IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

vs. **CASE NO. SC96177**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

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

> In April 1985, Michele Acosta and Mark Harris picked up appellant, Kenneth Stewart, while he was hitchhiking. When Acosta stopped to drop Stewart off, he struck her on the head with the butt of a gun and fired three shots, hitting Acosta in the shoulder and Harris in the spine. Stewart then forced Acosta and Harris from the car before driving off and picking up a friend, Terry Smith. The two removed items from the car's trunk and Stewart burned the car after telling Smith that the car belonged to a woman and a man whom he had shot. Acosta recovered from her injuries; Harris later died.
>
> Stewart was arrested and ultimately charged with first-degree murder, attempted first-degree murder, armed robbery, and arson. He consented to a search of his apartment, which yielded the items he and Smith had taken from Acosta's car. When shown a photopack display of suspects, Harris, who had not yet expired, and Acosta identified Stewart as the assailant. Acosta also identified Stewart in person at a preliminary hearing. While in jail, Stewart telephoned his grandparents. Detective Lease, who was visiting the grandparents, obtained their permission to secretly listen in on an extension. Via pretrial motions, Stewart sought to suppress the identifications made by Acosta and Harris, and the telephone conversation overheard by Lease. The court excluded the identification made by Harris, but ruled admissible both of Acosta's identifications and the telephone conversation.

Appellant Stewart was charged with the first degree murder of Mark Harris, the attempted first degree murder and armed robbery of Michelle Acosta, and second degree arson (DA-R. V7/857-58, 874-75,

920).[1] Stewart pled not guilty and trial commenced on August 25, 1986, before the Honorable John P. Griffin, Circuit Judge (DA-R. V1-V5).

On the Friday before the Monday trial, the court held a hearing to determine Stewart's competency to proceed (DA-R. V6/765-790). Two doctors that had been court appointed to determine competency, Dr. Arturo Gonzalez and Dr. Gerald Mussenden, had examined Stewart on August 19 and concluded that he was competent to stand trial (DA-R. V6/773-778, 781-784, 1077-78). Both Gonzalez and Mussenden testified that Stewart was communicative, able to provide coherent and relevant facts, and met all of the legal criteria for competency (DA-R. V6/775, 783). Dr. Gonzalez stated that Stewart has had an antisocial personality for years; that such could lead him to murder, but there was no psychosis which would interfere with Stewart's ability to distinguish between right and wrong (DA-R. V6/779-780). Dr. Mussenden noted that Stewart had minor, but not serious, emotional problems, and was not currently suffering severe depression or anxiety (DA-R. V6/784). Mussenden did not believe that Stewart's actions in this case grew out of any

[1]References to the record in the direct appeal from Stewart's convictions and sentences, Florida Supreme Court Case No. 70,015, will be referred to as "DA-R," followed by the appropriate volume and page number; references to the one-volume record in the direct appeal from Stewart's resentencing, Florida Supreme Court Case No. 75,337, will be referred to as "RS-R," followed by the appropriate page number; references to the record in the instant postconviction appeal, Florida Supreme Court Case No. 96,177, will be referred to as "PC-R," followed by the appropriate volume and page number.

personality disorder, but were more the result of his antisocial tendencies and willingness to be involved in such activities (DA-R. V6/788-789).

Stewart presented Dr. Walter Afield, a defense psychiatrist that opined that Stewart was not competent for trial (DA-R. V6/768-771). A defense attorney had contacted Dr. Afield after having difficulty communicating with Stewart (DA-R. V6/772-773). Dr. Afield evaluated Stewart on two occasions and also had trouble getting information from him (DA-R. V6/769). Dr. Afield found Stewart difficult to assess and determined that Stewart could not assist in his own defense (DA-R. V6/770). Afield thought Stewart possibly suffered from sociopathic personality problems, depression, and a long-standing personality disorder; there was also a concern about "fugue-like" states (DA-R. V6/770).

The written reports on Stewart's competency were included in the record on the direct appeal and provided to the court below during the Huff hearing (DA-R. V7/898-903; PC-R. V2/204, 236-242). Following the competency hearing, the trial judge found Stewart competent to stand trial, based on the testimony presented (DA-R. V6/790).

The State's case focused on the testimony of Michelle Acosta, the eyewitness and surviving victim, describing the events surrounding Harris' murder; and Terry Smith, a friend of Stewart's that testified that Stewart had admitted the shootings and provided

details about the offense to Smith (DA-R. V3/287-315, V3/350-381). The State also presented testimony about a telephone conversation Stewart had with his grandmother, overheard by a police detective, wherein Stewart admitted that he shot the victims to rob them (DA-R. V3/381-388, 400-403). Finally, the State offered forensic testimony about the bullets recovered from the scene matching a gun and ammunition found in Stewart's possession at the time of his arrest (DA-R. V4/465-496).

The theory of defense was to admit that Stewart shot Harris and Acosta, but under circumstances which would require the jury to return verdicts for lesser offenses (DA-R. V3/280-284). The jurors were told during opening statements that Stewart would not testify and the defense would not be presenting its own case (DA-R. V3/280). The defense seized upon Acosta's testimony that she hit the gas pedal just at the time of the shootings, trying to throw Stewart off balance, and noted discrepancies between Acosta's description of the offense and that provided by state witness Terry Smith, in order to present a defense that the shooting was accidental and not in furtherance of a felony (DA-R. V4/512-527, 537-544).

After deliberations, the jury found Stewart guilty of first degree felony murder, attempted second degree murder with a firearm (a lesser offense), robbery with a firearm, and second degree arson (DA-R. V4/582, V8/904-06, 1011).

At Stewart's penalty phase, defense counsel presented testimony by Bruce Scarpo, Stewart's stepfather, to recount Stewart's upbringing, including the exposure to drunkenness and violence from Stewart's mother, her family, and her boyfriend (DA-R. V5/634-673). Scarpo lived with Stewart and Stewart's mother from the time Stewart was 18 months old until his mother left with Stewart, when Stewart was about three (DA-R. V5/635-637). According to Scarpo, Stewart's mother's family were often drunk and violent (DA-R. V5/636). When Stewart was three, his mother took him with her around the country, traveling with her boyfriend, who claimed to rob convenience stores for a living (DA-R. V5/637-638). When that relationship broke up, Stewart was left to live with Scarpo in Charleston, South Carolina, and was raised by Scarpo with his new wife and her three children (DA-R. V5/640, 645).

Scarpo testified that Stewart believed him to be Stewart's natural father, and Stewart had no major problems until he was about thirteen, and learned that his real father had been killed in a barroom fight (DA-R. V5/646-49). Stewart ran away to live with his grandparents in Tampa and had his first encounters with the law (DA-R. V5/647-651). The grandparents no longer wanted Stewart so he returned to Scarpo but was, according to Scarpo, a changed individual (DA-R. V5/650-651). He went from being a clean kid and average student with a cheerful personality to a dirty, sullen child that skipped school and got suspended (DA-R. V5/653-655, 658,

662). Scarpo indicated Stewart felt a lot of turmoil because he believed Scarpo had been instrumental in his father's death (DA-R. V5/652, 664). Scarpo asked the jury to recommend life for Stewart because Scarpo believed Stewart could benefit from education and psychological counseling in prison and become an asset to the community (DA-R. V5/665).

James Hayward was a defense witness that testified Stewart lived with him for several months in 1977 (DA-R. V5/675). Hayward had told Stewart about Stewart's mother having committed suicide in 1968 and Stewart's father having been shot to death during an argument in 1971 (DA-R. V5/675-676). Hayward also testified about other members of Stewart's family that had met violent deaths, including an uncle murdered in 1968 and two aunts killed in an automobile accident while fleeing charges of child abuse (DA-R. V5/676).

The defense also presented Dr. Walter Afield, an expert in neuropsychiatry (DA-R. V5/681-700). Dr. Afield had met with Stewart twice before rendering his report, and then saw Stewart again the night before testifying (DA-R. V5/683-684). Afield also reviewed a variety of medical records and other documents and conducted psychological testing on Stewart (DA-R. V5/684). Afield received some background information from Stewart and Scarpo, and got some details from other sources including the other doctors that had examined Stewart (DA-R. V5/699). According to Afield,

Stewart suffered the mental disease of chronic depression and a sociopathic or psychopathic character disorder (DA-R. V5/688). Afield noted that Stewart's life had been filled with horrendous trauma, and that he was pretty well messed up by age five due to the way he was raised (DA-R. V5/688-689). Afield stated that Stewart did not have a chance due to the violence in his early life; he noted that Stewart had tried to kill himself a few times, winding up in the hospital, and hypothesized that he would succeed at some point (DA-R. V5/690). As a result of his environment, Stewart had no control over his own life, and through no fault of his own, he could not be rehabilitated (DA-R. V5/691). Dr. Afield discussed Stewart's family messing him up, the tremendous violence and death in his family, and Stewart going to his mother's grave and talking to her with his gun and whiskey bottle in hand (DA-R. V5/692).

