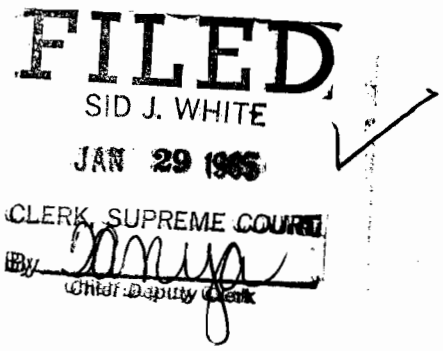
IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,005



ROY ALLEN STEWART,

Appellant,

-vs-

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from an order entered after an evidentiary hearing by the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida, denying a motion for post-conviction relief from a sentence of death.

Appellant Roy Allen Stewart was the defendant in the trial court, and the appellee, the State of Florida, was the prosecution. In this brief, the parties are referred to as they stood below. The symbol "R." refers to the record on appeal, and the symbol "T." refers to the separately bound transcripts of the evidentiary hearing in this case. The symbols "SR." and "ST." refer to the supplemental record; the record on appeal and separately bound transcripts of the defendant's trial by jury in Case No. 79-6621. The symbol "A" refers to the appendix attached to this brief.

STATEMENT OF THE CASE

After a trial by jury commencing June 25, 1979, Roy Allen Stewart was convicted of first-degree murder, robbery with a weapon, sexual battery, and burglary of a conveyance with a weapon. (SR. 1-3A, 10-38, 1080-5). Advisory sentencing proceedings were held on July 5, 1979, and consistent with the jury's recommendation, Circuit Court Judge Lenore C. Nesbitt imposed the death penalty; consecutive maximum sentences were imposed on the other convictions. (SR. 1112, 1114, 1182-8; ST. 2450-3, 2458-9).

This Court affirmed the conviction and sentence in Stewart v. State, 420 So.2d 862 (Fla. 1982). Rehearing was denied on November 9, 1982. The Supreme Court of the United States denied a petition for writ of certiorari on April 18, 1983. Stewart v. Florida, ___ U.S. ___ (1983).

On March 16, 1984, the defendant filed a motion for post-conviction relief, claiming that he was denied his right to effective assistance of counsel at the capital sentencing phase of his trial, in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. (R. 707-14). The motion was supported by affidavits of trial counsel (R. 516-17, 715), sworn statements of character witnesses (R. 519-699), and reports of a psychologist. (R. 700-6). The defendant also filed a motion for stay of execution of a death warrant signed on March 6, 1984. (R. 716). The trial judge, the Honorable Michael H. Salmon, ordered an evidentiary hearing on March 19, 1984 (T. 1-11) and granted a stay of execution on March 20, 1984.

(R. 718).

The evidentiary hearing was had on May 23 and 24, 1984. (R. 510-13). The trial court heard arguments of counsel on June 7, 1984. (R. 514). On July 13, 1984 and August 8, 1984, defendant Stewart filed memoranda of law in support of his motion. (R. 732-880). Corrected pages were filed on September 7, 1984. (R. 882-90). The trial court denied the motion for post-conviction relief by an order filed on September 11, 1984. (R. 891-898). The trial court found that counsel's performance was deficient but that the deficient performance did not prejudice the defendant. (R. 897-8).

Notice of appeal was timely filed on October 9, 1984. (R. 899). This appeal follows.

STATEMENT OF THE FACTS

At the evidentiary hearing on Roy Allen Stewart's motion for post-conviction relief from his sentence of death, the circumstances surrounding counsel's performance were reconstructed.

Lead counsel Stanley M. Goldstein was appointed to represent Stewart on April 27, 1979. (ST. 7). At the time he accepted the appointment, he had been a member of the Florida Bar for eleven years, primarily as an assistant state attorney. (T. 140-1). Mr. Goldstein had never prosecuted a capital case, but he had represented three to five people charged with murder for whom death was a possible punishment. (T. 142). This case is the only one in which he represented a person at penalty phase. (T. 143).

Mr. Goldstein never made an independent pretrial preparation for the sentencing phase in any capital case; apparently, the other cases occurred before the institution of the bifurcated process. (T. 143-4). Mr. Goldstein was not sure when capital trial were first bifurcated, but he recalled reading articles on the defense of capital cases and attending several criminal law seminars, none of which concerned the death penalty. (T. 144-5).

Any attempts at plea-bargaining were foreclosed by the certainty that the state was actively seeking the death penalty for Roy Allen Stewart. (T. 147-8). Mr. Goldstein prepared for his defense knowing that Stewart was on trial for his life and knowing that, in addition to three confessions, the state had "more physical evidence than [he] had ever seen in any case." (T. 148).

On May 8, 1979, Mr. Goldstein moved for the appointment of Thomas Sherman as his co-counsel because they worked in the same

office, and Mr. Goldstein would be with him and have control over what he was doing. (ST. 10; T. 145). Mr. Sherman had agreed beforehand to assist Mr. Goldstein in this case even though he had no experience with capital felonies. (T. 353). At the time he was appointed to help represent Roy Allen Stewart, Mr. Sherman had been an attorney for less than three years. (T. 351). He had been a clerk in federal court for fourteen months, he had represented four or five people in criminal cases, but he had never represented anyone in state court. (T. 352).

It was Mr. Sherman's primary responsibility to become thoroughly familiar with bite-mark evidence, a novel scientific issue in this case. (T. 145, 353). Lead counsel had been advised from the beginning that the state had such evidence, but at the time Mr. Sherman was appointed, the state's forensic odontologist had not yet formed an opinion as to identification, so Judge Nesbitt would not appoint a defense expert. (ST. 41; T. 147). One month later, on June 8, 1979, the trial judge appointed Dr. Lowell Levine as a defense expert in dental forensics. (ST. 61-2). Mr. Sherman stayed with Dr. Levine twenty-four hours a day for three or four days to "pick his brain" for issues. (T. 196).

On the same date that co-counsel was appointed, the court authorized funds for an investigator to assist the defense and appointed a psychiatrist to evaluate the defendant's "mental condition." (ST. 11-12; SR. 96). Dr. Sanford Jacobson's report, returned on May 16, related that the defendant was examined "to determine his competency for legal proceedings" and concluded that Stewart was competent to stand trial. (ST. 22; SR. 1145-51).

On May 22, lead counsel informed the court that Dr. Jacobson's report was inadequate for capital defense purposes:

> MR. GOLDSTEIN: And, that is something else. My client is indigent. I would like to have him re-evaluated as to Doctor Jacobson, at the time of his mental condition at the time of the incident, and at least two other doctors along with Doctor Jacobson to evaluate him as to any mental difficulty or emotional conditions which may be relevant to statutory or non-statutory mitigating circumstances, which could be used irrelevant [sic] at the time of sentencing.
>
> I need a full report on that, because the issue is going to come up as mitigating circumstances, and I have no means or funds to hire doctors to examine him.

(ST. 26-7).

Because Dr. Jacobson reported that defendant Stewart had been twice hospitalized in his home state of South Carolina for psychiatric reasons, the court appointed two additional psychiatrists, Doctors Jaslow and Corwin, to ascertain whether the defendant was competent to stand trial and whether he knew right from wrong at the time of the offense. (ST. 27-28; SR. 100). It was the court's belief that the mitigating circumstance of extreme mental or emotional disturbance would be included in the issue of whether the defendant knew right from wrong at the time of the offense. (ST. 28-9). Other than an allegation in a penalty phase motion obtained from other attorneys (T. 171, 356; SR. 1086), defense counsel did not again challenge that apprehension or the sufficiency of the reports. (R. 516-17; ST. 58, 2236-7, 2456).

The report of each doctor reflects the defendant's social and behavioral difficulties, as well as his history of drug and alcohol abuse up to and including the night of the offense. (SR.

1145-62). In addition, Dr. Jacobson stated that his opinion regarding the defendant's criminal responsibility might be altered if given additional information regarding the defendant's behavior, and both Doctor Corwin and Doctor Jaslow suggested the possibility that the offenses were committed during an episodic rage reaction. (SR. 1152-3, 1157-8, 1161-2). Defense counsel did not act upon the material contained in the doctors' reports or respond to the doctors' indications of the need for further information. (R. 516).

Lead counsel's testimony at the hearing in this case disclosed various reasons for his failure to investigate even those circumstances of the defendant's background and character outlined in the evaluations, especially with regard to his client's history of drug and alcohol abuse and its relationship to his mental condition.

First, in counsel's sole pretrial action regarding the penalty phase, he limited his investigator to a search in Dade County for "as many people as [he] possibly can that can come into Court and say something good about [defendant Stewart]". (T. 151). The search was not focused on any particular mitigating circumstances; Mr. Goldstein was looking for "anything[;] anybody that could say anything during the time that [the defendant] was working as a roofer or whenever he was in Dade County or whatever. (T. 151). When the investigator was unable to report any "good things," they started working on the defense. (T. 152).

Second, counsel's major pretrial decision -- that the strategy of the defense would be to place the blame for the

offenses on the victim's neighbors -- resulted in the concentration of all defense efforts on the guilt phase. Counsel explained how his theory of defense was formulated:

When Mr. Goldstein first met his client, the defendant was firmly convinced that he was guilty; the defendant remembered that he had punched [Mrs. Haizlip] before blacking-out, and he assumed that he had killed her when he woke up and learned that she was dead. (T. 153). Sometime after this meeting, Mr. Goldstein gathered all the evidence amassed by the state, including photographs and confessions, and went through it as he would in any other case. (T. 153-4). Counsel could not remember the particular piece of evidence, but there was something in there he didn't like; he just got the idea that there had been somebody else in Mrs. Haizlip's house with Roy Allen Stewart. (T. 154). With his investigator and the box of evidence, counsel went to the jail to confront the defendant, a client who was convinced of his own guilt (T. 153-4):

* * *

> [Mr. Goldstein]: I told Mr. Stewart flat out that I honestly thought he was lying to me and that I was the only one that was standing between him and that electric chair at that point and I wouldn't take anything from him -- I wouldn't take any kind of lies from him. He had to tell me the truth period and if he was trying to cover up for somebody I wanted to know who it was.
>
> He denied it.

* * *

Notwithstanding this denial, the defense team examined the state's evidence and unearthed four inconsistencies from which counsel derived his overall trial strategy. The incongruities in

the state's evidence consisted of the following: a discrepancy between the location and condition of Mrs. Haizlip's barely discernible purse in a state's photograph and the defendant's recollection of the scene; the defendant's vehement denial that he had confessed to Vanessa Brown, a "filthy slut" of a cocaine addict who lived across the street from the victim and whose disclosure to the police led to his arrest in South Carolina; the failure of the lab technician to gather for analysis [for the presence of cocaine] numerous white Kleenex tissues strewn about Mrs. Haizlip's otherwise immaculate lawn and home; and, an inconsistency between the medical examiner's report of the location of a stricture mark and the defendant's confessed version of the strangulation. (T. 155-8).[1]

Based on these incongruities, Mr. Goldstein formulated his capital defense strategy:

* * *

> [Mr. Goldstein]: But my theory was that if Vanessa and her boyfriend had gone into the house and the woman was laying in the bedroom and they saw the purse and were looking through the purse and the boyfriend had wandered into the kitchen and Vanessa was looking through the purse, the old lady hears them and comes and gets up and is coming into the living room and grabs the purse, and they wrestle over it, and the strap breaks, and the bodyfriend comes out of the kitchen or wherever he was, throws something across her neck from the back and pulls on it, and you will get a

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1 As part of Mr. Goldstein's trial strategy, he sought to have the medical examiner demonstrate to the jury that if the defendant's confession was to be believed, there would have been stricture marks completely around the victim's neck. He acknowledged, "The record will reflect that we didn't get too far with that. We were cut off during the trial." (T. 158).

stricture mark from here to here.

I thought that my theory was as good as their theory, but the jury didn't think so.

* * *

(T. 159).

Mr. Goldstein explained why he was never able to substantiate his theory; unlike the immunity given to a prosecutor, he could not accuse those he suspected, and the development of his strategy was furthered hampered by his failure to locate Vanessa Brown's companion, who had disappeared. (T. 160-1).[2]

Under the influence of what he characterized as a possible "ego kick," Mr. Goldstein remained convinced that he could win this case, even though he was aware in advance of trial that (a) he could not establish that the murder was committed by Vanessa Brown and her boyfriend; (b) he could not call his dental expert as a witness to counter the state's bitemark evidence; c) he could not dispute the consistencies of his client's guilt with the state's evidence of blood and "a half a dozen other things"; and d) he could not prevent the admission of his client's three confessions. (T. 161-6).

Despite these pretrial setbacks in pursuit of a defense he defined as "we had a weird thing in this trial" (T. 163), Mr. Goldstein ignored the eventuality of the penalty phase and proceeded to go for the win. (T. 166). Hence, all of his efforts and all of his co-counsel's efforts were devoted to the guilt

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2 At trial, counsel unsuccessfully attempted to have Vanessa Brown declared a witness of the court. (ST. 1757-88).

phase of trial. (T. 163).[3]

A third reason disclosed by counsel for his failure to investigate and prepare for the penalty phase was his lack of knowledge of the capital sentencing procedure. Counsel failed to realize that he might need witnesses for the penalty phase until after the jury returned its verdict, and he had no idea that sentencing proceedings would be conducted soon afterwards; the thought never occured to him. (T. 170-2).

What did occur to him was the thought that the judge "would cut [his] head off" if he asked for funds to send his investigator to the defendant's home state of South Carolina; besides, counsel did not know, nor did he seek, what could be accomplished there: ". . . I heard that he had some kind of psychiatric treatment when he was a child, that was it. That is all." (T. 167-8). Counsel did not know that his client had been ordered to undergo psychiatric evaluation there prior to pleading guilty to attempted armed robbery [the conviction for which the trial court found two aggravating circumstances. (SR. 1182-3)]. (T. 16-7, 168-9).

On the morning of sentencing, counsel met his client's family for the first time. (T. 174). According to counsel, "It got to the

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3 This statement is consistent with the allegations counsel made in support of their motion for continuance of the penalty phase filed on the morning of sentencing (SR. 113-114A, 1113; ST. 2220-1) and with their affidavits attached to the defendant's motion for post-conviction relief. (R. 516-7, 715). The record also reflects that their investigator did no further work on this case after June 21, 1979, prior to trial; his affidavit in support of investigative fees reveals that he did not even telephone, let alone visit, any of the defendant's family or acquaintances in South Carolina. (SR. 1120-2). One long distance call was made to verify employment. (T. 380).

point where we got to the sentencing and I needed some warm bodies and I needed them." (T. 189). In the hall outside the courtroom, counsel met with "some warm bodies" for 15 to 20 minutes to determine what evidence he was going to present at the capital sentencing hearing. (T. 175-6). Inside the courtroom, counsel met with a surprise; the judge denied the defense motions for continuance of the penalty phase and for mental evaluation for purposes of sentencing filed that morning. (T.176; SR. 113-114A, 1113, 1086). Counsel explained that after he had found nothing in the doctors' reports that he could use at trial, he did not review them until the defendant was convicted and the penalty phase became a reality. (T. 170-2). He moved for additional evaluation because one of the doctors had mentioned an "EEG or something else." (T. 170-1). Counsel wanted to know if the doctors could come up with anything he could use; at that point, he was still unaware of anything useful. (T. 177).[4]

Counsel's unawareness of anything useful included the defendant's history of substance abuse. The following colloquy transpired regarding counsel's strategy, if any, for the penalty phase:

* * *

> [Assistant State Attorney]: Let me get into some specifics.

