IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

vs. Case No. 77,~~212~~ 217

STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The Appellant, Kenneth Allen Stewart, was convicted and sentenced to death on October 3, 1986, for the first-degree murder of Ruben Dario Diaz. (R. 589-90) On March 15, 1990, this Court affirmed the conviction but vacated Stewart's death sentence and remanded for resentencing because the court failed to instruct the jury on the impaired capacity mitigating factor, § 921.141(6)(f), Fla. Stat. (1989). Stewart v. State, 558 So.2d 416 (Fla. 1990).

Mike Jones, the same court-appointed counsel who represented Stewart at his first trial, represented him in the jury resentencing proceeding which is the subject of this appeal. Bill James, the State Attorney for the Thirteenth Judicial Circuit, and John Skye, Assistant State Attorney, again prosecuted. (R. 539) The jury resentencing commenced October 9, 1990. (R. 4) The Honorable Richard A. Lazzara, circuit court judge in the Thirteenth Judicial Circuit, presided. (R. 1)

The jury recommended death by a vote of twelve on October 12, 1990. (R. 542) Stewart was sentenced to death November 21, 1990. (R. 546-47) Written findings supporting the death sentence were filed on that date. (R. 548-59)

On December 21, 1990, Stewart filed a Notice of Appeal to this Court pursuant to Article V, Section 3(b)(1) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(1)(A)(i). (R. 560) He was found indigent for purposes of appeal and the Public Defender for the Tenth Judicial Circuit was appointed to represent him in this appeal. (R. 516-17)

STATEMENT OF THE FACTS

Evidence presented at the jury resentencing held October 9-12, 1990, indicated the following:

The State's Case

Detective David Luis, Hillsborough County Sheriff's Office, investigated the homicide of Ruben Diaz in the early morning hours of December 6, 1984. (R. 228-29, 233) He observed the body of a white male lying face down along the side the road in Hillsborough County. (R. 230-31) Dr. Diggs, the medical examiner, responded to the scene of the homicide and later conducted an autopsy. (R. 257, 260) Diaz had two gunshot wounds to the head. One had stippling around the wound indicating that the projectile was fired from a range of about a foot or less. (R. 261-65) The other wound passed through both hemispheres of the brain. (R. 261) Dr. Diggs could not determine which shot was fired first. (R. 268) Both wounds were lethal. He found cocaine in Ruben Diaz's blood. (R. 272)

Randall D. Bilbrey, age 24, testified that he lived and worked in Tampa from June through late December of 1984. (R. 236-37) On December 9, 1984, he met Kenneth Stewart at a 7-Eleven store about a block from the mobile home park where he lived. (R. 238) Bilbrey gave Stewart money to buy a six-pack of beer and the two of them went back to Bilbrey's trailer where they drank beer. (R. 239-40)

After Stewart drank some beer, he started crying and said that he "didn't have the right to take anybody's life." (R. 240) When Bilbrey questioned him further, Stewart admitted that he had killed a guy two weeks earlier. (R. 240)

According to Bilbrey, Stewart told him that he and another guy, just released from jail, went out looking for money. They saw a big white, nice-looking car, maybe a Lincoln or a Cadillac, in front of a bar. They went inside, found the owner of the car, and convinced him to take them for a ride. Stewart, who was in the back seat, pulled a gun and instructed the man to drive toward Lutz. When they arrived in Lutz, they made the driver get out along a dirt road and lie face down with his hands above his head. They found $50 and cocaine in the man's pockets. (R. 240-42)

The other guy was yelling and screaming at Stewart, "Shoot him. Shoot him." The victim was yelling, "Don't shoot me." Stewart "just pulled the trigger." He shot the man twice in the head. Afterwards, the guy with Stewart asked why he shot the man twice and Stewart said he didn't know. (R. 242)

They burned the car at the Floriland Mall by pouring gasoline on it and lighting it on fire. They jumped the fence and ran. Stewart did not know where the other guy went. Stewart ran up behind a Winn-Dixie where five bums lived. He drank with them until he passed out. (R. 242-43)

Mechy Wright, fire inspector for the Tampa Fire Department, investigated the fire at the Floriland Mall. (R. 249-51) Wright determined that the fire was of incendiary origin. He later found that the car was leased to Ruben Diaz. (R. 256-57)

Bilbrey testified that Stewart stayed with him for about ten days, part of which time they were living "on the streets." During that time, Stewart drank a lot of alcohol every day and lived like

an alcoholic. Stewart also used marijuana. (R. 245, 248)

Michelle Acosta, age 28, testified that in the late evening of April 13, 1985, she and her long-time friend, Mark Harris, were returning to Tampa from the beach. (R. 278-79) It was sprinkling. They picked up Stewart hitchhiking on Nebraska Avenue. (R. 280-81) When they stopped to let Stewart out, he said, "Don't move. I have a knife." She and Mark sat there for two minutes, not knowing what to do. When she could sit there no longer, Acosta put her foot on the gas pedal "to maybe jerk him back so he would be out of control, then get out of the car real fast." When she did so, Stewart fired three gunshots, hitting her in the right shoulder. (R. 284) Mark was unable to get out because he was paralyzed from a gunshot wound. (R. 284) Stewart pulled him out of the car and forced Acosta out and left in the car. Mark died of pneumonia while hospitalized for the gun wound. (R. 285-86)

James Harville testified that on April 19, 1985, he was on night duty as manager of a 7-Eleven when two men approached. One pulled out a weapon and said, "This is a hold up," and pulled the trigger. The bullet entered Harville's head between his eyes. Although part of the bullet exited the back of his head, fragments remained in his head. Harville was hospitalized for one week. (R. 286-89) He was unable to identify the man who shot him but identified the other man. A man was brought into the back of the courtroom and identified by Harville as that man.[1] (R. 290-92)

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[1] The state introduced judgments showing Stewart's convictions for the murder of Mark Harris; attempted second-degree (continued...)

The Defense Case

After conferring briefly with counsel, Kenneth Stewart took the stand. (R. 299) He said that, although he had intended to testify about his life and background, the way he was raised and the things he went through, he had changed his mind. He had decided not to testify because it was "too difficult." (R. 301-02) On cross-examination, the prosecutor asked Stewart if it was "too difficult to sit here under oath . . . and tell those twelve people over there why you committed all these murders and other crimes. . . ."[2] Over defense objection, the court told Stewart to answer the question if he could. Stewart could not. (R. 302-03)

The prosecutor then asked Stewart if he anticipated that Dr. Sidney Merin would testify. Stewart did not know. Stewart said that he had talked to Dr. Merin in 1986, but did not remember what he told him, and had not talked to him again recently nor taken any psychological tests. (R. 301-04)

Dr. Sidney Merin, a clinic psychologist, testified that he evaluated Stewart on September 24, 1986, in contemplation of Merin's testifying in the penalty phase of Stewart's first-degree murder case. (R. 306-09, 340-41) He reviewed police and witness reports but conducted no psychological tests. (R. 309-10) He did

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[1](...continued)
murder of Michelle Acosta; armed robbery; attempted armed robbery; attempted murder of Harville; and aggravated assault. (R. 227-28)

[2] Defense counsel objected because the question was beyond the scope of direct. He made it clear that he asked Stewart about his life and the way he was raised, and that he intentionally phrased it that way. (R. 302-03)

not re-evaluate Stewart prior to this penalty proceeding.[3] (R. 315) The 1986 interview was the only time he saw Stewart. Merin said that Stewart was logical and coherent although his mood was slightly subdued, suggesting depression. (R. 320)

Stewart told Dr. Merin of a shooting by a codefendant and the Diaz incident which occurred after he had been drinking heavily, abusing alcohol and drugs. (R. 321, 329) He had little recall of that day. He normally drank "as much as a gallon of liquor per day, along with beer." He suspected that he also smoked marijuana that day. (R. 320) Stewart had been drinking heavily for years. (R. 321) Dr. Merin opined that Stewart shot Ruben Diaz in response to "an emotional instruction by an emotional acquaintance" who was with him at the time. Stewart mentioned an incident a year later which he described as an accident. (R. 329)

Dr. Merin said Stewart's eyes became moist when he began to relate the details of his family history. His first recollection was of his mother dressing him. One day she disappeared.[4] (R. 321) Until he was twelve years old, he thought his parents had separated and his mother was not allowed to see him. He believed that his stepfather was his natural father.

When Kenny was five years old, his stepfather remarried. His stepmother had three children. Kenny could not accept his stepmother and felt alienated and anxious about his real mother. When

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[3] Defense counsel told the prosecutor that he did not interview Merin again because "nothing changed." (R. 316) He talked to Dr. Merin during the luncheon recess that day. (R. 201)

[4] Stewart's mother died in 1968. (R. 321)

he was seven to nine years old, he had nightmares about running away in search of his natural mother. In his dreams, he would find his mother in a line at an airport and would call out to her and run to her. Just before touching her, he would awaken. (R. 322-23) He felt isolated and desperately needed some attachment. (R.322)

Although his stepfather told him his mother was dead, Kenny could not accept it and did not believe it until, at age twelve, he saw her grave when his grandfather was buried in the same cemetery. (R. 322) Kenny had asked to see his mother's grave, he did not really want to see it because seeing it would shatter his dreams. When he approached his mother's grave with her picture embedded on the tombstone, he "froze" and "was dazed." (R. 323)

After he saw his mother's grave, Kenny's pain and emotional trauma were so great that he began drinking. At age twelve, he drank from his stepfather's bar and took alcohol to school. He daydreamed in school, developing his own world. (R. 324)

Kenny loved and admired his stepfather, Bruce Scarpo, despite his firmness. One day, however, he found out that Scarpo was not his real father. Kenny was devastated. (R. 324-25) He then began wondering about his biological father. He ran away. The friend's grandmother helped him get to Tampa where his real grandmother lived. His grandmother obtained custody of him for a year, during which, Kenny said, "she filled my head with all sorts of stuff." (R. 325) She informed him that his biological father had been in prison and was later shot to death in a barroom fight. (R. 325) She also told him his stepfather had arranged to have his real

parents killed. Although this was not true, Kenny believed it. He wanted to kill his stepfather but he also loved his stepfather, creating conflict. (R. 325-26)

Stewart often ran away from his grandmother's home. He committed burglaries. He abused alcohol and drugs. At some point, he was arrested. His stepfather got him out of jail and took him back to South Carolina. He ran away and returned to Florida. He was released to his aunt when he again got in trouble. At age fourteen, he took his aunt's car and returned to South Carolina. (R. 326)

Kenny was arrested and sent to a state school. He remained there for two years. He then went to work in his stepfather's construction company. He considered himself the black sheep of the family and could not confide in his stepfather because of what his grandmother had told him. It kept "eating at him." (R. 327)

When his stepfather learned that Kenny was using drugs, he was furious. Taking his stepfather's pistol, Kenny returned to Florida where he committed more burglaries. He eventually spent nine months in jail and was put on probation. At seventeen, he violated probation and spent two and a half years in prison.

At nineteen, Stewart was even more obsessed with the loss of his real mother. His obsession was complicated by his love-hate relationship with his stepfather. He told Dr. Merin, "I had so much hate inside myself." (R. 328) He met a forty-year-old woman and lived with her for about two and a half years.

At twenty-one, finally learned that his mother committed suicide and that his natural father was killed by someone who was

not associated with his stepfather. He also learned that his paternal uncle was stabbed to death and that two of his aunts and a cousin were killed in a car accident. (R. 330-31)

Dr. Merin described these years as years of "compacted rage" which kept building and building. During this time, Stewart visited his mother's grave, taking a gun with him and drinking alcohol. He fantasized revenging his parents' deaths and returning to his mother's grave to kill himself or to have the police kill him. He was on a suicide mission. (R. 329)

Stewart was eventually arrested for carrying a concealed weapon. He escaped from the Tampa stockade and further destroyed himself by alcohol abuse. When the woman he was living with was arrested for prostitution, he found a job but continued drinking and going to his mother's grave, sometimes at 2:00 a.m., to obsess. (R. 329) His mind "turned off" and he did not remember large blocks of time after he had been drinking. (R. 331)

Dr. Merin did not think that Stewart suffered from "mental distress" at the time of the Diaz killing because he did not "break from reality, see little green men from Mars or think that he was Napoleon." Thus, his opinion was that Stewart was under emotional distress although not "extreme" emotional distress at the time of the homicide. Merin described Stewart as "the end product of years and years of extreme emotional distress." (R. 331) Stewart's behavior on the day of the homicide was consistent with his general level of mental and emotional behavioral characteristics during his teenage years and early twenties. (R. 344)

Dr. Merin testified that the excessive consumption of alcohol causes depression and loss of one's ability to control behavior. Excessive alcohol consumption over a period of years causes a chemical and, eventually, a structural change in the brain. In some cases, such brain damage might annihilate one's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. In this case, however, Dr. Merin believed that Stewart's excessive drinking reduced his grasp but did not annihilate his ability to appreciate what he was doing. Because Stewart had been drinking heavily for many years, he had learned to function in that natural state. (R. 331-33) Thus, Merin believed that Stewart's ability to appreciate the criminality of his conduct was impaired because of his alcohol intake but was not so "substantially" impaired that he did not know what was going on. (R. 345)

Dr. Merin opined that Stewart directed his anger, hostility and suicidal tendencies outward when he committed the homicide. Stewart's desire to identify his roots was important in his early life. Some time after age twelve, Stewart reached the point where he had no attachment. He decided he didn't care anymore because it had been "too painful." He then put himself in positions where he would hurt others and where he too could be hurt. (R. 333-36)

On cross-examination, Dr. Merin said that Stewart "in effect" admitted to the homicide but that they did not discuss the details. (R. 339-40) Dr. Merin found no evidence of psychotic thinking. Although he found internal conflicts, they were not sufficient to create a neurosis. (R. 340-41) Although Stewart had some features

of other behavior disorders, Dr. Merin's primary diagnosis was antisocial personality disorder. (R. 342)

Stewart's paternal aunt, Lillie Brown, of Seffner, Florida, testified that Kenny's mother, Elsie Tate Stewart was working as a stripper when she met his father, Charles, who was a roofer.[5] (R. 353-55) They were married when Charles was sixteen and Elsie was thirteen or fourteen. Kenny was born two or three years later while Charles was in prison and Elsie was moving from place to place. Charles spent much of his adult life in prison. (R. 355-56)

Ms. Brown saw Kenny as an infant and again when he was about eighteen months. At that time, he stayed with her sister for about six months. (R. 383-84) She described Kenny at that time as "hyper," crying, not satisfied with anything, and very emotionally disturbed. (R. 357) He was returned to his mother whose custody was closely supervised because she was on probation. (R. 384) At some point, Elsie became involved with Kenny's stepfather, Bruce Scarpo. She eventually left Kenny in South Carolina with Scarpo. (R. 357) Kenny's natural father told Ms. Brown that he had seen Kenny with cigarette burns all over his body when Kenny was two or three years old and living in South Carolina. (R. 359-60)

Ms. Brown recalled that Kenny's maternal grandmother told her that Elsie had been living in a house with lesbians who killed her when Stewart was four or five years old. (R. 361) Stewart's father was shot and killed at the Green Tavern Bar in Tampa in 1970 or

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[5] Although Stewart's mother is referred to in the transcript as "L.C.," her name was actually "Elsie."

