IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96177

KENNETH ALLEN STEWART,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant appeals the circuit court's denial of his Motion for Postconviction Relief prosecuted pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Record references to preceding proceedings will be referred to as follows:

"EH." – transcript of evidentiary hearing;

"R." – record on direct appeal;

"R2." – record on direct appeal from remand for written sentencing order;

"PC-R." – record of postconviction proceedings; and

"EX." – exhibits from postconviction hearing.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Appellant, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

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VI. PROCEDURAL HISTORY

On May 13, 1985, Mr. Stewart was charged by information with two counts of attempted first-degree murder, armed robbery, and arson (R2. 3-4). When one of the victims wounded subsequently died, Mr. Stewart was indicted for first-degree murder (R2. 17-18). The charges regarding both victims were consolidated for trial (R. 1024-25). On June 3, 1986, attorney Rex Barbas was appointed to represent Mr. Stewart. (R. 925).

Trial was held on August 25-27, 1986, and, on August 27, 1986, the jury rendered a verdict of guilty for first-degree murder, with a special verdict of felony murder (R. 1011). The jury also returned guilty verdicts on the counts of attempted second-degree murder with a firearm, robbery with a firearm, and second-degree arson (R. 904-906).

On August 27, 1986, the jury recommended that Mr. Stewart be sentenced to death (R. 1012). The court followed this recommendation without making written findings in support of death (R2. 37). Subsequently, the Florida Supreme Court remanded the case for written findings in support of death and for resentencing on the armed robbery conviction based on a guidelines departure. Stewart v. State, 549 So.2d 1171 (Fla. 1989).

On December 8, 1989, a hearing was held on the resentencing order (R2. 87). At this time, Attorney Barbas requested an opportunity to do investigation ... to find mitigating circumstances (R2. 88-89). The Court set a hearing for December 21st, with formal written findings set for December 22, 1989 (R2. 92-93).

On December 21, 1989, Mr. Barbas advised the Court there was nothing in mitigation (RS. 74). Mr. Stewart requested a continuance because he wanted to present some character witnesses in mitigation prior to resentencing (R2. 78). Further, Mr. Stewart advised the court that he had not seen his attorney prior to the resentencing (R2. 78). The court denied this request, saying, "You've had plenty of time to prepare this and other hearings" (R2. 79). On December 22, 1989, the judge made written findings in support of the death sentence (R2. 24-25). The court found two aggravators, previous conviction of a felony involving violence and capital felony committed in commission of a robbery, and the court found three statutory mitigating circumstances: extreme mental or emotional disturbance (slight weight), impaired capacity (little weight), and age (little weight) (R2. 24-25). Although the court also mentioned "catch-all"mitigation related to "some sort of trauma" Defendant suffered

at age 13, he gave it no weight. On direct appeal, the Florida Supreme Court affirmed the death sentence. Stewart v. State, 588 So.2d 972 (Fla. 1991).

On September 17, 1996, Mr. Stewart filed his Third Amended Motion to Vacate Judgments of Conviction and Sentence (PC-R. 42-186). On April 2, 1997, the circuit court held a Huff hearing, and, on August 4, 1997, the court entered an order denying in part Mr. Stewart's claims for relief[1] (PC-R. 295-304).

On December 17, 1998 and on March 19, 1999, an evidentiary hearing was held on the claims not summarily denied, and, on June 25, 1999, the lower court entered an order denying the remaining claims (PC-R. 373-491).

On July 21, 1999, the defendant gave timely Notice of Appeal of the circuit court's denial of his 3.850 motion.

VII. STATEMENT OF THE FACTS

A. Guilt-Phase Testimony

At trial, the State called Michelle Acosta, one of the victims (R. 287). Ms. Acosta testified that she and Mark Harris, the deceased victim, were riding in her 1978 Monte Carlo on the evening of April 13, 1985. (R. 290). She was driving (R. 290). They bought a six pack of beer and went to the beach (R. 291-292). Later, taking Mr. Harris home, she drove North on Nebraska Avenue and picked up a

[1]Claims 1, 2, 4, 7, 8, 9, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26 were summarily denied. An evidentiary hearing was granted on Claims 3, 5, 6, and 10. The defendant appeals the denial of Claims 2, 3, 5, 6, 8, 12, 14, 27, 18, 24, 25, and 26.

hitchhiker near the intersection of Nebraska Avenue and Busch Boulevard (R. 292-293). She identified Mr. Stewart as the hitchhiker (R. 293). Ms. Acosta testified that Mr. Stewart responded to her and Mr. Harris' questions as to where he wanted to go by indicating "Fowler," another street that intersects Nebraska Avenue (R. 296). Mr. Stewart's speech was slurred (R. 296). She knew that he was probably "on something" (R. 296). She took a right on Fowler and, as they approached 22nd Street, she and Harris told Mr. Stewart they needed to drop him off. (R. 296-97). He asked her to take him back to 15th Street (R. 297). She turned around to take him back and turned onto 15th Street at a school (R. 298). Ms. Acosta testified that she pulled in the school parking lot and stopped the car, but didn't turn it off (R. 298). After she put her foot on the brake, Mr. Stewart told them "not to move, that he had a knife" (R. 298). Ms. Acosta testified that she didn't know what to do and sat there for 15 seconds (R. 299). Suddenly she hit the gas apparently to startle or surprise Mr. Stewart, but he struck her with a gun butt (R. 299). She heard three gun shots, and was hit in the shoulder blade (R. 300). Ms. Acosta testified that Mr. Harris was "instantly paralyzed" and that Stewart got out of the passenger door and pulled Harris out (R. 300). Then she got out of the car when Stewart came around and grabbed her wrist (R. 300). Mr. Stewart then drove away (R. 300).

On cross-examination, Ms. Acosta admitted that, at first, she thought she'd been shot in the head and that the shots happened pretty much all at the same time as the blow to her head (R. 306). She testified that she didn't know how Mr. Stewart got out of the back seat to remove Mr. Harris from the car, but that Stewart didn't get out on her side (R. 307). Ms. Acosta again admits that she thought Mr. Stewart was drunk (R. 311).

Terry Lynn Smith testified that he first met Mr. Stewart in 1984, around Thanksgiving (R. 352). In the early morning hours of Sunday, April 14, 1985, Mr. Smith was at the Starlight Lounge on Nebraska Avenue when Margie Sawyer, with whom Mr. Stewart lived in an abandoned office space, came into the bar and signaled Mr. Smith outside, where Stewart was waiting in a dark blue or a black Monte Carlo (R. 355-357). According to Smith, Mr. Stewart said he shot two people who picked him up hitchhiking on Nebraska Avenue (R. 360). Mr. Stewart also said that the man in the passenger seat shared a beer with him and that the woman stopped at a 7-Eleven and bought another beer for Harris (R. 361). Smith testified that Stewart said that he told the people just to pull over, but they did not stop and he shot the man, then fired a shot at the girl (R. 361). Then, Smith said Stewart told him that he climbed into the front seat and pulled the car over (R. 361). The girl got out of the car and, according to Smith, Stewart crawled over the man, opened the passenger

side, and pulled the man out (R. 361-2). Stewart then drove off (R. 362). Later, Smith testified, he accompanied Mr. Stewart to the parking lot of Floriland Mall, where Stewart burned the car (R. 363-4).

On cross-examination, Mr. Smith testified that he pled guilty to three "life" felonies and two "fifteen year" felonies, which were reduced charges from the "at least five full life felonies" he faced prior to providing testimony against Mr. Stewart, in exchange for those reductions and for his testimony (R. 366). Further, Mr. Smith acknowledged that he understood that he would not be sentenced until after he testified against Stewart (R. 366).

Next, Mrs. Estelle Berryhill, Mr. Stewart's grandmother, testified that Mr. Stewart called her on April 25, 1985 and Mr. Stewart told her that "he thought he shot a man", and that Mr. Smith burned the car (R. 386).

Detective Lease testified that he listened to the conversation between Mrs. Berryhill and Mr. Stewart (R. 402). When Mrs. Berryhill asked Mr. Stewart "why he had done it," Stewart said, according to Lease, "I guess to rob them." Stewart then told her that "[T]hey are in the hospital. And they are going to be all right" (R. 403).

Finally, Mr. Driggs, the Hillsborough County medical examiner, testified that he performed an autopsy on Mr. Harris on May 12, 1985 (R. 425-426). Dr. Driggs also testified that Mr. Harris died from pneumonia and that the bullet wound

weakened his body and made him susceptible to infection (R. 430-432). According to Driggs, the "mechanism of death" was pneumonia and "the cause of death" was the wound (R. 432).

The defense called no witnesses.

B. Penalty-Phase Testimony

During penalty-phase, the defense called Bruce Scarpo, who testified that he was Mr. Stewart's guardian "since he was eighteen months old" and was "awarded custody" through his mother in a Tampa court (R. 634). Scarpo called himself Mr. Stewart's stepfather, "papers or no papers" (R. 634). Scarpo met Kenny's mother when she worked for him in Tampa (R. 635). He first saw Kenny when Kenny was 18 months old (R. 635). Scarpo testified that Kenny's mother had had problems "through her childhood" and was about to have her son taken away by the State when Scarpo told the family court that he and "Terri" were going to marry (R. 635). Kenny's mother's real name was Elsie, but everyone called her "Terri" (R. 636). After Scarpo "assured" the judge they were married and the court investigated his family, the judge decided that he and Terri could keep the child (R. 635). Scarpo claims that he then had problems with her immediate family and moved to Miami (R. 635). Scarpo said he wanted to get Terri away from her violent family (R. 636). However, Miami was still too close to the Stewarts so he, Terri, and Kenny moved

to Charleston, where Scarpo still lives (R. 636). Scarpo testified that Terri's family drank, fought, argued, and continually interfered with his personal life, with Terri, and with "the upbringing up the child" (R. 636).

In Charleston, he and Terri did pretty good for awhile, although Terri got on drinking sprees (R. 637). Then when Kenny was three, she left with a young "thug" from Miami, taking Kenny with her (R. 637). According to Scarpo, the "thug" robbed 7-Elevens for a living (R. 638). Terri and the thug periodically called Scarpo for money, and, after the thug hocked his gun, Scarpo refused to send money, even though Terri told him that Kenny had only had a hot dog to eat for three days. (R. 637-39). Subsequently, Terri brought Kenny back to Charleston, were she and her boyfriend broke up (R. 637-9). She then went on her "merry way," leaving Kenny with Scarpo (R. 639). Kenny was four (R. 639). In 1968, Scarpo remarried (R. 639). He testified that Kenny was five at that time (R. 641).

In six, maybe eight, months Kenny adjusted to life with Scarpo and, though mischievous at times, did well (R. 641). Kenny blended in with the rest of the children and had no more problems (R. 644). The "rest of the children" were Scarpo's new wife's children, the eldest of whom had, according to Scarpo, just finished medical school, the second eldest of whom had just graduated from "Nuclear School," and the youngest of whom had just received her real estate license and

managed two jewelry stores in North Carolina (R. 645). Mr. Scarpo testified that his family was like "the Walton's" (R. 646). Kenny was a "good boy", a "typical boy", and Scarpo never had "any serious problems with him" (R. 646).

Then, Scarpo continued, the big change came when Kenny was about thirteen (R. 647). Kenny ran away and, two days later, Scarpo got a call from Mr. Berryhill, Kenny's grandfather in Tampa (R. 647). Mr. Berryhill put Kenny on the phone, and he called Scarpo a liar and a phony (R. 648). Scarpo testified he hadn't told Kenny that he was not Kenny's "real" father and, Scarpo said, Kenny told him that he wanted to live with his own flesh and blood (R. 648).

The Berryhills, who, Scarpo insinuates, were only after Kenny's social security benefits, were awarded custody of him (R. 650). Then, Scarpo testified, Scarpo started getting strange phone calls from Kenny about his mother, who had committed suicide in 1968, and about his father, who was murdered in 1971 (R. 649-650). Eventually, after Kenny was arrested for a "burglary or something," Scarpo went to Tampa to appear in juvenile court with Kenny (R. 650). Kenny received six months probation and, because social security only paid $58.00 a month, the Berryhills gave Kenny back to him (R. 650).

Upon returning to Charleston, Kenny, according to Scarpo, had changed (R. 651). Kenny was introverted and believed that Scarpo was instrumental in his

father's death, a story which during the year or year and a half that Kenny was in Tampa, the Berryhills had, Scarpo said, drilled this into Kenny's head (R. 652).

After he returned from Tampa, Kenny started getting into trouble in school (R. P. 653). Before then, Scarpo testified, he and Kenny hunted, fished, and rode in boats (R. 653). Kenny idolized him and felt that he, Kenny, had authority over the other children because Scarpo was his dad (R. 654). Kenny depended on Scarpo for any little problem he would have (R. 654). But after Kenny returned from Tampa, he would daydream and not come to Scarpo with problems (R. 654).