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4 Other than a claim that the defense needed the requested time and evaluation in order to present to the jury a reliable and individualized view of the defendant, neither of the penalty phase motions contained a proffer of any specific factors that could or would be discovered. (SR. 113-114A, 1113, 1086).

[Mr. Goldstein]: Go ahead.

Q: Things that might have been sympathies, particularly there was plenty of testimony, especially from your client, that he had been a substance abuser, that he used drugs and alcohol.

A: Yes.

Q: Did you consider suggesting to the jury that they should extend mercy because he might have been under the influence of some cocaine or methaqualone or alcohol?

A: No.

Q: Why is that?

A: Well, maybe I am wrong, I don't know, but I am pretty sure that when I went to law school, that a valid defense was involuntary intoxication, somebody held you down and poured the whiskey down your throat or injected you with something without your permission, and voluntary intoxication was not a defense.

Q: I am not talking --

A: There was at a time -- I don't know, I don't think drug users were getting too much sympathy.

[Assistant State Attorney]: I am not talking about legal defenses. I am talking about possible mitigating circumstances.

[Mr. Goldstein]: I don't think I gave it too much attention.

* * *

(T. 186-87).[5]

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5 According to co-counsel, the possibility of raising intoxication as a defense was discussed early in the case because "the evidence was completely overwhelming." (T. 349). He had a vague recollection of calling someone in South Carolina, as reflected in Defense Exhibits G and H, and guessed that he might have asked about the defendant's psychological evaluation because of that defense. (T. 365-6). It was not until a few weeks before trial that Mr. Goldstein came upon his theory that somebody else had been in the house after defendant Stewart. (T. 366). (Cont'd)

Counsel's defense for the penalty phase, therefore, consisted of creating some doubt of his client's guilt:

> [Mr. Goldstein]: . . . What I was trying to convince the jury during the sentencing phase, was if I couldn't convince the jury in the trial that he didn't do it, then at least let me put in the idea that maybe he didn't do it, give me that, and then don't kill him because sometime in the future you may find out that somebody else did it and if we electrocute him it would be too late.

(T. 188).

This defense was based, in part, on counsel's personal belief that his client was innocent and that the state had not proven its case beyond a reasonable doubt. (T. 189). At trial, counsel felt that he could negate the state's bitemark identification testimony even though his own expert could not be called. (T. 191-2). And, although counsel "gave up" to fatigue after examining the state's expert for about half an hour on his "absurd" testimony, counsel felt that the defense had not lost anything. (T. 192). Counsel thought that he had adequately explained to the jury the rest of the physical evidence, including fingerprint, hair, and semen. (T. 192).

This defense was also based on counsel's belief that the judge had restricted his trial argument as to doubt. (T. 179-80). Counsel explained why his closing argument at the capital

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Defense Exhibits G and H indicate that on June 1, 1979, Mr. Sherman had called the defendant's parole officer, who testified at the penalty phase, requesting a psychological evaluation that had been conducted during the defendant's stay in a mental institution. (T. 364-5; R. 510). The exhibits were admitted through the testimony of the parole officer's supervisor, Mr. Mixon, who has known the defendant and his family for years, but who had not been called to testify at the penalty phase. (T. 310-19, 328-31).

sentencing hearing consisted of "leftovers":

* * *

> [Assistant Public Defender]: . . . What happened? You didn't have time to present the argument at the guilt phase?
>
> [Mr. Goldstein]: Yeah, that's what happened. And I let the judge do something to me that I wouldn't let -- I spent so much time going over each and every piece of evidence and trying to discredit each piece of evidence in the closing argument, and when it came down to [it,] the argument that I made at the end of the sentence is the argument that I was supposed to end my closing argument [with] at the end of the trial.
>
> I spent too much time and the judge told me, "You don't have any more time."
>
> I had told myself, "If you go on she will cut my head off - you know, put me in jail." I didn't, so I sat down.
>
> [Assistant Public Defender]: So during your closing argument of the guilt phase, the judge cut you off and said, "Time is up," and you used whatever argument you had left for your argument in the sentencing phase?
>
> [Mr. Goldstein]: Right.

* * *

(T. 180).

During cross-examination, additional reasons were advanced, in the form of constraints imposed on defense counsel, to account for his performance at the penalty phase. Responding to the question whether he made any conscious decision regarding the best posture of the defense for sentencing (T. 184), counsel explained that he had been constrained by the defendant's attitude, by the defendant's indigency, and by the limitations placed on his time. (T. 185-91).

Counsel knew that he was not going to get any sympathy from

the jury in light of the circumstances of the offense and the smug expression on the face of his client, who felt sure that he would not be sentenced to death. (T. 185). It was not until the point at trial when the [interrogating] officer told the jury that he had not given the defendant any assurances regarding the death penalty, that the reality of the situation came home to his client; by then, it was too late. (T. 185). Counsel also did not think the jury would be swayed by the testimony of his witnesses (who he had met for the first time that morning) regarding his client's problems adjusting to his father's death or to other people. Nevertheless, he "put it on anyway." (T. 186-7).

Counsel felt constrained by the trial court on the issue of funds. (T. 167-8, 190). Although counsel had been appointed by the judge in this case only "a couple" of times (T. 177), he stated:

* * *

> [Goldstein]: Well, I had enough appointed cases over the years and I knew that I would have to fight her.
>
> I needed more money for the investigator one time and I had to come in and file a motion and argue for it and fight for it and I did get it.

* * *

(T. 190).[6]

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6 The record belies counsel's assertion that he had to fight for additional investigative funds. (ST. 40-1, 44). It reveals that a) the investigator was eventually awarded a fee well in excess of that requested by counsel prior to trial (SR. 1120-2; 1136); b) counsel received the court's authorization of expenses for an assistant public defender from South Carolina to testify for the defendant at his pretrial suppression hearing (ST. 86-7); and c) (Cont'd)

The final constraint under which counsel felt he had been performing was that of time. In addition to being caught unawares by the impendency of sentencing (T. 172-3), counsel felt that he had not been given adequate time to prepare between his appointment and the commencement of trial. (T. 190). Counsel would have needed more time if he had known that he really had to prepare for the penalty phase during that same period.[7] (T. 190). But counsel liked to do one step at a time, and he was not allowed. (T. 191). Moreover, at the time of trial, "there wasn't really a hell of a lot of law written on it that [he] knew about." (T.191).

Following the testimony of lead trial counsel, the court heard the opinion testimony of the defendant's legal expert, Peter Raben, over objections by the state as to his presence in court during Mr. Goldstein's testimony, his qualifications as an expert

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despite co-counsel's claim in support of the motion to continue the penalty phase, that if the defendant had not been indigent, "he would have had the resources to better prepare for the sentencing proceeding" (ST. 2219), co-counsel secured the presence at sentencing of a Texas reporter, who was not permitted to testify, by promising payment of his witness fees and expenses. (ST. 2336-56). No similar arrangements were made for the appearance of character witnesses at sentencing. The defendant's mother and sister were reimbursed for their expenses after the hearing. (SR. 1133-4).

7 In the early stages of his representation, counsel had been apprised of the state's penalty phase witnesses and the aggravating circumstances which it intended to prove. (T. 178; ST. 74-5, 80-5). After the date was set for trial (ST. 12-3), counsel never requested a continuance despite opportunities to do so. (ST. 22, 39-40, 55, 62-3, 84-7). Prior to conviction, the only continuance that had been requested was granted at the close of the state's case, in part, so that counsel could prepare the defendant to testify. (ST. 1871-7). Counsel did not object when the trial court set July 5, 1979 as the date for sentencing after receiving the verdicts on June 30th. (ST. 2201-4).

on the issue of effective assistance of counsel, and the relevancy of his testimony. (T. 135-9, 194-204). In preparing for the evidentiary hearing in this case, Mr. Raben reviewed the entire record of defendant's trial and the motion for post-conviction relief with its supporting documents. (T. 205-6). Mr. Raben's expert testimony was based on this review, on his observation of counsel's testimony, and on his recent experiences in the Dade County Public Defender's Office, where, as a senior trial attorney, he had been responsible for a constant load of 25 to 50 cases, at least half of which were capital felonies. (T. 195-97, 205-6). Mr. Raben had practiced before the sentencing judge in this case for almost 18 months. (T. 197-8).

It was Mr. Raben's opinion that the defendant's sentencing hearing was fundamentally unfair due to counsel's deficient performance. (T. 206). Mr. Goldstein's performance fell substantially below the standards of the relatively small group of reasonably effective attorneys who were defending capital cases in 1979. (T. 206-7). This group included appellate and trial lawyers in the Public Defender's Office with whom Mr. Goldstein had belatedly consulted during the recess before sentencing. (T. 178, 207-8). Mr. Goldstein failed to familiarize himself with the range of knowledge necessary to defend this case, and his assessment of the case was unreasonable. (T. 207, 219-22).

Competent counsel would have handled the defense far differently. Competent counsel would have associated himself with another attorney so that one could investigate guilt or innocence and the other could begin preparation for the sentencing phase,

which was "fated in this case." (T. 208-9). According to Mr. Raben, "This was a death case from the time Mr. Goldstein got it, and who the prosecutors were, what the facts were, who the victim was, the whole case reeked of the death penalty. I think the last thing on Mr. Goldstein's mind was investigating this case as if it was a death case." (T. 209). Since Mr. Goldstein was given the luxury of a second attorney, he should have directed him to address the issue of sentencing; this strategy also helps in maintaining credibility before the same jury which rejects the theory of innocence. (T. 210-11).

A competent attorney would have examined the list of statutory mitigating circumstances and searched for witesses in the same manner as does the state with regard to aggravating factors. (T. 211). Competent counsel would have been aware of the treasure-trove of mitigating circumstances afforded by the Locket[t v. Ohio] case, which was decided prior to the defendant's trial. (T. 212). The case was well-known by attorneys to mean that counsel could present any evidence that would reflect favorably on a defendant in the jury's eyes. (T. 212).

One of the greatest sources of mitigating circumstances is a client's psychiatric history. (T. 212). Mr. Raben explained:

* * *

> Whenever you find out in a death case that there is something wrong with your client so that he has some kind of diminished amount of capacity, you bang it like a drum. You develop it as much as you can and you either lead the prosecutor or the judge or the jury to believe that they could be executing a sick person, which they do not want to do.
>
> I think Mr. Goldstein was aware of the

> psychiatric background of his client, but he ignored it.
>
> * * *

(T. 213).

Competent counsel would have investigated the defendant's history of mental problems and substance abuse, as well as the defendant's account of the blackout he experienced at the time of the offense; counsel would have presented this data to the appointed psychiatrists so that they could better evaluate the defendant's mental condition with regard to the issues of competency, premeditation, and mitigating circumstances. (T. 222-5).

It was the conclusion of defendant's legal expert that, under the circumstances of this case, counsel's ineffectiveness produced an unjust determination of sentence; a determination which would have been different but for counsel's failure to investigate and prepare for the penalty phase of trial. (T. 236). The errors in counsel's performance upon which Mr. Raben based his opinion may be summarized as follows. Counsel's defense strategy and the misuse of resources at his disposal were unreasonable. (T. 218-22, 225-6, 229-30, 252). Counsel's failure to investigate the defendant's social and psychiatric background was unreasonable. (T. 223-5, 254-5). Counsel's failure to prepare for the development of testimony and argument at the sentencing phase was unreasonable. (T. 219-20, 230-2). These errors resulted in the failure to present available evidence of mitigating circumstances; a meaningless presentation of defense witnesses from whom damaging testimony was adduced without reference to psychological factors;

and, an incredible closing argument composed of remains from the guilt phase and based on theories which the same jury had conclusively rejected. (T. 227, 233-5, 259-60, 267-8, 271-3).

In addition to the reconstruction of the defense by trial counsel and their investigator and its assessment by a legal expert (T. 139-273, 351-60, 376-90), the defendant presented the unrefuted testimony of two psychologists and numerous lay witnesses regarding the defendant's background and character and his mental condition at the time of the offense. (T. 17-133, 273-350, 360-76, 391-450). Some of these character witnesses had testified for the defendant at the penalty phase of his trial (T. 66-98, 360-76, 396-410; ST. 2359-84); others had conversed with counsel but had not been called to testify (R. 653-67; T. 18-66, 333-50); the remaining witnesses, including the defendant's fourth grade teacher, a childhood friend, and a fellow employee, had not been contacted by defense counsel but would have testified for the defendant if counsel had asked. (T. 410-80).[8]

In its order denying the defendant's motion for post-conviction relief, the trial court noted the witnesses who had appeared at the hearing and summarized the contents of their testimony. (R. 894-5). The trial court then reached the following conclusions:

> At an early stage of representation, defense counsel should have come to the inescapable

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8 The testimony of the defendant's post-conviction witnesses pertaining to aggravating and mitigating factors which defense counsel had failed to adduce is detailed in the argument portion of defendant's brief, infra.

conclusion that all hope of obtaining a verdict of not guilty should have been abandoned and substantial time should have been expended preparing for the penalty phase.

* * *

The aggravating circumstances found by the sentencing judge were undoubtedly considered by the sentencer to be of varying importance. However, it is not reasonably probable that the sentencer would have concluded that the totality of the evidence was such as to outweigh two of the aggravating circumstances: the fact that the crime was committed during the commission of a sexual battery and the way the killing was done.

This Court has determined that regardless of the conduct of the Defendant's counsel there is no reasonable probability that the sentence would have been different even if what was presented to this Court had been presented during the penalty phase of the Defendant's trial.

(R. 896-7).

SUMMARY OF ARGUMENT

In his motion for post-conviction relief from his sentence of death, defendant Roy Allen Stewart alleged the specific acts and omissions of trial counsel which prejudiced him in the capital sentencing phase of his trial. The motion was supported by affidavits of trial counsel, reports of a psychologist, and numerous statements of character witnesses. At the evidentiary hearing on his motion, the defendant presented the testimony of a legal expert, another psychologist, and the defense investigator at trial in addition to that of individuals who had given their sworn statements. In denying the motion, the trial court ruled that the overall defense strategy of trial counsel was unreasonable but that the defendant was not prejudiced by the deficiencies in counsel's performance. The trial court's ruling was only partially correct.

Through the testimony of defense counsel, in view of the circumstances at the time of trial, the defendant has demonstrated that counsel were not reasonably likely to render and did not render reasonably effective assistance at the most critical stage of his trial. The seriousness of lead counsel's initial error in deciding that he could win this case in the face of overwhelming evidence of guilt permeated the entire course of his performance until the defendant was sentenced to death. No investigation or preparation was made for sentencing because all efforts of the defense were devoted to the guilt phase of trial. Not only did counsel fail to act upon the reports of the psychiatrists who examined the defendant prior to trial, but he blinded himself to

the impendency of the penalty phase, and he was unaware of both the significance of the defendant's history of substance abuse and the necessity for securing the presence of witnesses familiar with the defendant's background, character and mental condition.

Counsel's actual performance at sentencing demonstrates the prejudice engendered by these deficiencies. It consisted of the elicitation of damaging evidence, the presentation of meaningless evidence, and remarks composed of leftovers from his closing argument at trial. Because of the pervasiveness of counsel's errors, the prejudice to the defendant must be presumed.

