IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,
a/k/a KEITH A. KIRKLAND,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 70,245

FILED

APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

KENNETH ALLEN STEWART will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee accepts appellant's statement of the case and facts as substantially accurate but would add the following:

Appellant's recitation of Dr. Diggs' testimony and conclusion as to how the victim, Reuben Diaz died, is not entirely accurate. Dr. Diggs went to the scene and found the body lying in a face down position (R 279). He found two gun shot wounds, one on the left front aspect and one behind the right ear (R 280). Although he was unaware as to which wound was first inflicted (R 282) he explained the trajectory of each (R 280). The wound Dr. Diggs labeled #1 was located at the left front of the head and revealed the projectile had traveled from left to right slighly downward and from front to back (R 282, 283). The wound Dr. Diggs labeled #2 was located behind the right ear and revealed a projectile had traveled from left to right and upward (R 282, 284). Although the appellant states in his statement of the case and facts that Dr. Diggs testified that both of these wounds were consistent with Diaz in a charging position, that assertion is not entirely correct. Dr. Diggs testified that wound #1 (front left) would be consistent with the victim on the ground either on his knees or raised up partially with someone standing over him (R 287). The stippling visible on the victim's face led the doctor to believe the shots were fired from close range within one foot or less (R 287, 288, 289). Because of the blood flow pattern on the victim's head, the doctor testified that the victim was face down when wound #2 was inflicted (R 290). On cross-

examination, however, the doctor testified that wound #1 could have been inflicted upon the victim in a crouched position in an attacking stance (R 293). The doctor did not testify that wound #2 could have been inflicted in this manner and it appears that his conclusions regarding both wounds were clearly contrary to the appellant's assertion.

Caridad Figueredo testified for the state that she is the victim's sister (R 300). On cross-examination she testified she was aware that her brother dealt cocaine (R 303, 307). When asked by appellant whether she was aware of large amounts of cash her brother carried, she responded "No" (R 307). As the appellant pressed this line of questioning, the state objected (R 308). The appellant argued that people who deal in drugs are subject to haphazard violent crimes and that this testimony was relevant to exculpate the appellant (R 308). The state responded it could not cross-examine the victim's sister as to statements the victim made to her, and on relevancy grounds the court upheld the state's objection (R 311, 312) (see Jackson v. State, 498 So.2d 906 (Fla. 1986), wherein the court held the victim's lifestyle is not determinative of whether a crime was heinous, atrocious and cruel).

SUMMARY OF THE ARGUMENT

Issue I: The record shows that defense counsel elicited and the jury heard precisely what appellant wished to develop through Terry Smith's testimony. In asking Smith whether or not Stewart had told Smith that Bilbrey committed the murder and answering the question twice before objection, the jury did in fact hear and had available to consider the very testimony appellant now asserts was not admitted. Insinuating questions suggesting the witness is not telling the truth and then treating those insinuating questions as if they were impeachment is neither allowed by the law of evidence nor were they appropriate.

Issue 11: After impeaching Terry Smith's credibility and indicating bias in his testimony, i.e. favorable treatment for his testimony, the trial court properly allowed Detective Marsicano to testify to Smith's prior consistent statement to rebut an express or implied charge of recent fabrication pursuant to §90.801(2)(b).

Issue 111: There was no error in denying defense counsel's motion to withdraw between the guilt and penalty phase of trial. Counsel's motion to withdraw was clearly untimely; the denial of this motion did not create ineffective assistance of counsel, and counsel did not at any time during penalty phase take the position that the appellant had committed the instant crime; he merely indicated the jury had returned its verdict of guilt.

Issue IV: In proving the aggravating factor that the appellant had previously been convicted of a violent felony, the trial court did not err in allowing Michelle Acosta, James Harville, and Terry Smith to testify during penalty phase about the details of these other violent felonies. Their testimony was entirely factual in nature and did not become the "main feature" of the proceeding as appellant asserts.

Issue V: It was not error for the trial court to exclude details of the murder of the appellant's father; sufficient details surrounding the murder of the appellant's father was admitted, as well as the doctor's testimony in regard to the effect thereof on the appellant. It further was not error for the trial court to exclude testimony regarding the possibility of cigarette burns on the appellant's body when he was two years old. The witness was attempting to testify that she was told over the phone by one relative that another relative had seen something she could only describe as cigarette burns. She didn't know if a playmate inflicted these so-called burns or the appellant's mother, how many burns there were or where they were located. Obviously it was not error to exclude this very speculative hearsay testimony. As to the so-called letter of remorse, it was not even determined that that is what it was. Counsel did not read it but only represented he believed it was a letter of remorse written by the appellant to the relatives of Mark Harris, the victim of another murder in another trial, in another case. Since the jury heard much of the appellant's remorse both through

Randall Bilbrey who testified the appellant cried when he told him about the crime he had committed, and through Joy Engle, the appellant's girlfriend, clearly the jury was aware that the appellant was remorseful.

Issue VI: Although much of appellant's argument regarding this issue is speculative as to how this murder actually occurred, the facts as presented through the testimony of witnesses clearly supported a jury instruction that the instant murder was committed in a cold, calculated and premeditated manner.

Issue VII: Although appellant asserts it was error for the trial court to refuse to instruct the jurors on the two mental mitigating factors, Dr. Merin testified clearly that the appellant was not under extreme emotional disturbance at the time of the offense and in fact "he knew pretty well what was going on there", and that his ability to appreciate the criminality of his conduct was not substantially impaired. Merely because another doctor in another trial regarding the facts surrounding another murder that occurred on a different date testified these two mental mitigating factors were present does not mean that they should be considered for this crime when the expert testimony presented by the appellant himself clearly contradicted the very content of those two factors.

Issue VIII: Two days prior to sentencing, the victim's sister and brother merely stated to the trial court that they wished the death sentence to be imposed. This is not in violation of Booth v. Maryland where extensive victim impact testimony of a

highly emotional nature was presented to the jury. See, Grossman v. State and Booth v. Maryland, infra.

Issue IX: The trial court imposed the sentence of death upon the appellant only after he orally made his findings on the record as to the aggravating and mitigating factors. This oral citation of findings was based on an apparent and well reasoned application of both the aggravating and mitigating circumstances in this case and are totally supported by the record. While recognizing this Court's holding in Van Royal v. State, infra, appellee would distinguish the holding in that case on several points most notably that that case involved the trial court's override of the jury's recommendation of a life sentence, and that the oral pronouncement of findings of fact in Van Royal was found to be inadequate, not merely incomplete.