Scarpo testified that he hadn't had problems with his other children except for the typical problems that all children have (R. 664). He testified that he knows what was there for Kenny for thirteen years and that a lot can be salvaged of him (R. 665). Scarpo says that he knows it will be twenty-five, maybe fifty years before Kenny gets out of prison but that Kenny can be an asset to the community (R. 665). Kenny, Scarpo tells the jury, just needs some help to deal with those "wrong, bad stories" the Berryhills told him about Scarpo (R. 665).

On cross-examination, Scarpo reiterated that his oldest daughter just graduated from medical school, that his son finished nuclear school, and that his younger daughter passed the real estate exam with a high average (R. 672). None of them have had any type of problem, Scarpo told the jury (R. 672). Finally, he stated that

he never abused or mistreated Kenny "in any fashion any time" (R. 672). The change in Kenny occurred because "they loaded up his head with me being instrumental in his father's death," despite the fact that Scarpo was a good father for many years, took Kenny hunting and fishing, and raised Kenny with his other children (R. 673). He idolized me, Scarpo concluded (R. 673).

James Hayward testified that he called Mr. Stewart's counsel the morning of the penalty-phase (R. 674). Hayward had been married to Kenny's father's sister, Kenny's aunt (R. 675). Kenny had lived with Hayward and the aunt for two to three months in "about 1977" (R. 675). Apparently, Hayward had related to Kenny sketchy details of his mother's and father's deaths (R. 675-6). Hayward also had told Kenny about the traffic accident deaths of two aunts and a nephew and his grandfather's death from cancer (R. 676). On cross-examination Hayward admitted that he hadn't seen Mr. Stewart since the thirteen year-old Stewart stayed with him (R. 676).

The defense called Dr. Walter Afield, a psychiatrist and expert in neuropsychiatry (R. 683). Dr. Afield testified that he first saw Mr. Stewart during the week of August 11, 1985 (R. 684). Afield saw him again on the night before Afield testified (R. 684). Afield bases his opinion on facts consistent with Scarpo's testimony, particularly that, from ages 5 to 13, Kenny was very happy and fit in the

happy Scarpo home (R. 686). Prior to the age of five, Afield testified, the mother and her boyfriends abused Kenny, and, after the age of 13, the father's relatives turned him against Scarpo (R. 685-686). Dr. Afield testified that Kenny received a "postgraduate course in how to be a psychopath" (R. 690). Afield further predicted, "I think this young man is going to kill himself at some point" (R. 690). He told the jury that Kenny tried to kill himself (R. 690). He even opined that Kenny is not treatable and not rehabilitatable (R. 691). Afield found that Mr. Stewart has an impairment in conforming his conduct to the "capacity" of the law (R. 694). Afield told the jury that Mr. Stewart got a "slight break" during his life with Mr. Scarpo, from whom Mr. Stewart received "a reasonable sort and reasonable amount of stability" (R. 694). Then, Dr. Afield repeated that Mr. Stewart can't be rehabilitated and will kill himself (R. 696). On cross-examination, Dr. Afield testified that most of his information about Mr. Stewart came from Scarpo (R. 699).

Joyce Engle testified that she met Stewart in jail after his arrest (R. 701). She testified that Stewart had shown remorse and was "salvageable" (R. 703).

Lash LaRue, the cowboy actor, testified that he knew Scarpo and had visited Kenny at Scarpo's (R. 705-06). LaRue saw a change in Kenny when he was thirteen or fourteen (R. 706). Scarpo attributed it to finding out Scarpo wasn't his real dad (R. 706).

Susan Alice Berg Medly testified by deposition that she is Kenny's stepsister (R. 712). She testified that he was pretty troubled when he was growing up (R. 715). Susan testified that Kenny learned that Scarpo wasn't his real father when he overheard a conversation between her mother and a friend (R. 717). Susan testified that Kenny got in more serious trouble in his teens but that he'd gotten in trouble prior to that as well (R. 718). Susan described Kenny as loving (R. 721).

The last witness at trial was Joanne Scarpo (R. 724). She testified that she lived with Bruce Scarpo and considered Kenny her child (R. 724). She asserted that Kenny worshiped Scarpo and speculated that Kenny may have resented her and her daughters (R. 725). After thirteen, Kenny, she said, was very, very troubled (R. 725). She testified that Kenny didn't get in trouble before he was thirteen (R. 326). Before turning thirteen he went to church, but she doesn't think he got to know God, though recently, he has shown remorse (R. 727-729).

C. Evidentiary Hearing Testimony and Evidence

Susan Smith Moore, who had testified by deposition in penalty-phase as Susan Alice Berg Medley, testified that she is Mr. Stewart's stepsister (EH. 6). She was four or five when her mother moved in with Scarpo (EH. 6). Kenny is a year younger than her (EH. 6). Susan lived with Scarpo for ten or eleven years, moving out when she was fifteen because of physical abuse by Scarpo (EH. 8). Susan described the

physical abuse by Scarpo, when the children were small, as spankings or whippings with his belt or hands (EH. 9). As the children got older, the beatings and kickings got worse (EH. 9). Scarpo beat Kenny with his fists, as if Kenny was a grown man (EH. 9). Moore witnessed these beatings (EH. 9). Once, when Kenny was ten or eleven, he failed to take the trash out (EH. 9). The family was sitting at the kitchen table when Scarpo learned of this (EH. 9). Scarpo started screaming at Kenny, then beat him over the kitchen table, knocked him down, ordered him to be a man and get up, pulled him up, then knocked him down (EH. 9-10). Finally, he made Kenny sit in the corner of the kitchen where the trash can usually sat and put the trash can on Kenny's head (EH. 10). Kenny had to sit like that while the others finished dinner (EH. 10). This kind of abuse of Kenny was common (EH. 10). Scarpo made Kenny an example, but he beat Susan's mother as well (EH. 10).

Scarpo's beatings depended on his moods, not Kenny's behavior (EH. 10). The beatings were regular (EH. 11). Thus, Kenny would have black eyes, bruises, and marks where he was grabbed (EH. 11). He and the girls would have stripes on their arms and legs from Scarpo's belt (EH. 11). The beatings began as far back as Susan could remember and did not cease until she left (EH. 11). Scarpo beat all the children (EH. 12). Susan did not know the beatings and abuse were not normal family behavior until friends saw the bruises and marks at school and brought them to a

teacher's attention, and the teacher took her to a shelter in Charleston (EH. 12). Susan then realized the beatings were not normal and that she could get help, so she left (EH. 12).

Susan also testified about the circumstances of the deposition she gave for the penalty-phase trial (EH. 14-16). Kenny's attorney or investigator called her at work, and she asked him to call back after work (EH. 15). No one talked to her prior to the deposition about her testimony and she was surprised she wasn't asked about the abuse (EH. 16). She would have come to testify in person but Scarpo told her there was no need (EH. 16). Susan also disputed Scarpo's testimony that he did not abuse his children, including Kenny, saying "he abused us mentally, physically, and sexually. He abused us in every way" (EH. 17). Scarpo needed to dominate the family (EH. 17). The sexual abuse also went on as far back as she could remember (EH. 17). He told her that fondling was how all fathers taught their daughters to act around men (EH. 18). He told her that he and she would run off together on his motorcycle (EH. 18).

Scarpo forced Kenny, who suffered from bed-wetting while he lived with Scarpo, to sleep in his own urine, and beat him, and humiliated him, even after Joanne Scarpo took him to the doctor and Scarpo was advised that Kenny suffered from a medical condition (EH. 19). Finally, a doctor diagnosed Kenny as hyperactive and

put him on Ritilin when he was eleven or twelve (EH. 20). (Scarpo testified at trial that he gave Kenny coffee instead of Ritilin (R. 646)).

Regarding the family photographs which Scarpo selected for Kenny's lawyer to use as a trial exhibit, Susan Moore testified that they do not reflect life with Scarpo (EH. 20).

Susan testified that if anyone tried to help the victim of one of Scarpo's beatings, the beating would be twice as bad (EH. 20). Joanne Scarpo tried a few times to step in, but she was afraid of Scarpo too. (EH. 20). The girls were brought up to think Kenny was Scarpo's possession and that Joanne and the girls had no business interfering (EH. 21). As Bruce's possession, the quality of Kenny's life was sad, lost, and brutal (EH. 22). This family was not like the Walton's (EH. 22).

Susan also testified that Scarpo drank daily from morning until night (EH. 22). She testified that he drank until the day he died (EH. 23).

After the beatings, Kenny, or whoever had been beaten, would be sent to the their room and isolated (EH. 24). Often, Scarpo would come in for a follow-up beating (EH. 24). The children would have to clean up their blood afterwards (EH. 24). Once, Susan recalls, after a beating, the next day her sister had to go find the person's teeth in the carpet and wash blood off the walls (EH. 25). Regardless of the severity of the assault, the children were not allowed to sympathize or empathize

with Bruce's victim (EH. 26). The victim was confined to their room if the wounds were visible (EH. 27).

Susan further recalled an incident when Scarpo and her mother were fighting and he put a gun to her head (EH. 28). Susan and Kenny were instructed to tell her goodbye because "she's going to die today" (EH. 28). Another time, Scarpo chased her and her mother to a neighbors' house (EH. 29). They hid in a closet and saw Scarpo with a shotgun outside (EH. 29). When Joanne Scarpo had an affair, Scarpo made her reveal the details of her sexual activities to the children (EH. 30).

On cross-examination, Susan Moore testified that she didn't know if Kenny was sexually abused, although his physical abuse was more severe because he was a boy (EH. 37). She testified that a secretary or investigator called her at work about giving a deposition (EH. 39). This was before the trial (EH. 39). She didn't know who Kenny's lawyers were and received all her information from Scarpo (EH. 40). When Kenny's lawyer called back, she gave the deposition, answering the questions put to her (EH. 42). She was not asked about the abuse, although she was prepared to answer those questions – in fact that's why she had the lawyer call at night when everybody was out of the office (EH. 43). She assumed Kenny had told his lawyer about the abuse (EH. 46).

On redirect, Susan Moore reiterated that she would have been willing to testify in person at the trial (EH. 48). The attorneys certainly could have gotten her phone number from her mother and contacted her (EH. 49). Finally, she testified that she has been married four times and suffered mentally because of the years of abuse by Scarpo (EH. 49).

Next, Linda Arnold testified that she, like Susan, is also Kenny's stepsister (EH. 54). She is older, so Kenny was three or four when they met and she was eleven or twelve (EH. 54). Linda Arnold lived under Scarpo for about eight years (EH. 54).

Linda Arnold characterized Scarpo as flamboyant, arrogant, intimidating (EH. 55). He exaggerated, tried to be overly impressive, and often misrepresented the truth (EH. 55) For instance, he would always tell people that she graduated from medical school, when in fact she went to nursing school (EH. 55).

Scarpo physically abused Linda many times (EH. 55). He also verbally, emotionally, and sexually abused her (EH. 55). Linda recalls that, when she was fifteen or sixteen, Scarpo made her drop her pants and underwear, bend over, and hold her ankles, while he used a belt buckle on her (EH. 56-57). This sort of beating could happen more than once a week (EH. 57). Like Susan's, Linda's abuse continued for the duration of her residency with Scarpo (EH. 58). She ran way when she was 18 (EH. 58).

Linda remembers Scarpo beating Kenny and that Scarpo was more aggressive because Kenny was a boy (EH. 58). With Kenny, Scarpo was not afraid to leave bruises where they could be seen (EH. 58). She recalls Kenny having black eyes, a bloody nose, fat lips, bruises, and cuts (EH. 58). In addition to using the belt on Kenny, Scarpo would slap, punch, and throw Kenny across the room (EH. 58). Once, Ms. Arnold recalled, Scarpo lined all four kids up to find out who had committed some infraction or other (EH. 59). Scarpo threatened to beat each of them until the child who had done the deed confessed (EH. 59). Linda believed that Kenny had probably committed the infraction, but, because Kenny had just received a terrible beating a few days before, Linda took the blame and the beating (EH. 59). Kenny's beatings were as frequent as, or more frequent than, anyone else's (EH. 59). For bedwetting, which Scarpo thought Kenny could control, Scarpo beat Kenny, made him sleep on the wet floor or the wet sheets, took away Kenny's sheets, or confined Kenny to his room for days wearing only his underwear and being fed only bread and water (EH. 60-61). If Kenny cried, Scarpo increased the violence of the beating (EH. 61). The children were never given medical treatment because Scarpo didn't want anyone to see the bruises (EH. 62). When Scarpo broke Joanne's collar bone, nose, or ribs, her mother wouldn't go to the doctor because the doctor would ask what

happened (EH. 62). Frequently, Joanne would have black eyes or bruises on her face which she tried to cover in makeup (EH. 63).

Scarpo also sexually abused Linda (EH. 64). She realized his actions were inappropriate when she was 15, but they continued until she left home at 18 (EH. 64).

Linda testified that, during Kenny's trial, an investigator called her and indicated that there was nothing she could share that would help Kenny because the trial was underway and the defense couldn't introduce new witnesses or evidence at that time (EH. 65). Had she been asked, she would have testified (EH. 65).