The prejudice caused by counsel's ineffectiveness is further shown by the evidence adduced at the post-conviction hearing which would have been available to counsel. Through the testimony of expert psychologists and numerous lay witnesses, the defendant established the existence of statutory and non-statutory mitigating circumstances, the negation of at least one aggravating circumstance, and the diminishment of the effects of other aggravating circumstances. The defendant has met his burden of showning that but for counsel's seriously deficient performance, there is a reasonable probability that the outcome of the capital sentecing proceeding would have been different.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF FROM THE PENALTY OF DEATH WHERE THE DEFENDANT MET HIS BURDEN OF DEMONSTRATING THAT COUNSEL'S SERIOUS ERRORS RESULTED IN A FUNDAMENTALLY UNFAIR CAPITAL SENTENCING PROCEEDING, IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The right to counsel is the right to the effective assistance of counsel; that is, counsel reasonably likely to render and rendering reasonably effective assistance in view of the circumstances of each case. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Meeks v. State, 382 So.2d 673 (Fla. 1980). In Strickland v. Washington, 466 U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court reiterated its long-held belief that the Sixth Amendment guarantee of counsel is necessary to protect the fundamental right to a fair trial, which it defined as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." 104 S.Ct. at 2063.

In Strickland, the Court enunciated the standards by which to judge a defendant's claim for relief predicated on the denial of his Sixth Amendment right to counsel. The Court emphasized that judicial scrutiny of counsel's performance must be highly deferential. Id., at 2065. In order to justify the very strong presumption of competency, however, counsel must fulfill certain basic duties. Most important is the duty to advocate the defendant's cause. Counsel also is obliged to "bring to bear such

skill and knowledge as will render the trial a reliable adversarial process." Id. This entails the duty "to interview potential witnesses and 'make an independent examination of the facts, circumstances, pleadings and law involved.'" Rummel v. Estelle, 590 F.2d 103, 105 (5th Cir. 1979), quoting, Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed.2d 309 (1948).

In giving deference to counsel's performance in fulfilling his responsibilities, the distorting effects of hindsight should be eliminated by reconstructing the totality of the circumstances surrounding counsel's conduct and by evaluating the conduct from counsel's perspective at the time. Strickland v. Washington, 104 S.Ct. at 2066; accord, Washington v. Strickland, 693 F.2d 1243, 1251 (5th Cir., Unit B, 1982) (en banc). Consequently, the court assessing a claim of ineffectiveness must determine whether the defendant has overcome the presumption that, under the particular circumstances of the case, counsel's acts or omissions were the result of "sound trial strategy," and that counsel's significant decisions were made in the exercise of "reasonable professional judgment." 104 S.Ct. at 2066.

Although it reversed the judgment of the lower court, the Supreme Court approved its conclusions regarding decisions made by counsel in light of his duty to investigate. Thus, strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable; and, choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments would support

such a limited investigation. Strickland v. Washington, 104 S.Ct. at 2066; Washington v. Strickland, 693 F.2d at 1252-56. The lower court provided a framework for analyzing the amount of pretrial investigation that is reasonable. Factors to be considered include the degree of punishment that the state seeks to impose, the degree of possible prejudice that might foreseeably result from a strategic choice, the number and relative complexity of the issues in the case, the strength of the government's case, the experience of counsel, and the overall strategy of counsel. Washington, 693 F.2d at 1250, n. 12, 1251, 1256-7 & n. 23.

And, like the trial itself, sentencing is a critical stage of the criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 77 S.Ct. 1197, 1205, 51 L.Ed.2d 393 (1977). The sentencing stage is "the time at which for many defendants the most important services of the entire proceeding can be performed." A.B.A. Standards on the Administration of Criminal Justice, Sentencing Alternatives and Procedures §5.3(e).

> The lawyer also has a substantial and very important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant himself. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships and the like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

A.B.A. Project on Standards for Criminal Justice, Standards Relating To The Defense Function, 227 (1970).

The crucial role played by counsel in the adversarial system requires that a defendant have access to an attorney with sufficient skill and knowledge to meet the prosecution's case effectively. Thus, the basic inquiry in determining any claim of ineffectiveness is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing proceeding] cannot be relied on as having produced a just result." Strickland v. Washington, supra at 2063-64. The burden of proof is placed on the defendant; he must show that counsel made such serious errors in performance that he was deprived of a fair sentencing hearing, a hearing whose result is reliable. 104 S.Ct. at 2064. Because of the unique and irreversible nature of the death penalty, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. Woodson v. North Carolina, 428 U.S. 280, 304-05, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976) (plurality opinion); accord, Gardner v. Florida, 430 U.S. 349, 360, 97 S.Ct. 1197, 1206, 51 L.Ed.2d 393 (1977) (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 603, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion).

In Gardner v. Florida, supra, the Court emphasized the importance of the reliability of information and the participation of counsel in arriving at a responsible sentencing decision. 96 S.Ct. at 1205-06. The Court held that a death sentence may not be imposed when it is based, at least in part, on information which the defendant or his counsel had no opportunity to deny or explain. In rejecting the state's argument that trial judges can

be trusted to exercise their discretion in a responsible manner even though they may base their decisions on secret information, the Court stated:

> . . . (T)he argument rests on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

97 S.Ct. at 1206.

The constitutional requirement of a greater degree of reliability when the death penalty is imposed necessarily invalidates a rule which prevents the sentencer in a capital case from giving independent mitigating weight to any aspect of the defendant's character and record and to circumstances of the offense that he proffers as a basis for a sentence less than death. Lockett v. Ohio, supra, 98 S.Ct. at 2964-65; accord, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Otherwise, an impermissible risk is created that the death penalty will be imposed in spite of factors which may call for a less severe penalty. Lockett v. Ohio, at 2965. A serious risk of error is also created when the defendant does not receive effective assistance of counsel at the penalty phase of trial. See United States v. Cronic, 466 U.S. ____, 104 S.Ct. 2039, 2045 (1984); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980).

In this case, counsel's failure to present available evidence

to the jury and judge which would have established the existence of mitigating circumstances and diminished the effect of aggravating circumstances was a serious error infecting the very fairness of the sentencing proceeding. The deprivation of defendant Stewart's right to effective assistance of counsel is evidenced by counsels' statements in motions and proceedings before the trial court; by counsels' admissions in their affidavits and on the witness stand; and by counsel's actual performance at the penalty phase of trial. Roy Allen Stewart has demonstrated that lead counsel's overall trial strategy, misallocation of resources, ignorance of capital sentencing law, and lack of investigation and preparation for the penalty phase resulted in counsel's failure to provide a rational basis for a sentence less than death. Accordingly, the outcome of the defendant's sentencing hearing must be deemed the unreliable product of counsel's ineffective assistance.

A. Counsel's Overall Trial Strategy Was Unreasonable

The trial court's decision that the defendant proved the first component of his claim for relief (R. 896) is supported by the facts and the law. The representation of Roy Allen Stewart began with the appointment of counsel with little experience in capital cases, who associated himself with an attorney of no experience. (T. 140-6, 351-3). It virtually ended with counsels' prediction of incompetency in their belatedly-filed Motion for Continuance of Death Penalty Proceeding:

* * *

4. That in sum, undersigned counsel, did all that was humanly possible to prepare for the trial stage herein, and was unable to devote any significant time to what was still not a reality, namely the penalty phase.

* * *

6. That if counsel must go forth at this time with the penalty phase, it appears nearly impossible for the defendant to be guaranteed his Sixth Amendment right to effective assistance of counsel in this obviously critical proceeding, in light of the standards set forth in Lockett, supra.

* * *

8. In addition, after receiving word of the verdict, the defendant's family is driving down from South Carolina on July 4th, 1979 and counsel has not had an opportunity to confer with them and will not be able to until Thursday morning, an hour before the hearing, at which time counsel must also depose the State's witnesses. Again, this will substantially detract from counsel's effectiveness at this most crucial proceeding.

9. That subsequent to the verdict herein, the undersigned have conferred with other attorneys who have defended First Degree Murder cases on the question of necessary preparation for the penalty phase. Said attorneys have advised that it is impossible to effectively represent a defendant at the penalty phase under the above described conditions, in light of the standards set forth in Lockett v. Ohio, supra, and Gardner v. Florida, 430 U.S. 349 (1977). . . . .

* * *

(SR. 113-114A, 1113).

From commencement of the prosecution to closing argument at sentencing, the representation of the defendant was tainted by the unreasonableness of counsel's significant trial decision; the decision that he could win this case against overwhelming odds. Knowing at the outset that the state was actively seeking the death penalty; knowing what aggravating circumstances the state

intended to prove and the evidence by which it intended to do so; knowing that the defendant had confessed to crimes which he believed he had committed; and knowing that, in addition to bitemark evidence, the state had more physical evidence than he had ever seen in any case, counsel nevertheless convinced himself, and then his client, that he could win. (T. 147-8, 152-60). When the defendant denied that he was covering-up for someone, counsel devised a theory that the capital murder was committed by Mrs. Haizlip's neighbors after the defendant left her home. (T. 154-9). Counsel based this defense, which he thought was "as good as their theory," on four minor inconsistencies gleaned from the vast array of state's evidence. (T. 153-60). Under what may have been the influence of an "ego kick," counsel remained convinced that he could win this case, even though he knew in advance of trial that his theory of defense could not be substantiated; that the testimony of his dental expert could not be utilized; and that the admission of the bitemark evidence and the defendant's confessions could not be prevented. (T. 160-6). Thus blinded to the reality of a penalty phase, counsel devoted all of his efforts and all of the resources at his disposal, including the services of a co-counsel and an investigator, to the defense of the guilt phase of trial. (T. 163).

It cannot seriously be disputed that counsel's assessment of the state's case was unreasonable. A competent attorney -- faced with an overwhelming amount of physical evidence to be presented by an experienced team of prosecutors, a victim whose violent death generated much publicity and who was portrayed as a pioneer

woman and widowed Sunday school teacher, and a defendant who had given written and tape-recorded confessions -- would have made a realistic judgment that the state could not lose this case. It cannot seriously be disputed that counsel's development of the theory of his case was unprofessional. A competent attorney -- faced with a client who had confessed in detail and who believed in his guilt and the great amount of physical evidence consistent with guilt -- would not have resolved to convince his client, and himself, that he could win this case. And, it cannot seriously be disputed that counsel's consequent decision to devote all of the efforts of the defense to the attainment of a not-guilty verdict was unreasonable. A competent attorney -- given a client whose pretrial evaluations indicated a psychosocial history rich in potential mitigating factors, the names of the state's witnesses who were to prove specified aggravating factors, and the resources at his disposal -- would have directed his co-counsel and his investigator to make some inquiry of his client's background and character in order to be prepared to meet the state's case for death.

As the trial court found, "(A)t an early stage of the representation, defense counsel should have come to the inescapable conclusion that all hope of obtaining a verdict of not guilty should have been abandoned and substantial time should have been expended preparing for the penalty phase." (R. 896). This conclusion is correct, for "permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense."

Washington v. Strickland, 693 F.2d 1243, 1552 (5th Cir. Unit B 1982) (en banc), reversed on other grounds, Strickland v. Washington, 466 U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1964); accord, Douglas v. Wainwright, 714 F.2d 1532, 1556 (11th Cir. 1983), affirmed on remand, 739 F.2d 531 (11th Cir. 1984); Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983).

If counsel, here, had made a realistic assessment of this case, he would have known that a finding of guilt was inevitable. That inevitability, however, is never the case at a sentencing hearing. At that stage, there is no set of facts and no set of legal principles that require a juror to vote for the death penalty. Given the vast spectrum of individual feelings about the appropriateness of the death penalty, given the basic humanity of the defendant no matter how heinous the crime, and given the availability of facts establishing mitigating circumstances and contesting aggravating circumstances that a reasonable investigation would have uncovered, there was in this case a rational basis for the jury to advise and the trial judge to impose a sentence of life imprisonment. The failure of counsel to shift his focus from the guilt phase of trial to what was required of him under the circumstances of this case was an error which infected each decision counsel made and each action counsel took or did not take until Roy Allen Stewart was sentenced to death. The failure of counsel to present any evidence that would permit a rational decision to give life rather than death requires reversal.

Counsel failed to inform himself of the procedural and

substantive underpinnings of Florida's capital sentencing law. Counsel "had no idea" that the penalty phase was to be held "as soon as practicable" after conviction, and he believed that there was little case law on the subject. (T. 172, 191); Sec. 921.141, Fla. Stat. (1973). Yet, the predecessor to the statute under which Roy Allen Stewart received the death penalty was explained by this Court several years before his trial. In State v. Dixon, 283 So.2d 1 at 5, 8 (Fla. 1973), this Court stressed, as the most important safeguard of the statute, the defendant's right to appear and argue for mitigation in a system where the weighing process is left to the judgment of jurors and judges:

> . . . In the [separate sentencing] proceeding, evidence may be presented as to any matter that the court deems as relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. [Section 921.141, Florida Statutes (1972)]. . . .

Since the issue of guilt or innocence has been decided, the jury can then view the question of penalty as a separate and distinct issue on facts in addition to those necessary to prove the crime. Id. at 8.[9] This Court also interpreted the statutory mitigating circumstances involved in this case:

* * *

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to

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9 One of the purposes of a bifurcated trial and separate sentencing proceeding is to allow the presentation of mitigating evidence regarding a defendant's mental condition at the time of the offense which is inconsistent with his claim of innocence during the first phase of trial. See Straight v. Wainwright, 422 So.2d 827, 832 (Fla. 1982).

> Fla.Stat. §921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.
>
> * * *
>
> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla. Stat. §921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect the person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.
>
> * * *

State v. Dixon, 283 So.2d 1 at 10. (e.s.).

In addition to the seminal explication of Florida's capital sentencing process in Dixon, defense counsel in this case should have known and made use of numerous decisions interpreting the statute, particularly with regard to the broad range of mitigating circumstances which may be presented for consideration by the jury and judge. See, e.g., Messer v. State, 330 So.2d 137 (Fla. 1976) (disparate treatment of co-perpetrator; extreme mental or emotional disturbance); Miller v. State, 332 So.2d 65 (Fla. 1976) (mental mitigating factors); Jones v. State, 332 So.2d 615 (Fla. 1976) (paranoid psychosis of indeterminate degree; hallucinations; chronic alcoholism); Chambers v. State, 339 So.2d 204 (Fla. 1976) (significant history of drug usage causing "self-induced" mental disturbance); Huckaby v. State, 343 So.2d 29 (Fla. 1977) (mental illness contributing to heinousness of crimes against family); Burch v. State, 343 So.2d 831 (Fla. 1977) (no prior history of criminal activity; substantially impaired capacity to appreciate criminality of conduct or to conform it to the law); Buckrem v.

State, 355 So.2d 111 (Fla. 1978) (intoxication and previous altercation with victim on day of offense; gainful employment; no previous criminal activity). Other cases discuss the important role of the jury in assessing the evidence presented to it and the impact of its advisory sentence on the trial judge and reviewing court. See Lamadline v. State, 303 So.2d 17 (Fla. 1974); Tedder v. State, 322 So.2d 908 (Fla. 1975). Instead, counsel persisted in the unprofessional belief that "the sentencing phase of the trial was a fairly new concept at the time" and that "there was very little in the way of case law to guide [him]." (R. 517; T. 191).

