IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 77,217

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Previously, this Court has affirmed the judgment of guilt and reversed and remanded for a new sentencing. Stewart v. State, 558 So.2d 416 (Fla. 1990).

On remand, at the sentencing proceeding, Detective David Luis testified as to his observations at the scene of the crime where the victim Rubin Diaz was discovered (R 228 - 234). Randall Bilbrey was a friend of the defendant and he testified that on December 9, 1984, the defendant asked for a quarter to use a pay phone and subsequently bought some beer. The two of them drank a couple of beers and the defendant started crying and said that he didn't have the right to take anybody's life. He admitted killing a person two weeks earlier (R 238 - 240). Appellant explained that he and a friend had gotten out of jail and that they were looking for money. They saw a big white car, a Lincoln or a Cadillac in front of one of the bars and went in to find the owner. Thereafter, they asked the owner for a ride and the man decided to give them one. Appellant admitted pulling a gun on the victim; he claimed that he and a companion directed the victim to drive them to Lutz, they went on dirt road, made the victim get out of the car. The companion urged Stewart to shoot the victim and while the victim yelled not to shoot, appellant shot him twice (R 242). Appellant and his companion took the car down to the 7-11, used the money to purchase some beer, cigarettes and gas and subsequently burned the automobile in order that no fingerprints be discovered (R 242, 243).

Fire Inspector Mechy Wright testified that he responded to an auto fire at the mall and described a 1981 Ford Thunderbird. He testified that there was an incendiary origin to the fire (R 256). Medical Examiner Dr. Charles Diggs testified that the victim had two gunshot wounds to the head (R 261).

Michelle Acosta was with her friend Mark Harris in 1985 when they picked up a hitchhiker, appellant Kenneth Stewart. She testified that he hit her with a gun and then she heard gunshots (R 280 - 283). Both she and Harris were shot and Harris subsequently died. Appellant took the car (R 285). James Harville was a 7-11 store employee on April 18th, 1985, when a holdup man entered and shot him. The bullet entered his head between the eyes at the top of the nose and he is still carrying the bullet in his head (R 287 - 288). Mr. Harville was able to identify in court one Terry Smith who was with the man who shot him on that April day (R 290 - 292). The state rested its case. The judgments and sentences from appellant's prior convictions were introduced (R 227 - 228)

Kenneth Stewart announced that he wanted to take the stand to explain why he wouldn't testify and when he got on the stand he explained that it was simply too difficult (R 299 - 302).

Dr. Sidney Merin a clinical psychologist interviewed the appellant pursuant to the request of the defense attorney (R 310). Dr. Merin repeated the personal history of the appellant as given to him by Mr. Stewart, a history which included the disappearance of his mother, the resulting alienation, his

drinking, his troubles with the law, including burglaries and his drinking which ultimately resulted in the Diaz killing (R 310 - 329). Dr. Merin opined that the appellant Stewart was not under mental distress, but that he was under emotional distress. On cross examination Dr. Merin conceded that appellant had told him that he committed the murder, and he did not discuss with appellant the murder of the other victim, Mark Harris or the shooting of Michelle Acosta or the shooting of James Harville (R 339). Dr. Merin found no evidence of psychotic thinking or fragmented thinking or bizarre content. There was no evidence of neurosis. There was no inappropriate affect. He opined that appellant had a behavior disorder, but not a psychosis (R 340 - 341). He described Stewart as an antisocial personality, a psychopath or sociopath (R 342). He was not under extreme disturbance on the day of the Diaz murder (R 343); he basically knew what was going on (R 343 - 344). Dr. Merin opined that the appellant had the ability to conform to the requirements of law and was not substantially impaired, but was impaired to some extent (R 345).

Appellant's aunt, Lillie Mae Brown, testified that appellant's mother was dead. She had heard that the mother of appellant was killed by lesbians and that his father also died in 1970 or 1971 (R 361). She added that since Stewart's incarceration he has become compassionate, emotional and has changed so much; he is gentle and brilliant (R 372).

Following argument by counsel and instructions by the trial court, the jury returned with a recommendation of death by a 12 - 0 vote (R 476). Subsequently, the trial court entered a sentencing order finding two aggravating circumstances: (1) commission of a robbery during the capital homicide, and (2) prior conviction of a violent felony. The trial court listed and rejected both the statutory and nonstatutory mitigating factors proffered by the defense (R 548 - 559). The trial court imposed a sentence of death and this appeal now follows.

SUMMARY OF THE ARGUMENT

I. The prosecutor did not improperly cross examine appellant after he took the stand; rather, he explored that which was asked and answered to modify, supplement and correct the testimony.

II. The trial court provided appellant with a more than adequate opportunity to present additional argument following the jury's unanimous death recommendation and the trial court correctly found a dilatory purpose in Stewart's last minute attempt to avoid the inevitable sentence.

III. The prosecutor did not commit reversible error in conducting the cross examination of Lillie Brown. Since so much of her testimony relied on the hearsay reports of others, the prosecutor could permissibly inquire as to the source and availability of some of those reports.

IV. The trial court did not err in failing to instruct the jury on the mitigating factor of extreme duress or substantial domination of another and adequately explained in its order why this factor was inapplicable.

V. The lower court did not err in giving the cold, calculated and premeditated aggravating instruction. Stewart is procedurally barred from complaining since he requested the instruction and cannot complain of injury since the trial court did not find this factor.

VI. The trial court did not commit error in failing to find the two statutory mental mitigating factors; it considered all

that was presented and explained in its sentencing order the reasons for rejection of these factors.

VII. The trial court did not err in failing to find nonstatutory mitigating evidence; the court explained its written order the reasons for rejection and appellant simply disagrees with the trial court's conclusion.

VIII. Appellant's death sentence is not disproportionate. Unlike many others, Stewart has a history of killing and attempting to kill other people. He should not be rewarded with a finding of disproportionality for his many efforts.

IX. Appellant's claim has previously been rejected and the law of the case doctrine precludes further litigation of the issue.

ARGUMENT

ISSUE I

WHETHER THE PROSECUTOR IMPROPERLY CROSS EXAMINED THE APPELLANT AFTER HE TOOK THE STAND.

Appellant's testimony both on direct and cross, consisted of the following at R 301- 304:

> BY MR. JONES:
>
> Q. Mr. Stewart, you understand that this proceeding is the penalty phase of a trial in which you have already been found guilty of first-degree murder?
>
> A. I do.
>
> Q. And do you understand that you have the right to testify in this proceeding regarding your life and your background an the way you were raised and the things you went through?
>
> A. I do.
>
> Q. Has it been your intention all along to testify as to that, as to those things, your life?
>
> A. Yeah, I had intended to, yeah.
>
> Q. Have you changed your mind?
>
> A. I have.
>
> Q. Okay. And do you intend to testify about it now?
>
> A. No.
>
> Q. Okay. Why is that?
>
> A. It's too difficult.
>
> MR. JONES: I have no other questions, Your Honor.
>
> THE COURT: Mr. Skye?

CROSS EXAMINATION

BY MR. SKYE:

Q. Is it too difficult to sit here under oath, Mr. Stewart, and tell those twelve people over there why you committed all these murders and other crimes; is that what you are telling us?

MR. JONES: Objection, Your Honor. That question goes beyond the scope of my direct examination.

THE COURT: No, I don't think it is. I will --

MR. JONES: Just for the record I want to make it clear what I asked him about was his life, the way he was raised. That is why I phrased it that way.

THE COURT: Well, I will allow him to answer if he can answer.

Go ahead, Mr. Stewart.

A. I can't answer that.

BY MR. SKYE:

Q. Do you anticipate that a man by the name of Doctor Sidney Merin is going to testify in this case. Mr. Stewart?

A. I don't know.

Q. If he were called as a witness in this case, perhaps even as the next witness, would you be surprised?

A. I wouldn't know.

Q. Have you had occasion to discuss your life with Doctor Sidney Merin, perhaps even back in 1986, and then perhaps again within the last couple of months, so that he can testify in this case?

A. No, I haven't.

Q. You haven't?

A. No.

Q. You don't discuss your background and at least part of your life with Doctor Merin back in 1986?

A. '86? You said in the last few months. No. I haven't.

Q. You did in '86?

A. Yes.

Q. You haven't talked to him again in the last few months.

A. No.

Q. Haven't taken a psychological test with him in the last few months?

A. No, I haven't.

Q. You did talk to him back in 1986?

A. I have, yes. I answered that yes.

Q. You told him quite a bit about your life and background, did you not?

A. I don't remember.

Q. You don't remember. Whatever it is you told Doctor Merin about your life and background, you are not prepared to tell this jury today; is that it?

A. I am not prepared, no.

Q. All those things your attorney, Mr. Jones, said in opening statement, we are not going to hear any of that from you?

A. No, you are not.

Q. Is that correct?

MR. SKYE: Thank you, Mr. Stewart. No further questions.

THE COURT: Any redirect?

MR. JONES: None, Your Honor.

THE COURT: Thank you Mr. Stewart. Step down.

The prosecutor also argued in his closing argument:

> The person who could best tell you why he committed these terrible crimes, he certainly didn't have much to say to you His testimony was about the briefest of any witness that appeared. Day before yesterday you saw him take the witness stand, raise his right hand to tell the truth, and he told you he had intended to testify but, then, it was just too difficult. Too difficult. It wasn't too difficult to murder two men in cold blood. It wasn't too difficult to engage in all the criminal activity that he's engaged in throughout his lifetime. But it was too difficult to talk about it.
>
> Rather than be exposed to what I call the crucible of truth, and that is, cross-examination, where you can ferret out what is happening, what the truth is, rather than be exposed to this, the defendant took the easy way out and chose to have his self-serving statements, which we certainly can't cross-examine, come to you through the testimony of his Aunt Lillie Brown, and also Doctor Merin.
>
> You will recall that Doctor Merin had previously examined him in connection with the first-degree murder. We go back in September of '86. And Doctor Merin hasn't talked with the defendant since that time.