1971. He had been in a fight over a pool game. (R. 362) The man who shot him fled to Charleston, South Carolina. Because Stewart's stepfather, Bruce Scarpo also lived in Charleston, Stewart believed his grandmother when she told him his stepfather had his father killed because his natural father was trying to take him from Scarpo. (R. 365-66) The man who shot Stewart's father eventually returned to Tampa, spent six months in county jail, and received one year probation. Kenny thought Scarpo was very powerful and had arranged the short sentence. (R. 367-68) Stewart also told her that Scarpo had repeatedly beaten him with his fists. (R. 371)

When Kenny's grandmother had custody of him, he stayed with his Aunt Lillie Brown on weekends and lived with her for three or four months. (R. 369) He was thirteen or fourteen at the time. Ms. Brown described him as compassionate and more thoughtful than any of her four sons. He was obsessed with learning who killed his parents. He desperately wanted someone to belong to. (R. 370)

Ms. Brown testified that Kenny had changed very much since his arrest. At that time he was "like an animal." She didn't know him or recognize his voice. (R. 372) She said Stewart had educated himself in prison. (R. 371) She described him now as brilliant, gentle, emotional and compassionate. Stewart's aunt visits him in prison once a month. He helps her with her problems. (R. 373) Stewart's "whole world" now is helping people. (R. 374)

She told of a recurring dream Kenny had while in prison. He was a baby in a large room. His mother was coming towards him. He was crying and screaming for her. When she was almost to him, she

disappeared and he awakened. Stewart's aunt told him that, when he was an infant, another aunt kept him for six months. When the aunt decided she didn't want him anymore, she returned him to the court. Since then, Kenny had not had the dream. (R. 379-80)

Following closing arguments, the court instructed the jury to consider in aggravation whether (1) Stewart had been convicted of another capital offense; (2) the crime was committed while he was engaged in a robbery; and (3) the homicide was committed in a cold, calculated and premeditated manner. (R. 463-64) He instructed the jury to consider in mitigation (1) Stewart's capacity to appreciate the criminality of his conduct was substantially impaired; (2) if he was under the influence of extreme mental or emotional disturbance; (3) his age; and (4) any other aspect of his character or the offense. (R. 465) The jury recommended death. (R. 542)

The judge sentenced Stewart to death. He found in aggravation that (1) Stewart was previously convicted of another capital or violent felony; and that (2) the crime was committed while he was engaged in a robbery. The judge found no statutory mitigation and no nonstatutory mitigation. (R. 542, 546-59)

SUMMARY OF THE ARGUMENT

I: Although Stewart did not testify, he took the stand to tell the jury he had intended to talk about his childhood but that it was "too difficult." Over defense objection, the prosecutor cross-examined him concerning the crimes committed and other matters beyond the scope of direct. Additionally, the prosecutor commented on Stewart's right not to testify. A defendant does not have to testify in a death penalty proceeding and cannot be forced to prove aggravating circumstances for the state. The court erred in permitting Stewart to take the stand and permitting the State to cross-examine him beyond the scope of direct.

II: At sentencing, Stewart requested a continuance so that his aunt could hire private counsel to represent him. He explained to the judge that his court-appointed counsel had not represented him effectively, citing various examples. The trial judge did not question counsel to verify Stewart's complaints and denied his request for a continuance. The record shows serious trial errors by counsel. A new sentencing is required because the judge failed to follow the required procedure when a defendant alleges that his court-appointed counsel is ineffective.

III: On cross-examination, and over defense objection, the prosecutor asked Stewart's aunt whether Stewart's grandmother was going to testify. The prosecutor's insinuation was that Stewart's aunt was lying when she testified that Stewart was beaten by his stepfather and that Stewart's grandmother would not confirm it if called. When a witness is equally available to both parties,

no inference should be drawn or comments made on the failure of either party to call the witness, unless invited by the defense. The defense did not suggest that Stewart's grandmother would testify and did not present an issue as to which her testimony would be relevant. The prosecutor brought up the issue as to which Stewart's grandmother's testimony might relate -- when Stewart told his aunt about the beatings. The error was prejudicial because it suggested that Stewart was required to present witnesses and had a burden to prove that death was not the proper penalty.

IV: The trial judge refused to instruct the jury on the "extreme duress and substantial domination of another" mitigating factor although the State and the defense presented unrebutted evidence to support it. The judge addressed and rejected this factor in his written findings and both counsel argued it to the jury. It is error for the judge to substitute his opinion for that of the jury by refusing to instruct the jury on mitigating factors when competent evidence is presented to support them.

V: The trial judge instructed the jury on the "cold, calculated and premeditated" aggravating factor even though he found, in his written opinion, that there was no evidence of CCP. This factor was inapplicable as a matter of law. The erroneous presence of the instruction tainted the death recommendation because the weighing process by the jury was distorted in favor of the death penalty. Thus, the death sentence is unreliable.

VI: Although they were reasonably established, the trial judge failed to find that (1) the defendant was under the influence

of extreme mental or emotional disturbance, and (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. If the judge did not abuse his discretion by finding the "extreme" and "substantial" modifiers were not established, he erred by failing to consider these nonstatutory mitigating factors.

VII: The trial judge also refused to consider and weigh the nonstatutory mitigation. Although he addressed two potentially mitigating circumstances, he found neither mitigating. Florida law establishes that both -- an abusive and traumatic childhood and potential for rehabilitation -- are valid mitigating factors. Both were established by unrebutted evidence. The judge also failed to mention Stewart's remorse, impaired capacity from alcohol and drug abuse, and emotional distress -- all valid mitigating factors.

VIII: Stewart's death sentence is not proportionately warranted because of the substantial mitigation in this case. Furthermore, the jury advisory verdict was unreliable because of the errors in Issues IV and V, infra. Thus, the case must be remanded for imposition of a life sentence.

IX: The Florida death penalty statute requires that, when the trial judge fails to file written findings in support of the death penalty, the defendant must be sentenced to life in prison. In Stewart's first penalty proceeding, the judge never filed any written findings. Stewart's death sentence is arbitrary and violates due process because other capital defendants in the same situation received life sentences.

ARGUMENT

ISSUE I

THE STATE CROSS-EXAMINED STEWART ON MATTERS BEYOND THE SCOPE OF DIRECT, FORCING HIM TO HELP THE STATE PROVE AGGRAVATING FACTORS, AND COMMENTED ON HIS FAILURE TO TESTIFY.

In State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court confirmed that a defendant does not have to testify in a death penalty proceeding and cannot be forced to prove aggravating circumstances for the state. In the instant case, Stewart did not actually testify but took the stand to say that, although he had intended to testify about his life and "how he was raised," he was not able to do so because it was "too difficult." Over defense objection, the prosecutor cross-examined Stewart on matters beyond the scope of direct. Additionally, he used Stewart's failure to testify to denigrate Stewart's defense (mitigation) and to support his argument to the jury that Stewart should be sentenced to death, thus misleading the jurors concerning the burden to prove that death is the proper punishment.

* * * * *

On the first day of testimony, defense counsel told the judge that Stewart had just advised him that he did not want to take the stand. Defense counsel continued, "It's a real, real important decision. What I am going to ask -- " (R. 276-77) The trial judge interrupted and said that, after the State's case was finished, defense counsel could consult with Stewart and then he would inquire of Stewart whether he was making the decision freely,

voluntarily, knowingly, and intelligently. (R. 277)

When the state rested, defense counsel requested twenty minutes to consult with Stewart. (R. 294) Afterward, defense counsel told the judge that Stewart would testify. The judge asked Stewart if that was what he wished to do. Stewart said that, based on his conference with counsel, he would take the stand and say why he was not going into his testimony. (R. 299) Defense counsel clarified his response, stating that Stewart would take the stand although his testimony would be different than what they had talked about. (R. 300) Stewart testified as follows:

> 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 and 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.

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.

MR. SKYE: 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 didn'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 his [sic] 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.

(R. 301-04)

The prosecutor and the judge continually used Stewart's failure to testify against him. During the charge conference, the prosecutor argued to the judge that "Mr. Stewart declined to" present a prima facie case as to that [mitigating] factor. (R. 407) Earlier, the prosecutor argued that Stewart's aunt should not be allowed to repeat hearsay because "the defendant had an opportunity . . . to testify" and "didn't want to tell the jury anything." The judge suggested that he argue, "[Y]ou heard it from other people. You sure didn't hear it from the defendant." (R. 375-78)

The prosecutor took the judge's advice. In his closing

argument, after describing state witness Bilbrey's version of the homicide, he said, "and just remember that Bilbrey's testimony in this regard was not contradicted in any fashion whatsoever." (R. 434) Later, the prosecutor argued to the jury that:

> [t]he 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 Dr. Merin.

(R. 435-36) The prosecutor took Stewart's statement out of context and argued to the jury that Stewart said it was "too difficult" to talk about the crimes. It was "his life and how he was raised" that Stewart was unable to talk about -- not the crimes. When the prosecutor asked him if it was too difficult to talk about the murders and crimes he committed, Stewart said only that he could not answer the question.

At sentencing, in denying Stewart's request for a continuance to obtain new counsel, the trial judge 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.

(R. 495) Stewart was not required to testify or to present his own evidence. By declining to testify, he did not forfeit his right to object to counsel's failure to adequately represent him.

* * * * *

The death penalty statute, as interpreted in State v. Dixon, is intended to protect the defendant from just this type of harassment by the prosecutor.

> The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla. Const., art. I, § 9, F.S.A., and U.S.Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

283 So.2d at 7-8. In this case, the prosecutor did exactly what Dixon and the death penalty statute prohibit. He cross-examined Stewart on matters concerning possible aggravating factors not covered in Stewart's direct testimony.

A.

The prosecutor's cross-examination was beyond the scope of Stewart's direct testimony.

Stewart took the stand only to say that he would not testify about his traumatic childhood because it was "too difficult." Over defense objection, the state went beyond direct by asking Stewart if it was "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 . . . ." (R. 302) Stewart's direct

testimony never suggested that he intended to talk about why he committed murders or other crimes.

In Golden v. State, 429 So.2d 45 (Fla. 1st DCA 1983), the court stated that the question is whether the cross-examination was "reasonably suggested by the defendant's direct examination." 429 So.2d at 56. In Golden, the testimony of Porterfield, another defendant in the case, went beyond a general denial of guilt and into specific subjects "pertinent to his participation in the crime." He described in great detail his own activities and those of the codefendants on the day of the homicide, claiming that he took no part in the killing. The court held that the state was entitled to cross-examine Porterfield concerning a stolen watch found in his car even though the evidence had been suppressed, based on Porterfield's detailed description of his excursion with the codefendants on the day of the homicide. 429 So.2d at 57-58.

On the other hand, the Second District Court of Appeal found, in Pate v. State, 529 So.2d 328 (Fla. 2d DCA 1988), that the defendant's testimony on direct examination that (1) he thought at first that his arrest concerned a prior DUI offense, and (2) he initially refused to talk with the officer because he was not accustomed to being accused of such a crime, did not justify the cross-examination concerning the details of his DUI. The state's exploration of Pate's past criminal history was error. Further, Pate's statement that he was "not normally accustomed to it" was so "inherently imprecise" that it was not susceptible to being called false so as to justify cross-examination for impeachment purposes.

In the instant case, Stewart did not even mention any crimes with which he had been charged. As in Pate, Stewart's statement that it was "too difficult" to talk about his life was so "inherently imprecise" that it was not susceptible to being termed false. Nevertheless, the prosecutor attempted to impeach Stewart's testimony during by inferring that Stewart was lying about his motivation for deciding not to testify.

This Court found that the trial court properly restricted defense counsel's cross-examination of a prosecution witness in Echols v. State, 484 So.2d 568 (Fla. 1985). Two of the subjects about which defense counsel wanted to cross-examine the state's investigator had not even been mentioned by the investigator on direct. Although the investigator had testified that he had listened to tapes received from the Indiana police, the Court determined that the defense was not entitled to cross-examine the investigator as to whether anyone had attempted to perform voiceprint analyses of the tapes. Id. at 572.

The subject matter of the direct examination in Echols (the tapes) and Pate (defendant's DUI arrest) were much closer to the proposed cross-examination than in the instant case. In this case, Stewart testified about nothing on direct. He merely told the jury why he was not going to testify about his background. His brief statement did not open the door to cross-examination by the State. In a death case, a defendant must be able to discuss (or decline to discuss) his family background as mitigation without being subject to cross-examination concerning why he committed the crimes. See

Dixon, 283 So.2d at 7-8. The prosecutor's tactic on cross-examination is exactly what the death penalty statute; article 1, section 9 of the Florida Constitution; and the fifth amendment to the United States Constitution prohibit.

B.

The prosecutor forced stewart to help prove nonstatutory aggravating circumstances.

The prosecutor has the burden of proving aggravating circumstances to justify a death sentence. The state must establish the existence of one or more aggravating circumstances before the death penalty can be imposed. The state must also show that the aggravating circumstances outweigh the mitigating circumstances. Arrango v. State, 411 So.2d 172, 174 (1982).

Even if the defendant testifies, which he is not required to do, the prosecutor cannot force the defendant to assume the State's burden to prove aggravating factors. The state can cross-examine him only on matters which he has raised. He cannot go beyond them to force the defendant to prove aggravating circumstances for the state. Dixon, 283 So.2d at 7-8.

The prosecutor urged the jury to find Stewart's failure to testify as nonstatutory aggravation. He argued to the jury, essentially, that Stewart should die because he was unwilling to testify and to undergo cross-examination to "ferret out the truth." Failure to testify and submit to cross-examination about why he committed the crimes is not a statutory aggravating factor. It supports none of the statutory aggravating factors. Only those aggravating circumstances enumerated in section 921.141(5) of the

Florida Statutes may be considered by the sentencer. § 921.141(5), Fla. Stat. (1989); Hitchcock v. State, 413 So.2d 741, 746 (Fla. 1982); Elledge v. State, 346 So.2d 998, 1002-03 (Fla. 1977) (must guard against unauthorized aggravating factor going into equation which might tip scales of weighing process in favor of death.")

C.

The prosecutor's argument impermissibly denigrated Stewart's mitigation defense.

In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990), this Court reversed, in part because the prosecutor's strategy throughout the trial was to discredit the whole notion of psychiatry and the insanity defense in particular. Unlike Nowitzke, Stewart did not present an insanity defense. Nevertheless, the prosecutor's strategy in closing argument was to discredit Stewart's mitigation which was his only defense against the death penalty.

The judge instructed the jury on both mental mitigators. These were the two most important mitigating factors in Stewart's defense. The State's cross-examination of Stewart was designed to denigrate Stewart's mental mitigation. The prosecutor first asked Stewart if he had talked to Dr. Merin and then whether Dr. Merin would be testifying. His obvious purpose was to infer that Stewart declined to testify to avoid cross-examination, knowing Dr. Merin would testify for him. Thus, he insinuated that the jury should not believe Dr. Merin because Stewart did not testify. If such tactics are permitted, defendants facing the death penalty will hesitate to talk to psychiatric experts, knowing that the content of their communication may later be used against them.