And, since counsel was "pretty sure" that voluntary intoxication was not a valid defense at trial, he did not give "too much attention" to its significance in establishing mitigating circumstances. (T. 186-7). Indeed, the record of the charge conference at trial illustrates his complete failure to inform himself of relevant law and facts. The jury was instructed on voluntary intoxication only because the prosecutor and the trial judge did not agree with counsel that the instruction would waste time and was inapplicable. (ST. 1899). It is obvious that Mr. Goldstein had no idea that voluntary intoxication has long been a valid defense in this state to specific intent crimes, such as premeditated murder, robbery, and burglary with which the defendant was charged. See, e.g., Garner v. State, 28 Fla. 113, 9 So. 835 (1891); Britts v. State, 158 Fla. 839, 30 So. 363 (1947); Mauldin v. State, 382 So.2d 844 (Fla. 1st DCA 1980), conviction vacated, Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984)

(conviction for first degree murder reversed on ground of ineffective assistance where counsel had failed to investigate and obtain objective confirmation of severity of defendant's chronic alcoholism); Presley v. State, 388 So.2d 1385 (Fla. 2d DCA 1980) (record appeared to support prima facie claim of ineffective assistance where counsel erroneously believed that voluntary intoxication was not a defense to the specific intent crime of burglary). Although Mr. Goldstein's performance at trial is not challenged here, his ignorance of the law of voluntary intoxication as a legal defense substantiates the defendant's claim that he did not render effective assistance at the penalty phase. For, as the jury was instructed, counsel should have known that voluntary drunkenness or intoxication is defined as "impairment of the mental faculties by the use of narcotics or other drugs." (SR. 1051). Thus, even if Stewart's abuse of alcohol and drugs did not exist to such an extent that he was incapable of forming a specific intent, counsel should have known that his client's intoxication did exist to the extent of establishing two statutory mental mitigating circumstances. Section 921.141(6)(b) and (f), Florida Statutes (1979); (T. 280-4).

Because counsel unreasonably chose to remain ignorant of law and facts relevant to the capital sentencing phase of trial, counsel failed to discharge his basic responsibility to his client.

B. Counsel's Preparation For Sentencing Was Unreasonable, And His Performance Was Prejudicial.

The record reveals that counsel devoted a combined total of thirty-eight hours to their preparation for the penalty phase of trial. (SR. 1163-81). Even assuming that a competent attorney assisted by a co-counsel and an investigator would have waited until the eve of sentencing to prepare, it is obvious that Mr. Goldstein's deficiencies prevailed until the conclusion of his representation. Mr. Goldstein testified that he worked the entire time, but he could not remember anything that he did during the recess. (T. 173-4). Counsel's inability to recall specific details can be explained by the complete absence of any meaningful work product.

While counsel may have assisted Mr. Sherman in drafting the penalty phase motions and in obtaining copies of instructions from other attorneys (R. 715; T. 174, 356-7; SR. 1093-1103), one thing is certain: counsel did nothing to effectuate a challenge to that which the state had been actively pursuing from the start; a sentence of death by electrocution. The exigencies of the situation and his duties as an advocate demanded more from counsel than drafting motions and obtaining instructions that he would be unable to support and arranging for the attendance of a Texas reporter and a Roman Catholic priest whose testimony he would be unable to present. This misallocation of resources during the brief recess was especially unreasonable since neither witness had any relationship to the circumstances of the offense or to the person of the offender. (ST. 2313-36, 2353-56). As the defendant's legal expert noted, these witnesses, who were to be

paid despite counsel's cries of indigency, were mere frosting on a non-existent cake. (T. 225-6).

If counsel had neglected to investigate and obtain evidence of his client's background and character, the exigencies of the situation and his duties as an advocate demanded that he do so then. If counsel had neglected to review and act upon the reports of the psychiatrists, the exigencies of the situation and his duties as an advocate demanded that he do so then. If counsel had neglected to revise his guilt phase strategy in order to mount a defense at the sentencing hearing, the exigencies of the situation and his duties as an advocate demanded that he do so then. Counsel's failure to discharge his obligations resulted in his inability to effectively meet the state's case for death.

It was in a group discussion on the morning of sentencing lasting no more than twenty minutes, that counsel acquired the totality of his knowledge of the background and character of his client who was facing death. It was in a group discussion lasting no more than twenty minutes that counsel determined what evidence to present in arguing for his client's life. It was after this group discussion of no more than twenty minutes, that counsel chose his witnesses for the sentencing hearing without any further preparation of their testimony. (T. 175-6). It was after this group discussion on the morning of sentencing, that counsel argued the motions which had consumed part of the hours devoted to preparation for the penalty phase. Mr. Goldstein urged:

> . . . I believe if he had an opportunity to be re-examined by psychiatrists like Dr. Stillman -- while [the family members] are here -- I think the family can add a lot to what the defendant can

> tell the psychiatrist, as he could better arrive at a conclusion as to the defendant's mental capacities for this part of the proceedings[.] . . . I would request Dr. Stillman with his psychiatric staff to examine the defendant and have a chance to talk to the family to get some kind of background on him, before a conclusion is reached, so we can be better prepared to present it to the jury.

(ST. 2220-21). It is apparent from the generalities of counsel's argument that he put himself in no better position after his group meeting than he had been when he drafted his motions. The glaring error in counsel's motions is the failure to support them with a proffer of the evidence that would be obtained. The glaring error in counsel's performance is the failure to defend his client's life with a presentation of the evidence that should have been obtained.

From Mr. Goldstein's revelation of his decision-making process within the totality of the circumstances as he viewed them at the time, only one conclusion can be reached: counsel's representation was the antithesis of reasonable professional assistance. Counsel's errors were the product of his obsession to prove his theory of the case and the abdication of his role to advocate the defendant's cause. There is no sound trial strategy in counsel's failure to recognize and act upon available mitigating evidence. There is no sound trial strategy in counsel's attempt to save the defendant's life by creating "some doubt" of his guilt in light of the overwhelming evidence on which the jury found him guilty. There is no sound trial strategy in taking the chance that "some warm bodies" might appear in mitigation of a death sentence; for, it was the defendant's aunt in Miami, and not

the defendant's attorney at trial, who ensured the presentation of defense witnesses at the penalty phase of trial. (T. 40-2, 370-1). Given counsel's disdain for evidence of the defendant's history that could have been obtained, given counsel's disregard of character witnesses who would have been willing to testify, and given counsel's belief, under the circumstances of this case, that a majority of the jury could be persuaded by the same arguments of the defendant's innocence that the unanimity of the jury had rejected, it is beyond dispute that counsel failed to meet the state's case for death with the skill and knowledge required of an adversary. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 100 S.Ct. at 1715. Mr. Goldstein's performance at the sentencing hearing proved the prophecy true.

The state presented the following evidence for the jury to consider in determining whether Roy Allen Stewart should live or die.

In 1975, Stewart was convicted of a burglary and theft which occurred in Smokes Garage in Florence County, South Carolina. He was placed on probation, with the condition that he pay $100.00 in restitution. (ST. 2283-90; 2300-1). In 1976, Stewart was convicted and sentenced for the attempted armed robbery of a convenience store clerk in Sheraton County, South Carolina. Investigation revealed that at approximately 2:45 in the morning, the defendant pointed a pistol over the counter at the cashier and

demanded money; something apparently happened to scare him away because he left immediately. (ST. 2290-3). The investigating officer did not know if it was possible that Stewart had changed his mind. (ST. 2294). As a result of Stewart's guilty plea to attempted armed robbery, his probation was revoked. In 1977, he was sentenced to a concurrent term of three years and again ordered to make restitution. (ST. 2298-2302).

In February, 1978, Stewart was released on parole under the supervision of Paul Wayne Edwards, South Carolina Probation and Parole Commission. (ST. 2298, 2302). One year later, Stewart's parole was revoked in absentia for absconding the jurisdiction. (ST. 2304). Mr. Goldstein's examination focused on the agent's efforts to rehabilitate the defendant. Edwards claimed to have tried hard, but he was unable to keep up with the whereabouts of his parolee. (ST. 2307-9). Counsel elicited the fact that Edwards' last contact with his parolee was the result of the defendant's arrest for possession of marijuana (ST. 2310-11):

* * *

[DEFENSE COUNSEL]: You told him you shouldn't play with marijuana while on parole?

[AGENT EDWARDS]: I advised him of the company he was keeping, also.

Q: You advised the company he was working for?

A: The company he was keeping. The people he was socializing with.

Q: So, you told him not to mess with marijuana and not to mess around with bad guys?

A: Oh, yes. Sure.

Q: What else did you do to try and

rehabilitate him?

A: That's all.

Q: That's it.

A: Yes.

* * *

Following this exchange, the jury learned two more things; Edwards would have been more than glad to work with the defendant if he had been able to contact him, and the parole agent did not rehabilitate Roy Allen Stewart. (ST. 2311-12).

From the medical examiner who performed the autopsy in this case, the jury was re-informed of the injuries that Mrs. Haizlip had sustained, and it was told of the high degree of pain she may have suffered. (ST. 2313-36). At the conclusion of the testimony of Dr. Diggs, the state rested its case for the death penalty.

Outside the presence of the jury, the defense unsuccessfully sought the admission of the testimony of a Texas deathhouse reporter who Mr. Goldstein had never met until the sentencing hearing (ST. 2336-37). In the course of his career, Don Reid, Jr. had witnessed the death by electrocution of 189 inmates. (ST. 2337). He grew to oppose capital punishment. (ST. 2339-41). After describing the process by which the State of Texas executes a sentence of death, Mr. Reid spoke of his work on the Texas Legislative Prison Reform Committee. The Penal Reform Board had been given access to the records and research reports of the Texas Department of Corrections; the studies showed that out of 37 deathrow inmates whose sentences were commuted and who were released into society, only two were returned to prison for

violating their parole. They had been accused of driving while intoxicated. (ST. 2344-5).

In view of Mr. Goldstein's afterthought that Mr. Reid could inform the jury of the defendant's prospects for rehabilitation (ST. 2354-5), counsel's "strategy" in cross-examining the defendant's parole agent is that much more incredible. There can ben no rational explanation for counsel's elicitation of his client's arrest for possession of marijuana when he had objected to the introduction of his burglary and theft convictions. (ST. 2245-50, 2283). There can be no justification for counsel's belated recognition that his client could have some of the "redeeming qualities" he had sought in moving for additional evaluations (SR. 1086-7) and the subsequent establishment of his client's lack of rehabilitation. There can be no exercise of reasonable professional judgment for counsel to follow this last-minute plea to the trial judge (ST. 2354-5):

* * *

> . . . I would like to proffer [Mr. Reid's] testimony to his work and rehabilitative part. In other words, I would like to give this jury an option that they can--if they can give him a life sentence, he will be there for 25 years, and in the 25 years he would be given an opportunity to learn and go to school and rehabilitate himself. If he is eligible for parole--whether 45 or 30 or 40 years--he can be rehabilitated, while in prison, and he can serve a useful purpose, whatever that may be, whether it is talking to kids to tell them not to make the same mistakes he did, or whatever. Just to give them the option between the life and death, and let them understand a little bit more about them.

. . . with the utter negation of that option in his closing argument to the jury. (ST. 2421-40). Not surprisingly, defense

counsel was also unsuccessful in moving for the admission of the testimony of a Catholic priest. The judge found the testimony irrelevant based on counsel's proffer that the Catholic Church is opposed to a sentence of death by electrocution but that the defendant is not a Catholic, and the priest is not the clergyman of the defendant's parish. (ST. 2353-6).

After a brief recess, the defense presented the following evidence for the jury to consider in determining whether Roy Allen Stewart would live or die.

Mr. Goldstein's first question to the defendant's mother portended the shallowness of his presentation: "Mrs. Hodge, basically, Roy testified that there was some problem with his father during his teen years; is that true?" (ST. 2359-60). Following defense counsel's lead, Roy's mother began the story of her son's life when he was at the age of fifteen. When Roy was fifteen, his father took sick with chronic rheumatoid arthritis. The disease crippled Roy's father in just a few month's time. The man who had been active all his life was unable to walk. Roy left school in order to help with the care of his father. (ST. 2360). Because his father was a complete invalid, Roy's mother had to quit her job. To help support the household, which included Roy's brother and child, Mrs. Hodge took in sewing at home. Roy made some financial contribution by working at night in a nearby factory. The majority of his time was spent around the home. (ST. 2361-2). Ten days after his eighteenth birthday, Roy's father died in his arms. Roy clung to his dad, trying to give him artifical respiration. (ST. 2363). After the death of his father,

Roy seemed to turn to drugs; twice, he tried to commit suicide. This bad period went on for several months until Roy met a girl. He calmed down and changed. One night, he borrowed his mother's car to visit the girl, and a tire blew out. Some men pulled him unconscious from a canal. He was hospitalized for several days in Lake City because of a brain concussion. (ST. 2363-4).

After a long bedrest, Roy married the girl. Things were good for about five months until she started running around. The couple separated, and Roy started going bad again. Roy got arrested. It was the first time he had ever been in any kind of real trouble with the police. (ST. 2364).

Following defense counsel's lead, Roy's mother ended the story of her son's life three years later, when he was eighteen. As far as she knew, Roy had not used drugs before his father died. (ST. 2364-5). There was no cross-examination.

Roy's older sister Betty was married and living away from home at the time of their father's death. Betty noticed a change in Roy's personality; he had been close to his father, and he couldn't seem to cope with his loss. (ST. 2365-66). For several months, it was one thing after another with Roy. He was hospitalized under the care of a psychiatrist for an overdose of drugs, but the family did not have enough money to continue treatment. Because of Roy's age, the rehabilitation [center] could not help him unless he got into trouble. (ST. 2366-7). Betty thought Roy had been doing drugs before his marriage because of his up-and-down moods. After he had caught his wife with another man, Roy was arrested and put in a correctional

institution. Upon his release, Roy got a job with Delay Roofing Company. Betty did not see her brother often because his job was 80 miles away in Columbia. When she did see him, she felt that her brother was on drugs or alcohol. (ST. 2368-9). One day, Roy left without telling anyone. Some months later, Roy's Uncle Frank called the family to say Roy was with him. Roy was doing very well at the time; he was working, and he seemed to have settled down. (ST. 2369-70).

There was no other questioning of Roy Allen Stewart's sister. There was no testimony given by his uncle. No other witnesses to describe his childhood were called by the defense; no other evidence to shed light on his background was presented.

Linda Dennis and her husband, Frank, worked for her father at D & S Roofing in Miami. Roy got a job there working on a crew. He lived with his aunt and uncle for a month and did not give them any trouble. (ST. 2372-3). Roy then moved in with Brett Garett. Their duplex was on Wayne Avenue, across the street from Mrs. Haizlip's home. After six or seven months, Roy was kicked out because the roommates could not get along. On the occasions when she saw her nephew, Linda did not notice any drug usage by Roy. (ST. 2373-4). Roy came to Linda's house on the Monday morning after Mrs. Haizlip's body was found. He was hitchhiking home to South Carolina, and he wanted his aunt to wash some clothes. Linda saw no blood on Roy's clothes. After they were washed, she left them in a plastic bag in the laundry room. (ST. 2373-5). Later that afternoon, Linda discovered that $100.00 was missing from the desk drawer. When her husband got home, Linda told him

that she suspected Roy. Frank went looking for Roy, and they got into a bad fight. Worried, Linda called the family in South Carolina. On the following Wednesday, she learned that Roy had been seen walking towards his mother's house that morning. (ST. 2376-8).