Dr. Afield testified that Stewart had been raised to be a sociopath and psychopath and "programmed from day one ... [t]o either kill himself or kill somebody else" (DA-R. V5/681, 683, 688-690, 695). According to Afield, Stewart could appreciate the criminality of his conduct, but his ability to conform his conduct to the requirements of the law was impaired (DA-R. V5/694). Afield also opined that although Stewart would always be a danger to society, a structured prison environment would help (DA-R. V5/697, 700). Afield noted that it was impossible to get Stewart to

communicate about his problems, because no one ever taught Stewart any communication skills, and that Stewart's problems had been locked into him since he was about five years old (DA-R. V5/695-696).

Other defense witnesses included Joyce Engle, Lash LaRue, Susan Alice Berg Medley [sic - Medlin], and Joanne Scarpo. Engle was a rehabilitative services worker that met Stewart in jail and testified that he showed a great deal of remorse over this killing (DA-R. V5/701-702). She stated Stewart had a lot of emotional problems, that he was aware of his problems and had asked for help, and that he deserved to get it (DA-R. V5/704).

LaRue had visited the Scarpos when Stewart was growing up (DA-R. V5/705-707). When he was around eight, Stewart was a normal boy and didn't seem to have any problems (DA-R. V5/705-706). LaRue noticed a change of attitude when Stewart was 13 or 14, and when LaRue mentioned the change to Bruce Scarpo he was told Stewart had not adjusted to learning that Scarpo was not his natural father (DA-R. V5/706-707). LaRue asked the jury to spare Stewart's life so that Stewart could learn about religion (DA-R. V5/707-708).

Susan Medlin, Stewart's stepsister, testified via deposition that Stewart never got into serious trouble until he was 13 (DA-R. V5/713, 715-718). She described Stewart as grief stricken when he learned that he was not related by blood to Bruce Scarpo (DA-R. V5/717). She recalled that Stewart got into trouble for

shoplifting and stealing a CB radio, then ran away (DA-R. V5/717-718). Medlin indicated that hurting someone was out of character for Stewart, and she thought that he could become a productive member of society (DA-R. V5/721-722).

Finally, Joanne Scarpo, Stewart's stepmother, described Stewart as a "jovial little boy," very attached to his stepfather (DA-R. V5/724-725). Upon learning that Scarpo was not his natural father at 13, he became very troubled, brooded constantly, and started getting into trouble with the law (DA-R. V5/725-726). She stated Stewart was very remorseful about the shootings, and that he had corresponded with the family pastor from Charleston and was developing religious awareness (DA-R. V5/727-720).

Following the penalty phase of the trial, a jury recommended that the court impose a sentence of death by a vote of 10 - 2 (DA-R. V5/756-57). The judge followed the recommendation and imposed a sentence of death on the murder conviction, two fifteen year sentences on the attempted murder and arson convictions, and a life sentence for the armed robbery conviction (DA-R. V7/837-840).

On appeal, Stewart alleged the following errors:

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS INCRIMINATING STATEMENTS MADE BY STEWART DURING A TELEPHONE CONVERSATION WITH HIS GRANDMOTHER WHICH DETECTIVE LEASE INTERCEPTED.

ISSUE II

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

ISSUE III

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

ISSUE IV

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

ISSUE V

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

ISSUE VI

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

ISSUE VII

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

ISSUE VIII

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

ISSUE IX

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

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

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

of error were advanced:

ISSUE I

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

ISSUE II

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

ISSUE III

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

ISSUE IV

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

ISSUE V

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

ISSUE VI

THE SENTENCING JUDGE ERRED BY REIMPOSING A GUIDELINES DEPARTURE SENTENCE BECAUSE NO WRITTEN REASONS HAD ACCOMPANIED THE ORIGINAL GUIDELINES DEPARTURE.

This Court affirmed the death sentence but remanded the

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

On September 17, 1996, Stewart filed his Third Amended Motion to Vacate Judgments of Conviction and Sentence, raising twenty-four claims (PC-R. V1/R42-186).[2] The trial court held a Huff hearing and on August 14, 1997, issued an Order summarily denying twenty of the claims and granting an evidentiary hearing on the other four (PC-R. V2/R295-304).

The evidentiary hearing was held on December 17, 1998, and continued on March 19, 1999, before the Honorable Daniel Perry (PC-R. V4-V5). Stewart presented the testimony of his two stepsisters, Susan Moore and Linda Arnold; his aunt, Lillian Brown; his trial attorney, Rex Barbas; and Barbas' investigator, Sonny Fernandez (PC-R. V4/T5, 54, 80; V5/T103, 201). The deposition of defense expert Dr. Faye Sultan was also admitted by stipulation (PC-R. V5/T102; V6/1-50). The State presented testimony from former prosecutor John Skye and psychiatrist Dr. Walter Afield (PC-R. V5/T221, 239).

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[2]During the four years between the finalization of Stewart's sentence and the filing of the substantive motion below, there were a number of pleadings and hearings which are not included in the record on appeal but are reflected in the Case Progress Notes (PC-R. V1/1). The Case Progress Notes also reflect that, since April, 1994, this case was assigned to at least five different circuit judges and there are eleven different attorneys listed as counsel of record for Stewart.

Susan Moore had testified at trial as Susan Medlin (PC-R. V4/T5). She is a year older than Stewart and lived with him from the time she was four or five years old until she left home at fifteen (PC-R. V4/T6, 8). Moore testified that Bruce Scarpo disciplined them physically and drank every day (PC-R. V4/T8, 17-18). She claimed that although her parents were well off financially and the house was kept up by servants and the children doing their chores, Scarpo abused them repeatedly (PC-R. 8-10, 17-18, 25). Susan's mom, Joanne, was also beaten by Scarpo in front of Stewart (PC-R. V4/T10). Moore specifically recalled incidents where Stewart was beaten for having taken liquor to school from the house and Joanne was beaten for having had an affair (PC-R. V4/T27, 29).

Moore testified that she was living in North Carolina at the time of the trial, with a family and career (PC-R. V4/T35-36). Scarpo and her mother, who are now both dead, were living in South Carolina (PC-R. V4/T14, 35). Moore did not keep close contact with Stewart after leaving home and avoided her family because she was afraid of Scarpo and did not want him to know where she was; however, she knew about the trial, and either her mom and/or Scarpo told her to expect to be contacted by Stewart's defense attorney (PC-R. V4/T13-15). When she was contacted, she did not mention any abuse in the Scarpo household; she assumed that Stewart would have told his attorney about the abuse (PC-R. V4/T42-43, 46). She

stated that she did not know how to get ahold of Stewart's attorney to offer her help, although she admitted that she probably could have found this out from Scarpo or her mom if she had asked (PC-R. V4/T39-40). She also stated that she would have been willing to come to Tampa and testify, despite her fear of Scarpo, but that Scarpo told her this would not be necessary (PC-R. V4/T16).

Linda Arnold echoed her sister's testimony about Scarpo's abuse (PC-R. V4/T55-60). Arnold was about eight years older than Stewart; she described Scarpo as arrogant, intimidating, and physically and emotionally abusive (PC-R. V4/T54, 55). Scarpo also sexually abused Linda and Susan, although Stewart apparently never knew of this abuse (PC-R. V4/T55, 73). Arnold was living in Wisconsin at the time of Stewart's trial, and she was contacted by a defense investigator but was told that the trial was already in progress (PC-R. V4/T64, 70). She stated that although she was afraid of Scarpo, she would have testified if asked (PC-R. V4/T65). She also stated that she assumed Stewart would have told the defense team about the abuse by Scarpo, and that at the time of the trial, she had never told anyone, including her husband, about her past abuse (PC-R. V4/T76).

