IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

vs. CASE NO. SC01-1998

STATE OF FLORIDA,

Appellee.

____________________________/

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

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant Stewart was convicted of first degree murder and second degree arson and sentenced to death in 1986. On direct appeal, Stewart v. State, 558 So. 2d 416 (Fla. 1990), this Court outlined the facts of the case as follows:

> Daniel Clark heard two gunshots on December 6, 1984, at about 12:15 a.m., "just a split second or two" apart. He got out of bed, walked outside, looked down the road in both directions, but saw nothing. At approximately 1:00 that same morning, Linda Drayne spotted a body lying alongside the road and reported it to the police. Investigation revealed that the body was that of Ruben Diaz, who had been shot twice from a distance of a foot or less, once in the front of the head, and once behind the right ear. Sometime after midnight, police also discovered Diaz's car, which had been set on fire in a mall parking lot. Several months later, Stewart was arrested in connection with another crime and while in custody was charged with first-degree murder and second-degree arson for the instant offenses. During the guilt phase of the trial, Randall Bilbrey, who shared a trailer with Stewart from December 9 to December 19, 1984, testified that Stewart told him that he and another man were looking for someone to rob when they spotted a big, expensive-looking car outside a bar. They went in and engaged the car's owner, Diaz, in conversation, convincing him to give them a ride. Once in the car, Stewart, who sat in the back seat, pulled a gun and ordered Diaz to drive to a wooded area where he ordered Diaz to get out of the car, lie on the ground, and place his hands on his head. He took Diaz's wallet, which contained fifty dollars, and a small vial of cocaine, and then, at the urging of the second man, shot Diaz twice in the head. Stewart and the second man later burned the car to destroy

> fingerprints.
>
> The state's second key witness was Terry Smith, a friend with whom Stewart shared an apartment. Smith testified that Stewart told him that a man picked him up hitchhiking and that he pulled a gun, ordered the man to drive to a certain location where Stewart ordered the man out of the car, made him lie on the ground, robbed him, and shot him twice. Stewart was convicted of both crimes. He was sentenced to fifteen years in prison for arson, and, consistent with the jury recommendation, death for first-degree murder.

558 So. 2d at 418.

This Court affirmed Stewart's convictions, but vacated his death sentence and remanded for a new sentencing proceeding before a jury, due to the trial judge's failure to provide a jury instruction on impaired capacity. Following the remand, another death sentence was imposed and was upheld by this Court on direct appeal. Stewart v. State, 620 So. 2d 177 (Fla. 1993). In that appeal, this Court held that it was error for the trial court to fail to weigh the mental health evidence as nonstatutory mitigation, noting that the two statutory mental mitigating circumstances had not been established, but that the error was harmless as it had no effect on the court's decision to sentence Stewart to death. 620 So. 2d at 180. The Court also rejected Stewart's claim that his death sentence was disproportionate. Id., at 180, n. 2.

During subsequent postconviction proceedings, Stewart waived

any potential guilt-phase claims and the State agreed to provide Stewart with a new sentencing proceeding (V3/447-453). The new sentencing trial was held March 19 - 21, 2002 (V5 - V11). The State presented the testimony of the homicide detective Carl Luis; witness Randall Bilbrey; and medical examiner Dr. Charles Diggs to describe the Diaz murder (V8/519-535, 536-543, 590-618). The State also presented Michelle Acosta and James Harville, who had been shot by Stewart in other, unrelated episodes shortly after the Diaz murder (V8/545-556, 619-623). Diaz's niece, who was born after Diaz had been killed, read a statement from the family, and the State admitted copies of Stewart's multiple prior convictions into evidence (V9/660-671, 672).

The defense presented the testimony of Stewart's stepsisters Susan Moore and Linda Arnold, and his aunt, Lillian Brown, who described Stewart's background and abusive childhood (V9/673-713, 716-747; V10/892-910). Margie Sawyer, Stewart's girlfriend at the time of the murder, testified about Stewart's drinking habits, his relationship with his stepfather, his work history, and his obsession with the deaths of his biological mother and father (V9/772-791). According to Sawyer, Stewart had beaten her quite a few times when drinking, but was very good natured when sober (V9/787, 789).

Stewart also presented testimony from psychiatrist Dr. Michael Maher and clinical psychologist Dr. Fay Sultan (V9/753-771; V10/866-891). Dr. Maher first met Stewart in March, 2001, and had talked to him less than two hours altogether, but had reviewed extensive records including documents from other doctors, family statements, and police reports (V9/761-62). Dr. Maher concluded that on December 6, 1984, Stewart had been suffering from a severe psychiatric disorder, post-traumatic stress disorder, due to his extreme childhood abuse. Maher also concluded that Stewart was intoxicated at the time of the murder and that these factors had an impact on his ability to think and make decisions, as well as his behavior (V9/753). Maher characterized Stewart as being mentally ill and at a vulnerable age, and opined that Stewart's ability to conform his behavior to the requirements of law was substantially impaired (V9/766-67). According to Maher, Stewart's background compelled him in an "unthinking reactive way" to commit the Diaz murder (V9/768).

Dr. Sultan also characterized Stewart as mentally ill (V10/881). Sultan met Stewart in 1993 and conducted testing and extensive record review before reaching her conclusions (V10/867, 876). Stewart demonstrated a normal IQ score, in the 90s, but had been severely depressed since adolescence (V10/877,

880). Sultan testified that Stewart's family history reflected generations of serious mental problems, and that Stewart's thoughts, moods, clarity of thinking, and judgment were all deeply affected by his mental illness (V10/880-81). In addition to his depression, she diagnosed Stewart as having a terrible substance abuse problem which affected his ability to control impulses and think clearly (V10/881). Sultan noted that Stewart had grown up with tremendous loss, abandonment, and violence, and that he had many symptoms of post-traumatic stress disorder (V10/881-82). Due to these factors, Sultan concluded that Stewart committed the Diaz murder while under the influence of extreme mental and emotional disturbances, and that his ability to conform his conduct to socially acceptable behavior was "greatly impaired" (V10/881-83). She felt the same conclusions would apply to Stewart's mental state during the subsequent murder of Richard Harris, as described by Michelle Acosta (V10/883). On cross examination, Sultan admitted that Stewart's actions in setting the car on fire in order to destroy evidence were "self-protective acts," but she maintained that, despite Stewart's wanting to cover up something he had done wrong, he was not thinking clearly and rationally due to his intoxication (V10/889-891).

