned guilty verdicts on all charges. Sentencing was held on July 5, 1979. Mr. Stewart challenged the jury instructions regarding the aggravating factors. Counsel objected to including all of the statutory aggravating factors in the instructions (R. 2268). He also objected to the lack of guidance the jury received as to the aggravating factors ("To a layman, no capital crime might appear to be less than heinous") (R. 2256, 2259). However, the trial judge ruled she would "follow the standard jury instructions" (R. 2263). The jury returned an advisory sentence of death. Judge Nesbitt sentenced Mr. Stewart to death on July 27, 1979. On direct appeal, Mr. Stewart challenged the jury instructions as

deficient and failing to give the jury sufficient guidance ("the law should not be used merely as a tool for after-the fact analysis by lawyers and judges, but should be shared with the jury, so that their recommendation of sentence will be based upon these well-recognized principles rather than upon caprice and emotion")(Initial Brief on Direct Appeal at 48). On direct appeal, Mr. Stewart also argued that the absence of mental health testimony denied Mr. Stewart not only mitigating evidence, but also evidence negating the presence of aggravating circumstances ("The nature of the 'rage reaction' mental disorder suggested by the psychiatric reports is such that, if established, it would not only provide two statutory mitigating circumstances, but would also tend to lessen, if not entirely negate, the impact of at least two aggravating circumstances found by the lower court: that the capital felony was committed in the course of a sexual battery, and that the murder was heinous, atrocious, and cruel.")(Initial Brief on Direct Appeal at 29 n.12). This Court affirmed the conviction and sentence on direct appeal. Stewart v. State, 420 So. 2d 862, 865 (Fla. 1982) ("the standard sentencing instructions adequately covered the matters in the proposed instructions").

On March 6, 1984, Governor Graham signed a death warrant for Mr. Stewart. A Rule 3.850 Motion to Vacate Conviction and Sentence involving one issue was filed on March 16, 1984. The issue raised was whether defense counsel was ineffective in the penalty phase of Mr. Stewart's trial. A stay was issued by the

circuit court and an evidentiary hearing was held. Counsel for Mr. Stewart presented the testimony of numerous family members, friends, and a school teacher, who testified about substantial mitigation in Mr. Stewart's past. Counsel also presented the testimony of Dr. Barry Crown and Dr. Syvil Marquit, mental health experts, who testified that Mr. Stewart suffered from mental illness for most of his life, that he had a long history of alcohol and drug use, that he was under the influence of a serious mental disturbance at the time of the offense, that his capacity to appreciate the wrongfulness of his conduct was substantially impaired due to a combination of drug and alcohol abuse at the time of the offense, that he had psychological problems even in early childhood, and that he suffered from a blackout at the time of the offense.

Mr. Stewart argued in his post-hearing memorandum of law that he was prejudiced by counsel's deficient performance when mental health evidence was not presented to the jury. He argued not only that this evidence would have established mitigating circumstances, but also that the evidence would have negated aggravating circumstances: "Not only did counsel fail to obtain evidence to negate aggravating circumstances or establish mitigating circumstances, but he failed to argue the applicability of any circumstances" (PC-R. 806); "In addition to the establishment of the statutory mental mitigating circumstances and the explanation for the rage under which the offense was committed, Dr. Marquit provided evidence to negate

the statutory aggravating circumstances" (PC-R. 839); "But for counsel's errors, there would have been sufficient evidence to raise doubt on the applicability of aggravating circumstances" (PC-R. 844). Mr. Stewart specifically relied upon the case of Huckaby v. State, 343 So. 2d 29 (Fla. 1977), wherein this Court found the presence of mental impairment negated the heinous, atrocious or cruel aggravating circumstances (PC-R. 736-37, 752-53). The circuit court found that counsel's performance at the sentencing phase of the proceedings was deficient under the first prong of the Strickland v. Washington test (PC-R. 896)("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."). The circuit court, however, declined to find that Mr. Stewart was prejudiced by such deficient performance and denied relief in light of "[t]he aggravating circumstances found by the sentencing judge" (PC-R. 897).

On appeal, Mr. Stewart asserted that the trial court correctly found deficient performance: "defense counsel in this case should have known and made use of numerous decisions interpreting the statute" (Initial Brief on 3.850 appeal at 36). Mr. Stewart argued trial counsel was unreasonably ignorant of Huckaby v. State, 343 So. 2d 29 (Fla. 1977), among other cases, and that "[i]nstead, counsel persisted in the unprofessional belief that 'the sentencing phase of the trial was a fairly new

concept at the time' and that 'there was very little in the way of case law to guide [him].'" (Initial Brief on 3.850 appeal at 37). "It is defense counsel who must know that '[t]he law does not require that capital punishment be imposed in every conviction in which a particular state of occur'" (Initial Brief on 3.850 appeal at 93).[2]

This Court affirmed the circuit court's finding on the question of deficient performance -- i.e., that counsel's performance was deficient. See Stewart v. State, 481 So. 2d 1210, 1212 (Fla. 1985)(Affirming the circuit court's ruling that Appellant had proven the deficient performance prong over the state's argument that counsel was not deficient, and noting that "[t]he circuit court obviously found sufficient competent substantial evidence to support its conclusion,...and we will not disturb such a finding of fact."). This Court also affirmed the circuit court's ruling that prejudice had not been sufficiently established and denied relief ("we will not disturb such a finding").

On September 10, 1986, Governor Graham signed a second death warrant for Mr. Stewart. A second Rule 3.850 Motion was filed on September 25, 1986.[3] The sole issue in that motion was that the death penalty is improperly imposed in Florida in a racially

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[2]Again here, Mr. Stewart cited to and relied upon Huckaby v. State.

[3]At the time of Mr. Stewart's conviction and at the time of his first 3.850 motion, Rule 3.850 was in substantially different form than it is today with regard to time limits.

discriminatory manner. The circuit court denied this second motion, and on appeal this court affirmed the circuit court's denial. Stewart v. State, 495 So. 2d 164 (Fla. 1986).

On June 8, 1990, Governor Martinez signed Mr. Stewart's third death warrant setting the execution for July 10, 1990. An Emergency Motion to Vacate Judgment and Sentences was filed in the circuit court on July 7 and a hearing was held in the circuit court July 8 - 11. This Emergency Motion contained seven claims. Mr. Stewart's Brady/Giglio claim was denied without an evidentiary hearing.