In closing, the prosecutor argued to the jury that Stewart told the story of his unfortunate childhood to Dr. Merin so that Dr. Merin could testify in his behalf to establish mental mitigation. (R. 435-36) This argument was also intended to denigrate Stewart's defense that he was emotionally impaired based on his traumatic childhood, lack of identity and drug and alcohol abuse.

As with the insanity defense, the legislature and the courts have made a policy decision that mental mitigating circumstances tend to establish a defense against the death penalty. In fact, the death penalty is constitutional in Florida only because the weighing of aggravating and mitigating factors prevents the arbitrary imposition of the death penalty. See Dixon, 283 So.2d 1. The prosecutor inferred that Dr. Merin's testimony was merely Stewart's self-serving story which they should seriously question because Stewart did not testify. To place before the jury the issue of whether a nontestifying defendant should be disbelieved because his testimony comes in through a mental health expert only confuses the jury and this is reversible error. See Nowitzke, 572 So.2d at 1355; Garron v. State, 528 So.2d 353, 357 (Fla. 1988).

D.

The trial judge erred by allowing Stewart to take the stand because he knew that Stewart did not intend to testify.

In Richardson v. State, 246 So.2d 771 (Fla. 1971), this Court reversed because the state called to the stand a codefendant, knowing that he planned to refuse to testify on the ground of self-incrimination. The Richardson Court found this scenario extremely

prejudicial to the defendant because the jury would necessarily conclude that the codefendant must be guilty and, therefore, the defendant must also be guilty. Id. at 777.

Citing Richardson, the Apfel court noted that, "where the state, knowing that a witness will assert his right against self-incrimination, nevertheless calls that witness who is closely identified with the defendant or similarly implicated and the witness does in fact claim the privilege, the defendant is thereby prejudiced." Apfel v. State, 429 So.2d 85, 86 (Fla. 5th DCA 1983). Accordingly, if the court and the state know that a witness will invoke the fifth amendment privilege, it is improper for the court to permit the jury to hear the witness invoke it. The same rule preludes the defense from calling a witness to the stand to invoke the privilege. Neither side may benefit from the invoking of the privilege and the questions asked in conjunction with it. Id.

In the instant case, Stewart did not invoke his fifth amendment right. Instead, he declined to testify because he felt that it would be too stressful for him to do so. Before he took the stand, he told the trial judge that he would be taking the stand only to say that he would not be going into his testimony. (R. 299) Thus, the trial judge should not have allowed defense counsel to call Stewart to the stand. See Apfel.

It was unnecessary for Stewart to tell the jury that he was not going to testify. Like invoking the fifth amendment, any refusal to testify suggests to the jury that the nontestifying defendant or witness has something to hide and thus is prejudicial

to the defendant. In this case, even if the jurors would not otherwise have drawn an adverse inference from Stewart's brief statement, the prosecutor made certain that they did. His first question on cross-examination ("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. . . .") and his closing argument (quoted above at pages 20-21) suggested to the jurors that Stewart was not testifying because he had something he did not want to talk about and that they should hold it against him. This was extremely prejudicial and requires reversal.

E.

The State's inferences concerning Stewart's failure to testify violated Stewart's fifth amendment right against self-incrimination.

Any prosecutorial inference which calls for an explanation by the defendant violates his right against self-incrimination. The cross-examination, argument, and attendant inferences called for testimonial rebuttal, violating Stewart's fifth amendment rights.

First, the prosecutor asked Stewart a question which was really a comment on Stewart's failure to testify about the homicide. He then tried to suggest to the jury that Stewart was taking the easy way out by letting Dr. Merin testify for him. When he learned that Dr. Merin had not re-evaluated Stewart prior to this penalty proceeding, he tried to use Merin's 1986 interview with Stewart to make the same point. In his closing, he overtly told the jury that Stewart "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." (R. 436)

The right to remain silent, which includes the right not to testify against oneself, does not automatically disappear because the defendant takes the stand for a limited purpose. Stewart said that he was taking the stand only to say that it would be too difficult for him to testify about his childhood. This did not open the door to any questions the prosecutor wanted to ask Stewart to belittle and humiliate him, nor did it open the door to the prosecutor's argument urging the jury to punish Stewart with death for his failure to testify about the crimes he committed.

Although the defendant gives up his right to remain silent as to matters he testifies about, he does not open the door to disparaging and accusatory remarks by the prosecutor and judge, nor does he give up his fifth amendment right not to testify about the crimes. The prosecutor's cross-examination of Stewart and his comments on Stewart's failure to testify created a serious due process violation, in addition to violating his constitutional rights to remain silent and not to be a witness against himself.

ISSUE II

THE TRIAL JUDGE FAILED TO ADEQUATELY CONSIDER AND INVESTIGATE STEWART'S REQUEST FOR A CONTINUANCE TO RETAIN PRIVATE COUNSEL FOR SENTENCING.

An indigent defendant's right to appointed counsel includes the right to effective representation by such counsel. Anders v. California, 386 U.S. 738, 744-45 (1967); Nelson v. State, 274 So.2d 256, 258 (Fla. 4th DCA 1973). The right to counsel adheres at every critical stage of a prosecution. United States v. Wade, 388 U.S. 218, 237 (1967); Traylor v. State, 17 F.L.W. S42, S46 & n.24 (Fla. Jan. 16, 1992); Carter v. State, 408 So.2d 766, 767 (Fla. 5th DCA 1983); Amend. VI, U.S. Const.; Art. I, § 16, Fla. Const.; Fla. R. Crim. P. 3.111(d)(5). A "critical stage" is any stage that may significantly affect the outcome of the proceedings. Traylor, 17 F.L.W. at S46. Sentencing is a critical stage. Chestnut v. State, 575 So.2d 27, 28 (Fla. 5th DCA 1991); Carter, 408 So.2d at 767.

A primary right protected by the "Section 16 Counsel Clause" of the Florida Constitution is the right to choose the manner of representation. Traylor, 17 F.L.W. at S46. The sixth amendment also guarantees that, "in all criminal prosecutions, the accused shall enjoy the right to have assistance of counsel of his choice." Cruse v. State, 538 So.2d 954, 955 (Fla. 5th DCA 1989). A defendant's right to counsel of his choice may not be arbitrarily, unnecessarily or unreasonably denied. Id. (citing federal cases).[6]

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[6] Cruse cites other federal cases holding that right to counsel of choice may not be used to obstruct the orderly administration of justice. 538 So.2d at 955 & n.2. Stewart's belated (continued...)

When a defendant questions the competency of court-appointed counsel, the judge must inquire into the reasons. Bowden v. State, 588 So.2d 225 (Fla. 1991); Hardwick v. State, 521 So.2d 1071, 1074-75 (Fla.), cert. denied, 488 U.S. 871 (1988); Johnston v. State, 497 So.2d 863, 867 (Fla. 1986); Chiles v. State 454 So.2d 726, 726 (Fla. 5th DCA 1984); Nelson, 274 So.2d at 258. "[I]t is incumbent upon the trial court to make a sufficient inquiry of the defendant and his appointed counsel to determine whether there is reasonable cause to believe that counsel is not rendering effective assistance. . . ." Bowden, 558 So.2d at 229 (citing Hardwick).

In Hardwick, this Court specifically approved the procedure set out in Nelson, 274 So.2d 256, to be applied when a defendant seeks to discharge court-appointed counsel:

> If incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court-appointed counsel is not rendering effective assistance to the defendant. If reasonable cause for such belief appears, the court should make a finding to that effect on the record and appoint a substitute attorney who should be allowed adequate time to prepare the defense. If no reasonable basis appears for a finding of ineffective representation, the trial court should so state on the record and advise the defendant that if he discharges his original counsel the State may not thereafter be required to appoint a substitute.

Hardwick, 521 So.2d at 1074-75.

In this case the judge did not conduct a meaningful inquiry.

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[6](...continued)
request was not made to obstruct the orderly administration of justice, however. The record suggests that Stewart hesitated to complain and did not fully realize until he discussed the situation with his aunt that his representation was inadequate. (R. 489-98)

At Stewart's sentencing hearing, before the judge imposed sentence, defense counsel informed the judge that Stewart had just advised him that his aunt was procuring other counsel for him, and that he would like to be represented by other counsel. (R. 489-90)

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.

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 point, 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 this sentencing.

THE COURT: Where's your aunt today?

THE DEFENDANT: Well, she's not here today. She couldn't come today, because she has to baby sit here [sic] 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 this 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, it cetera. Problems with corresponding with him over the phone. I've never been 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 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, and 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 that 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.

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. 489-98)

Although the judge asked Stewart what complaints he had concerning his representation, he never attempted to determine whether Stewart had good cause for his complaints. Stewart's attorney, Mike Jones, was present. The judge could easily have asked him why he did not challenge jurors who knew the prosecutor, Bill James. He could have asked Jones if he had been to the jail to see Stewart

prior to the resentencing. He could have asked Jones if it was true that Stewart could not talk to him on the telephone prior to the resentencing and why. He could have asked if Jones had other cases which kept him from adequately preparing Stewart's case.

Williams v. State, 532 So.2d 1342 (Fla. 4th DCA 1988), is similar to the case at hand. On the day of trial, the judge denied the defendant's request to discharge her court-appointed counsel and requested a one week continuance to retain private counsel. Although the defendant tried to tell the judge her reasons for wanting to discharge counsel, the judge failed to make any attempt to examine her complaints. The Williams court noted that the trial judge failed to investigate the defendant's reasons or to make a finding as to whether counsel rendered ineffective representation as required by Nelson and approved by this Court in Hardwick, 521 So.2d 1071. The court found the error harmful and reversed.

The main difference between Williams and the case at hand is that Stewart did not ask for a continuance until the morning of his final sentencing. Nevertheless, sentencing is a critical stage of a criminal proceeding. Traylor, 17 F.L.W. at S46. Sentencing is especially critical, as Stewart noted, when the judge is about to sentence the defendant to death and his life is at stake. Although a continuance would have been inconvenient for the court, Stewart's right to a fair penalty trial far outweighed this inconvenience.

The trial judge seemed to feel that new counsel would not benefit Stewart now; thus, the issue should be left for appeal. (R. 489-98) This is not true. If the judge had granted Stewart's

request and Stewart had been able to talk with and retain the lawyer that he was to see on Friday, the lawyer might have asked the judge to allow him or her to submit additional mitigatiom or he might have filed a motion for a new penalty trial alleging ineffective assistance of counsel.[7] The judge might have proceeded with sentencing and then held a hearing on the motion for new penalty trial to explore Stewart's allegations, or he might have delayed sentencing to consider the allegations. If he determined that a new penalty trial was necessary because of ineffective assistance, it would have been much more efficient to have scheduled a new sentencing with different counsel while Stewart was already in Tampa rather than years later after a collateral appeal.

This case is distinguishable from Bowden v. State, 588 So.2d 225, in which this Court found no error, for several reasons. First, the trial court asked defense counsel to respond to Bowden's allegations. Counsel told the judge that they had been to the jail three times to talk with Bowden who refused to discuss the facts of the case or his potential testimony with them. Second, Bowden's former attorney had withdrawn due to lack of cooperation from Bowden. Third, the trial court did give Bowden a ten day continuance to retain private counsel and renew his motion. Bowden apparently did not retain private counsel and renew his motion after the ten days elapsed. 588 So.2d at 229-30.

An additional difference is that Bowden did not argue on

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[7] Court-appointed counsel filed no motion for new trial in this case. In fact, the record does not indicate that he filed any motions other than a motion for continuance. (R. 536-37)

appeal that denial of his requests to discharge counsel deprived him of effective assistance of counsel or otherwise prejudiced him. 588 So.2d at 229 n.2. Stewart was denied due process by his lawyer's ineffectiveness. Because two jurors knew the State Attorney, his jury may have been biased. His counsel was apparently too busy to see him at the jail or to talk with him on the telephone, which resulted in a serious lack of preparation for trial.[8] Stewart told the judge that his life was at stake and he needed better representation -- someone who would be fair to him.

In Brooks v. State, 555 So.2d 929 (Fla. 3d DCA 1990), the court reversed and remanded for a new trial because the trial court failed to adequately consider the defendant's motions to discharge counsel. At the pretrial hearing on the defendant's motion, the court asked the defendant only one question and did not question counsel at all. The court rejected the state's argument that the trial judge observed defense counsel's efforts and was aware of counsel's trial preparation. Defense counsel's appearance at several pretrial hearings on the defendant's behalf did not reflect the scope of his efforts nor refute the defendant's contentions.

The record in the case at hand reflects no pretrial motions or hearings other than a motion for continuance. (R. 536-37) Motions for continuance generally reflect a lack of preparation rather than preparation. The record reflects no preparation other than the scheduling of two witnesses to testify for the defense. Defense

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[8] Stewart was in the Tampa jail for approximately five months prior to the resentencing proceeding. (R. 534-35)

counsel admittedly did not talk with Dr. Merin about his testimony beforehand other than some "casual conversation" which most likely occurred during the fifteen minute recess he requested to talk to Dr. Merin. (R. 316) The record does not indicate whether counsel talked with Stewart or his aunt prior to the resentencing proceeding. Jones did not even have Stewart re-evaluated by Dr. Merin who testified as a defense expert and seriously damaged Stewart's mitigation.

The trial judge stressed the fact that he had followed this Court's mandate. He did. This is beside the point, however. The right to effective assistance of counsel adheres at a resentencing in a capital case just as it does in every other critical criminal proceeding. The judge (and, apparently, defense counsel) conducted Stewart's resentencing as though it were just a procedural hurdle to sustain Stewart's death sentence -- something to get through as quickly as possible. Had the judge been interested in substance as well as procedure, he would have explored Stewart's complaints to ascertain that Stewart was adequately represented. Instead, he glossed over Stewart's complaints and tried to justify his actions on the record without inquiring enough to risk discovering that Stewart's complaints were valid.[9]

Although the United States Constitution guarantees the right

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[9] On the date originally scheduled for the allocution hearing, the judge expressed displeasure upon learning that defense counsel was unprepared. Defense counsel said that he might not have anything further to say anyway, but needed time to consult with Stewart and decide. The judge said that the sentencing was weighing heavily on his mind and he was looking forward to hearing arguments from counsel that day. (R. 598-600)

to a fair trial through the due process clause, it defines the basic elements of a fair trial largely through the sixth amendment which includes the right to counsel. Strickland v. Washington, 466 U.S. 668, 691-92 (1984). The Strickland Court held that the same standard applies to a capital sentencing proceeding such as that provided by Florida law. Counsel's role at a penalty proceeding is to ensure that the adversarial process works to produce a just result. 466 U.S. at 687. Thus, the right to counsel is recognized as the right to "effective" counsel and is intended to assure that the defendant will have a fair trial. Strickland, 466 U.S. at 686.