Stewart's aunt, Lillian Brown, is the sister of Stewart's biological father (PC-R. V4/T80). She stated that her sister Dorothy Lee had custody of Stewart when Stewart was about fifteen months old; that Dorothy was abusive and made Stewart stay in bed

all day (PC-R. V4/T82). Stewart also stayed with Brown during the summer that Stewart was thirteen years old, when Stewart was determined to find out about his biological family (PC-R. V4/T82-83, 86). About that time, Stewart's maternal grandmother told Brown that Scarpo was brutal with Stewart, and Scarpo told Brown that he had to be forceful with Stewart because Stewart's parents had bad genes (PC-R. V4/T83-84). Brown stated that she was never contacted to assist at the time of Stewart's trial (PC-R. V4/85).

At the continuation of the evidentiary hearing, the deposition of defense witness Dr. Faye Sultan, a clinical psychologist, was admitted by stipulation (PC-R. V5/T102, V6/5). Dr. Sultan had met with Stewart three times and reviewed a number of documents provided by collateral counsel (PC-R. V6/7-10). She diagnosed Stewart with severe depression but not psychosis, substance abuse problems, and a personality disorder with borderline and antisocial features (PC-R. V6/11). Sultan noted that Stewart's juvenile records indicated that he had been abusing alcohol and drugs since adolescence (PC-R. V6/15). Sultan felt that Dr. Afield did not have important information which could have made his assessment more accurate, although she could not say that Afield did not have sufficient information to render an opinion (PC-R. V6/32-33). According to Sultan, Stewart's amenability to rehabilitation could not be determined because he had never been provided an opportunity to receive treatment while in a stable environment, free from drugs

(PC-R. V6/16).

Dr. Sultan agreed with Dr. Afield as to the applicability of the statutory mental mitigation, and identified nonstatutory mitigation including Stewart's abuse as a child, having lost both parents at an early age, and continuing substance abuse problems (PC-R. V6/19-20). Sultan put great emphasis on Michelle Acosta's testimony as the primary indicator of Stewart's intoxication on the night of the murder, finding that Acosta's statements coupled with Stewart's chronic drug abuse would impair Stewart's ability to premeditate and affect his capacity to form specific intent (PC-R. V6/22, 37-40). Sultan did not believe it was possible to determine the amount of alcohol Stewart had consumed that night, but felt that Acosta's testimony was sufficient to establish Stewart's intoxication (PC-R. V6/40). Finally, Dr. Sultan agreed with Dr. Afield that Stewart had average intelligence, suffered no retardation or organic brain damage, and met the criteria for a personality disorder with antisocial and borderline features (PC-R. V6/27, 42).

Stewart's trial attorney, Rex Barbas, is now a circuit judge, and had been practicing criminal law for eleven years before he represented Stewart on these charges in 1986 (PC-R. V5/T103-04). Barbas had prosecuted capital cases while at the State Attorney's Office from 1975-79, and had defended about ten capital defendants prior to Stewart (PC-R. V5/T105-07). Stewart is the only one of

his capital defendants to have gotten the death penalty (PC-R. V5/T107). Barbas noted the standard practice in Hillsborough County in 1986 to only appoint one defense attorney for capital cases; at that time, no one really "specialized" in mitigation or penalty phase litigation (PC-R. V5/T108). Although he did not have co-counsel, Barbas had the assistance of other experienced attorneys in his office and hired an investigative firm to pursue penalty phase issues (PC-R. V5/107, 109-110).

Barbas testified about several issues which were researched for consideration at the time of trial: the search of Stewart's apartment, the admissibility of his statements to his grandmother, intervening cause as a defense to Harris' death, and competency (PC-R. V5/T111). He researched a voluntary intoxication defense, and knew that Stewart's alcohol use by habit as well as on the night of the murder could be relevant to both guilt and penalty issues (PC-R. V5/T111). However, he did not pursue a voluntary intoxication defense because he knew from what Stewart told him about the crime that Stewart was following a plan to get picked up as a hitchhiker, then rob and shoot the people that picked him up, and then burn the car (PC-R. V5/T177-179). Nothing in the way Stewart related the facts of the case indicated that Stewart could not form the intent to kill or to rob due to his drinking or drug use (PC-R. V5/T181). In addition, none of the experts that had examined Stewart, including Dr. Afield, could offer any testimony

to support a voluntary intoxication defense (PC-R. V5/T181-182). Barbas talked to Stewart and Margie Sawyer and Terry Smith, investigating how Stewart had spent the evening of the murder; other than the testimony elicited from Acosta, there was nothing to present about Stewart's state of mind (PC-R. V5/T149-150). Barbas knew that Stewart had been drinking and that he could use Smith and Stewart to show the amount that had been consumed, but he did not want to put Stewart on the stand (PC-R. V5/T119, 157, 186). He felt that Stewart's version would be very damaging as it would supply strong evidence for the charges, particularly as to premeditation, which the State did not otherwise have (PC-R. V5/T180). In addition, Stewart could communicate, but never showed any reaction or emotion about anything they discussed (PC-R. V5/T119). Furthermore, Barbas believed that if he formally pursued a voluntary intoxication defense and requested a jury instruction on intoxication, he would be opening the door for the State to present expert testimony from Drs. Gonzalez and Mussenden about Stewart having elaborate recall as to the details of the crime (PC-R. V5/T118).

Barbas felt that he could argue intoxication from Acosta's testimony as part of his theory that Harris' murder was an accidental shooting, without putting the State on notice and having to rebut detrimental expert testimony (PC-R. V5/T149-153). He made a conscious decision against requesting an intoxication

instruction, not because it would be inconsistent with the defense he was pursuing, but because it would allow the State to present damaging evidence and Barbas did not think the instruction would be beneficial without more evidence of Stewart's intoxication, which he could not present (PC-R. V5/T118, 151, 153, 154). He selected the defense which was most consistent with what Stewart was telling him and was also consistent with Acosta's testimony (PC-R. V5/T185). He discussed the theory of defense with Stewart, and Stewart knew that Barbas intended to acknowledge that Stewart had committed the shootings (PC-R. V5/T119). Barbas felt that accidental shooting was the strongest defense, even though the State was proceeding on a felony murder theory, because he believes that juries don't really understand felony murder versus premeditation, which Barbas noted was born out in this case by the jury's verdict to a lesser included offense on the charge of attempted first degree murder of Acosta (PC-R. V5/T116-117, 180).

At the evidentiary hearing, Barbas was asked if he had been provided jail records about Stewart's suicide attempt prior to trial (PC-R. V5/T120). He stated that he believed that he had all of these records, but he could not recall whether he had gotten them from his investigators or from the State (PC-R. V5/T120-121). Barbas and Afield were aware of Stewart's suicide attempt, and it was considered in Afield's diagnosis of depression; Barbas noted that, other than showing remorse, he did not believe the suicide

attempt was significant for the penalty phase (PC-R. V5/T120). Barbas recalled having reviewed records from Tampa General Hospital about the suicide attempt; regardless of whether he had possession of the jail and hospital records, he was aware of the contents of those documents at the time of trial (PC-R. V5/T158-59, 192).

The penalty phase theory of defense was to convince the jurors that Stewart was not responsible for his actions, because his mental and emotional condition had been determined by years of abuse and a number of triggering events that occurred when Stewart was about thirteen and learned that his mother killed herself when he was five, that Scarpo was not his real father, that his real father had been killed in a bar, and that an uncle had died (PC-R. V5/T142-143, 191).

Barbas hired Dr. Afield because he was aware of Afield's credentials and his ability to communicate with jurors; Afield had extensive experience testifying in capital cases (PC-R. V5/T195-196). He acknowledged that he was responsible for providing background information to Dr. Afield; Barbas passed on what he obtained by himself and his investigators during witness interviews (PC-R. V5/T121). He discussed the facts of the case with Afield, about how Stewart had been drinking heavily that day, talking to his mother at her grave, the concerns about Stewart's mother and his learning that Scarpo was not his real father (PC-R. V5/T122). Barbas was not surprised when Afield described Stewart as a

sociopath, but he had not expected Afield's testimony that Stewart could not be rehabilitated (PC-R. V5/T139, 144). The issue of rehabilitation can play several ways with jurors, as it may help with those that are just interested in seeing a defendant locked away (PC-R. V5/T144). However, Barbas generally would not want to bring this out, and he tried to minimize the impact by bringing out the benefits of a structured environment for Stewart, as Afield had told him that Stewart, as a sociopath, needed the structure of prison (PC-R. V5/T144-146).

