

IN THE SUPREME COURT OF FLORIDA

KENNETH STEWART,

Petitioner,

v.

Case No. SC04-1241

JAMES V. CROSBY, JR.,

Respondent.

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RESPONSE TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent, JAMES V. CROSBY, JR., by and through the undersigned counsel, pursuant to this Court's Order of August 11, 2004, and hereby responds in opposition to the successive Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be dismissed, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's initial opinion, reported at Stewart v. State, 549 So. 2d 171, 172 (Fla. 1989):

In April 1985, Michele Acosta and Mark Harris picked up appellant, Kenneth Stewart, while he was hitchhiking. When Acosta stopped to drop Stewart off, he struck her on the head with the butt of a gun and fired three shots, hitting Acosta in the shoulder and Harris in the spine. Stewart then forced Acosta and Harris from the car before driving off and picking up a friend, Terry

Smith. The two removed items from the car's trunk and Stewart burned the car after telling Smith that the car belonged to a woman and a man whom he had shot. Acosta recovered from her injuries; Harris later died.

Stewart was arrested and ultimately charged with first-degree murder, attempted first-degree murder, armed robbery, and arson. He consented to a search of his apartment, which yielded the items he and Smith had taken from Acosta's car. When shown a photopack display of suspects, Harris, who had not yet expired, and Acosta identified Stewart as the assailant. Acosta also identified Stewart in person at a preliminary hearing. While in jail, Stewart telephoned his grandparents. Detective Lease, who was visiting the grandparents, obtained their permission to secretly listen in on an extension. Via pretrial motions, Stewart sought to suppress the identifications made by Acosta and Harris, and the telephone conversation overheard by Lease. The court excluded the identification made by Harris, but ruled admissible both of Acosta's identifications and the telephone conversation.

Petitioner Stewart was charged with the first degree murder of Mark Harris, the attempted first degree murder and armed robbery of Michelle Acosta, and second degree arson (DA-R. V7/857-58, 874-75, 920).¹ Stewart pled not guilty and trial

¹References to the record in the direct appeal from Stewart's convictions and sentences, Florida Supreme Court Case No. 70,015, will be referred to as "DA-R," followed by the appropriate volume and page number; references to the one-volume record in the direct appeal from Stewart's resentencing, Florida Supreme Court Case No. 75,337, will be referred to as "RS-R," followed by the appropriate page number; references to the

commenced on August 25, 1986, before the Honorable John P. Griffin, Circuit Judge (DA-R. V1-V5).

The State's case focused on the testimony of Michelle Acosta, the eyewitness and surviving victim, describing the events surrounding Harris' murder; and Terry Smith, a friend of Stewart's that testified that Stewart had admitted the shootings and provided details about the offense to Smith (DA-R. V3/287-315, V3/350-381). The State also presented testimony about a telephone conversation Stewart had with his grandmother, overheard by a police detective, wherein Stewart admitted that he shot the victims to rob them (DA-R. V3/381-388, 400-403). Finally, the State offered forensic testimony about the bullets recovered from the scene matching a gun and ammunition found in Stewart's possession at the time of his arrest (DA-R. V4/465-496).

The theory of defense was to admit that Stewart shot Harris and Acosta, but under circumstances which would require the jury to return verdicts for lesser offenses (DA-R. V3/280-284). The jurors were told during opening statements that Stewart would not testify and the defense would not be presenting its own case (DA-R. V3/280). The defense seized upon Acosta's testimony that

record in Stewart's postconviction appeal, Florida Supreme Court Case No. 96,177, will be referred to as "PC-R," followed by the appropriate volume and page number.

she hit the gas pedal just at the time of the shootings, trying to throw Stewart off balance, and noted discrepancies between Acosta's description of the offense and that provided by state witness Terry Smith, in order to present a defense that the shooting was accidental and not in furtherance of a felony (DA-R. V4/512-527, 537-544).

After deliberations, the jury found Stewart guilty of first degree felony murder, attempted second degree murder with a firearm (a lesser offense), robbery with a firearm, and second degree arson (DA-R. V4/582, V8/904-06, 1011). Following the penalty phase of the trial, the jury recommended that the court impose a sentence of death by a vote of 10 - 2 (DA-R. V5/756-57). Judge Griffin followed the recommendation and imposed a sentence of death on the murder conviction, two fifteen-year sentences on the attempted murder and arson convictions, and a life sentence for the armed robbery conviction (DA-R. V7/837-840).

On direct appeal, Stewart was represented by Assistant Public Defender Douglas Connor, and alleged the following errors:

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS INCRIMINATING STATEMENTS MADE BY STEWART DURING A TELEPHONE CONVERSATION WITH

HIS GRANDMOTHER WHICH DETECTIVE LEASE
INTERCEPTED.

ISSUE II

THE TRIAL COURT ERRED BY FORCING STEWART TO
STAND TRIAL IN SHACKLES WITHOUT CONDUCTING
AN EVIDENTIARY HEARING OR CONSIDERING
ALTERNATIVE SECURITY MEASURES.