On July 10, during the stay hearing on the Emergency Motion, former Assistant Attorney General Calvin Fox contacted the office of undersigned counsel to relate his concerns about the innocence of Mr. Stewart. Although factual innocence was not a claim in the Emergency Motion to Vacate, Judge Salmon agreed to allow Mr. Fox to proffer his testimony. As a result of the testimony of Mr. Fox concerning the problems he discovered with the investigation and prosecution of this case, Judge Salmon entered a temporary stay of execution and allowed counsel for Mr. Stewart to file an amended Motion to Vacate addressing the factual innocence claim (PC-R3. 2524). An Amendment to the Motion to Vacate was filed on August 29, 1990 and an evidentiary hearing was held on the claims on February 11-12, 1991. Evidence was received as to Mr. Stewart's claim of innocence arising from Mr. Fox' testimony and as to the penalty phase ineffective assistance claim arising from Mr. Godwin's testimony. On July 2, 1991, the

circuit court denied Mr. Stewart's Amended Motion to Vacate Judgment and Sentences. Mr. Stewart appealed.

Following this Court's decision in James, Mr. Stewart attempted to present (as attachments to his reply brief) affidavits from his trial and appellate counsel stating that they had made strategic decisions to preserve at trial and present on direct appeal the "Espinosa" issue, but that they simply failed to do so properly. Upon motion by the State, these affidavits were stricken from Mr. Stewart's reply brief. Thereafter, on June 9, 1993, Mr. Stewart filed the instant motion for post-conviction relief, presenting this issue. Upon objection by the State, this Court refused to hold Mr. Stewart's appeal in abeyance pending resolution of the motion in the circuit court. On December 9, 1993, this Court affirmed the circuit court's decision, finding Mr. Stewart's claim that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence barred as a repetition of the claim presented in his first Rule 3.850 motion. The Court also found that trial and appellate counsel had failed to preserve the Espinosa issue for review. The Court did not address the issue of counsel's ineffectiveness for their failure to properly preserve this issue.

Following this Court's denial of rehearing, Mr. Stewart promptly sought a hearing on his fourth motion for post-

conviction relief.[4] Nonetheless, on March 9, 1994, the governor of the State of Florida signed Mr. Stewart's fourth death warrant. Mr. Stewart, accordingly, sought a stay of execution in the circuit court and an evidentiary hearing. On March 29, 1994, a non-evidentiary hearing was held on Mr. Stewart's motions. On March 30, 1994, the circuit court denied both. Mr. Stewart sought rehearing. On April 10, 1994, the circuit court granted Mr. Stewart's motion for rehearing, ordered that an evidentiary hearing be held on the merits of Mr. Stewart's claim of ineffective assistance of counsel entitling him to Espinosa relief and stayed Mr. Stewart's execution. A hearing was set for April 21, 1994, before the expiration of Mr. Stewart's warrant week.

At that hearing, Mr. Stewart will present the testimony of Bob Schrank, Esq., Mr. Stewart's direct appeal attorney, who will testify that he wished to, and felt he did, present the issue of vague jury instructions to this Court. Honorable Stanley Goldstein will testify in accord with his affidavit, to wit:

> I, STANLEY GOLDSTEIN, having been duly sworn or affirmed, do hereby depose and say:
> 1. I am an attorney licensed to practice in the State of Florida. At the present time, I am a circuit court judge in the Eleventh Judicial Circuit, Dade County, Florida.
> 2. I represented Roy Allen Stewart in his 1979 capital trial in Dade County. I was court-appointed.
> 3. At the time of Mr. Stewart's trial, I believed that Fla. Stat. sec. 921.141 was

[4]The circuit court lacked jurisdiction to consider the motion while appellate proceedings were before this Court.

facially invalid because the statute failed to adequately define the aggravating circumstances so as to guide the jury's consideration of those circumstances. Prior to trial, I filed a Motion to Declare Florida Statute Section 921.141 Unconstitutional (R. 139). In particular, I noted that the statutory aggravating circumstance of "especially heinous, atrocious, or cruel" failed to provide the jury sufficient guidance for deciding when that circumstance applies (R. 141).

4. During the charge conference prior to the penalty phase, I objected to the aggravating factor of "heinous, atrocious or cruel" (R. 2258-62). My argument was based on the Florida Supreme Court's limiting construction in State v. Dixon, which I cited to the trial court. It was my belief that the instruction on "heinous, atrocious, or cruel" had to be identical to the language in Dixon. The trial court found that there was sufficient evidence to support this aggravating factor (R. 2263), but did not give the complete Dixon instruction to the jury (R. 2278).

5. It was certainly my purpose in representing Mr. Stewart to challenge the vague and overbroad language used to define the aggravating circumstances for the jury. I was trying to say that the statute as written was recognized, even then, as being so vague that it required explanation and definition in order to be understood by a jury. Slight variations in the jury instruction, changes in the judge's tone or inflection, could & probably did substantially change the meaning of the aggravating circumstance from court to court. I believe that I did what was necessary to litigate this issue. However, if it is determined that I in some fashion failed to adequately raise the issue, I had no strategic reason for the failure: it resulted only from my unawareness of what else I needed to do.

(PC-R IV. 47-48). Judge Goldstein will also testify that, had the jury been properly instructed and had he obtained the information presented at Mr. Stewart's first Rule 3.850 motion,

he would have called an expert medical witness to testify that it is impossible to determine whether the victim in this case was conscious at the time her injuries were inflicted, or at the time she was strangled, that it is more likely than not that the victim was unconscious at the time of the sexual assault, and, accordingly, it is impossible to say whether the victim suffered any prolonged pain or agony during the murder. Judge Goldstein will further testify that, had the jury been properly instructed and had he obtained the information presented at Mr. Stewart's first Rule 3.850 motion, he would have called an expert forensic dentist to testify that the victim in this case did not move or struggle as she was being bit upon the breast and thigh. Judge Goldstein will further testify that, had the jury been properly instructed and had he obtained the information presented at Mr. Stewart's first Rule 3.850 motion, he would have introduced a mental health expert who would have testified that, due to organic brain damage, exacerbated by the long term abuse of drugs and alcohol, Mr. Stewart, if indeed he committed this attack at all, had blacked out during the course of these events and was totally incapable of forming any intent to inflict a high degree of pain upon, or torture, the victim in this case.