Issue X: Neither independently nor cumulatively do the asserted errors mandate either imposition of a life sentence or remand for a new penalty trial.

ARGUMENT

ISSUE I

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

Appellant asserts it was error for the court to restrict his cross-examination of Terry Smith as to whether the appellant in fact told Smith that Randall Bilbrey committed the instant murder. Appellant asserts the jury was therefore deprived of any evidence which might create a reasonable doubt as to his guilt, revealing Bilbrey as the true killer. Appellee would assert that appellant is indulging himself in this assertion. The jury was well informed of the appellant's assertions of Bilbrey's guilt in this trial. On cross-examination of Randall Bilbrey appellant repeatedly accused Bilbrey of committing the instant crime:

Q. Are you homosexual, Mr. Bilbrey?

A. Yes.

Q. As a matter of fact, did you not tell Mr. Kirkland that you picked up Reuben Diaz in a bar December 5th, 1984?

A. No.

Q. You did tell him that you lured Reuben Diaz into a remote wooded area and killed him in a cold blooded manner? Did you tell Mr. Kirkland that?

A. No.

Q. Isn't it true you should be sitting at that table, Mr. Bilbrey?

A. No.

Q. Didn't you set the car on fire on the passenger side because that is the side you were sitting in?

A. No.

Q. You know about evidence being left behind in cars and things like that, don't you?

A. Yes. (R 383-385)

*   *   *

Q. You didn't kill, you didn't kill Mr. Diaz and then resign because you suddenly were endowed with new wealth?

A. No. (R 385)

On re-direct, Bilbrey stated that all of the facts of the crime that he testified about were told to him by the appellant and that he, Bilbrey, had never been at the scene of a murder or participated in any way in a murder (R 393).

After Randall Bilbrey testified, Terry Lynn Smith was called as a witness by the state and said he was currently living in the county jail, and had been convicted of a felony seven times (R 395). He said that during the time when he was living with the appellant and the appellant's girlfriend in April of 1985 (R 400), the appellant told Smith he was once hitchhiking and a man pulled over and picked him up (R 402). Smith testified that the appellant told the driver to pull over and get out and the appellant got out as well. He testified that the appellant had told the driver to lay on the ground face down and then shot him once or twice (R 403). The appellant told Smith he took cocaine

from the glove compartment and about **$50** from the victim's pocket **(R 404).** The appellant told Smith the victim's car was white (R **404).** Smith testified that some days after the appellant had told him this, they both were at Floriland Mall together and the appellant showed Smith where he burned the victim's car (R **405-406).** Smith said he does not know Randall Bilbrey **(R 408)** but that the appellant had told him of a former associate that was homosexual. On cross-examination, Smith said he is awaiting sentencing on five felonies: two armed robberies, one attempted armed robbery, and two aggravated batteries (R **411).** He stated he knew he could do life in prison on these charges; that he would be sentenced after he testified at the instant trial; that he had not been told that the court would be lenient with him, but stated "Seems only natural that for my cooperation he would be" (R **411).** It appears at this point that the appellant had established from Smith a bias, and clearly a motivation to testify favorably for the state. Smith went on to testify however, that the state attorney's office promised him nothing and that he was aware that the state did not impose sentences (R **414-415).** The following then transpired:

> Q. Now, in light of those factors, Mr. Smith, remembering again, that you are under oath today, Mr. Kirkland did tell you about a homosexual with whom he had been acquainted with in January, correct?
>
> A. Yes, sir.
>
> Q. And he told you, did he not, that that homosexual had committed a murder of someone who was unidentified to Mr. Kirkland at the time he told you that story?

A. No, sir, he did not.

Q. Mr. Kirkland told you that that homosexual was alone when he committed that murder, didn't he?

A. No, sir, he did not. (R **416)**

The state objected, and at side bar argued counsel was testifying for the appellant as in "didn't Mr. Stewart tell you this, didn't Mr. Stewart tell you that" (R **418).** The state asserted that it was ethically inappropriate unless the appellant was going to somehow substantiate what Mr. Bilbrey assertedly told the appellant. The appellant argued that the court was shifting the burden of proof and he was merely impeaching the witness. The court upheld the objection (R **418-420).**

Appellee would assert that the questions asked were answered. The appellant asked and received answers from both Bilbrey and Smith regarding what he now urges the jury was deprived of hearing. The record however, shows it was not.

In Marrero v. State, **478** So.2d 1155 (Fla. 3d DCA **1985),** the court held that "The law of evidence does not provide - and never has - that a party may attack the credibility of a witness simply by insinuating through his questions to the witness that the witness in fact has made statements which are inconsistent with present testimony, and then treating the insinuating questions as if they were impeaching questions" **Id.** at **1156.** The Marrero court noted the ethical problem created when being unprepared or unwilling to prove up the impeaching statements, the insinuating questions were asked. Id. at 1157. Here, the appellant tried to

insinuate Smith was lying: that the appellant actually told Smith that Bilbrey committed this murder. However, Smith answered the questions in the negative twice, and surely the jury had the opportunity to hear the questions and the responses thereto.

In Pahl v. State, 415 So.2d 42 (Fla. 2d DCA 1982), the appellant was convicted of arson and manslaughter. The district court found error in the trial court's grant of the state's motion in limine preventing the testimony of three witnesses who saw the victim set three fires shortly before the fire in question, thus precluding the jury from hearing this testimony tending to show that the victim, not the defendant set the fire. In Pahl, there was solid independent evidence, however, connecting the victim to the crime. The court said "Where the state relies substantially on circumstantial evidence to connect an accused with a crime, and there is independent evidence connectinq another person with that crime, the defendant may also by circumstantial evidence attempt to prove that someone else committed the act in question". (emphasis added) In the case sub judice, however, save for the insinuations, there was no independent evidence connecting any other person with this crime.