Despite the judge's remark that he perceived Stewart's request as a delaying tactic, all of the evidence in the record points to the truth of Stewart's allegations. Nevertheless, we are 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 motion, during which an evidentiary hearing would be held to flesh out the record and examine Stewart's complaints. See McKinney v. State, 579 So.2d 80, 82 (Fla. 1991) (ineffective assistance generally not reviewable on direct appeal); Ventura v. State, 560 So.2d 217, 220 (Fla. 1990) (ineffective assistance claims more properly addressed in motion for postconviction relief under Fla. R. Crim. P. 3.850 because of opportunity for evidentiary hearing); Kelley v. State, 486 So.2d 578, 585 (Fla. 1986); State v. Barber, 301 So.2d 7, 9 (Fla. 1974)

(issue of adequacy of representation cannot be raised for first time on direct appeal; Fla. R. Crim. P. 3.850 provides means to resolve issue where evidence can be taken); Wright v. State, 428 So.2d 746, 749 (Fla. 1st DCA 1983) (ineffective assistance appealable on direct appeal only if raised and ruled on in motion for new trial below). Thus, we wish to reserve the issue of ineffective assistance for collateral appeal in the event Stewart's sentence is affirmed.

To refute the trial court's finding that Stewart's complaints were a delaying tactic and to show that the trial court's failure to investigate Stewart's claims was not harmless, however, it is necessary to point out what appear on the face of the record to be blatant, serious errors by defense counsel. The first, which Stewart brought to the attention of the judge, was his counsel's failure to challenge two jurors who knew the State Attorney.

A.

The State was represented by the elected State Attorney Bill James, and his assistant, John Skye. (R. 9). Three potential jurors knew Bill James. Two of them served on the jury.[10] To make matters worse, one served as foreman. Defense counsel never asked these jurors any questions about Bill James. He seemed anxious to get through voir dire as quickly as possible. Jury

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[10] The third prospective juror, Carol McCammon, had been at political functions for Mr. James and at a dinner party with him. When asked if she spoke with him at those functions, she said, "not a great deal. Nothing close." She did not think it would impair her ability to be fair. (R. 23) The jury was selected just before McCammon would have been called; thus she did not serve as a juror.

selection took a total of 3 1/2 hours. (R. 538) Defense counsel had two peremptories left and the state had three. (R. 178)

Jury Foreman Gailand Kiltz told the judge on voir dire that "Mr. James' wife works where I work. I have met both him and his wife at various meetings. He doesn't remember me but -- " Kiltz said that the last time he saw Mr. and Mrs. James was "probably a year ago." He had worked with James' wife for six or eight years, but not directly with her. He did not think it would "jeopardize, you know." He did not think it would impair his ability to give Stewart or the State a fair trial. (R. 22)

Assistant State Attorney Skye asked Kiltz about the relationship. Kiltz said that Bill James probably wouldn't remember him and it wouldn't affect his ability to be fair. He didn't know James "that well." (R. 80-81) Counsel never asked Kiltz about his relationship with the prosecutor. Kiltz was the foreman. (R. 475)

Juror Helen Benshoof knew Bill James "politically." She last saw him at a political function, "not real recently." She did not think it would impair her ability to give Stewart and the State a fair trial. (R. 22-23) As to this juror, neither the prosecutor nor defense counsel brought up the issue again. Benshoof served.

B.

Stewart also told the judge that he was unable to communicate with Jones by telephone while he was in jail for five months prior to the penalty proceeding. (R. 534-35) He said Jones was involved in other cases and was too busy to come to the jail. Because the judge did not ask Jones to explain, we have insufficient informa-

to the penalty proceeding. (R. 534-35) He said Jones was involved in other cases and was too busy to come to the jail. Because the judge did not ask Jones to explain, we have insufficient information concerning Stewart's difficulty communicating with counsel. The problem was potentially serious and may have caused other problems including Stewart's lack of a recent psychological evaluation, counsel's failure to call other witnesses, and the confusion concerning Stewart's testimony.

C.

As defense witnesses, Jones called only Dr. Merin, who relied on his 1986 notes, and Stewart's aunt. In the first penalty phase, however, Kenny uncle, stepfather, maternal grandmother, and others testified, in addition to Dr. Merin. See Stewart, 558 So.2d 416. We do not know whether the decrease in witnesses was some sort of defense strategy or, more likely, because defense counsel did not take Stewart's jury resentencing seriously and did not see Stewart prior to trial to plan the defense.

D.

Another blatant error suggested by Stewart's comments was the defense counsel's failure to have Stewart tested and re-evaluated by Dr. Merin prior to this proceeding. Dr. Merin talked to Stewart for the first and only time on September 24, 1986, the morning of Stewart's first penalty phase proceeding. (R. 306, 315, 320, 339) Merin's evaluation was based on what Stewart told him during that interview, held in contemplation of Dr. Merin testifying in penalty phase of Stewart's first-degree murder case. (R. 340-41) Merin

conceded that he based his opinion on one interview and background information provided by defense counsel. He did not talk to Stewart's family or perform psychological tests.

That Stewart did not see Dr. Merin again prior to the instant sentencing proceeding would appear to have been because defense counsel, who was too busy to see Stewart at the jail or talk to him on the telephone, never got around to arranging an appointment for Stewart to see Dr. Merin. Jones had not even interviewed Dr. Merin again before the trial. (R. 316) He asked the judge if he could meet with Dr. Merin for about fifteen minutes during the resentencing. (R. 201) He later told the prosecutor that Dr. Merin's testimony would be the same, obviously surprising the prosecutor:

MR. JONES: Everything is the same.

MR. SKYE: You didn't interview him again?

MR. JONES: No. Why?

MR. SKYE: I don't know.

MR. JONES: Nothing's changed.

(R. 316) Jones went on to say that, after he spoke with Dr. Merin about his testimony (apparently during the fifteen minute recess), he told Dr. Merin that everything was about identical to his last trial testimony, maybe less favorable to the defendant.[11] He said that he and Dr. Merin "had some casual conversation." (R. 316)

Stewart's "testimony" on cross-examination indicates that he did not know whether Dr. Merin would testify:

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[11] If defense counsel knew that Merin's testimony was not favorable the first time, why did he use him again?

MR. SKYE: 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 didn'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 his [sic] him in the last few months?

A. No, I haven't.

(R. 303-04)

Dr. Merin's testimony did not help to establish the statutory mitigating factors. He said that Stewart's emotional distress was chronic but not "extreme" and that his capacity to appreciate the criminality of his conduct was impaired but not "substantially" so.

(R. 344-45) On cross-examination, Dr. Merin said that, although Stewart had some features of other behavior disorders, he primarily had an antisocial personality. (R. 342) The testimony continued:

> Q. So, Mr. Stewart is, in fact, a psychopath?
>
> A. In terms of old terminology, yes. There are some additional factors which would tend to modify the use of that term. But for impact some people continue to use that term.
>
> Q. And he is also a killer, as you understand; is that not true?
>
> A. He has killed, yes.

(R. 342) Based on Dr. Merin's testimony, the prosecutor argued in closing that Stewart was a "psychopathic killer":

> He is known as an antisocial personality. He doesn't get along with other people. Doesn't like other people. He was what doctor Merin said used to be referred to as a psychopath. He was a psychopathic killer.

(R. 440)

Stewart's aunt testified that Stewart was a different person from the "animal" who committed the crimes in 1984 and 1985. (R. 372) Stewart educated himself in prison. (R. 371) She described him as brilliant, gentle, emotional and compassionate. (R. 373) Brown said that Stewart's "whole world" is helping people. (R. 374)

If this was indeed true, Dr. Merin's substantiating testimony would have helped the defense tremendously. If Dr. Merin had seen Stewart again before the resentencing and had done psychological testing, he might have found a great improvement. In Nibert, 574 So.2d at 1061, Dr. Merin testified that he had tested the defendant before the first trial and retested him 2 1/2 years later. He found substantial improvement. He attributed the first set of

results to the effect of alcohol on Nibert's brain. He attributed the improvement to the drying out and rehabilitation of the brain. In vacating Nibert's death sentence, this Court cited Dr. Merin's opinion, supported by batteries of tests. 574 So.2d at 1062-63.

Counsel had nothing to lose by having Stewart re-evaluated because Merin's diagnosis could not have been much worse. If he talked to Stewart's aunt before the trial, then he knew that she believed Stewart had improved tremendously. He must have been familiar with some of the many cases in which this Court has found that a mental improvement and potential for rehabilitation is mitigating. See, e.g., Nibert v. State, 574 So.2d 1059 (Fla. 1990); see also Breedlove v. Singletary, 17 F.L.W. S67, S68 (Fla. Jan. 23, 1992) (court reversed for evidentiary hearing on Rule 3.850 motion alleging ineffective assistance in part because defense counsel did not talk with mental health experts until the morning of their testimony). Had Merin (or another mental health expert) tested Stewart, he might have found significant improvement, as did Stewart's aunt, which would have established a nonstatutory mitigating factor. Without expert testimony that Stewart had changed, the judge discredited Stewart's aunt's testimony. (R. 557)

E.

An additional error which may have resulted from counsel's failure to talk with Stewart prior to the penalty proceeding was Stewart's aborted testimony. Defense counsel either persuaded or allowed Stewart to get on the witness stand to tell the jury that

he would not testify, thus opening the door to cross-examination and prosecutorial comments on Stewart's failure to testify. See Issue I, supra. This was extremely prejudicial.

Following voir dire, the judge asked defense counsel if he wanted him to instruct the jury about the defendant's right to remain silent in a criminal trial. Defense counsel said yes. (R. 209) This suggests that he did not know whether Stewart would testify at that time. Both Stewart and Jones seemed unprepared for what happened which suggests that Jones had not spent much, if any, time with Stewart discussing his testimony.

After his fifteen minute conference with defense counsel, Stewart said that, based on his conference with counsel, he would take the stand and say why he was not going into his testimony. (R. 299) Defense counsel clarified that Stewart's testimony would be different than what they had talked about. (R. 300) This suggests that defense counsel recommended the course of action Stewart took.

* * * * *

In Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990), this Court held that "[h]aste has no place in a proceeding in which a person may be sentenced to death." More recently, in Wike v. State, 17 F.L.W. S146 (Fla. Feb. 27, 1992), the Court reversed for a new penalty phase proceeding because the trial refused to grant defense counsel a one week continuance to procure additional mitigating witnesses. The Court noted that, although the granting of a continuance is generally within the discretion of the trial court judge, the judge abused his discretion by denying the continuance

because it was for a short duration and with a specific purpose. 17 F.L.W. at S147.

As in Scull and Wike, Stewart needed only a short time to see the lawyer that his aunt had contacted. The lawyer was scheduled to see Stewart at the jail on Friday. Thus, the continuance would have been for a short duration and for a specific purpose. Stewart told the judge that his aunt had tried to call him beforehand but that the judge's secretary told her the judge couldn't talk about the case. The judge said he had received no message from his secretary. He did not bother, however, to ask his secretary whether Stewart's aunt had called.

The above examples of defense counsel's unpreparedness and ineptitude show that the court's error was not harmless. Thus, the court's denial of Stewart's request for a continuance to obtain new counsel, without sufficient inquiry, denied Stewart's right to effective assistance of counsel and, therefore, was reversible error of constitutional dimension. Hardwick, 521 So.2d 1071.

ISSUE III

THE TRIAL COURT ERRED BY FAILING TO SUSTAIN DEFENSE COUNSEL'S OBJECTION WHEN THE PROSECUTOR ASKED STEWART'S AUNT WHETHER STEWART'S GRANDMOTHER WOULD TESTIFY.

On cross-examination, the prosecutor asked Stewart's aunt, Lillie Brown, whether Stewart's grandmother was going to testify. Defense counsel objected on grounds that it was

> not relevant; calls for a legal conclusion. Not a proper question to ask this witness. Goes beyond the direct. Just a few of my objections.

(R. 391) The judge overruled the objection and Stewart's aunt said she did not know. (R. 391)

The "grandmother" in question was Stewart's maternal grandmother, Estelle Berryhill. Because Lillie Brown is Stewart's paternal aunt, she would not be expected to know whether his maternal grandmother would testify. Also, Lillie Brown had just told the prosecutor that she had not spoken with Estelle Berryhill since "right after Kenneth was sentenced." (R. 390) No one suggested that Stewart's grandmother would testify.

The prosecutor's insinuation was that Lillie Brown was lying when she testified that Stewart was beaten by his stepfather, Bruce Scarpo. On cross-examination, Ms. Brown testified that Stewart told her he had been beaten by his stepfather only after he was in prison. She continued, however, that she already knew about the beatings because Stewart had previously told his grandmother who had told her about it. (R. 371) The prosecutor's question, therefore, was meant to imply that Stewart's grandmother would not have

corroborated Lillie Brown's story.

In State v. Michaels, 454 So.2d 560, 562 (Fla. 1984), this Court held that, when a witness is equally available to both parties, no inference should be drawn or comments made on the failure of either party to call the witness. An exception is when the comment is invited. An example of an invited comment is when defense counsel indicates that he will call an alibi witness and fails to do so. See Buckrem v. State, 355 So.2d 111, 112 (Fla. 1978); Jenkins v. State, 317 So.2d 90 (Fla. 1st DCA 1975).

A prosecutor may comment on the defendant's failure to call a witness particularly within the defendant's control is "when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state." Jackson v. State, 575 So.2d 181, 188 (Fla. 1991). In Jackson, however, this Court found the special relationship (defendant's mother) irrelevant because the defendant, who presented no evidence, had not placed at issue any particular theory of defense to which his mother could have presented relevant testimony. Jackson had no burden to present evidence; thus, the court erred by allowing the state to comment on the absence of Jackson's mother. Id.

On the other hand, in Michaels, 454 So.2d 560, the prosecutor commented upon the defendant's failure to call his daughter. The defendant's daughter was particularly within his control and would be expected to have relevant evidence concerning her father's claim

that he was protecting her when he killed the victim. See also Romero v. State, 435 So.2d 318 (Fla. 4th DCA 1983) (prosecutor's comment justified where defendant failed to call witnesses who would be expected to substantiate his alibi and were more available to the defendant who knew where to find them).

The instant case is like Jackson rather than Michaels or Romero. Although a special relationship might have existed between Stewart and his grandmother, no evidence in the record suggests they were still in contact. If, as the prosecutor insinuated, the grandmother would not have testified favorably to Stewart, then she would have been available to the prosecutor. The defense in no way implied that Stewart's grandmother would be called to testify.

Even if Stewart's grandmother was more available to the defense, however, Stewart presented no issue necessitating his grandmother's testimony. Lillie Brown testified on direct examination that Stewart's stepfather beat him. (R. 371) On cross-examination, the prosecutor attempted to impeach her testimony by insinuating that Stewart made up this story because he did not tell her about the beatings until he was in prison. When Ms. Brown told him that Stewart had told his grandmother about the beatings when he was younger, the prosecutor implied through his question to Ms. Brown that Stewart's grandmother would not confirm the story. The issue presented by the prosecutor, therefore, was not whether Stewart's stepfather beat him, but whether Stewart told his grandmother that his stepfather beat him. Thus, the State, not the defense, created the issue which the prosecutor then used to

insinuate that Stewart's aunt was lying. In Brown v. State, 524 So.2d 730, 731 (Fla. 4th DCA 1988), the court found reversible error where the prosecutor, not the defendant, made an alibi defense an issue and created the impression that alibi witnesses existed but were not called. In our case, the prosecutor to created an issue as to whether Stewart told his grandmother that his stepfather beat him and then insinuated that the defense did not call the grandmother because she would not confirm it.