On cross-examination, the state adduced one more detail of the fight: Linda had found out that Roy went at her husband with a broken glass. (ST. 2379).

At the time of trial, James Beckworth had known Roy Allen Stewart for approximately fifteen years. (ST. 2380). Beckworth had seen him off and on in South Carolina, and he was Roy's superintendent at D & S Roofing. Roy did not get along with the other roofers, and he was fired as a result of an altercation with one of them. (ST. 2381). Unlike Roy's aunt, James Beckworth did notice a change in Roy's personality after he moved in with Brett Garett. Beckworth attributed the change to abuse of drugs and alcohol. He was told that Roy was using marijuana and quaaludes. Beckworth thought that Roy was belligerent and maladjusted. He saw Roy one time after he had been fired, and Roy's condition seemed to have worsened. (ST. 2382-3).

To cross-examination, James Beckworth replied that he did not know the details of the altercation; that the defendant knew it was against the law to use drugs; and that no one ever forced the defendant to take drugs. (ST. 2384).

Roy Allen Stewart was the last witness to testify at his capital sentencing hearing. The following is the total evidence in mitigation of the death penalty which defense counsel produced

from his client: the defendant had been injured in the fight with his uncle. The defendant exhibited his stomach wound to the jury. (ST. 2385-6). There was no other questioning of Roy Allen Stewart. There was no other evidence of the circumstances of the offense or the character of the offender.

Because of this failure, the evidentiary portion of the sentencing phase consisted of the damning portrayal of but one period in the life of a man who was facing the electric chair. As a direct result of counsel's acts and omissions, the jury and judge were left with the incomplete picture of a man who broke the law; who was likely to do so again; who was unable to cope with the stresses of his life; who lost his job because of his belligerence; who stole from his aunt and fought with his uncle. If there was any possibility that the defendant would be given a life sentence despite counsel's performance during the presentation of evidence, it ended with the final arguments to the jury.

In an unsuccessful attempt to reopen his case prior to summation, Mr. Goldstein reaffirmed the unreasonableness of every decision he had made in the conduct of his defense:

> Let me proffer that the basis for it is that I think that the only argument to this jury as to whether or not to put him in the chair, perhaps there isn't a reasonable doubt. There is some reasonable doubt, though, and I want to just list the facts in which I believe there is some doubt, and one of those things is that the fact that Vanessa Brown did lie in her sworn statement when she made this -- gave this testimony to [Detective] Singleton, that Roy Allen Stewart had come to her house on March 15th.

(T. 2389-91). The trial judge reminded counsel of the nature of

the penalty phase of a capital trial:

> I must comply with the Rules of Court as I understand them, and that was a matter that went to the facts of the case, and this should have been introduced in the first part of the trial.
>
> To bring all kinds of facts into this proceeding; it is improper. We are instructed to the aggravating and mitigating circumstances in this proceeding.

(ST. 2391). (e.s.).

Unfortunately for Roy Allen Stewart, counsel failed to heed either the court's message or the prosecutor's closing argument on the applicability of aggravating and mitigating circumstances. Although punctuated by improper comments, the state's closing argument provides an instructive backdrop against which to assess the ill-chosen and prejudicial remarks of defense counsel. This is so because the prosecutor did for the jury what Mr. Goldstein should have done for his client from the start; dissect the death penalty statute, analyze the facts of the case in light of the aggravating and mitigating circumstances, and obtain the evidence to establish or negate the applicable factors. In convincing the jury of the state's case for death, the prosecutor did his job. After reminding the jury of its verdicts, reviewing its function at this stage of the proceedings, and informing the jury that the mitigating circumstances it may consider are unlimited, the prosecutor systematically discussed each circumstance and the evidence which established or negated it. (ST. 2391-2421).[10]

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10 The prosecutor's improper comments consisted of an incorrect instruction on the statutory mitigating circumstance of "extreme mental or emotional disturbance" to which no objection was made (Cont'd)

By contrast, the defense could not convince the jury of its case for life because it had none. Not only did counsel fail to obtain evidence to contest aggravating circumstances or establish mitigating circumstances, he failed to argue the applicability of any circumstance. In his final opportunity to furnish a rational basis for a sentence of life, defense counsel sealed Roy Allen Stewart's fate. In so doing, he committed the last of the egregious errors in his representation.

For his closing argument at sentencing, counsel resurrected the remains from his closing argument at the guilt phase of trial. Counsel began his argument with a personal attack and the unjustified charge that the prosecutor failed to enumerate "any other mitigating circumstances." (ST. 2421-2). He described his view of the prosecutor's characterization of his client by repeating the term "monster" several times, yet the prosecutor had not said it once. (ST. 2422-3). He asked the jury not to put itself at the same level as his client or to place any blame on his client that belonged to him. (ST. 2423-4). Defense counsel then fulfilled his most unreasonable decision as the representative of a person who had just been convicted of a capital offense; in the face of three confessions and more

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(ST. 2406); improper references to the non-statutory aggravating circumstance of "lack of remorse" to which a general objection was made (ST. 2413, 2417-18, 2421); and an inflammatory response to the message on the defendant's t-shirt to which no objection could be made, since it was defense counsel who permitted his client to wear to his sentencing hearing a shirt that said "It is more fun in a waterbed." (ST. 2417). Although counsel objected to the comment that the defendant used a loaded gun in his robbery attempt (ST. 2398), counsel withdrew from the case before he could object to the improper finding that the defendant placed a pistol to the clerk's head. (ST. 1183).

physical evidence than he had ever seen in any case, counsel tried to convince the same jury that it had made an error in judgment.

Counsel explained the first inconsistency that had led him to the conclusion that Roy Allen Stewart was not guilty of capital murder: the defendant admitted to the police that he attacked, that he robbed, that he raped, that he strangled, but he vehemently denied speaking with Vanessa Brown. (ST. 2424-6). In his argument, counsel relied on the defendant's admissions to Vanessa Brown, but her statement was not in evidence. Counsel relied on the defendant's explanations to the psychiatrists, but their reports were not in evidence. (ST. 2425-9). Counsel referred to deviations in the defendant's confessions, and he ignored the state's protestations:

> I will object to this. This has nothing to do with aggravating and mitigating factors.

(ST. 2428-37). Counsel concluded his argument on the inconsistencies which led him to believe in the defendant's innocence with the acknowledgment that the jury had not accepted it:

* * *

> The point I am trying to make is that I don't know what happened in that house. I don't believe that the State met their burden. I don't believe that I was able to prove to you, beyond and to the exclusion of a reasonable doubt, that somebody else came in the house and did away with Mrs. Haizlip. . . . .

(ST. 2437). Counsel began his remarks for mitigation of sentence with an announcement which foreclosed its possibility. Counsel told the jury that he never, ever excused Roy Allen Stewart for beating Mrs. Haizlip and that he never asked the jury to "forgive

him and turn him loose and give him another chance after beating a 76-year-old woman" because, as counsel explained, "I don't care what his excuse was. It was inexcusable." (ST. 2436-7). With just a few words, counsel kept his client on his inexorable path to the sentence of death, for counsel told the jury that had convicted Roy Allen Stewart of the robbery, sexual battery, and murder of a woman who was "next to a saint" that it could not mitigate the consequences of his client's least injurious behavior.

The damaging import of the remainder of counsel's argument is almost anticlimactic. The brevity and nature of counsel's analysis merely reinforces the conclusion that his investigation, preparation, and performance were prejudicial as a matter of law. Defense counsel told the jury it would be punishment enough that the "boy" of 23 would not see anything until he is 48 years old. He told the jury that the "boy" might be imprisoned for thirty years or more until he could convince somebody that he is rehabilitated. (ST. 2438). Counsel added:

> You are not talking about a burglary charge where they run him in and out; you are not talking about rehabilitation as you heard today. That is a farce! What did you do to rehabilitate him? They had him where they could have done something with him. They did nothing.

* * *

After nullifying any consideration by the jury of the defendant's prospects for rehabilitation, counsel made the only direct references in his entire closing argument to the particular circumstances of the defendant's life. Counsel sought to excuse the defendant's "badness" by blaming the shock in his life caused

by his father's long illness and death. Counsel argued, "[Roy Allen Stewart] never had a chance to socialize with people, because from 15 to 18 he was stuck in the house and working at night." (ST. 2438-9). Counsel's statement that the defendant "was a misfit from then on" (ST. 2439) is the sum total of his argument on the central issue of the penalty phase; why the circumstances of his client's background and character should mitigate a sentence of death in light of the offense for which he was convicted. Counsel's statement that the family vainly attempted to get help for the defendant after "he started to go bad" at 18 (ST. 2438) underscores his ignorance of the defendant's childhood development and mental condition and the concept of mitigating circumstances. After these brief, inaccurate, and unreasoned words in mitigation of a sentence of death, counsel returned to his theme that the defendant is not a murderer, even though "(y)ou already settled that issue." (ST. 2439-40).

Counsel concluded his final argument to the jury by asking it to take the chance which he had rejected:

* * *

> I want you to give him a chance. I want you to show that you are bigger, better, more humane, and Christian than he is. I want you to put him in prison and lock him up and I want to see whether he can learn a trade, whether he can go to school, whether he can become a citizen -- a useful citizen -- and come out maybe when he is 50 years old and contribute something. Maybe he can contribute while he's in prison. Maybe he can stop one kid from getting in trouble. They take those kids up there now to talk to them.
>
> What do you accomplish by killing them?
>
> Thank you.

(T. 2440).

The answers to the uncertainties counsel posed should have been known to him before trial. If counsel had conducted a minimally adequate investigation, he would have been able to say much more about Roy Allen Stewart than "maybe" he should have a chance to live; he must live.

Even from the heights of a deferential view, Strickland v. Washington, 466 U.S. ____, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984), it can be seen that counsel's representation fell far below an objective standard of reasonableness. The independent duty to investigate and prepare is the heart of effective representation. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982), cert. denied, Balkcom v. Goodwin, 103 S.Ct. 1798 (1983); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983). The special importance of a capital sentencing proceeding gives rise to a duty on the part of defense counsel to be prepared for that crucial phase of trial. Stanley v. Zant, 697 F.2d 955, 963 (11th Cir. 1985). This obliges counsel to "undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment[.] . . . (S)atisfactory acquittal of these responsibilities normally will be predicated on an independent search for witnesses with knowledge of the defendant's character, disposition to commit crimes and extenuating circumstances[.]" Baldwin v. Maggio, 704 F.2d 1325, 1332-3 (5th Cir. 1983). A complete lack of investigation and preparation cannot be deemed a tactical decision; an attorney cannot make a strategic decision that renders unnecessary an investigation of

his client's one plausible line of defense. Washington v. Strickland, 693 F.2d 1243, 1252-1253 (5th Cir., Unit B, 1982) and cases cited. The presumption of competency can be rebutted when trial counsel testifies credibly at an evidentiary hearing that his choice was not strategic. Id., at 1257; accord, Stanley v. Zant, supra, at 966 (11th Cir. 1983) (counsel for a capital defendant must be deemed ineffective were he to testify that he had no strategy whatsoever for the sentencing phase and that he failed to consider or develop possible mitigating circumstances).

The record in this case conclusively establishes the serious breach of counsel's duty to investigate and prepare for the penalty phase of trial. It establishes counsel's ignorance of the procedural and substantive aspects of capital sentencing law; it establishes counsel's disregard for his responsibilities in defending a client whose very life was at stake; and it establishes the ineffectiveness of his representation. When a defense counsel is "so ill prepared that he fails to understand his client's factual claims or the legal significance of those claims or that he fails to understand the basic procedural requirements applicable in court," it must be held that counsel failed to advocate "within the range of competency expected of members of the criminal defense bar." Young v. Zant, 677 F.2d 792 at 798 (11th Cir. 1982).

In Young v. Zant, supra, the defendant was sentenced to death under a process similar to the statutory scheme in Florida; the issues of guilt and punishment are considered by the jury in separate proceedings. His counsel proceeded to trial on an

insanity defense he could not possibly establish. 677 F.2d at 796. Counsel was not aware of the bifurcated process in death penalty cases; in his argument at the conclusion of the first phase, defense counsel conceded his client's guilt because of his mistaken belief that such action was strategically necessary in order to make a strong plea for mercy. 677 F.2d at 799. The Eleventh Circuit found that competent counsel would have handled the case far differently, and it held that counsel's failure to inform himself of basic criminal procedure deprived the defendant of his right to effective assistance of counsel in both phases of his capital trial. Young v. Zant, supra.

In King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), the Court ruled that defense counsel failed in his obligation to be prepared for the penalty phase of trial. The Court based its ruling in large part on the record of the state post-conviction relief hearing, at which the defendant had presented the uncontradicted testimony of competent attorneys and long-term acquaintances to support his claim for relief. 714 F.2d at 1485, 1490. The Court found that defense counsel presented some mitigating evidence at the sentencing hearing. Noting counsel's reasons for seeking a continuance of the penalty phase, however, the Court ruled that counsel's failure to present other available evidence cannot be deemed a strategic decision taken after a reasonable investigation into the alternatives. Id. at 1490.

As in this case, counsel did not merely neglect to present available mitigating evidence; he made a closing argument that "may have done more harm than good." Id. at 1491. The Court held

that counsel's argument, in combination with his failure to present available mitigating evidence, denied the defendant his right to effective assistance of counsel at the penalty phase of trial. King v. Strickland.[11]

In Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), the trial court overrode the jury's recommendation of life imprisonment. In proceedings before the trial judge, counsel had protested the lack of time while conceding that he had done nothing to prepare for the penalty phase, and he had stated that neither he nor the defendant were aware of any mitigating evidence to present. 714 F.2d at 1555-6. The Court rejected the notion that counsel's admissions were a self-deprecatory trial tactic, finding that his so-called strategy was "patently unreasonable" and could not excuse the failure to conduct a reasonably substantial investigation into the defendant's one plausible line of defense. 714 F.2d at 1556.

In reversing the defendant's death sentence, the Court held, "Counsel's ineffectiveness cries out from a reading of the

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11 The Supreme Court vacated the judgment and remanded the case for further consideration in light of Strickland v. Washington, supra. Strickland v. King, 466 U.S. ____, 104 S.Ct. 2651, 81 L.Ed.2d 358 (1984). On remand, the Eleventh Circuit adhered to its earlier decision. King v. Strickland, No. 82-5306 (11th Cir. December 3, 1984). The Court discussed the circumstantial evidence on which King was convicted and compared the case to the facts of Strickland v. Washington. The Court found that the Supreme Court's standards differed little from the standards it had applied in concluding that counsel's "failure to present available character witnesses in mitigation and his weak closing argument constituted both an unreasonable professional performance by the attorney and impermissible prejudice to King, thereby denying him effective assistance of counsel at the penalty phase of his trial." Id..

transcript." Id. at 1557. As in King v. Strickland, supra, the cause was remanded. Wainwright v. Douglas, 466 U.S. ____, 104 S.Ct. 3575 (1984). On remand, the Court adhered to its prior decision. Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984). It reiterated its view of counsel's ineffectiveness and held that "'under virtually any standard, prejudice is evident on the face of the record.'" 739 F.2d at 533.