In rebuttal to the mental mitigation evidence, the State

presented the testimony of Dr. Sidney Merin, clinical and neuropsychologist (V10/921-952). Merin had examined Stewart in Sept. 1986, and had reviewed other documents and material (V10/923, 926, 934). According to Merin, there are three general categories of mental conditions: mental illnesses, which involve a cognitive thinking disorder with bizarre and unusual thought processes that break with reality; emotional disturbances, which involve terribly uncomfortable feelings associated with hysteria, depression, obsession, phobias, etc.; and character or behavior disorders, which involve personalities that do not know how to handle their behavior and have difficulty following the rules of society (V10/928-933).

After evaluating Stewart and reviewing other material, Merin concluded that Stewart was not psychotic or mentally ill, but demonstrated characteristics associated with a behavior disorder due to antisocial features in his personality (V10/934). Merin noted that, although he did not observe Stewart to be depressed, the information he reviewed from other sources indicated that Stewart suffered from depression which was, according to Merin, a mood disorder rather than a mental illness (V10/934, 943). Merin agreed with Sultan that Stewart had average intelligence and a history of substance abuse (V10/935, 940, 944). Merin also acknowledged that Stewart was under general distress due to

his background circumstances, but testified that Stewart had lived with this level of distress most of his life; it was not extreme and did not present any unusual characteristics at the time of the murder, and it did not affect his thinking in terms of moral or legal issues (V10/942-43). Merin did not believe that Stewart's ability to conform his conduct to the requirements of law was substantially impaired (V10/944).

The jury returned a recommendation of death by a vote of seven to five (V4/629). A Spencer hearing was conducted on May 31, 2002, and on August 6, 2001, Judge Fleischer sentenced Stewart to death for the Diaz murder (V4/766-777; V11/1071-1100, 1101-1136). In her sentencing order, the judge found three aggravating circumstances: prior violent felony convictions (a prior first degree murder, two prior attempted murders, a prior aggravated assault, and two prior robbery convictions); under a sentence of imprisonment; and murder committed for pecuniary gain (V4/767-68). The court determined that the statutory mental mitigation factors had been proven, and provided "some" weight to both factors even though the judge concluded that Stewart's disturbance was not extreme and his impairment was not substantial (V4/769-771). The court grouped and weighed other nonstatutory mitigation, including Stewart's childhood abuse and exposure to brutality (some weight), the lack of an acceptable

father figure in childhood (modest weight; also weighed in conjunction with other mitigation), his mother's abandonment (little weight in addition to some weight given to same facts as nonstatutory mental mitigation), alcohol abuse and intoxication at the time of the crime (modest additional weight), low-normal intelligence (little weight), homeless (little weight), family history of mental illness and suicide attempts (already weighed, no additional weight), remorse (modest weight), compassion for others (modest weight), spiritual development during incarceration (modest weight), totality of other sentences (130 years in prison) on unrelated charges (modest weight), and good prison record (little weight) (V4/772-777). The court concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death (V4/777). This appeal follows.

SUMMARY OF THE ARGUMENT

Stewart is not entitled to any relief in this appeal. His claim that the trial court erred in denying the defense request for a special jury instruction on nonstatutory mitigation has been repeatedly rejected by this Court. His allegations that Florida's death penalty is unconstitutional facially and as applied in his case have also been rejected, and no reasonable basis to reconsider prior decisions denying these claims has been offered.

Stewart's allegation that the court below failed to allocate sufficient weight to the mitigation evidence presented is similarly without merit. As this Court has recognized, the trial judge bears the responsibility for determining the appropriate weight of mitigation, and no abuse of discretion in the findings entered below has been demonstrated.

A review of other cases in which the death penalty has been imposed refutes Stewart's claim that his sentence is not proportional. This was a heavily aggravated murder which, contrary to Stewart's assertions, was not greatly mitigated. No error has been shown with regard to the imposition of the death sentence in this case, and no relief is warranted.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE DEFENSE REQUEST FOR A SPECIAL JURY INSTRUCTION ON NONSTATUTORY MITIGATION.

Stewart's first claim challenges the trial court's ruling refusing a defense request for a special jury instruction on the nonstatutory mitigating evidence. The denial of a requested instruction is reviewed for an abuse of discretion. Darling v. State, 808 So. 2d 145, 163 (Fla. 2002).

The record reflects that, in this case, the jury was thoroughly and accurately instructed on its penalty phase responsibilities in accordance with all relevant authority (V11/1036-1048). Stewart asked the court for an additional instruction, specifically enumerating the multiple nonstatutory mitigating circumstances sought by the defense (V4/620-21]; V9/821-85). He asserted this instruction was necessary because it was the theory of his defense, but did not argue that it would affect the weight of the nonstatutory mitigation in the eyes of the jury. The denial of this request was proper.

This Court has repeatedly held that the standard jury instruction on nonstatutory mitigating circumstances is sufficient, and there is no need to give a separate instruction on each item of nonstatutory mitigation. Gore v. State, 706 So.

2d 1328, 1334 (Fla. 1997); San Martin v. State, 705 So. 2d 1337, 1349 (Fla. 1997); James v. State, 695 So. 2d 1229, 1236 (Fla. 1997); Finney v. State, 660 So. 2d 674, 684 (Fla. 1995). Stewart relies on Justice Anstead's concurring opinion in Downs v. Moore, 801 So. 2d 906 (Fla. 2001), as authority for requiring the instruction in this case, but neglects to mention that this Court has directly rejected his claim in a number of other cases. Notwithstanding Justice Anstead's concerns, the judge below followed the law, and Stewart has not offered any reasonable basis to find an abuse of discretion in this ruling. Stewart's speculation that the jury would improperly embark on a counting process in the absence of his requested instruction is unwarranted; his jury was accurately and adequately advised on how to reach its recommendation, and juries are presumed to follow such instructions.