ISSUE III

THE TRIAL JUDGE ERRED BY OVERRULING
APPELLANT'S OBJECTION TO THE BAILIFF, DEPUTY
MORONE, TESTIFYING AS A PROSECUTION WITNESS
IN THE PENALTY PHASE.

ISSUE IV

THE TRIAL JUDGE ERRED BY REFUSING TO GIVE DEFENSE REQUESTED SPECIAL PENALTY PHASE INSTRUCTION NUMBER ONE BECAUSE THE STANDARD JURY INSTRUCTIONS ARE OTHERWISE SUBJECT TO INTERPRETATION IN AN UNCONSTITUTIONAL MANNER.

ISSUE V

THE JURY WAS IMPROPERLY INSTRUCTED BECAUSE DEFENSE COUNSEL'S REQUEST FOR INSTRUCTION ON ALL OF THE AGGRAVATING CIRCUMSTANCES WAS DENIED; THE JURY WAS TOLD THAT AGGRAVATING CIRCUMSTANCES WERE ESTABLISHED; AND THE JURY WAS INSTRUCTED TO WEIGH A NONVIOLENT FELONY CONVICTION.

ISSUE VI

THE TRIAL COURT ERRED BY FAILING TO MODIFY THE PENALTY INSTRUCTION AS REQUESTED TO INFORM THE JURY THAT STEWART WOULD NOT NECESSARILY BE ELIGIBLE FOR PAROLE IN TWENTY-FIVE YEARS IF A LIFE SENTENCE WERE IMPOSED.

ISSUE VII

THE TRIAL COURT ERRED BY EXCLUDING RELEVANT EVIDENCE IN MITIGATION AND ALLOWING STATE CROSS-EXAMINATION TO ESTABLISH A NON-STATUTORY AGGRAVATING CIRCUMSTANCE.

ISSUE VIII

THE SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE THE SENTENCING JUDGE HEARD TESTIMONY FROM THE VICTIM'S FATHER DESCRIBING THE CHARACTER OF THE

VICTIM AND URGING A SENTENCE OF DEATH.

ISSUE IX

THE SENTENCE OF DEATH MUST BE VACATED BECAUSE THE SENTENCING JUDGE FAILED TO PREPARE WRITTEN FINDINGS AS REQUIRED. ALSO, HE FAILED TO PREPARE WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHEN IMPOSING SENTENCE ON THE NON-CAPITAL FELONIES.

In 1989, this Court affirmed the judgments, but remanded for entry of written orders to support the death sentence as well as the guidelines departure on the robbery sentence. Stewart v. State, 549 So. 2d 171 (Fla. 1989). Thereafter, Stewart sought certiorari review in the United States Supreme Court, but his petition was denied. Stewart v. Florida, 497 U.S. 1032 (1990).

Upon remand, the trial court entered a written order consistent with the prior oral findings that there were two aggravating circumstances, prior conviction of a violent felony and murder committed during the course of a robbery, and ascribing little weight to the mitigating circumstances of extreme disturbance, impaired capacity, age, and childhood trauma (RS-R. 24-27). The trial judge reimposed the life sentence for the robbery, providing written reasons to support the guidelines departure (RS-R. 11-12).

On appeal from this remand, Assistant Public Defender Douglas Connor again represented Stewart, and advanced the following claims of error:

ISSUE I

THE SENTENCING JUDGE ERRED BY FINDING AS AN AGGRAVATING CIRCUMSTANCE SECTION 921.141(5)(d) (COMMISSION OF A ROBBERY) WHICH MERELY DUPLICATED A NECESSARY ELEMENT OF APPELLANT'S FIRST DEGREE MURDER CONVICTION.

ISSUE II

APPELLANT'S SENTENCE OF DEATH WAS IMPOSED IN VIOLATION OF THE FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION BECAUSE A STATE STATUTE MANDATING A SENTENCE OF LIFE IMPRISONMENT WAS ARBITRARILY DISREGARDED.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO MAKE FURTHER INQUIRY BEFORE DENYING STEWART'S REQUEST FOR A CONTINUANCE TO PRESENT "CHARACTER WITNESSES."

ISSUE IV

THE SENTENCING JUDGE'S WRITTEN SENTENCE DOES NOT SUPPORT HIS FINDING OF THE SECTION 921.141(5)(d) (COURSE OF ROBBERY) AGGRAVATING CIRCUMSTANCE.

ISSUE V

THE SENTENCING JUDGE FAILED TO CONSIDER OR GIVE WEIGHT TO ESTABLISHED NON-STATUTORY MITIGATING CIRCUMSTANCES.

ISSUE VI

THE SENTENCING JUDGE ERRED BY REIMPOSING A GUIDELINES DEPARTURE SENTENCE BECAUSE NO

WRITTEN REASONS HAD ACCOMPANIED THE ORIGINAL
GUIDELINES DEPARTURE.