Barbas never heard anything like the allegations of abuse by Bruce Scarpo recited in Stewart's postconviction motion (PC-R. V5/T124). Barbas believed he had gotten Scarpo's name from the predecessor attorney, and he used Scarpo as a main contact since Scarpo had been Stewart's primary guardian (PC-R. V5/T113-114). Barbas and his investigators both interviewed potential witnesses, and Barbas always interviewed witnesses he was preparing to testify (PC-R. V5/T113). Usually the investigator found the witnesses, but Barbas also spoke to them (PC-R. V5/T113, 122). Barbas denied that he relied heavily on Scarpo for the penalty phase evidence, but he did rely on Scarpo to provide the names of potential witnesses (PC-R. V5/T122). Barbas spoke to Scarpo a lot, but also developed information about Stewart as a child from stepsisters, an aunt, grandmother, grandfather, Lash LaRue, and from other names that Scarpo provided which Barbas couldn't specifically recall (PC-R.

V5/T133-135, 140-141).

Scarpo told Barbas that he treated Stewart like a son, and painted himself to be like "Papa Walton" (PC-R. V5/T124). Barbas relied on Stewart as a primary source of information, and Stewart never told Barbas that Scarpo had abused or mistreated him in any way (PC-R. V5/T185-86). Based on his conversations with Stewart, Barbas never had any reason to believe that Scarpo was abusive, just the opposite (PC-R. V5/T186). Barbas was adamant that no one ever gave him any indication that Scarpo was abusive, and Barbas did not believe anyone ever gave such indication to his investigators, or Barbas would have heard about it (PC-R. V5/T188-189).

Barbas was shown a copy of a note allegedly found in his defense attorney file, but he stated unequivocally that he had never seen the note before (PC-R. V5/T162-164). Barbas had given his defense file to postconviction attorneys for Stewart six or seven years before the evidentiary hearing, and did not specifically recall details about what may have been in the file, but he knew that he had not seen this note (PC-R. V5/T160, 192). The note provided information about beatings and abuse by Scarpo, but was not in Barbas' handwriting, or that of anyone he recognized from his office or the investigative firm, and he had no idea where it might have come from (PC-R. V5/T163). Barbas commented that the note contained just the sort of information they would be looking

for, and that the presentation of Stewart's penalty phase would have been different if he had had the note (PC-R. V5/T164). However, he stated that the contents of the note were "so contrary to what I recall being told that I can't conceive of knowing this and not having utilized it or made Dr. Afield aware of it" (PC-R. V5/T163). Although the State objected to admission of this note into evidence due to the lack of authenticity, the court below permitted Stewart to admit the entire defense file as an exhibit (PC-R. V5/T169).

Barbas noted repeatedly that his billing statements did not reflect all of the time he put into the case (PC-R. V5/T110, 129, 189). He recognized from the beginning that this would be an easy case for the State, as suggested by the fact that the State Attorney himself was involved (PC-R. V5/T131-132).

Barbas' investigator, Sonny Fernandez, also testified at the evidentiary hearing (PC-R. V5/T201). Fernandez did not have any independent recollection of this investigation, but could piece it together from the witness summaries in his file (PC-R. V5/T204). Fernandez and his wife had an investigative firm since 1980 or 81, and prior to that time Fernandez was an investigator with the Hillsborough County Sheriff's Office for twelve years (PC-R. V5/T208). They handled a number of penalty phase investigations (PC-R. V5/T209). Sometime prior to the Stewart trial, Mr. Fernandez had a heart attack, and his wife took over his

responsibilities on the case (PC-R. V5/T109, 205).

Fernandez reviewed the mystery note that Barbas had not recognized and thought it looked like one from his file (PC-R. V5/T202). He did not recognize the handwriting and could not identify where the note may have come from (PC-R. V5/T209). His personal notes reflect that during an interview with Joyce Engle, Engle told him that Lilly Brown told Engle that Scarpo had abused Stewart, but he did not recall ever confirming this information (PC-R. V5/T204, 210). He acknowledged that abuse by Scarpo would be just the kind of information he was looking for from these witnesses (PC-R. V5/T206). Fernandez had spoken to Susan Medlin Moore and to Linda Arnold; he would have routinely asked them about any abuse by Scarpo, and if they had indicated there was any, this would have been reflected in his notes, but there was no such indication (PC-R. V5/T206, 212, 216). His notes do reflect that when he contacted Moore and Arnold, Moore told him that she did not want to come to Tampa for the trial because she was unable to take off work or to leave her child; Arnold also said that she was financially unable to come and that she did not want to take time off of work (PC-R. V5/T211-212). Fernandez recalled that Lash LaRue was out of work at the time of the trial but that Scarpo had indicated he would pay LaRue's expenses (PC-R. V5/T215).

The State presented John Skye and Dr. Afield at the evidentiary hearing (PC-R. V5/T221, 239). Skye was one of the

prosecutors that tried the case and stated unequivocally that the State did not suppress any jail records (PC-R. V5/T222). Skye noted that he never had these records, and that the defense could have obtained them directly from the jail by asking for them and providing a release signed by Stewart (PC-R. V5/T222, 236).

Skye also testified that there was no "deal" for Terry Smith's testimony other than that described by Smith in his deposition and trial testimony: the State entered into a plea agreement with Smith to testify against Stewart, and the State reduced some pending attempted murder charges down to aggravated batteries in exchange for this testimony (PC-R. V5/T225-226). They were open pleas, with the understanding that Smith would be sentenced sometime after testifying (PC-R. V5/T225-227). The deal, as it existed, was disclosed to the defense, and as noted above, Smith accurately testified about it (PC-R. V5/T227). Skye recalled that the morning Smith was to be sentenced, following Stewart's trial, Skye and State Attorney Bill James discussed it and Skye believed that James may have recommended a below-guidelines sentence for Smith, but this was never part of the deal (PC-R. V5/T228-229). Skye noted that prosecutors often avoid including a specific sentence as part of a deal because they want to be able to salvage some credibility with the jury, which has already been lost by reducing charges (PC-R. V5/T230).

Dr. Afield testified that he routinely destroyed his records

after ten years, so he was not able to review his file on Stewart, but he was able to reconstruct his involvement in the case from reviewing his deposition and testimony and the competency reports that had been provided to him (PC-R. V5/T241-242). He recalled that he did not believe that Stewart was competent for trial because he had too many problems, and could not cooperate with his attorney or anyone else (PC-R. V5/T241). He knew that Stewart had a terrible history of abuse, and was depressed to the point of not being able to cooperate, but was not psychotic (PC-R. V5/T241). Stewart had average or above average intelligence and there was no indication of retardation, brain damage, or any need for further testing (PC-R. V5/T242-245). Although Stewart was very tormented, defensive and disturbed, and had been drinking heavily on the day of the murder, Dr. Afield did not feel that Stewart met the criteria for insanity or intoxication as would preclude a finding of premeditation (PC-R. V5/T244-245).

Dr. Afield knew about the suicide attempts and Stewart's having spent the day drinking and visiting his mother's grave (PC-R. V5/T244-246). Afield also knew that Stewart had suffered extensive abuse as a child, and thought that Stewart had a "horrible history of abuse and that it was kind of a text book case on how to raise a murderer" (PC-R. V5/T247). Afield had not heard anything about abuse while Stewart was in the Scarpo household; Afield met with Stewart three times, but Stewart never mentioned it

and there was nothing about it in the other doctors' reports (PC-R. V5/T248). Dr. Afield felt that Stewart was a victim of the system, suffering abuse and other factors beyond his control (PC-R. V5/T247). Stewart had some features of an antisocial personality, based on his horrible life from an early age, being abandoned, losing family members; he was fairly disturbed by the time he reached adolescence (PC-R. V5/T249-250).

Dr. Afield confirmed that his new knowledge about possible abuse by Scarpo when Stewart was 5 to 13 years old would not "in any manner" change or modify his opinion or any of his testimony from trial, it just reinforced his testimony (PC-R. V5/T251). With or without the abuse by Scarpo, there is the same end result of a badly abused, unfortunate soul (PC-R. V5/T251). Afield's testimony about Stewart not being rehabilitative was based on all of the information he had, including Scarpo's testimony and Afield's tests results (PC-R. V5/T256). He still believes that Stewart would not benefit from treatment because his history was so terrible and had gone on for so long (PC-R. V5/T256-257). Afield admitted that if Stewart had been abused by Scarpo it would mean he never really had a chance at rehabilitation, but does not believe this would make a difference (PC-R. V5/T257-258). Afield felt like he came on with the jury as strong as he could, saying that Stewart never had a chance and did not deserve the death penalty because he was a victim of bad circumstances (PC-R. V5/T258-259).