In Roman v. State, 475 So.2d 1228 (Fla. 1985), the defendant urged error in the denial of a mistrial when the prosecutor asked a witness "Isn't it a fact you talked to your brother before he was arrested and he told you what happened?" Roman's objection thereto was based on the state's lack of a factual basis for inferring that the defendant had told his sister what happened, and

the suggestion that the defendant had told his sister anything was improper and erroneous because the jury probably thought the prosecution would not allude to something that had not transpired. This Court agreed the question was improper. Id. at 1233. Appellee would assert similarly, here, the jury could believe that the appellant would not insinuate facts that blatantly did not occur; however, the very issue raised is lacking as not only the questions posed to Smith were answered by him but appellant put forth nothing to substantiate his insinuations. In fact, the appellant himself in his own brief before this Court, stated "The jurors heard the evidence and were capable of deciding whether the defense theory had any merit or created reasonable doubt" (See, page 36 of appellant's brief)

Appellant then goes on in his brief to state that the court's sustaining the state's objection to the appellant's closing argument in advancing this defense theory showed the jury that the judge did not believe it.[1] In closing argument, counsel for appellant stated he knew who killed the victim (R 497). He advised the jury that Bilbrey was well schooled in his testimony (R 498). He argued at great length that Bilbrey committed the crime " . . . he killed him in a cold blooded manner in which

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1/ Although appellee disagrees with appellant's assertion, it should be noted the jury was instructed by the court:

> "Deciding a verdict is exclusively your job. I cannot participate in that decision in any way. Therefore, please disregard anything I may have said or done that made you think I preferred one verdict over another." (R 532).

only a person like him is capable of" (R **499)**, and went on at length as to why the victim would not have gotten into a car with the appellant but that the victim would not have been threatened by Bilbrey and would have gotten into a car with Bilbrey (R 500). He told the jury that after Bilbrey fell in love with the appellant, Bilbrey told the appellant of the murder he (Bilbrey) committed (R 501). The state objected only after the appellant told the jury that the appellant told Smith what Bilbrey had told the appellant (R 501). This was clearly objectionable since Smith clearly denied it in his testimony. The appellant then recounted to the jury what Smith told Officer Marsicano (which he asserts was error for admission, see Issue 11, infra) and stated that it was all Bilbrey's actions that Smith had recounted to Marsicano as the appellant's. (R 502).

How the appellant can assert first that the jury was not fully informed of the appellant's theory of defense is belied by the record, and second that his insinuations in cross-examination without independent evidence in support thereof were proper is without authority. The trial court's rulings on both the appellant's cross-examination of Smith and on the appellant's argument to the jury were clearly appropriate.

ISSUE II

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

It is clear that on cross-examination, appellant attempted to impeach Terry Smith and show that he fabricated his testimony to obtain leniency for the five felonies he was to be sentenced for after the instant trial. It is even more apparent that the appellant attempted to show that Smith fabricated his testimony of the appellant's confessions. Thereafter, to rebut these assertions the state called Detective Marsicano who testified that some ten hours after Smith was arrested on other crimes, Smith told Marsicano that approximately one week earlier Smith had a conversation with the appellant in which the appellant told Smith that he (the appellant) was with the victim and they drove to Lutz where the victim was made to get out of the car and lay face down; that he was shot twice, once in the head possibly, that two grams of cocaine and $50 was taken from the victim or his car and that the car was then torched at Floriland Mall (R **469).**

As at trial, appellant now asserts this was hearsay and inadmissible. Appellee would respond that it was admissible pursuant to **Florida Statute 90.801(2)(b)** and was offered to rebut an express or implied charge of recent fabrication and that the trial court did not err in admitting the testimony.

On cross-examination of Smith, the appellant did more than attempt to show Smith's motive to obtain a lenient sentence by

testifying. He tried to show that Smith changed his testimony, i.e. that the appellant told Smith Bilbrey killed Diaz instead of telling Smith the appellant had committed this murder. The state is certainly allowed to rebut an assertion of fabrication of this manner pursuant to **90.801(2)** (b).

"The general rule regarding prior consistent statements or bolstering testimony, is that such evidence is inadmissible absent impeachment based on an attempt to show a recent fabrication or other reason for the witness' lack of credibility." Demps v. State, 462 So.2d 1074 at 1075 (citations omitted) (Fla. 1984).

In Wilson v. State, 434 So.2d 59 (Fla. 1st DCA 1983), the witness' prior statement, like Smith's herein, was made at the time of her arrest. The court said:

> "The record reflects that defense counsel extensively questioned the witness as to the circumstances of her own plea negotiations, and the state sentencing recommendation, and as to the circumstance that the witness' sentencing proceeding was being delayed until after the defendant's trial. The witness' prior statement was made at the time of her arrest, before any plea negotiations or related events occurred. We conclude that the court properly permitted use of the statement to rebut defense counsel's implied assertion of improper influence, motive or recent fabrication." Id. at 59, 60 and citing McElveen v. State, 415 So.2d 746 (Fla. 1st DCA 1982) and **§90.801(2)** (b), **Florida Statutes.**

In Jackman v. State, 140 So.2d 627 (Fla. 3d DCA 1962), a witness, who was a co-defendant, testified for the state and on cross-examination was questioned about what sentence she would receive or expect in exchange for her testimony. To rebut this attempt to show recent fabrication in order to obtain a favorable

sentence, the state called an FBI agent to whom this witness had given a statement before any motive to falsify had arisen and which was consistent with her trial testimony. Citing Van Gallon v. State, 50 So.2d 882 (Fla. 1951), the court held the agent's testimony came within the application of the exception to the hearsay rule. **Id.** at 629. In Van Gallon, the court held that "once the witness' story is undertaken by imputation, insinuation or direct evidence, to be assailed as a recent fabrication, the admission of an earlier consistent statement rebuts the suggestion of improper motive and the challenge of his integrity." Id. at 882.

Certainly appellant cannot convincingly state that the jury hereinbelow was not left with an impression of Smith's improper motive to fabricate after appellant's cross-examination of him. See, Kelley v. State, 486 So.2d 578 (Fla. 1986).

In DuFour v. State, 495 So.2d 154 (Fla. 1986), the court held that through its references in cross-examination of the witness' negotiations with the state attorney's office involving armed robbery charges, the defense adequately impeached the witness' credibility raising the spectre of both improper motive and recent fabrication. Citing Wilson v. State, supra, this Court in DuFour held that because the statement in question was made at the time of the witness' arrest prior to any plea negotiations or the filing of murder charges against the witness in a Georgia case, the trial court could properly have found that the witness' statement was made prior to the existence of the

witness' motive to fabricate. Id. at 495 So.2d 160. In any event, appellee would assert that Marsicano's recitation of Smith's prior consistent statement did not prejudice the appellant. See, Kelley v. State, supra at 486 So.2d 583. In Parker v. State, 476 So.2d 134 (Fla. 1985), this Court found error in the admission of a prior consistent statement introduced but determined it was harmless in light of the fact that it did not give any significant additional weight to the witness' original testimony. Id. at 137. Appellee would assert the trial court exercised sound discretion in admitting Smith's prior consistent statement after the appellant's insinuating and accusatory cross-examination; and that should this Court determine it was an abuse of discretion and erroneous, on the totality of Smith's testimony it should be determined to be harmless.