In 1991, this Court affirmed Stewart's death sentence, but remanded the robbery sentence with directions to impose a guidelines sentence on that conviction. Stewart v. State, 588 So. 2d 972 (Fla. 1991). United States Supreme Court certiorari review was again sought and denied. Stewart v. Florida, 503 U.S. 976 (1992).

Stewart's postconviction proceedings were initiated in 1993. On September 17, 1996, Stewart filed his Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising twenty-four claims (PC-R. V1/R42-186). The trial court summarily denied twenty of the claims and granted an evidentiary hearing on the other four (PC-R. V2/R295-304). The evidentiary hearing was held on December 17, 1998, and continued on March 19, 1999, before the Honorable Daniel Perry (PC-R. V4-V5). Following the hearing, the trial court issued an Order denying Stewart's remaining postconviction claims (PC-R. V3/R373-395).

Petitioner raised the following ten issues in his post-conviction appeal in Stewart v. State, 801 So. 2d 59 (Fla. 2001): (1) ineffective assistance of counsel during the guilt and penalty phases; (2) State failed to produce jail records in violation of Brady; (3) penalty phase jury instructions

diminished the jury's sense of responsibility in violation of Caldwell; (4) penalty phase jury instructions shifted burden to Stewart to prove that death sentence was inappropriate in violation of Caldwell; (5) death sentence rests on unconstitutional automatic aggravating circumstance; (6) statute setting forth aggravating factors is vague and overbroad; (7) vague and overbroad prosecutorial argument on aggravating circumstances and ineffectiveness of counsel for failing to object to the same; (8) shackling during trial and penalty phase denied Stewart fair trial; (9) capital sentencing statute is unconstitutional on its face and as applied; and (10) cumulative error. Stewart, 801 So. 2d at 64. This Court affirmed the denial of postconviction relief. Id.

Prior Habeas Corpus Proceedings

On December 30, 2002, Stewart filed a Petition for Writ of Habeas Corpus with this Court in Stewart v. Crosby, SC02-2716. Stewart asserted the following three issues in his habeas corpus petition: (1) Florida's death penalty statute is unconstitutional under Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), and Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000); (2) appellate counsel was ineffective in failing to raise on direct appeal issues relating to trial counsel's ineffectiveness and

other alleged trial errors; and (3) appellate counsel was ineffective for failing to raise on direct appeal the issue of trial counsel's concession of Stewart's guilt. See, Stewart v. Crosby, 2004 Fla. LEXIS 666 (Fla. 2004), rehearing denied, August 10, 2004, Stewart v. Crosby, 2004 Fla. LEXIS 1208 (Fla. 2004).

On May 13, 2004, this Court denied Stewart's Petition for Writ of Habeas Corpus. Stewart v. Crosby, 2004 Fla. LEXIS 666, 2-5 (Fla. 2004). In denying Stewart's prior habeas corpus petition, this Court found Stewart's claims to be either without merit or procedurally barred. As this Court explained:

Stewart first argues that Florida's capital sentencing scheme violates the United States Constitution under *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). This Court has previously addressed and rejected this claim. See *Jones v. State*, 845 So. 2d 55 (Fla. 2003); *Bottoson v. Moore*, 833 So. 2d 693 (Fla.), *cert. denied*, 537 U.S. 1070, 154 L. Ed. 2d 564 (2002); *King v. Moore*, 831 So. 2d 143 (Fla.), *cert. denied*, 537 U.S. 1067, 154 L. Ed. 2d 556 (2002). Further, one of the aggravating circumstances in this case was that Stewart had been convicted of a prior violent felony. The prior violent felony aggravator alone satisfies the mandates of the United States Constitution; therefore, imposition of the death penalty was constitutional. See *Lugo v. State*, 845 So. 2d 74, 119 n.79 (Fla.), *cert. denied*, 157 L. Ed. 2d 216, 124 S. Ct. 320 (2003). Stewart is not entitled to relief on this claim.

Stewart's remaining claims present issues that lack merit or are procedurally barred because they

were raised or properly could have been raised in a Florida Rule of Criminal Procedure 3.850 motion. In his first two subclaims, Stewart asserts that appellate counsel was ineffective in failing to raise on direct appeal trial counsel's ineffectiveness with respect to possible mitigation and a voluntary intoxication defense. In these claims, Stewart presents a procedural variant of claims which this Court addressed and rejected in Stewart's rule 3.850 motion. It is improper to argue in a habeas petition a variant to a claim previously decided. *Porter v. Crosby*, 840 So. 2d 981, 984 (Fla. 2003). Stewart is not entitled to relief on these claims.

Stewart's third subclaim, challenging the competency hearing, presents no argument or factual grounds to support the claim; therefore, it is dismissed as insufficiently pled. See *Shere v. State*, 742 So. 2d 215, 218 n.6 (Fla. 1999).