Following the hearing, the court below issued an extensive Order denying Stewart's remaining postconviction claims (V3/R373-395). The court found that the State did not withhold any exculpatory evidence, because the jail records were equally available to the defense and because the true deal with Terry Smith had been disclosed; that Dr. Afield had rendered adequate mental health assistance; and that Stewart had failed to demonstrate that trial counsel had been deficient in his guilt phase performance or that any deficiency in his penalty phase performance could have affected the outcome of the sentencing (PC-R. V3/377, 380, 387, 393, 395). This appeal follows.

SUMMARY OF THE ARGUMENT

I. The trial court properly rejected Stewart's claims that his attorney was constitutionally ineffective and that the State withheld favorable evidence. At the evidentiary hearing below, no deficiency or prejudice was established with regard to counsel's guilt or penalty phase performance. In addition, the State did not withhold any material, exculpatory information. The court below applied the correct legal standards, and its factual findings are supported by the record.

II. The trial court's summary rejection of Stewart's other claims was proper. Stewart has failed to demonstrate any error in the trial court's application of a procedural bar to these direct appeal issues.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN DENYING STEWART'S POSTCONVICTION CLAIMS FOLLOWING AN EVIDENTIARY HEARING.

Stewart initially challenges the trial court's denial of his postconviction claims which were developed factually during the evidentiary hearing below. The hearing encompassed four claims: ineffective assistance of guilt phase counsel, ineffective assistance of penalty phase counsel, ineffective mental health assistance, and the State's withholding of material, exculpatory evidence. As will be seen, a review of the record provides clear support for the trial court's findings with regard to each these issues, and the court's conclusions should not be disturbed on appeal.

A. INEFFECTIVE ASSISTANCE - PENALTY PHASE

As his first claim, Stewart offers the familiar allegation that his trial counsel was ineffective at the sentencing phase of his trial. Of course, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to

show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569. This Court discussed these standards in Blanco v. State, 507 So. 2d 1377, 1381 (Fla. 1987):

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable

> professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show the inadequate performance actually had an adverse affect so severe that there is a reasonable probability the results of the proceedings would have been different but for the inadequate performance.

Stewart has failed to satisfy this heavy burden. Not only has he failed to show that trial counsel's conduct fell outside the wide range of reasonable professional assistance, but he has also failed to show that the results of his trial or sentence would have been different.

The allegations in this claim can be summarized into several different areas: (1) counsel's alleged failure to present compelling mitigation about abuse Stewart suffered from Bruce Scarpo and as a toddler; (2) counsel's alleged failure to present evidence of Stewart's alleged intoxication at the time of the offense and his longstanding substance abuse and alcohol addiction problems; (3) counsel's alleged failure to obtain relevant jail and background records offering further mitigation of mental health problems and longstanding substance abuse; and (4) counsel's alleged failure to prepare Dr. Afield, the defense mental health expert. The trial court found that Stewart had failed to establish any prejudice with regard to his attorney's penalty phase performance, and therefore it was not necessary to consider whether the performance was constitutionally deficient (PC-R. V3/387).

As to counsel's alleged failure to develop and present

additional mitigation from Stewart's abuse by Bruce Scarpo and as a toddler, it is apparent that this evidence would not add significantly to the mitigation that was presented at trial. At trial, extensive testimony about Stewart having been abused by his mother and her family was admitted, so the testimony about abuse as a toddler would only be cumulative (DA-R. V5/634-673, 681-701). Although the alleged abuse by Scarpo occurred at a different stage in Stewart's life, it is similar in content to other testimony about abuse by other family members. More importantly, the critical evidence about Stewart's teenage experiences -- finding out about his mother's suicide, his natural father's death, and other violence in the family –- was submitted to the jury. The sentencing order reflects that the judge weighed childhood trauma in considering Stewart's sentence (RS-R. 26).

It is necessary to analyze the testimony from the evidentiary hearing in order to properly assess this claim. Although Susan Moore and Linda Arnold testified about abuse in the Scarpo household, both women also stated that they were not contacted until the time of the trial and both said they would have come to Tampa to testify at the trial if they had been asked (PC-R. V4/T15-16, 64-65). However, the testimony and personal notes of Sonny Fernandez reflect that both Moore and Arnold were contacted prior to trial, and both indicated at that time that they could not come to Tampa to testify (PC-R. V5/T205-206, 211-212; V6/135-37). In

addition, both Moore and Arnold said that they were not asked about abuse by Scarpo, but Fernandez indicated that he routinely asked for this type of information, and if he had received any information about any abuse, it would be reflected in his notes, but it isn't (PC-R. V4/T42-43, 76; V5/T206, 216; V6/134-139). Furthermore, Arnold admitted that back in 1986, she had not revealed the abuse to anyone, including her husband (PC-R. V4/T76). Both Scarpo and his wife Joanne are dead and unable to rebut the current accusations of abuse (PC-R. V4/T14). Thus, although Stewart's current claim places much emphasis on testimony from his stepsisters about abuse by Scarpo, there were good reasons to not simply take this testimony at face value.

The evidence adduced below did not demonstrate any deficiency in Barbas' performance with regard to any abuse by Scarpo. Although the lower court did not need to address this particular issue since the claim was resolved on the prejudice prong, the testimony below failed to establish that Barbas reasonably should have known about Scarpo's alleged abuse. There is no suggestion that Stewart or Scarpo revealed any abuse to Barbas; to the contrary, Barbas testified that neither Stewart nor Scarpo offered any indication of such abuse (PC-R. V5/T124, 185-186). Barbas used the best sources of information available to him, Stewart and Scarpo, and presented a penalty phase which focused on Stewart being a victim of circumstances beyond his control, compelling him

to commit murder.

Stewart has identified three potential sources of this information other than Moore and Arnold: the mystery note allegedly found in the defense file Barbas gave to Stewart's collateral attorneys six or seven years before the evidentiary hearing; Joyce Engle; and Lilly Brown. As for the mystery note, Barbas was adamant that he had not seen the note and no one at the evidentiary hearing could verify the authenticity of the note (PC-R. V5/T162-64, 192, 209). Although Sonny Fernandez testified that the note looked like something he had in his file, he also said that he had no independent recollection of this investigation and he could not identify the note itself (PC-R. V5/T202, 209). As to Joyce Engle, the notes from Fernandez reflect that Engle had been told about Scarpo's abuse of Stewart from Lilly Brown; Brown herself only had limited hearsay knowledge of Scarpo being a tough disciplinarian (PC-R. V4/T83-84; V6/130). Absent more persuasive evidence about how the allegations of abuse by Scarpo could have reasonably been discovered by Barbas, no deficiency with regard to the failure to develop this mitigation has been demonstrated.

The trial court's conclusion that any newly discovered mitigation offered in support of this claim would not affect the result of Stewart's penalty phase is correct. Although Stewart relies heavily on the parade of horribles described by Moore and Arnold, both women discussed several incidents in their testimony

-- such as their sexual abuse by Scarpo, and Scarpo threatening one of Arnold's boyfriends with a gun –- which Stewart never even knew about (PC-R. V4/T17, 55, 67-68, 73). As Dr. Afield noted, even with new allegations of abuse, the end result is the same abused, unfortunate soul that the jury heard about (PC-R. V5/251). Of course, Dr. Afield stated directly that his opinion would not change a bit even with new evidence of abuse (PC-R. V5/251, 257). Given the similarity between the evidence of abuse actually presented at trial and the evidence of abuse presented at the evidentiary hearing, the trial court's finding that the new evidence of abuse would not make a difference is reasonable and cannot be disturbed on appeal.

The argument that counsel was ineffective for failing to present additional penalty phase evidence about Stewart's intoxication on the night of the murder is similarly without merit. Stewart recites the information regarding intoxication from the competency reports generated by Drs. Mussenden and Gonzalez; there is no suggestion that Barbas was not aware of this information. In fact, Barbas' decision to focus on mitigation portraying Stewart as a victim of circumstances beyond his control rather than emphasizing his drinking and chronic substance abuse was entirely reasonable.