ISSUE III

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

At the time penalty phase commenced, counsel moved to withdraw and have new counsel represent the appellant during that phase of trial. Counsel stated he had accused the state's witness of committing the murder and advanced that position to the jury very aggressively and now had to take the posture of admitting the appellant did commit the crime but to request leniency in sentencing (R 550, 563). First, it must be noted that the appellant did not join in this motion for substitution of counsel as he was not present at the time the motion was made (R 559, 564). Second, counsel did not at any time take the position during the penalty phase that the appellant committed this crime; he merely indicated the jury had returned its verdict of guilt even though they had heard state witness Bilbrey and state witness Smith and indicated that even though they both said the crime occurred in two different ways "You believed them and you found him guilty" (R 765, 766). Appellant apparently has no faith in the jury system and disbelieves that juries are presumed to follow the instructions given to them. The trial judge herein below instructed the jury:

> ". . . This case must not be decided for or against anyone because you feel sorry for anyone or are angry with anyone. Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case . . ." (R 531).

In Sanborn v. State, 474 So.2d 309 (Fla. 3d DCA 1985), the court said if a motion to withdraw is denied the attorney must continue representation: "so long as the attorney performs competently as an advocate under the circumstances, the defendant is represented effectively and the integrity of the adversary system of justice is not compromised." **Id.** at 312 (citations omitted). "A motion to withdraw as counsel is a matter of broad judicial discretion. The primary responsibility of the court is to facilitate the orderly administration of justice. In making the decision the court must consider the timing of the motion, inconvenience to the witnesses, period of time elapsed between the date of the offense and trial, and the possibility that new counsel will be confronted with the same conflict." **Id.** at 314.

Certainly, appellant was aware prior to the instant trial that the state was seeking the death penalty and aware of what defense he would present. Nevertheless, his motion to withdraw came but moments before penalty phase was to commence. It was therefore untimely made. Additionally, it can't be stated with certainty that new counsel would not be confronted with the same asserted view by the jury as trial counsel asserts he would have been. Additionally, the appellant was not present when this motion was made and there is nothing to indicate he wished new counsel.

In Williams v. State, 438 So.2d 781 (Fla. 1983), also a capital case, the issue raised was whether there was an abuse of discretion in the denial of a continuance of the penalty phase so

that counsel could submit proposed mitigating factors. Although not precisely on point, in Williams, the court found that Williams' attorney had been aware since his appointment eleven weeks prior that the death penalty was sought, and found that was adequate time to prepare in denying the motion. Additionally, in Williams, the court noted that counsel never alleged that the motion was made in good faith and not for purposes of delay only. Appellee would argue in light of the need for the orderly administration of justice as set out in Sanborn v. State, supra, the appellant herein like that in Williams, supra, had adequate time prior to trial to present a motion to withdraw. In the case sub judice, the trial court weighed the arguments and found the defense presented in the guilt phase proper. Appellant argues in response to this that the court found the defense proper in denying the motion to withdraw (R **572)** but asserts the court had eariler found the defense line of questioning in establishing that defense unbelievable (and see, Brief of Appellant, pp. **33-34).** In fact, in denying the motion to withdraw, the court said "I think it was a proper argument under your theory of the case. I don't see where the jury would in any way reflect on you for making that argument at all.'' (R **572).** The trial court said he believed juries are smart enough to know the lawyers are attempting to do their job and that they were cautioned that what the lawyers say is not evidence (R **571).** During the questioning of Terry Lynn Smith, wherein the appellant endeavored to cross-examine Smith in establishing his defense he asked questions the

form of which were ruled to be improper (R 419). Merely because the form of a question is improper or even unbelievable does not mean that the defense presented is improper, nor did the trial court ever so rule.

A defendant challenging a death sentence on ineffective assistance of counsel grounds must show that without error the outcome would have been different. King v. Strickland, 748 F.2d 1462 (11th Cir. 1984). Appellant herein relies on Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), to support his assertion, but forgets the emphasis placed by the court regarding counsel's efforts on the defendant's part in Strickland during the penalty phase was to humanize his client and to urge the existence of emotional disturbance at the time the crimes were committed as did counsel for appellant herein. Appellant herein made a tactical decision to present a defense of innocence, surely cognizant of the possibility the jury would not agree. Thereafter, in penalty phase the appellant's entire life was presented to the jury in a sympathetic light and he was characterized as an individual who grew up under emotionally trying circumstances. The inconsistency now complained of is imagined.

In Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1983), the appellant urged his attorney was ineffective for failing to present mitigating evidence of his history of childhood abuse, economic hardships, and heroin use. The court responded that at that point counsel was still maintaining Funchess' innocence and

that in light of this strategy it was reasonable for counsel to elect not to present mitigating evidence which implied guilt but which attempted to excuse culpable conduct; and that such a strategic decision warranted deference and counsel's decision to proceed in that manner was not unwise. Id. at **689-690.** Similarly, sub judice, counsel's strategy to maintain his client's innocence remained throughout the penalty phase where the appellant's guilt was not admitted, merely acquiescence to the jury's verdict of guilt was acknowledged, and evidence in mitigation of sentence in regard to their verdict was urged. The trial court then did not err in denying appellant's motion to withdraw and for appointment of new counsel.

ISSUE IV

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

Appellant asserts that the testimony by victims of prior violent felonies for which Stewart had previously been convicted became the feature of the trial and was error. (Because the testimony came from victims of crimes that were committed subsequent to the instant crime, but for which appellant had previously been convicted, it should first be stated that in both Elledge v. State, 346 So.2d 988 (Fla. 1977) and Daugherty v. State, 419 So.2d 1067 (Fla. 1982), the court found no error to use as an aggravating factor a conviction for a capital felony that occurred subsequent to the felony for which the appellant was being sentenced. The legislature refers to prior convictions not prior crimes.)