Rather than calling all of Stewart's relatives to testify, defense counsel called Stewart's aunt to tell the jury about Kenny's childhood and family, including information she learned from Kenny and from other family members. Hearsay is permissible in a death penalty proceeding. § 921.141(1), Fla. Stat. (1989). The prosecutor implied, however, that the defense purposefully excluded Stewart's grandmother because she would not support Brown's testimony.

The prosecutor's insinuation in the instant case is like the prosecutor's actual comment in Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983). In response to the defense argument that the state lacked evidence, the prosecutor argued that if the officers "had anything to say about the innocence of the defendant they could have and would have been called by the defendant." 430 So.2d at 950. The court reversed because the comment may have led the jury to believe the defendant had the burden of proving his innocence.

In Stewart's case, the prosecutor's insinuation was that, "if Stewart's grandmother had anything to say that would help the

defendant, she could have and would have been called by the defense." As in Dixon, this may have led the jury to believe that Stewart had the burden of calling witnesses to prove that death was not the appropriate penalty.

The rule against commenting on a party's failure to call witnesses is based on two important constitutional rights. Crowley v. State, 558 So.2d 529 (Fla. 4th DCA 1980); Romero, 435 So.2d 318. The Fourth District Court of Appeal explained as follows:

> Reference by the prosecuting attorney to a criminal defendant's failure to call certain witnesses impinges primarily upon two related constitutional rights. The first is the defendant's right to remain silent which places a concomitant obligation on the state not to comment on the defendant's exercise of that right. In this context, such a comment is prejudicial error. E.g., Gilbert v. State, 362 So.2d 405 (Fla. 1st DCA 1978). The second is the presumption of innocence, again to be considered together with the state's obligation to come forward with evidence sufficient to prove the defendant guilty beyond a reasonable doubt. Thus, a comment that indicates to the jury that the defendant has the burden of proof on any aspect of the case will constitute reversible error. E.g., Dixon v. State, 430 So.2d 949 (Fla. 3d DCA 1983) and cases cited therein.

Romero, 435 So.2d at 319. Although the second part of the Romero analysis (presumption of innocence) may not seem relevant to the penalty phase of a capital trial, the right to either testify or remain silent is an essential right provided to a defendant through article I, section 9, of the Florida Constitution and the fifth amendment to the United States Constitution. It is fully applicable in the penalty phase of a capital trial. State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973), cert. denied, 416 U.S. 943 (1974).

The prosecutor has the burden of proving aggravating circumstances to justify a death sentence. The state must establish the

existence of at least one aggravating circumstances before the death penalty can be imposed. The state must then show that the aggravating circumstances outweigh the mitigating circumstances. Arrango v. State, 411 So.2d 172, 174 (1982). Thus, any prosecutorial inference which calls for a testimonial explanation by the defendant violates his right against self-incrimination.

In the instant case, the prosecutor's inference called for a testimonial explanation by Stewart as to why he did not call his grandmother to testify. It implied to the jury that Stewart had the burden of calling witnesses to verify what other witnesses said. Although mitigating factors must only be established within a reasonable certainty, Campbell v. State, 571 So.2d 415 (Fla. 1990), the prosecutor's questioning may have led the jurors to believe that it must be corroborated by other witnesses.

Stewart's grandmother's testimony would have been cumulative because she learned about the beatings from Kenny, just like Kenny's aunt. The prosecutor's question and inference were very harmful, however, because they may have caused the jurors to disbelieve all of Stewart's aunt's testimony, and/or to believe they should not give any weight to mitigation that was not corroborated by other evidence.

Lillie Brown's testimony about how much Stewart had improved while in prison was extremely important. Because Dr. Merin had not evaluated Stewart again before this proceeding, Ms. Brown was the only witness who could relate this change to the jury. This was important nonstatutory mitigation. See, e.g., Nibert v. State, 574

So.2d 1059 (Fla. 1990). If the jury disbelieved Brown's testimony because the prosecutor questioned her credibility with his question about Stewart's grandmother, then the error was extremely harmful.

Because of this and other errors in this penalty proceeding, such as the error in Issue I, supra, Stewart's penalty trial lacked the fundamental fairness guaranteed by the due process clauses of the Florida and United States Constitutions. Thus, the jury recommendation does not meet the constitutional requirement of heightened reliability in capital sentencing. Stewart's death sentence must be vacated and a new penalty phase trial ordered.

ISSUE IV

THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY TO CONSIDER THE MITIGATING FACTOR THAT STEWART ACTED UNDER EXTREME DURESS OR SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

Defense counsel requested a jury instruction on the mitigating factor that Stewart was under extreme duress or substantial domination of another, § 921.141(6)(e), Fla. Stat. (1989). His request was based on the testimony of state witness Randall Bilbrey that Stewart shot Diaz because his accomplice was screaming "shoot him, shoot him," and the testimony of Dr. Merin that Stewart was responding to an emotional instruction from an emotional acquaintance. The judge denied the instruction.[12] (R. 398, 407-13)

Even though the jury was not instructed on this mitigating factor, both counsel argued it to the jury.[13] (R. 440-41, 454-55)

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[12] After jury instructions, the judge asked defense counsel if, out of an abundance of caution, he wanted to again urge him to give the instruction. Defense counsel said yes and the judge again denied the motion. (R. 471-72)

[13] The prosecutor argued as follows:

> You might even be subjected to the suggestion that at the time this murder was committed, at the time Diaz was shotgun [sic], that Stewart was somehow acting under duress and that he was dominated by this unnamed accomplice, who was telling him to shoot Diaz. Well, I suggest to you this is sheer nonsense, and if that argument is made, it's an insult to your intelligence. Because all you have to do is go back and review the facts and you will recall that it was Kenneth Stewart who pulled the gun in the car, put the gun to Diaz's head. And it was Kenneth Stewart who pulled the trigger twice as Diaz lay on the ground pleading for his life.

(R. 440-41)

(continued...)

At sentencing and in his written order, the trial judge felt it appropriate to address this mitigating circumstance "in terms of whether it was reasonably established by the evidence":

> [A]fter gaining the confidence of the victim, [Stewart] 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 [sic] 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,[14] or substantial domination by another person.[15]
>
> 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 [sic] did not shoot the victim in a random fashion in response to a "command" from another person.

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[13](...continued)
Defense counsel argued that

> Another event that took place that you need to take into consideration was the degree of influence that the person who was with him, the unidentified person that was with him, had when he began screaming and yelling at him, "Shoot him. Shoot him." 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. But since he has been convicted of premeditated murder . . . .

(R. 454-55) Thus, the prosecutor and defense counsel must have believed that the jury might consider it the factor.

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

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

(R. 508-09, 554-55) If the judge thought there was no evidence to support the "extreme duress and substantial domination" mitigating factor, why did he bother to address it in his written order?

Some of the judge's facts were incorrect and his reasoning was flawed. Although Stewart had the gun, he was not necessarily the dominant party in the robbery. Bilbrey testified that Stewart said "they" told Diaz to drove toward Lutz. "They" made him get out of the car and lie face down on the ground. While this was happening, Stewart's accomplice was yelling and screaming at him. "They" went through Diaz's pockets, taking $50 and some cocaine. At this point, because the accomplice was yelling, "shoot him, shoot him," Stewart pulled the trigger. An equally reasonable conclusion is that the accomplice was the dominant party but only Stewart possessed a gun.

Contrary to the judge's reasoning, the medical examiner's conclusion that Stewart fired twice at close range does not refute Bilbrey and Merin's testimony that Stewart pulled the trigger in reaction to his friend's emotional outburst. Because Stewart was very drunk and certainly tense from the robbery in progress, the shouting from his accomplice, combined with pleas from the victim, may well have caused Stewart to lose control and fire twice. If he was pointing the gun at Diaz's head when lost control and fired, the bullets would of course hit Diaz in the head.

Even if the judge's finding was not clearly erroneous, his failure to instruct the jury on this mitigating factor was error. In its opinion remanding this case for resentencing, this Court

stated as follows:

> [A]n instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. . . . Nor may a trial judge inject into the jury's deliberations his views . . . by wrongfully denying a requested instruction. . . .[16]

Stewart v. State, 558 So.2d 416, 420 (Fla. 1990); accord Bowden v. State, 588 So.2d 225 (Fla. 1991) (quoting from Stewart).

In Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986), this Court stated that "a trial judge should not be permitted in any way to inject his preliminary views of a proper sentence into the jurors' deliberations." Quoting from Cooper v. State, 336 So.2d 1133, 1140 (1978), the Floyd court noted that:

> If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

497 So.2d at 1216. That is exactly what happened in this case.

In Robinson v. State 487 So.2d 1042 (Fla. 1986), the trial judge refused to give the statutory mitigators that (1) the defendant was an accomplice and his participation relatively minor; and (2) his capacity to appreciate the criminality of his conduct was impaired. 487 So.2d at 1042. This Court found sufficient evidence to warrant instructing the jury on these two mitigators.

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[16] The omitted portions of the text referred to the omitted jury instruction in Stewart's first penalty proceeding in which the judge refused to instruct on the "impaired capacity" mitigating factor because Dr. Merin testified that it was not "substantial" impairment. See Stewart, 558 So.2d at 420-21. (R. 526-27)

In discussing the second of the two, the Court observed that, although the judge may not have believed the evidence, "others might have, and it, too, was adequate at least to instruct the jury on." 487 So.2d at 1043. The Court reiterated that the jury must be allowed to consider any evidence presented in mitigation. Id.

In this case, although the judge did not believe that Stewart was under extreme duress or substantial domination, the jury may have believed it. Trial counsel said that he especially wanted the "duress" instruction, noting that the death penalty statute says extreme duress "or" substantial domination of another. (R. 412) In Toole v. State, 479 So.2d 731 (Fla. 1985), this Court defined "duress" as follows:

> "Duress" is often used in the vernacular to denote internal pressure, but it actually refers to external provocation such as imprisonment or the use of force or threats. See Guralnik, New World Dictionary of the American Language (2d college ed. 1974).

479 So.2d at 734. In Gribbin v. Gribbin, 499 So.2d 858 (Fla. 4th DCA 1986), the appellate court quoted from Toole while attempting to define "duress" in a family law setting. Gribbin stated:

> Duress is a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition.

499 So.2d at 861 (quoting from Herald, et al v. Hardin, 116 So. 863 (Fla. 1928)).

Although the evidence may not indicate that Stewart was under duress or domination by another when the two men picked up Diaz in a bar, the evidence clearly suggests that Stewart was under duress and substantial domination of another when he pulled the trigger.

The aggravating factor specifies that this condition exist when the defendant commits the homicide -- not at some earlier time. All of the evidence in this case indicates that Stewart did not contemplate killing Diaz until his accomplice began shouting at him to shoot Diaz while Stewart was holding the gun to Diaz's head. At the same time that Diaz was yelling, "don't shoot me," Stewart's accomplice was yelling, "shoot him, shoot him." (R. 242) Stewart had been drinking heavily and was probably having difficulty coping with the situation. The shouting created turmoil and confusion. At this point, something in Stewart snapped. Thus, he was under extreme duress and may also have been under substantial domination of his accomplice at the moment of the homicide. This is exactly what the statute requires.

There is no evidence to the contrary. In Stewart's original trial, another state witness, Terry Smith, testified that Stewart had told him a completely different story about the Diaz homicide, in which Stewart was alone when he shot Diaz. Stewart, 558 So.2d at 418. Thus, the instruction was not requested at the prior penalty proceeding. At this proceeding, the state did not call Smith to testify, thus eliminating any evidence other than Bilbrey's version of the homicide and Dr. Merin's corroborating testimony.

In Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court determined that the eighth amendment to the United States Constitution requires that the sentencer not refuse to consider or be precluded from considering any relevant mitigating evidence. In Riley v. Wainwright, 517 So.2d 656 (Fla. 1988), this

Court held that Lockett applies equally to the jury's recommendation of sentence. 517 So.2d at 657-659. The Riley Court based its holding in part on Hitchcock v. Dugger, 481 U.S. 393 (1987), in which the Court found a Lockett violation even though the judge and jurors heard the mitigating evidence because their consideration was restricted to only the statutory mitigating factors.

The instant case may be worse. Although the judge considered and rejected the "extreme duress and substantial domination of another" factor, even addressing it in his written sentencing order, he refused to instruct the jurors that they could consider this factor. Moreover, The judge instructed the jury on three statutory aggravating factors, one of which (CCP), he determined, was not supported by any evidence. (R. 463-64) The jury was instructed on four mitigating factors.[17] (R. 465) Had the jurors been told that they might consider this additional mitigating factor, they might have recommended life instead of death. A life recommendation would have materially changed the sentencing decision. See, e.g., Walsh v. State, 418 So.2d 1000 (Fla. 1982); Tedder v. State, 322 So.2d 908 (Fla. 1975).

Due process requires that the jury be instructed on all mitigating circumstances. In deciding whether to instruct as to statutory mitigators, the trial judge should err on the side of caution and instruct on the requested factors rather than being too

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[17] The judge instructed on "impaired capacity" because of this Court's sentencing remand. He decided that he should also instruct on "emotional distress" to be safe, based on this Court's remand. (R. 405-06) He apparently instructed on "age" because Judge Griffin did so in Stewart's first penalty hearing. (R. 399)

restrictive. Robinson, 487 So.2d at 1043. Limiting instructions to those mitigating factors which the judge deems appropriate distorts the death penalty sentencing scheme. Cooper, 336 So.2d at 1140.

The Riley Court determined that resentencing with a new jury is required when the original jury recommendation is invalid. 517 So.2d at 658-59. The sentencing scheme was distorted in this case and Stewart's death sentence should be reversed with directions that he be afforded a new penalty trial with a new jury. See Stewart v. State, 558 So.2d 416, 420-21 (Fla. 1990) (remanding this case for this resentencing because the trial judge failed to instruct on the "impaired capacity" mitigating factor).

ISSUE V

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY TO CONSIDER THE AGGRAVATING FACTOR THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT PRETENSE OF MORAL OR LEGAL JUSTIFICATION BECAUSE THE JUDGE FOUND NO EVIDENCE OF CCP.