Linda confirmed Susan's testimony that Scarpo drank from morning to night (EH. 65). Linda never knew what to expect and lived in constant fear (EH. 66). Once, when she was sixteen, Scarpo put a gun to her head after a bizarre incident when Scarpo picked a fight with Linda's date (EH. 68-69). When her date fled, Scarpo put a gun to her head and made Linda call the boy and tell him that if he ever came near her that Scarpo would shoot her (EH. 67-68).

On cross-examination, Linda Arnold testified that the investigator did not ask her about abuse by Scarpo (EH. 75-76). Then, on redirect, she testified that neither the investigators nor the attorney asked her to testify, or to give a deposition (EH. 78). Further, neither attorney nor investigator explained the type of information needed for a penalty-phase trial (EH. 79).

Lilly Brown, Kenny's aunt, testified that, when Kenny was fifteen months old, he was left with Lilly's sister, Dorothy Lee Stewart. Dorothy whipped Kenny, made him stay in bed all day and was very brutal (EH. 82).

Ms. Brown saw Kenny again when he was almost fourteen and back in Florida (EH. 82). Lilly remembers Scarpo telling her that he was very brutal with Kenny because Kenny came from bad genes (EH. 84). Scarpo told her he used his fists on Kenny, put garbage cans on his head, and that, even after Kenny was grown, he whipped Kenny several times (EH. 85). Mrs. Brown was never contacted by Kenny's attorneys or investigator (EH. 85). Had she been contacted, she would have been happy to testify (EH. 85).

The deposition testimony of Dr. Faye Sultan was entered into evidence by stipulation of the parties (EH. 102; EX. 1). Dr. Sultan is a clinical psychologist, and the State stipulated that she was an expert in the field of clinical psychology (EX. 1, pp. 4-5). Dr. Sultan testified that she first interviewed and tested Mr. Stewart for 10 or 11 hours on November 19, 1993 (EX. 1, p. 5). Since that time, she has interviewed Mr. Stewart on two other occasions (EX. 1, p. 6). Dr. Sultan reviewed jail records from the Hillsborough County jail, which detail two suicide attempts that Mr. Stewart made while in custody in Tampa (EX. 1, p. 6). She also reviewed records from the South Carolina Department of Youth Services related to Kenny's use of alcohol and

marijuana as an adolescent and documenting a suicide attempt he made at the age of sixteen, and she reviewed records describing his academic and social performance during his adolescence (EX. 1, p. 7). Dr. Sultan also reviewed statements by Michelle Acosta, including police interviews, a deposition, and a transcript of Ms. Acosta's trial testimony (EX. 1, p. 7). Dr. Sultan reviewed the note from Mr. Stewart to his lawyer describing abuse by Scarpo, Scarpo's testimony, Dr. Afield's testimony, and Susan Medley (Moore's) testimony (EX. 1, p. 7). Dr. Sultan also reviewed school records relating to Mr. Stewart's elementary and middle school years (EX. 1, p. 8) and the evidentiary hearing testimony of Susan Moore, Linda Arnold, and Lilly Brown (EX. 1, p. 8) She reviewed notes from an attorney interview with Margie Sawyer and a court opinion discussing testimony of a Bilbrey and Dr. Merin regarding Kenny Stewart's drug and alcohol abuse (EX. 1, p. 8). Additionally, Dr. Sultan interviewed Susan Moore and Linda Arnold extensively (EX. 1, p. 8).

Based on her review of these materials and her interviews, Dr. Sultan opined that Mr. Stewart suffers from a number of mental illnesses (EX. 1, p. 10). His principal set of diagnoses are major depression, both severe and recurrent without psychotic features (EX. 1, p. 10). He also shows multiple diagnoses that relate to his abuse of substances, including cannabis intoxication and alcohol dependence (EX.

1, p. 10). Finally, she diagnosed Mr. Stewart with many of the features of a personality disorder with borderline and anti-social features (EX. 1, p. 10).

Emphasizing the importance of Susan Moore's and Linda Arnold's testimony and statements about Scarpo's brutality, Dr. Sultan observed that Scarpo's trial testimony "is in direct rebuttal of the existence of the possibility of any abuse" (EX. 1, p. 11). Dr. Sultan then explained that the absence of such important information shades understanding and may misdirect the clinician whereas a full family background provides the clinician the opportunity to examine the effect of that shared background on other people who grew up in the same home (EX. 1, p. 12). Therefore, without the story from Kenny's siblings, Dr. Sultan concludes, it is difficult to assess the damage caused by the mutually endured abuse (EX. 1, p. 12).

Dr. Sultan explained how the lives of Susan Moore and Linda Arnold have been physically, emotionally, and socially difficult (EX. 1, p. 13). Thus, Dr. Sultan paints a substantially different picture of Mr. Stewart's life with Scarpo than that presented by Scarpo at trial. The documentary and testimonial record reveals that, for at least 18 years Kenny Stewart endured savage abasement without let up and without abatement. There was no oasis of normalcy or respite from violence at Scarpo's house (EX. 1, pp.13-14) Compounding the abuse, Dr. Sultan noted that Mr. Stewart had become a significant substance abuser by middle adolescence (EX. 1, p.

14). The record reveals that Kenny used alcohol from age 12 and, by age 16, he was a ward of the South Carolina justice system and a heavy substance abuser and heavy user of alcohol (EX. 1, p. 14). Dr. Sultan testified that substance and alcohol abuse continued until Kenny was jailed (EX. 1, p. 14). Dr. Afield testified that he was not provided Mr. Stewart's history of drug and alcohol abuse (EX. 244).

Regarding Dr. Afield's gratuitous testimony that Kenny could never be rehabilitated, Dr. Sultan opined that one would have to follow a sober Stewart for a period of time and treat his mental illness before such a statement regarding rehabilitation could be made (EX. 1, p. 15). Dr. Sultan emphatically disagreed with Dr. Afield's statement that Kenny Stewart was a "killer" by the age of five or six (EX. 1, p. 16).

Based on her review of the records not available to Dr. Afield, and her extensive interviews with Kenny Stewart and with Susan Moore and Linda Arnold, with whom Afield never talked, Dr. Sultan found that Kenny suffered under both statutory mental health mitigators (EX. 1, p. 21) and disputes Dr. Afield's speculative testimony about Kenny's capacity for rehabilitation (EX. 1, p. 16).

Dr. Sultan also identified numerous non-statutory mitigators, including attention deficit disorder, neurologic dysfunction, the severe and torturous abuse he experienced under Scarpo, the horrible abuse he watched his stepsisters and

stepmother endure, the loss of both parents to violence early in childhood, the fact that he grew up with no basic support system despite appearances to the contrary, and his very high degree of substance abuse (EX. 1, pp. 19-20). In fact, Sultan opines, the substance abuse alone would have substantially impaired his ability to use good judgment and to reason and significantly altered the aspects of his personality most readily seen by others (EX. 1, p. 20). Additionally, Dr. Sultan indicated that Mr. Stewart's ability to form specific intent or to premeditate was impaired and substantially effected by such abuse (EX. 1, p. 21).

At the evidentiary hearing, trial attorney Rex Barbas testified that, at the time Stewart was tried, the court would not appoint two attorneys to represent a defendant on a death-penalty case (EH. 108). At that time he was unaware of attorneys who specialized in mitigation (EH. 108). He did hire Sonny Fernandez as an investigator, but Sonny had a heart attack in the middle of the case and his wife, Mrs. Fernandez, took over his responsibilities (EH. 108).

Mr. Barbas acknowledged that he did minimal research on the defense of voluntary intoxication because he did not think it was a viable defense (EH. 111). While acknowledging that alcohol use could be an issue in both guilt phase and penalty phase, Mr. Barbas did not recall how much time he spent preparing for penalty phase, deferring instead to his time sheets (EH. 113). His affidavit for

payment, avering time spent on particular tasks, was placed in evidence (EX. 5). The affidavit indicates that Mr. Barbas billed approximately 5.7 hours from December 13, 1985 through August 27, 1986 developing mitigation, all with Scarpo on the phone except for an hour conference with Scarpo and Joyce Engle on August 25, 1985 (EX. 5).

During the penalty phase, Judge Barbas testified that both he and his investigator would interview witnesses, but he acknowledges that Scarpo was his main contact to get witnesses (EH. 113).

Mr. Barbas's theory of the case was that the shootings were accidental (EH. 117). Barbas testified that he rejected the voluntary intoxication defense because psychiatrists could have been utilized by the state (EH. 118). Also, he believed he would have had to put Mr. Stewart on the stand (EH. 119).

Mr. Barbas testified that he believed Mr. Fernandez obtained Stewart's jail records (EH. 121). However, Mr. Fernandez's file was admitted into evidence and it is devoid of the records (EX. 6). Barbas also admitted that he would have had the responsibility to provide those records to Afield (EH. 121).

The penalty phase lasted two hours and it started right after the verdicts were returned (EH. 122). Barbas denied that he relied heavily on Scarpo for development of the penalty phase (EH. 122). However, Scarpo gave Barbas the names of witnesses

(EH. 122-123). Further, Barbas conceded that Scarpo painted himself as "Papa Walton" when he testified (EH. 124). The family album was introduced to show that Kenny had an idealistic life with Scarpo (EH. 124). Although Mr. Barbas testified that he was never was told by Scarpo of Scarpo's brutality (EH. 124) and had no recollection of speaking to Linda Arnold (EH. 127), Barbas would have considered evidence or testimony about Scarpo's beatings and abuse important to the case (EH. 128). Further, Barbas concedes that his bill does not reflect calls to any penalty phase lay witnesses except for those to Scarpo (EH. 135; EX. 5).

Barbas indicated that it would be important for Afield to know that Scarpo beat his family (EH. 148), and he has no independent recollection of when he saw the Hillsborough County Jail or Tampa General Hospital records concerning Mr. Stewart's suicide attempts and doesn't know if those records were provided to Dr. Afield (EH. 160).

Regarding the notes from his penalty-phase file wherein Stewart advises counsel of Scarpo's brutality (EX. 3), Barbas denies having seen it, but says that he can't conceive of knowing this and not having utilized it (EH. 162-3). He adds that the note would have helped substantially (EH. 164). The entirety of his penalty phase file was entered into evidence (EX. 3).

Sonny Fernandez testified that he was hired by Mr. Barbas to investigate the case (EH. 201). Fernandez testified that he had a copy of the Stewart note, which Barbas denied seeing, in his investigator file (EH. 202). Further, Fernandez admits that he obtained information from Joyce Engle regarding Scarpo's beatings of Kenny (EH. 204).

During the State's rebuttal, John Skye, the assistant state attorney on Stewart's case, testified that he didn't remember even thinking about the jail records and denied the State suppressed them (EH. 223). He added that he didn't believe the jail or the state attorney would have an obligation to turn the records over to the defense in any case. (EH. 235) Skye testified that Terry Lynn Smith agreed to enter open pleas to reduced charges in exchange for testifying against Stewart (EH. 226). Skye believed State Attorney Bill James made a recommendation for Smith under the guidelines (EH. 229).

Dr. Walter Afield testified at the evidentiary hearing as an expert in psychiatry (EH. 238-239). He was hired by Rex Barbas to examine Kenneth Stewart for competency (EH. 240). He rendered an opinion that Stewart was not competent to stand trial (EH. 241). His records from the time are lost (EH. 241). Afield testified that he diagnosed Stewart with major depression (EH. 244). He testified that he was not provided information regarding Stewart's alcohol and drug abuse because such

information is not in his report. (EH. 244). Afield did testify that Stewart's ability to conform his conduct to the requirements of the law was substantially impaired (EH. 246). He was aware of Stewart's suicide attempts (EH. 246). Afield was not, however, aware of any abuse in Scarpo household (EH. 247-8). Afield believes that he remembers a history of sexual abuse in Kenny's case (EH. 249). Afield initially thought Kenny was not competent because he went into a fugue state (EH. 254). Afield does testify that, if Scarpo was the terrible abuser as his daughters have sworn, that abuse would have added to Kenny's problem (EH. 257-258). Further, it shows that Kenny, contrary to trial evidence presented, never had a chance for rehabilitation (EH. 258). To Afield's knowledge, Barbas never told him about Scarpo's abuse (EH. 262). However, if Barbas had the jail or hospital records, Afield would have expected those to be supplied to him (EH. 262).

SUMMARY OF ARGUMENT

1(a). The lower court erred in holding that Mr. Stewart failed to establish at the evidentiary hearing that he is entitled to relief under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), on the grounds that he received constitutionally deficient assistance of counsel at the penalty and sentencing phase of his trial in that counsel failed to investigate and present substantial

mitigation evidence of horrendous childhood abuse. Further counsel failed to develop or present evidence of defendant's alcoholism and drug use.

1(b). The lower court erred in holding that Mr. Stewart did not establish at the evidentiary hearing that he received ineffective assistance of a mental health expert, that the attorney failed to properly prepare the psychiatrist with thorough documentation, and that the psychiatrist did not spend enough time with Mr. Stewart or interview pertinent available collateral material or sources to render a full, accurate opinion.