In Boyde v. California, 494 U.S. 370 (1990), the United States Supreme Court considered a similar issue on a case out of California. The challenged jury instruction advised the jurors to consider eleven factors in determining whether to impose a sentence of life or death. The last of these factors was "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This was the only factor that even remotely suggested that the jury could

consider evidence about the defendant’s character or background in mitigation of the offense. Boyde claimed that the jury instructions interfered with the jury’s obligation to consider all relevant mitigating evidence, since the factor could be interpreted as limiting the jury’s consideration to evidence related to the crime rather than the perpetrator. The Supreme Court rejected Boyde’s claim, holding that there was no reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. Boyde, 494 U.S. at 380.

Similarly, the denial of the jury instruction in this case did not preclude the jury from considering any relevant evidence. In light of the clear case law denying this claim, Stewart has failed to demonstrate any error in the trial court’s ruling on his request for a special instruction on nonstatutory mitigation. He is not entitled to any relief on this issue.

ISSUE II

WHETHER FLORIDA'S DEATH PENALTY STATUTE IS FACIALLY UNCONSTITUTIONAL.

Stewart next asserts that Florida's death penalty statute is unconstitutional. Citing Ring v. Arizona, 122 S.Ct. 2428 (2002), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227 (1999), he claims that the sentencing scheme violated his constitutional rights to due process and a jury trial. This Court's review is de novo; however, Stewart's allegations do not present any basis for relief. This Court has declined to invalidate Florida's capital sentencing law based on Ring. Bottoson v. State, 27 Fla. L. Weekly S891 (Fla. Oct. 24, 2002).

It must be noted initially that this issue has not been preserved for appellate review, and therefore this claim should be rejected as procedurally barred. Although, as Stewart notes, a defendant may challenge the facial constitutionality of a statute for the first time on appeal when the argument presents a claim of fundamental error, the current allegation of a Ring and/or Apprendi violation would not amount to fundamental error even if this Court were to find that those decisions were not fully satisfied on the facts of this case. In Maddox v. State, 760 So. 2d 89, 95-96 (Fla. 2000), this Court noted several different definitions for fundamental error, including "error that goes to the foundation of the case," "error which reaches

down into the validity of the trial itself," and error "where the interests of justice present a compelling demand for its application," none of which is implicated on the facts of this case. In addition, this Court has repeatedly recognized that not all errors of "constitutional magnitude" constitute fundamental error. State v. T.G., 800 So. 2d 204, 212 (Fla. 2001); Maddox, 760 So. 2d at 100 (quoting Judge v. State, 596 So. 2d 73, 79 n. 3 (Fla. 2d DCA 1991)).

In Barnes v. State, 794 So. 2d 590 (Fla. 2001), this Court found an alleged Apprendi[1] error had not been preserved for appellate review. The United States Supreme Court has also held that an Apprendi claim is not plain error. United States v. Cotton, 122 S. Ct. 1781 (2002) (holding an indictment's failure to include the quantity of drugs was an Apprendi error but it did not seriously affect fairness, integrity, or public reputation of judicial proceedings, and thus did not rise to level of plain error). These cases confirm that any possible constitutional violation under Apprendi is not "fundamental error" warranting judicial review of an unpreserved claim.

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[1]Ring is merely an extension of Apprendi. Clearly, the application of Apprendi was limited to (1) factual findings, other than prior conviction, (2) which increase the statutory maximum for a charged offense. Because the Arizona Supreme Court interpreted its law as prescribing only a life sentence upon conviction for first-degree murder, Ring, 122 S.Ct. at 2436; Ring v. State, 25 P.3d 1139, 1150 (Ariz. 2001), Ring fits squarely within the Apprendi holding, and thus, the Ring decision does not extend or expand the Sixth Amendment right at issue in Apprendi.

Even if Apprendi error could be deemed fundamental in some contexts, the present case does not provide the facts for such a conclusion here. Stewart fails to acknowledge that, due to the existence of his "prior violent felony conviction" aggravating factor, the judge was authorized to impose the death penalty even if additional jury findings may be deemed necessary in the context of other cases. See Bottoson, 27 Fla. L. Weekly at S898; S900 (J. Shaw, concurring; J. Pariente, concurring). It is undisputed that Stewart's judge properly found the existence of the prior conviction factor, and therefore no additional jury findings were required with regard to Stewart's eligibility to receive the death penalty. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (prior conviction properly used by judge alone to enhance defendant's statutorily authorized punishment). Since the defect alleged to invalidate the statute - lack of jury findings to enhance the sentence - is not implicated in this case due to the existence of the prior conviction, Stewart has no standing to challenge any potential error in the application of the statute on other facts.

If Stewart had no prior conviction, his sentence would still be constitutionally valid. According to Stewart, Florida's capital statute is constitutionally flawed due to its failure to require that a "death qualifying aggravating factor" be alleged in the indictment and expressly found by a jury. This argument

is premised on a fundamental misunderstanding of Florida law. In Ring, the United States Supreme Court applied Apprendi to invalidate Arizona's capital sentencing scheme, which required a judge, acting alone, to determine a capital defendant's eligibility for the death penalty. In Florida, unlike Arizona, death eligibility is determined by the jury upon conviction for first degree murder. See Bottoson, 27 Fla. L. Weekly at S893; S902 (J. Quince, concurring; J. Lewis, concurring); Shere v. Moore, 27 Fla. L. Weekly S752, S754 (Fla. Sept. 12, 2002) (statutory maximum sentence for first degree murder is death); Mills v. Moore, 786 So. 2d 532, 538 (Fla.), cert. denied, 532 U.S. 1015 (2001) (same). Ring is not applicable in Florida because capital punishment is not an "enhanced" sentence for first degree murder; accordingly, no further jury findings are required.