(R 435 - 436)

Appellant complains that the prosecutor's cross examination exceeded the scope of direct. It did not and appellee makes no apology for the cross examination. On direct Mr. Stewart was

asked whether he understood and had intended to testify "regarding your life and your background and the way you were raised and the things you went through" but he answered that "it's too difficult" (R 301). While appellant may have hoped that he had tactically accomplished his mission by providing a sympathetic self-serving acknowledgment to talk about -- and therefore not open to cross examination, unfortunately for Stewart the question was open-ended enough to include his "life", and the "things you went through". But Stewart's life and what he went through comprises not only the mitigating matters he wants the jury to hear, but all about his life, including the murder of victim Ruben Diaz, previous murder victim Mark Harris and assault victims Michelle Acosta and James Harville. See Coco v. State, 62 So.2d 892, 895 (Fla. 1953) (cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief by the witness on cross examination); Mancebo v. State, 350 So.2d 1098 (Fla. 3d DC 1977) (wide latitude is permitted on cross-examination in criminal proceeding the scope and limitation of which lies within the sound discretion of the trial court); Buford v. State, 403 So.2d 943 (Fla. 1981) (cross examination extends to entire subject matter and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief); Johnson v. State, 380 So.2d 0124 (Fla. 1979) (once a criminal defendant becomes a

witness he may be examined the same as other witnesses on matters which illuminate the quality of his testimony); Magill v. State, 386 So.2d 1188 (Fla. 1980).

Appellant next contends under this point that the prosecutor improperly forced Stewart to help prove nonstatutory aggravating circumstances. He did not. Stewart is unhappy with the prosecutor's argument to the jury. But State Attorney James told the jury to consider the aggravating circumstances instructed by Judge Lazzara (R 429, 433), and the trial judge instructed the jury that the aggravating circumstances were limited to those enumerated in the statute (R 463) Additionally, appellant did not interpose any objection to the prosecutor's argument to the jury, thereby failing to preserve for appellate review any complaint about it. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990).[1]

Appellant next argues that the prosecutor's argument impermissibly denied Stewart's mitigation defense. Again, appellant's failure to object below to the prosecutor's closing argument precludes appellate review. Steinhorst, supra; Occhicone, supra. Even if the point were preserved it is meritless. Appellant's attempts to compare the prosecutor's

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[1] Even if this claim were preserved for review it would be meritless as there is nothing wrong with the prosecutor's commenting on the evidence that appellant chose to testify and chose not to offer legitimate explanation for his conduct (R 435 - 436).

argument to the egregious performance of the prosecutor in Nowitzke v. State, 572 So.2d 346 (Fla. 1990) wherein this Court found numerous errors. If the appellant's complaint is that a prosecutor in jury argument may never disagree with the opinion presented by a defense-called mental health expert then the courts may as well close the door on capital trials because the ready availability of professional witnesses is known to all. Here, the prosecutor did not make an all out assault on the field of psychiatry -- as in Nowitzke -- but rather permissibly argued in limited fashion and correctly that the self-serving statements about Stewart's life came through the testimony -- much of it hearsay and second hand -- of Aunt Lillie Brown and Dr. Merin (R 436). Indeed the prosecutor regarded much of Dr. Merin's testimony as helpful to the state (psychopath, killer, etc.) (R 439 - 440). No fundamental error is present in the prosecutor reminding the jury of the weakness of the testimony that was presented by appellant Stewart.

Appellant next argues that the lower court erred in allowing Stewart to take the stand because he knew that Stewart did not intend to testify. This claim, not presented below, may not permissibly be initiated here. Steinhorst, supra. Appellant does not explain how a trial judge may constitutionally prohibit a defendant from exercising his right to testify on his own behalf (and had the trial judge sua sponte so ruled that error would now be advanced by current appellate counsel). In opening statement, defense counsel indicated that Stewart would testify

(R 218). After the state concluded its presentation, this colloquy ensued:

> "THE COURT: What is his decision?
>
> MR. JONES: He is going to testify.
>
> THE COURT: Is that what you wish to do, Mr. Stewart?
>
> THE DEFENDANT: What?
>
> MR. JONES: You are going to testify, right, based on conversation we had in there?
>
> THE DEFENDANT: Yes, in the conversation, yes.
>
> THE COURT: You do want to testify sir?
>
> THE DEFENDANT: I am going to take the stand and say why I am not going to go into my testimony.
>
> THE COURT: All I want to know is --
>
> MR. JONES: He is going to be taking the stand. He is going to be offering some testimony. It's different than what we had talked about, but he is going to be taking the stand. That is what he means."

(R 299 - 300)

If appellant perceives that it is best for him to explain to the jury on the stand that it is too difficult for him to detail his life, he may do so This Court should not tolerate, however, the inmates -- taking-over-the-asylum scenario of permitting that and accepting a subsequent contention that it should have been stopped.

This Court previously has refused to fall for similar manipulative defense ploys. Cf. Waterhouse v. State, ___ So.2d ___, 17 F.L.W. S132 (Fla. 1992)[2]

Appellant denies that the prosecutor improperly commented on appellant's failure to testify; he commented instead on the fact that he did testify and the paucity and non-impressive substance of his testimony.

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[2] The cases cited by appellant are totally inapposite. In Richardson v. State, 246 So.2d 771 (Fla. 1971), the state attempted to call to the stand an accomplice in the arson to inculpate himself and the defendant knowing the witness would assert his Fifth Amendment right. In Apfel v. State, 429 So.2d 85 (Fla. 5th DCA 1983), the court ruled similarly that it would be improper for the defense to elicit from a witness on the stand his assertion of the Fifth Amendment privilege. Here, in contrast, defendant chose to get on the stand to explain why he could not or would not add mitigating details and the prosecutor merely explored that testimony.

ISSUE II

WHETHER THE TRIAL COURT FAILED TO ADEQUATELY CONSIDER AND INVESTIGATE STEWART'S REQUEST FOR A CONTINUANCE AT SENTENCING.

The record reflects that after the penalty phase testimony and after a 12 - 0 jury death recommendation, on November 21, 1990, defense counsel interrupted and stated that appellant's aunt was procuring other counsel.[3] The following colloquy ensued:

> MR. JONES: Excuse me, can I interject, Your Honor?
>
> I was waiting for a -- I assumed the Court was going to ask if we were prepared to go forward.
>
> Mr. Stewart has just advised me just recently, I mean within the past five minutes, that his aunt is procuring other counsel for him, and he would like to be represented at this proceeding by other counsel.
>
> THE COURT: Like who?
>
> MR. JONES: I don't know who.
>
> THE COURT: Who, Mr. Stewart?
>
> THE DEFENDANT: Well, my aunt called your secretary about two or three days ago
>
> THE COURT: I received no message from my secretary.

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[3] Bear in mind this was two weeks after the court had granted defense counsel a continuance for the opportunity to ask defendant if there was additional evidence (R 596 - 601) and a week after the defense said there was no additional evidence (R 606 - 610).

THE DEFENDANT: Well, anyway your secretary informed her that you wouldn't talk to her, because your secretary thought that it was something to do with the case, and she was trying to explain to her then that she had contacted an attorney that is supposed to come to the jail Friday.

THE COURT: Who is that?

THE DEFENDANT: I don't know his name. I wasn't able to get to the phone and talk with him last night.

THE COURT: What's the State's position, Mr. James, or, Mr. Skye?

MR. SKYE: Your Honor, unless there is some legal basis for the Court to at this pint, or unless Mr. Jones is asking on some legal basis to be relieved of representation of Mr. Stewart, the sentencing has been set for however long its been set for, and it would be the State's position that we should go forward.

There wouldn't be any error of any sort at this late date with the Court proceeding with the proceeding.

THE COURT: Did you ask your aunt to retain other counsel for you, Mr. Stewart?

THE DEFENDANT: Her and I both decided it was best under the circumstances, due to the nature of the sentencing.

THE COURT: Where's you aunt today?

THE DEFENDANT: Well, she's not here today. She couldn't come today, because she has to baby sit her grandchildren.

MR. JONES: And just for the record, Your Honor I don't think it's appropriate for me at this point to ask to be relieved.

I have no legal basis to ask to be relieved, however, my client has asked me to ask the Court to continue this proceeding for the

reason I set forth earlier; and that is, that he would like to have other counsel.

THE COURT: Are you dissatisfied with Mr. Jones.

THE DEFENDANT: Well, there's a few things with regard to the initial jury selection.

MR. JONES: Jury selection process.

THE COURT: Such as?

THE DEFENDANT: A little -- differences in interest there. There were a few jurors I didn't want on the jury, because of reasons -- they admitted having some type of social relations with Mr. James' wife and himself.

And before they were selected I asked him not to select them, and he had a different feeling on that and went ahead and selected them.

And there were a few other matters that are just -- I just feel that I would rather feel confident with another attorney that I can get to come to the jail and, you know, converse with him upon matters, and have him represent me during the sentencing, being that it's such a significant thing, you know.

We're dealing with my life here, you know.

MR. JAMES: Your Honor, with respect to the allegation about the jurors having some social relationship --

THE COURT: Well here's my view.

My view is that maybe, depending upon what I do here, that may be a matter for appeal.

It doesn't go to the issue of sentencing here.