1(c). The lower court erred in holding that Mr. Stewart failed to establish at the evidentiary hearing that he is entitled to relief under Strickland v. Washington, 466 U.S. 688, 104 S. Ct 2052, 80 L. Ed. 674 (1984), on the ground that he received constitutionally deficient assistance of counsel in the guilt/innocence phase of his trial in that counsel failed to present or argue voluntary intoxication as a defense and request a jury instruction on voluntary intoxication despite the fact that such a defense and instruction was supported by the evidence and did not conflict with the defense's theory that the shooting was accidental.

2. The lower court erred in denying the defendant relief after the evidentiary hearing on his claim that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Hillsborough County Jail records.

3. Mr. Stewart should have been granted an evidentiary hearing or relief on his claim that the jury instruction violated Espinosa v. Florida, 112 S. Ct. 2926 (1992), Caldwell v. Mississippi, 472 U.S. 320 (1985), and Pate v. State, 112 So.2d 380 (Fla. 1959) on the ground that the instructions repeatedly advised the jury their recommendation was "advisory." The lower court erroneously found this claim was procedurally barred.

4. Mr. Stewart should have been granted an evidentiary hearing or relief on his claim that the jury instructions and prosecutor's argument unconstitutionally shifted the burden of proof to Mr. Stewart to prove that mitigation outweighs aggravation. The lower court erred in holding this claim procedurally barred.

5. The lower court erred in denying Mr. Stewart an evidentiary hearing or relief on his claim that his death sentence rests upon unconstitutional aggravating circumstances and in holding that the claim is procedurally barred.

6. The lower court erred in denying Mr. Stewart an evidentiary hearing or relief on his claim that the felony murder statute sec. 921.141(5), Fla. Stat. (1987) was unconstitutionally overbroad and vague. The lower court erred in holding that this claim is procedurally barred.

7. The lower court erred in denying Mr. Stewart an evidentiary hearing or relief on his claim that arguments by the state in closing urged the jury to apply

aggravating circumstances in a manner inconsistent with constitutional requirements. This claim should not have been found to be procedurally barred and is sufficiently pled.

8. The lower court erred in denying Mr. Stewart an evidentiary hearing or relief on his claim that he was shackled and suffered prejudice by such shackling during the trial. This claim is not procedurally barred.

9. The lower court erred in refusing to grant Mr. Stewart an evidentiary hearing or relief on his claim that Florida's Capital Sentencing Statute is unconstitutional. This claim is not procedurally barred.

10. The lower court erred in refusing to grant Mr. Stewart an evidentiary hearing or relief on the cumulative unconstitutionality of the procedural and substantive errors in his trial. This claim is not procedurally barred.

ARGUMENT I

THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

At the evidentiary hearing, Mr. Stewart presented evidence substantiating his claims regarding a Brady violation, as well as ineffective assistance of counsel at the guilt and penalty phases of his trial.

1. The Lower Court Erroneously Denied Appellant Relief On His Claim That His Counsel Provided Ineffective Assistance Of Counsel During His Trial And That He Was Prejudiced By Counsel's Actions, In Violation Of The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

A. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

1. Failure to present available lay witness mitigation.

Under the standard of Strickland v. Washington, 466 U.S. 668 (1984), counsel has "a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate deficient performance by the attorney and prejudice to prevail on an ineffective assistance of counsel claim. Id. Mr. Stewart has fulfilled each requirement.

At the evidentiary hearing, Mr. Stewart presented a staggering amount of

powerful mitigation which trial counsel failed to present at trial. Susan Smith Moore, who had testified by deposition in penalty-phase as Susan Alice Berg Medley, testified that she is Mr. Stewart's stepsister (EH. 6). She was four or five when her mother moved in with Scarpo (EH. 6). Kenny is a year younger than her (EH. 6). Susan lived with Scarpo for ten or eleven years, moving out when she was fifteen because of physical abuse by Scarpo (EH. 8). Susan described the physical abuse by Scarpo, when the children were small, as spankings or whippings with his belt or hands (EH. 9). As the children got older, the beatings and kickings got worse (EH. 9). Scarpo beat Kenny with his fists, as if Kenny was a grown man (EH. 9). Moore witnessed these beatings (EH. 9). Once, when Kenny was ten or eleven, he failed to take the trash out (EH. 9). The family was sitting at the kitchen table when Scarpo learned of this (EH. 9). Scarpo started screaming at Kenny, then beat him over the kitchen table, knocked him down, ordered him to be a man and get up, pulled him up, then knocked him down (EH. 9-10). Finally, he made Kenny sit in the corner of the kitchen where the trash can usually sat and put the trash can on Kenny's head (EH. 10). Kenny had to sit like that while the others finished dinner (EH. 10). This kind of abuse of Kenny was common (EH. 10). Scarpo made Kenny an example, but he beat Susan's mother as well (EH. 10).

Scarpo's beatings depended on his moods, not Kenny's behavior (EH. 10). The beatings were regular (EH. 11). Thus, Kenny would have black eyes, bruises, and marks where he was grabbed (EH. 11). He and the girls would have stripes on their arms and legs from Scarpo's belt (EH. 11). The beatings began as far back as Susan could remember and did not cease until she left (EH. 11). Scarpo beat all the children (EH. 12). Susan did not know the beatings and abuse were not normal family behavior until friends saw the bruises and marks at school and brought them to a teacher's attention, and the teacher took her to a shelter in Charleston (EH. 12). Susan then realized the beatings were not normal and that she could get help, so she left (EH. 12).

Susan also testified about the circumstances of the deposition she gave for the penalty-phase trial (EH. 14-16). Kenny's attorney or investigator called her at work, and she asked him to call back after work (EH. 15). No one talked to her prior to the deposition about her testimony and she was surprised she wasn't asked about the abuse (EH. 16). She would have come to testify in person but Scarpo told her there was no need (EH. 16). Susan also disputed Scarpo's testimony that he did not abuse his children, including Kenny, saying "he abused us mentally, physically, and sexually. He abused us in every way" (EH. 17). Scarpo needed to dominate the family (EH. 17). The sexual abuse also went on as far back as she could remember

(EH. 17). He told her that fondling was how all fathers taught their daughters to act around men (EH. 18). He told her that he and she would run off together on his motorcycle (EH. 18).

Scarpo forced Kenny, who suffered from bed-wetting while he lived with Scarpo, to sleep in his own urine, and beat him, and humiliated him, even after Joanne Scarpo took him to the doctor and Scarpo was advised that Kenny suffered from a medical condition (EH. 19). Finally, a doctor diagnosed Kenny as hyperactive and put him on Ritilin when he was eleven or twelve (EH. 20). (Scarpo testified at trial that he gave Kenny coffee instead of Ritilin (R. 646)).

Regarding the family photographs which Scarpo selected for Kenny's lawyer to use as a trial exhibit, Susan Moore testified that they do not reflect life with Scarpo (EH. 20).

Susan testified that if anyone tried to help the victim of one of Scarpo's beatings, the beating would be twice as bad (EH. 20). Joanne Scarpo tried a few times to step in, but she was afraid of Scarpo too. (EH. 20). The girls were brought up to think Kenny was Scarpo's possession and that Joanne and the girls had no business interfering (EH. 21). As Bruce's possession, the quality of Kenny's life was sad, lost, and brutal (EH. 22). This family was not like the Walton's (EH. 22).

Susan also testified that Scarpo drank daily from morning until night (EH. 22). She testified that he drank until the day he died (EH. 23).

After the beatings, Kenny, or whoever had been beaten, would be sent to the their room and isolated (EH. 24). Often, Scarpo would come in for a follow-up beating (EH. 24). The children would have to clean up their blood afterwards (EH. 24). Once, Susan recalls, after a beating, the next day her sister had to go find the person's teeth in the carpet and wash blood off the walls (EH. 25). Regardless of the severity of the assault, the children were not allowed to sympathize or empathize with Bruce's victim (EH. 26). The victim was confined to their room if the wounds were visible (EH. 27).

Susan further recalled an incident when Scarpo and her mother were fighting and he put a gun to her head (EH. 28). Susan and Kenny were instructed to tell her goodbye because "she's going to die today" (EH. 28). Another time, Scarpo chased her and her mother to a neighbors' house (EH. 29). They hid in a closet and saw Scarpo with a shotgun outside (EH. 29). When Joanne Scarpo had an affair, Scarpo made her reveal the details of her sexual activities to the children (EH. 30).

On cross-examination, Susan Moore testified that she didn't know if Kenny was sexually abused, although his physical abuse was more severe because he was a boy (EH. 37). She testified that a secretary or investigator called her at work about

giving a deposition (EH. 39). This was before the trial (EH. 39). She didn't know who Kenny's lawyers were and received all her information from Scarpo (EH. 40). When Kenny's lawyer called back, she gave the deposition, answering the questions put to her (EH. 42). She was not asked about the abuse, although she was prepared to answer those questions – in fact that's why she had the lawyer call at night when everybody was out of the office (EH. 43). She assumed Kenny had told his lawyer about the abuse (EH. 46).

On redirect, Susan Moore reiterated that she would have been willing to testify in person at the trial (EH. 48). The attorneys certainly could have gotten her phone number from her mother and contacted her (EH. 49). Finally, she testified that she has been married four times and suffered mentally because of the years of abuse by Scarpo (EH. 49).

Next, Linda Arnold testified that she, like Susan, is also Kenny's stepsister (EH. 54). She is older, so Kenny was three or four when they met and she was eleven or twelve (EH. 54). Linda Arnold lived under Scarpo for about eight years (EH. 54).

Linda Arnold characterized Scarpo as flamboyant, arrogant, intimidating (EH. 55). He exaggerated, tried to be overly impressive, and often misrepresented the truth (EH. 55) For instance, he would always tell people that she graduated from medical school, when in fact she went to nursing school (EH. 55).

Scarpo physically abused Linda many times (EH. 55). He also verbally, emotionally, and sexually abused her (EH. 55). Linda recalls that, when she was fifteen or sixteen, Scarpo made her drop her pants and underwear, bend over, and hold her ankles, while he used a belt buckle on her (EH. 56-57). This sort of beating could happen more than once a week (EH. 57). Like Susan's, Linda's abuse continued for the duration of her residency with Scarpo (EH. 58). She ran way when she was 18 (EH. 58).

Linda remembers Scarpo beating Kenny and that Scarpo was more aggressive because Kenny was a boy (EH. 58). With Kenny, Scarpo was not afraid to leave bruises where they could be seen (EH. 58). She recalls Kenny having black eyes, a bloody nose, fat lips, bruises, and cuts (EH. 58). In addition to using the belt on Kenny, Scarpo would slap, punch, and throw Kenny across the room (EH. 58). Once, Ms. Arnold recalled, Scarpo lined all four kids up to find out who had committed some infraction or other (EH. 59). Scarpo threatened to beat each of them until the child who had done the deed confessed (EH. 59). Linda believed that Kenny had probably committed the infraction, but, because Kenny had just received a terrible beating a few days before, Linda took the blame and the beating (EH. 59). Kenny's beatings were as frequent as, or more frequent than, anyone else's (EH. 59). For bedwetting, which Scarpo thought Kenny could control, Scarpo beat Kenny, made

him sleep on the wet floor or the wet sheets, took away Kenny's sheets, or confined Kenny to his room for days wearing only his underwear and being fed only bread and water (EH. 60-61). If Kenny cried, Scarpo increased the violence of the beating (EH. 61). The children were never given medical treatment because Scarpo didn't want anyone to see the bruises (EH. 62). When Scarpo broke Joanne's collar bone, nose, or ribs, her mother wouldn't go to the doctor because the doctor would ask what happened (EH. 62). Frequently, Joanne would have black eyes or bruises on her face which she tried to cover in makeup (EH. 63).

Scarpo also sexually abused Linda (EH. 64). She realized his actions were inappropriate when she was 15, but they continued until she left home at 18 (EH. 64).

Linda testified that, during Kenny's trial, an investigator called her and indicated that there was nothing she could share that would help Kenny because the trial was underway and the defense couldn't introduce new witnesses or evidence at that time (EH. 65). Had she been asked, she would have testified (EH. 65).

Linda confirmed Susan's testimony that Scarpo drank from morning to night (EH. 65). Linda never knew what to expect and lived in constant fear (EH. 66). Once, when she was sixteen, Scarpo put a gun to her head after a bizarre incident when Scarpo picked a fight with Linda's date (EH. 68-69). When her date fled,

Scarpo put a gun to her head and made Linda call the boy and tell him that if he ever came near her that Scarpo would shoot her (EH. 67-68).

On cross-examination, Linda Arnold testified that the investigator did not ask her about abuse by Scarpo (EH. 75-76). Then, on redirect, she testified that neither the investigators nor the attorney asked her to testify, or to give a deposition (EH. 78). Further, neither attorney nor investigator explained the type of information needed for a penalty-phase trial (EH. 79).