Thus, Stewart's argument that an aggravating factor must be alleged in the indictment and expressly found by a jury beyond a reasonable doubt is without merit, as the existence of an aggravating factor is a determination that concerns the defendant's selection for capital punishment, rather than his eligibility for the death penalty. Clearly, Ring does not require jury findings for sentencing, only for eligibility. As Justice Scalia stated, Ring "has nothing to do with jury sentencing." Ring, 122 S.Ct. at 2445. Apprendi and Ring

involve the jury's role in determining death eligibility, but do not require that the actual selection of sentence be made by a jury. Quoting Proffitt v. Florida, 428 U.S. 242, 252 (1976), Ring acknowledged that "[i]t has never [been] suggested that jury sentencing is constitutionally required."[2] Ring, 122 S.Ct. at 2447, n.4. Rather, Ring involves only the requirement that the jury find the defendant death eligible. That determination must be made by the jury, while the actual sentencing decision may constitutionally be made by the trial court. See Spaziano v. Florida, 468 U.S. 447, 459 (1984) (finding Sixth Amendment has no guarantee of right to jury trial on issue of sentence).

In addition, even if an aggravating factor is construed to determine eligibility rather than selection, the suggestion that it must be charged in the indictment has no basis in law. This claim has been repeatedly rejected. See Hildwin v. State, 531 So. 2d 124, 128 (Fla. 1988) (rejecting claim that Florida law makes aggravating factors into elements of the offense so as to make the defendant death-eligible), aff'd., 490 U.S. 638 (1989); Lightbourne v. State, 438 So. 2d 380 (Fla. 1983) (aggravating circumstances do not need to be charged in indictment). In addition, United States Supreme Court precedent does not support

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[2] See Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.)

Stewart's position. Hurtado v. California, 110 U.S. 516 (1984) (holding there is no requirement for an indictment in state capital cases). Apprendi did not address the indictment issue. Apprendi, 530 U.S. at 477, n.3. Ring similarly did not address the issue, and although Ring, in part, overruled Walton v. Arizona, 497 U.S. 639 (1990), this claim was rejected by this Court prior to Walton being decided and does not, in any way, rely on Walton for support. Therefore, Ring does not compel further consideration of this issue.

Thus, Stewart's death sentence satisfies the Sixth Amendment as construed in Ring. His prior violent felony convictions permitted the judge to impose a capital sentence, even without jury involvement. In addition, by returning a recommendation for death, his jury necessarily found beyond a reasonable doubt that at least one statutory aggravating factor existed. Ring merely requires a jury, rather than a judge acting alone, make the determination of certain factors and that those factors be established beyond a reasonable doubt. These requirements have been met in this case. Stewart had a penalty phase jury which heard evidence related to aggravation and mitigation. The jury was instructed that the aggravators had to be proven beyond a reasonable doubt. Following the instructions, Stewart's jury recommended a death sentence. Clearly, aggravation was proven beyond a reasonable doubt. See Hildwin v. Florida, 490 U.S. 638

(1989) (holding that where jury made a sentencing recommendation of death it necessarily engaged in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved). Because the finding of an aggravating factor clearly authorized the imposition of a death sentence, the requirement that a jury determine the conviction to have been a capital offense is fulfilled.

Stewart's speculation that the jury may have disagreed as to which aggravating factors existed, or "completely disregarded" the instructions to consider aggravating factors, is unwarranted. Jurors are presumed to follow the court's instructions, and jurors are not required to agree on different theories of liability. See Schad v. Arizona, 501 U.S. 624 (1991) (jury need not agree on alternative theories of prosecution). That seven jurors conclude at least one aggravator exists is more than is constitutionally required.

In conclusion, aggravating factors in Florida are not elements of the offense, but are constitutionally mandated capital sentencing guidelines. Florida's capital sentencing scheme affords the sentencer the guidelines to follow in determining the various sentencing selection factors related to the offense and the offender by providing accepted statutory aggravating factors and mitigating circumstances to be

considered. Given that a defendant faces the statutory maximum sentence of death upon conviction of first degree murder, the employment of further proceedings to examine the assorted "sentencing selection factors," does not violate due process. The plain language of Apprendi and Ring establishes that those cases come into play when a defendant is exposed to a penalty exceeding the maximum allowable under the jury's verdict. Because Stewart was death eligible upon conviction, Ring does not invalidate his death sentence or render Florida's sentencing scheme unconstitutional.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN DENYING STEWART'S MOTION TO DISMISS, WHICH ALLEGED THAT FLORIDA'S DEATH PENALTY STATUTE IS UNCONSTITUTIONAL BECAUSE IT PERMITS A JURY RECOMMENDATION BY A BARE MAJORITY.

Stewart's next claim asserts that the trial court erred in denying his motion to dismiss, which alleged that Florida's capital sentencing scheme is unconstitutional because it permits a jury to return a recommendation for death by a "bare majority" vote. This Court's review is de novo. This Court has repeatedly rejected this claim, and Stewart has not provided any reasonable basis for reconsideration of the issue. See Bottoson, 27 Fla. L. Weekly at S893; S902 (J. Quince, concurring; J. Lewis, concurring); Card v. State, 803 So. 2d 613, 629, n.13 (Fla. 2001), cert. denied, 122 S. Ct. 2673 (2002); Sexton v. State, 775 So. 2d 923, 937 (Fla. 2000); Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994); Brown v. State, 565 So. 2d 304, 308 (Fla.), cert. denied, 498 U.S. 992 (1990).

The United States Supreme Court's decision in Ring v. Arizona, 122 S. Ct. 2428 (2002), does not address this issue, and therefore does not compel further consideration of this claim. See 122 S. Ct. at 2436, n.4. Federal law does not reject Florida's scheme or require that capital juries be unanimous. Proffitt v. Florida, 428 U.S. 242 (1976); Johnson v.

