IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART, :

Appellant, :

vs. : Case No. 77,217

STATE OF FLORIDA, :

Appellee. :

_____ :

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

REPLY BRIEF OF APPELLANT

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TENTH JUDICIAL CIRCUIT

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NOTE: Appellant relies on the arguments in his Initial Brief in Issues III and IX, which are not included in this Reply Brief.

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STATEMENT OF THE CASE AND FACTS

Florida Rule of Appellate Procedure 9.210(c) provides that, in an answer brief, "the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified." See Dania Jai-Alai Palace, Inc. v. Sykes, 450 So.2d 1114, 1122 (Fla. 1984). "This simple, concise statement plainly means that the appellee's answer brief shall not contain a reiteration of the statement of the case and . . . facts stated in appellant's brief, but shall only state wherein appellee disagrees with appellant's statement and supplement that statement to the extent necessary to correct any material misstatements and omissions in appellant's statement." Metropolitan Life and Travelers Ins. Co. v. Antonucci, 469 So.2d 952, 954 (Fla. 1st DCA 1985).

In its brief in this case, Appellee has indicated no disagreement with Appellant's statements of the case or facts. Every piece of evidence in Appellee's statement of the case and facts was mentioned in Appellant's statements. Appellee merely edited Appellant's statements by omitting all detail, thus creating a bland and uninformative summary of the proceedings. For example, rather than telling this Court that Stewart learned during his early teens that his father had been shot to death in a barroom fight,[1] Appellee stated that "[Stewart's] father also died in 1970 or 1971." (Brief of Appellee at 3) Appellee apparently attempted to lessen the mitigating nature of the evidence by deleting all detail.

It appears that Appellee created a new and shorter version of

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[1] See brief of Appellant at 7.

the case and facts by omitting information helpful to Stewart's case, hoping that this Court would read its shorter version rather than Stewart's more complete version and would thus be unaware of evidence supporting Stewart's arguments. If Appellee is offering its statement of facts as an alternative to Appellant's statement and is representing it as a summary of the evidence presented at trial, Appellant wishes to make clear that Appellee has omitted the majority of relevant evidence and has thus presented a misleading picture of the penalty proceeding. Because Appellee's Statement of the Case and Facts is misleading and contains nothing that is not included in Stewart's statement, it should be disregarded.

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.

Appellee first argues that the prosecutor's cross-examination did not exceed the scope of direct because Stewart's "life" encompassed everything that he did. Fortunately, the "scope" is not that broad. If it were, every defendant who mentioned anything in his life would be subject to cross-examination concerning everything else that had happened in his life. Cross-examination would be unlimited. Even more importantly, however, Stewart did not talk about his life. He said he **was unable** to talk about his life. Thus, **nothing** about Stewart's life was within the scope of direct.

The cases cited by Appellee actually support Stewart's case by providing examples of the proper scope of direct. In Coco v. State, 62 So.2d 892 (Fla. 1953), for example, the Court ruled that defense counsel should have been permitted to introduce evidence on cross-examination that the fingerprints on the gun did not compare with the defendant's fingerprints because, on direct, the officer testified concerning his use of fingerprints. Thus, the cross-examination concerned the same issue. Similarly, in Mancebo v. State, 350 So.2d 1098 (Fla. 3d DCA 1977), the trial court properly allowed the State to cross-examine the defendant concerning his past misbehavior because, on direct, defense counsel brought out evidence of good character. In the instant case, nothing the prosecutor asked Stewart "illuminated the quality of his testimony." See Johnson v. State, 380 So.2d 1024 (Fla. 1979).[2] The questioning was intended to prejudice the jury against Stewart.

In Magill v. State, 386 So.2d 1168 (Fla. 1980), the defendant in a capital case placed at issue his mental and emotional state prior to the robbery. This Court held that the prosecutor was entitled to cross-examine the defendant concerning his mental and emotional state after the robbery. Unlike Magill, Stewart did not attempt to explain his past emotional state to justify his criminal behavior. Instead, Stewart declined to testify concerning his mental and emotional state at any time. Thus, the prosecutor should not have been permitted any cross-examination concerning

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[2] Johnson v. State, also cited by Appellee, is not relevant because it deals with the prosecutor's right to impeach the credibility of a testifying defendant with prior convictions.

Stewart's mental state or the homicides. See also Buford v. State, 463 So.2d 949 (Fla. 1981) (court properly excluded questioning of state witnesses concerning defendant's nonviolent nature because they did not testify that defendant had propensity for violence).