Lilly Brown, Kenny's aunt, testified that, when Kenny was fifteen months old, he was left with Lilly's sister, Dorothy Lee Stewart. Dorothy whipped Kenny, made him stay in bed all day and was very brutal (EH. 82).

Ms. Brown saw Kenny again when he was almost fourteen and back in Florida (EH. 82). Lilly remembers Scarpo telling her that he was very brutal with Kenny because Kenny came from bad genes (EH. 84). Scarpo told her he used his fists on Kenny, put garbage cans on his head, and that, even after Kenny was grown, he whipped Kenny several times (EH. 85). Mrs. Brown was never contacted by Kenny's attorneys or investigator (EH. 85). Had she been contacted, she would have been happy to testify (EH. 85).

The aforementioned testimony verifies that much of the penalty phase evidence was not even true and certainly didn't serve to individualize Mr. Stewart, the very

purpose of mitigation evidence and essence of a reliable penalty phase. See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995). In its order denying relief, although the lower court did not rule on the question of deficient performance, the court appears to have found Arnold and Smith credible.[2] However, in sustaining Mr. Stewart's convictions and sentences on the grounds that the prejudice prong was not met, the lower court erred in failing to follow this court's precedent regarding the prejudice prong of Strickland.

In Rose v. State, 675 So.2d 567 (Fla. 1996), this Court ordered a new penalty phase because counsel did not obtain school, hospital, prison, and other records. Rose 675 So.2d at 572. Interestingly, in Rose, as in the instant case, counsel opted to present a far-fetched "accidental death" theory instead of focusing on things that might have established to a jury that he should get life. Rose, 675 So.2d at 572. Certainly, in Rose, as in this case, the evidence presented in postconviction was far more compelling than that presented at trial. See also Phillips v. State, 608 So.2d 778 (Fla. 1992) (prejudice established by strong mental mitigation: which was "essentially unrebutted"); Mitchell v. State, 595 So.2d 938 (Fla. 1992) (prejudice established by

[2]Further, Mr. Barbas conceded the quality of the testimony of Susan Smith and Linda Arnold (EH. 128). Additionally, the record now before the Court shows conclusively that Mr. Barbas could have presented this compelling testimony to the jury, which instead heard Bruce Scarpo present a false past which his savage brutalization of Kenny Stewart is never mentioned.

expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So.2d 1288 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (quality of mitigating evidence presented at hearing established that counsel's errors deprived defendant of a reliable penalty phase proceeding); Rutherford v. State, 727 So.2d 216 (Fla. 1998) (prejudice factors are balance of aggravation and mitigation and whether evidence presented at hearing is cumulative); see also Haliburton v. Singletary, 691 So.2d 466 (Fla. 1997); Lush v. State, 498 So.2d 902 (Fla. 1986); Breedlove v. State, 692 So.2d 874 (Fla. 1997); LeCroy v. Dugger, 727 So.2d 236 (Fla. 1998); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Heiney v. State, 620 So.2d 171 (Fla. 1993); Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995); and Chandler v. United States, 193 F.3d 1297 (11th Cir. 1999).

State and federal courts have and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See, e.g. Deaton v. Dugger, 635 So.2d 4, 8 (Fla. 1993); Phillips v. State, 608 So.2d 778 (Fla. 1992); State v. Lara, 581 So.2d 1288 (Fla. 1991); Stevens v. State, 552 So.2d 1082 (Fla. 1989); Bassett v. State, 541 So.2d 596 (Fla. 1989); State v. Michael, 530 So.2d 929, 930 (Fla. 1988); O'Callaghan

v. State, 461 So.2d 1154, 1155-56 (Fla. 1984); Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984). In this case, counsel settled for the convenient path, choosing to present what the sentencing court summarized as "some form of trauma" when Mr. Stewart learned that Scarpo was not his real father. This story was readily available and, though tidier than the truth, which in this case is horrendous, the story was not Mr. Stewart's but Scarpo's.

At the hearing, Mr. Barbas acknowledged that Scarpo was his main contact (EH. 113). His denial that he relied heavily on Scarpo for the development of the penalty phase (EH. 122) is not credible when his affidavit reflects that the only other witness he talked to was Joyce Engle, and he met her with Scarpo (EX. 5). Almost all of his minimal penalty-phase preparation involved Scarpo (EX. 5). According to Barbas' Scarpo-centric penalty-phase theory, then, this revelation that Scarpo wasn't

his “blood father” accompanied by bad news about some relatives whom Stewart didn’t even know, was the primary point of mitigation the defense was arguing to the jury. Unfortunately, not only was this not an accurate portrait of Mr. Stewart’s childhood, the paint Mr. Barbas was using was disappearing, and, after the evidentiary hearing, that portrait of Mr. Stewart’s childhood has been erased, and replaced by a litany of brutality at the hand of Scarpo himself. The note which Mr. Stewart wrote to Fernandez should have alerted the defense to the fact that the skeletons in Papa Walton’s closet may not have been metaphorical (EX. 3). Although Mr. Barbas concluded that the testimony of Arnold, Moore, and Brown was compelling and that he would have utilizedit , he actually tried to imply that the note was not in his file at the time of trial, though he concedes it is there now (EH. 162-164; EH. 3). Sonny Fernandez, however, indicates that he has a copy of the note in his file (EH. 202). Further, the Court indicates that the note more than likely came from Mr. Fernandez (EH. 214-215). Further, the defense had notice that Scarpo beat Kenny, as Mr. Fernandez testified that he obtained information about this from Joyce Ingle (PC-R. 204). Also, Fernandez testified that Lilly Brown asked him to call about Kenny’s background but he apparently didn’t follow up and call her (EH. 205). Clearly, the defense should have known about Scarpo and should have talked to Susan and Linda in person. Importantly, both Susan Moore and Linda Arnold deny

that either Barbas or Fernandez explained mitigation to them. Thus, the fact they wouldn't volunteer abuse to strangers on the phone is completely plausible. In her trial deposition, she did say that Stewart was "pretty troubled growing up" but this was not pursued by counsel (R. 386).

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). In the instant case, other than to say he didn't know about Scarpo's brutality, attorney Barbas does not offer a reason, let alone attempt to circumscribe a strategy, for not presenting the extraordinarily powerful testimony of Susan Moore and Linda Arnold. On the contrary, he states that he would have certainly used their testimony in the penalty phase (EH. 128).

Had the jury heard of the unrelenting abuse Mr. Stewart endured at the hand of Scarpo, there is no reasonable probability that the results of the sentencing phase of the trial would not have been different. Strickland, 466 U.S. at 694. Having heard only the misleading story of Mr. Stewart from Scarpo, the jury and judge were incapable of making an individualized assessment of the propriety of the death sentence in this case.

The evidence presented by Mr. Stewart at the evidentiary hearing presents a far different picture than that presented at trial. See, Chandler, Lara, and Baxter, supra. In fact, not only would the powerful, new evidence of childhood abuse fit comfortably in a painting by Hieromymous Bosch, it was, as in Phillips, "essentially unrebutted." Given this unrebutted testimony of unremitting abuse, it would be impossible for the sentencing court to again find that "...in tracing the Defendant's life ... the Defendant was able to cope with these various situations and ... deliberately chose a life that led him to ... the crime" (R2. 24-25). That might be true if in fact his father had been Papa Walton, as the trial court evidence made his childhood appear, but it is not true for the Kenny Stewart that Scarpo beat and abused from the time he was eighteen months old until he was grown (R2. 634; EH. 85).

In Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), the Federal Court of Appeals explained the essential constitutional mandate the United States Supreme Court has annunciated and emphasized:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death

> penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Tyler v. Kemp, 755 F.2d 531, 743 (11th Cir. 1985) (citations omitted).

Therefore, in preparing and presenting penalty-phase evidence, counsel's highest duty is to individualize the human being in jeopardy of losing his or her life. See, e.g, Harris v. Dugger; Middleton v. Dugger; Kimmelman v. Morrison, 106 S.Ct at 2588-89 (1986) (failure to request discovery based on mistaken belief that the state was obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); see also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

Finally, this Court, having remanded this case back to the circuit court for written findings, Stewart v. State, 549 So.2d 1171 (1989), noted, in considering the sufficiency of those findings, which mentioned but arguably gave no weight to childhood trauma, that: "While the Order may not mention every incident of abuse that Stewart suffered, we are convinced that it substantially covers his traumatic childhood..." Stewart v. State, 588 So.2d 972, 974 (1991). Now, considering the available evidence that should have been presented and which documents that Mr. Stewart suffered an unbroken sequence of abuse and barbarism from womb to crime with no Waltonesque interlude of even minimally normal upbringing, this Court must concede that, not only did the sentencing order not "substantially cover his traumatic childhood," the judge and jury did not even hear an accurate, complete recounting of the unabated brutality Mr. Stewart endured. Further, a true picture of Stewart's childhood would have rendered Dr. Afield's testimony more compelling, would have required a fair court to give substantial, not slight or little, weight to the statutory mental health mitigators, and would have, as Dr. Afield concedes and Dr. Sultan confirms, undercut the "non-rehability" of Mr. Stewart, a factor which the sentencing court uses as determining aggravators, explicitly finding that Mr. Stewart "was and is beyond rehabilitation" in its sentence for robbery with a firearm (R2. 11). (See also R2. 87).

Also, Mr. Barbas had a second opportunity to present this crucial mitigation evidence when Mr. Stewart was resentenced in December, 1989 (R2. 24-27). At that time, Mr. Barbas advised the court that he has found no new mitigation. Id. He had asked the court for a continuance on December 8, 1989, so he could subpoena prison records to look for mitigation, but he did no new investigation (R2. 90). Thereafter, on December 23, 1989, the court filed its written sentencing order (R2. 11-12). The court gave slight weight to the "extreme mental or emotional disturbance" mitigator, little weight to the "substantial impairment" mitigator, little weight to the "age" mitigator, "and, apparently, no weight to "catch-all character" mitigation, finding:

> ...the Defendant suffered some form of trauma at approximately age thirteen (13) years, when during a relatively short period of time, his mother committed suicide, two (2) aunts were killed in a vehicular accident, and discovered that the man he thought to be his natural father was, in fact, his step-father; that he was given information that his step-father was instrumental in some way in the death of his natural father...

(R2. 26).

Had the court been presented with the poignant, powerful mitigation of childhood abuse and the battery of his stepsisters and stepmother now of record and available at trial and resentencing, there is a reasonable probability that the outcome would have been different, particularly when considered with the new evidence of

Mr. Stewart's history of substance abuse and alcoholism presented by a properly prepared expert.

2. Failure to present evidence of intoxication at the time of the offense.

In addition to the childhood abuse evidence, there was considerable evidence of Mr. Stewart's intoxication at the time of the offense. Significant substance abuse is a mitigating factor. See Savage v. State, 588 So.2d 975 (Fla. 1991); Cooper v. State, 581 So.2d 49 (Fla. 1991); Downs v. State, 574 So.2d 1095 (Fla. 1991); Carter v. State, 560 So.2d 1166 (Fla. 1990); Pentecost v. State, 545 So.2d 861 (Fla. 1989); Masterson v. State, 516 So.2d 256 (Fla. 1987); Hansbrough v. State, 509 So.2d 1081 (Fla. 1987).

In particular, evidence of intoxication at the time of the offense has been repeatedly recognized as a mitigating factor. See Buckrem v. State, 355 So.2d 111 (Fla. 1978); Norris v. State, 429 So.2d 688 (Fla. 1983); Amazon v. State, 487 So.2d 8 (Fla. 1986); Proffitt v. Florida, 510 So.2d 896 (Fla. 1987); Fead v. Florida, 512 So.2d 176 (Fla. 1987); Masterson v. State, 516 So.2d 256 (Fla. 1987); Holsworth v. State, 522 So.2d 348 (Fla. 1988); Carter v. State, 560 So.2d 1166 (Fla. 1990); Cheshire v. State, 568 So.2d 908 (Fla. 1990); Buford v. State, 570 So.2d 923 (Fla. 1990); Downs v. State, 574 So.2d 1095 (Fla. 1991). Further, the overwhelming

evidence of intoxication could and should have been presented to weaken the aggravating circumstances that were presented by the prosecution. In Mr. Stewart's case, one of the two aggravating factors, committed in the course of a robbery, arose from the circumstances of the instant case. Counsel should have attacked the weight to be afforded this aggravating factor by presenting the substantial evidence of intoxication at the time of the offense. Similarly, the prior violent felony aggravators arising from the contemporaneous shooting might have been diluted by evidence of Mr. Stewart's intoxication at the time of the offense. This evidence was not argued to the jury as mitigation.

Other witnesses could have testified concerning Mr. Stewart's severe substance abuse problem and his intoxication at the time of the offense. Dr. Gerald Mussenden, a psychologist who evaluated Mr. Stewart with respect to competency and sanity, noted the following in his report:

> Kenneth was next asked regarding drug and alcohol problems. Kenneth does admit that he is an alcoholic and that he has consumed large amounts of alcohol and illegal drugs over the years. It is obvious that while he was living within the community, he could not control his intake of alcohol nor could he control his intake of illegal drugs. He indicated that he would drink approximately one gallon of whiskey a day and would use approximately five rocks of cocaine.