What other problems did you have with Mr. Jones besides that?

THE DEFENDANT: Well just -- I feel that Mr. Jones had other problems as far as, you know, being adequately able to defend me -- excuse me, being able to give enough attention to this case, because of other cases, et cetera.

You know, initially when he had it, when the case came back.

He was involved in other cases that he couldn't apply all his time to me as far as coming to see me at the jail and, et cetera.

Problems with corresponding with him over the phone. I've never be able to do that.

I just feel that, you know, I just -- I need better representation here, you know.

THE COURT: So this record is clear, the procedure this Court follows is the procedure that has been mandated by the Florida Supreme Court.

You have the sentencing phase, wherein a jury is selected,; hears the evidence, and makes a recommendation to this Court.

You then have, I style it an allocution hearing, where you give the attorneys a chance to offer whatever evidence they deem appropriate as well as argument of law.

And we had that hearing here on November 13th. And then you have the final sentencing process or the final step in the sentencing process where I impose the sentence, and that's why we're here.

And at this step the evidence is closed, the arguments have been made and it's merely, I come in here and if I impose the death sentence I have a written order prepared to be filed contemporaneously with the imposition of sentence, or, if I don't impose the death sentence, I just impose life imprisonment.

The evidence, in my view, is now closed. The arguments of counsel are now closed. At this juncture there's nothing more to be said.

Both at the sentencing phase before the jury, and at the allocution hearing before this Court Mr. Stewart declined on both occasions to offer any testimony or evidence on his own behalf.

What he's now raising is some type of issue relating to the alleged incompetency of Mr. Jones.

All right, he's questioning the jury selection process. That's a matter for appeal. That's a matter for post-conviction relief, which I fully expect will some day come back to this Court, in the event that the sentence I'm about to impose is affirmed by the Florida Supreme Court on direct appeal.

His aunt is not here. I've received no communication from his aunt. I don't see any legal reason at this point not to proceed to sentencing.

Are you claiming that at the present time you're incompetent or insane, Mr. Stewart?

THE DEFENDANT: Well, Your Honor, there's a lot of things, you know, that I just feel that if I had other counsel things would be addressed through that counsel.

They would be fair for me in this proceeding. I have no -- nothing else to offer you except that, you know.

THE COURT: Well, I --

Go ahead, Mr. Jones.

MR. JONES: Your Honor, I've explained to Mr. Stewart, again, in this brief conversation about the 3.850 vehicle, and that that is something that would be available to him after sentencing.

However, he intimated to me that, nonetheless, these things about the jury selection process, and I didn't know about the other things until he just now said

those; that he wanted you to be made aware of those through counsel prior to sentencing.

I was just relating to the Court what my client asked me.

THE COURT: Well, he's made me aware of them right now, an it doesn't change my position in any way, whatsoever.

Those are matters for an appellant [sic] court to address later down the road, which I know they will address.

Everybody has had a full, fair opportunity to present what evidence they felt was appropriate, both to the jury and to this Court.

I see this as -- and I'll make this finding for the record -- nothing more than a delay tactic. You know, built-in error, if you will.

I'm sure that some court will address this at a later date, being very familiar with the direct appellant [sic] process involving a defendant's case, with regard to the post-sentence relief that is sought in those appeals.

I'm not going to continue the sentencing hearing. I'm following the mandate of the Florida Supreme Court and I'm going to continue to follow that mandate.

We are here for sentencing and I'm prepared to move forward with sentencing.

So to the extent he's asking for a continuance to bring in some unknown lawyer to be retained supposedly by his aunt, who's not even present before the Court to address issues which appear to me are not appropriate to be addressed during the sentencing phase that we are now here on, it's irrelevant and I deny that request, and the record is clear in that regard.

As I said, I am now prepared to make the following findings of fact and conclusions of law.

> So the record is clear, that's why I didn't -- my intent was to come in here and impose sentence, okay?
>
> MR. JONES: I understand.
>
> THE COURT: And I didn't mean to cut anybody off in that regard but the record is now clear that that's his position.

(R 489 - 498)

It is abundantly clear that Stewart in a last minute theatrical attempt to avoid his inevitable sentence merely wanted a delay. Cf. Waterhouse v. State, ___ So.2d ___, 17 F.L.W. S132 (Fla. 1992) (We refuse to permit an intransigent defendant to completely thwart the orderly process of justice). Here, appellant voiced no complaint throughout the penalty phase proceedings. The Court set a time of November 7, agreeable to the state and defense, to hear additional arguments (R 481); on November 7 agreed to defense counsel's request for a short one week continuance (R 598 - 599); on November 13, defense counsel argued for the imposition of life and appellant personally said he had nothing to say:

> THE COURT: Yeah, I understand. How about Mr. Stewart?
>
> Mr. Stewart, you care to address me here today or testify or offer anything on your own behalf?
>
> THE DEFENDANT: I don't have nothing to say really, no.
>
> THE COURT: You understand you have that right?
>
> THE DEFENDANT: Yes.

> THE COURT: And I'm willing to sit here as long as it takes to hear from you. Do you understand that you?
>
> THE DEFENDANT: I understand.
>
> THE COURT: You don't want to do that?
>
> THE DEFENDANT: No.
>
> MR. JONES: We've discussed that a few times.
>
> THE COURT: I'm sure you have, but I wanted to put that on the record, too.

(R 610)

Only moments before the sentencing a week later did appellant initiate the belated request for new counsel. Moreover, the trial court did inquire as to whether appellant was dissatisfied with counsel. The court explained that whatever concern Stewart may have had regarding jury selection could be an issue for appeal and that the time for presentation of evidence was closed and Mr. Stewart had previously declined to offer anything at allocution (R 494). Cf. Bowden v. State, 585 So.2d 225, 230 (Fla. 1991).

Frankly, appellee is confused and does not understand Stewart's position with respect to a possible ineffective assistance of counsel claim. We are told first of all at page 41 of appellant's brief that Stewart is:

> " . . . not presenting or arguing the issue of ineffective assistance of counsel. Because the trial judge failed to explore Stewart's complaints, the record contains insufficient evidence to resolve the question of effective assistance. The issue therefore, is more appropriate for a Rule

> 3.840 [sic] motion, during which an evidentiary hearing would be held to flesh out the record and examine Stewart's complaints."

Having said that, appellant then devotes the next nine pages of argument suggesting that trial counsel may have been ineffective. Appellee is in agreement that claims of ineffective counsel are more appropriately resolved in a post-conviction, post-appeal proceeding pursuant to Rule 3.850.

As this Court well knows, it is extremely awkward time-consuming and ultimately self-defeating to attempt via remand during the pendency of a direct appeal a determination of trial counsel's effectiveness. See Nixon v. State, 572 So.2d 1336, 1339 - 1340 (Fla. 1990). In any event, appellee would prefer not addressing a claim which appellant insists he is not asserting and simply await the proper presentation of the claim after this Court affirms the judgment and sentence. But since appellee cannot be certain that the Court will agree with appellee's assessment that Stewart is not intending to raise the ineffective counsel issue, we offer the following additional comments.

(A) Appellant implies that counsel may have been deficient during jury selection because two jurors knew the state attorney Bill James, jurors Gailand Kiltz and Helen Benshoof (R 22, R 80 - 81) Juror Kiltz stated that the state attorney didn't remember him and had last seen him a year ago. He stated that the fact that Mr. James' wife worked where he did would not impair his ability to give Stewart a fair trial (R 21 - 22). MS. Benshoof

had not seen Mr. James recently and the last time was at a political function. She too thought she could be impartial (R 22 - 23). Kiltz added that Mr. James probably wouldn't remember him and he did not know Mr. James that well (R 81). This juror stated that his stepson had been involved in some trouble with the law but that would have no bearing on this case. He had a brother in law enforcement but that was not a problem in maintaining their own opinions (R 84). Ms. Benshoof had a close friend of her daughter's in law enforcement and a nephew who was convicted of a crime. These facts would not affect her ability to be fair (R 86 88). Kiltz had reservations about the effectiveness of the death penalty (R 103). Defense counsel questioned Kiltz and Benshoof (R 140, 142, 156 - 158). Counsel wanted Stewart to participate with him in the excusal of jurors (R 161).

Trial counsel was neither deficient nor is there a reasonable likelihood of a different outcome had counsel acted differently. If a claim of ineffective counsel were made, it would be meritless.

(B) Stewart expresses a concern that Stewart's alleged difficulty in communicating with his attorney may have caused other problems including the failure to call other witnesses, confusion regarding Stewart's testimony, etc. Again, obviously the best forum for examining why counsel did what he did is via a 3.850 hearing rather than engage in speculation. But if we have to engage in speculation here, as this court well knows trial

counsel used additional witnesses in the first trial and achieved the unsatisfactory result of a death recommendation and could competently decide it's best not to use cumulative witnesses Stewart v. State, 558 So.2d 416 (Fla. 1990). As to appellant's claim of difficulty in communication, suffice it to say that the trial judge opined that Stewart's complaints on November 21, 1990, were "nothing more than a delaying tactic", to stall his sentencing (R 496).

(C) Stewart's inquires why additional defense witnesses who testified in the first trial did not testify at the second sentencing. Appellee responds that counsel undoubtedly felt that since the first approach was unsuccessful, a different one might yield a better result. Counsel was not deficient in utilizing appellant's aunt.