Louisiana, 406 U.S. 356 (1972) (jury unanimity not required for twelve-person jury); Apodaca v. Oregon, 406 U.S. 404 (1972) (same); Williams v. Florida, 399 U.S. 78, 86 (1970) (Constitution does not require States to provide a jury of twelve persons). There is no basis to recede from prior, established law on this point.

Finally, Stewart's assertion that a jury recommendation returned by a bare majority "is not sufficiently reliable" (Appellant's Initial Brief, p. 55), is disingenuous. Stewart does not explain why the reliability of a recommendation returned in accordance with the law must be questioned; to the contrary, such a recommendation reflects the jury followed the instructions provided by the trial court. Stewart's speculation that one juror may have concluded that no aggravating factor existed is refuted by the fact that his prior convictions were only obtained after unanimous juries convicted him of the prior offenses, conclusively establishing this factor beyond a reasonable doubt. Florida's capital sentencing scheme is constitutional, and no relief is warranted on this issue.

ISSUE IV

WHETHER THE TRIAL COURT FAILED TO PROPERLY WEIGH THE MITIGATING EVIDENCE.

Stewart next claims that his death sentence must be reversed because the trial court allegedly failed to provide appropriate weight to the mitigation evidence presented below. Although Stewart focuses on the weight allocated by the court below to the statutory mental mitigation, his argument challenges the trial court's findings with regard to all of the mitigation presented.

Trial court findings on mitigation are reviewed for an abuse of discretion. Bell v. State, 27 Fla. L. Weekly S937 (Fla. Nov. 7, 2002). A review of all of the evidence presented below and the sentencing order establishes only that Stewart disagrees with the factual conclusions reached by his trial judge, and no abuse of discretion occurred below. Therefore, this claim is without merit.

In sentencing Stewart to die for the murder of Ruben Diaz, the trial judge complied with all applicable law, including the dictates of this Court's decision in Campbell v. State, 571 So. 2d 415 (Fla. 1990). She expressly evaluated the aggravating factors and mitigating circumstances, and insured adequate appellate review of her findings by discussing the factual basis for each of the aggravating and mitigating factors. Campbell clearly recognizes that the factual question as to whether a

mitigating factor was reasonably established by the evidence is a question for the trial judge, and that the judge has the responsibility to assess the appropriate weight of any mitigation found. No abuse of discretion has been demonstrated with regard to the trial judge's factual findings or legal conclusions on any factors in the instant case.

Stewart primarily takes issue with the trial court's allocation of "some" weight to the statutory mental mitigating factors. The court below reduced the weight of this mitigation based on her determination that the "extreme" and "substantial" qualifiers for the statutory mitigation had not been proven (V4/769-772). Stewart would require the court below to give further weight to these factors, based on the testimony of his experts at the sentencing proceeding. However, this Court has repeatedly recognized that a trial judge may reject expert testimony, particularly when it is refuted by other evidence presented. Knight v. State, 746 So. 2d 423, 436 (Fla. 1998) (noting even uncontroverted expert testimony can be rejected, especially when it is difficult to reconcile with other evidence); Walls v. State, 641 So. 2d 381, 388 (Fla. 1994); Foster v. State, 679 So. 2d 747, 755 (Fla. 1996), cert. denied, 520 U.S. 1122 (1997). In this case, Stewart's experts were directly controverted by Merin's testimony, which established that Stewart's disturbance was not extreme and his impairment

was not substantial. The resultant credibility decision was for the trial judge. Walker v. State, 707 So. 2d 300, 318 (Fla. 1997).

Stewart's argument on the trial court's findings on these factors offers minor complaints about the trial court's written findings with little discussion of the testimony actually presented by the experts below. The trial court reviewed the testimony extensively in her order addressing the presence of the statutory mental mitigators:

> 1. Extreme mental disturbance at the time of the shooting.
>
> Approximately one week prior to his court appearance on March 20, 2001, Dr. Michael Maher, a forensic psychiatrist, spent about one and one half hours interviewing the Defendant. On March 19, 2001, Dr. Maher saw the Defendant for about twenty minutes. The doctor testified that he had reviewed reports from other physicians, psychologists, family members, police reports, legal documents related to prior proceedings, and prior testimony.
>
> Dr. Maher concluded that the Defendant was suffering from a "very severe psychiatric disorder, specifically Post Traumatic Stress Disorder (PTSD) related to extreme childhood trauma and abuse, and he was also intoxicated at the time and that those factors had a major impact on his ability to think and make decisions on his behavior."
>
> Dr. Ellen Sultan, a clinical psychologist, also testified on behalf of the Defendant. In 1995 she spent approximately twenty hours over five visits with the Defendant. She administered the Minnesota Multi-phasic Personality Inventory and an IQ test. She also reviewed school

and jail records, records of the Defendant's suicide attempts, and the testimony of family members. Dr. Sultan also spoke with family members and a friend of the Defendant.

Dr. Sultan agreed with Dr. Maher's conclusion that the Defendant was under the influence of extreme mental disturbance due to Post Traumatic Stress Disorder as a result of a "highly traumatized" childhood. He suffered loss, violence, abandonment, abuse, all symptoms of PTSD. The Defendant was depressed, had suffered five prior suicide attempts, and had a "terrible, terrible substance abuse problem." According to Dr. Sultan, the Defendant's heavy drinking reduced his ability to control his impulses or to think clearly.

Randall Bilbrey testified that Kenneth Stewart told him that at the time of the homicide "he was drunk or had been drunk for a long time."

On rebuttal the State called Dr. Sidney Merin, a clinical psychologist. Dr. Merin stated that he had reviewed materials related to the crime, including witness and police reports, and reports from family members. He also interviewed the Defendant for about an hour in September, 1986, on the date of his conviction. Dr. Merin disagreed with Drs. Maher and Sultan as to the Defendant's mental state at the time he murdered Mr. Diaz.