Stewart's subclaim regarding his incompetence to proceed at all material stages during trial lacks support in the record on direct appeal. Appellate counsel may raise a claim of ineffective assistance of trial counsel only where the ineffectiveness is apparent on the face of the record. *Gore v. State*, 784 So. 2d 418, 437-38 (Fla. 2001). Stewart is not entitled to relief on this subclaim.

In his final claim, Stewart asserts that appellate counsel was ineffective in failing to raise on direct appeal the issue of trial counsel's concession of guilt. Appellate counsel is not ineffective for failing to raise a claim of ineffective assistance of trial counsel on direct appeal because such claims are more effectively raised in a motion for postconviction relief under rule 3.850. See *Grubbs v. Singletary*, 120 F.3d 1174, 1177 (11th Cir. 1997) (*citing Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987)). The claim is procedurally barred.

Because all of Stewart's claims are either without merit or procedurally barred, we deny the petition for writ of habeas corpus.

On June 21, 2004, Stewart filed the instant, successive petition for writ of habeas corpus in which he now challenges, for the first time, the admission of alleged hearsay testimony which was presented during the guilt phase of his 1986 trial and which was relied upon during both the guilt and penalty phase. Stewart's successive habeas petition now alleges a Confrontation Clause violation under Crawford v. Washington, 124 S.Ct. 1354, 1364 (2004). For the following reasons, Stewart's untimely, successive habeas corpus petition should be dismissed.

SUMMARY OF THE ARGUMENT

In Crawford v. Washington, 158 L. Ed. 2d 177, 124 S. Ct. 1354, 1374 (2004), the United States Supreme Court ruled that a *testimonial* out-of-court statement by an unavailable witness is barred by the Confrontation Clause unless the defendant had an opportunity to cross-examine the declarant. The petitioner, Kenneth Stewart, has now filed an out-of-time, successive habeas petition asserting an alleged Confrontation Clause violation under Crawford which is inappropriate for belated habeas corpus relief. Further, under the rules now applicable to capital post conviction relief, a capital defendant may not file a successive habeas petition, and may not file an out-of-time motion for post conviction relief in the circuit court based on "new law" unless

that "new law" has been held to apply retroactively. Stewart's successive habeas petition is an unauthorized pleading and should be dismissed.

ARGUMENT

ISSUE

STEWART'S ATTEMPT BY WAY OF WRIT OF HABEAS CORPUS TO CIRCUMVENT WELL-ESTABLISHED RULES OF CRIMINAL PROCEDURE REGARDING TIME LIMITATIONS FOR AND ABILITY TO FILE A SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF MUST BE DENIED

Following his jury trial in 1986, the petitioner/defendant, Kenneth Stewart, was convicted of first-degree murder. Now, eighteen years after his jury trial and conviction, Stewart has filed an out-of-time, successive habeas petition asserting, for the first time, that alleged hearsay testimony was presented during his 1986 trial in violation of the Confrontation Clause and this testimony allegedly constituted "fundamental error" under Crawford v. Washington, 124 S.Ct. 1354 (2004). The question before the U.S. Supreme Court in Crawford, on certiorari review of the state court's decision on *direct appeal*, was whether the "procedure [used by the State of Washington] complied with the Sixth Amendment's guarantee that, 'in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" "

Crawford, 158 L. Ed. 2d 177, 124 S. Ct. at 1357. For the following reasons, Stewart's attempt to utilize a successive petition for writ of habeas corpus to circumvent well-established rules of criminal procedure regarding time limitations for and the ability to file a successive motion for postconviction relief must be denied.

In Crawford, the defendant was charged with assault and attempted murder and Crawford claimed self-defense. At trial, the State introduced a tape-recorded statement given by Crawford's wife to the police, as evidence that the crime was not in self-defense. Crawford's wife did not personally testify against Crawford at trial because of the state's marital privilege; therefore, Crawford had no opportunity for cross-examination. At trial, Crawford argued that admitting his wife's tape-recorded statement violated his federal constitutional right to be "confronted with the witnesses against him." Crawford, 124 S. Ct. at 1358. On direct appeal, the Washington Supreme Court upheld Crawford's conviction after determining that the statement was reliable. However, on certiorari review, the United States Supreme Court held that the admission of the tape-recorded statement violated the Confrontation Clause. In Crawford, the U.S. Supreme Court held that out-of-court statements that fall within the classification

of "testimonial" may not be admitted at trial, even if the trial court finds the statements to be reliable, unless the declarant is unavailable and there had been a prior opportunity for cross-examination.