Counsel for appellant advises that in the first penalty phase the defense witnesses included appellant's uncle, stepfather, maternal grandmother, Dr. Merin and others (Brief, p. 44) and refers to this Court's prior opinion at 558 So.2d 416. But this Court's prior opinion only alludes to the uncle, the grandmother and Dr. Merin. How does she know who else testified? She knows because counsel, and this Court and the appellee are aware of the prior appeal, Case No. 70,245. And since we are asked to engage in a contest for speculation, the state will offer that stepfather Bruce Scarpo who testified in the earlier penalty phase (R 646 - 68) of appeal 70,245) possibly may not have been called again since Scarpo originally did not testify to

any abuse by him and either would not or could not so testify in the remand penalty phase so trial counsel utilized instead the hearsay testimony of Aunt Lillie (R 317).

Additionally at the prior penalty phase the defense utilized the testimony of grandmother Estelle Berryhill (R 690 - 699 of appeal 70,245) who testified about being told that Stewart had received cigarette burns as an infant -- and this Court ruled on the last appeal that her testimony was properly excluded. 558 So.2d at 419 - 420. Trial counsel could legitimately conclude that he should not recall her to have her testimony excluded again.

(D) Appellant suggests that counsel may have been deficient in not having appellant re-examined by Dr. Merin prior to the second penalty phase testimony. But counsel was not deficient nor is there a reasonable probability of a different outcome. Dr. Merin's testimony had already received favorable reviews in this Court's opinion remanding for a new sentencing proceeding. Merin adequately covered appellant's family history given to him by Stewart and he described the mitigating psychological evidence as he saw it (R 306 - 336). Trial counsel stated that he had spoken to Dr. Merin and after their discussion everything was "just about identical" (R 316). If appellant is complaining that Dr. Merin conceded on cross examination that Stewart was a psychopath and a killer (R 342)_ it is not made clear how a re-examination would have avoided the disclosure of such a fact.

The complaint that a second examination would have yielded corroboration to the testimony of Aunt Lillie Mae Brown, suffice it to say that her testimony about appellant's early life was generally consistent with Dr. Merin's report from appellant; counsel ably elicited various hearsay reports from witness Brown. Mrs. Brown testified that when Stewart was age thirteen or fourteen he was "very soft," "compassionate" and "thoughtful" (R 370. She opined that he had changed from the time of his arrest and since his arrest he has become "compassionate", "very soft" and "gentle" (R 373). The trial court even allowed the witness to relate a dream appellant told her about (R 378 - 380). This witness, however, did not know of appellant's teenage burglaries, arrests for carrying a concealed firearm or escape from the County Stockade (R 393). That Stewart was compassionate, soft and gentle as a thirteen year old and again during his incarceration would not change the fact that he in-between was a multiple murderer.

(E) Finally, appellant wants to visit his "aborted testimony" on counsel. That appellant chose as he had the right to do, to tell the jury about how difficult it was to testify, cannot be deemed an error by counsel. The record reflects that appellant made this choice after conferring with counsel (R 299 - 300). Six weeks after the penalty phase testimony and after the trial court had already granted one intervening continuance prior to imposing sentence on November 7, 1990 (R 596 - 601) and after appellant subsequently on November 13, 1990, personally informed

the court that he had nothing to say (R 610), appellant on November 21, urged that he would like new counsel whom he could not name and about whom he asserted his aunt had told the judge's secretary (the court received no message from the secretary) (R 490).

This is not the brief continuance found in Wike v. State, ___ So.2d ___, 17 F.L.W. S145 (Fla. 1992), but the abusive, dilatory behavior of the type condemned by this Court in Waterhouse v. State, ___ So.2d ___, 17 F.L.W. S132 (Fla. 1992).

ISSUE III

WHETHER THE PROSECUTOR ERRED REVERSIBLY IN CROSS EXAMINING LILLIE BROWN.

The record reflects that defense witness Lillie Mae Brown testified at length regarding hearsay communications involving various members of appellant's family and associates. For example, the witness stated that the knowledge she had regarding the death of Kenneth Stewart's mother was "hearsay" from appellant's grandmother that the mother had killed herself (R 360); the grandmother also said she "had been living in a house with lesbians. These lesbians had killed her" (R 361). She also testified that appellant at one point had run away and the grandmother got custody of him (R 369).

On cross examination, the prosecutor asked the witness the name of the grandmother (it was Estelle Berryhill), whether and where she was living (in Tampa), when was the last time the witness spoke to the grandmother and whether the witness knew if she were going to testify in this case (R 390 - 391).

Defense counsel objected that the question was not relevant, called for a legal conclusion and went beyond the scope of direct examination. The court overruled the objection and ruled that if the witness knew she could answer the question. The witness answered that she didn't know (R 391). Appellant did not request a mistrial.

In his closing argument the prosecutor made no reference to the grandmother (R 429 - 442).

As noted in Issue II, supra, this Court well knows that Berryhill testified previously in the last trial briefly about hearsay reports of cigarette burns to Stewart as an infant -- testimony that was stricken. If Mrs. Berryhill had additional testimony of knowledge about the defendant, the prosecutor was entitled to learn about it. Even if Mrs. Berryhill were not to be called as a defense witness, the prosecutor might be interested in using her as a witness to confirm or refute some of the hearsay testimony generously allowed by the trial court in this case.

Appellant cites a number of cases wherein the court have expressed a concern about remark or argument calling into question the defendant's failure to produce supporting witnesses. But all of these cases involved the guilt-innocence determination in which the prosecution carries the burden to establish guilt beyond a reasonable doubt and during which the defendant is cloaked in a presumption of innocence. In the instant case, in contrast, the jury was told from day one that appellant's guilt had already been established and that their responsibility was confined to making the penalty recommendation (R 211). And this Court has recognized that what is appropriate in a penalty phase may be inappropriate in the guilt phase. See Muehleman v. State, 503 So.2d 310, 317 (Fla. 1987). Indeed, this Court has acknowledged that since it is the defendant, not the state, who knows all about his own life, it is the defendant who must bring to the attention of the sentencer the nonstatutory mitigating

circumstances relied on. Lucas v. State,. 568 So.2d 18, 24 (Fla. 1990).

Finally, to the extent that appellant may be changing the basis of his argument in this Court from that presented to the trial court, he may not do so. Steinhorst v. State, 412 So.2d 332 (Fla. 1982).

ISSUE IV

WHETHER THE LOWER COURT ERRED IN FAILING TO INSTRUCT THE JURY TO CONSIDER THE MITIGATING FACTOR OF EXTREME DURESS OR SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

The trial court explained in its written findings in support of the death penalty why the mitigating factor of acting under extreme duress or under the substantial domination of another person was inapplicable.

> THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.
>
> Although the Court declined to instruct the jury as to this mitigating circumstance, the Court still feels it appropriate to address this mitigating circumstance in terms of whether it was reasonably established by the evidence. The Court cannot so conclude.
>
> The evidence was clear beyond all doubt that the defendant was the dominant individual in this robbery and murder. After gaining the confidence of the victim, he positioned himself in the backseat of the victim's vehicle. He then pulled a weapon on the victim, he directed the victim to drive to a remote area, he ordered the victim out of the vehicle, he made the victim lie face down on the ground, and then he robbed and shot the victim. Although the testimony indicated that the other individual with the victim was yelling "shoot" and in the opinion of the defendant's mental expert the defendant was responding to an emotional instruction by an emotional friend when he killed the victim, nevertheless, the evidence does not rise to the level of extreme duress, i.e., external provocation such as the use of force or threats,[4] or[5] substantial domination by another person.

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[4] Toole v. State, 479 So.2d 731, 734 (Fla. 1985).

> Moreover, the evidence from the medical examiner is unrefuted that the victim was shot twice in the head at close range (one foot or less from the firearm to the wounds). This evidence is significant because it clearly indicates that the victim did not shoot the victim in a random fashion in response to a "command" from another person.
>
> Therefore the court finds and concludes that this mitigating circumstance was not reasonably established by the evidence (R 554 - 55)"

The trial court also explained at the time of the colloquy on jury instructions:

> THE COURT: On the, basically, by analogy what they are saying, once a reasonable quantum of evidence is presented showing in that case impaired capacity, I have to instruct on it. It's not for me to inject myself into their deliberative process with regard to my views relative to the degree of evidence.
>
> But when you look at this evidence here, all right? Mr. Bilbrey testified that, apparently, according to the defendant, he and his buddy were down and out on their luck. They went to this bar. They saw this nice car. They went in there. They convinced Mr. Diaz to give them a ride. And then it was the defendant who got in the back of the car, the defendant who had the gun. It was the defendant who said, you know, "Let's go to Lutz." Went to a remote road, to Whitaker Road, had him get on the floor, I mean, get on the ground.
>
> And, thus, the testimony shows that whoever did, if we ever find out who this unknown person.

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[5] Hill v State, 515 So.2d 176 (Fla 1987).

MR. SKYE: I [sic] not sure there was an unknown person.

THE COURT: Anyway, an unknown person says, "Shoot the defendant." He shot twice. The other guy said, "Why did you shoot him twice?" The defendant said, "I don't know."

Of course, coupled with that is Doctor Merins' testimony -- where is it -- he was responding to an emotional instruction by an emotional friend. What is an emotional friend?

(R 410 - 411)

* * * *

THE COURT: Emotional friend when he killed Diaz. That to me doesn't rise to a reasonable quantum of evidence showing that whoever this unknown person was, was exercising substantial domination over Mr. Stewart. There is no evidence to suggest this other person had a weapon. All the evidence suggests, when you look at it, is that Mr. Stewart is the moving force. He is not, you know, acting under any extreme duress from anybody. Sure, they are in a what, obviously, was an emotional situation, the guy is saying, "Shoot. Shoot," you know. But that doesn't show, I think Mr. Skye is right. I mean, to instruct the jury on that is, I think, stretching it too far.