The trial court instructed the jurors that they could consider the statutory aggravating factor that the homicide was committed in a cold, calculated and premeditated manner without pretense of legal or moral justification ("CCP"). He defined CCP for the jury on his own initiative, based on Maynard v. Cartwright, 486 U.S. 356 (1988). He told the jury that this aggravating factor

> consists of a careful plan or prearranged design to kill. A pretense of morality or legal justification is any claim of justification or excuse that though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

(R. 464)

In his written order, however, the trial judge found that CCP was not proven beyond a reasonable doubt. In fact, the judge found no evidence at all of the "cold, calculated and premeditated" aggravating factor. He stated as follows:

> 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 FLW S555 (Fla. 10/11/90) (The fact that Defendant approached the victim after firing the 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 heightened

premeditation bearing the indicia of a plan or prearranged design.)

(R. 551) (emphasis added).

Because the judge found no evidence supporting CCP, the instruction was inapplicable as a matter of law. Based on the facts of this case, and the prosecutor's closing argument, the jurors may have equated a plan to rob with a plan to kill, and erroneously used this improper factor to recommend imposition of the death penalty. Accordingly, the jury's recommendation is tainted and unreliable under article 1, section 17, of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution.

The law is clear that the jury must be instructed on only those aggravating and mitigating factors supported by the evidence. Roman v. State, 475 So.2d 1228, 1234 (Fla. 1985) (standard jury instructions instruct judge to give instructions only for those aggravating and mitigating circumstances for which evidence has been presented). Conversely, the trial court is required to instruct on all aggravating and mitigating circumstances "for which evidence has been presented. Fla. Std. Jury Instr. (Crim.) at 78, 80." Stewart v. State, 558 So.2d 416, 420 (Fla. 1990). The obvious deduction from the above is that the trial court is not permitted to instruct the jury on an aggravating or mitigating circumstance that is not supported by any evidence.

In Stewart, in which this Court reversed for this resentencing, the Court found that, because evidence of CCP was presented at trial, the trial court was required to (and did) instruct the

jury on this factor. 558 So.2d at 420. The evidence presented in Stewart's first trial was different, however. In addition to the testimony of Randall Bilbrey, the State introduced the testimony of Terry Smith who told a completely different version of the Diaz homicide. In Smith's version, Stewart was picked up by Diaz while hitchhiking and committed the robbery and murder by himself. Thus, Smith's version contained no mention of an accomplice who shouted "shoot him, shoot him," causing Stewart to pull the trigger. Stewart, 558 So.2d at 418. Because Smith's story supported the CCP aggravating factor, the instruction was warranted.

The instant resentencing contained no evidence of CCP. The State did not introduce Terry Smith's testimony although they could have done so. Terry Smith was brought into the courtroom so that James Harville, another state witness, could identify him as the man with Stewart when Harville was shot in a convenience store robbery. (R. 292) Thus, the State's exclusion of Smith's testimony was obviously a tactical decision -- the State wanted the jury to believe Bilbrey's version of the incident rather than Smith's.

"Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or arranged to commit murder before the crime began." Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990) (citations omitted). Bilbrey's testimony that Stewart pulled the trigger because the accomplice was shouting at him to "shoot him," patently shows that Stewart did not plan to commit the murder before the crime began.

In Omelus v. State, 584 So.2d 563 (Fla. 1991), this Court found that the state had presented no evidence to support the "heinous, atrocious and cruel" aggravation. Although, as in Stewart's case, the judge did not find this aggravator applicable in his sentencing order, he improperly instructed the jury on it. This Court found that the trial court erred by instructing the jury on this inapplicable factor.

In conducting a harmless error inquiry, the Omelus Court noted that, as in Stewart's case, the prosecutor strenuously argued the applicability of the factor. The Court concluded that it would be inappropriate to consider hypothetically whether a life override would be affirmed. Thus, the Court remanded for a new sentencing proceeding with a new jury. 584 So.2d at 566-67.

An instructional error was also held to be reversible error by this Court in Jones v. State, 569 So.2d 1234 (Fla. 1990). There, the jury was permitted to consider whether the murder was especially heinous, atrocious or cruel despite a lack of evidentiary support in the record. The Jones Court concluded that the error was not harmless because the jury may have erroneously believed that the defendant's sexual abuse of the corpse supported this factor. 569 So.2d at 1238-39.

Similarly, in this case, the jury may well have considered evidence that Stewart and his accomplice planned the robbery in advance to support the CCP aggravating factor, of which there was no evidence. The prosecutor argued to the jury that Stewart decided to rob someone, citing the acts leading up to the homicide

as support for his unfounded conclusion that the crime was cold, calculated and premeditated.[18] (R. 433-34)

This Court has consistently recognized that it is constitutional error for the jury to be prevented from considering non-statutory mitigating factors in determining whether to recommend life imprisonment or the death penalty, because failure to do so skews the analysis in favor of imposition of the death penalty. Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987); see also Cooper v. Dugger, 526 So.2d 900, 901 (Fla. 1988); Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987) (if jury recommendation upon which judge must rely results from unconstitutional procedure, entire sentencing process is tainted by that procedure).

A jury instruction on an improper statutory aggravating factor results in the same taint. If an additional aggravating factor is considered, more mitigation will be needed to counterbalance the presence of the aggravating factor. Thus, the presence of the improper factor also necessarily skews the analysis in favor of the death penalty, which renders the death penalty unreliable.

As the trial judge noted, a plan to rob does not establish the CCP aggravating factor. Jackson v. State, 498 So.2d 906 (Fla. 1986); Hardwick v. State, 461 So.2d 79 (Fla. 1984). Even an intent to kill does not by itself establish this factor. Brown v. State, 444 So.2d 939 (Fla. 1984); Peavy v. State, 442 So.2d 200 (Fla. 1983). The unrebutted evidence in this case showed that Stewart pulled the trigger only when an accomplice began shouting, "shoot

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[18] The prosecutor's argument is quoted at page 71, infra.

him, shoot him." (R. 242) Dr. Merin supported Bilbrey's testimony. He testified that when Stewart shot Diaz, he was "responding to an emotional instruction from an emotional acquaintance." (R. 329, 398) Thus, the evidence showed conclusively that the crime was not cold, calculated and premeditated.

Nevertheless, the prosecutor argued to the jury in closing that the crime was cold, calculated and premeditated because Stewart and an accomplice decided to rob someone to get some money:

> Have we proved that the crime for which the defendant is to be sentenced, in other words, the murder of Ruben Diaz, was that committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification? You heard what the defendant told his friend, Randall Bilbrey, about the crimes concerning Ruben Diaz. The defendant and another person who had been released from jail, they were broke. They had no money. And they decided to rob someone to get some money. Based on the evidence that you have heard, how else would you expect the defendant to get money other than through a criminal act?
>
> They walked up Nebraska Avenue and some place along that neighborhood they noticed a big shiny white car outside a bar. They went inside, struck up a conversation with Ruben Diaz, and somehow enticed him to give them a ride. The defendant got in the back seat. His accomplice got in the passenger's side of the car, and shortly as they were driving northward the defendant took out a gun and put it right to Diaz's head. Directed him where to stop, ordered him to lie down on the shoulder of the road. And as Diaz was begging for his life -- "Take my wallet. Take whatever you want. Don't kill me" -- the defendant showed him absolutely no mercy whatsoever. He shot him. Not once but twice. If there ever was a cold-blooded, calculated, premeditated execution style killing, this was it.
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> As Diaz lay dying on the roadside the defendant robbed him of his car, took a small vial of cocaine from him, fifty dollars in cash, and just remember that Bilbrey's testimony in this regard was not contradicted in any fashion whatsoever.

(R. 433-34) The prosecutor did not get the story straight, to

Stewart's detriment, of course. According to Bilbrey's testimony, Stewart and the accomplice robbed Diaz before killing him, not afterward. "They," not just Stewart, ordered him to get out of the car and lie down. Most importantly, the prosecutor left out Bilbrey's testimony that, while Diaz was begging for his life, the other guy was yelling and screaming at Stewart, "Shoot him. Shoot him." (R. 242) This detail, conveniently omitted by the prosecutor, was the evidence that showed conclusively that the murder was not premeditated.[19]

There is no doubt but that the jurors applied the CCP aggravating factor in recommending the death penalty. The prosecutor's argument to the jury that Stewart and his accomplice "decided to rob someone," misleadingly inferred that the intent to rob established heightened premeditation. His emotional and unsupported argument that, "[i]f ever there was a cold-blooded, calculated, premeditated execution style killing, this was it," was not a logical conclusion drawn from the evidence, but merely the prosecutor's attempt to persuade the jury to consider this factor in recommending the death penalty. (R. 433-34) Even if the prosecutor had not told the jury this factor was established, the jurors would still have attributed weight to this factor when told by the court that it was permissible under the law that they do so.

The jury would not appreciate that as a matter of law it could

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[19] The prosecutor also failed to mention Bilbrey's testimony that Stewart later cried in remorse, expressing the sentiment that he "had no right to take a life." This suggested that he regretted his spontaneous action. (R. 240)

not properly weigh the CCP aggravating factor into the equation of whether to recommend life or death for Stewart. In fact, the jury is presumed to have used this instruction and to have followed the law given it by the trial judge. Grizzel v. Wainwright, 692 F.2d 722, 726-27 (11th Cir. 1982), cert denied, 461 U.S. 948 (1983). The burden is on the state to show beyond a reasonable doubt that the instruction on this inapplicable statutory aggravating factor did not affect the jury recommendation. See Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Riley, 517 So.2d at 659. The state cannot meet that burden.

The judge's decision that the "cold, calculated and premeditated" instruction was warranted constituted a finding that the evidence legally supported the instruction. The trial court made an erroneous decision as a matter of law; he admitted there was no evidence that the homicide was committed with heightened premeditation. Thus, he encouraged the jurors to base their advisory verdict on an inapplicable aggravating factor. His erroneous instruction violated the limits imposed by this Court, expanding the definition of the factor and rendering it unconstitutionally overbroad as applied. Godfrey v. Georgia, 446 U.S. 420 (1980). A new penalty proceeding with a new jury is required.

ISSUE VI

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

Although there was abundant evidence to support them, the judge failed to find the statutory mitigating factors that (1) the defendant was under the influence of extreme mental or emotional disturbance, § 921.141(6)(b), Fla. Stat. (1989); and (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired, § 921.141(6)(f), Fla. Stat. (1989). (R. 553-54) Even if the judge did not abuse his discretion by concluding that the "extreme" and "substantial" modifiers were not established, he erred by failing to consider these factors as nonstatutory mitigation. This Court is required to review the record in each death penalty case and to make an independent determination of whether the trial judge's written findings are supported by the record. The Court cannot ignore evidence of mitigating circumstances in the record. Parker v. Dugger, 112 L.Ed.2d 812, 824-27 (1991).

In Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court stated that trial "judges may not refuse to consider relevant mitigating evidence." 511 So.2d at 535 (citing Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982)). In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court held that if the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature

(question of law), the judge must find it a mitigating circumstance and weigh it against the aggravating factors. The judge cannot dismiss a factor as having no weight. Similarly, in Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Court held that, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. 574 So.2d at 1062. A judge can reject a defendant's claim that a mitigating circumstance has been proven only if the record contains competent substantial evidence to support that rejection.

The trial court based his rejection of the two statutory mitigating factors on Dr. Merin's testimony. Dr. Merin testified that in his opinion Stewart suffered from emotional disturbance, but not "extreme" emotional disturbance and that his capacity to appreciate the criminality of his acts was impaired but not "substantially" impaired. In Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990), this Court stated that, although the death penalty statute required that emotional distress be "extreme,"

> it clearly would be unconstitutional for the state to restrict the trial court's consideration solely to "extreme" emotional disturbances. Under the case law, any emotional disturbance relevant to the crime must be considered and weighed by the sentencer, no matter what the statutes say. Lockett; Rogers. Any other rule would render Florida's death penalty statute unconstitutional.

568 So.2d at 912. The Cheshire Court continued that, under Rogers, the trial court is obligated to consider and weigh each and every mitigating factor apparent on the record, whether statutory or nonstatutory. Id. In this case, we submit that both statutory

mental mitigating circumstances were established. Even if this Court determines that the trial judge did not abuse his discretion in finding that the statutory requirements of "extreme" and "substantial" were not met, however, the trial court erred by failing to consider and weigh these factors as nonstatutory mitigating factors. See Cheshire, 568 So.2d at 912.

Whether emotional distress is "extreme" and whether impaired capacity is "substantial" require a subjective determination. Just because Dr. Merin did not consider Stewart's emotional disturbance to be "extreme," or his judgment to be "substantially" impaired did not mean that these factors were not established. One could easily differ with Dr. Merin's opinion which was based upon one interview with Stewart prior to his first penalty phase proceeding in 1986.

In the opinion remanding this case for a new penalty proceeding, Stewart v. State, 558 So.2d 416 (Fla. 1990), this Court noted that Dr. Merin stated that "in his opinion Stewart was drunk at the time of the shooting and that his control over his behavior was reduced by his alcohol abuse." (R. 527) The trial judge determined that the instruction on impaired capacity was inappropriate based on Dr. Merin's testimony that he believed that Stewart was impaired but not substantially so. This Court concluded that, to allow an expert to decide what constitutes "substantial," is to invade the province of the jury. (R. 527-28) Applying the same logic, the trial judge should not rely on the expert's opinion as to whether the "extreme" and "substantial" modifiers apply instead of independently considering the evidence.

Emotional Distress

The trial judge did not find this mitigator based on Merin's testimony that Stewart's emotional disturbance was not extreme, and that he found no evidence of psychotic, bizarre or fragmented thinking or psychosis. The judge observed that Dr. Merin diagnosed Stewart's problem as an antisocial personality disorder. He noted that Merin said defendant was a "killer." (R. 553) This observation was based on the prosecutor's cross-examination of Dr. Merin during which he led him into such testimony. The prosecutor asked,

> Q. So, Mr. Stewart is, in fact, a psychopath?
>
> A. In terms of old terminology, yes. There are some additional factors which would tend to modify the use of that term. But for impact some people continue to use that term.
>
> Q. And he is also a killer, as you understand; is that not true?
>
> A. He has killed, yes.

(R. 342) Dr. Merin said only that Stewart "has killed," which is true of every defendant at a penalty phase proceeding. Aggravating and mitigating factors are intended to separate the ordinary murder from the "most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So.2d at 7. Thus, the judge unconstitutionally based his rejection of the emotional disturbance mitigating factor on a criterion applicable to every capital defendant.

Dr. Merin said he did not think Stewart suffered from "mental distress" at the time of the Diaz killing because he did not break from reality, see little green men from Mars or think that he was Napoleon. He was under emotional distress although not "extreme"

at the time of the homicide. Merin described Stewart as "the end product of years and years of extreme emotional distress."[20] (R. 331) He found Stewart's behavior on the day of the homicide consistent with his general level of mental and emotional behavior during his teenage years and early twenties. (R. 344)

Dr. Merin's reasoning shows that he used an improper standard to determine whether Stewart suffered from mental distress. That Stewart did not "break from reality, see little green men from Mars or think that he was Napoleon," shows that Dr. Merin was basing his conclusion on the test for insanity -- whether Stewart knew right from wrong. If Stewart had believed he was Napoleon, or seen little green men, he undoubtedly would not have known right from wrong. The insanity standard cannot be used to determine the weight of a mitigating factor. See Campbell v. State, 571 So.2d at 418-19; Mines v. State, 390 So.2d 332, 337 (Fla. 1980) (finding of sanity does not eliminate consideration of statutory mitigating factors concerning mental condition).