In this untimely, successive habeas petition, Stewart now argues that "fundamental" error occurred under Crawford, and that the Confrontation Clause allegedly was violated during his 1986 criminal trial, because:

(1) Detective Lease testified that he listened to a telephone conversation between Stewart and Stewart's grandmother, Estelle Berryhill,² in which Mrs. Berryhill asked Stewart, "Did you shoot [them]" and "Why...?;" and, during the telephone conversation, Stewart admitted shooting the couple and he also admitted that his reason was "I guess to rob them" (V3/402-403);

²Mrs. Berryhill testified on two occasions during the defendant's trial. She testified as a state witness during the guilt phase and as a defense witness during the penalty phase. (DA-R V3/381-389; V5/690-699). On direct examination by the prosecutor during the guilt phase, Mrs. Berryhill confirmed that (1) her husband answered the telephone call from the defendant, (2) Detective Lease had permission to listen to the telephone conversation, and (3) Detective Lease did not tell Mrs. Berryhill what to say. (DA-R V3/383-384). On cross-examination during the guilt phase, defense counsel explored the details of the telephone conversation, (V3/384; 386-388). Stewart admitted to his grandmother that he thought he shot a man; but, according to Mrs. Berryhill, Stewart told her that the "Smith boy" was the one that burned the car. (V3/386-387).

(2) Michelle Acosta identified Stewart on multiple occasions as the armed hitchhiker who shot both Ms. Acosta and Mark Harris (V3/293-295). In addition to identifying Stewart at trial, Michelle confirmed that she previously had selected Stewart's photograph from a group of photos displayed to her shortly after her release from the hospital (V3/294-295). During a preliminary hearing, Michelle also identified Stewart, who was seated in the midst of a "bunch" of other "guys" in the courtroom. (V3/295); and

(3) Both Detective Lease and Detective Roo testified at trial and confirmed Michelle Acosta's prior courtroom and photopack identifications of Stewart (V3/407-409; 419-420).

Stewart also argues that his untimely, procedurally-barred claim of alleged Confrontation Clause error extended to his 1986 penalty phase because the State relied on Stewart's admissions (during the telephone conversation) to establish robbery as the underlying motive for the crimes. Finally, Stewart asserts that his newly-alleged "fundamental" errors were "uncorrected by the appellate review process."

In 1989, this Court previously addressed the admissibility of Detective Lease's testimony at Stewart's trial. On direct appeal, Stewart argued that the incriminating part of Detective Lease's testimony was his admission that robbery had been

Stewart's motive, and if this statement been suppressed, the jury might have found him guilty only of second-degree murder. Stewart, 549 So. 2d at 172. Stewart argued that (1) the admission of this testimony violated the fourth amendment and article I, section 12 of the Florida Constitution, and (2) evidence of his conversation was obtained in violation of his sixth amendment right to counsel and fifth amendment rights under Miranda v. Arizona, 384 U.S. 436, (1966). See, Stewart, 549 So. 2d at 172-173.

On direct appeal in 1989, this Court denied Stewart's claims that his admissions should be suppressed under either the Fourth, Fifth, or the Sixth Amendment [right to counsel]. As this Court painstakingly explained:

The first point on appeal is that the telephone conversation between Stewart and his grandmother should have been suppressed. Lease testified that during the conversation Stewart admitted shooting "that guy and the girl" and that his reason was "I guess to rob them." According to Stewart, the incriminating part of Lease's testimony was his admission that robbery had been his motive. He claims that had this statement been suppressed, the jury might have found him guilty only of second-degree murder. He asserts that admission of this testimony violated article I, section 12 of the Florida Constitution, which provides that persons have a right to be secure "against the unreasonable interception of private communications by any means." Unfortunately for Stewart, the same provision states that this right "shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court." In *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122,

28 L. Ed. 2d 453 (1971), the Court ruled that no fourth amendment violation occurred where government agents testified at trial concerning a conversation they had monitored between the defendant and an informant wearing a warrantless bug. The passive role played by Detective Lease in the instant case with the consent of the grandparents is far less intrusive than that played by the government officers in *White*. We detect no article I, section 12 violation.

Stewart further claims that evidence of the conversation was obtained in violation of his sixth amendment right to counsel. He asserts that this right to counsel had attached at his first appearance hearing, which had been held two days earlier, and that Lease's actions violated *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). In *Henry*, the Court ruled that the right to counsel was violated where a cellmate was told not to question or initiate any conversation with Henry, who was represented by counsel, but merely to listen. The cellmate later testified in court as to what Henry said concerning details of the crime. Stewart's reliance on Henry is misplaced; there is a significant distinction. Henry's cellmate was acting as a government agent; he was a paid informant expressly commissioned to obtain incriminating evidence and to deceive Henry as to that purpose. No such encounter took place here. Stewart conversed only with his grandmother, not with a state agent. There was no point at which prosecution and accused interacted. The right enunciated in *Henry* applies only during significant encounters between prosecution and accused. See *United States v. Ash*, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973); *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). Stewart's argument that his fifth amendment rights were violated under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is equally unpersuasive. Suffice it to say that Miranda warnings are required to combat the "inherently compelling pressures" of "in-custody interrogation." *Id.* at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. No such interrogation occurred here.