(R 411)

THE COURT: But I think you have got to look at that extreme duress in conjunction with substantial domination. I mean, duress to me means somebody is coercing me, putting extreme pressure on me to commit an act that I otherwise would not want to commit. When I look at it, I think that is the basic law of duress.

MR. JAMES: How in the world does someone cause you to act under duress when you have got the gun?

> THE COURT: Okay, Mr. James. I am ruling with the State.
>
> (R 411)

What is the evidence submitted that required the trial court to submit for the jury's consideration that Stewart acted under extreme duress or under the substantial domination of another person? *Florida Statute 921.141(b)(e)*. The testimony of Randall Bilbrey was that appellant admitted that he had pulled a gun on the victim in the parking lot and that Stewart and his unnamed accomplice directed him to drive to Lutz (R 241). The "accomplice" yelled to him to shoot him and the victim begged not to be shot Stewart shot him (R 242).

Appellant testified but did not urge that he was under duress or the domination of another (R 301 - 302). Dr. Merin interviewed appellant and Merin reported that in that interview "he was responding to an emotional instruction by an emotional acquaintance whom he claims was present with him at the time of the shooting" (R 329).

Even defense counsel in closing argument did not urge as appellant does here, domination by another. He argued:

> "Now am I going to suggest to you that that person was in control of Kenny Stewart? No. That Kenny Stewart had no choice at that time but to do the horrible thing that he did? No. No."
>
> (R 453)

Whatever may have been appellant's desire to argue the mitigating factor he now urges was abandoned affirmatively in his jury summation.

The fact is that there is no competent, substantial evidence that (a) there even was an accomplice to Stewart present during the homicide, (b) that such an anonymous person encouraged Stewart to murder Diaz, (c) or finally that if there was any encouragement that it constituted duress or domination. The only testimony supporting the "accomplice" thesis is that of Bilbrey and Dr. Merin, who merely reported the self-serving hearsay statements of Stewart. Appellant argues that in the original trial another witness Terry Smith testified that appellant told him that he acted alone when he kidnapped, robbed and murdered Diaz. (Brief p. 63) If so, it would seem a needless waste in judicial resources to reverse and remand for another resentencing proceeding where Smith can be produced to again repeat Stewart's acting alone admission.

Finally, even if this Court were to hold that there was technical error by the trial court's failure to instruct the jury (even though there was no testimony of "duress" or "domination")[6] any such error would be harmless. The trial court did instruct the jury to consider in mitigation "any other aspect of the defendant's character or record and any other circumstance

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[6] The evidence supporting this mitigator below is even weaker than the assertion of the Flip Wilson television character that "the Devil made me do it" since nothing remotely suggested anyone made Stewart do anything. See Toole v State, 479 So2d 731, 734 (Fla. 985) (Duress refers not to internal pressure but to external provocation such as imprisonment or the use of force or threats). Hill v. State, 515 So.2d 176 (Fla. 1987) (Defendant not codefendant was armed).

of the offense" (R 465) and counsel was permitted to argue what he wanted. Thus, the jury was allowed to consider everything in mitigation and give to it the weight it deserved.

ISSUE V

WHETHER THE LOWER COURT ERRED BY GIVING THE INSTRUCTION COLD, CALCULATED AND PREMEDITATED AGGRAVATING FACTOR.

Appellant concedes the trial court did not find "CCP". Appellant is procedurally barred from raising a complaint in this Court because not only did appellant fail to object below to preserve it for appellate review, he affirmatively requested that the instruction be given (R 422, R 464, 472). See McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1990). Cf. Daugherty v. Dugger, 533 So.2d 287 (Fla. 1988) (rejecting a "Maynard" attack on the "HAC" factor because "this aggravating factor was not found in this case.).

The trial court's order recites:

> THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
>
> The Court has carefully reviewed the evidence as it relates to this aggravating circumstance which the State of Florida claims was proved beyond a reasonable doubt However, the Court concludes that this aggravating circumstance was not proved beyond a reasonable doubt given the interpretation by the Florida Supreme Court in Rogers v. State, 511 So.2d 526 (1987) as to the meaning of "cold, calculated and premeditated."
>
> While it is true that the Defendant consciously sought out the victim to rob him, there is no evidence that the Defendant "had a careful plan or prearranged design to kill [the victim] during the robbery". Rogers, pg. 533. Although there is no question there

> is ample evidence of simple premeditation, this Court is forced to conclude, as in Rogers, "that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of 'calculation'." Rogers, pg. 533. See also Farinas v. State, 15 F.L.W. S555 (Fla. 10/11/90) (The fact that Defendant approached victim after firing first shot and then had to unjam his gun three times before firing fatal shots to the back of the victim's head did not evidence a heightened premeditation bearing the indicia of a plan or prearranged design.)
>
> (R 551)

The trial court did not have the benefit of this Court's decision in Wickham v. State, ___ So.2d ___, 16 F.L.W. S777 (Fla. 1977) wherein the Court held that while the murder may have begun as a caprice it escalated to CCP.

Appellant presents an interesting formula for automatic-reversal. Since a trial court should instruct a jury on aggravating factors (like CCP) and mitigating factors "for which evidence has been presented," Stewart v. State, 558 So.2d 416, 420 (Fla. 1990), when a trial court subsequently declines to find an aggravator for which he has instructed because of the state's failure to prove beyond a reasonable doubt, reversal is automatically required since no one knows the basis of the jury's recommendation. In such a thesis, reversal should always flow because of the dichotomy between this Court's mandate that an instruction be given when any evidence supports the factor and the subsequent determination by the judge as to whether the factor is proven beyond a reasonable doubt. What are we to make

of this dilemma? The argument is simply another consequence of the continuing error to regard the jury as the sentencer. It is not. The trial judge is the sentencer and it is to his order that a reviewing court should look to see whether his findings are supported by the evidence and whether the appropriate weighing has been conducted.[7] See Sochor v. Florida, ___ Cr.L. ___ (1992) (confirming that the judge is the sentencer).

Appellant cites Omelus v. State, 584 So.2d 563 (Fla. 1991) and Jones v. State, 569 So.2d 1234 (Fla. 1990). Omelus required a new sentencing proceeding -- this Court determined -- because the prosecutor had argued the applicability of the HAC factor when the case presented a contract killing and the defendant did not know the manner of death or intend the infliction of a high degree of pain. Omelus involved the anomalous; applying the HAC factor vicariously to the non-killer who also had one mitigating factor and four jurors who had recommended life. Omelus should not be extended to the trigger man who had no mitigating circumstances found by the trial judge and a 12 to 0 death recommendation. In Jones v. State, supra, this Court held that the trial court had erroneously instructed the jury on HAC; the

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[7] There was some evidence supporting the CCP factor. According to Bilbrey's account, appellant told him that he and his accomplice were looking for money, observed a big shiny car outside a bar, enticed victim Ruben Diaz to give them a ride, Stewart pulled out a gun, forced him to drive to a secluded area, ordered him to lie down on the side of the road and shot him twice in the head.

trial court did not make a factual finding of this factor in the sentencing order and "in many cases, this would obviate any error" 569 So.2d at 1238. However, that error in conjunction with the erroneous conviction of sexual battery (sexual acts occurred after the victim's death) might well have led the jury to conclude that such post-mortem acts supported the HAC factor.

Other errors present in the case included victim impact evidence in violation of Booth v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 (1987), error in preventing the jury from considering the potential sentence of imprisonment and in permitting the state to introduce evidence of lack of remorse in the guilt and penalty phases. Id. at 1240. No such multiple errors occurred in the case sub judice, the state did not introduce any improper evidence and the relevant evidence offered (albeit perhaps insufficient under this Court's demanding standard of Rogers v. State) does not require a reversal where the jury instruction given was requested by defense counsel and the CCP aggravator was not found by the sentencing judge.

ISSUE VI

WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND AND WEIGH THE TWO STATUTORY MENTAL MITIGATING CIRCUMSTANCES.

The trial court explained:

STATUTORY MITIGATING CIRCUMSTANCES

THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

This Court is reasonably convinced that the Defendant was 21 year of age at the time of the commission of this murder. However, this fact, given the evidence in the case, is not of a kind capable of mitigating the Defendant's punishment. Rogers, pg. 534. That is, although there is evidence to suggest that the Defendant had an unsettled childhood, there is no significant evidence linking his age to any other of his characteristics or the case itself such as immaturity. Echols v. State, 484 So.2d 5678, 575 (Fla. 1985), Mills v. State, 476 So.2d 172 (Fla. 1985), and Garcia v. State, 492 So.2d 360 (Fla. 1986). Indeed, the Defendant's own mental health expert, Dr. Sidney Merin, described him as logical and coherent and possessing the equivalent of an 11th grade education. Moreover, the Defendant's detailed recitation of the facts of this robbery and murder to his friend, Randall Bilbrey, is a further reason to reject this mitigating factor of age. Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986).

Therefore, the Court concludes that although the fact the Defendant was 21 years of age was established by the evidence, this fact, based on fairness and the totality of the Defendant's life and character, cannot be considered as "extenuating or reducing the degree of moral culpability for the crime committed." Rogers, pg. 534.

II.

THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

The Court has carefully reviewed and considered the evidence, including the expert testimony of the Defendant's mental health expert, as to whether this mitigating circumstance was reasonably established by the evidence. The Court simply cannot conclude that it was so established.