The same conclusion must be reached here. Not only did counsel fail to investigate and prepare for the penalty phase, which he unreasonably believed would not occur so soon after the conviction, but he depicted his client as a bad person with no redeeming qualities whose least offensive behavior toward the victim in this case was inexcusable. See also Holmes v. State, 429 So.2d 297 (Fla. 1983) (holding counsel's representation during the penalty phase was ineffective where counsel failed to contest the applicability of aggravating circumstances, to argue for the existence of mitigating circumstances, or to support mitigating factors with available expert evidence of the defendant's mental and emotional condition, and where counsel's closing remarks to the sentencer consisted of a general argument against capital punishment and the expression of hope that the judge had "mellowed" since the last time he had imposed the death penalty).

Roy Allen Stewart has shown that the deficient acts and omissions of counsel were based on Mr. Goldstein's unrelenting conviction that he could win this case against overwhelming odds. He has shown that counsel's single-minded pursuit of a not-guilty verdict was unprofessional and unsound. He has shown that

counsel's failure to take steps in preparation for the penalty phase was unreasonable in light of the state's strong case for guilt and the insubstantiality of his counsel's case for innocence. He has shown that counsel's overall trial "strategy" resulted in the total failure to investigate and prepare for the penalty phase of trial, even though counsel knew before trial those witnesses who would be called to establish aggravating circumstances. He has shown that his counsel's ego and his ignorance and his misallocation of resources disabled his representation at the penalty phase of trial. He has shown that counsel's performance at the sentencing hearing consisted of eliciting damaging evidence about his background and character, furnishing incomplete and meaningless evidence from "some warm bodies," and presenting a closing argument that was patently unreasonable and incurably prejudicial. In short, Roy Allen Stewart has more than met his burden of demonstrating that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 104 S.Ct. 2052 at 2064.

Moreover, the record shows that counsel's representation at sentencing was not merely decificent or indequate in most respects, it was functionally equivalent in every respect to having no representation at all. See Adams v. Balkcom, 688 F.2d 734, 739 n. 1 (11th Cir. 1982), citing, Davis v. Alabama, 596 F.2d 1214, 1221-22 (5th Cir. 1979), vacated as moot, 100 S.Ct. 1827 (1980). This case is one in which the ineffectiveness of counsel is so pervasive that no specific inquiry into prejudice is

required. See United States v. Porterfield, 624 F.2d 122, 125 (10th Cir. 1980); Pickens v. Lockhart, 714 F.2d 1455, 1465-68 (8th Cir. 1983). See also Young v. Zant, supra at 798; accord House v. Balkcom, 725 F.2d 608, 619-20 (11th Cir. 1984) (particularizaed inquiry not required in light of pervasiveness of counsel's errors at both phases of capital trial, including counsel's failure to investigate and develop meaningful strategy and to be present at crucial portions of trial, to prepare the defendant's testimony, and to acquire knowledge of the capital sentencing process). Thus, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there had been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." United States v. Cronic, 466 U.S. ___, 104 S.Ct. 2039, 2047 (1984). Roy Allen Stewart has shown that because of counsel's utter failure to challenge the state's case for death, the resultant penalty must be deemed the unreliable product of a fundamentally unfair sentencing proceeding.

The record of the hearing on the defendant's motion for post-conviction relief is further demonstration of the prejudice engendered by counsel's deficiencies. From a comparative review of the evidence that a reasonably effective attorney would have presented at the penalty phase of trial in 1979, it can only be decided that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, 104 S.Ct. at 2068.

Instead of painting a picture of a "monster" whose life began

at the age of fifteen, a reasonably competent attorney would have presented the story of a troubled youngster who, despite all the attempts that he made, never received the care and support from his parents or the acceptance of his peers that he so desperately needed. He would have presented the story of a person who had been mentally ill throughout his life but who is, nevertheless, uniquely amenable to rehabilitation and treatment. He would have presented sufficient reasons for a sentence less than death.

Roy Allen Stewart's troubled existence began before he was born. When his mother was four months pregnant, his sister Paulette was rushed to the hospital. After Paulette was taken into surgery, their mother collapsed and had to be hospitalized as well. Only four years old at the time, Paulette had to remain in bed for about six months. She was learning how to walk again when Roy was born. (T. 18-20). From the day he was born, Roy was different. For several weeks after birth, he just slept. Unlike other babies, Roy did not cry. He had to be awakened for his feedings. (T. 20-1).

Roy was spoiled by his family. His mother was the main disciplinarian, and she meted out her punishment inconsistently. Either Roy's tantrums were indulged or he was beaten. Eventually, Roy's mother closed her eyes to her son's problems. (T. 21-4). Roy's mental and emotional difficulties became more apparent in elementary school, where he developed a pattern of truancy and came to believe himself incapable of performing adequately. (T. 32-2; R. 700-1). There was one teacher, though, from whose class Roy did not run away and under whose care he seemed to thrive;

Miss Dora Truluck.

At the time of hearing, Miss Dora had taught school in Roy's town for nearly forty years. Out of the thousands of children who had passed through her classroom, she remembers Roy Allen Stewart with fondness:

> [MISS TRULUCK]: I can see him in my classroom right now as if it was last week. He was a little taller than the other children, had kind of reddish looking hair and he just stands out in my memory.
>
> [INVESTIGATOR COHN]: Why is that?
>
> [MISS TRULUCK]: Well, there are several reasons. Roy was, to me, was a little bit different than the other children in the classroom and he seemed to be wanting attention, seemed to be needing some special attention or love. I am not a psychiatrist and I can't say exactly what it was, but in my dealings with children over the years he was just a little bit different.

(ST. 573; T. 114).

Roy was a poor reader, and he did not perform well in school. He seemed to be a disturbed child. Miss Dora could not label the problem, but she though something was "wrong with Roy." (T. 119). In all those years, she taught two children about whom she felt something was wrong. One child had been under psychiatric care and is doing quite well. The other child was Roy. (T. 119).

Miss Dora recalled that Roy's parents never communicated with her:

> Well, now I got the impression that he did not get the support at home that he needed because we had parent-teacher conferences during the year and no one ever came and he seemed to be disappointed because all the children felt so proud when their parents came, but hsi parents never came. So, I didn't get the opportunity to

> talk with them. I felt that Roy needed some special help but I didn't know how to give it to him. I gave him all the help that I could.

(R. 573-4; T. 117-8).

Roy was a pleasant but highly emotional child who tried really hard to make friends. His attempts would backfire because he did not know how. Roy would do little things to annoy the children, and then he would come to Miss Dora in tears because the children picked on him. (R. 544-5; T. 116-7).

Roy did have two friends in that class. One was Jeannie Truluck, a very popular girl. Roy had a crush on her, and he would ride his bike up and down her street. Jeannie had a speech impediment because of her deafness. Roy took time with her and made sure that she understood things. (T. 120, 128-9). Roy's other friend in school was Freddy Young. Mr. Young is a minister now, but he was a fellow "outcast" in fourth grade. He and Roy did not live in town; they were at the lower end of the socio-economic scale and were looked down upon by other children. (T. 124-7). Roy and Freddy signed up for Little League, but their parents did not come to the games. (T. 125-6). Although both children were picked on by other kids, Roy protected Freddy. Freddy was once confronted by some bullies in school. Roy stepped in and said, "If you fight him you got to fight me." Roy took Freddy's place. (T. 128). Roy even saved Freddy's life. (T. 240). They were on a Boy Scout outing, and a boy started to drown in the river. Roy heard his shouts. Although he had just learned to swim, Roy jumped in and brought the boy back to shore. Although his own family congratulated him, Roy was bitterly

disappointed that his achievement went unrecognized by the Boy Scouts and by the parents of the child he had saved. (T. 25-6).

The friendship ended after several months, Freddy's mother felt that there was no supervision at Roy's home. (T. 130).

There was another person in Stewart's childhood who felt that he was not given proper guidance. J. Wallace Mixon, South Carolina Department of Parole and Community Corrections, is the supervisor of the parole officer who testified at the penalty phase of trial. (T. 310-11). Instead of eliciting damaging evidence through cross-examination of the parole officer, defense counsel should have presented the testimony of a corrections official who had known the Stewart family all his life.

Mr. Mixon's father was a sharecropper with Roy's grandfather. Mr. Mixon knows all of Roy's family. (T. 318; R. 584). His first official contact with Roy came when the child was nine or ten years old. As a magistrate's constable at the time, Mr. Mixon investigated complaints by the townspeople of Roy's thievery. He recalled one incident in particular. Mr. Mixon and the chief of police questioned Roy about a child's sword that was taken from a home. Roy readily admitted the theft, and he took the men to a little makeshift building in the woods constructed out of scrap materials. Roy called it his hideout, and he retrieved other worthless items and coins that he had taken. Mr. Mixon and the police chief took Roy to confront his parents. Instead of reprimanding their son, they became indignant and took his side. The items were returned, and no one pressed charges. (T. 319-22; R. 584-7).

Like the other individuals who knew the background and character of the child who was left without supervision, J. Wallace Mixon thought Roy was "different":

> [MR. MIXON]: Well he didn't act like a normal person to me. He was withdrawn, he was quiet, he looked to me like he had something on his mind that maybe was troubling him.
>
> [INVESTIGATOR COHN]: Did he ever talk to you about anything like that?
>
> [MR. MIXON]: He didn't express anything. That's my, that's my opinion, my recollections on seeing him, seeing his expression on his face from the time he was a little boy.
>
> [INVESTIGATOR COHN]: I see. Did you ever see any kids pick on him?
>
> [MR. MIXON]: I didn't, not personally, no.
>
> Q: Did you ever express any of these opinions, have you ever expressed any of these opinions to anyone else in this office?
>
> A: I have related my feelings for Roy to practically everybody in this office.
>
> Q: At what time did you do that?
>
> A: I don't remember.
>
> Q. Well was it before you heard about these charges down in Florida, subsequent to those charges being made known to you?
>
> A: Probably after he got into the trouble in Florida because as I said, I didn't supervise him directly. I knew that he was on parole. And after he got in trouble in Florida and I heard what they had charged him with, then it impressed me, see. Then I could look back and I began to tell different people in the office my knowledge of him, you know, dating back when he was ten, twelve years old.

(R. 590-1; T. 322-3).

Although Mr. Mixon believes that the defendant should remain in prison, like other people who knew the background and character

of Roy Allen Stewart, the parole supervisor believes that death is not the appropriate punishment in this case:

> [MR MIXON]: Based on my knowledge of him, his family, and his family in their dealings with Roy, whether -, I don't want to belittle his parents. I am satisfied they were doing the best they knew how, they thought they were doing right, but I am satisfied if Roy had had different supervision, brought up under a different environment, I don't feel like he would have been in the situation and condition he is in today. Therefore, I don't think it should be used in this instance. However, I am in agreement with the death penalty as I say in certain cases.
>
> [INVESTIGATOR COHN]: Do you feel sorry for Roy Allen Stewart?
>
> [MR. MIXON]: Yes, I have always had a feeling for him due to the fact that he needed something he wasn't getting.

(R. 589-90; T. 324-5). And, like other people who observed the development of Roy Allen Stewart, Mr. Mixon would have testified at the penalty phase of trial if only he had been asked. (T. 324).

The environment in which Stewart grew up was placed in perspective by Sybil Cox, a woman who met Roy during the period after his father's death and the break-up of his marriage. Ms. Cox, a supervisor of hospital staff in the nearby town of Sumter, explained that Roy was raised in a small town where everyone knew everybody else. Roy felt that no matter how much he tried, he could not live down his mistakes. (T. 100-1, 105; R. 607). Roy confided many things to Sybil Cox. When Roy was a small child, he stole little things. As he got older, the objects became more valuable, such as bicycles. Roy felt that his mother was against him and did not want anything to do with him. He felt rejected because he tried to reach out for help, and he was met with

criticism. So often, Roy spoke of his father and how he had pushed him around in a wheelchair. Although he was left alone most of the time, Roy felt that it was his responsibility to look after his father. (T. 102-3, 109; R. 607).

Roy was fun to be with, and he was very good to her and her children. Although he respected the ban of alcohol and drugs in her home, there were times when he was not the same person she had met. After a while it became obvious to Ms. Cox that Roy was on drugs. There were two incidents which made her realize that Roy was using more than marijuana. One afternoon, Roy came to her home and inexplicably went into a rage. He started crying and using profanities. He ran into a field, and she had to keep him from tearing out his hair. Sybil Cox took him to the hospital, and he calmed down the following day. The second incident occurred on the afternoon of his arrest for attempted armed robbery. As Ms. Cox was coming out of a store, she saw Roy parked in someone else's car. He asked if they could talk, and she said, "Yes." Roy started shaking and perspiring. When she asked him what was wrong, he repeated, "I've gotta go," and he drove away. Ms. Cox thought he looked like a "junkie needing a fix." (T. 105-8; R. 607-8).

For the jury, Ms. Cox would have assessed Roy Allen Stewart's character as follows:

> When I heard about what he did or was convicted of in Florida, I firmly don't believe he is capable of this in his right state of mind. He never harmed me in any way although, I heard others say he did drugs and what he'd do when on them, never anything when he was himself.
>
> Roy never had the advantages of after school

> nurseries, children's mental health program or drug centers. He needed care long before I met him because his problems were very deep seated.
>
> How do you take a small neglected child, guilty of children's misdemeanors, lonely and taking drugs as a false reality and expect them to become productive individuals? It always leads to disaster for the individual and sadly, in a lot of cases for others.
>
> To sum up Roy Stewart. There was a little boy feeling lonely and rejected, stealing items but not being punished, critized for his actions continuously, reaching out for help but not getting it. As he grew older, there were the very reliable drug pushers and supposed friends to lend their hand, not to help as he felt but to eventually help his self-destruction and someone else's. Once he matured he was so deep into this, that he was not able to pull away himself. . . .

(R. 608).

Sybil Cox visited Roy while he was in jail for attempted armed robbery, but she never saw him after he was released. (T.108-9).

Sometime after his release, Roy's mother asked her brother to give him a job at D & S Roofing Company. Roy moved to Miami and lived with Linda and Frank Dennis. His aunt and uncle enjoyed his visit. Roy participated in family outings, and he took pleasure in being with the kids. He had a lot of patience; if the children got their fishing lines tangled or if they needed bait for their hooks, Roy would take the time out to do it for them. Without being asked, he helped with the dishes and did other little things around the house. He did not stay out late, and he followed the rules of the house. (T. 333-5, 396-8; R. 613-15).

The Dennis' have a small, two-bedroom home and Roy was asked to find his own place after he had been working for a month. Roy

moved to a duplex just a few blocks away. He developed his own group of friends and gradually stopped visiting his relatives. Roy's new friends were involved with drugs; they weren't the type of people Linda and Frank Dennis associated with. (T. 337-8, 398-9).

For several months, Roy was a good worker. He developed an attitude, though, that he could work independently. His attitude caused problems with other workers, and his drug usage increased. Roy admitted smoking marijuana and taking THC and Quaaludes. Roy did not really get messed up until he lost his job at D & S Roofing. (T. 338-41; R. 626-7).

Roy was fired by Frank's partner and father-in-law, Thomas James Snowden. Frank believes that Jim Snowden should have investigated the altercation more closely because they found out later that it wasn't Roy's fault. (T. 341-2).

Instead of adducing from Stewart's aunt the evidence that he stole money from her and that she had heard he attacked her husband with a broken glass, defense counsel should have provided an explanation through the testimony of the combatant who started the fight, Frank Dennis.