Appellant would assert that in Mann v. State, 453 So.2d 784 (Fla. 1984), this Court found no error in the submission of a conviction as well as the victim's testimony to establish a prior conviction of a violent felony. In Stano v. State, 473 So.2d 1282 (Fla. 1985), the defendant argued it was error for the state to introduce evidence regarding Stano's eight prior first degree murder convictions. Citing Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959), this Court held that similar fact evidence regarding collateral crimes can be admissible if not made a feature of the

trial. Id. at 1289. Although the court cautioned that the state's argument in Stano about these eight other first degree murder convictions approached the "outer most limits of propriety", no error was found. ". . . in a sentencing proceeding the state may introduce testimony as to the circumstances of a prior conviction rather than just the bare fact of that conviction." Id. at 1289 (citations omitted).

The appellant asserts that the prosecutor's characterization of the testimony, in stating that the appellant had shot Mark Harris and Michelle Acosta like two bugs, and shot James Harville like a bug, made their testimony a feature of the trial. Appellee disagrees and asserts it did not increase or diminish the witnesses factual recitations, and was in fact proper argument thereon. In DuFour v. State, 495 So.2d 154 (Fla. 1986), the defendant argued the trial court erred in admitting into evidence during the penalty phase extensive details of an earlier murder he had committed in Mississippi. Responding to Dufour's argument that the testimony went too far, the court found his assertion without merit. Id. at 163. ". . . Details of prior felonies involving the use or threat of violence to the person are properly admitted in the penalty phase of a capital trial, and that evidence inadmissible in the guilt phase may be relevant and admissible in evaluating aggravating and mitigating factors." DuFour, supra at 163 citing Perri v. State, 441 So.2d 606 (Fla. 1983) and Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976)

(compare, Hoffman v. State, **474** So.2d **1178, 1182** (Fla. **1985),** where the court found no error in the trial court's consideration of the details and manner of a prior murder to establish that the defendant had been previously convicted of a violent felony.

In Elledge v. State, **346** So.2d **988** (Fla. **1977),** the defendant was on trial for murdering Margaret Anne Strack. He had previously been convicted of the murder of Edward Gaffney and Kenneth Nelson. The Gaffney and Nelson murders occurred after the Strack murder but convictions were obtained before the Strack murder trial just as in the instant case the murder of Mark Harris occurred after the Diaz murder but a conviction against the appellant for the murder of Mark Harris was earlier returned. At trial in Elledge, during the penalty phase without objection by the defendant, Catherine Nelson, the widow of Kenneth Nelson testified in detail concerning the events surrounding that crime. In closing, the prosecutor made extensive reference to those events, and on appeal Elledge asserted it was error to allow the testimony and argument based on it. The court said "The question then arises whether it was proper to permit Mrs. Nelson to testify concerning the events which resulted in the conviction as opposed to restricting the evidence to the bare admission of the conviction. We conclude it was appropriate to admit Mrs. Nelson's testimony. This is *so* because we believe the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her parti-

cular case. Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. It is a matter that can contribute to a decision as to sentence which will lead to uniform treatment and help eliminate 'total arbitrariness and capriciousness in [the] imposition of the death penalty'". Id. at 1001 and citing Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), affirming, 315 So.2d 461 (Fla. 1975). The Elledge court went on to say if it was proper to admit Mrs. Nelson's testimony, ". . . then clearly it was appropriate for the prosecutor to comment on it in arguing for the death penalty." Id. at 1002. Victim testimony at penalty phase regarding the circumstances of a prior conviction was upheld as well recently in Jackson v. State, 13 F.L.W. 305, 306 (Case No. 69,197 Fla. May 5, 1988).

Appellant then attempts to rely upon Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). In Booth, the victim impact statements emphasized the victim's outstanding personal qualities, noted just how deeply they would be missed, and described the emotional and personal problems the family members faced as a result of the murders. The victim impact statement in Booth even described the crime, "They were butchered like animals". A granddaughter described how her wedding turned out to be a sad ceremony as she went to the funeral after her wedding instead of on her honeymoon. A daughter stated she couldn't watch violent movies or even look at knives any more. The murders were described in the victim impact statement by the

official who took the family's statements as ". . . a shocking, painful, and devastating memory to them that permeates every aspect of their daily lives . . ." Id at 96 L.Ed.2d 440. Sub judice, the witnesses/victims were not even victims of the instant crime, but rather witnesses of prior crimes; secondly, they testified to the facts of the crimes only; there was no testimony of the impact of the crime on them personally, or the affect of the crime on their daily lives. They merely stated the facts. Neither James Harville or Michelle Acosta relayed any testimony of the nature described in Booth, or even remotely akin to it. They related facts in order to establish an aggravating factor. That was all, and that has been accepted by this Court as proper.[2]

2/ It should be noted as to the prior convictions for crimes to which Michelle Acosta and James Harville testified that it is not error to allow evidence in aggravation of a prior conviction that is on appeal at the time of its introduction at penalty phase. Justus v. State, 438 So.2d 358, 368 (Fla. 1983), citing Ruffin v. State, 397 So.2d 277 (Fla. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981) and Peek v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 60 L.Ed.2d 342 (1981).

ISSUE V

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

A. HAYWOOD'S TESTIMONY

James Haywood was married to the appellant's aunt (R 639), and had not seen the appellant for the nine years prior to trial, although the appellant had lived with Haywood for approximately one month in 1977 (R 645, 646). Haywood stated he'd accumulated some biographical data on the appellant and his family (R 640). He testified about the details of a car accident in 1969 wherein several of the appellant's aunts and a cousin were killed (R 641). There was no testimony as to whether or not the appellant knew these relatives, or if so, was close to them.

Haywood went on to testify that Charles Edward Stewart was the appellant's father and is now dead; he had been murdered in 1971 (R 641, 642). When asked if the witness knew the circumstances of the elder Stewart's death, Haywood began to relate in detail the pool-room fight and the murder of the appellant's father; the name of the tavern, the people who were playing pool, who was there with who, the issue over who was losing the game of pool, the fight that ensued, etc. etc. etc. (R 642). Finally, an objection on relevancy grounds was raised by the state (R 643). The state acknowledged that the establishment of the fact that the appellant's father was murdered and its impact on him was relevant but that the details surrounding that

murder were not (R **643).** The appellant responded that it was relevant to show how the murder was communicated to the appellant **(R 644).** (However, there was no evidence that Haywood was the one who told the defendant of his father's murder). The court ruled that the testimony of the doctor who was to be called by the appellant as an expert would certainly cover these details and how the appellant's family history effected him as well as the impact on him of the knowledge of his father's death. The objection was therefore sustained **(R 644).**