Mr. Stewart will also present the testimony of Dr. Barry Crown, who will testify that he has been provided with the information presented at Mr. Stewart's first Rule 3.850 motion, that in 1984 he was asked by Robin Greene, Mr. Stewart's counsel at that time, to examine him regarding the existence of possible

mitigating circumstances under Chapter 921.141(6). His attention was directed to factor (b) that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and factor (f) that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. He will testify that he saw Mr. Stewart on May 16 and 17, 1984; he administered the Wechsler Adult Intelligence Scale, the Reitan Indiana Fascia Screening Test, the Graham Kendall Memory for Design Test, the Booklet-Category Test, the Trail Making Test, the Adult Neuropsychological Questionnaire, the Luria-Nebraska Psychological Battery, and the Drawing the Person Test. He will testify that on the Weschler Adult Intelligent Scale Mr. Stewart had a full scale I.Q. score of 103, but with significant discrepancies between the verbal and performance scores and that the discrepancy between the verbal score and the performance score is indicative of cognitive problems. He will add that he also reviewed: pretrial statement of Mr. Stewart; prison records from both Florida and South Carolina; records of the South Carolina State Hospital; EEG Report - Jackson Memorial Hospital, 1984; examination of Elizabeth A. McMahon, Ph.D.; examination reports of Sanford Jacobson, M.D.; examination report of William Corwin, M.D.; examination report of Albert Jaslow, M.D.; examination reports of Syvil Marquit, Ph.D.; and the examination report of George M. Barnard, M.D. He will testify that for many years Mr. Stewart had been a regular consumer of

alcohol, particularly beer in great quantities. He had used marijuana on a regular basis. He had used at various times Tuinol, Dilantin, synthetic Dilantin and other hallucinogenic drugs. He also had a history of black outs or memory losses as indicated in the pre-trial reports made for the purposes of competency to stand trial. He will testify that the report of Sanford Jacobson, M.D. states that it could not have been determined how drugs and alcohol would affect Mr. Stewart's behavior. Dr. Crown will add that Mr. Stewart's motor activity was not unusual and no trembling, twitching, or unusual movements were noted; he did not give the appearance of tension by his speech or body movements; Mr. Stewart was cooperative and put forth excellent effort to succeed; he did not attempt to either maximize or minimize his responses so distortion did not play a role in the diagnosis. Dr. Crown will state that he concluded that Mr. Stewart suffers from a mild form of cognitive impairment, based upon neuropsychological tests; this cognitive impairment was probably sustained through a post concussion syndrome resulting from Mr. Stewart's 1974 automobile accident; and that this cognitive impairment was also most likely contributed to by the long history of drug and alcohol abuse. Dr. Crown will state that he has recently been asked to re-examine Mr. Stewart to determine whether he was capable of forming the intent to torture the victim in this case at the time of crime for which he has been charged. He will testify that he saw Mr. Stewart again on April 7, 1994 at Florida State Prison

and that, in addition to seeing Mr. Stewart, he reviewed additional materials that were made available to him that he did not have previously. These materials included the trial testimony of Roy Stewart, the Parole and Probation testimony of Roy Stewart, the trial testimony of Barbara Hodge - Mr. Stewart's mother, the trial testimony of Betty McCutcheon - Mr. Stewart's sister, the 3.850 testimony of Barbara Hodge - Mr. Stewart's mother, the 3.850 testimony of Paulette Roberson - Mr. Stewart's sister, the 3.850 testimony of Betty McCutcheon - Mr. Stewart's sister, the Affidavit of Barbara Hodge - Mr. Stewart's mother, the affidavit of Frank Dennis, the Medical records of S.A. Greenberg, M.D., and the Psychological Evaluation of E.G. Schleimer, Ph.D. Dr. Crown will testify that, according to Mr. Stewart's family, after the 1974 automobile accident, Mr. Stewart changed becoming easily upset and very unpredictable, that, from the review of the above information, there are at least nine reported episodes in Mr. Stewart's life where he has suffered some form of memory loss or amnesia in conjunction with severe anger or rages, that these incidents have occurred since 1974 to beyond the time of the crime for which he is charged and that most of these episodes occurred when Mr. Stewart had been struck or was threatened with some form of physical attack. Dr. Crown will issue the expert medical opinion that Mr. Stewart's history of memory loss is consistent with the organic brain damage found. The long history of drug and alcohol abuse would exacerbate the symptoms. By history and documentation, Mr. Stewart's condition

is of long duration. He has had episodes of memory loss, amnesia, and idiosyncratic responses to alcohol and drugs. An essential feature of his substance use has been intermittent dyscontrol, aggressiveness and bizarre inappropriate behavior. This pattern is highly correlated with organic brain damage. Dr. Crown will add that this defect manifests itself intermittently even without the consumption of alcohol, but that the effects of his organic brain damage are exacerbated by his long history of using intoxicants, including both drugs and alcohol. Dr. Crown will testify that the loss of cognitive control or function results in Mr. Stewart functioning at a very primitive level that manifests itself in episodes of dyscontrol or at times rages, of which Mr. Stewart would have no memory. He will testify that these observations, examined in light of the facts of this case as described in the materials which he has reviewed, lead him to the conclusion that Mr. Stewart was incapable of forming the specific intent to torture the victim in this case.

Mr. Stewart will call Dr. Arden, a forensic expert witness who will testify that it is impossible to determine with any degree of certainty, whether the victim was conscious at any point during her murder or whether she suffered prolonged pain and agony. Further, he will testify that, based upon his review of the trial testimony of Dr. Souviron, it is more likely than not that the victim was unconscious at the time she was bitten on the breast and thigh. Dr. Arden's testimony will be buttressed by Dr. Briggel, an expert dental witness.

The State sought either a writ of prohibition or interlocutory appellate review of the circuit court's order granting Mr. Stewart the opportunity to present this evidence and of its stay of execution. This action follows.

SUMMARY OF ARGUMENT

While the State's Application twists through a confusing bramble of purported procedural and res judicata bars, the issues before this Court are actually quite simple and call for a clear mandate affirming the circuit court's order granting Mr. Stewart an evidentiary hearing and temporarily staying his imminent unconstitutional execution.