Although Stewart does not, and credibly could not, challenge the introduction of his own incriminating admissions and statements against penal interest³ under Crawford, Stewart nevertheless asserts that his untimely, successive habeas corpus petition is the appropriate forum to consider his procedurally barred complaints of whether (1) Mrs. Berryhill's questions to Stewart (Did you shoot them? and Why?), (2) Michelle Acosta's consistent, pre-trial identifications under § 90.801(2)(c), Fla. Stat.,⁴ and (3) the prosecutor's closing argument, which reiterated Stewart's incriminating admissions during the

³Stewart does not suggest that Crawford would apply to either the declarant's state-of-mind exception or declarations against penal interest. Furthermore, these untimely, procedurally-barred claims would be meritless in any event. See, Horton v. Allen, 370 F.3d 75 (1st Cir. 2004) (addressing Crawford and reaffirming the "firmly rooted" test of nontestimonial hearsay in Ohio v. Roberts, 448 U.S. 56 (1980); see also, United States v. Reyes, 362 F.3d 536, 540 n.4 (8th Cir. 2004) (noting that Crawford does not apply to co-conspirator statements because they are nontestimonial); McKinney v. Bruce, 2004 WL 1730326, *6 (D. Kan. 2004) (holding that testimony by a witness of victim's statements to others before he was murdered were not testimonial); Fowler v. State, 809 N.E.2d 960, 964 (Ind. Ct. App. 2004) (holding that victim's statement to officer who responded to her call for emergency assistance was not testimonial).

⁴Under section 90.801, Florida Statutes, a statement is not hearsay "if the declarant testifies at the trial . . . and is subject to cross-examination concerning the statement and the statement is . . . one of identification of a person made after perceiving the person." § 90.801(2)(c), Fla. Stat.

telephone call to Mrs. Berryhill, constituted the impermissible introduction of *testimonial* out-of-court statements by *unavailable* witnesses in alleged violation of the Confrontation Clause under Crawford.

For the following reasons, Petitioner's untimely claims of alleged "fundamental" errors under Crawford are both procedurally barred and meritless.

The instant petition for writ of habeas corpus should be dismissed for failure to comply with Rule 3.851(d)(2)(B) or Rule 3.851(d)(3). The State respectfully submits that the cited rules do not allow capital defendants to file successive state habeas petitions. Additionally, these cited rules would allow capital defendants to file out-of-time 3.850 motions based upon new case law only when the alleged "new law" has established a new fundamental constitutional right and that new right has been held to apply retroactively.

The current version of Rule 3.851, in effect since 2001, applies "to all **motions** and **petitions** for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death." (emphasis supplied.) Rule 3.851(d)(1) requires that, subject to certain exceptions, a motion to vacate judgment of conviction and sentence must be filed within one year after the judgment and

sentence become final. Rule 3.851(d)(2) delineates the exceptions to this time limit:

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that

(A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

Besides setting time limits for filing motions to vacate judgments of conviction and sentence, Rule 3.851 additionally distinguishes between initial and successive motions, setting forth more restrictive page limits and establishing more rigorous pleading requirements for successive motions. See Rule 3.851(e).

Finally, Rule 3.851(d)(3) also establishes a schedule for filing petitions for writ of habeas corpus:

(3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief

filed under this rule.

It cannot be disputed that the present version of 3.851, adopted three years before Stewart filed the instant successive habeas petition, applies to the defendant's successive habeas petition. See, Mann v. Moore, 794 So. 2d 595 (Fla. 2001)(declining to apply former Rule 9.140(b)(6)(E) to Mann because of some confusion in the effective dates of the rules, but announcing that, effective January 1, 2002, "all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion").⁵ The plain language of Rules 3.851 requires the dismissal of the Defendant's successive habeas petition. Rule 3.851(d)(3) requires that all petitions for writ of habeas corpus be filed simultaneously with the initial brief on appeal from the circuit court's order on the defendant's initial motion for postconviction relief. The rule makes no provision for successive habeas corpus petitions filed long after the appeal on a defendant's initial motion for postconviction relief, and Stewart's successive habeas petition must be dismissed as unauthorized.

⁵The substance of former Rule 9.140(b)(6) is now contained in Rule 9.142(a)(5), and essentially "mirrors" (Mann) the filing requirements for habeas petitions as set out in Rule 3.851(d)(3).

Even if the rule did not prohibit successive habeas petitions, Stewart's habeas petition is inappropriate and should be dismissed. Stewart concludes that his successive habeas petition is allegedly proper because he is relying on recently-decided law.⁶ However, the right to habeas relief, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." Haag v. State, 591 So. 2d 614, 616 (Fla. 1992). Stewart has made no demonstration that any of the limitations on out-of-time and successive motions for relief contained in Rule 3.851 are constitutionally unreasonable.⁷ Habeas corpus is not

⁶Stewart would only be entitled to file a successive postconviction motion if this Court had already determined in a proper case, that the "new law" relied upon had been found to be retroactive. See Rule 3.851(d)(2)(B). Crawford has not been found retroactive, and Stewart cannot seek retroactivity of same in a successive motion. See also Dixon v. State, 730 So. 2d 265 (Fla. 1999)(noting that retroactive application of new law is a "relatively rare occurrence," and that issues of retroactivity may be litigated in initial motions for postconviction relief, but may not be litigated in the first instance in out-of-time successive motions.)