Appellee suggests that Stewart's complaints concerning the prosecutor's closing argument were not preserved because defense counsel did not object. We submit that the argument, combined with the entire issue of Stewart's "nontestimony," was so fundamentally unfair that Stewart was denied due process of law. The prosecutor made Stewart's refusal to testify the main feature of the trial, using it to prejudice the jury against Stewart. Characterizing Stewart's refusal as testimony, he inconsistently argued to the jury that Stewart took the easy way out by declining to testify and having his story presented by other witnesses. Moreover, any objection by counsel would have been futile because it was the judge who suggested to the prosecutor that he make such an argument to the jury.[3] See generally Simpson v. State, 418 So.2d 984, 987 (Fla. 1982) (where timely objection is made to an improper comment and objection is overruled, thus rendering futile a motion for mistrial, the issue is properly preserved for appeal).

Appellee inappropriately cited Waterhouse v. State, 17 F.L.W. S132 (Fla. Feb. 20, 1992), for what Appellee termed an "inmates-taking-over-the-asylum" scenario. In Waterhouse, the defendant refused to cooperated with various lawyers appointed to represent

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[3] The judge suggested that the prosecutor argue, "[Y]ou heard it from other people. You sure didn't hear it from the defendant." (R. 375-78)

him. At trial, he wanted his lawyer to present what counsel believed to be an unethical defense (residual doubt). Because counsel refused, he asked to make his own closing argument. Later, he decided he wanted his attorney to make the closing argument using the residual doubt defense. Defense counsel declined and the judge forced the defendant to make his own closing argument. The defendant argued the residual doubt defense.

Stewart's case is a far cry from Waterhouse. Stewart never complained about his lawyer until the final sentencing hearing. (See Issue II) He certainly did not try to dictate the defense or any other issue at trial. Whether his "nontestimony" was his idea or that of counsel is unclear. It is clear, however, that he took the stand with counsel's approval if not at counsel's suggestion.[4] This was clearly not a Waterhouse scenario. Stewart did not try to manipulate counsel or the court. It appears instead that Stewart may have been counseled to his detriment by his own counsel.

ISSUE II

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

Appellee notes that Stewart's request for new counsel was made two weeks after the court granted defense counsel's request for a continuance to ask Stewart about additional evidence, and a week after defense counsel told the judge there was no additional

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[4] Stewart told the judge that he was going to take the stand and say why he was not going to testify, based upon his conversation with counsel. (R. 299-300)

evidence. (Brief of Appellee at 16 n.3) We would add, however, that the judge never inquired as to whether defense counsel ever asked Stewart about additional witnesses or evidence, or whether Stewart wanted other evidence introduced during the jury penalty proceeding or at trial. Defense counsel's requests for additional time suggest only that he was unprepared for the sentencing.

Appellee again cited Waterhouse v. State, 17 F.L.W. S132 (Fla. Feb. 20, 1992), in which the defendant went through several lawyers, refused to cooperate, and insisted that his lawyer argue at resentencing that he did not commit the homicide. Waterhouse supports Stewart's argument because Stewart's case is diametrically opposite. Stewart cooperated fully with counsel and never complained until the final sentencing hearing. Although, as Appellee noted, the judge asked Stewart if he wanted to address the court at the allocution hearing, and he declined, the judge did not ask him if he was satisfied with his representation. Stewart's complaint was not that he was unable to address the court or the jury. His complaint was that his counsel's representation was inadequate. When the judge asked him if he was dissatisfied with counsel, Stewart said "yes." The judge refused to pursue the matter.[5]

Stewart would gain no advantage by delaying the pronouncement of the death sentence. His only advantage would be the procurement

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[5] As noted in our Initial Brief, this case is not like Bowden v. State, 588 So.2d 225 (Fla. 1991), which Appellee asks this Court to "compare favorably." (Brief of Appellee at 23) The judge explored Bowden's allegations by asking defense counsel to respond. As in Waterhouse, Bowden had a history of failure to cooperate with attorneys. Additionally, the judge gave Bowden ten days to retain new counsel and renew his motion.

of effective counsel. The record is replete with examples of what appears to be ineffectiveness of counsel.

A.

Appellee argues that Juror Kiltz, who knew the State Attorney, stated that the State Attorney did not remember him. Although we do not know if that was true, whether Bill James remembered Kiltz is irrelevant. Kiltz, the jury foreman, obviously remembered James and might have future contact with him because Kiltz worked with James' wife. That Juror Benshoof saw Bill James at a political function, as argued by Appellee, suggests that she might be politically motivated to vote for the death penalty.