(R. 898-901). Dr. Mussenden further noted that, on the day of the offense, Mr. Stewart began drinking during the mid-part of the morning, after which he went to the cemetery to visit his mother's grave (Id.). The offense occurred late that evening after a day of drinking (Id.). Similarly, Dr. Gonzalez, another mental health expert who evaluated Mr. Stewart for competency, would have been able to testify that Mr. Stewart woke up in the morning and began drinking 90 proof whiskey, and finished off the gallon during the day (R. 902-3). Like Dr. Mussenden, Dr. Gonzalez would also have been able to recount Mr. Stewart's ingestion of illegal drugs on the day of the offense, and his trip to the cemetery to visit his mother's grave (Id.).

Further, as Dr. Sultan testified (EX. 1, pp. 19-20), there was abundant evidence of Mr. Stewart's extensive history of drug abuse and alcoholism dating back to the age of 12, when he began drinking (EX. 1, pp. 6-7). None of this mitigation was presented to the jury either, those records were not obtained, and were not presented to the mental health expert.

Mr. Stewart's history establishes that weighty statutory mitigation was present in his case. The trial court found that "little weight" or "slight weight" was to be afforded to the two statutory mental health mitigating factors (R. 246), and that Mr. Stewart was in "sufficient control of his faculties to make a conscious decision" at the time of the offense (Id.). The trial judge also gave little weight to Mr. Stewart's age

(Id.). Neither of the aggravators found in Mr. Stewart's case is a weighty factor, Maxwell v. State, 603 So.2d 490 (1992), whereas the two statutory mitigating factors present in Mr. Stewart's case are "two of the weightiest mitigating factors." Santos v. State, 629 So.2d 838 (Fla. 1994).

3. Failure to obtain and/or present pertinent records.

Defense counsel's performance was rendered ineffective in an important respect because counsel did not obtain or properly present important records through the mental health expert. Mr. Barbas did not obtain these records and the State did not disclose them, although they contained essential mitigation. At the evidentiary hearing, Dr. Sultan testified by introduction of her deposition that she reviewed records of the Hillsborough County Jail (EX. 1, p. 6; EX. 1, p. 4). These records outline in detail Mr. Stewart's mental health problems, including two suicide attempts while he was awaiting trial in the instant case (EX. 4). The jail also had the Tampa General Hospital records of treatment following of Mr. Stewart's suicide attempts (EX. 4). These records, Department of South Carolina Youth Services records, and school records provide, in conjunction with interviews of Mr. Stewart, Linda Arnold, and Susan Moore, the basis for Dr. Sultan's opinion that Mr. Stewart had suffered long-standing substance and alcohol abuse (EX. 1, p. 14). This evidence was not presented to the sentencers. These records allow Dr. Sultan to rebut Dr. Afield's

devastating commentary to the jury regarding Mr. Stewart's lack of potential to be rehabilitated (EX. 1, p. 15). At the evidentiary hearing, Dr. Afield conceded that his opinion was based on the fact that Mr. Stewart had had a period of relative normalcy with Scarpo (EH. 248). An expert, properly prepared and provided records of Mr. Stewart's true history, could not testify, as Dr. Afield did, that Stewart is beyond rehabilitation (R. 696; EX. 1, pp. 15-16).

The following are brief examples of the information in the jail records:

> "At apparently 0500, Keith Kirkland 1N7"A" was pulled from cell to go to clinic.
>
> From the time this writer took over 1 North catwalk I noticed Kirkland lying on his back asleep. All night he was in the same position as at the time he was pulled for the clinic. Frank Hale, his cell mate 1N7"C" said Kirkland gave him (Hale) his parents phone number and said if anything happens, call my parents. Subject could not be awakened for canteen list by Ofc. Ford or breakfast by Ofc. Rodriguez."
>
> * * *
>
> "At approximately 0455 hours, Deputy Rodriguez #1972 informed me that inmate Kirkland was not responsive to attempts to awaken him.
>
> Deputy Rodriguez and I entered the cell and attempted to wake inmate Kirkland. There was still no response. Inmate Kirkland was breathing heavily, his pupils appeared dilated and his skin was warm

Nurse Wright was contacted and instructed us to bring him to the clinic.

At this time inmate Hale, Frank WM #363341 informed me that inmate Kirkland had been talking about committing suicide for 2 or 3 days. Inmate shares the same cell with inmate Kirkland. Inmate Hale further stated that inmate Kirkland was taking the same medication as he was. The clinic identified the medication as Elavil.

Upon examination of inmate Kirkland Nurse Wright requested that EMS transport. EMS arrived approximately 0520 hours. Deputy Shirley escorted inmate Kirkland to Tampa General Hospital.

A search of cell 1 North 7 was conducted and no contraband was found."

* * *

"2233 R.T. Nurse came in and put a nose O2 on Keith. Keith asked "How he got here"

2345 Keith says he sees ants crawling all over the walls."

* * *

"0011 hrs. Nurse Davis checked vital signs. Inmate continued to sleep through even shaking and voice commands."

* * *

"At 0120 hours, this date, I received a telephone call from a lady that identified herself as the wife of Keith Kirkland. She said her name was Marjorie Kirkland. She was crying and asked how Keith Kirkland was doing. I advised her

> that as far as I knew, he was doing ok. She said that she had received a letter from Keith today (which would have been 11-5-85) and Keith had returned all of her pictures and had told her in the letter that he had 400 mg of elavil and that he was going to O.D. on the pills.
>
> The lady went ahead and told me that a couple of months ago he had told her the same thing and that she knows he definitely will take the pills in an attempt to O.D.
>
> I asked how he had gotten the pills and she said she did not know but that he was housed in 1S1 which she told me was a single cell.
>
> She kept crying and told me that if I found out anything to leave a message for her at 935-5618 and that she would call me back.
>
> At no time did I mention to her that Keith Kirkland was in TGH ICU as a result of overdose.
>
> s/Hubert G. Conrad #1623
> Sergeant
> Booking and Releasing Bureau."

(EX. 4). Mr. Barbas does not know if he provided these records to Dr. Afield (EH. 160). Further, these records are not addressed in the reports of any of the mental health experts who examined Mr. Stewart, nor does either Afield's or Barbas' affidavit for fees mention time spent obtaining or reviewing these records (EX. 5; E2). At the evidentiary hearing, Dr. Afield did confirm that he was not provided records of the full history of Mr. Stewart's drug and alcohol abuse (EH. 244).

4. Failure to prepare mental health expert.

Mr. Stewart was entitled to expert psychiatric assistance when the state made his or her mental state relevant to the proceeding. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see O'Callaghan v. State, 461 So.2d 1354 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mason v. State, 489 So.2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert plays a critical role in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and

> about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

This historical data must be obtained not only from the patient but from sources independent of the patient because a patient's self-report is inherently suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Mason, 489 So.2d at 737, quoting Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980).

Under the Ake standard, trial counsel Barbas failed to provide his client with "a competent psychiatrist . . . [to] conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S. Ct. at 1096 (1985). Dr. Afield was retained to do a competency evaluation; however, because of the lack of time and materials provided to him by counsel, Dr. Afield's testimony actually hurt Mr. Stewart and he could not relate the extent and quality of Mr. Stewart's major depressive episodes, fugue states, severe alcohol and substance abuse, physical abuse, and diminished capacity at the time of the offense. At the evidentiary hearing, Dr. Sultan's testimony was much more powerful than Dr. Afield's trial testimony.

Dr. Sultan interviewed Mr. Stewart on several occasions, meeting with him for 10 or 11 hours in November 1993 (Ex. 1, p. 5-6). Dr. Afield only saw Mr. Stewart twice, initially evaluating him for competency and then meeting with him the night before Afield's testimony (R. 683-84).

Dr. Sultan reviewed numerous documents and records (EX. 1, p. 6). These records related to Mr. Stewart's longterm history of drug and alcohol abuse, including his level of intoxification at the time of the charged crime, as well as suicide attempts by Mr. Stewart, both as a teenager and while incarcerated pending trial (Ex. 1, pp. 6-7). These records provided Dr. Sultan with a documented history of Mr. Stewart's

substance abuse and sucidal tendencies, all of which could have been submitted to the jury and trial court as mitigation. Contrastingly, it is not clear from the Dr. Afield's trial testimony what, if any, records he reviewed. In fact, at the evidentiary hearing Dr. Afield testified that his opinion at trial was based on the inaccurate Scarpo hypothetical and his competency evaluation (EH. 256). Thus, it is clear that Dr. Sultan was more fully informed in terms of records and documentation of Mr. Stewart's problems. Had attorney Barbas provided Dr. Afield with these records, which were readily available, Dr. Afield could have educated the jury and the court as to the true nature and extent of Mr. Stewart's addiction and illness.

Additionally, Dr. Sultan, in contrast to Dr. Afield, was fully informed as to the horrendous childhood abuse inflicted on Mr. Stewart at the hands of Bruce Scarpo (Ex. 1, p.8). Dr. Sultan reviewed documents relating to the abuse, including a note from Mr. Stewart to attorney Barbas, and the hearing testimony of Mr. Stewart's sisters and Aunt (Ex. 1, p.8). Dr. Sultan also conducted extensive interviews with Mr. Stewart's sisters (Ex. 1, p. 8). Dr. Afield testified at the evidentiary hearing that attorney Barbas never told him about Scarpo's abuse, but that he would have "absolutely" used it in his testimony had the information been provided (EH. 262). Further, Dr. Afield conceded that this information demonstrated that Mr. Stewart never had a chance for rehabilitation, thus undercutting Afield's trial testimony on

this point (EH. 258). Dr. Afield's lack of knowledge of the Scarpo abuse prevented him from providing a fully formed opinion relating to Mr. Stewart. Not only did this incomplete picture prevent Dr. Afield from imparting powerful mitigating evidence of childhood abuse to the sentencer, it served as the foundation for his faulty testimony about Mr. Stewart's prospects for rehabilitation.

The record demonstrates that attorney Barbas inadequately prepared Dr. Afield to testify at the penalty phase of Mr. Stewart's trial in violation of Ake . Dr. Afield was not prepared to impart the nature and depth of Mr. Stewart's addiction, both historically and at the time of the crime, and depressive state, including multiple suicide attempts. Nor was Dr. Afield informed as to the extent of the horrible childhood abuse inflicted on Mr. Stewart.

Thus, Mr. Stewart was denied the competent mental health evaluation and assistance that he was entitled to. The lower court's order ignores the litany of testimonial and documentary evidence of which Dr. Afield was deprived. This evidence, properly provided to the expert, would have presented the jury and court with a wealth of mitigation, both statutory and non-statutory, which was never presented.

5. Conclusion.

The mitigation available in this case is comparable to that produced by the

defendant in Hildwin. See Hildwin v. Dugger, 654 So.2d at 110. The "quite limited" mitigation testimony at trial in Hildwin is equally limited in this case. Moreover, as in Chandler, Lara, and Baxter, the evidence presented at the evidentiary hearing paints a different, darker picture than the trial testimony did. The aggravators in this case simply do not outweigh the mitigation. See, Chandler, supra, Baxter, supra, Rutherford, Haliburton, and Jones. The new mitigation of childhood abuse and psychiatric diagnosis is of the kind and quality that has been held to be compelling. Baxter, supra; Rose, supra; Mitchell; Lara; LeCroy. Further, this case does not include a finding of HAC or CCP, befitting the most egregious murders. Chandler; Baxter; and Rutherford. Arguably, this case involves an accidental shooting by a very drunken man, and the jury returned a special verdict of felony murder. Finally, the evidence presented at the evidentiary hearing is not cumulative to that presented at the trial. The testimony of Linda Arnold, Susan Moore, and Lilly Brown is different than, and additional to, the type of very early childhood trauma Scarpo testified to. Further, the evidence is more direct, providing specific accounts of abuse, and there is a very substantial amount of mitigation regarding drug abuse and alcoholism at the time of the crime as well as a long documented history of such abuse. The fact that Stewart, as a boy, also had to witness brutality to his stepsisters and stepmother is

new and significant. See, Jones; Rutherford. Overriding all of this is the fact that Mr. Stewart's death sentence is based in large part on false evidence, on lies.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

Mr. Barbas testified that voluntary intoxication could have been used as a defense to both robbery and first-degree murder (EH. 179), however, he failed to use plentiful and available evidence of Mr. Stewart's voluntary intoxication to assert this viable defense. See Garner v. State, 28 Fla. 113, 9 So. 35 (Fla. 1891). "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So.2d 91, 92-93 (Fla. 1985) (citations omitted). See Bell v. State, 394 So.2d 979 (Fla. 1981); State ex rel. Goepel v. Kelly, 68 So.2d 351 (Fla. 1953). See also Occhicone v. State, 570 So.2d 902 (Fla. 1990); Gurganus v. State, 451 So.2d 817 (Fla. 1984). Furthermore, a defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882 (1981). Mr. Barbas did not prepare such an instruction or request such an instruction because he testified that the defendant had told him, when he was preparing the defendant to testify, that his original plan was to shoot the people that picked him up hitchhicking (EH. 179). However, this

testimony is not credible because Mr. Barbas did argue that the shooting not intentional, but not accidental (R. 515-526). Further, he asked the jury why Stewart would say he had a knife (R. 518). Actually, Mr. Barbas' jury argument is completely consistent with a voluntary intoxication defense. Thus, his testimony that he considered asserting voluntary intoxication, but rejected it because of Mr. Stewart's alleged statement to him (EH. 179). In fact, there was substantial evidence, from Ms. Acosta's testimony, that Mr. Stewart was intoxicated (R. 296). Mr. Smith also testified about alcohol use (R. 31). Further, Stewart's vague statements to Mrs. Berryhill evidence a person not all there (R. 386).