Dr. Merin concluded that the Defendant was not psychotic, that he had "no breaks with reality." Nor was the Defendant mentally ill or suffering from an emotional disturbance. Rather, Dr. Merin testified that the Defendant had a character or behavior disorder, and that he had antisocial features in his personality.

Dr. Merin found the Defendant under some "general distress" which he had been experiencing most of his life. His emotional distress probably "prompted him to start drinking and using drugs early in his life." Thus, Dr. Merin confirmed a history of alcohol dependency and possible

polysubstance abuse. Dr. Merin stated that "there was always a level of emotional distress as well, but again he lived with it" [and] "it did not affect his thinking in terms of moral or legal issues." According to Dr. Merin, the Defendant was coherent, relevant, and his thinking was goal directed during his interview.

On cross-examination, Dr. Merin indicated that the Defendant had probably suffered "very significant emotional distress in his early life." But Dr. Merin maintained that although the Defendant's "behavior was the end product of emotional distress, at the time of the victim's death the Defendant's behavior was quite different."

Dr. Merin's opinion has remained unchanged since he testified in 1986, that is, that the Defendant was not under extreme mental distress when he murdered Ruben Diaz.

The Court is persuaded that Dr. Merin's diagnosis is correct. Dr. Merin had the benefit of evaluating the Defendant relatively close in time to the murder of Ruben Diaz. More importantly, the Defendant's behavior during the time at issue reflects that of a person with a character disorder, a person with an antisocial personality. Although the Defendant may have been under the influence of drugs and alcohol, the undisputed facts reveal a man who acted deliberately, out of anger, and with brutality. He had a goal – to meet his own needs. The needs of the stranger who crossed his path were of no concern to him.

The Court is therefore not reasonably convinced that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the murder. The Court, however, is reasonably convinced that the Defendant's mental health was impaired and that his mental problems were further exacerbated by the use of alcohol and drugs.

The Court has therefore given some weight to this factor.

2. <u>Unable to conform his conduct to the requirements of law at the time of shooting</u>.

Dr. Maher testified that the Defendant's capacity to conform his behavior to the requirements of law was "very substantially impaired." The Defendant was brought up in a family of "intense and cruel violence that existed all of the time, not simply on occasion." The Defendant began drinking alcohol at about the age of twelve, ran away from home at about thirteen and began getting into trouble with the law as a young teenager. At seventeen, the Defendant was sent to prison where he learned more about violent culture. It is "because of these aspects of his background that he was compelled in an unthinking and reactive way to commit these offenses."

Dr. Sultan testified that the Defendant's ability to behave in a socially accepted way was "greatly impaired." He was "not able to think situations through in a logical way, not able to control inappropriate impulses, dangerous, violent impulses." According to Dr. Sultan, the Defendant supposedly deteriorated significantly between the murders of Ruben Diaz and Mark Harris.

When challenged on cross-examination, Dr. Sultan testified that her opinion was based primarily on her observations and testing of the Defendant, the reports of Ms. Sawyer, Mr. Bilbrey, the Defendant's sisters, Ms. Moore and Ms. Arnold, and in a very small measure on Mr. Stewart's own reporting. It is clear from the record that neither sister knew anything significant about the Defendant after he was twelve or thirteen years old. They lived with him when he was about four until he was about twelve or thirteen. Except for one very brief visit, neither sister had any further contact with the Defendant until after he was arrested for this murder. The sisters, therefore, had no information about the Defendant at the time of the murder. In fact, they knew nothing about his emotional

state or his abilities from the age of twelve or thirteen until the date of his arrest. Ms. Sawyer was drinking heavily at the time of the murder and was barely functioning herself. Mr. Bilbrey added little, other than that he knew the Defendant was using marijuana and the Defendant had told him that he was "just drunk or had been drunk for along time."

Dr. Merin testified that the Defendant's capacity to conform his behavior to the requirements of law was not substantially impaired. Rather, Dr. Merin stated that the Defendant had a character disorder and exhibited an "antisocial personality." As stated above, the Court is convinced that Dr. Merin is right.

The Court has no doubt that the Defendant endured abuse during his childhood, began drinking and using illegal drugs at an early age, and certainly had mixed emotions about his family members, both his natural family and those who played some familial role in his life. This Court, however, does not accept Dr. Maher's conclusion that the Defendant was "compelled" to act as he did. Nor is the Court persuaded by Dr. Sultan's testimony. Based on the totality of her testimony, particularly her answers on cross-examination, the Court doubts the validity of Dr. Sultan's evaluation of the Defendant and frankly has disregarded most of her conclusions.

Dr. Merin's conclusions are much more credible in light of the Defendant's behavior around the time of the homicide. In fact, much of the information about his behavior comes from the Defendant himself. The Defendant remembered at least some of what he had done with and to Ruben Diaz. He told Mr. Bilbrey and Ms. Sawyer about it. According to Mr. Bilbrey, the Defendant described the victim in more detail than Mr. Bilbrey could recall when he testified before this Court.

We know from what the Defendant said that he decided to rob someone because he

needed money. He decided to search out the owner of the car that he admired, the car that he decided he wanted. He did not simply steal the car. He decided to have the victim leave the bar with him. He decided to take the victim to a remote site. He chose a place so isolated that he would not be discovered. He and his accomplice forced the victim to lie face down while they took the victim's money and drugs. The Defendant shot the victim once at close range and then he moved to shoot the victim from another angle. Although the Defense wants the Court to accept as fact that it was the Defendant's accomplice who encouraged the murder, the only evidence of that is the Defendant's self-serving statement to Mr. Bilbrey. Why did the Defendant shoot the victim a second time when he had already shot Mr. Diaz at close range? "I don't know" was the Defendant's answer.

The fact is that the Defendant had to get a gun and decided to carry that gun. He had to make certain there were bullets in the gun. The Defendant had to decide to use the gun. We do not know how much time elapsed between the two shots that killed Mr. Diaz. We do know, however, that the Defendant changed positions because of the different trajectories of the bullets. We do know that each shot was fatal. We do know that Kenneth Stewart decided to and did make sure that he left Ruben Diaz dead.