Appellee noted that counsel wanted Stewart to participate in the excusal of jurors. (Brief of Appellee at 25) Stewart told the judge, however, that he asked counsel not to select the jurors who knew Bill James. (R. 492) Obviously, counsel disregarded his wishes. The judge did not ask defense counsel to explain. Two different jurors might have resulted in a different advisory verdict if the jury foreman and/or the other juror who knew Bill James influenced the jurors to vote for death.

C.

Appellee speculates that defense counsel failed to call witnesses who testified at Stewart's earlier penalty trial as a defense tactic because his first tactic did not work. If so, the tactic was ineffective because the advisory verdict this time was worse than the first time. It seems more likely that defense counsel was merely unprepared.

Appellee mentioned that Stewart's grandmother's testimony was excluded the first time. (Brief of Appellee at 27) We would note, however, that only her testimony about the cigarette burns was excluded. Stewart v. State, 558 So.2d 416, 419-20 (Fla. 1990). Furthermore, in this penalty proceeding, the trial judge allowed Stewart's aunt to testify about the cigarette burns. His grandmother could have testified about other matters too.

D.

We do not know what Dr. Merin might have found had he re-examined Stewart prior to this penalty proceeding. Stewart's aunt's testimony that Stewart had changed greatly, however, suggests that a new evaluation might have been extremely helpful. Dr. Merin's testimony at the first penalty proceeding did not produce a life recommendation. Additionally, Dr. Merin's only interview with Stewart was held on the morning of Stewart's first penalty proceeding. Merin did no testing whatsoever. If defense counsel thought a re-examination was unnecessary or tactically unwise, his judgment and representation are questionable. If he just never got around to preparing for trial, his representation was ineffective. Without an evidentiary hearing, it is impossible to know.

Stewart's plea for new counsel was not, as Appellee suggests, the dilatory behavior condemned in Waterhouse. Stewart very patiently sat by without complaining until he finally realized, with the help of his aunt, that his lawyer was doing nothing to help him. Even though it was the last minute, he tried to explain to the judge calmly and rationally why his attorney was ineffective

and why he needed counsel who would help him. The trial judge, who was anxious to get on with his imposition of the death penalty and understandably irritated by this last minute turn of events, had no time to explore Stewart's complaints.

As stated in our Initial Brief, we are not arguing ineffective assistance of counsel as an issue in this case, but noted examples of what appears from the record to be ineffective representation to refute the trial judge's finding (and now Appellee's argument) that Stewart's request was merely a delaying tactic. Stewart was denied an adequate hearing on his request for new counsel as required by this Court. See Bowden, 588 So.2d 225; 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).

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.

The trial judge's reasoning (set out in Brief of Appellee at 34-35) shows that, although he espoused the proper standard for determining whether to instruct the jury on the § 921.141(6)(e) mitigating factor, he failed to follow it. Instead of instructing the jury, based on the reasonable quantum of evidence presented, and letting the jury decide whether the factor was reasonably established, the judge weighed the evidence and decided that the factor was not established. This is evidenced by his discussion of the evidence -- Stewart had the weapon and the evidence suggested

he was the moving force; the fact that they were in an emotional situation "doesn't **show** . . . ." (R. 411) The judge's use of the word "show" indicates that, instead of determining whether a reasonable quantum of evidence was presented, he weighed the evidence and determined that the factor was not **reasonably established.**

Appellee argues that Stewart testified and did not urge that he was under duress or the domination of another. As discussed in Issue II, Stewart did not actually testify. He merely took the stand to tell the jury that he would not testify. He did not discuss the homicide. Thus, he would not have been expected to discuss whether he was under duress when he committed the crime. Furthermore, whether the defendant testifies that he was under duress is irrelevant because the defendant is not required to testify at all.[6] The State's evidence indicated that Stewart was under duress and may have been dominated by his accomplice.