The standard governing a defendant's right to a jury instruction in this regard is also settled: any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner v. State, 480 So.2d 91 (Fla. 1985); Mellins v. State, 395 So.2d 1207 (Fa. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981); cf. Bryant v. State. A voluntary intoxication defense must be pursued by competent counsel if there is evidence of intoxication, even under circumstances where trial counsel explains that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So.2d 348 (Fla. 4th DCA 1985).

The standard instruction on intoxication reads as follows:

Voluntary drunkenness or intoxication (impairment of the mental faculties by the use of narcotics or other drugs) does not excuse or justify the commission of crime, but intoxication (impairment of the mental faculties by use of narcotics or other drugs) may exist to such an extent that an individual is incapable of forming and intent to commit a crime of which a specific intent is an essential element. When the evidence tends to establish intoxication (impairment of the mental faculties by the use of narcotics or other drugs) to this degree, the burden is upon the state to establish beyond a reasonable doubt that the defendant did, in fact, have sufficient use of his normal faculties to be able to form and entertain the intent which is an essential element of the crime.

Drunkenness (impairment of the mental faculties by the use of narcotics or other drugs) which does not go to the extent of making a person incapable of forming the intent, which is an essential element of the crime, does not in any degree reduce the gravity of the offense. Drunkenness (impairment of the mental faculties by the use of narcotics or other drugs) arising after the formation of the intent which is an essential element of a crime and voluntarily induced for the purpose of nerving the offender to commit a crime already planned does not excuse or reduce the degree of crime.

Partial intoxication (impairment of the mental faculties by the use of narcotics or other drugs) which merely arouses the passions or reduces the power of conscience neither mitigates nor lessens the degree of guilt if the offender still knew right from wrong, the probably consequences of his act, and was capable of forming a specific intent to commit the crime.

A voluntary intoxication defense would not have been inconsistent with any theory of defense and Mr. Barbas' explanations to the contrary are not credible.

Pursuant to Florida law specific intent may be negated by evidence of voluntary intoxication, i.e., the inability to form the requisite intent for robbery or the specific intent required for premeditated murder due to intoxication. Linehan v. State, 476 So.2d 1262 (Fla. 1985); Gurganus v. State, 451 So.2d 817 (Fla. 1984). See also Occhicone v. State, 570 So.2d 902, n.2 904 (Fla. 1990). Intoxication was a relevant and significant defense to the charge which supported, rather than conflicted with, the defense that Mr. Stewart's counsel presented. Voluntary intoxication could and should have been employed as a defense to Mr. Stewart's first-degree murder charge and could have rebutted the necessary element of premeditation implicated in the murder and robbery charges.

An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc)(ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present

a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers.

Use of the intoxication evidence and an appropriate mental health expert in Mr. Stewart's case would have prevented a verdict of first-degree murder on the premeditated murder theory. Prejudice from counsel's failure is clear because Mr. Stewart could not have formed specific intent for murder or robbery. See Bunney v. State, 603 So.2d 1270 (Fla. 1992).

Arguing voluntary intoxication would not have been inconsistent with counsel's defense at trial. In fact, evidence of Stewart's drunken state would have supported the theory that the shooting was accidental. Counsel did not contest guilt -- in fact, he conceded it (R. 512). In his opening statement, Mr. Barbas argued that the defense would rely on Michelle Acosta's testimony (R. 281-282) and in closing did rely on her testimony about Kenny saying that he had a knife, 15 seconds passing, and Acosta hitting the gas (R. 519). ("Michelle Acosta's version of what happened is basically what happened.") But Ms. Acosta also said that Mr. Stewart's speech was slurred and he was "on something" (R. 296). She also portrayed him as non-communicative. All of her statements about Mr. Stewart and his actions indicated that he was drunk. Therefore, based on the record, Mr. Barbas should have requested the instruction and asserted the defense. Had Mr. Barbas learned about Mr. Stewart's

background and long history of substance abuse, he would have asserted the defense of voluntary intoxication. Further, had he done so, there is a reasonable probability that the jury would have determined Mr. Stewart was impaired.

C. THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE IN VIOLATION OF BRADY V. MARYLAND AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Recently, in Way v. State, No. SC78640 (Fla. 2000), this court analyzed Brady v. Maryland, and its progeny in light of Strickler v. Green, 119 S. Ct. 1936 (1999), which provides:

> There are three components of a true Brady violation: [1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued.

Way at 11 (quoting Strickler, 1195 S. Ct. at 1948).

Additionally, in Young v. State, 739 So.2d 553 (Fla. 1999), this Court noted that the focus in postconviction Brady-Bagley analysis is ultimately the nature and weight of undisclosed information:

> The ultimate test in backward-looking postconviction analysis is whether information which the State possessed and did not reveal to the defendant and which information was thereby unavailable for trial, is of such a nature and weight that confidence in the outcome of the trial is

> undermined to the extent that had information been disclosed to the defendant, the result of the proceeding would have been different.

Young, 739 at 559.

At the evidentiary hearing, Mr. Stewart produced evidence regarding numerous documents in possession of the Hillsborough County Jail which were never disclosed to defense counsel (EX. 4). These documents outline in detail Mr. Stewart's mental health problems, including two suicide attempts and the ensuing internal investigation into these attempts, while he was awaiting trial in the instant case. Id. The records also note that Stewart was suffering hallucinations, and had been prescribed anti-depressant medication. Id. The county jail also obtained but did not disclose the hospital records that were generated as a result of Mr. Stewart's suicide attempts. Id.

Under Way, then, these records are favorable to Mr. Stewart in that the records provide strong evidence of mitigation. Dr. Sultan testified at the evidentiary hearing that the suicide attempts are an indication of how serious his depression has been (EX. 1, p.17). Further, Sultan testified that he was going through withdrawal and the symptoms of withdrawal from alcohol and drugs (EX. 1, p. 18). Further, the records contain evidence that Mr. Stewart had been prescribed Elavil (EX. 4). The records describe Mr. Stewart hallucinating ants on the wall. Id.

These records, which were, in all likelihood, inadvertently suppressed, contain important mitigation evidence. They would have led a reasonably competent trial counsel to examine Mr. Stewart's substance abuse history and should have alerted counsel to Mr. Stewart's deeply troubled past. These records, which were in the custody of a police agency, the Hillsbrough County Jail, should have been turned over to the defense under Brady. Mr. Barbas' testimony that he thinks he saw them is not credible as they ate not in his penalty phase file (EX. 3). Alternatively, if he had them, he should have used them.

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MERITORIOUS CLAIMS

1. The Lower Court Erred In Denying Mr. Stewart An Evidentiary Hearing Or Relief On Claim (II) Of The 3.850 that Mr. Stewart's Sentencing Jury Was Misled By Prosecutorial Argument And Jury Instructions Which Unconstitutionally Diluted The Jury's Sense Of Responsibility For Sentencing In Violation Of The Eighth And Fourteenth Amendments.

Mr. Stewart's jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory" (R. 622; R. 746; R. 740). Because great weight is given the jury's recommendation in Florida, the jury is a sentencer. Espinosa v. Florida, 112 S. Ct. 2926 (1992). The jury's sense of responsibility was diminished by the jury instructions which indicate that the jury role is advisory (R. 622; R. 746).

The prosecutor calls the jury's decision a "recommendation" (R. 740). This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). See Pait v. State, 112 So.2d 380 (Fla. 1959). This claim is not procedurally barred because the improper argument and jury instruction constitute fundamental error. See State v. Johnson, 616 So.2d 1 (Fla. 1993); Fuller v. State, 540 So.2d 182, 184 (Fla. 5 DCA 1989).

2. The Lower Court Erred In Denying Mr. Stewart An Evidentiary Hearing Or Relief On His Claim (XII) In The 3.850 That Mr. Stewart's Sentence Of Death Violates The Fifth, Sixth, Eighth, And Fourteenth Amendments Because The Penalty Phase Jury Instructions Were Incorrect Under Florida Law And Shifted The Burden To Mr. Stewart to Prove That Death Was Inappropriate And Because the Trial Court Employed A Presumption Of Death In Sentencing Mr. Stewart To Death.

Mr. Stewart's jury was improperly instructed that mitigating factors must outweigh aggravating factors (R. 747).

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So.2d 1 (Fla. 1973)(emphasis added). This straightforward standard was not applied at the penalty phase of Mr. Stewart's capital proceedings (R. 747). To the contrary, both the court and the prosecutor shifted to Mr. Stewart the burden of proving whether he should live or die. In Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die, concluding that these claims should be addressed on a case-by-case basis in capital post-conviction actions. Hamblen, 546 So.2d at ___.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, supra, because the instruction given in this case unconstitutionally shifts to the defendant the burden of proving that mitigation outweighs aggravation. In so instructing Mr. Stewart's jury, the court injected misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Prosecutorial argument and judicial instructions at Mr. Stewart's capital penalty phase required that the jury impose death unless mitigation was not only produced by

Mr. Stewart, but also unless Mr. Stewart proved that the mitigation he provided outweighed and overcame the aggravation (R. 749). The trial court then employed the same standard in sentencing Mr. Stewart to death. See Zeigler v. Dugger, 524 So.2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This standard shifted the burden to Mr. Stewart to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The instructions, thus, gave the jury inaccurate and misleading information regarding who bore the burden of proof as to whether a death recommendation should be returned.

The standard which the prosecutor argued, upon which the judge instructed Mr. Stewart's jury, and upon which the judge relied is a distinctly egregious abrogation of Florida law and therefore the Eighth Amendment. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990)(Kennedy, J., concurring)(a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious").

In his penalty phase instructions to the jury, after a timely objection by trial counsel, the judge explained that the jury's job was to determine if the mitigating circumstances outweighed the aggravating circumstances:

> You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 747).

According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Further, the lower court's denial of this claim as procedurally barred is erroneous as the instruction constitutes fundamental error. See McDonald v. State, 743 So.2d 501, 505 (Fla. 1999).

3. The Lower Court Erred In Denying Mr. Stewart An Evidentiary Hearing Or Relief On His 3.850 Claim (XIII) That Mr. Stewart's Death Sentence Rests Upon An Unconstitutional Automatic Aggravating Circumstance, In Violation Of Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger, And the Eighth Amendment.

Mr. Stewart was convicted of one count of first-degree murder, with robbery being the underlying felony (R2. 24-27). The State argued for a conviction based on the felony charged, and argued that the victim was killed in the course of a felony ("...I don't think anybody considered this premeditated murder.") (R. 741). The jury returned a special verdict of guilt for first-degree felony murder (R. 1011).

Since felony murder was the basis of Mr. Stewart's conviction, the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the aggravating circumstance of "in the course of a felony" was not "a means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer v. Black, 112 S. Ct. 1130, 1138 (1992). In this case, felony murder was presented to the jury as a statutory aggravating circumstance. The jury had already found that the murder was committed during the course of a felony when it returned a special verdict to that effect at the guilt phase. Unlike the situation in Lowenfield v. Phelps, 484 U.S. 231 (1988), the narrowing function did not occur at the guilt phase. Thus, the use of this non-narrowing aggravating factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139.

The sentencing jury was instructed that it was entitled to return a death sentence upon its finding of guilt of first degree felony murder because the underlying felony was an aggravating circumstance which justified a death sentence. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under Florida's statute, violates the eighth amendment. ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]imiting

the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). Because Mr. Stewart was specifically convicted of felony murder, he faced automatic statutory aggravation for felony murder.

The Court in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991) found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but *three* times to convict and then enhance the seriousness of Engberg's crime to a death sentence. *All* felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position that the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the *Furman/Gregg* narrowing requirement.
>
> Additionally, we find a further *Furman/Gregg* problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative

> weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at least one "aggravating circumstance" be found for a death sentence becomes meaningless. *Black's Law Dictionary*, 60 (5th ed. 1979) defines "aggravation" as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, *but which is above and beyond the essential constituents of the crime or tort itself."* (emphasis added)
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the *Furman/Gregg* weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P.2d at 92.

This error cannot be harmless in this case.