In James v. State, 615 So. 2d 668 (Fla. 1993), this Court held that fairness dictated that it would consider claims arising under Espinosa v. Florida, 112 S.Ct. 2726 (1992), in a successive motion for post-conviction relief (regardless of whether the issue had been raised in prior motions for post-conviction relief and regardless of whether the issue had been decided adversely to the defendant) if trial counsel had objected to the offending jury instructions on the grounds of vagueness at the time of trial and raised the issue on direct appeal. Mr. Stewart claims that he is entitled to have his claims of ineffective assistance of counsel and instructional error evaluated in light of James and Espinosa. Had Mr. Stewart had the cite to James in conjunction with his repeated citations to Huckaby he would have received a new sentencing in his first 3.850 motion. The cite to James and Espinosa would have allowed Mr. Stewart to establish

the prejudice that Judge Salmon previously found wanting.[5] The issues therefore before this Court are: Is Mr. Stewart entitled to have his ineffective assistance of counsel claim evaluated in light of James and Espinosa. Is there a factual issue as to whether that error infected the circuit court's analysis of the prejudice prong of the ineffective assistance of counsel claim contained in Mr. Stewart's first Rule 3.850 motion.

ARGUMENT

MR. STEWART IS ENTITLED TO A FULL AND FAIR EVIDENTIARY HEARING ON HIS CLAIM THAT THE INEFFECTIVE FAILURE OF HIS PRIOR COUNSEL TO PROPERLY PRESERVE AND PRESENT THEIR CHALLENGE TO THE VAGUE PENALTY PHASE JURY INSTRUCTIONS USED IN HIS SENTENCING HEARING, AFTER THEY HAD MADE A DECISION TO DO SO, ENTITLES HIM TO THE BENEFIT OF JAMES V. STATE AND ESPINOSA V. FLORIDA. SUCH ERROR INFECTED THE CIRCUIT COURT'S EVALUATION OF THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CONTAINED IN MR. STEWART'S FIRST RULE 3.850 MOTION.

I. A circuit court judge has authority to enter a stay where he or she has a pending 3.850 motion which contains enough facts to show that the movant might be entitled to relief.

The authority of a Circuit Court Judge to enter a stay of execution is well established. State v. Kokal, No. 83-8975 (Cir. Ct., 6th Jud. Cir., Duval County, October 10, 1988)(David C. Wiggins, J.); State v. Muehleman, No. 83-04924 (Cir. Ct., 6th Jud. Cir., Pinellas County, June 30, 1989)(Crockett Farnell, J.); State v. Cooper, No. 83-678 (Cir. Ct., 6th Jud. Cir., Pinellas County, June 7, 1989)(William L. Walker, J.); State v. Oats, No.

[5]It is important to note that Judge Salmon was the judge who denied the original 3.850. He knows what facts and what law he relied on in concluding prejudice had not been shown. He is now the same judge who has determined that James and Espinosa cast doubt upon the validity of that determination.

80-0016 (Cir. Ct., 5th Jud. Cir., Marion County, June 5, 1989) (Victor J. Muleh, J.); State v. Johnston, No. 83-5401 (Cir. Ct., 9th Jud. Cir., Orange County, December 12, 1988)(Rom W. Powell, J.); State v. Scott, Nos. 83-9115 and 83-9912 (Cir. Ct., 6th Jud. Cir., Pinellas County, November 21, 1988)(W. Douglas Baird, J.); State v. Teffeteller, No. 79-931 (Cir. Ct., 7th Jud. Cir., Volusia County, November 18, 1988)(S. James Foxman, J.); State v. Jackson, Nos. 84-965 and 84-7995 (Cir. Ct., 6th Jud. Cir., Pinellas County, October 18, 1988)(Robert E. Beach, J.); State v. Deaton, No. 83-10366 (Cir. Ct., Broward County, September 29, 1988)(Leroy Moe, J.); State v. Peede, No. 83-1682 (Cir. Ct., 9th Jud. Cir., Orange County, June 24, 1988)(Michael F. Cycmanick, J.); State v. Koon, No. 82-134 (Cir. Ct., 20th Jud. Cir., Collier County, June 13, 1989)(Hugh D. Hayes, J.); State v. Parker, No. 78-11151 (Cir. Ct., 11th Jud. Cir., Dade County, June 1, 1988) (Fredricka G. Smith, J.); State v. Phillips, No. 83-435 (Cir. Ct., 11th Jud. Cir., Dade County, November 13, 1987)(Arthur Snyder, J.). Respondent had before him Mr. Stewart's Rule 3.850 Motion which was filed on June 9, 1993. In this motion, Mr. Stewart presented the affidavits of Mr. Stewart's trial and appellate attorneys regarding their strategic decisions to raise a challenge to the standard jury instructions and their ignorance of how to better preserve an issue. The thrust of this motion was that Mr. Stewart received ineffective assistance which resulted in an unreliable sentence of death as now established in Espinosa.

As the State concedes, Judge Salmon's order granting the stay was entered pursuant to Mr. Stewart's pending Rule 3.850 motion. Unlike the case of State v. Schaeffer, 467 So. 2d 698 (Fla. 1985), in which Judge Schaeffer initially granted a stay of execution without having before her a Rule 3.850 Motion, Judge Salmon had before him a Rule 3.850 motion, as written and then explained by counsel during oral argument and in a motion for rehearing. There should be no question that Judge Salmon had jurisdiction to grant a stay of execution. See State v. Green, 466 So. 2d 218 (Fla. 1985), noted in State v. Schaeffer, supra at 698-99 (At the time of the Circuit Court's grant of a stay of execution, the defendant had filed a motion for collateral relief under Rule 3.850); State v. Beach, 466 So. 2d 218 (Fla. 1985), noted in State v. Schaeffer, supra at 698-99 (Defendant had presented to Circuit Court a stay application which contained enough facts so that it could be treated as a Rule 3.850 motion subject to amendment).

Moreover, the authority of a circuit court to grant leave to amend in a Rule 3.850 proceeding is also well established. See, Woods v. State, 531 So. 2d 79 (Fla. 1988). See also Bolender v. State, ___ So. 2d ___, 15 F.L.W. 311 (Fla. May 25, 1990)(Circuit Court denied defendant's second Rule 3.850 motion, but granted a temporary stay of execution with leave to amend to allow defendant access to files of a co-defendant). In fact, when Judge Salmon issued a stay of execution in Mr. Stewart's case in 1990, this Court denied the State's writ of prohibition.