Appellee has taken defense counsel's closing comments on this factor out of context to argue that counsel abandoned the issue. First, common sense tells us that a properly preserved request for a mitigating jury instruction is not abandoned by counsel's argument to the jury. Counsel may not have argued this mitigating factor to the jury because the judge refused to instruct on it. Defense counsel's argument, returned to its proper context, shows that he first asked the jury to consider the influence of the accomplice upon Stewart, and then acknowledged that the accomplice

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[6] Appellee's further comment on Stewart's failure to testify reinforces Stewart's arguments in Issues I and II.

did not totally remove Stewart's choice in the matter. A further examination of defense counsel's argument suggests that he then lost his train of thought and moved on:

> 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)

Appellee next suggests that there was no competent, substantial evidence that there was an accomplice present or that such a person encouraged Stewart to commit the crime. (Brief of Appellee at 37) If this is so, then the State presented no competent, substantial evidence that Stewart committed the crime. Randall Bilbrey, the **only** witness who implicated Stewart, testified that an accomplice encouraged Stewart to commit the crime. This was the State's **only** evidence as to how the crime occurred. Appellee now disputes the testimony of its own key witness, suggesting that this Court should instead rely on the inconsistent testimony of Terry Smith, a state witness in the guilt phase of Stewart's first trial.

Appellee suggests further that it would be a "needless waste in judicial resources to reverse and remand for another sentencing proceeding where [Terry] Smith can be produced to again repeat Stewart's acting alone admission." (Brief of Appellee at 37) In effect, Appellee suggests that it is unnecessary to produce evidence at trial, and that we should just take a shortcut and execute

Stewart without due process. Appellee's suggestion is prohibited by the Florida death penalty statute which requires a penalty proceeding within certain statutory guidelines, without which the statute would be unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1977), cert. denied, 416 U.S. 943 (1974); §921.141, Fla. Stat. (1991). Moreover, we do not know whether Terry Smith would testify in another penalty proceeding or that he would relate the same story. Perhaps the State chose not to call him again because his story changed, or he refused to testify because he no longer had any incentive to do so.

If Appellee's final argument -- that the error was harmless because the court instructed on the "catch-all" mitigator -- had merit, it would be unnecessary for the court to instruct on any other mitigators. Fortunately, this is not the law in Florida.

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.

Appellee has misleadingly asserted that defense counsel requested the CCP aggravating factor. Defense counsel did not request that the jury be instructed on the CCP aggravating factor. He requested only that the trial court define the terms in the CCP aggravating factor in his instruction.

When this factor came up for discussion, the judge suggested an instruction defining the terms used in the CCP aggravating

factor. He based his suggestion on the findings of the United States Supreme Court in Maynard v. Cartwright, 486 U.S. 356 (1988). When he suggested the instruction containing the definitions, defense counsel told him that he requested that instruction. (R. 422) This does not mean that he requested that the jury receive a CCP instruction. He only requested the definitions.

Appellee's argument that Omelus v. State, 584 So.2d 563 (Fla. 1991) (Court held that jury should not have been instructed on HAC because no evidence of HAC) should not be extended to a case such as this lacks legal validity. In effect, Appellee argues that this Court should not apply the law to a case in which the jury unanimously recommended death and the judge (we submit, erroneously) found no mitigation. Had the law been properly applied in this case, perhaps the jury would not have unanimously recommended death. As the judge conceded, there was absolutely no evidence of CCP. What Appellee cited as evidence of CCP (Brief of Appellee at 41 n.7) was merely evidence that Stewart premeditated the robbery.

In the recent case of Sochor v. Florida, 6 F.L.W. Fed. S323 (June 8, 1992), the United States Supreme Court found no eighth amendment violation based on an erroneously given CCP instruction by assuming that the jury would not have relied upon a theory not supported by the evidence. The Court distinguished a theory not supported by the evidence from an improper legal theory which would violate the eighth amendment.

In the instant case, the jury was presented with an improper legal theory when the prosecutor argued that the State proved CCP

based upon Stewart's premeditation of a robbery.

> 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. . . .**[7]

(R. 433-34) Because the prosecutor argued an improper legal theory, the instruction violated the eighth amendment.

ISSUE VI

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

Stewart does not, as Appellee suggests (sarcastically, we presume), ask this Court to apply Tedder to this case. We cited Cheshire v. State, 568 So.2d 908 (Fla. 1990), for its holding that emotional distress need not be extreme to be mitigating. (See Brief of Appellant at 75-76) The Cheshire Court considered two separate but related issues: (1) the jury override; and (2) the judge's conclusion that Cheshire's emotional disturbance was not mitigating because the disturbance failed to meet the statutory criterion of being "extreme." This Court reversed on both points. 568 So.2d at 910. The trial court is constitutionally required to consider the mitigation whether the jury recommends life or death. The Cheshire Court cited Lockett v. Ohio, 438 U.S. 586 (1978), and Rogers v.