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

According to the Florida Supreme Court, the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So.2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every

murder during the course of a burglary justifies the imposition of the death penalty.") However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweighed the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. In Maynard v. Cartwright, 486 U.S. at 461-62, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Espinosa v. Florida held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the eighth amendment. See also Johnson v. Singletary, 612 So.2d 575 (Fla. 1993) (Florida penalty phase jury is a co-sentencer and must therefore be constitutionally instructed).

Espinosa and Stringer are changes in law specifically holding Lowenfield does not apply in Florida. This change in law warrants reconsideration of this issue. Thus, the lower court's findings of a procedural bar was erroneous.

4. An Evidentiary Hearing Or Relief Should Have Been Granted On The Claim (XIV) Of The 3.850 That Florida's Statute Setting Forth The Aggravating Circumstances To Be Considered In A Capital Case Is Facially Vague And Overbroad In Violation Of The Eighth And Fourteenth Amendments. The Facial Invalidity Of The Statute Was Not Cured In Mr. Stewart's Case Where the Jury Did Not Receive Adequate Guidance. As A Result, Mr. Stewart's Sentence Of Death Is Premised Upon Fundamental Error Which Must Now Be Corrected in Light Of New Florida Law.

At the time of Mr. Stewart's trial, the language of sec. 921.141 (5), Fla. Stat. (1987), which defined the "murder in the course of a felony" aggravating factor was facially vague and overbroad.

"[I]n a `weighing' state [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 113 S. Ct. 528, 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.

In Florida, the jury is a co-sentencer. Johnson v. Singletary, 612 So.2d 575 (Fla. 1993). "By giving `great weight' to the jury recommendation, the trial court

indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). This indirect weighing of the facially vague and overbroad aggravator violates the Eighth and Fourteenth Amendment. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. Id. at 2928.

Under Espinosa,the judge's consideration of the narrowing construction does not cure the facially vague and overbroad statutory language. See Smalley v. State, 546 So.2d 720 (Fla. 1989); Suarez v. State, 481 So.2d 1201 (Fla. 1985); Deaton v. State, 480 So.2d 1279 (Fla. 1985); Breedlove v. State, 413 So.2d 1 (Fla. 1982). Espinosa was a change of "fundamental significance." Witt v. State, 387 So.2d 922, 931 (Fla. 1980).

Richmond and Espinosa have established that Mr. Stewart's sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 616 So.2d 1 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So.2d 1126, 1129 (Fla. 1983).

The failure to instruct on the necessary elements which a jury must find constitutes fundamental error. State v. Jones, 377 So.2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So.2d 630, 633 (Fla. 1989). In fact, Mr. Stewart's jury was so instructed (R. 749). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So.2d 221, 224 (Fla. 1988). Unfortunately, Mr. Stewart's jury received inadequate instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. This was fundamental error. State v. Jones.

Moreover, because the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments, it impinges upon a liberty interest. Thus, the application of the statute violated due process. State v. Johnson, 616 So.2d 1 (Fla. 1993).

5. An Evidentiary Hearing Or Relief Should Have Been Granted On Claim XVII Of The 3.850 That Aggravating Circumstances Were Overbroadly And Vaguely Argued By Counsel For The State, In Violation Of Espinosa v. Florida, Stringer v. Black, Sochor v. Florida, Maynard v. Cartwright, Hitchcock v. Dugger, And The Eighth And Fourteenth Amendments, And Mr. Stewart's Trial Counsel Was Ineffective For Not Objecting In Violation Of The Sixth Amendment To The United States Constitution.

During closing argument, counsel for the State proffered arguments which urged the jury to apply aggravating circumstances in a manner inconsistent with the Florida Supreme Court's narrowed interpretation of those circumstances (R. 736). Counsel compared the victims to bugs snuffed out by Stewart (R. 736); accused Mr. Stewart's attorney of pandering to religion (R. 737); riding Afield's testimony, the prosecutor says that this "unrehabilitatable person" gets to watch the sun come up and small the coffee" (R. 738).

Such arguments urged the jury to apply these aggravating factors in a vague and overbroad fashion. As a matter of law, the Eighth Amendment was violated. Richmond v. Lewis, 113 S.Ct. 528 (1992); Espinosa v. Florida, 112 S.Ct. 2926 (1992).

6. An Evidentiary Hearing Or Relief Should Have Been Granted On Claim XXIV Of The 3.850 that Mr. Stewart Was Deprived Of His Rights To Due Process And Equal Protection under The Fourteenth Amendment To The United States Constitution, As Well As His Rights Under The Fifth, Sixth, And Eighth Amendments, When Mr. Stewart Was Improperly Shackled During His Trial And Penalty Phase.

The defendant alleged that Mr. Stewart was shackled throughout his trial and penalty phase, in view of the jury that convicted him and sentenced him to death.

The shackling of a defendant was expressly disapproved in Elledge v. Dugger, 823 F.2d 1439 (11th Cir.), modified on other grounds, 833 F.2d 250 (11th Cir.), cert. denied, 485 U.S. 1014 (1987) (Footnote omitted):

> Were [the presumption of innocence] the sole rationale which prohibits courtroom shackling, the defendant here would have no case. The jury knows he is not innocent. Having just convicted him of a crime that makes him a candidate for capital punishment, he is no longer entitled to a presumption of innocence.
>
> * * *
>
> With no definitive answer as to how the shackling at sentencing would affect the jury, it might be appropriate to consider the issue on a case-by-case basis and make a judicial evaluation as to the effect on the jury in each particular case. Much as we might be inclined to follow this path, it would not seem to be available if controlling precedents are faithfully followed. The problem is that the Supreme Court has not bottomed the prohibition against shackling on presumption of innocence alone. When a broader concern is brought into play, there seems to be no

reason to restrict the principles to the guilt-innocence phase of the trial. The language of the Supreme Court and this court in opinions regarding shackling, gives full consideration to that broader concern.

The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 475 U.S. 560, ___, 106 S.Ct. 1340, 1345, 89 L.Ed.2d 525, 534 (1986). "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970). When shackling occurs, it must be subjected to "close judicial scrutiny," Estelle v. Williams, 425 U.S. 501, 503-04, 96 S.Ct. 1691, 1692-93, 48 L.Ed.2d 126 (1976), to determine if there was an "essential state interest" furthered, Holbrook, 475 U.S. at ___, 106 S.Ct. at 1345, 89 L.Ed.2d at 534, by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed, Holbrook, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525; Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982); Hardin v. Estelle, 365 F.Supp. 39, 47 (U.D. Tex.) aff'd on other grounds, 484 F.2d 944 (5th Cir. 1973).

This Court has fully adopted the broad concerns reflected in the Supreme Court opinions. Allen, 728 F.2d at 1413-14; Zygadlo v. Wainwright, 720 F.2d 1221, 1223-24 (11th Cir. 1983), cert, denied, 466 U.S. 941, 104 S.Ct. 1921, 80 L.Ed.2d 468 (1984). Putting the case in the same posture as it would be had the shackling occurred at the guilt-innocence stage of the trial it is apparent that resentencing is required.

Elledge, 823 F.2d at 1450-51. In addition, the court noted in footnote 22:

> Nothing in Holbrook indicates that the Supreme Court did not intend its ruling to apply to the penalty phase of a capital case; furthermore, it is unreasonable to believe that the court made its rule in Holbrook unaware that capital case trial are bifurcated. We think Holbrook means what it says.

Elledge, 823 F.2d at 1451, fn. 22. The Elledge continues:

> The second problem with the shackling decision is that the State at no time made any showing that the shackling was necessary to further an essential state interest. Needless to say, the security and safety of a state's courtrooms is an essential state interest. Holbrook, 475 U.S. at ___, 106 S.Ct. at 1345, 89 L.Ed.2d at 534. There is no indication that the trial court considered alternative restraints, as the court is required to do. Id. at ___-___, 106 S.Ct. at 1342-44, at 530-32; Woodard, 692 F.2d at 221; Hardin, 365 F.Supp. at 47. Safeguards deemed necessary by other courts dealing with the issue are absent in Elledge's case. The trial court never "polled the jurors to determine whether any of them would be prejudiced by the fact the defendant was under restraints." Woodard, 692 F.2d at 222. See also Bowers, 507 A.2d at 1081 (voir dire adequate to screen out one juror who indicated shackling would influence him). The trial court also gave no specific cautionary instruction. See, e.g., Billups v. Garrison, 718 F.2d 665, 668 (4th Cir. 1983); Commonwealth v. Brown, 364 Mass. 471, 305 N.E.2d 830, 834 (Mass. 1973).

Elledge, 823 F.2d at 1452.

The trial court's use and failure to prohibit this "inherently prejudicial practice" entitles Mr. Stewart to a new sentencing proceeding before a jury. In addition, Mr.

Stewart's trial court failed to poll the jury regarding possible prejudice, give a cautionary instruction, or consider alternative restraints.

The shackling of Mr. Stewart throughout penalty phase stripped Mr. Stewart's penalty phase of any fairness. Mr. Stewart's penalty phase was prejudiced, and Mr. Stewart is entitled to a new sentencing before a jury. Elledge, 823 F.2d at 1450-51.

7. An Evidentiary Hearing Or Relief Should Have Been Granted On Claim XXV Of The 3.850 That Florida's Capital Sentencing Statute Is Unconstitutional On Its Face And As Applied For Failing To Prevent The Arbitrary And Capricious Imposition Of The Death Penalty, And For Violating The Constitutional Guarantee Prohibiting Cruel And Unusual Punishment, In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments.

Florida's capital sentencing scheme denies Mr. Stewart his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Profitt v. Florida, 428 U.S. 242 (1976). This state's law failed to meet these rudimentary constitutional guarantees, and therefore violates the Eighth Amendment.

Concurring in Way v. State, No. SC78640, 42 (Fla. 2000), Justice Pariente urged the Court to permit the jury to consider “residual” or “lingering” doubt as a non-statutory mitigator. She also suggests, in view of the finality of the death

penalty, that there are important reasons why the Court's review of death sentences might extend to an evaluation of the evidence supporting guilt. Way at 44. Justice Pariente notes that in resentencing proceedings a defendant may lose the benefit of lingering doubt. Way at 47.

Finally, Justice Pariente notes that Florida is in a small minority of jurisdictions which allow imposition of the death penalty with a less-than-unanimous jury vote. Way, at 47.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to the arbitrary and capricious imposition of the death penalty, and is thus violative of the Eighth Amendment.

Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Profitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and the jury receives

unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Florida law creates a presumption of death where but a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factors. This systematic presumption of death cannot be squared with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

In view of the arbitrary and capricious application of the death penalty under the current statutory scheme, the constitutionality of Florida's death penalty statute is in doubt. For this and previously stated arguments, the Florida death penalty statute basically and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

8. An Evidentiary Hearing Or Relief Should Have Been Granted On Claim XVI Of The 3.850 That Mr. Stewart's Trial Court Proceedings Were Fraught with Procedural and Substantive Errors, Which Cannot Be Harmless When Viewed As A Whole Since The Combination Of Errors Deprived Him Of The Fundamentally Fair Trial Guaranteed Under The Sixth, Eighth, And Fourteenth Amendments.

Mr. Stewart did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ellis v. State, No. 75,813 (Fla. July 1, 1993); Ray v. State, 403 So.2d 956 (Fla. 1981); Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991).

In Jones v. State, 569 So.2d 1234 (Fla. 1990), this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether:

> even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation.

> Seaboard Air Line R.R. Co. v. Ford, 92 So.2d 160, 165 (Fla. 1956) (on rehearing); see also,e.g., Alvord v. Dugger, 541 So.2d 598, 601 (Fla. 1989) (harmless error analysis reviewing the errors "both individually and collectively"), cert. denied, ____ U.S. ____, 110 S. Ct. 1834, 108 L.Ed.2d 963 (1990); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986) ("the combined prejudicial effect of these errors effectively denied appellant his constitutionally guaranteed right to a fair trial").

Jackson v. State, 575 So.2d 181, 189 (Fla. 1991). See also Ellis v. State (new trial ordered because of prejudice resulting from cumulative error).

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

The errors set forth in this motion and the whole record considered cumulatively indicates that Mr. Stewart did not get a fair trial. His penalty phase lasted two hours and began late in the afternoon after the guilt-phase concluded. Before working into the evening, the judge assured the jurors that this (the penalty phase) would take two hours (R. 587-8). No wonder the jury was out for less than an hour before recommending death. When his own expert witness advises the penalty phase jury (based on a false past constructed by the chief abuser) that Mr. Stewart was a killer at age five and not rehabilitatable, perhaps Mr. Stewart was thankful for the brevity with which the jury sentenced him to die.

CONCLUSION AND RELIEF SOUGHT

Mr. Stewart prays that his convictions and sentences, including his sentence of death, be vacated, or, where an evidentiary hearing is warranted, that his case be remanded for such a hearing.

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant, which was typed in Font Times New Roman, Size 14, has been furnished by United States Mail, first-class, prepaid to all counsel of record on September 24, 2001.

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