Although Dr. Merin found no evidence of psychotic thinking, he conducted no medical or psychological tests and did not talk to Stewart's family members. His evaluation was based on what Stewart told him during an interview held in contemplation of Merin's testifying in the penalty phase of Stewart's first-degree murder

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[20] Counsel for both sides agreed that Dr. Merin's testimony that Stewart's emotional disturbance was the end product of years and years of emotional disturbance was new since Stewart's earlier penalty proceeding. (R. 407) Thus, although this Court did not find Dr. Merin's testimony sufficient to require an instruction of this mitigating factor in Stewart's earlier case, Dr. Merin's testimony now includes sufficient evidence to support this factor.

case. Merin found internal conflicts but found them insufficient to have created a neurosis. (R. 340-41) He said that, although Stewart had some features of other behavior disorders, his primary diagnosis was antisocial personality disorder. (R. 342) This is an easy diagnosis to reach based upon one interview and no medical or psychological testing data. Had Stewart told Dr. Merin that he saw little green men from Mars, presumably Dr. Merin would have diagnosed Stewart as psychotic.

The emotional distress upon which Dr. Merin based his opinion was created by Stewart's bizarre childhood, lack of identity, and his chronic alcohol and drug abuse. Stewart's mother neglected him as an infant. His aunt described Stewart, at the age of eighteen months, as "hyper," crying, not satisfied with anything, and very emotionally disturbed. (R. 357) This could have resulted from his mother's alcohol and drug abuse prior to his birth or from abuse and neglect during his infancy. Stewart's mother, who killed herself when Kenny was about five, left him with a stepfather who apparently cared about him but was also physically abusive. Stewart finally learned or confirmed at the age of twelve that his mother was dead, his stepfather was not his biological father, and that his biological father had been murdered. He was told that his stepfather, whom he loved, was responsible for his biological parents' deaths. Thus, began his extreme emotional distress of many years duration.

It seems strange that extreme emotional distress of many years duration somehow becomes normal and thus ceases to exist. Dr. Merin

found the same thing to be true with substantial impairment. (R. 331-33) According to Dr. Merin's reasoning, one becomes so extremely disturbed and so substantially impaired over the years that one finally hits the point of partial recovery. Although some distress and impairment still exists, it is no longer extreme or substantial. This reasoning defies logic.

As discussed below, all of the evidence showed that Stewart suffered from chronic alcohol and drug abuse. In Nibert, 574 So.2d at 1063, this Court found that evidence of chronic and extreme alcohol abuse "is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior." See also Ross v. State, 474 So.2d 1170, 1174 (Fla. 1985). Thus, the evidence of Stewart's drinking discussed below also supports the emotional distress mitigating factor.

Impaired Capacity

The unrebutted evidence in this case showed that (1) Stewart had been drinking heavily for years, having started at age twelve; (2) he also used drugs; (3) around the time of the homicide, he was drinking about a case of beer a day with alcohol and\or a gallon of alcohol a day with beer, and smoking marijuana; (4) his mind sometimes "turned off" and he did not remember large blocks of time after he had been drinking; (5) Stewart often went to his mother's grave with a gallon of whisky; (6) the instant homicide occurred after Stewart had been drinking heavily and abusing drugs; (7) Stewart could not remember very much about that day; (8) after the

homicide, Stewart went behind a Winn-Dixie where five bums lived and drank with them until he passed out; (9) after the homicide, Stewart drank a lot of alcohol every day, used marijuana, and lived like an alcoholic. (R. 242-455, 248, 320-21, 329, 331) This testimony came not only from Dr. Merin, but also from the state's key witness, Randall Bilbrey. It was unrebutted. In fact, all of the testimony indicated that Stewart was continually drunk. Evidence of impairment through drug or alcohol abuse must be considered in mitigation. Nibert, 574 So.2d at 1063 (Nibert suffered from chronic and extreme alcohol abuse since his preteen years and was drinking heavily when he committed the crime); Cheshire, 568 So.2d at 911; Hardwick v. State, 521 So.2d at 1076.

In Nibert, this Court found that the trial court erred by failing to find and weigh a substantial amount of mitigation. The Court determined that, when a reasonable quantum of uncontroverted evidence of a mitigating factor is presented, the trial must find and weigh the factor. The judge may reject the factor only if the record contains "positive evidence" which refutes the evidence of a mitigating circumstance. 574 So.2d at 1062. In this case, the record contains no evidence even suggesting that Stewart was not habitually drunk and under the influence of alcohol when he committed the homicide. Even the testimony of the state's key witness supported this mitigating factor. Bilbrey said that Stewart drank, used marijuana and "lived like an alcoholic." (R. 245, 248)

The trial judge did not find this factor partly because of Dr. Merin's testimony that Stewart's impairment was not "substantial."

(R. 507, 553-54) The problem is that Dr. Merin's conclusion did not follow from his findings. Dr. Merin testified that excessive consumption of alcohol causes depression and loss of ability to control behavior. Excessive alcohol consumption over a period of years causes a chemical and, eventually, a structural change in the brain. In some cases, such brain damage might annihilate one's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of law. In Stewart's case, however, Dr. Merin believed that Stewart's excessive drinking reduced his grasp but did not annihilate his ability to appreciate what he was doing. He said that, because Stewart had been drinking heavily for many years, he had learned to function in that natural state. (R. 331-33) Thus, although his ability to appreciate the criminality of his conduct was impaired because of his alcohol intake, it was not so "substantially" impaired that he did not understand what was going on. (R. 345)

Again, this sounds like the insanity standard. One does not need to be so substantially impaired that he does not know what is going on to meet the impaired capacity mitigator. "Total annihilation" is not required. One who does not know what is going on either lacks the necessary intent to commit the crime or is legally insane. The insanity standard cannot be used to determine the weight of a mitigating factor. See Campbell, 571 So.2d at 418-19.

Furthermore, Dr. Merin's conclusion that Stewart's capacity to appreciate the criminality of his conduct was not "substantially" impaired because he was used to functioning in an alcoholic state

defies logic. Perhaps Stewart's toleration of alcohol permitted him to function rather than passing out. Nevertheless, the long term damage to his brain would be much greater than that of someone who drank only on occasion. Dr. Merin performed no tests on which to base his opinion that Stewart's brain was not affected by his long-term alcohol and drug abuse.

The trial judge also noted, in support of his rejection of this factor, that (1) Stewart 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) after the murder, Stewart took the victim's vehicle to another location and burned it to destroy evidence; (3) Stewart admitted to Bilbrey that he did not have the right to take anyone's life; and (4) Stewart recited the details of the robbery and murder to Bilbrey with specificity, thus contradicting the notion that he did not know what he was doing. (R. 554) None of these "facts" show that Stewart's capacity to appreciate the criminality of his conduct was not impaired when he committed the homicide. They show only that he had not passed out, was able to function, and recalled some of the events surrounding the homicide.

The judge's finding that Stewart was able to discuss the murder with the mental health expert is contradicted by Dr. Merin's testimony that Stewart had little recall of that day, due to his intoxication, and that they did not discuss the details of the homicide. Perhaps the murder itself remained in Stewart's mind because of the shock of killing someone. Stewart later cried and

admitted that he had no right to take anyone's life. This suggests that, when he was less impaired by alcohol than on the day of the homicide, he realized that what he had done was morally wrong and regretted his actions.

Like Dr. Merin, the trial judge seemed to believe that the impaired capacity mitigating factor required that Stewart not know what he was doing. If Stewart did not know what he was doing, the murder would have instead been an accident or Stewart would have been insane. Because he remembered the homicide and was able to tell Bilbrey about it it does not negate this mitigating factor.

* * * * *

Accordingly, the trial court erred by failing to find that Stewart suffered from extreme mental or emotional distress and a substantially impaired capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of law. If the judge did not abuse his discretion by failing to find the modifiers applicable, he was required to find these factors to be nonstatutory mitigation. See Nibert; Campbell; Rogers.

ISSUE VII

THE TRIAL COURT ERRED BY FAILING TO FIND UNREBUTTED NONSTATUTORY MITIGATION WHICH WAS CLEARLY ESTABLISHED BY THE EVIDENCE.

The trial judge must consider all relevant mitigating evidence before determining whether to impose a life or death sentence. See Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Under no circumstances may the court give a mitigating circumstance no weight by excluding the evidence from its consideration. Eddings, 455 U.S. at 114-15. In the case at hand, the trial judge did not find any statutory or nonstatutory mitigation. (R. 557) The judge failed to find and properly weigh all mitigating factors established in the record.

If mitigation is supported by the evidence and is of a nature which reduces a defendant's moral culpability for the homicide, then it must be weighed against the aggravating circumstances. Rogers, 511 So.2d 533. In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court held that the judge must expressly evaluate in his written sentencing order every statutory and nonstatutory mitigating factor proposed by the defendant. If the evidence reasonably establishes a given mitigating factor (question of fact) and if the factor is mitigating in nature (question of law), the judge must find it a mitigating circumstance and weigh it against the aggravating factors. Once established, the judge cannot dismiss a factor as having no weight. The judge's decision must be supported by "sufficient competent evidence in the record." Id.

In Nibert v. State, 574 So.2d 1059 (Fla. 1990), the Court

found that, where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. 574 So.2d at 1062. A trial court can reject a defendant's claim that a mitigating circumstance has been proven only if the record contains competent substantial evidence to support that rejection.

Whether a particular nonstatutory factor is "mitigating in nature" is a question of law. Any factor that reasonably may serve as a basis for imposing a sentence less than death is mitigating. Campbell, 571 So.2d at 419 n.4 (citing Lockett). Examples of valid non-statutory mitigating circumstances set out in Campbell include (1) abused or deprived childhood; (2) remorse; (3) good prison record and potential for rehabilitation; and (4) disparate treatment of an equally culpable codefendant. Campbell, 571 So.2d at 419. All of these factors were arguably present in Stewart's case. The first three were established. The fourth was suggested by state witness Bilbrey's testimony that Stewart had an accomplice who was never apprehended or charged.

The trial judge in this case noted two possible nonstatutory mitigating factors: deprived and difficult childhood and transition from being a violent person to a compassionate person since his incarceration. He found neither.

A.

A defendant's disadvantaged or pathological family background and/or his traumatic childhood and adolescence are valid nonstatutory mitigating factors. See, e.g., Nibert v. State, 574 So.2d 1059, 1061-62 (Fla. 1990); Stevens v. State, 552 So.2d 1082, 1086 (Fla. 1989); Brown v. State, 526 So.2d 903, 907-08, (Fla.), cert. denied, 488 U.S. 944 (1988); Burch v. State, 522 So.2d 810, 813 (Fla. 1988); Rogers, 511 So.2d at 535; and Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). The trial judge in this case erroneously found to the contrary.

The judge concluded that Stewart's actions in committing the murder were not significantly influenced by his childhood experience so as to justify its use as a mitigating circumstance. He stated further that the effects produced by Stewart's childhood trauma were not relevant to his character and record and the circumstances of the case. (R. 556) Such absurd reasoning is refuted by logic and established case law.[21]

In Nibert, the trial judge dismissed uncontroverted evidence

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[21] The judge also noted that "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." (R. 556) This comment has no bearing on the subject, and is also patently untrue. Ms. Acosta testified that they picked up Stewart who was hitchhiking, he subsequently pulled a gun and shot at them when she put her foot on the gas to jerk the car. In this case, Stewart and an acquaintance met Diaz in a bar and talked him into taking them somewhere in his car. They made him get out of the car and robbed him. The only similarity is that both cars were burned at the same location. The judge may have based this observation on testimony from Stewart's earlier trial by Terry Smith who did not testify in this proceeding. See Stewart, 558 So.2d at 418. If so, it was improper for him to do so.

of Nibert's physically and psychologically abusive childhood because Nibert was 27 years old at the time of the murder and had not lived with his mother since age eighteen. This Court pointed out that:

> The fact that a defendant had suffered through more than a decade of abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

574 So.2d at 1062. The judge's reasoning in this case -- that Stewart's character was not affected by his horrible childhood -- reflects the same logic faulted by this Court in Nibert.

Furthermore, a defendant's disadvantaged childhood need not be related to the crime. In Brown v. State, 526 So.2d 903, 908 (Fla. 1988), the trial judge erred by concluding that Brown's "disadvantaged childhood, his abusive parents, and his lack of education and training, do not establish mitigation in the eyes of this court or the eyes of the law." Mitigating evidence is not limited to the facts surrounding the crime but can be anything in the life of a defendant which might mitigate against the appropriateness of the death penalty for that defendant." Id. (citing Hitchcock v. Dugger, 481 U.S. 393; Eddings v. Oklahoma, 455 U.S. 104, and Lockett v. Ohio, 438 U.S. 586)).

The record of the penalty phase testimony in the instant case contains much convincing and uncontroverted evidence of childhood abuse, neglect and psychological problems. Stewart's aunt testified about Kenny's abusive and disadvantaged childhood and his identity

crisis during his formative years. Additionally, Dr. Merin testified about Stewart's childhood traumas. Because of his unsuccessful search for his biological parents and his identity, Stewart reached the point where he had no attachment. He didn't care anymore because it had been "too painful." He then put himself in positions where he would hurt others and where he too could be hurt. (R. 333-36)

The trial court erred as a matter of law by failing to consider and weigh Stewart's abusive and traumatic childhood which was reasonably established as mitigating evidence.

B.

The judge chose to totally disregard Stewart's aunt's testimony that Stewart had changed significantly since his incarceration. Although he listed "his transition from being a violent person to a compassionate person since his incarceration" as one of two "arguable" nonstatutory mitigators, he erroneously determined that this evidence was not mitigating in nature. He wrote that, although he did not doubt Stewart's aunt's sincerity, the facts elicited at sentencing manifested the "true nature" of Stewart's character -- a violent individual who has no hesitancy in taking an innocent individual's life or perpetrating extreme acts of violence on an innocent individual. Again, he cited Dr. Merin's testimony, as characterized by the prosecutor in closing, that the defendant is "a sociopath/psychopath who is a killer." He concluded that "any transformation is not truly of a mitigating circumstance given defendant's history of murder and violence." (R. 557)

This is clearly contrary to the law. What the judge seems to be saying is that, although he believes Stewart's aunt's testimony that Stewart has changed, the "real" Stewart is the "psychopath" who committed the crimes rather than the warm, caring individual Stewart's aunt described. Apparently, the judge determined that no matter how much Stewart had changed, it did not mitigate the crimes he committed. This is error as a matter of law.