The record reflects that both Rex Barbas and Dr. Afield were aware of Stewart's history of alcohol and substance abuse as well

as his drinking on the day of the murder (PC-R. V5/T122, 157, 186, 244). In fact, Afield's trial testimony discussed the fact that Stewart had spent that day at his mother's grave with his gun and a bottle of whiskey (DA-R. V5/692). Barbas was also aware of the potential relevance of intoxication in a penalty phase proceeding (PC-R. V5/111). Since Barbas knew both the facts and law now urged in support of this claim, Stewart cannot suggest that the defense investigation into this mitigation was inadequate. Thus, Barbas' decision not to present further evidence of Stewart's substance abuse was informed and reasonable, and current counsels' disagreement with the quantity of evidence presented does not satisfy Stewart's burden of establishing that all reasonably competent attorneys would have presented this additional evidence.

Stewart also alleges that his attorney was ineffective for failing to obtain and present complete records of his mental health problems and his history of drug and alcohol abuse. However, the defense in fact obtained many of the records identified, and the physical records now offered collaterally do not contribute significantly to the information which the defense already possessed. The court below determined that no deficiency in counsel's performance had been demonstrated with regard to this issue (PC-R. V3/388-389).

When Barbas was asked about the jail records at the evidentiary hearing, he stated that he believed that he had all

these records, and he recalled having reviewed the hospital records about Stewart's suicide attempt (PC-R. V5/T120-121, 158-159). He also noted that, even if he did not have physical possession of the records, he was aware of the information contained therein (PC-R. V5/T186, 192). The investigator's notes also reflect that Stewart's juvenile records from South Carolina were being sought by the defense (PC-R. V6/132).

Although Stewart alleges that these records would have made a difference because they would rebut Dr. Afield's testimony that Stewart was not rehabilitative, in fact Dr. Afield's evidentiary hearing testimony refutes this suggestion. At the hearing, Dr. Afield stated that none of the new information that had been provided for his consideration since the time of trial would have affected his prior testimony "in any manner" (PC-R. V6/251). Dr. Afield reiterated his prior position, that Stewart's background and problems were so horrendous and had gone on for so long that no treatment would help him; any evidence of new abuse by Scarpo only confirmed his prior opinion on this point (PC-R. V5/251, 256-259).

Dr. Afield's testimony at the evidentiary hearing also refutes much of Stewart's claim of inadequate mental health assistance due to his attorney's alleged failure to provide sufficient background information to Dr. Afield. The trial court rejected the suggestion of a violation of Ake v. Oklahoma, 470 U.S. 68 (1986), specifically finding that Dr. Afield rendered adequate mental health assistance

(PC-R. V3/395). Since Dr. Afield testified that his opinion would not change with consideration of the new allegations of abuse, it is clear that providing additional information to Dr. Afield would not have a made a difference in this case.

Many of Stewart's allegations in this issue are directly refuted by the record. Dr. Afield was qualified as an expert in the area of neuropsychiatry at the time of his penalty phase testimony (DA-R. V5/681, 683). Afield testified on August 27, 1986, and stated that he had rendered a report on August 11, after having seen Stewart on two occasions (DA-R. V5/631, 683-684). Afield had also seen Stewart the night before Afield testified, and stated that he "had an opportunity to review a variety of medical records and other documents" (DA-R. V5/684). He also indicated that he had administered tests, as psychological testing was part of his evaluation (DA-R. V5/684). Defense counsel asked Afield to "assume certain facts," and then went on for five pages in the record to describe the violence, neglect, family dysfunction, and loss with which Stewart had grown up (DA-R. V5/684-688). Afield testified that his information came from defense counsel's hypothetical on Stewart's background; the testimony of Bruce Scarpo; and other records from other sources, including other doctors who had seen Stewart (DA-R. V5/T698-699).

Dr. Afield testified that Stewart was suffering from a mental disease, was chronically depressed, and was a sociopath or

psychopath (DA-R. V5/688). He described Stewart's early years as "horrendous," and noted this was "a textbook case on how to raise a sociopath." (DA-R. V5/688). Dr. Afield believed that, due to the way he was raised, Stewart never had a chance (DA-R. V5/688).

> We then have a boy who runs away, winds up in a variety of institutions, essentially, gets a postgraduate course in how to be a psychopath. Tries to kill himself a few times.
> ...
> But when you have this much happening to you, early on, bad, bad abuse, bad abuse, a lot of violence, a lot of deaths a lot of murder, the kid goes to the graveyard, talks to his mother with his gun and his bottle of whiskey. It's just predictable.

(DA-R. V5/688, 692). Afield also stressed, consistent with the penalty phase defense theory, that Stewart had no control over any of this, that it was not his fault (DA-R. V5/691). Finally, Afield opined that Stewart's ability to conform his conduct to the requirements of the law was impaired (DA-R. V5/694).

Clearly, Dr. Afield's testimony refutes the allegations now presented by Stewart. Afield was a neuropsychiatrist that had examined Stewart and conducted psychological tests; had seen Stewart on several occasions, including two times prior to generating his report more than two weeks before testifying; was aware of Stewart's suicide attempts and his having gone to his mother's grave with his gun and his bottle of whiskey; and testified that Stewart suffered from emotional disturbance and was impaired in his ability to conform his conduct to the law. Even if

Stewart now believes that Dr. Sultan could have offered more favorable testimony, this is not a sufficient basis for relief. Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990); Stano v. State, 520 So. 2d 278, 281 (Fla. 1988) ("That Stano has now found experts whose opinions may be more favorable to him is of little consequence").

Thus, although Stewart suggests that Afield improperly relied on Stewart's self-report and failed to get reliable historical data, Barbas had provided and Afield had considered a number of documents relating to this case (DA-R. V5/684; PC-R. V5/T121-122, 186, 241-242). And although Stewart asserts that Afield did not have adequate time or materials for a competent psychiatric exam, he has not identified any real deficiencies with the mental health assistance provided. Even his new expert, Dr. Sultan, would not say that Dr. Afield did not have sufficient information at the time of trial to render his opinion (PC-R. V6/32-33). Stewart's argument is merely a discourse in why counsel now believes that Dr. Sultan would have been a better witness.

Notably, Dr. Sultan's conclusions are consistent with many of those discussed by Dr. Afield at trial. Both doctors agreed with the diagnosis of severe depression without psychosis; both agreed that both statutory mental mitigators applied (DA-R. V5/688, 694; PC-R. V5/T255, V6/19, 22). Both doctors found that Stewart had at least average intelligence, with no indications of retardation or

organic brain damage, and both determined him to have antisocial personality features (PC-R. V5/T242-243, 249, 250; V6/27, 42). Although Dr. Sultan's testimony discusses Stewart's substance abuse history to a greater extent than Afield's, Afield was aware of this information (PC-R. 5/244). The only matters which Afield and Sultan did not agree on were the guilt phase issue of Stewart's intoxication impairing premeditation and the question of Stewart's ability to be rehabilitated; even on the rehabilitation issue, Sultan would not say that Stewart could be rehabilitated, just that it could not be determined because reasonable treatment in the proper environment had never been provided to Stewart (PC-R. V6/16).

As previously noted, Stewart must establish more than the existence of a new expert with a more favorable opinion in order to obtain relief on this issue. Psychiatric evaluations may be considered constitutionally inadequate so as to warrant a new sentencing hearing where the mental health expert ignored "clear indications" of either mental retardation or organic brain damage. Rose v. State, 617 So. 2d 291, 295 (Fla. 1993); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987). Although granted a hearing on this claim, Stewart did not present any testimony suggesting that he suffers from brain damage, or that there were any indicators of such damage ignored by Dr. Afield. Even if such testimony had been presented, it would not necessarily demonstrate that Dr. Afield's

examination was insufficient. Engle v. Dugger, 576 So. 2d 696, 702 (Fla. 1991). Since Stewart has failed to demonstrate any inadequacies in his mental health examination, or to otherwise show that his mental health assistance was constitutionally ineffective, this claim was properly denied.

Strickland counsels that, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, it is not necessary to address whether counsel's performance fell below the standard of reasonably competent counsel. 466 U.S. at 697. The trial court below followed this advice, rejecting Stewart's claim due to a lack of prejudice (PC-R. V3/393, 395). It is important to keep in mind that the jury recommendation of death in this case was strong, ten to two. Stewart committed a senseless murder of a young man unfortunate enough to have been in a car that picked him up, following his own plan to rob and shoot his random victims. The circumstances of the offense, shooting a second victim, and his prior record demanded the imposition of the death penalty for this crime.

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available

evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present this evidence in light of the aggravated nature of the crime. The mitigation suggested in the instant case is much less compelling than that described in Buenoano, and this case is also highly aggravated. See also, Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992) (asserted failure to investigate and present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a postconviction evidentiary hearing); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991), cert. denied, 515 U.S. 1166 (1995) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Provenzano, 561 So. 2d at 546 (cumulative background witnesses would not have changed result of penalty proceeding).