Judge Salmon had the jurisdiction and inherent authority to grant a temporary stay of execution and leave to amend. Based on the claim at issue, Judge Salmon essentially found that the ends of justice required the entry of a stay. The only arguable basis upon which this Court could vacate Judge Salmon's order would be if it was an abuse of discretion. It is respectfully submitted that based on the proffered testimony, there was no abuse of discretion.

II. Rule 3.850 authorized Judge Salmon to entertain Mr. Stewart's motion to vacate.

Rule 3.850 provides: "A second or successive motion may be dismissed if ...." (emphasis added). The word "may" is a discretionary term. It reflects the circuit court's discretion to not dismiss a second or successive motion where it determines that the ends of justice warrant consideration of the second or successive motion. This is in keeping with the promise of the Florida Constitution:

> The courts shall be open to every person for redress of any inquiry, and justice shall be administered without sale, denial or delay.

Art 1 §21 of the Florida Constitution.

> Excessive fines, cruel or unusual punishment ... are forbidden.

Art 1 §17 of the Florida Constitution.

> No person shall be deprived of life, liberty or property without due process of law....

Art 1 §9 of the Florida Constitution.

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never

> be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

This Court in Witt v. State, 387 So. 2d 922, 929 (Fla. 1980), recognized that "major constitutional changes in law will be cognizable in capital cases under Rule 3.850." This Court explained that to invoke this provision the change of law must "cast serious doubt on the veracity or integrity of the original trial proceeding." 387 So. 2d at 929. Espinosa has cast such doubt on the outcome of Mr. Stewart's prior proceedings. Not only did Espinosa invalidate Florida's prior jury instruction on "heinous, atrocious or cruel," but also Espinosa overturned Florida law saying that Maynard v. Cartwright did not apply in Florida because the judge was the sentencer. Compare Espinosa, 112 S. Ct. at 2929 ("neither actor must be permitted to weigh invalid aggravating circumstances") with Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989)(distinguishing Maynard because "[i]n Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence").

Here, Judge Salmon who presided over Mr. Stewart's 3.850 proceedings in which trial counsel's performance was judged deficient, has indicated that his finding that prejudice was not sufficiently shown has been called into question by Espinosa. Judge Salmon found no prejudice by relying on the aggravators found by the original trial judge. He did not consider the prejudice Mr. Stewart suffered before the co-sentencer-the jury.

He did not consider the prejudice Mr. Stewart suffered when the jury did not receive narrowing constructions of aggravating circumstances, nor hear mental health testimony which would have negated the presence of the narrowing construction.

This Court on appeal deferred to the factual determinations of Judge Salmon. This Court should again defer to Judge Salmon's determination that Espinosa establishes error in his analysis and warrants an evidentiary hearing.

III. Mr. Stewart is entitled to the benefit of James because any failure on his part to meet James' prerequisites stems solely from his trial and appellate counsel's ineffectiveness.

A. Mr. Stewart's motion alleges facts sufficient to support his claim that his counsel performed deficiently when they failed to properly preserve and present a jury instruction issue.

This Court has never determined whether a capital defendant may be excused from the prerequisites set forth in this Court's decision in James, where his failure is due solely to his trial and appellate counsel's deficient performance. What this Court has determined is that it is not, as a matter of law, deficient performance for a trial or appellate attorney to fail to predict the Espinosa decision and to make a choice not to challenge this Court's reasoning in Smalley v. State, 546 So. 2d 720 (Fla. 1989), and its predecessors. See, Henderson v. Singletary, 617 So. 2d 313, 317 (Fla. 1993)("[t]he failure to raise a claim which would have been rejected at the time of appeal does not amount to deficient performance."). Mr. Stewart does not raise this claim. In fact, here, Mr. Stewart's alleges that his counsel did foresee

the Espinosa decision, that they chose to challenge the reasoning of this Court, they chose to preserve at trial, and present on direct appeal, the vague jury instruction issue, they attempted to preserve and present that issue at trial and direct appeal, but that they failed to do so properly. The failure to perform these relatively simple acts, i.e., to properly preserve and present an issue after deciding to do so, is what constitutes deficient performance in Mr. Stewart's case.

This issue is well-settled in Mr. Stewart's favor. In Lockhart v. Fretwell, 113 S. Ct. 838 (1993), it was conceded that the failure to adequately object to a jury instruction on an aggravating circumstance was deficient performance. 113 S. Ct. at 842 n.1. Similarly in Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), the Eleventh Circuit found counsel's failure to object to evidence of previous arrests was deficient performance. In Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), the failure to object at sentencing to consideration of a prior plea of nolo contendere was found to be deficient performance. See, also, Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992)(considering failure to object to improper argument as deficient performance, but declining to find prejudice because the alleged errors were harmless beyond a reasonable doubt). Clearly, if the allegations contained in Mr. Stewart's motion are taken as true,[6] his counsel's failures constituted deficient

[6]This Court has repeatedly held, where no evidentiary hearing has been held, the factual allegations contained in a Rule 3.850 motion must be taken as true, unless conclusively

performance. Under similar circumstances in Mendyk, this Court ignored the bar which arose from counsel's waiver and looked to the merits of the claim which had been waived by counsel's failure to object to determine whether Mendyk had met the prejudice prong of the ineffectiveness test. Here, the merits are clearly in Mr. Stewart's favor.

B. Mr. Stewart's claims are not procedurally barred, nor have they been passed upon by this Court.

Before addressing the merits, however, it is necessary to dispel the State's erroneous assertions of procedural bar and res judicata. First, assuming that Mr. Stewart is entitled to the benefit of James, he is not barred from raising this issue in a successive Rule 3.850 motion. Indeed, in James, the issue was not only raised in a successive motion, it was raised for the first time in a successive motion. Therefore the State's apparent argument, at Page 13 of its Application, that this claim has been barred, is simply incorrect.