The trial judge may not be permitted to ignore the passage of time between the original sentencing in the fall of 1986 and this resentencing in November of 1990 in determining whether death is the appropriate sentence. A defendant's potential for rehabilitation is a significant factor in mitigation. Cooper v. Dugger, 526 So.2d 900, 902 (Fla. 1988). Although such evidence does not lessen the defendant's culpability for the crime committed, it is "clearly mitigating in the sense that it might serve as a basis for a sentence less than death." Id. (citing Skipper v. South Carolina, 476 U.S. 1 (1986) (conduct in prison mitigating for same reason)); accord Nibert, 574 So.2d at 1062; Campbell, 571 So.2d at 419 n.4; Songer v. State, 544 So.2d 1010, 1011-12 (Fla. 1989) (defendant experienced positive change and self-improvement while in prison); Brown, 526 So.2d at 908 (potential for rehabilitation constitutes a valid mitigating factor); Riley v. Wainwright, 517 So.2d 656.

The judge's conclusion in this case is somewhat like that of the judge in Lamb v. State, 532 So.2d 1051, 1054 (Fla. 1988). Lamb's trial judge found that none of the mitigating circumstances rose "to the level of a mitigating circumstance to be weighed in

the penalty decision." This Court remanded because it was not clear whether the judge considered the mitigating evidence.

In this case, it is clear that the trial judge did not consider the mitigating evidence because he said that he did not. He decided that none of the statutory mitigating factors were established and that the two arguable nonstatutory mitigating factors were not mitigating -- even though this Court has stated time and time again that they are mitigating and must be given some weight. See Nibert; Campbell; Rogers.

The judge failed to even mention several other nonstatutory mitigating circumstances. He did not address remorse which was argued by the defense. Defense counsel argued in closing:

> Now what do you have to go by to determine that? Does he show this because he wasn't able to discuss this and express his remorse on the stand? Well, that in and of itself suggests remorse. For this man, the man that is not the monster, the man that is not the creature, the man that is not under the influence of this life style he was living at the time on the streets, is unable to relive it. And the suggestion of it, I hope you could see from where you were, I hope you could see it brings tears to his eyes. He is unable to relive the nightmare. That indicates remorse.

(R. 452-53)

The State also presented testimony that Stewart was remorseful. Randall Bilbrey testified that Stewart cried "and sort of had a fit" when he told him about Diaz and said that he had no right to take a life. (R. 240) Rmorse is a recognized mitigating factor. Nibert, 574 So.2d at 1062; Campbell, 571 So.2d at 419 n.4; Morris v. State, 557 So.2d 27 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

If this Court does not find that the trial judge erred by failing to find and weigh the two statutory mental mitigators, in accordance with Issue VI, supra, then the trial judge should clearly have found them to be nonstatutory mitigators. If Stewart did not suffer from "extreme" emotional distress at the time of the homicide, then he clearly suffered from some emotional distress -- even Dr. Merin said this was true. (R. 331)

Similarly, if Stewart's ability to appreciate the criminality of his conduct was not "substantially" impaired, as required to establish the statutory mitigating factor, it was at least to some extent impaired. Dr. Merin said so. (R. 331-33) The ill effects of chronic alcohol and drug abuse at the time of the offense is a well-established mitigating circumstance which the trial court must consider, especially when, as in this case, it is established by uncontroverted evidence in the record. Hardwick, 521 So.2d at 1076; Nibert, 574 So.2d at 1063; Carter v. State, 560 So.2d 1166, 1169 (Fla. 1990); Fead v. State, 512 So.2d 176, 178 (Fla. 1987).

Accordingly, the trial court abused its discretion by failing to find these nonstatutory mitigating factors established and weighing them against the aggravating factors. A sentence of death imposed where the sentencer has erroneously failed to consider relevant mitigating evidence violates the eighth and fourteenth amendments. Lockett, 438 U.S. at 608. The court's failure to even consider this myriad of nonstatutory mitigation also violates the Florida Constitution. The sentence of death must be vacated.

ISSUE VIII

THE DEATH PENALTY IS DISPROPORTIONATE BECAUSE OF THE SUBSTANTIAL MITIGATION IN THIS CASE.

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). This Court quoted the above passage in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), a case in which the death penalty was reduced to life. In State v. Dixon, 283 So.2d 1, 7 (Fla. 1973), cert denied sub nom., 416 U.S. 943 (1974), this Court observed similarly that "[d]eath is a unique punishment in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes."

The arbitrary and capricious imposition of the death penalty violates both the United States and Florida Constitutions. Furman, 408 U.S. 238; Dixon, 283 So.2d 1. Accordingly, this Court must examine the record of each case in which the death penalty is imposed to be sure that its imposition is constitutional and complies with the standards set by the legislature and the courts. Goode v. State, 365 So.2d 381 (Fla. 1979). "A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the death penalty

is administered evenhandedly." Fitzpatrick, 527 So.2d at 811.

Even when a jury recommends the death penalty, the presence of uncontroverted, substantial mitigation removes the case from the category of "the most aggravated and least mitigated of serious offenses." See Penn v. State, 574 So.2d 1079, 1083-84 (Fla. 1991) (based partly on Penn's heavy drug use, court found that this was not one of the least mitigated and most aggravated murders); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990) (trial court incorrectly weighed substantial mitigation; death penalty disproportionate); Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990) (several mitigating factors effectively outweighed remaining valid aggravating circumstances); Fitzpatrick v. State, 527 So.2d 807, 811 (Fla. 1988). Because of the significant mitigation in this case, the death penalty is unwarranted as a matter of law.

In Fitzpatrick, the defendant, while attempting to rob a bank, shot and killed a deputy sheriff and wounded another deputy. The trial court found five aggravating factors and three mitigating factors. Following the jury recommendation, he sentenced Fitzpatrick to death. This Court upheld the aggravating and mitigating factors but reduced Fitzpatrick's sentence to life, finding that his was not the sort of unmitigated case contemplated by Dixon. The Court noted that the "heinous, atrocious and cruel" factor and the "cold, calculated and premeditated" factor were conspicuously absent. 527 So.2d at 812.

In this case, the trial court found only two aggravating circumstances: (1) Stewart was previously convicted of another

capital or violent felony; and (2) the crime was committed while he was engaged in a robbery. As in Fitzpatrick, HAC and CCP were conspicuously absent. In fact, the trial judge stated in his sentencing order that he found no evidence of CCP. Although Stewart committed another capital felony and other violent felonies, they were committed after the instant offense and before Stewart was apprehended, when he still suffered from the mental and emotional impairments that caused him to commit this homicide.

To suggest that death is always justified when a defendant previously has been convicted of murder is "tantamount to saying the judge need not consider the mitigating evidence at all in such instances." Cochran v. State, 547 So.2d 928, 933 (Fla. 1989). The United States Supreme Court has consistently overturned cases in which the mitigating evidence was ignored. Id. (citing Hitchcock; Eddings; Lockett). A prior homicide conviction does not automatically mandate the death penalty.

In Cochran, the jury was not told that the defendant committed a second homicide four days before the one for which he was on trial. 547 So.2d at 934. Without this knowledge, the jury recommended life. The judge, however, imposed the death penalty, primarily because of the second homicide. (R. 931) This Court determined that the judge was permitted to consider the second homicide in weighing the aggravating and mitigating factors, but found that the extensive mitigation in the case made the jury's life recommendation reasonable. Thus, the override was unwarranted.

The evidence showed that Cochran had emotional problems and a

severe learning disability as a child. At the time of the homicide, he was depressed because the mother of his child had broken off their relationship and prevented him from seeing the child. Cochran was eighteen years old.

The mitigation in Stewart was more extensive than Cochran's. Stewart had severe emotional problems. He was born to a fifteen or sixteen year old stripper and an alcoholic father who was in prison when Stewart was born. (R. 355-56) His mother was on probation and neglected him. He lived with an aunt for about six months between the ages of one and two. (R. 383-84) His mother married again and eventually left Kenny with his stepfather. His mother killed herself when Kenny was four or five and his father was eventually murdered outside a bar. (R. 362-62) Throughout his childhood, Kenny refused to believe that his mother was dead and had recurring dreams about finding her. (R. 322-23) When Stewart learned at age twelve that his stepfather was not his biological father, he was devastated and began to search for his identify. His grandmother told him that his stepfather arranged to have his parents killed. Although not true, Stewart believed it for years. (R. 325-26)

Although Stewart's jury recommended death, had they not known of the other homicide, they might also have recommended a life sentence, as did the jury in Cochran. The case would then be almost identical to Cochran except that Stewart was three years older and had much more extensive mitigation.[22] For this reason,

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[22] Stewart's jury was also improperly instructed. The trial judge denied the jury the opportunity to consider the "extreme (continued...)

the death penalty is not proportionately warranted in this case.

The Fitzpatrick Court also relied heavily on mental mitigation and the defendant's low emotional age. Admittedly, the evidence showed that Fitzpatrick acted more mentally ill than did Stewart (though no more than did Cochran). Nevertheless, the testimony of both defense witnesses showed that Stewart had a long and significant history of emotional distress and alcohol impairment. Although Dr. Merin did not choose to apply the adjectives "extreme" and "substantial" to the two mental mitigators, he found that Stewart's emotional distress was "the end product of years and years of extreme emotional distress," and that Stewart's alcohol intake reduced his grasp but did not totally annihilate his ability to appreciate what he was doing. Because Stewart had been drinking heavily for many years, he had learned to function in that state. (R. 331-33) He told Dr. Merin that he drank heavily and abused drugs prior to he homicide and had little recall of that day. After the homicide, he drank and used cocaine until he passed out. (R. 243, 321, 329)

Although Stewart was 21 years old when he committed the homicide, we do not know what his mental or emotional age might have been because he received no psychological testing. We do

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[22](...continued)
duress or substantial domination" mitigating factors of which evidence was presented by the state and the defense. (See Issue IV, supra.) The error was exacerbated because the trial court erroneously instructed the jury on the "cold, calculated and premeditated" aggravating factor even though no evidence was presented to support it. See Issue V, supra.) Had the jury been properly instructed, it might well have recommended life instead of death.

know, however, that he had an abusive, disadvantaged childhood and ran away at the age of twelve which apparently ended his schooling.

The trial judge erred by failing to find the two mental mitigators and substantial nonstatutory mitigation based on Stewart's childhood. (See Issues VI and VII, supra.) He also erred by failing to find that Stewart had improved substantially since his incarceration. (See Issue VI, supra.) Stewart's aunt's unrebutted testimony showed that Stewart had completely changed and his whole world now is helping others. (R. 374) The state presented no evidence to rebut any of the mitigation.

This extensive and substantial mitigation makes the death penalty disproportionate because such mitigation has in the past warranted a life sentence in similar cases such as Cochran, Fitzpatrick, and Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1990) Livingston shot and killed a convenience store clerk during a robbery. He shot at another woman in the store. He burglarized a residence earlier that day. The jury recommended death. This Court found that Livingston's youth, marginal intelligence, abusive and neglected childhood and problems with drugs and alcohol counterbalanced the two valid aggravating factors and remanded for a life sentence. Stewart's mitigation was equally extensive. See also Hegwood v. State, 575 So.2d 170 (Fla. 1991) (court erred in overriding life recommendation in case where defendant shot and killed three employees in robbery of "Wendy's" because of mitigation evidence that seventeen year old defendant had unfortunate and impoverished childhood).

The jury may have disregarded the mitigation because the State was permitted to infer that Stewart had the burden to prove that death was inappropriate, and because he failed to testify. Although Stewart took the stand, it was only to say that it was too difficult for him to testify about his childhood. Nevertheless, the state cross-examined him concerning the crimes, forced him to help prove aggravating circumstances, and argued to the jury that his failure to testify was aggravating in nature. (See Issue I, supra.) Additionally, the State questioned Stewart's aunt as to whether his grandmother would testify, thus inferring that Stewart had the burden of proof. (See Issue III, supra.)

For these reasons, the jury recommendation is unreliable and should be disregarded. Imposition of the death penalty here is unconstitutionally arbitrary under the eighth and fourteenth amendments to the United States Constitution and article 1, section 17, of the Florida Constitution.

ISSUE IX

STEWART'S DEATH SENTENCE VIOLATES THE UNITED STATES CONSTITUTION BECAUSE THE COURT ARBITRARILY DISREGARDED § 921.141(3), FLORIDA STATUTES (1989), WHICH MANDATES A LIFE SENTENCE.

When Stewart was first sentenced to death in this case (case no. 70,245), the trial judge never entered any written findings in support of the death sentence. When this Court vacated Stewart's death sentence and remanded for the instant resentencing, Stewart v. State, 558 So.2d 416 (Fla. 1990), the majority stated:

> We note that no written findings in support of the death penalty were ever submitted by the trial court. In Grossman, 525 So.2d at 841, we announced the rule that prior to, or contemporaneously with, orally pronouncing a death sentence, courts are required to prepare a written order which must be filed concurrent with the pronouncement. In Stewart v. State, 549 So.2d 171 (Fla. 1989), we ruled that should a trial court fail to provide timely written findings in a sentencing proceeding taking place after Grossman, we are compelled to remand for imposition of a life sentence. Because the instant sentencing proceeding preceded Grossman, that rule is inapplicable here. However, if the court on remand reimposes the death penalty without written findings, the rule will apply.

(R. 528-29) In a specially concurring opinion, Justice Barkett stated that she would commute Stewart's sentence to life imprisonment under the authority of section 921.141(3), Florida Statutes (1983). She noted that, "[t]o this date, the trial court has never provided any written findings to support the imposition of the death penalty." (R. 530)

In Hicks v. Oklahoma, 447 U.S. 343 (1980), the Court held that sentencing is not merely a matter of state procedural law. When a defendant is arbitrarily deprived of a clear statutory right as to

how his sentence must be imposed, he is deprived of due process of law. The right to due process protects against the arbitrary deprivation of life, liberty or property. Stewart has a protected interest in not being arbitrarily sentenced to death. Because section 921.141(3) specifically requires a sentencing judge who does not issue written findings in conjunction with imposition of a death sentence to "impose sentence of life imprisonment," due process mandates that Stewart receive a life sentence.

When the majority in Stewart v. State, 549 So.2d 171 (Fla. 1989) approved a different consequence for the court's failure to provide written findings, based on whether the defendants were sentenced prior to or after Grossman v. State, 525 So.2d 833 (Fla. 1988), cert. denied, 109 S.Ct. 1354 (1989), the equal protection clauses of the Florida and United States Constitutions became implicated. Stewart belongs to the less favored class of defendants who remain subject to a death sentence rather than those who will automatically have life sentences imposed. The only distinction is the date the oral sentence was pronounced.

This invalid distinction allows the state another chance to impose a death sentence on persons like Stewart while giving other defendants the protection afforded them by state statute. The disparate treatment is arbitrary and inconsistent with the eighth amendment requirement that capital punishment "be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Accordingly, this Court should remand this case for imposition of a life sentence.

CONCLUSION

For the above reasons, Stewart's death sentence should be vacated and the trial court ordered to impose a life sentence. (See Issues VIII and IX) If the Court does not so order, then this Court should reverse and remand for a new penalty phase trial with a new jury, to be properly instructed on the aggravating and mitigating circumstances and be appointed effective counsel. (See Issues I through V) If not, then Stewart should at least be resentenced by the trial judge who should be ordered to find the mental mitigators and to consider and weigh the myriad of nonstatutory mitigation. (See Issues VI and VII)

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of the Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 31st day of March, 1992.

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