Appellee would first state that James Haywood never testified he witnessed the pool-room murder of the appellant's father, or where his account of the incident came from. Although hearsay, if probative, is admissible in the penalty phase, Swan v. State, **322 So.2d 485** (Fla. 1975); Green v. Georgia, **442** U.S. 95, 99 S.Ct. **2150,** 60 L.Ed.2d **738** (1979), the details of this remote crime of which the appellant became aware of years later, were not established to be correct, true, or relevant. The aspect of this murder urged by the appellant to be relevant was that (1) it was the appellant's biological father who was murdered, (2) it was not made known to him for years, **(3)** he believed his stepfather, Bruce Scarpo, was his real father, **(4)** the realization that Scarpo was not his real father had an emotional impact upon him, **(5)** a grandmother may have suggested that Scarpo was involved in the murder of the appellant's biological father. However, since it was later revealed that Scarpo had no such involvement, the truth or falsity of his involvement was of no moment since it is urged merely that the appellant did at one

time believe that Scarpo was involved. The appellant seems to concede this in asserting that in fact Scarpo was not involved but the appellant's asserted belief to the contrary effected him emotionally. This being so then, the details of the murder of the appellant's father, even if accurately stated by Haywood, were totally and wholly irrelevant and the court correctly curtailed continued testimony of those facts in light of the medical testimony to follow as to the effect of the murder and the appellant's beliefs about it on him emotionally. It is clear that in counsel's statements to the jury before the appellant presented his mitigating evidence, throughout the testimony of the defense witnesses in mitigation and in counsel's closing remarks, the jury was well aware of the salient details of the murder of the appellant's father, the possibility of the appellant's misinformation relating thereto, and its asserted impact upon him. The trial court was therefore, correct in curtailing the additional testimony which was neither relevant nor necessary to the theory of mitigation advanced which was clearly the effect of the murder on the appellant, rather than the details thereof.

B. CIGARETTE BURNS

Estelle Berryhill testified the appellant is her grandson, and his natural mother was her daughter (R 691). She stated she was unaware of any incident when the appellant was three years old involving cigarette burns on his body until just days before trial when one Lillian Brown, another relative, told her over the

phone that yet another relative had told Lillian Brown of these burns. The state objected on hearsay grounds (R 692, 693). On a proffer by the appellant, Mrs. Berryhill testified that Lillian told her on the phone that Dorothy Smith told Lillian that when appellant was in Dorothy's custody as a two year old he had cigarette burns on his body (R 695, 696). Although Lillian Brown was alive healthy, clear thinking and at home in Brandon at the time of trial, she did not appear at trial. (R 697, 698). Mrs. Berryhill testified that Lillian Brown could not say where the burns were located nor could she describe them to Mrs. Berryhill in any fashion other than cigarette burns (R 698). Mrs. Berryhill testified she was not told how many burns there were, how they got there, or where the appellant got them, merely that on one occasion twenty-one years ago when Dorothy Smith got custody of the appellant, Dorothy saw something she described to Lillian Brown who in turn described them to the witness Estelle Berryhill as cigarette burns. This communication was made several days before trial (R 699).

The court, in noting the "relaxed" rules of evidence during a penalty phase ruled that this particular hearsay testimony was just too speculative in nature. The court said there was nothing to tie these alleged burns to the appellant's mother or even to a playmate (R 701). The appellant argued its was probative to show that he was abused at age two. The court sustained the state's objection finding the speculative nature outweighed any probative value to show he was abused. Appellee would respond that first,

the jury heard of these cigarette burns on the appellant's body before the state made its objection (R 692). Second, in light of the fact that Elaine Scarpo who along with her husband Bruce Scarpo testified that they had custody of the appellant from the time he was four years old until he was about 13 or 14 and he was "jovial, full of fun, and a darling child" (R 684), the probative value of these alleged burns on his body at age two or three is not only diminished in significance but becomes devoid of any probative value whatsoever.

C. LETTER OF REMORSE

Appellant cites Pope v. State, 441 So.2d 1073 (Fla. 1984), in support of his assertion that the so-called letter of remorse should have been admitted. Certainly, Pope is not on point with the appellant's assertion as Pope refers to consideration of lack of remorse as impacting on an aggravating factor. In the case sub judice, lack of remorse was not an issue before the trial court, and nowhere does the record support any assertion that lack of remorse was considered by the court or the jury, or presented in any manner. A letter, the contents of which counsel was unaware did not by its exclusion cause lack of remorse to be considered below. In fact, the appellant's girlfriend Joy Engle testified the appellant has been overcome with remorse, albeit since his arrest (R 730-734). So the jury was clearly apprised of the appellant's feelings of remorse.

Similarly, appellant's citation of Simmons v. State, 419 So.2d 320 (Fla. 1982), where the court found error in excluding psychiatric testimony as to the appellant's rehabilitative capacity is not on point.

Appellee would first assert that the contents of the letter are unknown; not merely because its admission was rejected, but because counsel did not read it and could not properly advise the court of its contents. The record is completely devoid of any concrete evidence that it was what appellant now claims, i.e. a letter of remorse to the parents of Mark Harris. Appellee would next assert that even if assuming arguendo it was a letter of remorse as to the murder of Mark Harris, this was but another of the appellant's victims in another case that is not relevant to any remorse as to the instant murder. The appellant never took the witness stand and testified as to his remorse. Introduction of the so-called letter of remorse would be in essence allowing the appellant to testify through written notes without being cross-examined thereon. Even in Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), also cited by appellant, the court found the excluded testimony of the jailers as to the defendant's behavior in jail could have been more credible than the defendant's own self-serving statements of his own good behavior. In the instant case, the testimony of the appellant's girlfriend that he felt great remorse was far more "disinterested" as the Supreme Court described it in Skipper, than the appellant's own letter would have been. (And see,

concurring opinion of Justice Powell joined by Justice Rehnquist in Skipper where Justice Powell said "The type of evidence required to be admitted under Lockett and Eddings thus pertained to conduct and circumstances prior to the crime and to the nature and extent of the defendant's participation in the crime. In this case, for the first time, the court classifies as "mitigating," conduct that occurred after the crime and after the accused has been charged. Almost by definition, such conduct neither excuses the defendant's crime nor reduces his responsibility for its commission. It cannot, therefore, properly be considered "mitigating evidence" that the sentencer must consider under the constitution.) Id. at 476 U.S. 12.