And what did the Defendant do after taking the victim's money? He decided to use that money to get gasoline and other items he wanted. He then drove around for a period of time and finally set the victim's car on fire in order to avoid being apprehended.

The credible evidence suggests that the combination of drugs, alcohol, and abuse which the Defendant experienced throughout his relatively young life certainly did impact him. The Court has no doubt, however, that although the Defendant may have been under the influence of alcohol and

> drugs when he murdered Ruben Diaz, he had the capacity and the will to make the choices that put him in the position in which he now finds himself.
>
> The Court, therefore, is not reasonably convinced that the Defendant's capacity to conform his conduct to the requirements of law was substantially impaired. The Court, however, is convinced that the Defendant's capacity was impaired due to the combination of factors presented to this Court regarding his background. The Court has therefore given some weight to this factor.

(V4/769-772). The trial court's findings are consistent with the testimony presented below, and supported by competent, substantial evidence.

Stewart primarily disputes the trial court's credibility determination that resulted in her limiting the value of the mental mitigation to "some" weight, based on the testimony of the State's expert, Dr. Merin, in rebuttal. According to Stewart, the trial judge abused her discretion in relying on Merin's testimony for a number of reasons. He offers the following observations: Merin had initially been retained by the defense in this case and had testified previously as a defense witness;[3] Merin had only briefly evaluated Stewart in 1986 and had insufficient information upon which to base his conclusions; the court's reliance on Merin having seen Stewart

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[3]Stewart's reliance on Sanders v. State, 707 So. 2d 664 (Fla. 1998), to suggest some impropriety with Dr. Merin's testimony below, is misplaced; that decision clearly recognized that the defense privilege was waived once Merin was placed on the stand as a witness. 707 So. 2d at 669.

closer in time to the murder was misplaced because Merin did not see Stewart until nearly two years after the crime; Merin's testimony did not negate the possibility that Stewart had other mental disabilities beyond the antisocial personality disorder diagnosed by Merin; Merin "could not very well change his opinion" since he had previously testified for the defense; Merin's testimony was not "totally opposed" to that of the other doctors; Merin previously testified that Stewart was the end product of years of extreme emotional distress; Merin's theory is refuted by evidence that, earlier on the day of the homicide, Stewart drank a bottle of whiskey at his mother's grave; the judge's rejection of Dr. Sultan's testimony was not supported by Sultan's cross-examination; the judge improperly discounted the testimony of the other lay witnesses; Drs. Sultan and Maher reached different opinions than Merin; and Merin's opinion is unreasonable and contradictory. Stewart also attacks the judge's findings that Stewart acted deliberately and without concern for his victim as unsupported by the evidence.

Stewart's petty criticisms of the trial court's order deserve little comment. Several of his assertions are refuted by the testimony, and notably, Stewart does not challenge the trial court's recitation of the facts and evidence presented below. He does not dispute the trial court's findings on the substance of Merin's testimony, he only attacks the reasons

recited by the trial court for believing Merin's testimony over the other experts. Credibility determinations are vested with the trier of fact for a number of obvious reasons, including the opportunity to observe the witness' courtroom demeanor, level of confidence, and qualifications. As long as the factual findings are supported by the evidence, a trial court's determination to believe one expert over another is beyond the purview of an appellate court.

The court's order outlines relevant considerations which properly impact a reasoned credibility decision. The judge properly considered the facts of this case, including Stewart's selection of the victim, scheming to rob the victim, taking the victim to a remote location and shooting him twice, from two different positions, and setting the victim's car on fire to conceal evidence. These facts refuted the defense experts' testimony that Stewart's actions were not deliberate. Where, as here, opinion testimony relies on facts which are not supported by the evidence, its weight is properly diminished. Walls, 641 So. 2d at 388; Gudinas v. State, 693 So. 2d 953, 967 (Fla.) (affirming rejection of expert testimony on statutory mental mitigators where expert's opinion was heavily based on unsupported facts), cert. denied, 522 U.S. 936 (1997). On the facts of this case, no abuse of discretion has been shown with regard to the trial court's treatment of the mental mitigation

evidence.

Stewart's challenge to the trial court's weighing of the nonstatutory mitigation is similarly without merit. This Court has repeatedly recognized the relative weight to be assigned any aggravating or mitigating circumstance is within the broad discretion of the trial judge. Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997), cert. denied, 525 U.S. 837 (1998); Cole v. State, 701 So. 2d 845, 852 (Fla. 1997), cert. denied, 523 U.S. 1051 (1998); Bell v. State, 699 So. 2d 674, 678 (Fla. 1997), cert. denied, 522 U.S. 1123 (1998); Campbell, 571 So. 2d at 420. Notably, the court below did not reject a single fact in mitigation offered by the defense, although several of the factors identified were duplicitous and of marginal significance. In addition, Stewart's complaint that the judge improperly discounted some mitigation because it had previously been weighed in her consideration of the statutory mental mitigation is unwarranted; his theory would require the court to weigh the same evidence twice. Clearly, once a fact has been weighed as part of one mitigating factor, it need not be artificially enhanced by weighing it again as a separate nonstatutory mitigating circumstance.

As a general rule, a trial court's treatment of mitigation after a proper inquiry and comprehensive analysis of the evidence will not be disturbed on appeal. Knight, 746 So. 2d at

436. The trial court's single-spaced, eleven page order in this case extensively discusses all of the judge's findings with regard to each mitigating factor proposed by the defense (V4/769-777). A fair review of that order, and the testimony supporting it, clearly refutes Stewart's claim that the court below did not properly consider the mitigating evidence he presented.