Second, the State's more imaginative argument, at pages 11-12 of its Application, that this Court has already passed on the issue of whether Mr. Stewart is entitled to the benefit of James, ignores, even misrepresents, the procedural history of Mr. Stewart's case. As this Court is well aware, Espinosa was issued during the pendency of Mr. Stewart's appeal from the denial of

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rebutted by the record. Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990); Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986); LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). See also Mills v. State, 559 So. 2d 578, 578-579 (Fla. 1990); Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

his third Rule 3.850 motion. Mr. Stewart raised the Espinosa issue in his Initial Brief. Issue IV, Brief of Appellant, Stewart v. State, Case No. 78,498, Florida Supreme Court. In its Answer Brief, the State responded that the Espinosa issue was procedurally barred. Brief of Appellee, Case No. 78,498, Florida Supreme Court. Thereafter, this Court issued its decision in James. Mr. Stewart attempted to present this issue in his reply brief and through the affidavits of trial and appellate counsel attached to his reply brief. The State immediately lodged a vociferous objection, asking this Court to not only strike the attachments, but also to strike "any reliance by the Appellant on said 'Attachments'". As its sole support for this objection, the State argued:

> Said affidavits are not part of the record on appeal herein, nor any part of any other record relied upon by the court below. Moreover, neither the Appellee, nor the post-conviction court below, have ever had the opportunity to test or assess the veracity of said self-serving affidavits, through cross-examination or otherwise. No stipulation of the parties, as required by Fla.R.App.P. 9,200(f) has been sought either.

Objection to and Motion to Strike "Attachments" to the Reply Brief and Any Reliance Thereon, May 17, 1993, Case No. 78,498, Supreme Court of Florida. (Emphasis supplied). The Court granted the State's Motion and Mr. Stewart was not allowed to present the James issue in his reply brief. Mr. Stewart then presented the James issue to the circuit court in a Rule 3.850 motion where the State would have the opportunity to "test or assess the veracity of said self-serving affidavits, through

cross-examination or otherwise". Not surprisingly, the State showed no interest in actually conducting this test. The State's argument that this Court has passed upon the merits of an issue which the State asked this Court not to consider is more than baseless; it is flatly improper.[7]

C. The State is bound by its representation to this Court that Mr. Stewart's claims require an evidentiary hearing.

The State has taken two diametrically opposed positions regarding Mr. Stewart's claims under James, each tailored to whatever result the State was trying to obtain at the time. As noted above, after the State had filed its brief, but before Mr. Stewart had filed his reply brief, Stewart, this Court decided James. Mr. Stewart then attempted to present his claims in his reply brief and through affidavits of trial and appellate counsel attached to his reply brief. The State immediately lodged a vociferous objection, asking this Court to not only strike the attachments, but also to strike "any reliance by the Appellant on said 'Attachments'". As its sole support for this objection, the State argued:

> Said affidavits are not part of the record on appeal herein, nor any part of any other record relied upon by the court below. Moreover, neither the Appellee, nor the post-conviction court below, have ever had the opportunity to test or assess the veracity od said self-serving affidavits, through cross-

[7]Should this Court choose not to reach the issue of the relationship between ineffective assistance of counsel and the applicability of James, the State's conduct in this regard serves as an independent basis upon which this Court may affirm the order of the circuit court. See, Section III.C., infra.

> examination or otherwise. No stipulation of the parties, as required by Fla.R.App.P. 9,200(f) has been sought either.

Objection to and Motion to Strike "Attachments" to the Reply Brief and Any Reliance Thereon, May 17, 1993, Case No. 78,498, Supreme Court of Florida. (Emphasis supplied). With this argument before it, this Court granted the State's Motion. The State's representation that it needed the opportunity to test the veracity of the affidavits was false and disingenuous, for no sooner were they afforded that opportunity than they turned around and argued that the issue could be resolved as a matter of law.[8]

At some point, a party, even if it is the State, must be bound by its representations in the same, or a related case. If it is not, principles like candor before a tribunal will take second chair to the principle of winning at all costs. There has been no significant change in law or fact since the State said that a hearing was needed on this claim other than the State's political interest in seeing this execution go forward on schedule. Neither this Court, nor the intermediate appellate courts of Florida, nor the federal courts have hesitated to prevent this manipulation of the legal process. Bregman v. Alderman, 955 F.2d 660 (11th Cir. 1992); In re: Woolley's Parkway Center, Inc., 147 B.R. 996 (1992); Hodkin v. Perry, 88 So. 2d 139 Fla. 1956); McKee v. State, 450 So. 2d 563 (Fla. App. 3d Dist.

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[8]The State's current position that no hearing is necessary is particularly outrageous given the fact the circuit court scheduled that hearing on a date well within the warrant period.

1984). See, also, Gould v. State, 558 So. 2d 481 (Fla. App. 2d Dist. 1990), reversed on other grounds, 577 So. 2d 1302 (not finding, but acknowledging the applicability of the doctrine of estoppel by inconsistent positions to representations by the State in criminal proceedings). Under the particular facts of this case, this Court should likewise not hesitate to hold the State to its prior position and affirm the decision of the trial court.

Because the procedural bars asserted by the State are either dependent upon the applicability of James or are simply incorrect, this Court should proceed to determine whether Mr. Stewart was prejudiced by his counsel's deficient performance by examining the merits of the otherwise waived claim. Mendyk, supra.

IV. If Espinosa is applicable to Mr. Stewart's case, there is a reasonable doubt whether the circuit court would have determined that Mr. Stewart had not been prejudiced by his trial counsel's deficient preparation for and performance during the penalty phase of his capital trial.

A. The jury instructions given to Mr. Stewart's jury on both the "heinous, atrocious, and cruel" and "pecuniary gain" aggravating factors were unconstitutionally vague and erroneous under Espinosa.

The State concedes and this Court has found that the instruction on the "heinous, atrocious, and cruel" aggravating factor given to Mr. Stewart's sentencing jury was unconstitutionally vague. The State, however, argues that the same may not be said for the "pecuniary gain" instruction. Page 13, Application. The State, however, has proffered no defense of the instruction given to Mr. Stewart's sentencing jury. No such

defense is possible, particularly where the State took advantage of the vagueness of the instruction by arguing to the jury that the aggravator should be applied in a way inconsistent with the narrowing language supplied by the Florida Supreme Court. The state argued at closing of penalty phase, "[the crime] was committed partly for physical satisfaction, but clearly it was also committed partly for pecuniary gain" (R. 2403)(emphasis added). The state also argued, "the crime for which the defendant committed, in part at least, was committed for pecuniary gain" (R. 2404). Assistant State Attorney Stelzer testified at the evidentiary hearing in February 1991 that he did not necessarily think that pecuniary gain was the primary motive (PC-R3. 2577). Ms. Greene testified at that hearing that she was in agreement with Mr. Stelzer, and although she was aware that Mr. Stewart took the watch, she did not think the evidence showed that the murder was committed for the purpose of pecuniary gain (PC-R3. 2645). At the charge conference, Mr. Stewart's trial attorney argued, "I believe the legislative intent when they passed this particular statute and when they construed this particular aggravating circumstance to concern more murder-for-hire than they were with murder that took place in the matter of this case" (R. 2256). The law is clear that the aggravator of "pecuniary gain" is not applicable unless it is the primary or sole motive for the crime. The Florida Supreme Court struck a lower court's finding of this aggravator because "[t]here was not, however, sufficient evidence to prove a pecuniary motivation