⁷See Felker v. Turpin, 518 U.S. 651 (1996)(finding that time limitations imposed for filing federal habeas petitions do not act as a suspension of the writ). It bears noting that capital defendants in federal court face similar time limits for filing habeas petitions and their right to file successive habeas petitions is likewise limited. Further, the restrictions on out-of-time motions contained in Rule 3.851(d)(2)(B) are very similar to the restrictions on successive federal habeas petitions contained in 28 USC Section 2244 (b)(2), which provides, in part:

(2) A
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a substitute for an appropriate motion for post conviction relief in the trial court, and is not "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court. See also, Baker v. State, 2004 Fla. LEXIS 314, 31-32 (Fla. 2004) (emphasizing that this Court "will dismiss as unauthorized, habeas corpus petitions filed by noncapital defendants that seek the kind of collateral postconviction relief available through a motion filed in the sentencing court, and which (1) would be untimely if considered as a motion for postconviction relief under rule 3.850, (2) raise claims that could have been raised at trial or, if properly preserved, on direct appeal of the judgment and sentence, or (3) would be considered a second or

presented in a
second or
successive
habeas corpus
application
under section
2254 that was
not presented
in a prior
application
shall be
dismissed
unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

successive motion under rule 3.850 that either fails to allege new or different grounds for relief, or alleges new or different grounds for relief that were known or should have been known at the time the first motion was filed.”)

Stewart’s current complaints all relate to issues arising out of, and purported errors allegedly occurring during, his original jury trial in 1986. The fact that the trial court’s evidentiary rulings were affirmed on direct appeal cannot convert these issues into issues that only this Court may address. Thus, habeas corpus does not lie for redress of these claimed grievances. Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992); Mills v. Dugger, 574 So. 2d 63 (Fla. 1990). On the contrary, they are issues that may be raised by Defendant, if at all, only by way of a motion for post conviction relief filed in the original trial court, and not by way of a habeas petition in this Court, as subsections (d)(2)(B) and (d)(3) of Rule 3.851 clearly contemplate.

To the extent that this Court arguably has sanctioned habeas corpus as a vehicle to challenge prior decisions of this Court on direct or collateral appeal, this Court admittedly has experienced practical difficulties with this approach. See, Hall v. State, 541 So. 2d 1125 (Fla. 1989) (directing that, in the future, claims under the then recently decided case of

Hitchcock v. Dugger, 481 U.S. 393 (1987), would not be cognizable in habeas proceedings, and should be presented in a Rule 3.850 motion). Moreover, regardless of past history, this Court not only limits a capital defendant to one habeas corpus proceeding, but Florida law undeniably places severe limits on successive, out-of-time motions for post conviction relief. The remedy of habeas corpus relief is available only "in those limited circumstances where the petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence," or where the original sentencing court would not have jurisdiction to grant the collateral relief requested. Stewart cannot meet those requirements. Further, Stewart cannot "repackage" this petition and file it in the circuit court as a properly filed, successive motion for postconviction relief. See Rule 3.851 (d)(2)(B). His petition must be dismissed.

Although the State does not abandon any of the foregoing procedural objections, Stewart's reliance on Crawford, a decision that forbids the admission of testimonial⁸ evidence by

⁸Notably, when a nontestimonial statement is at issue, Crawford is inapplicable. Although the Crawford Court left "for another day any effort to spell out a comprehensive definition of 'testimonial', the Supreme Court did identify three categories of testimonial statements: (1) "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;"

witnesses who are not made available for cross-examination, is misplaced. It has long been recognized that in order for a criminal defendant to state a violation of the Confrontation Clause, he must demonstrate that "he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the [trier of fact] the facts from which [the trier of fact] could ... appropriately draw inferences relating to the reliability of the witness.'" Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674 (1986), quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

In this case, there was no testimonial evidence⁹ presented by any witness who was not made available for cross-examination

(2) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;" and (3) statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 124 S. Ct. at 1364.