Approximately one week before Mrs. Haizlip was killed, Roy had asked Frank to loan him $50.00 to go back home to South Carolina. Frank said "No" because he thought Roy would spend it on drugs. The night Frank learned that Roy took the money, he went to Roy's hangout, the Perrine Pub. Frank asked Roy for the money. Roy became angry because he thought his uncle was embarrassing him in front of his friends. Frank was angry because

Roy was supposed to be broke, and he was spending his money on beer and a game machine. Roy invited his uncle outside to talk. Roy continued to rail about his uncle's demand for the money, so Frank "busted his head open" and knocked him down. Roy held onto his glass of beer as he fell. After his uncle kicked him a few times, Roy broke the glass and tried to stab Frank in the leg. Roy kept coming at Frank, so Frank pulled out his pocket knife and stabbed his nephew with it. (T. 343-6; R. 634-43).

Frank Dennis was not asked to testify at the penalty phase of trial. He could have explained to the jury why he placed part of the responsibility on Roy's parents for what happened to their son. Frank echoes the same theme expressed by Dora Truluck and J. Wallace Mixon; Roy did not have someone to watch over him when he was a child. (T. 346-8).

Instead of eliciting only unfavorable evidence of Stewart's employment record, defense counsel should have presented the testimony of the man who has regretted his hasty decision to fire Roy Allen Stewart.

During the first several months he worked for Thomas James Snowden, Roy was a good employee, and he carried out his responsibilities in a workmanlike manner. Roy seemed like a fun-loving person who got along with well with the group. Approximately two months before the altercation with the other roofer, Roy's attitude and personality seemed to change; either something was bothering him or he was on drugs. (T. 391-3; R. 653-7).

On the day of the incident, one of the roofers radioed Jim

and said, "I want you to get out to the job quick. Roy went crazy." Jim spoke to the men at the job. They said that Roy just seemed sick. He went off his rocker. Roy had threatened one of the men, and he had been running up and down the street cursing in a loud voice. (T. 394-5; R. 657-8).

Jim Snowden did not ask, and Roy did not offer an explanation. If Jim had to do it all over again, he would have investigated the incident more closely. He would have given Roy time to calm down, and he would have asked Roy more questions. He would have questioned each man individually before acting so hastily. (T. 395; R. 660-1).

If he had been called to testify at sentencing, Jim Snowden would have related to the jury an episode of selflessness reflecting on the character of Roy Allen Stewart:

> [MR. SNOWDEN]: Yes. One incident I want to point out, the PTA from the South Miami Heights Manor Elementary School called me and said they wanted to know if I would donate any leftover shingles I had to cover the roof. I told them I had some but not all of one color. I had various colors. They said they didn't care if they were mixed up various colors as long as they didn't leak, and I told them I would donate the shingles to cover the roof and I thought it would be nice at the time if maybe we donated labor to put those shingles on that roof.
>
> I asked all the men if they would volunteer to lay these shingles on if I furnished the shingles, nails, all the plastic roof, cement and various stuff we needed for the roof.
>
> I asked all of them. I had no volunteers till I came to Roy Stewart and Roy Stewart volunteered to nail those shingles on without pay.
>
> I went and got him on a Saturday morning. I had a lot of trouble getting ahold of the PTA Chairman to get a gate unlocked where we could get in and Roy loaded those shingles on the top. He

put the shingles on the roof and nailed them without a dime's pay.

He volunteered that. He had no kids at school, or no children. And nobody that he knew even went to that school as far as I know, but that was just a volunteer on his own part, and at that time that happened, I would say about three months before the murder incident come up.

[INVESTIGATOR COHN]: Prior to the change in personality?

[MR. SNOWDEN]: Well, I would say about a month or so before his change in personality and he seemed to be happy to do it.

[INVESTIGATOR COHN]: Never got any real thanks from anybody?

[MR. SNOWDEN]: The PTA wrote a letter thanking us for doing the job. I never made any personal contact with any of them. It was all on the phone and by letter for thanks for doing the job.

[COHN]: And he was never paid for that?

[MR. SNOWDEN]: He was never paid for it.

[COHN]: That was the kind of person that he was?

[MR. SNOWDEN]: That's the kind of person he was before his personality changed.

* * *

[MR. SNOWDEN]: And every time I go by there I see that roof. It's still up there. It makes me think of him.

(R. 663-6).

Instead of producing no evidence whatsoever to verify Stewart's substance abuse and its effect on his emotional and mental condition in the weeks preceding the homicide, defense counsel should have offered the testimony of two men who were in a position to observe Stewart's turmoil.

Like the other men at D & S Roofing Co., Charles Homer Washburn felt that Roy Allen Stewart was a good worker, outgoing and friendly. They were friends, and Roy sometimes drove him to work. Roy's personality changed the last few months that Charles Washburn knew him; he was heavy into drugs. Mr. Washburn observed him swallowing Quaaludes after working hours like they were popcorn. Roy would sprinkle "Angel Dust" on the marijuana he smoked. It got to the point where almost every day after work Roy was getting high on something, either alcohol or pills or marijuana. ((T. 410; R. 669-76). Roy was told that he was taking too many drugs, but he did not think so. Like an alcoholic, Roy said he knew how to handle it. After a while, nobody wanted to be around him. He was nasty and did not give a damn about anyone, including his close friends. Roy probably got fired because of his strong need for drugs. (T. 413-4; R. 677-80). After Roy was fired, his drug use increased; he was reduced to living in the woods. (T. 412-3).

If Charles Washburn had been called as a witness at the sentencing hearing, he would have testified that death is not the appropriate penalty for Roy Allen Stewart. It is Mr. Washburn's opinion that Roy did not know what he was doing when he was under the influence of alcohol and drugs or what the drugs were doing to him; he was like Dr. Jekyll and Mr. Hyde. (T. 412; R. 696).

The other individual who observed Roy Allen Stewart's turmoil did testify for him at the penalty phase of trial. Defense counsel's perfunctory examination of James Traft Beckworth is in sharp contrast to the detailed questions posed by the prosecutors

during pretrial deposition, which Mr. Goldstein attended. Instead of eliciting a one-sided portrayal of Stewart's maladjustment and belligerence, defense counsel should have reinforced Mr. Beckworth's discerning analysis of June 20, 1979 of the person he had known for years:

* * *

(LANCE STELZER) [ASSISTANT STATE ATTORNEY]: Did you ever see Roy Stewart drinking a lot of alcohol or smoking a lot of marijuana?

[MR. BECKWORTH]: Yes.

[ASSISTANT STATE ATTORNEY]: Did you ever see Roy All[e]n Stewart drink a lot of alcohol and smoke a lot of marijuana and become violent?

[MR. BECKWORTH]: No.

[ASSISTANT STATE ATTORNEY]: In your opinion, is Roy Allan Stewart sane or insane?

[MR. BECKWORTH]: I don't think I am qualified to answer such a question.

[ASSISTANT STATE ATTORNEY]: Did you ever see him act in such a manner that you would say to yourself, "That guy has got to be crazy"?

[MR. BECKWORTH]: Very definitely. He is kooky.

(ROBERT GODWIN) [ASSISTANT STATE ATTORNEY]: Let me say this to you.

You don't have to be a psychiatrist or psychologist to give an opinion as to whether someone is sane or not. In Florida law, you are allowed to give your opinion as a layman.

So, based upon your experience and based upon your knowledge of Roy Allen Stewart, were you ever able to form an opinion, in your own mind, as to whether he was sane or insane at the time you knew him?

[MR. BECKWORTH]: From the time Roy came to Florida, Roy has not been the Roy Stewart that I personally knew.

> He is so heavy into drugs and that I know he is not himself. He's -- I can't use the term "insane". I'm sorry I can't do that.
>
> But, he's very definitely -- since I am an ex-alcoholic and drug addict, I know the actions of these people and that's not -- I don't guess it is legally insane, but to my opinion, yes, he is insane.
>
> * * *

(A. 9-10; T. 407).

During the month preceding the homicide, Jim Beckworth saw Roy on a daily basis. He could communicate with him, but they did not have a normal conversation. Mr. Beckworth explained to the prosecutor why Roy only appeared to understand him to a certain extent: "If you asked him what time of day it was -- He would tell you so many joints to the next one. His entire life was around where he was going to get the next dope from." (A. 10-11).

Instead of allowing Mr. Beckworth's penalty phase testimony to end on the note that Roy Allen Stewart was never forced to take the drugs he knew were illegal, defense counsel should have countered with Mr. Beckworth's opinion:

> * * *
>
> I don't think anybody, once they reach a certain stage and their bodies are craving it, it is not freely taken again. It is dictated. It becomes their way of life. I don't think [he always took drugs freely and voluntarily]. I think that it was dictated to him.
>
> His body and his mental capacity told him that this is top priority of your life. Get more of it.

(A. 22-3).

When he was asked what he had told the defense investigator about Roy Allen Stewart, James Beckworth replied:

[Mr. Beckworth]: I told him I thought he was a very extremely kind person who -- and, I believe I said this exactly to him. That, if you know Roy and you know anything about people who are very firm believers in the bible, then there are certain things in the bible that says that a person -- the demon possess. Roy was raised among Pentacostal holiness people. They are extremely, extremely religious people. The women do not wear makeup. They don't shave their legs. That extreme religious type people, and they believe in demons casting out of the demons.

If that is true -- and I'm not sure that it is or is not -- but, if such a thing is possible, definitely I believe there was a demon in Roy causing him to do all of these things like this stuff.

[Assistant State Attorney]: Did you tell that to the investigators that came to you?

[Mr. Beckworth]: Yes, I sure did.

[Assistant State Attorney]: Can you tell me what else you told the investigator?

[Mr. Beckworth]: Other than the fact I think Roy is an extremely kind person, I don't believe --

[Mr. Goldstein]: Let me help you. Tell him about the incident with the father.

How long have you known Roy Stewart?

[Mr. Beckworth]: Since he was 14 -- 14, 15 years old.

[Mr. Goldstein]: Tell him about the incident with his father.

[Mr. Beckworth]: His father had a disease where his muscles -- the man couldn't stand or anything, you know. I have gone to Roy's house and Roy a teenager, would have to get up and go to the bathroom when his father would be sitting on the commode, and wipe that man's ass and put his pants back on and bring him back to the chair and sit him down. Not once, many times I have seen that. I have seen him sit there and hand feed his father because his dad would be able to handle the spoon once or twice, and Roy would feed him.

* * *

((A. 15-17; T. 403-5).[12]

And, instead of calling the defendant for the sole purpose of exhibiting the scar he had received in the fight with his uncle, counsel could have presented his client's own story. The transcript of Roy Allen Stewart's clemency interview on March 25, 1983 indicates that the defendant would have been able to reveal to the jury much more about himself than his scar. (R. 846-80). The uncontradicted testimony of James Beckworth and other co-workers, townspeople, and relatives shows the harm caused by the serious errors of defense counsel. The positive impact on the jury of the moving testimony of these simple people, unskilled in law and anxious to help, cannot be disputed. And, when the testimony of the defendant's expert psychologists is added to the sentencing calculus, it cannot be disputed that the defendant has met his burden of demonstrating prejudice. The unrefuted testimony of these experts provides objective confirmation of mitigating circumstances and positive explanation of aggravating circumstances.

Dr. Syvil Marquit is a board-certified clinical psychologist who has testified in capital cases. He was qualified as an expert without objection. (T. 419-20).

Dr. Marquit first met Roy Allen Stewart on April 14, 1983 at

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12 After speaking with defense counsel prior to trial, Mr. Beckworth received the impression that counsel did not particularly care for his testimony one way or the other. Counsel did not review his testimony prior to sentencing. (T. 408-9).

Florida State Prison. Before he examined the defendant, Dr. Marquit had reviewed the reports of other experts, the accounts of people in Stewart's life, and his medical records. He was aware of the circumstances of the offense and the defendant's detailed confessions. During the course of his five-hour visit, Dr. Marquit conducted a personal interview with Roy Allen Stewart and administered a battery of tests, including the Bender Motor Gestalt Test with recall procedure, the full WAIS, a Sentence Completion Test, the Rorschach Test, the Psychological Associates Unconscious Associations Probe, and the Marquit Verbal Thematic Productivity Test. The latter two tests were developed by Dr. Marquit, and they are used by many psychologists throughout the country. Dr. Marquit used his own thematic apperception test because Stewart produced adequate results on other standardized tests even though he had a history of being inadequate. (T. 421-3, 457-8; R. 700).

Based on his review of considerable documentation concerning the offense and the offender, his personal interaction with the defendant over the course of several hours, and the results of the battery of psychological tests he administered, Dr. Marquit concluded that Roy Allen Stewart is now mentally ill and has been all his life. (T. 424; R. 700).

Dr. Marquit reviewed the history of Roy Allen Stewart which helped form the basis for his opinion. The behavior of Stewart was different from that of his three siblings. His mental illness became more apparent in school where he could be more readily compared with other children. Although he tried to participate

with other children in ordinary activities, he was unsuccessful. Stewart was unable to socialize with and relate to others in a normal fashion. He reacted by becoming a loner; by doing things that a person does alone, such as fishing or playing pinball. (R. 700-1; T. 424). Stewart's limitations in relating to others was compounded by his inadequacy to absorb academic material. He probably had a learning disability. Thinking himself "slow" and unable to succeed, he gave up interest. Despite his normal intelligence, Stewart was twice kept back in school, losing two years of education. He finally quit school altogether in ninth grade. Tests show, however, that Stewart has the ability to learn. (R. 701; T. 424).

His mental illness went unrecognized. During Stewart's formative years, he was not provided with either guidance for academic achievement or supervision for personal development. He was pampered as the baby of the family, and he was allowed to do much as he pleased. Stewart developed ways of his own, often resisting and resenting interference. For the most part, he suffered no consequences for his wrongdoing, since he was admonished only when his misdeeds strongly annoyed his indulgent parents. Punishment, when it came, was physically abusive. Since he was not carefully watched or corrected during his upbringing, Stewart was not impressed that punishment for wrongdoing was at all certain. More often than not, he suffered no consequences for his misdeeds. (R. 701; T. 425).

The child looked at his failure in school and used it to feel more inferior. Gradually, he developed a tendency in his early

years to compensate and give himself things. He would usually steal things of minor importance, whatever objects he could take. Then, Stewart began a series of breaking and entering acts. During this time, there is no evidence at all that he understood what was happening to him; nor did his family understand that his behavior was not normal. Indeed, his habit of petty stealing is so strong, that he does not believe himself able to control it. Because he regards this tendency as beyond his control, he tends to adapt by developing naive fantasies which help him to overcome these feelings of helplessness. In his mind, he creates an environment free of stimuli which encourage his stealing impulses. His mental process reveals that he experiences his stealing behavior as a compulsion over which he has insufficient control. (R. 702-3; T. 424-5; 432-3).

Dr. Marquit explained the relationship between Stewart's detailed confessions and the "black-out" episode he had experienced at the time of the offense. Because Stewart's parents, especially his mother, administered physical punishment so inconsistently, he developed hysterical patterns of reacting to punishment or confrontation. If he was bigger than the person who confronted him with force, like Mrs. Haizlip, he would react by beating him or her. So attacked, he would oftentimes black-out and be unable to recall the incident. Yet, confronted by a person of superior power who does not use overt force, such as the interrogating officers, he seeks to avoid physical contact by becoming very submissive and accomodating. (R. 701-2; T. 425-6, 475-6). In view of Stewart's reaction when Mrs. Haizlip slapped

him and his resultant loss of memory, there is nothing inconsistent with the fact that he later confessed in such detail. When confronted by police, he would tell everything he could possibly tell and not disagree about anything. Stewart was afraid of getting hit, so he poured forth. (T. 435-6, 475-6).