Even though the expert did testify that this tragic event was the end product of extreme emotional disturbance, his opinion both on direct and cross examination was otherwise clear and succinct as to the Defendant's mental state at the time of the commission of this murder, which is the relevant time period provided by law. That is, it was the expert's opinion the Defendant was not under influence of any mental disturbance and although he was under the influence of emotional disturbance it was not extreme. Moreover, the expert testified that there was no evidence of psychotic, bizarre or fragmented thinking or psychosis. Additionally, the expert found that the conflicts in the Defendant's life created a behavior disorder, which was not a psychosis but rather amounted to an antisocial personality such as is found in a sociopath or psychopath. Indeed, the expert opined that the Defendant is a "killer."

Therefore, the Court finds and concludes that this mitigating circumstance was not reasonably established by the evidence.

III.

THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

Again, the Court has carefully reviewed and considered the expert testimony of the Defendant's mental health expert, as to whether this mitigating circumstance was reasonably established by the evidence. Again, the Court cannot conclude that it was so established. And again, the opinion of the expert was clear and concise -- at the

time of the murder the Defendant knew what he was doing within the framework of his conduct and his capacity to conform his conduct to the requirements of the law, although impaired by the use of alcohol and his background, was not substantially impaired.

Additionally, the evidence revealed beyond a reasonable doubt that: (1) The Defendant was able to discuss the events of the murder with the mental health expert, although the expert did not go into the specifics of the crime; (2) The Defendant, after the murder, took the victim's vehicle to another location and burned it to destroy any evidence of prints on the vehicle; and (3) The Defendant admitted to his friend, Randall Bilbrey, that he did not have the right to take anyone's life. Moreover, "The specificity with which [the Defendant] recited the details of the robbery and murder to his friend (Randall Bilbrey) contradicts the notion that he did not know what he was doing, . . ." Kokal, pg. 1319.

Therefore, the Court finds and concludes that this mitigating circumstantial was not reasonably established by the evidence.

IV.

THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

Although the Court declined to instruct the jury as to this mitigating circumstance, the Court still feels it appropriate to address this mitigating circumstance in terms of whether it was reasonably established by the evidence. The Court cannot so conclude.

The evidence was clear beyond all doubt that the Defendant was the dominant individual in this robbery and under. After gaining the confidence of the victim, he positioned himself in the backseat of the victim's vehicle. He then pulled a weapon on the victim, he directed the victim to drive to a remote area, he ordered the victim out of the vehicle, he made the victim lie face down on

> the ground, and then he robbed and shot the victim. Although the testimony indicated that the other individual with the victim was yelling "shoot" and in the opinion of the Defendant's mental expert the Defendant was responding to an emotional instruction by an emotional friend when he killed the victim, nevertheless, the evidence does not rise to the level of extreme duress, i.e., external provocation such as the use of force or threats,[8] or[9] substantial domination by another person.
>
> Moreover, the evidence from the medical examiner is unrefuted that the victim was shot twice in the head at close range (one foot or less from the firearm to the wounds). This evidence is significant because it clearly indicates that the victim did not shoot the victim in a random fashion in response to a "command" from another person.
>
> Therefore, the Court finds and concludes that this mitigating circumstance was not reasonably established by the evidence.

Appellant cites Cheshire v. State, 568 So.2d 908 (Fla. 1990), a jury override case involving a lovers' quarrel between killer and victim. This Court reduced the sentence to life, noting that under Tedder jurisprudence the trial court's role is solely to determine whether the evidence is sufficient to form a basis for the jury to recommend life imprisonment. This court found such a basis in Cheshire's intoxication, a perceived affront to his family status and the emotional distress

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[8] Toole v. State, 479 So.2d 731, 734 (Fla. 1985).

[9] Hill v. State, 515 So.2d 176 (Fla. 1987).

accompanying a failed marriage, and the fact that his spouse had left him for another person. Id. at 911 - 912. The trial curt erred in failing to consider this mitigating evidence in conjunction with the reasonable juror standard of Tedder. Moreover, the trial court's order did not mention nonstatutory mitigating factors only statutory ones and it appeared the trial court failed to consider nonstatutory mitigating.

Appellant apparently asks this Court to extend Cheshire and now require the trial court in its weighing process to conduct a Tedder analysis even when the jury submits a 12 to 0 death recommendation. Whatever intellectual appeal Tedder may have, it certainly loses all claim to rationality to require a trial judge to imagine that the unanimous death recommendation is really a unanimous life recommendation and then ask the trial judge to speculate on matters in the evidence which not only the jury may have relied on to support their recommendation but also to consider that which they may have relied on to subvert their recommendation and to conclude that what was rejected has been established. If that is not judicial capriciousness, it would be difficult to imagine what is.

In contrast to the trial judge in Cheshire, the trial judge sub judice articulated in his sentencing order a consideration of both statutory and nonstatutory proffered mitigating evidence (R 552 - 557). To the extent that appellant cites Cheshire for the unremarkable proposition that non-"extreme" emotional disturbance can be a mitigating factor, suffice it to say that the trial

judge was aware of that from this Court prior remand opinion (R 399 - 407).

Emotional Distress --

In essence, appellant really complains that the trial court should give the same weight to his proffered mitigating weight that appellant does. But it is not the law that a trial judge must accept and give the same weight as that required by the defense. The weight is for the trial court to determine. As stated in Preston v. State, ___ So.2d ___, 17 F.L.W. S 252, 255 (Fla. 1992):

> "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. Reversal is not warranted simply because an appellant draws a different conclusion. Sireci v. State, 587 So.2d 450 (Fla. 1991), petition for cert. field (U.S. Jan. 31, 1992) (No. 92-7177); Stano v. State, 460 So.2d 890 (Fla. 1984), cert. denied, 471 U.S. 1111 (1985).

See also Pace v. State, ___ So.2d ___, 17 F.L.W. S205 (Fla. 1992); Ponticelli v. State, 593 So.2d 483 (Fla. 1991); Robinson v. State, 574 So.2d 108 (Fla. 1991); Zeigler v. State, 580 So.2d 127 (Fla. 1991); Sochor v. State, 580 So.2d 595 (Fla. 1991); Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990); Jones v. State, 580 So.2d 143 (Fla. 1991). Error, if any, would be harmless. See Wickham v. State, 593 So.2d 191 (Fla. 1992).

In the case sub judice, appellant complains that the lower court improperly rejected the emotional distress mitigator on the basis of Dr. Merin's concession that Stewart was a psychopath and a killer. Stewart reasons that the court's description of the

Merin testimony is improper; the criterion of killer is "applicable to every capital defendant." Appellee submits that the trial judge cannot be faulted here for noting that appellant has killed before (victim Harris) attempted to kill before (victims Acosta and Harville) and that appellant's own expert who did not inquire about the Harris-Acosta episode (R 339) admitted the seemingly obvious fact that appellant's homicidal activity was not a one-shot deal. In rejecting some of what Dr. Merin opined the Court could focus on the weaknesses or equivocal nature of the testimony.

Appellant declares in his brief that Dr. Merin's "reasoning shows that he used an improper standard to determine whether Stewart suffered from mental distress" (Brief p. 78). To the extent that counsel for appellant is pointing out the weak nature of the defense evidence submitted below and the correctness of the trial court in rejecting the mitigating evidence submitted, appellee is grateful. To the extent that appellant is disagreeing with his own expert and urging that he is more seriously disturbed than his expert's testimony reflects, we do not understand appellate counsel's mental health expertise credentials to be comparable to Dr. Merin. The truth is that appellant was extraordinarily capable of kidnaping the victim, removing him to a secluded area and executing him with two bullets to the head. Rather than condemning Dr. Merin, he should be applauded for having the integrity to admit that appellant had a behavior disorder, was an antisocial personality and a

sociopath (R 342), and that at the time of the murder knew what he was doing (R 344). His ability to conform was not substantially impaired (R 345). It was permissible for the prosecutor to inquire if he knew what he was doing. Ponticelli, supra.

Appellee reasserts its previous argument that the court considered and appropriately rejected as insubstantial the evidence submitted. Appellant noted at Brief, p. 79 that Stewart's mother killed herself when Stewart was aged five; the testimony of appellant's witness Aunt Lillie Mae Brown , however, inconsistently urged that at one point she was told that the mother had killed herself (R 360) and -- a page later -- that lesbians had killed her (R 361). Whatever the situation may have been, a lesbian murder and a suicide seem to be, to a degree, inconsistent.

The trial court relied on this Court's decision in Kokal v. State, 492 So.2d 1317, 1320 (Fla. 1986), wherein the Court rejected a claim that *F.S. 921.141(6)(f)* should have been found since "the specificity with which Kokal recounted the details of the robbery and murder to his friend contradicts the notion that he did not know what he was doing."

Appellant argues that Bilbrey and Merin referred to Stewart's use of alcohol an drugs. Merin, of course, relied solely on the self-report of appellant and as the trial court noted his memory of the details casts great doubt on the efficacy of the drugs and alcohol. As for Bilbrey, he testified that on

December 9, 1984, he and Stewart each drank two beers (R 240). Stewart relayed the details of the kidnapping, robbery and execution of victim Diaz and subsequent arson of the automobile "so they can't get fingerprints or nothing off of it" (R 243). From that time (December 9)[10] for the next ten days Stewart drank a lot and smoked marijuana (R 248). No detail as to the amount was given. To the extent appellant may be suggesting extreme intoxication at the time of the murder there is no evidence to support it and the execution of, the kidnapping, robbery and murder and subsequent burning of the car refutes it. Appellant relies on Nibert v. State, 574 So.2d 1059 (Fla. 1990), but in that case there was no evidence that appellant encountered victim Snavely with an intent to kill (whereas Stewart forced Diaz at gunpoint to drive to a secluded area where he shot the victim twice in the head); there was no evidence of a robbery (unlike the instant case), evidence at the scene demonstrated the consumption of alcohol and numerous people attested to Nibert's drinking problem. Dr. Merin had testified in Nibert that the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to control his behavior was substantially impaired (in the instant case Merin opined that Stewart's emotional disturbance was not extreme, he pretty much knew what was going on, and that his ability or capacity to

[10] Detetive Luis arrived at the scene of the Diaz homicide on December 6 (R 229).

conform to the requirements of law was not substantially impaired (R 344 - 345).