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[7] The remainder of the prosecutor's closing argument concerning CCP is quoted on page 71 of Appellant's Initial Brief.

State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), for its ruling -- separate from the jury override issue -- that Florida's death penalty statute would be unconstitutional if the trial judge considered only emotional disturbance that met the statutory criterion.

Appellee quotes from Preston v. State, 17 F.L.W. S252 (Fla. April 16, 1992), for the "unremarkable" proposition that whether mitigation is established is within the discretion of the trial judge. (Brief of Appellee at 48) Appellee omitted the final sentence of the paragraph, however. This final line distinguishes Preston and other cases cited by the Appellee from this case:

> The trial court's determination regarding the establishment of these mitigating factors is supported by competent, substantial evidence.

Preston, 17 F.L.W. at S255. In the instant case, the judge's findings were not supported by evidence in the record. The State presented no evidence to rebut testimony by Dr. Merin and by its own key witness, Randall Bilbrey, indicating that Stewart was emotionally disturbed and that his capacity to appreciate the criminality of his conduct was impaired at the time of the offense.

Appellee criticizes undersigned counsel's conclusion that Dr. Merin used an improper standard to determine whether Stewart suffered from mental distress, because undersigned counsel's "mental health credentials" are not comparable with those of Dr. Merin. (Brief of Appellee at 49). Undersigned counsel does not argue that Dr. Merin used an improper **medical** standard, but that he used an improper **legal** standard. Hopefully, undersigned counsel's legal

expertise is at least as great as that of Dr. Merin. Dr. Merin testified that Stewart did not suffer from "extreme" mental distress because he did not break from reality, see little green men from Mars or think that he was Napoleon, although he described Stewart as "the end product of years and years of extreme emotional distress." (R. 331) We do not understand this Court's holdings to require that a defendant break from reality, see little green men or think he's Napoleon to meet the statutory criterion for "extreme emotional distress." See e.g., Mines v. State, 390 So.2d 332, 337 (Fla. 1980) (sanity finding does not eliminate need to consider statutory mental mitigators).[8]

Appellee next argues that there is no evidence to support Stewart's argument that he was extremely intoxicated at the time of the murder. This is absolutely wrong. The **unrebutted** evidence showed that (1) at the time of the homicide, Stewart was drinking about a case of beer a day with alcohol or a gallon of alcohol a day with beer, and smoking marijuana; (2) the instant homicide occurred after Stewart had been drinking heavily and abusing drugs; (3) Stewart could not remember very much about that day; (4) after the homicide, Stewart continued to drink until he passed out; and (5) two weeks after the murder, Stewart "lived like an alcoholic.

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[8] Additionally, Dr. Merin conducted no medical or psychological tests and did not talk to any witnesses or Stewart's family members. His evaluation was based on one interview with Stewart on the morning of the penalty phase of Stewart's first-degree murder case in 1986. It takes no medical training to know that no expert witness, no matter how brilliant, can make a valid and complete diagnosis based on one interview and no testing.

Stewart "lived like an alcoholic. (R. 243, 248, 320-21, 329-331) Appellee's further implication that one cannot commit a kidnapping, robbery, murder or arson while drunk is refuted by logic and by so many cases that citations would be a waste of our limited space.

Appellee's attempted distinctions between Nibert v. State, 574 So.2d 1059 (Fla. 1990), and this case are factually incorrect with the exception of Dr. Merin's testimony and Stewart's prior record. (See Brief of Appellee at 51-52) Had Dr. Merin re-examined Stewart prior to the instant proceeding, as he did Nibert, his conclusions might have been like those in Nibert. Stewart's prior record had nothing to do with the finding of the statutory mental mitigators. We would also note that Appellee's assertion that Stewart's aunt's contact with Stewart was only for three or four months when he was thirteen (see Brief of Appellee at 52 n.11) is incorrect. She saw him as an infant, at eighteen months, on weekends and for three or four months when he lived with her at age thirteen or fourteen, and every month since he has been in prison. (R. 369, 373, 383)

In summation, Appellee's argument consists primarily of incorrect factual arguments easily refuted by the record and thus does not refute Stewart's argument that the trial court erred by failing to weigh the two statutory mental mitigators, either as statutory or nonstatutory mitigation.