Appellee would assert that (1) if this was a letter of remorse and if it had been introduced it would not only be viewed by the jury as self-serving,[3] but was in fact cumulative as Joy Engle testified as to the appellant's remorse; therefore, his remorse for this crime was presented to the jury for consideration. (Note also that state witness Randall Bilbrey testified the appellant had cried in remorse for this murder).

It was therefore appropriate for the trial court to exclude this letter the contents which were unknown then, unknown now, and would have only a self-serving impact on the jury especially in light of the testimony regarding the appellant's remorse from other sources.

3/ Compare this letter with the poems written by the defendant and excluded by the trial court in Herring v. State, 446 So.2d 1049 (Fla. 1984).

ISSUE VI

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

The appellant alleges as error the jury instruction on the aggravating factor of cold, calculated and premeditated without pretense of moral or legal justification, and the court's failure to orally recite that as a factor weighed when pronouncing sentence. Appellee would first assert that the evidence clearly supported the giving of the instruction. The instant murder was committed in a secluded wooded area near Lutz (R 226). In Huff v. State, 495 So.2d 145 (Fla. 1986), the court found the aggravating factor of cold, calculated and premeditated applicable in part because the murders were committed in a wooded and secluded area in which the defendant felt safe.

Although the appellant speculates in his brief as to how the victim, Reuben Diaz, was murdered and states the wounds were consistent with the victim running at the appellant's gun, this is not wholly accurate. (See Brief of Appellant, p. 69). The medical examiner, Dr. Diggs, testified that wound number one (front left) would be consistent with the victim on the ground either on his knees or raised up partially, with someone standing over him (R 287). Because of the blood flow pattern and the trajectory of the bullet, Dr. Diggs testified the victim was face down when wound number two was inflicted (R 290). Dr. Diggs stated on cross-examination that wound number one could have been inflicted

upon the victim while he was in a crouched position in an attacking stance (R 293) although both shots were fired from one foot or less (R 289). The appellant's speculation as to how Reuben Diaz died in an effort to support his argument that the cold, calculated and premeditated instruction was erroneous further flies in the face of the testimony of both Bilbrey and Smith. Bilbrey said the appellant held a gun on the victim once inside the car for the trip to Lutz (R 372); and that once stopped he made the victim get out of the car and lay face down (R 373). Bilbrey said the victim was yelling "Don't kill me. I'll give you anything you want - take my car, I won't tell anybody" (R 373). Smith testified that the appellant forced Diaz to ride to Lutz at gun point as well; and once there told the victim to get out of the car and lay face down and then the appellant shot him once or twice (R 403).

Therefore, the only testimony regarding the victim dying while running at the appellant was (as opposed to being executed while begging for his life) in response to a defense question to the medical examiner, whose conclusions were clearly to the contrary.

This Court assessed the heinous, atrocious and cruel factor in Parker v. State, 476 So.2d 134 (Fla. 1985), and after noting that the victim was removed from the car after pleading for her life and the fatal wound inflicted - she was shot execution style. And in reviewing the cold, calculated and premeditated factor and upholding its finding, the court said the facts spoke for themselves in establishing it. Id at 139-140.

In Cannady v. State, 427 So.2d 723 (Fla. 1983), this Court found it error to employ the cold, calculated and premeditated factor when the only direct evidence of the manner of that murder came from the appellant's statement that he did not mean to kill the victim and did so only when the victim jumped at the defendant. In the instant case, the only evidence of the manner of this murder was through the appellant's statement to Bilbrey and Smith which supports a finding of this factor. This Court has held in the past that execution type murders, especially coupled with a "death ride" to a remote area with a gun pointed at the victim during the ride is supportive of a finding that the murder was cold, calculated and premeditated. Parker v. State, supra, and see Herring v. State, 446 So.2d 1049 (Fla. 1984) (a convenience store robbery where the defendant shot the clerk twice and this Court found the facts, especially the second shot supported the cold, calculated and premeditated factor).

Appellant makes much about the fact that the trial court instructed the jury on the cold, calculated and premeditated factor but when orally pronouncing sentence did not indicate this factor was relied upon in determining the sentence to be imposed. Appellee would respond that since the evidence supported the giving of the instruction, any failure of the judge to weigh or consider this as an aggravating factor could only inure to the benefit of the appellant. Even should this Court find that this factor was unsupportable, the sentence imposed should not be disturbed. In light of one mitigating factor and two other additional aggravat-

ing factors found, any error in this regard would be harmless. Ferguson v. State, 417 So.2d 631 (Fla. 1982).

In a footnote (see Brief of the Appellant, p. 72, fn. 26) the appellant discredits the state's description in voir dire of this crime as an execution and suggests error in denying the requested dismissal of the panel when the court introduced counsel for both sides and specifically introduced the prosecutor as "your elected state attorney, Bill James". In this regard, it should be noted number one that there was no objection to the characterization of this murder as an execution and the appellant is therefore precluded from raising it as an issue for this Court's consideration. Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004, 98 S.Ct. 1660, 56 L.Ed.2d 93 (1978); Jones v. State, 411 So.2d 165, 168 (Fla. 1982). In addition, it should be noted that in closing argument appellant said "the only thing the state has done to lend this case any iota of credibility is to have your elected state attorney personally conduct the prosecution" (R 517). Appellee would therefore state that mention of this by the appellant even in a footnote should not be well taken much less considered.

In sum, it is apparent the record supports the giving of the cold, calculated and premeditated aggravating factor instruction.

ISSUE VII

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

Appellant's assertion that the trial court erred in failing to give the requested instruction is without merit. **Any** assertion that **3921.141, Florida Statutes,** and the standard jury instructions improperly preclude consideration of some mitigating evidence by using such modifying terms as "extreme", "significant", "relevant", or "substantial" has been rejected by this Court. Lemon v. State, 456 So.2d 885 (Fla. 1984); Johnson v. State, 438 So.2d 774 (Fla. 1983). No case law need be cited for the proposition that the legislature is presumed to mean what it says. The modifiers are in the statute, and the evidence did not support the requested instructions. Dr. Merin, called as a witness by the appellant, testified the appellant's ability and capacity to conform his conduct to the requirements of law was not substantially impaired; and the appellant was not suffering from an extreme or severe mental or emotional disturbance at the time this murder was committed (R 728). Dr. Merin stated the appellant had mental and emotional disturbances due to long term anguish, but that it was not extreme; that the appellant "pretty much knew what was going on there . . ." (R 723). With this as a backdrop, appellant has no basis for his present assertion.