In Nibert there was no evidence the defendant had a prior record of violent criminal behavior; in the instant case, Stewart has killed another victim (Harris) and almost killed or wounded two others (Acosta and Harvell) as well as victim Diaz in the instant case. Unlike Nibert the instant case merely presents self-serving admissions of appellant to Dr. Merin[11] and the Bilbrey testimony that appellant drank a couple of weeks after the homicide.

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[11] Appellant's Aunt Lillie Brown admitted that her contact with Stewart was for a three or four month period when appellant was thirteen (R 383).

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND UNREBUTTED NONSTATUTORY MITIGATING EVIDENCE.

The trial court was well aware of Campbell v. State, 571 So.2d 415 (Fla. 1990) and explained why it was not finding the nonstatutory mitigating factors of deprived and difficult childhood and the transition from being a violent person to a compassionate person since his incarceration.

NONSTATUTORY MITIGATING CIRCUMSTANCES

> The Court has carefully reviewed and considered the evidence in terms of whether the evidence reasonably established any nonstatutory mitigating circumstances. Campbell v. State, 15 F.L.W. S342, S344 (Fla. 6/15/90. The Court finds that there are arguably two such circumstances -- the Defendant's deprived and difficult childhood and his transition from being a violent person to a compassionate person since his incarceration.
>
> As to the first circumstance, the Court concludes that the Defendant's "actions in committing this murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance." Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985). That is, the effects produced by the Defendant's childhood trauma are simply not relevant given the Defendant's character and record and the circumstances of this case. Rogers, Pg. 535. The evidence in this case was crystal clear -- the Defendant, who needed money, consciously sought out the victim whom he thought had money for the express purpose of depriving that victim of his money by the use of a firearm and in the course of this nefarious scheme took the victim at gunpoint to a remote area where he in fact robbed him and murdered him. The evidence is also clear that this murder and robbery of Mr. Diaz was the beginning of a

> series of criminal act of violence and murder perpetrated by the Defendant which transpired over a five month period of time in which robbery was the motivating factor. Indeed, as noted above, the subsequent robbery and murder involving Ms. Acosta and Mr. Harris were perpetrated in almost the exact same manner as the robbery and murder of Mr. Diaz.
>
> Accordingly, the Court finds that the evidence "factually does not support a conclusion that [the Defendant's] childhood trauma produced any effect upon him relevant to his character, record, or the circumstances of the offense . . . " Rogers, Pg. 535.
>
> As to the second circumstance, the Court does not doubt the sincerity of the testimony of the Defendant's aunt as to her perceptions of the change in the Defendant since he has been incarcerated. Nevertheless, the Court simply cannot ignore the facts elicited at the sentencing proceeding which manifest the true nature of the Defendant's character -- he is a violent individual who has no hesitancy in taking an innocent individual's life or in perpetrating extreme acts of violence on an innocent individual Or, as noted by Defendant's mental health expert, the Defendant is a sociopath/psychopath who is a killer.
>
> Accordingly, the Court finds that whatever character transition the Defendant may have undergone since he has been incarcerated, it is not truly of a mitigating circumstance given the facts of this case and the Defendant's history of murder and violence. Campbell. Pg. S 344.

In essence appellant disagrees with the trial court's conclusion. This Court has repeatedly held that it is for the trial judge to consider whether proffered mitigating evidence in a given case actually are mitigating and the weight to be accorded such evidence. See cases cited infra in Issue VIII at pages 61 - 63.

Appellant attempts to posture the trial court's order as an erroneous legal ruling that such things as traumatic childhood could not be deemed valid mitigating, as a matter of law. But the truth is, the court's order does not recite that the law will not permit the trial court to consider nonstatutory mitigating and therefore the court declines to do so; rather the order recognizes that such attempts may be considered but that in the factual context of this case the proffered mitigating is insubstantial -- that it carries little or no weight.[12] Even if the trial judge had wrongfully failed to weigh appellant's alleged remorse (others opined on that, Stewart did not testify to his remorse) and the loving nature perceived by his aunt, the result would not be different and is harmless. Pace v. State, ___ So.2d ___, 17 F.L.W. S205 (Fla. 1992); Wickham v. State, 593 So.2d 191 (Fla. 1991).

See also Cook v. State, 581 So.2d 141, 144 (Fla. 1991) (even though not full compliance with Campbell particularly in view of the double murder in this case the trial judge would have imposed the sentence of death even if the sentencing order had contained findings that the nonstatutory mitigating circumstances had been proven); Downs v. State, 572 So.2d 895, 901 (Fla. 1990) (even

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[12] Appellee's review of the record fails to find counsel's jury argument regarding disparate treatment of an equally culpable codefendant (R 442 - 462). Rather, appellant argued that Stewart operated under the influence of his "companion" (R 453). If appellant did not urge his present claim of mitigation below, he may not do so now. See Lucas v. State, 568 So.2d 18, 23 - 24 (Fla. 1990).

though a lack of discussion of mitigation in the sentencing order satisfactorily demonstrates the trial court conducted the appropriate balance).

At the risk of repetition, appellee submits that the trial court did not commit error -- and does not commit error -- in failing to give the same weight to the testimony of appellant's relative as appellant and his counsel would desire. That Stewart's aunt believes he was and is a lovable human being is laudatory (for the aunt) but the trial judge is entitled to conclude that appellant's total history - leaving in his wake victims Diaz, Harris, Acosta, Harville -- represents the "real" Stewart -- a psychopath and a killer in the words of defense witness Dr. Merin.

Finally, appellant complains about the trial court's failure to discuss remorse. This can hardly be deemed a fatal error, especially since appellant himself declined even to mention any remorse in his brief testimony; perhaps, that was one of the matters "too difficult" to share. Appellant presumably relies on the testimony of Randall Bilbrey and Dr. Merin to establish Stewart's remorse. But even from Bilbrey's testimony it is not clear the degree to which appellant was expressing true remorse and the extent it was a mere accompaniment to his drinking. And Dr. Merin did not discuss with Stewart the shootings of Acosta, Harris, and Harville. His testimony was based on what Stewart told him (R 340).

ISSUE VIII

WHETHER THE DEATH PENALTY IS DISPROPORTIONATE BECAUSE THERE WAS ALLEGEDLY SUBSTANTIAL MITIGATION IN THIS CASE.

"Appellant is a good man, except that sometimes he kills people."

> Fead v. State, 512 So.2d 176, 180 (J. Grimes, concurring in part and dissenting in part)

The trial court noted in its findings appellant's unfortunate habit of killing and attempting to kill people:

> THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING USE OR THREAT OF VIOLENCE TO THE PERSON.
>
> The Court concludes that this aggravating circumstance was proved beyond a reasonable doubt. The State of Florida introduced certified copies of judgments reflecting the following felony convictions as to the Defendant which involved either a capital crime or the use or threat of violence to a person:
>
> 1. State's Exhibit No. 21 -- Judgment of convictions for attempted murder in the second degree and armed robbery imposed on August 27, 1986 in Case No. 85-4025. These convictions were affirmed by the Florida Supreme Court at 549 So.2d 171 (1989) although the Court reversed the sentence imposed as to armed robbery and remanded for resentencing.
>
> 2. State's Exhibit No. 22 -- Judgment of convictions for attempted murder in the first degree and attempted armed robber imposed on June 9, 1986 in Case No. 85-4023.
>
> State's Exhibit No. 24 -- Judgment of conviction for aggravated assault imposed on June 9, 1986 in Case No. 85-4384.

4. State's Exhibit No. 24 -- Judgment of conviction for murder in the first degree imposed on August 27, 1986 in Case No. 85-4825. This conviction was affirmed by the Florida Supreme Court at 549 So.2d 171 (1989) although the Court temporarily remanded the case to the Trial Court so that the Trial Court could provide written findings justifying the imposition of the death penalty.

Moreover, the State introduced evidence detailing the gruesome facts and circumstances relating to some of the foregoing convictions.

As to Case Nos. 85-4025 and 85-4825 Ms. Michelle Acosta testified that in April of 1985 during the late evening she and her friend, Mark Harris, picked up the Defendant while he was hitchhiking. Ms. Acosta was driving, Mr. Harris was in the front passenger seat and the Defendant was in the backseat. Once they arrived at the place the Defendant wanted to be left off, the Defendant pulled a firearm on them. The Defendant then proceed to strike Ms. Acosta in the head, shoot both her and Mr. Harris, drag both of them from the vehicle, steal the vehicle, and then later burn the vehicle. Mr. Harris later died as a result of this criminal incident. It is noteworthy that the fats of this case are strikingly similar to the facts of the case involving the murder of Mr. Diaz.

As to Case No. 85-4023 Mr. James Harville testified that he was working at a convenience store during the early morning hours of April 19, 1985. At that time two young men came into the store. One of them pulled a firearm, told him this was a "hold up" and immediately shot him between the eyes. The bullet is still lodged in his head.

Accordingly, the Court finds that it has been established by the evidence beyond all doubt that the Defendant has been previously convicted of another capital felony and of

> felonies involving the use of violence to other persons and the threat of violence to another person.
>
> (R 549 - 551)

In the instant case the jury recommended a sentence of death by a 12 to 0 vote (R 542) and appellant does not challenge the two aggravating factors found (R 548 - 550).