⁹For example, a declarant's statement to a confidential informant, whose true status is unknown to the declarant, does not constitute testimony within the meaning of Crawford. See, United States v. Saget, 2004 U.S. App. LEXIS 15529, 18-19 (2d Cir. 2004), quoting Crawford 124 S. Ct. at 1367-1368, citing Bourjaily v. United States, 483 U.S. 171, 97 L. Ed. 2d 144, 107 S. Ct. 2775 (1987) (approving use of co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were properly admitted against the defendant without a prior opportunity for cross-examination).

by the defense. All of the witnesses now cited by the petitioner -- Michelle Acosta, Mrs. Berryhill, and Detective Lease -- each testified at Stewart's jury trial in 1986. (DA-R. V3/287-315, V3/381-389, V3/389-415). The Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." See, Delaware v. Fensterer, 474 U.S. 15, 21, 106 S. Ct. 292, 294, 88 L. Ed. 2d 15 (1985); see also, People v. Price, 120 Cal.App.4th 224 (2004) (holding that a prior opportunity to cross examine the declarant at a preliminary hearing was adequate opportunity to confront the witness under Crawford); Blanton v. State, 2004 Fla. App. LEXIS 11821 (Fla. 5th DCA 2004) (holding that a prior deposition was adequate opportunity for the defendant to cross-examine the declarant, and "as Crawford points out, the primary goal of the Confrontation Clause is to prevent the use of statements not previously tested through the adversarial process. Id. at 1363. This goal is ordinarily met when an accused is provided with notice of the charges, a copy of the witness's statement, and a reasonable opportunity to test the veracity of the statement by deposition.") Therefore, although the State urges this Honorable Court to apply the previously-cited procedural bars to this untimely, successive habeas proceeding, the petitioner's

procedurally barred claim is, alternatively, meritless. Cooley v. State, 849 A.2d 1026 (Md. App. May 27, 2004) (concluding that Crawford did not overrule the unbroken line of cases holding that the Confrontation Clause does not operate to exclude pretrial statements made by a witness who actually testifies at trial).

In this case, *even if* Stewart had raised a Confrontation Clause objection during his 1986 trial, his objection would have been meritless because there was no testimonial evidence presented by any unavailable witness who did not testify at trial. Moreover, *even if* Stewart had preserved his current Confrontation Clause complaint both at trial and on direct appeal, any alleged Confrontation Clause violation would have been subject to a harmless error analysis. Violations of the Confrontation Clause, if preserved for appellate review, are subject to harmless error review, and "Crawford does not suggest otherwise." See, United States v. McClain, 2004 U.S. App. LEXIS 15528, 8-9 (2d Cir. 2004), citing Coy v. Iowa, 487 U.S. 1012, 1021, 101 L. Ed. 2d 857, 108 S. Ct. 2798 (1988). Stewart could not then, and cannot now, demonstrate that any *testimonial* evidence was presented by any unavailable witness who was not made available for cross-examination; and, therefore, there was no Confrontation Clause error at all in this case.

Consequently, there would be no need to even resort to a harmless error analysis. Furthermore, in addition to Stewart's own admissions, which were not then, and are not now, subject to exclusion under Crawford, the State's case included the in-court testimony of Michelle Acosta, the surviving victim, who described the events surrounding Harris' murder, and Terry Smith, a friend of Stewart's that testified that Stewart had admitted the shootings and provided details about the offense to Smith.

Finally, even if the Crawford decision arguably applied to this defendant's current complaints, which it does not, the State respectfully submits that the decision of the United States Supreme Court in Crawford, addressing a matter of procedural law, is not retroactive on collateral review, as numerous other courts have already concluded.¹⁰ See, e.g., Garcia v. United States, 2004 U.S. Dist. LEXIS 14984, 4-10

¹⁰As Justice Cantero urged in his specially concurring opinion in Windom v. State, 2004 Fla. LEXIS 664 (Fla., 2004), the State respectfully submits that this Court "should answer questions about the retroactivity of decisions of the United States Supreme Court based on that Court's own standards, as articulated in Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), and not based on the now-outmoded test we announced in Witt v. State, 387 So. 2d 922, 925 (Fla. 1980)." Id.

(D.N.Y., 2004) (concluding that Crawford did not announce a fundamental rule concerning the right of confrontation); Evans v. Luebbers, 371 F.3d 438, 444 (8th Cir. 2004) ("The Crawford Court did not suggest that this doctrine would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to Teague v. Lane's, [489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989)] non-retroactivity doctrine."); Wheeler v. Dretke, 2004 U.S. Dist. LEXIS 12809 at *1 n.1 (N.D. Tex. July 6, 2004) (same); Hutzenlaub v. Portuondo, 2004 U.S. Dist. LEXIS 13587, 3-4 (E.D.N.Y., 2004) (stating that the "Court's holding in Crawford offers no retroactive protection" to the Petitioner).

Under the rules now applicable to capital postconviction relief, a capital defendant may not file a successive habeas petition, and may not file an out-of-time motion for post conviction relief in the circuit court based on "new law" unless that "new law" has been held to apply retroactively. Stewart's successive habeas petition is an unauthorized pleading and should be dismissed.

WHEREFORE, Respondent respectfully requests that this Honorable Court DISMISS Stewart's successive Petition for Writ of Habeas Corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been furnished by U.S. Regular Mail, to John Jennings and Daphney Gaylord, Office of the Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of September, 2004.

COUNSEL FOR RESPONDENT

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

COUNSEL FOR RESPONDENT