for the murder itself beyond a reasonable doubt." Peek v. State, 395 So. 2d 492 (Fla 1980)(quoted in Initial Brief of Appellant on Direct Appeal at 48-9); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982)(followed in Rogers v. State, 511 So. 2d 526 (Fla. 1987)); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988)("[I]t has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain."). Mr. Stewart's jury failed to receive any limiting instructions on the aggravator of "pecuniary gain." In fact, the prosecutor argued that no such limitation was applicable. As a result, the instruction on this aggravator "fail[ed] adequately to inform [Mr. Stewart's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. at 361-62. Mr. Stewart's jury must be presumed to have relied on this vague jury instruction, Stringer v. Black 112 S. Ct. 1130 (1992), and it must be considered when assessing the deleterious effect of the Espinosa error in this case.

B. Trial counsel's deficient failure to present mitigating evidence, considered with the erroneous instructions given to his sentencing jury, form a reasonable basis for the circuit court to conclude that Mr. Stewart was prejudiced by trial counsel's failures.

Mr. Stewart's case is unique. The circuit court previously determined that Mr. Stewart's trial counsel failed to adequately prepare for the penalty phase of Mr. Stewart's capital trial. It also determined, however, that Mr. Stewart had not been prejudiced by his counsel's deficient performance. If, however, the circuit court had considered the deleterious effects of the

vague jury instructions in making this decision, there exists a reasonable doubt whether he would have reached the same conclusion. The circuit court stated as much:

> The decision in the first motion was bottomed upon the concept that the mitigating factors contended to exist would not outweigh the aggravating factors found, provided that the aggravator heinous, atrocious, or cruel had been found to exist upon appropriate instruction to the jury. Absent that aggravator, prejudice may have existed.

(PC-R IV 72). Emphasis supplied.

> This Court has concluded that the Defendant is entitled to a full evidentiary 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.

(PC-R IV 144). Emphasis supplied.

Had Mr. Stewart been afforded the opportunity for that evidentiary hearing, which was, and is, scheduled prior to the end of Mr. Stewart's warrant period, he would have introduced evidence to show that, had the jury been properly instructed, and had trial counsel performed sufficiently, trial counsel would have introduced testimony from a competent expert in forensic medicine who would have testified that the victim would have been rendered unconscious by the blows to her head and that it is impossible to determine from the evidence presented in this case whether these blows were administered first, or last. Further, had trial counsel not deficiently prepared for the penalty phase of Mr. Stewart's capital trial, he would have presented

competent, credible evidence that, due to organic brain damage, exacerbated by the long term abuse of drugs and alcohol, Mr. Stewart, if indeed he committed this attack at all, had blacked out during the course of these events and was totally incapable of forming any intent to inflict a high degree of pain upon, or torture, the victim in this case. See, Stein v. State, 19 Fla. L. Weekly 532, 534 (Fla. 1994) (finding of heinous, atrocious or cruel struck because "no evidence was presented to demonstrate any intent on Steins' part to inflict a high degree of pain or to otherwise torture the victims"). The narrowing construction of heinous, atrocious or cruel requires that the defendant intended "to inflict a high degree of pain or to otherwise torture." This narrowing construction can be found repeatedly in the Florida Supreme Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel

is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another") Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1977)(the presence of a mental or emotional disturbance may explain and negate heinous, atrocious, or cruel aggravating circumstances). There is a reasonable probability that, and most certainly a reasonable doubt whether, a properly instructed jury would, had it heard the evidence which went unpresented due to trial counsel's deficient performance, have refused to find this aggravating factor. Thus, this aggravating circumstance should have not been considered by this Court in determining whether Mr. Stewart was prejudiced by the deficient performance which this Court found had been provided by trial counsel.

As to the "pecuniary gain" aggravating factor, the State has yet to raise any cogent argument that a properly instructed jury would have, beyond a reasonable doubt, found this aggravating factor to exist. It, too, improperly became part of the circuit court's determination that Mr. Stewart had suffered no prejudice from his trial counsel's failure to investigate and present mitigating evidence.

Had trial counsel not provided deficient representation and had the jury been properly instructed, as the circuit court must now consider under James, there exists a basis from which the circuit court could have determined that there was a reasonable

probability that the outcome of Mr. Stewart's capital sentencing would have been different. Under Mendyk, the error could not be harmless beyond a reasonable doubt.

V. The prejudice prong of the Strickland standard requires consideration of the deleterious effect of the vague "pecuniary gain" jury instruction and the effect of the vague "heinous, atrocious, or cruel" jury instruction on Mr. Stewart's sentencing jury and requires the trial court to revisit its determination regarding prejudice in light of not only the evidence at trial but also that which was pursued in the first 3.850 motion.

Here vague jury instructions on two aggravating factors infected the consideration of two aggravating factors. As to the "pecuniary gain" aggravating factor, the State has yet to raise any cogent argument that a properly instructed jury would have, beyond a reasonable doubt, found this aggravating factor to exist, had they been properly instructed. Lance Stelzer, one of the Assistant State Attorneys prosecuting Mr. Stewart, testified that he did not believe that this aggravating factor, when properly narrowed, was, or even could have been, proven. (PC-R3. 2577). Indeed, Mr. Stelzer, in order to get the jury to find this factor at trial, had to argue the factor in a manner inconsistent with this Court's narrowing construction (R. 2420). In light of the weight given the pecuniary gain aggravator and the evidence of mitigation, the erroneous consideration of the pecuniary gain aggravating factor cannot be held harmless beyond a reasonable doubt. In the words of Stringer, an "extra thumb" was placed upon the death side of the scales. Without that "thumb," one emphasized by the prosecutor, see, Clemons v. Mississippi, 110 S. Ct. 1441 (1990), a binding life

recommendation may have been returned by the jury. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

As to the heinous, atrocious, and cruel aggravating factor, the trial record was far from conclusive. The State's own forensic dentist, Dr. Souviron, testified that the "bite marks" (which would logically be associated with the sexual assault) were perpetrated at or about the time of death, because the marks indicated that the victim was unconscious at the time the bites were administered and because there would have been more blood in the area of the injury had the victim been alive. (R. 635). The State's medical examiner, Dr. Diggs, similarly testified that he could not say which blows were administered before death, much less unconsciousness. (R. 1201-1202) As Dr. Diggs noted, the victim could well have been unconscious when the multiplicity of blows described by the Florida Supreme Court were administered. See, Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989)("we decline to apply this aggravating factor in a situation in which the victim who was strangled, was semiconscious during the attack.")