He developed rage reactions to his feelings of inadequacy. He had many fears in life. He could not be self-supportive for long periods of time, and he did not feel attractive to women. He usually worked with his family or friends so that he could get along. He knew that he was different, and he had much experience with being inferior. Stewart could not understand why he was unable to get along well with other people. Notably, there were periods in his life where he did not engage in antisocial behavior. These were the times when he felt somewhat nurtured by another person. According to Dr. Marquit, these periods of response and the results of the tests suggest the possibility of a good chance for this man who never had one. (R. 703-4; T. 425-6).

Like Stewart's stealing behavior, his use of alcohol and drugs made him feel better. It reached the stage of a compulsion, which is definite evidence of a mental disorder. It takes him out of his misery, so he does not have to feel bad about himself. It is a form of self-restoration. Drug usage would render Stewart even more ineffectual because his mind would not be available to him. (R. 704; T. 426, 430, 434).

Dr. Marquit was not sure whether the hysterical patterns of behavior which Stewart had developed in life were exacerbated by his substance abuse. It would lessen his control over impulses,

but because of the chronic nature of his mental illness, Stewart was always in distress. The use of alcohol and drugs would remove any impediments he might have. It would be difficult for anyone under the influence of the amount of alcohol and drugs that have been documented in this case to be in full mind. It is more likely that the distress under which Stewart was operating became more reactive under the circumstances of this case, where the elderly victim physically confronted him. Stewart's test responses indicate that he goes out of his head when he is slapped in the face. Not only that, but there is reference to the fact that Stewart cannot tolerate seeing a child being slapped in the face. Thus, based on the facts and circumstances of this case, Dr. Marquit was able to form the opinion that the capital felony was committed while Roy Allen Stewart was under the influence of extreme mental or emotional disturbance, and that the capacity of Roy Allen Stewart to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T. 446-9, 469-71; R. 706). [Sec. 921.141(6)(b),(f), Fla. Stat. (1979)].

In addition to the establishment of mitigating circumstances, Dr. Marquit's testimony was sufficient to negate the effects of aggravating circumstances. Dr. Marquit described how the defendant's mental condition contributed to the rage under which the heinous offense was committed after the victim slapped him. (T. 425-6, 446-9, 464-7; R. 706). [Sec. 921.141(5)(h), Fla. Stat. (1979)]. See Jones v. State, 332 So.2d 615 (Fla. 1976); Huckaby v. State, 343 So.2d 29 (Fla. 1977); Burch v. State, 343 So.2d 831

(Fla. 1977). Dr. Marquit described the attempted armed robbery, on which was based two findings in aggravation as a "cry for help." Stewart agreed to do it, but he could not go through with it. It was the kind of act by a person who is caught up in things he cannot control; he does not know what to do, he does not understand anything about it, and he cannot help himself. Dr. Marquit bases his opinion on the uncharacteristic features of the robbery attempt: Stewart did not take the money he had demanded and is so in need of having; he did not try to hide from the police; and, he carried a gun, which he has never used before or since in connection with people. (T. 429-30, 434-5; R. 702). [Sec. 921.141(5)(a),(b)]. Stewart did not kill Mrs. Haizlip in order to derive a pecuniary gain from the theft of her pocket watch. Stewart was under the spell of his compulsion to steal. Because of his mental illness, his need to restore his feelings of self-worth, he did not have the wherewithal to resist. (T. 432-3; R. 702-3). [Sec. 921.141(5)(f)].

The most compelling evidence of the prejudice caused by counsel's closing argument in the penalty phase of trial is Dr. Marquit's testimony regarding Roy Allen Stewart's basic humanity and his prospects for rehabilitation and treatment.

These qualities are manifest in Stewart's test responses, which are reliable indicators. They are reliable because Stewart is not smart enough to malinger. Although he is of average intelligence, Stewart cannot use that intelligence in a way to have "smarts." That Stewart did not malinger on the tests administered by Dr. Marquit is shown by the lack of distortion in

the copy drawings and by the consistency of the other results with Stewart's life history. (T. 437-8). Dr. Marquit did not find anything to indicate, in either the interviews or the test responses, that Roy Allen Stewart is an inherently violent person. Violent types of behavior are usually projected on the Roscharh and Verbal [Thematic] Tests, and there were none expresssed here. If someone picks a fight with Stewart, he will fight back, but he does not go out looking for a fight. He is not a sadistic person. (T. 438-9). The defendant has other very human qualities. He is sentimental. He will come to your aid if you are in trouble. He will help you out. He will identify with any victim in any place. He is definitely remorseful about what happened in this case. (T. 440).

Dr. Marquit would have told the jury and the judge in this case that in spite of Roy Allen Stewart's mental illness, difficulties, and handicaps, his responses to the tests provide a very worthwhile alternative to the death penalty. Stewart's general capacity to learn, his alertness of mental functioning, and his potential for following leadership demonstrate that the can be rehabilitated. Dr. Marquit is convinced that Roy Allen Stewart has the capacity and flexibility to learn appropriate responses to stressful situations while he is in the structured environment of prison. Therefore, after vocational training and psychotherapy, Stewart will not react with rage under extremely stressful conditions when a person physically confronts him. He definitely can be treated for his mental illness and become productive over a period of years, and Roy Allen Stewart merits

the chance. (T. 440-4, 476-9; R. 706).

The unrefuted medical conclusions of Dr. Barry Crown are in substantial conformity with those of Dr. Marquit.

In addition to his other qualifications, Dr. Crown has had extensive clinical experience dealing with drug abusers. He served as Clinical Director of the National Institute of Mental Health, National Drug Abuse Training Center, at the University of Miami. He was a Clinical Training Director of the Dade County Program, an Associate Director of the National Council on Drug Abuse, and he attended the White House Conference on Children and Drug Abuse. (T. 274-6).

Dr. Crown interviewed and then administered a battery of psychological tests to Roy Allen Stewart over a four-hour period on May 6-7, 1984. The tests are objective examinations of the relationship between brain function and behavior. Dr. Crown had reviewed various psychological reports as well as medical and prison records prior to meeting Stewart. He was aware of Stewart's confessions and the brutal nature of the homicide. It was Dr. Crown's conclusion that Roy Allen Stewart has a mild form of [cognitive] impairment which is consistent with both drug usage and the head injury Stewart had sustained in an automobile accident in 1974; he labeled the disorder Organic Brain Syndrone. (T. 276-80; R. 510).

There are two relationships between this brain dysfunction and the excessive use of alcohol and drugs. The first arises in childhood, when people like Stewart find that they are functioning only marginally in relation to their peers. They turn to drugs as

a form of self-treatment for the anxiety that they feel because they experience a lack of inner personal relationships. The second arises as a consequence of the first. Because of the brain damage, people such as Stewart are more susceptible to the effects of the substances they use. Thus, the substance abuse exacerbates the cognitive dysfunction, and it exacerbates the degree of impairment while the person is under the influence. A vicious cycle is created. (T. 280-1).

Asked if he formed a conclusion as to whether Stewart was operating under extreme mental or emotional disturbance at the time of the offense, Dr. Crown replied, "Given the nature of the circumstances, it is my opinion that Mr. Stewart was under a great deal of strain. He was imbibing a large amount or quantity of substances and this would exacerabate the cognizance problem and he would have been impaired." (T. 281-3). Stewart's inner controls would be diminished so that he would not have been able to exercise the kind of control that he might have exercised had he not been in a stressful situation under the effects of drugs.(T. 283). [Sec. 921.141(6)(b), Fla. Stat. (1979)]. It was Dr. Crown's opinion that Stewart's ability to confrom his conduct to the requirements of law would have been diminished significantly. Based on the tests and Stewart's reasoning ability and judgment under the circumstances would have been significantly diminished; functioning on a much more primitive basis, Stewart would not have been able to conform his conduct to the requirements of law. (T. 283-4). Thus, the effects of alcohol and drugs would release Stewart's cognitive control mechinism to the

point where he would function at a much more primitive level even if Stewart knew that what he was doing was wrong. (T. 284). [Sec. 921.141(6)(f), Fla. Stat. (1979)].

In making his diagnosis, Dr. Crowm utilized the most accurate method of identifying problems of the brain, neurological testing; "generalizable" information gathered from Stewart's history and records; and the objective information he had himself obtained. Ineed, the only test that is more accurate than the examination Dr. Crown conducted is an autopsy of brain tissue. (T. 287-304).

The testimony of Dr. Crown and Dr. Marquit established a medical basis for the relevant evidence provided by the numerous witnesses who had observed the growth and development of Roy Allen Stewart. In light of the uncontroverted testimony of the witnesses who appeared on the defendant's behalf at the hearing on his motion for post-conviction releif from a sentence of death, it is clear that the defendant has met the burden of proof enunciated by the Supreme Court of the United States in Strickland v. Washington, 466 U.S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and by this Court in Knight v. State, 394 So.2d 997 (Fla. 1981). Therefore, the order of the trial court must be reversed.

In deciding that the defendant did not show prejudice, the trial judge asked, "Would the sentencer, giving due consideration [to] the evidence and arguments presented at the hearing upon the motions, have concluded that the sentence warranted was life imprisonment rather than death[?]" (R. 897).

The trial judge, who was not the original sentencing authority in this case, responded:

> The aggravating circumstances found by the sentencing judge were undoubtedly considered by the sentencer to be of varying importance. However, it is not reasonably probable that the sentencer would have concluded that the totality of the evidence was such as to outweigh two of the aggravating circumstances: the fact tha the crime was committed during the commission of a sexual battery and the way the killing was done.
>
> This Court has determined that regardless of the conduct of the Defendant's counsel there is no reasonable probability that the sentence would have been different even if what was presented to this Court had been presented during the penalty phase of the Defendant's trial.
>
> Accordingly, the Motion is denied.

(R. 897).

The trial court's order is erroneous in several respects. Although the court credited all of the evidence adduced in the defendant's behalf, its order does not reflect the "reasoned judgment" required by this Court on direct review of the imposition of a death sentence. State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

Implicit in the trial court's assumptions regarding the sentencer's weighing process is its acceptance of the opinion testimony of the psychologists. Even if it was proper for the court to interpret the weight given by the sentencer to particular aggravating circumstances, and it was not, the court overlooked the essential fact that neither the advisory jury nor the sentencing judge in this case heard the evidence undermining aggravating circumstances and establishing mitigating circumstances.

It was improper for the court to speculate as to the sentencing judge's calculus because the defendant has negated the

sentencer's finding that the capital felony was committed for pecuniary gain, Sec. 921.141(5)(f); the defendant has called into question the sentencer's reliance on the defendant's conviction for attempted armed robbery, Sec. 921.141(5)(a),(b); and the defendant has established the existence of numerous mitigating circumstances. Sec. 921.141(6)(b),(f); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); accord, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In analogous circumstances, this Court pondered whether the result of the weighing process by both the jury and the judge would have been different without an impermissible aggravating factor and concluded:

> We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial[.]

Elledge v. State, 346 So.2d 998 at 1003 (Fla. 1977). Because at least one aggravating circumstance in this case was improperly considered, and the defendant established statutory and non-statutory mitigating circumstances, this cause must be remanded for resentencing. Id. It is impossible to state that defendant was not harmed by counsel's failure to present such evidence.

Moreover, in a capital case such as this, the overriding importance to the defendant of providing the jury with all relevant evidence of mitigating circumstances cannot be gainsaid. It is the jury who must make the initial determination of whether the defendant should live or die. It is the jury whose advisory opinion can be the critical factor in determining whether or not the death penalty should be imposed. Lamadline v. State, 303

So.2d 17 (Fla. 1974). It is the jury who must not be deprived of testimony relevant to its determination of mitigating circumstances; for, if it was unable to consider such available evidence as psychiatric testimony, a sentence of death imposed in accordance with its recommendation cannot be upheld. Messer v. State, 330 So.2d 137 (Fla. 1976); Miller v. State, 332 So.2d 65 (Fla. 1976); Perry v. State, 395 So.2d 170 (Fla. 1981). It is the jury whose advisory opinion may not be disregarded except under the exacting standards delineated by this Court. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

It is the sentencer who must not be precluded from considering, "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, supra, 98 S.Ct. at 2964 (emphasis in original); accord, Eddings v. Oklahoma, supra.

It is the legislature whose provisions for a large number of mental mitigating factors reflect a determination to mitigate the death penalty in favor of life for those whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse. Miller v. State, 373 So.2d 882 (Fla. 1979).

Yet, it is defense counsel who must bear the burden of providing a basis for a sentence less than death. It is defense counsel who must know that "(t)he law does not require that

capital punishment be imposed in every conviction in which a particular state of facts occur." ... [;] that "(n)o defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors." ... [;] that ... "this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment." Alvord v. State, 322 So.2d 533, 540 (Fla. 1975).[13]

It is defense counsel who must conduct an adequate investigation "in order to present a reliable, individualized view of the defendant to the jury which includes all relevant mitigating evidence." (SR. 113-114A, 1113, 1086-1087). It was defense counsel who failed in every way, under any standard, to assist the defendant in meeting the state's case for death. Roy Allen Stewart has met his burden of showing that he was prejudiced by his counsel's deficient performance. Roy Allen Stewart's relatives, townspeople, co-workers, and acquaintances related the circumstances of his background and described his character and mental condition. Roy Allen Stewart's medical experts amplified the testimony of the lay witnesses and established unrefuted evidence of his emotional and mental state of mind. Roy Allen Stewart's trial attorneys explained the actions they took and the decisions they made in view of the facts and circumstances as they perceived them at the time. Roy Allen Stewart's legal expert

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13 In Jones v. State, 332 So.2d 615 (Fla. 1976); Huckaby v. State, 343 So.2d 29 (Fla. 1977) and Burch v. State, 343 So.2d 831 (Fla. 1977), this Court reversed the death sentences of defendants who committed heinous crimes. As in this case, the mental illness of those perpetrators was a contributing factor of the crimes.

demonstrated the unsoundness of their judgments and the unprofessionalism of their representation.

It has been shown that but for counsel's errors, there would have been sufficient time to conduct a reasonable investigation and make an adequate presentation for the penalty phase of trial. But for counsel's errors, there would have been time to secure the appearance of numerous witnesses who could furnish relevant evidence of Stewart's background and character. But for counsel's errors, there would have been time to adequately prepare those witnesses who did attend the penalty phase of their own accord. But for counsel's errors, there would have been a positive and complete account of the person whose life was at stake and not the meaningless, damaging testimony that was elicited. But for counsel's errors there would have been expert scientific evidence to support and clarify the testimony of the lay witnesses. But for counsel's errors there would have been sufficient evidence to establish numerous statutory and non-statutory mitigating circumstances. But for counsel's errors, there would have been sufficient evidence to cast doubt on the applicability of aggravating circumstances. But for counsel's errors, there would have been a persuasive concluding argument to the jury. But for counsel's errors, there is reasonable probability that Roy Allen Stewart would have been given life rather than death.

CONCLUSION

Based on the cases and authorities cited herein, the appellant requests this Court to reverse the judgment of the lower court and remand this cause to the trial court for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, CALVIN FOX, Assistant, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 28th day of January, 1985.

Robin H Greene

ROBIN H. GREENE
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