The cases cited by Stewart are not factually comparable. This case does not involve the discovery of extensive psychiatric mitigation that was unknown at the time of trial, as in Hildwin v. State, 654 So. 2d 107 (Fla.), cert. denied, 516 U.S. 965 (1995),

State v. Lara, 581 So. 2d 1288 (Fla. 1991), Baxter v. Thomas, 45 F.3d 1501 (11th Cir.), cert. denied, 516 U.S. 946 (1995), and Rose v. State, 675 So. 2d 567 (Fla. 1996). In Baxter, for example, the only penalty phase testimony presented was a few minutes from a preacher witness, despite the fact that Baxter had a lengthy psychiatric history. Nor is this case like Chandler v. State, 193 F.3d 1297 (11th Cir. 1999), where defense counsel did not begin preparing a penalty phase until after the conviction was returned, the day before the penalty phase was held. See also, Lara, (despite extensive mitigation available, counsel failed to prepare and the entire sentencing phase testimony was less than seven pages of transcript).

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: committed during the course of a felony, and prior violent felony convictions. Stewart's prior record included convictions for attempted first degree murder, attempted robbery, and aggravated assault (DA-R. V4/624-627, V9/1209-1216). Neither the contemporaneous convictions, nor Stewart's other capital murder (see Stewart v. State, 620 So. 2d 177 (Fla.), cert. denied, 510

U.S. 980 (1993), were previously considered in weighing this aggravating factor, but these certainly could be considered if a new sentencing proceeding were to be conducted in this case. Stewart has not and cannot meet the standard required to prove that his attorney was ineffective when the facts to support these aggravating factors are compared to the mitigation now argued by collateral counsel.

Thus, the investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Stewart's life. There has been no deficient performance or prejudice established in the way Stewart was represented in the penalty phase of his trial. On these facts, the appellant has failed to demonstrate any error in the denial of his claim that his attorney was ineffective in the investigation and presentation of mitigating evidence or in any other aspect of the penalty phase litigation.

B. INEFFECTIVE ASSISTANCE - GUILT PHASE

Stewart also alleges that his guilt phase representation was constitutionally deficient because his attorney did not present a voluntary intoxication defense or request a jury instruction on

this defense. Stewart's claim and the testimony from the postconviction hearing establish only that his current counsel disagree with trial counsel's strategic decision on this issue. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Rose, 675 So. 2d at 570 (affirming denial of postconviction relief on ineffectiveness claim where claims "constitute claims of disagreement with trial counsel's choices as to strategy"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994), cert. denied, 525 U.S. 1159 (1999); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Stewart's claims, this Court must be highly deferential to counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the

> time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also, Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992), cert. denied, 120 S.Ct. 804 (2000); Stano, 520 So. 2d at 281, n. 5 (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

At the evidentiary hearing, Rex Barbas testified directly that he explored the adoption of a voluntary intoxication defense, but abandoned that defense for strategic reasons (PC-R. V5/T111). Neither Stewart's description of the offense nor the expert witnesses to examine Stewart offered viable support for this defense (PC-R. V5/177-179, 181-182, 244-245). In addition, Barbas identified several tactical reasons for not wanting to put Stewart on the stand, and other than the testimony elicited from Michelle Acosta about Stewart's actions, there was no other evidence of intoxication available (PC-R. V5/119, 149-150, 157, 180, 186). Finally, Barbas considered that his request for an intoxication instruction and formal pursuit of that defense would open the door to the State presenting damaging expert testimony about Stewart's

elaborate recall of the details of Harris' murder (PC-R. V5/118). He felt that he could argue the beneficial portion of Acosta's testimony, without opening the door to harmful rebuttal, as support for his defense of an accidental shooting (PC-R. V5/149-153).

Stewart's primary argument is that Barbas should not have foregone the intoxication defense because it was not inconsistent with Barbas' preferred defense of an accidental shooting. However, Barbas testified that this was not his reason for declining to adopt a voluntary intoxication defense; rather, his reasons are outlined above (PC-R. V5/118, 151, 154). Notably, Stewart has not identified any additional evidence that he alleges Barbas should have presented in furtherance of an intoxication defense, or any further investigation of the issue that should have been done. He does no more than disagree with the strategic decision not to formally pursue this defense.

Thus, Barbas' conclusion not to pursue a formal intoxication defense was a strategic decision, not subject to being second-guessed in a postconviction proceeding. Strickland, 466 U.S. at 689; Rutherford, 727 So. 2d at 223; Rose, 675 So. 2d at 569. In Rutherford, a strategic decision against presenting evidence of mental mitigation was upheld as effective assistance. Because counsel had investigated the mitigation and weighed the consequences of presenting this evidence to the jury, Rutherford's claim of ineffectiveness was rejected. Rutherford dictates that an

informed decision with regard to the presentation of evidence will defeat an allegation that counsel was constitutionally deficient.

In Rose, trial counsel was faulted for not presenting guilt phase witnesses that claimed to have seen the victim alive after the time she was alleged to have been kidnaped by Rose. In affirming the denial of postconviction relief, this Court noted that defense counsel had testified that each of the witnesses had inherent problems:

> In light of counsel's testimony at the hearing, it is apparent that counsel was aware of the witnesses in question and knowledgeable about the pros and cons of calling them as witnesses. Based upon this knowledge, counsel made an informed strategic decision not to call them. In light of the strong likelihood that the State could have successfully impeached each of these witnesses, it is apparent that there was a reasoned basis for counsel's decision. Hence, the trial court did not err in concluding that Rose failed to demonstrate that counsel's performance was deficient.

675 So. 2d at 570. This reasoning applies equally in the instant case, and establishes the lack of merit in Stewart's argument.

Furthermore, even if this case had been tried as collateral counsel insists it should have been, the result would not have been any different. The evidence against Stewart was very strong, and much of it belied an intoxication defense. Following the shootings, Stewart drove Acosta's car, and Smith testified that Stewart was able to drive for some time after the offense (DA-R. V3/356-363). Stewart told Smith that he had Acosta turn the car

around because he noticed the area where he first directed her was too busy; Stewart also told Smith they needed to burn the car in order to get rid of fingerprints (DA-R. V3/361, 364). Barbas was correct about the State experts knowing Stewart had extensive recall of the incident, and Stewart himself told Barbas that he was acting on a plan to rob and shoot the victims (PC-R. V5/T179). All of these facts were inconsistent with a credible defense of intoxication, and would have caused any reasonable fact finder to reject even an expert's opinion that Stewart was too intoxicated to form an intent to kill. See, Jennings v. State, 583 So. 2d 316, 319 (Fla. 1991); White v. State, 559 So. 2d 1097, 1099 (Fla.), cert. denied, 516 U.S. 1017 (1995) (defendants' ability to recall and deliberateness of their actions inconsistent with intoxication defense). Given the strength of the State's case, even if the defense at trial had Stewart testify about how much he had to drink[3] and requested an intoxication instruction, he still would have been convicted of first degree murder. Thus, he has failed to demonstrate that his attorney was deficient or that any possible deficiency could have prejudiced his trial. His claim of ineffective assistance of counsel in the guilt phase of his trial was properly denied.

[3]Stewart has never identified what this testimony may have been, and Dr. Sultan's deposition suggests that Stewart would not be a reliable source of information on this (PC-R. V6/144).

C. BRADY V. MARYLAND

The final issue to be addressed at the evidentiary hearing alleged a violation of Brady v. Maryland, 373 U.S. 83 (1963). In this claim, Stewart challenged the State's alleged failure to provide Hillsborough County Jail Records to his attorney prior to trial.[4] The court below ruled that no Brady violation had been proven because the jail records were equally available to the defense, and therefore additional voluntary disclosure was not required (PC-R. V3/377). In his argument on this claim, Stewart has not addressed the finding below of equal availability.

The trial court's ruling was a correct application of law, since it is widely recognized that Brady does not impose a duty to disclose exculpatory evidence that is equally available to the prosecution and defense. Roberts v. State, 568 So. 2d 1255 (Fla. 1990), cert. denied, 515 U.S. 1133 (1995); James v. State, 453 So. 2d 786 (Fla.), cert. denied, 469 U.S. 1098 (1984). The court's ruling was a correct application of fact, since unrefuted testimony from the evidentiary hearing established that these jail records could have been obtained by the defense (PC-R. V5/T222, 236). Clearly, Stewart has failed to establish any error in the trial

[4]An evidentiary hearing was also granted on the claim that the State failed to disclose the true nature of the deal struck with Terry Smith for Smith's testimony. The only evidence presented at the hearing with regard to this claim was John Skye's testimony that the testimony from trial and from Smith's deposition accurately described the deal that was made (PC-R. V5/T225-230), and this claim has apparently been abandoned as it is not argued in this appeal.

court's denial of relief on this claim.