Accepting Mr. Stewart's allegations as true, prejudice is shown. An evidentiary hearing is required.

VI. Other grounds supporting a stay of execution.

Further equitable grounds exist upon which this Court must affirm the decision of the circuit court. At the time Mr. Stewart first challenged his trial counsel's ineffective

assistance at the sentencing phase of his capital trial, and at all other times relevant hereto, the State of Florida, the Governor of the State of Florida, the Florida Board of Executive Clemency, the Florida Parole Commission, and other governmental entities have maintained a secret file, generally known as the "clemency investigation file," containing exculpatory information relevant both to Mr. Stewart's innocence and the constitutional infirmity of his sentence of death. This file was created when an investigation was conducted into Mr. Stewart's case in order to assist the Cabinet in deciding whether clemency should be granted. Prior to the signing of a death warrant, the Cabinet must consider clemency in all capital cases: "In all cases where the death penalty has been imposed, the Florida Parole Commission shall conduct a thorough and detailed investigation into all factors relevant to the issue of clemency." Rule 15, Rules of Executive Clemency of Florida. Investigators interview witnesses and investigate the circumstances of the crime and the character of the defendant. In Mr. Stewart's case, it is known that the investigators received letters from the trial prosecutors favoring clemency for Mr. Stewart in light of previously unknown mitigation.

The results of this investigation, beyond the letters of the trial prosecutors, are unknown to Mr. Stewart. Mr. Stewart has sought the disclosure of exculpatory evidence which was found during the clemency investigation. However, the Parole Commission and the Cabinet responded saying that they will not

disclose the exculpatory evidence because neither body has prosecutorial functions. They have not disputed their possession of mitigating and hence exculpatory evidence.

In denying Mr. Stewart's first Rule 3.850 motion, the circuit court found that Mr. Stewart's trial counsel had afforded Mr. Stewart constitutionally deficient representation because of his failure to investigate and present mitigating evidence, but that Mr. Stewart had suffered no prejudice thereby because such mitigating evidence was not of sufficient weight to have raised a reasonable probability that the outcome of Mr. Stewart's trial would have been different.

In denying Mr. Stewart's claim of newly discovered evidence of actual innocence in Mr. Stewart's third Rule 3.850 motion, the circuit court found the same to be without merit. At the time this Court denied these claims, the State of Florida, specifically including, but not limited to, its Governor, the Florida Parole Commission, and the Board of Executive Clemency, possessed, and to this date possess, a secret file containing exculpatory evidence, evidence which would have entitled Mr. Stewart to relief.[9]

The State of Florida concealed such evidence from Mr. Stewart and his post-conviction counsel. It has continued to conceal such evidence from Mr. Stewart and all subsequent post-

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[9]The governor of the State of Florida has admitted that the primary purpose of the clemency investigation is to obtain information which is favorable to the defendant. He has maintained, nonetheless, that this Court, or any other court, has no right to see such information.

conviction counsel, thereby preventing Mr. Stewart from demonstrating the prejudice arising from his trial counsel's deficient performance.

Pursuant to the Florida Supreme Court's decision in Hoffman v. State, 613 So. 2d 405 (Fla. 1992), Mr. Stewart sought to compel the State of Florida to reveal to this Court and Mr. Stewart the exculpatory evidence in their possession. That action is presently pending appeal before this Court.[10] See Agan v. Florida Board of Executive Clemency, and Agan v. Florida Parole Commission, Case Nos. 83,047 and 83,048, Supreme Court of Florida. Mr. Stewart's brief in that appeal is incorporated herein by specific reference.

Rather than reveal the information in its possession, the State of Florida has sought to prevent this Court from ever hearing the exculpatory evidence which would entitle Mr. Stewart to relief by seeking Mr. Stewart's execution prior to the Florida Supreme Court's resolution of the afore-mentioned appeal and without ever revealing the exculpatory evidence in their possession. The warrant pending in Mr. Stewart's case was signed in complete defiance of the mandate of the Supreme Court of the United States in Brady. The very Governor who has declared he has no prosecutorial function has scheduled Mr. Stewart's execution in order to preclude him from discovering the contents of the secret file regarding Mr. Stewart and the crime of which

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[10]A copy of Mr. Stewart's brief is attached hereto as Defendant's Exhibit A, and by this reference incorporated herein as if fully set forth within the body of this document.

he was convicted. Mr. Stewart is entitled to a stay of this improper death warrant pending resolution of the afore-mentioned appeal. Should it ultimately be determined that Mr. Stewart is entitled to the exculpatory evidence in the State's possession (or should the State now voluntarily turn over the same), he is further entitled to a have such a stay extended for a reasonable amount of time to allow him to review the same and conduct follow up investigation, see, generally, State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); see also Walton v. Dugger, 18 Fla. L. Weekly 309 (May 27, 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), and thereafter to the relief sought in his first and third Rule 3.850 motions.

CONCLUSION AND RELIEF SOUGHT

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Mr. Stewart respectfully submits that he is entitled to an evidentiary hearing and thereafter relief, and respectfully urges that this Honorable Court affirm the decision of the circuit court in all respects.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on **April 15, 1994.**

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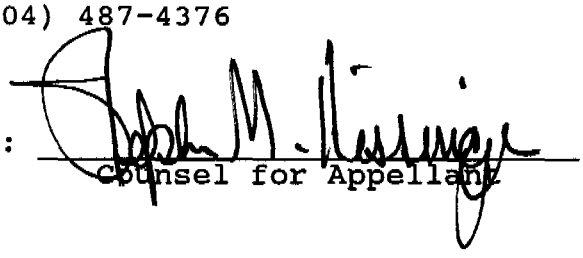
By: 
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