Appellant emphasizes his alleged emotional problems and abused and disadvantaged childhood and in essence asks this Court to accord greater weight than did the trial court. But the trial court explained why he rejected the proffered mitigation (R 552 - 554).

I. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

> This Court is reasonably convinced that the Defendant was 21 years of age at the time of the commission of this murder. However, this fact, give the evidence in the case, is not of a kind capable of mitigating the Defendant's punishment. Rogers, pg. 534. That is, although there is evidence to suggest that the Defendant had an unsettled childhood, there is no significant evidence linking his age to any other of his characteristics or the case itself such as immaturity. Echols v. State, 484 So.2d 568, 575 (Fla. 1985), Mills v. State, 476 So.2d 172 (Fla. 1985), and Garcia v. State, 492 So.2d 360 (Fla. 1986). Indeed, the Defendant's own mental health expert, Dr. Sidney Merin, described him as logical and coherent and possessing the equivalent of an 11th grade education. Moreover, the Defendant's detailed recitation of the facts of this robbery and murder to his friend, Randall Bilbrey, is a further reason to reject this mitigating factor of age. Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986).
>
> Therefore the Court concludes that although the fact the Defendant was 21 years of age

was established by the evidence, this fact, based on fairness and the totality of the Defendant's life and character, cannot be considered as "extenuating or reducing the degree or moral culpability for the crime committed." Rogers, pg. 534.

II.

THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

The Court has carefully reviewed and considered the evidence, including the expert testimony of the Defendant's mental health expert, as to whether this mitigating circumstance was reasonably established by by the evidence. The Court simply cannot conclude that it was so established.

Even though the expert did testify that this tragic event was the end product of extreme emotional disturbance, his opinion both on direct and cross examination was otherwise clear and succinct as to the Defendant's mental state at the time of the commission of this murder, which is the relevant time period provided by law. That is, it was the expert's opinion the Defendant was not under the influence of emotional disturbance it was not extreme Moreover, the expert testified that there was no evidence of psychotic, bizarre or fragmented thing or psychosis. Additionally, the expert found that the conflicts in the Defendant's life created a behavior disorder, which was not a psychosis but rather amounted to an antisocial personality such as is found in a sociopath or a psychopath. Indeed, the expert opined that the Defendant is a "killer."

Therefore, the Court finds and concludes that this mitigating circumstance was not reasonably established by the evidence.

III.

THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

> Again, the Court has carefully reviewed and considered the evidence, including the expert testimony of the Defendant's mental health expert, as to whether this mitigating circumstance was reasonably established. And again, the opinion of the expert was clear and concise -- at the time of the murder the Defendant knew what he was doing within the framework of his conduct and his capacity to conform his conduct to the requirements of the law, although impaired by the use of alcohol and his background, was not substantially impaired.
>
> Additionally, the evidence revealed beyond a reasonable doubt that: (1) The Defendant was able to discuss the events of the murder with the mental health expert, although the expert did not go into the specifics of the crime; (2) The defendant, after the murder, took the victim's vehicle to another location and burned it to destroy any evidence of prints on the vehicle; and (3) The Defendant admitted to his friend, Randall Bilbrey, that he did not have the right to take anyone's life. Moreover, "The specificity with which [the Defendant] recited the details of the robbery and murder to his friend (Randall Bilbrey) contradicts the notion that he did not now what he was doing, . . ." Kokal, pg 1319.
>
> Therefore, the Court finds and concludes that this mitigating circumstance was not reasonably established by the evidence.

This Court has held that it is for the trial judge to consider the mitigating evidence offered and the weight, if any, to be accorded to it. See, generally, Nixon v. State, 572 So.2d 1336 (Fla. 1990) (clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So.2d 108 (Fla. 1991) (no error in failing to find additional mitigating factors; trial court's comprehensive order discussed

all mitigating presented and reflected it considered and weighed it); Gunsby v. State, 574 So.2d 1085 (Fla. 1991) (trial judge considered conflicting testimony of mental health professionals and as an appellate court we have no authority to reweigh that evidence); Engle v. Dugger, 476 So.2d 696 (Fla. 1991) (mental health experts often reach different conclusions); Sanchez-Velasco v. State, 570 So.2d 908 (Fla. 1990) (failure to find extreme mental or emotional distress an inability to appreciate the criminality of conduct not error judge could appropriately reject it since the evidence was not without equivocation and reservation); Zeigler v. State, 580 So.2d 127 (Fla. 1991) (judge explained why he was giving little or no weight to the mitigating evidence); Sochor v. State, 580 So.2d 595 (Fla. 1991) (Okay for trial judge to reject mitigating factors; although several doctors testified as to defendant's mental instability, one testified he had not been truthful and another that he had selective amnesia and deciding about the family history as mitigation is within the trial court's discretion); Jones v. State, 580 So.2d 143 (Fla. 1991) (while a poor home environment in some cases may be mitigating, sentencing is an individualized process and the trial court may find it insufficient); Ponticelli v. State, ___ So.2d ___, 16 F.L.W. S669 (Fla. 1991) (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony "speculation" an there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State,

587 So.2d 450 (Fla. 1991) (the decision as to whether a particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve conflicts in the evidence, that determination should be final if supported by competent substantial evidence); Pettit v. State, ___ So.2d ___, 17 F.L.W. S41 (Fla. Case No. 75,565, January 9, 1992).

Appellant's reliance on cases such as Cochran v. State, 457 So.2d 928 (Fla. 1989); Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988); Livingston v. State, 565 So.2d 1288 (Fla. 1988) and Hegwood v. State, 575 So.2d 170 (Fla. 1991) is unavailing. Cochran and Hegwood both involved jury overrides with the attendant Tedder protections, not a unanimous death recommendation as here. Fitzpatrick involved extreme emotional mitigating evidence presented and the Court characterized the defendant as a "disturbed man-child, not a cold-blooded heartless killer." Livingston killed once. In the instant case, no mitigating evidence was found and appellant has killed twice on separate occasions and attempted other homicides. No disproportionality infirmity is present.[13]

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[13] This Court is aware of appellant's other homicide. See Stewart v. State, 549 So.2d 171 (Fla. 1989); Stewart v. State, 588 So.2d 972 (Fla. 1991).

This Court has previously rejected disproportionality arguments when there are two valid aggravating factors even if the mitigating circumstances include abused childhood or disadvantaged educational background.

See Dougan v. State, ___ So.2d ___, 17 F.L.W. S10 (Fla. 1992) (rejecting a disproportionality argument where defendant was not mentally deficient and suffered no racial discrimination uncommon to all of the black community); Watts v. State, ___ So.2d ___, 17 F.L.W. S27 (Fla. 1992) (death not disproportionate where three aggravating factors were weighed against twenty-two-year-old defendant with law I.Q.); Freeman v. State, 563 So.2d 73 (Fla. 1990) (death not disproportional when two aggravating circumstances were weighed against mitigating evidence of low intelligence and abused childhood); Kight v. State, 512 So.2d 922 (Fla. 1987) (death penalty proportionately imposed with two aggravating circumstances despite evidence of mental retardation and deprived childhood); Wickham v. State, 593 So.2d 91 (Fla. 1991) (rejecting a disproportionality contention despite the trial court's failure to find and weigh abusive childhood, alcoholism, history of hospitalization for mental disorders including schizophrenia proportionality cases urged by the defense were domestic violence, heat of passion cases or severely mentally disturbed defendants).

Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988) is distinguishable. There, the unanimous opinion of several experts was that he was crazy as a loon and witnesses at the scene

described him as psychotic. Appellant's claim here is based largely on self-serving accounts he made and hearsay of his aunt.

Appellant cites Cochran v. State, 547 So.2d 928 (Fla. 1989), a decision which rested on a jury life recommendation and the attendant peculiar Tedder v. State, 322 So.2d 908 (Fla. 1975) jurisprudence -- a circumstance inapplicable here as the jury recommended death by a 12 to 0 vote[14] (R 542). Livingston v. State, 565 So.2d 1288 (Fla. 1988) involved the striking of one improper aggravating factor found by the trial judge, two valid mitigating factors found by the trial court and a host of mitigating that outweighed Livingston's single murderous escapade. In contrast, there are no improper aggravating sub judice, the trial court explained why there was no substantial mitigation and appellant's homicidal adventures -- separate incidents -- claimed two victims and almost claimed two others (Acosta and Harville). This Court has not held -- yet -- that such a propensity to murder should be deemed sufficiently mitigating to merit a disproportionality finding.

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[14] Penn v. State, 574 So.2d 1079 (Fla. 1991) was also a jury override case.

ISSUE IX

WHETHER THE DEATH SENTENCE IS UNCONSTITUTIONAL BECAUSE OF THE ALLEGED ARBITRARY DISREGARD OF F.S. 921.141.

On March 15, 1990, this Honorable Court affirmed the judgment and remanded for a new sentencing proceeding before a jury and the court explained that the "Grossman rule" was inapplicable (R 528 - 529). That constitutes the law of the case and is res judicata. Cf. Tillman v. State, 591 So.2d 167 (Fla. 1991).

Appellant merely is seeking a belated rehearing and announces his agreement with dissenting Justice Barkett and disagreement with the majority.[15] This point should not be revisited.

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[15] Appellee agrees with the concurring in part and dissenting in part opinion of Justice Grimes; nevertheless, a new sentencing proceeding was conducted.

CONCLUSION

For the foregoing reasons, the sentence imposed should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 12TH day of June 1992.

OF COUNSEL FOR APPELLEE.