Furthermore, Rex Barbas testified at the evidentiary hearing that he believed that he did have the jail records in his possession (PC-R. V5/T120-121). And regardless of whether Barbas maintained physical possession of the records, it is beyond dispute that both Barbas and Dr. Afield were aware of the contents of these records, including Stewart's suicide attempts (PC-R. V5/T120, 158-161, 186, 192, 246; see also DA-R. V5/690). Since the mitigation now argued from the Hillsborough County jail records was known to the defense at the time of trial, Stewart cannot show any materiality with regard to these documents.

On these facts, the trial court properly rejected all of Stewart's claims which were developed factually at the evidentiary hearing. Stewart has failed to demonstrate any error in the court's rejection of his claims that his attorney was constitutionally ineffective and that the State withheld exculpatory evidence. The denial of his postconviction motion must be affirmed.

ISSUE II

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING OTHER POSTCONVICTION CLAIMS.

Stewart next challenges the trial court's summary denial of several claims in his postconviction motion which were rejected as procedurally barred. Each of his arguments will be addressed in turn; as will be seen, each of these claims could have been, and in fact some were, presented on direct appeal. It has long been the law in this State that claims which could have been, should have been, or were raised on direct appeal are not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Shere v. State, 742 So. 2d 215 (Fla. 1999); Ragsdale v. State, 720 So. 2d 203 (Fla. 1998); Jennings, 583 So. 2d at 322; Engle, 576 So. 2d at 699; Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Meeks v. State, 382 So. 2d 673 (Fla. 1980), cert. denied, 459 U.S. 1155 (1983). The court below properly denied each of these claims summarily as procedurally barred.

A. CALDWELL COMMENTS/INSTRUCTIONS

Stewart initially asserts that comments and instructions to his jurors improperly characterized their role as "advisory" in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). This Court has consistently rejected this claim collaterally as it could and should have been raised both at trial and on direct appeal. See, Johnston v. Dugger, 583 So. 2d 657, 662-663, n. 2 (Fla. 1991),

cert. denied, 513 U.S. 1195 (1995); Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988) ("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). Furthermore, Stewart's suggestion that this claim is not barred because it amounts to "fundamental error" must be rejected. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990), cert. denied, 517 U.S. 1247 (1996) (trial court properly rejected Caldwell issue as barred as it did not involve fundamental error). This Court has consistently rejected this claim collaterally even when combined with allegations of ineffective assistance of counsel which are not raised herein. Rose, 617 So. 2d at 297; Provenzano, 561 So. 2d at 545. The claim is also without merit. Archer v. State, 673 So. 2d 17, 21 (Fla.), cert. denied, 519 U.S. 876 (1996) (Florida standard jury instructions adequately describe role to jury); Pope v. Wainwright, 496 So. 2d 798, 805 (Fla. 1986), cert. denied, 480 U.S. 951 (1987).

B. PENALTY PHASE INSTRUCTIONS/BURDEN SHIFTING

Stewart's next claim alleges that the instructions given to his jury unconstitutionally shifted the burden of proof with regard to his sentence; this claim is also procedurally barred. There were several issues regarding the instructions given to Stewart's penalty phase jury argued and rejected in his direct appeal,

including the instant claim. Stewart, 549 So. 2d at 174. The claim therefore demanded summary denial below. Engle, 576 So. 2d at 699 ("This claim is procedurally barred because it was rejected in the appeal from Engle's resentencing"). As previously noted, claims relating to jury instructions are consistently rejected in collateral proceedings as they can only be raised at trial and on direct appeal. See, Downs v. State, 740 So. 2d 506, 509, n. 4, 5 (Fla. 1999) (rejecting same burden shifting claim presented herein); Teffeteller v. Dugger, 734 So. 2d 1009, 1016, n. 9 (Fla.), cert. denied, 527 U.S. 1003 (1999) (same); Ragsdale, 720 So. 2d at 205, n. 2; Jennings, 583 So. 2d at 322. Stewart's reliance on Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), to suggest that the trial court should have considered the issue is not persuasive, since Hamblen was a habeas action which attacked appellate counsel as ineffective for failing to raise a similar issue. Hamblen clearly does not imply that a burden shifting claim premised on the trial record can be considered in a motion for postconviction relief filed pursuant to Rule 3.850, and Stewart's suggestion to the contrary must be rejected.

C. AUTOMATIC AGGRAVATING FACTOR

Stewart's claim that the factor of "during the course of a felony" was unconstitutionally applied since felony murder was the basis of Stewart's guilty verdict was rejected by this Court in

Stewart's second direct appeal, with the Court noting it has "rejected this argument many times." Stewart, 588 So. 2d at 973. Thus, it is clearly barred from collateral review. Engle, 576 So. 2d at 699. Stewart's claim that Espinosa v. Florida, 505 U.S. 1079 (1992), cert. denied, 511 U.S. 1152 (1994), and Stringer v. Black, 503 U.S. 222 (1992), constitute a change in law requiring this Court to revisit this issue is without merit, since those cases do not even address the particular argument presented herein.

D. CONSTITUTIONALITY OF STATUTE - VAGUE/OVERBROAD FACTOR

Stewart next contends that the aggravating circumstance of murder committed during a felony, as set forth in Florida's death penalty statute, is facially vague and overbroad. This is another claim which should have been raised on direct appeal, and was properly found to be barred. Hall v. State, 742 So. 2d 225, 226 (Fla. 1999); LeCroy v. Dugger, 727 So. 2d 236, 241, n. 11 (Fla. 1998); Ragsdale, 720 So. 2d at 205, n. 2. Jennings, 583 So. 2d at 322. Stewart does not even attempt to identify any error with the lower court's finding of a procedural bar on this issue.

E. PROSECUTORIAL ARGUMENT ON AGGRAVATING FACTORS

Stewart next alleges that the prosecutor improperly argued the existence of overbroad aggravating circumstances. This claim is both barred as one which should have been raised on direct appeal,

and insufficiently pled, in that the alleged improper argument is not adequately identified in Stewart's motion. Summary denial was therefore required. Jennings, 583 So. 2d at 322. Any attempt to recast the claim as one of ineffective assistance of counsel cannot revive this barred issue. See, Robinson v. State, 707 So. 2d 688, 697-98 (Fla. 1998) (improper to litigate barred, substantive matters in postconviction proceedings under the guise of ineffective assistance of counsel); Johnson v. Singletary, 695 So. 2d 263, 265 (Fla. 1996); Medina, 573 So. 2d at 295.

F. SHACKLING DURING TRIAL

Stewart's claim of error due to his having been shackled during trial is procedurally barred since it was rejected in his direct appeal. Stewart, 549 So. 2d at 173-174. Stewart's argument does not mention that this claim was previously rejected, and he has not attempted to identify any error with the lower court's finding of a procedural bar. Thus, collateral relief was properly summarily denied. Engle, 576 So. 2d at 699.

G. CONSTITUTIONALITY OF STATUTE - 8TH AND 14TH AMENDMENTS

Stewart next challenges the constitutional validity of Florida's death penalty statute. This is once again an issue which should have been raised on direct appeal, and is now procedurally barred. Hall, 742 So. 2d at 226; LeCroy, 727 So. 2d at 241, n.

11; Ragsdale, 720 So. 2d at 205, n. 2; Jennings, 583 So. 2d at 322. Once again, Stewart does not identify any error in the finding of a procedural bar, and the trial court's ruling must be affirmed.

H. CUMULATIVE ERROR

Stewart's claim that a combination of alleged errors rendered his trial fundamentally unfair was properly summarily denied, as no showing of constitutional error has been made with regard to any of the claims currently or previously presented. In the absence of any demonstrated errors, this claim must be rejected as meritless. Downs, 740 So. 2d at 509, n. 5. Mendyk, 592 So. 2d at 1081. Thus, the summary rejection of Stewart's claim of cumulative error was correct.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's denial of postconviction relief must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Harry Brody and Jeffrey Hazen, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of August, 2000.

COUNSEL FOR APPELLEE