ISSUE VII

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

Although Appellee correctly noted that it is the role of the

trial judge to decide whether proffered mitigating evidence is mitigating and the weight to be accorded to it, Appellee does not go far enough. The trial judge must do so within the guidelines provided by this Court. He cannot disregard clearly established mitigation, giving it no weight at all. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett, 438 U.S. 586; Rogers, 511 So.2d at 533.

Appellee disparages the testimony of Stewart's aunt because she is a relative. Who other than a relative or close friend knows about the defendant's childhood and character? Appellee disparages Appellant's argument that the udge should have discussed Stewart's remorse in his order because Stewart did not personally testify that he was remorseful. Appellee disparages state witness Randall Bilbrey's testimony, suggesting that Stewart's remorse may have been "a mere accompaniment to his drinking." In the previous issue, however, Appellee pointed out that Bilbrey and Stewart drank only two beers. (Brief of Appellee at 51)

Appellee disparages Dr. Merin's testimony concerning Stewart's remorse because it was based on what Stewart told him. In that case, what point would there have been for Stewart to testify that he was remorseful? Appellee would have argued that Stewart's testimony was merely self-serving. In any event, the trial court failed to even mention remorse in his order.

ISSUE VIII

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

As in the last issue, Appellee argues that "it is for the

trial judge to consider the mitigating evidence offered and the weight, if any, to be accorded to it." (Brief of Appellee at 61) In a number of cases cited by Appellee, the judge was attempting to resolve conflicting testimony. (See Appellee's parentheticals on page 62) In the instant case, the testimony was not conflicting. Although the trial judge may examine the conclusions drawn by the witnesses to ascertain that they are supported by the evidence from which they were drawn, the judge cannot ignore the evidence and draw his own conclusions based only upon emotion.

Appellee notes correctly that Cochran v. State, 547 So.2d 928 (Fla. 1988), and Hegwood v. State, 575 So.2d 170 (Fla. 1991), were jury override cases. This does not mean that this Court must ignore its findings in those cases if the jury recommends death. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1989), this Court relied on the jury override cases of Ferry v. State, 507 So.2d 1373 (Fla. 1987), and Amazon v. State, 487 So.2d 8 (Fla.), cert. denied, 479 U.S. 914 (1986), to reduce Fitzgerald's death sentence to life.

Appellee incorrectly stated that Penn v. State, 574 So.2d 1079 (Fla. 1991), was a jury override. (Brief of Appellee at 65 n.14) The jury in Penn recommended death. This Court remanded for imposition of a life sentence. 574 So.2d at 1080. For the reasons in our Initial Brief, the Court should do the same in this case.

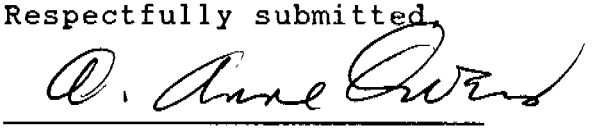
ISSUES III and IX

Appellant relies on the arguments in his Initial Brief as to these two issues.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 7th day of July, 1992.

Respectfully submitted,



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/aao

Supreme Court of Florida

MONDAY, JULY 20, 1992

KENNETH ALLEN STEWART,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 77,217
	*	
STATE OF FLORIDA,	*	
	*	
Appellee.	*	
	*	
* * * * * * * * * * * * * * * * *		

Appellant's Motion to Extend Page Limits for Reply Brief is granted and Appellant's Reply Brief of nineteen (19) pages was received by this Court on July 10, 1992.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: A. Anne Owens, Esquire
Robert J. Landry, Esquire

IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART, :

Appellant, :

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

STATE OF FLORIDA, :

Appellee. :

:

FILED
SID J. WHITE
JUL 10 1992
CLERK, SUPREME COURT
By
Chief Deputy Clerk

MOTION TO EXTEND PAGE LIMITS FOR REPLY BRIEF

The Appellant moves this Honorable Court to accept his reply brief although it exceeds the page limit of fifteen pages imposed by Florida Rule of Appellate Procedure. As grounds, Appellant states:

1. Because of the number and complexity of the issues presented by this capital appeal, Appellant's counsel was unable to comply with the fifteen page limit for Appellant's reply brief.

2. Appellant's constitutional right to effective assistance of counsel entitles him to have counsel thoroughly present and argue the issues for his appeal.

3. Appellate counsel has contacted Assistant Attorney General Candance Sunderland who, on behalf of opposing counsel Robert J. Landry, objects to this page number extension.

WHEREFORE, Appellant respectfully requests this Court to accept his reply brief of 19 pages served together with this motion.