Finally, even if this Court reaches a different conclusion with regard to the trial court's findings as to any of this mitigation, there is no reason to remand this cause for resentencing since it is clear that any further consideration would not result in the imposition of a life sentence. Despite limiting the weight of some of the statutory mitigation proposed by Stewart (which could reasonably have been rejected), the trial court did weigh the mental health testimony as statutory mitigation and found an additional 23 nonstatutory factors in mitigation (V4/769-777). Any error relating to the sentencing court's failure to articulate additional weight to the mitigation found is clearly harmless since the mitigation in this case cannot offset the strong aggravating factors found. Thomas v. State, 693 So. 2d 951, 953 (Fla. 1997); Lawrence v. State, 691 So. 2d 1068, 1076 (Fla.), cert. denied, 522 U.S. 880 (1997); Barwick v. State, 660 So. 2d 685, 696 (Fla. 1995); Armstrong v. State, 642 So. 2d 730 (Fla. 1994), cert. denied,

514 U.S. 1085 (1995); Wickham v. State, 593 So. 2d 191, 194 (Fla. 1991), cert. denied, 505 U.S. 1209 (1992); Cook v. State, 581 So. 2d 141, 144 (Fla.) ("we are convinced beyond a reasonable doubt that the judge still would have imposed the sentence of death even if the sentencing order had contained findings that each of these nonstatutory mitigating circumstances had been proven"), cert. denied, 502 U.S. 890 (1991). Therefore, this Court should affirm the sentence imposed.

<u>ISSUE V</u>

WHETHER STEWART'S DEATH SENTENCE MUST BE REVERSED AS DISPROPORTIONATE.

Stewart's last issue disputes the proportionality of his death sentence. Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. <u>Kramer v. State</u>, 619 So. 2d 274, 277 (Fla. 1993). The purpose of a proportionality review is to compare the case to similar defendants, facts and sentences. <u>Tillman v. State</u>, 591 So. 2d 167, 169 (Fla. 1991). When factually similar cases are compared to the instant case, the proportionality of Stewart's sentence is evident.

The court below found three aggravating circumstances: (1) prior violent felony conviction, (2) under sentence of imprisonment, and (3) committed for pecuniary gain. These factors were clearly established and are not challenged in this appeal. No statutory mitigating circumstances were found. Although the court below allocated some weight to the mental statutory mitigating factors, the sentencing order clearly reflects that the court found that Stewart's mental problems, while exacerbated by alcohol, were not extreme, and that the impairment of his ability to conform his conduct to law was not substantial (V4/769-772). The jury recommended death by a vote

of 7 to 5 (V13/357-58, V50/4691-92).

Stewart asserts that his sentence is disproportionate due to the trial court's finding of the statutory mental mitigating factors. However, the court discounted the weight of this mitigation because the qualifiers "extreme" and "substantial" were not shown (V4/769-772). Thus, his extensive reliance on cases finding a death sentence to be disproportionate based on the presence of statutory mental mitigation is misplaced.

A review of factually similar cases supports the imposition of the death sentences herein. An obviously similar case is Stewart's other capital sentence, for victim Mark Harris, which mirrors the mitigation found below and applies only two aggravating factors. Stewart v. State, 588 So. 2d 972, 973 (Fla. 1991). In addition, the relevant circumstances are the same as when this Court previously denied a proportionality challenge in Stewart's prior appeal for the instant murder. Stewart, 620 So. 2d at 180 n. 2.

Many other cases also demonstrate the proportionality of the death sentence imposed in this case. See Knight, 746 So. 2d at 437 (double murder during robbery, despite extensive but rejected mental health evidence); Hildwin v. State, 727 So. 2d 193 (Fla. 1998) (presenting similar aggravators and mitigation); Rolling v. State, 695 So. 2d 278 (Fla.) (affirming multiple murders despite significant statutory and nonstatutory mental

mitigation and abusive childhood), cert. denied, 522 U.S. 984 (1997); Henyard v. State, 689 So. 2d 239 (Fla. 1996) (affirming two death sentences despite both statutory mental mitigators, low intelligence, impoverished upbringing, and dysfunctional family), cert. denied, 522 U.S. 846 (1997); Ferrell v. State, 680 So. 2d 390, 391 (Fla. 1996) (prior violent felony was only aggravating factor; defendant was impaired, disturbed, and under the influence of alcohol); Duncan v. State, 619 So. 2d 279 (Fla. 1993) (distinguishing other cases where defendants had not previously been convicted of murder); Brown v. State, 565 So. 2d 304 (Fla.) (death sentence for murder committed during the course of burglary was proportionate where there were two aggravating factors balanced against the mental mitigators), cert. denied, 498 U.S. 992 (1990).

The cases cited by Stewart do not compel a contrary result. His argument relies principally upon Cochran v. State, 547 So. 2d 928 (Fla. 1989), Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), Larkins v. State, 739 So. 2d 990 (Fla. 1999), and Cooper v. State, 739 So. 2d 82 (Fla. 1999). These cases are easily distinguishable. Cochran involved a jury override, presenting different considerations than a proportionality analysis. See Burns v. State, 699 So. 2d 646, 649, n. 5 (Fla. 1997). In Fitzpatrick, the experts unanimously agreed that both statutory mental mitigating factors existed, and testimony established

that Fitzpatrick was delusional and psychotic. Larkins presented a defendant with organic brain damage and a prior conviction obtained twenty years before the capital murder. Finally, in Cooper, the teenage defendant was diagnosed with brain damage and in the borderline retarded category, with no prior criminal record. The mental mitigation presented in the instant case was not comparable to that at issue in Cooper.

The evidence presented in the instant case established that the Diaz killing was the senseless beginning to an extremely violent series of crimes. Balanced against this heinous crime was a laundry list of character traits and aspects of the crime which Stewart urged as mitigating evidence. This evidence was thoroughly considered and properly afforded minimal weight. Based on the foregoing, this Court must find that Stewart's sentence is proportional, and reject Stewart's plea for a life sentence.

CONCLUSION

Based on the foregoing arguments and authorities, the appellant's sentence must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000 -- Drawer PD, Bartow, Florida, 33831, this _____ day of November, 2002.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

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COUNSEL FOR APPELLEE