The trial court did instruct the jury they could consider any other factors in mitigation in addition to the statutory

mitigating factor given. The jury heard the relatives' testimony of the appellant's troubled adolescence, and the testimony of Dr. Merin. If they wished to apply this evidence they heard to considerations in mitigation, they were free to do so. Merely because they either did not, or doing so felt the aggravating factors outweighed any mitigation is not cause or ground for complaint. The evidence failed to support the giving of these instructions in this trial.

Appellant asserts because another doctor in another trial for another murder that occurred at another time found these mitigating factors to be present, they should have been considered here. Appellee would respond that should be of no force or effect on this crime.[4]

To find error here because the two requested mitigating instructions were given in a different trial because supported by the evidence there would be error in itself. The evidence in the instant case did not support the giving of these two instructions and the court did not err in failing to give them. (See Roberts v. State, 510 So.2d 885 at 894-895 (Fla. 1987), where this Court recognized the broad discretion of **a** trial court in determining applicability of a mitigating circumstance).

4/ Appellant fails to state that that other doctor in that other trial also testified that the appellant was beyond rehabilitation, but instead chooses to address the slightly more favorable testimony of Dr. Merin as to the appellant's ability for rehabilitation . . . . Dr. Merin stated it would take "many, many years" (R 726).

In Daugherty v. State, 419 So.2d 1067 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983), this Court relied upon its previous decisions in Riley v. State, 413 So.2d 1173 (Fla. 1982); Smith v. State, 407 So.2d 894 (Fla. 1981) and Lucas v. State, 376 So.2d 1149 (Fla. 1979), for the well established proposition that it is a matter for the trial court to decide whether a particular mitigating circumstance has been proven and if so the weight it will be given.

Appellant asserts Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), requires that the instant instructions should have been given. Lockett, however, merely requires the admission of evidence that establishes facts relevant to the appellant's character, his prior record, and the circumstances of the offense in issue. Id. at 438 U.S. 604-605, n.12. That mandate was complied with hereinbelow.

ISSUE VIII

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

Appellant alleges error in the testimony of the victim's brother and sister "urging" that the appellant be sentenced to death. First, the testimony had no indicia of "urging". Victoria Diaz testified she was the victim's sister. When asked by the prosecutor whether she had a recommendation of sentence to make to the court she said "death" (R 877). That was all she said. No underlying urging or passionate plea. Just one word that echoed the previously recommended jury advisory sentence. Renee Diaz, the victim's brother recommended death as well because the appellant didn't give his brother a chance and destroyed his family's life (R 878). Two days after the victim's brother and sister "testified", the appellant appeared for sentencing. There was no indication by the trial court that he even considered what the victim's brother and sister had said.

This "testimony" by the victim's brother and sister is urged as error on the basis of Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). In Booth, the victim impact statements were detailed and emphasized not only the victim's outstanding qualities but the despair of family members over their loss. The testimony by the victim's brother and sister sub judice, certainly doesn't rise to the same level as that in Booth.

Additionally, appellant's failure to object bars subsequent appellate review of this issue. Grossman v. State, 525 So.2d 833, 842 (Fla. 1988). Moreover, the fact that it was the trial judge and not the jury who heard the victim's brother and sister testify further distinguishes the instant case from Booth where the jury heard the victim impact statements. Appellee would therefore urge that if any such error is found it is harmless inasmuch as judges are presumed to ignore irrelevant material. See, Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

ISSUE IX

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

Appellant, citing Van Royal v. State, 497 So.2d 265 (Fla. 1986), contends that his sentence of death must be vacated because the trial court failed to submit written findings as required by §921.141(3), Florida Statutes (1985). The state respectfully recognizes this Court's holding in Van Royal, but contends that the distinguishing factors in the case sub judice amply justify affirmance of the sentence imposed.

In Van Royal, the trial court's written findings overrode the jury's recommendation of life, followed sentencing by over 6 months, and were filed after the record on appeal had been filed in this Court. In reversing Van Royal's sentence, this Court stated "[We] cannot assure [ourselves] that the trial judge based the oral sentence [of death] on a well reasoned application of the factors set out in section 921.141(5) and (6), and in Tedder v. State,[5] and find the death sentences in the case unsupported" 497 So.2d at 628. It is similarly important to note that in Van Royal, the oral pronouncement of findings was found to be inadequate not merely incomplete. 497 So.2d at 628.

In the case sub judice, the trial court imposed the sentence of death after he orally made his findings on the record as to

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5/ 322 So.2d 908 (Fla. 1975).

the aggravating and mitigating factors (R 800, 803), and that the sentence imposed followed the jury's 10-2 voice of a sentence of death (R 802). See Muehlman v. State, 503 So.2d 310, 317 (Fla. 1987), and Nibert v. State, 508 So.2d 1, 4 (Fla. 1987).

The trial court's oral findings were based on an apparent and well reasoned application of both the aggravating and mitigating circumstances in this case and are totally supported by the record; hence, appellant's sentence of death must be affirmed.

Should, however, this Court be inclined to hold otherwise, your appellee would request that jurisdiction be relinquished to the trial court to allow for submission of written findings in support of the sentence of death.

ISSUE X

WHETHER THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR JURY ADVISORY OPINION AND WHETHER HE THEREFORE MUST BE GIVEN A NEW PENALTY PHASE AT TRIAL. (Restated).

Appellant reiterates the arguments presented in preceding issues and adds here, without any support in his assertion that Michelle Acosta's testimony was misleading. It was not. It was factual in content and factually correct, and properly admitted (See Issue IV).

Appellant goes on to say that either independently or cumulatively these asserted errors entitle the appellant to a new penalty trial. Nothing asserted throughout appellant's brief as error is in fact error, nor is he entitled to a new penalty trial. Appellee would assert that examination of the record in the instant case shows that the trial, and the imposition of the penalty of death complies with the statutes set by the legislature and applied by this Court. Goode v. State, 365 So.2d 381 (Fla. 1979). Since in each of the issues presented by appellant the jury actually heard precisely what the appellant wished it to hear and was appropriately instructed, any error this Court may find is certainly harmless beyond a reasonable doubt in light of the entire trial, both the guilt and penalty phases therein. Valle v. State, 502 So.2d 1225 (Fla. 1987).

CONCLUSION

WHEREFORE, based on the foregoing arguments, references to the record, and citations of authority the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830, this 7th day of October, 1988.

OF COUNSEL FOR APPELLEE