IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART, :

Appellant, :

vs. : Case No. SC01-1998

STATE OF FLORIDA, :

Appellee. :

______________________________:

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

INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

The record in this case is divided into two parts -- the record documents and the penalty trial. Volumes I through IV contain the pleadings and other record documents. Volumes V, VI and VII contain the voir dire. Volumes VIII through XI contain the transcript of the penalty phase trial and sentencing hearings. Although there is a duplication of numbers in the record and the transcript, they are distinguishable because of the different volumes. References are to the volume, followed by the page numbers, separated by a slash. For example, the Indictment, which is in Volume 1 at page 18 is referenced as (1/18).

The issues in this brief are arranged in approximate chronological order and the arrangement has no bearing on the perceived merit of the issues.

PROCEDURAL HISTORY OF THE CASE

On September 24, 1986, Kenneth Allen Stewart, was found guilty of murder in the first degree. The murder of Ruben Dario Diaz was alleged to have occurred on December 6, 1984. Following a penalty phase, in which

the jury recommended death, he was sentenced to death on October 3, 1986. Stewart v. State, 558 So. 2d 177 (Fla. 1990). The trial court never wrote or filed a sentencing order. Id. Thus, his findings as to aggravating and mitigating factors were not revealed.

On March 15, 1990, this Court affirmed Stewart's conviction but vacated the death sentence and remanded for resentencing before a new jury because the court failed to instruct the jury on the impaired capacity mitigating factor, § 921.141(6)(f), Fla. Stat. (1989); Stewart, 558 So. 2d at 421. The court refused to reverse for a life sentence due to the lack of a sentencing order because the case was decided before this Court rendered its decision in Grossman v. State, 525 So. 2d 833, 41 (Fla. 1988), requiring contemporaneous written findings.[1]

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[1] At the conclusion of the Court's opinion in Stewart v. State, 620 So. 2d 416 (Fla. 1993), Justice Barkett, Chief Justice, specially concurring, stated as follows:

> I...continue to adhere to my original view that Stewart's sentence should have been commuted to life imprisonment pursuant to section 921.141(3), Florida Statutes (1983), which provides that "[i]f the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment." See Stewart v. State, 549 So.2d 171, 177-78 (Fla.1989) (Barkett, J., concurring in part, dissenting in part). The court made no written findings when the sentence was originally imposed. The clear and unambiguous language of the

Michael Jones, the court-appointed counsel who represented Stewart at his first trial, also represented him at the resentencing in October of 1990. The jury recommended death and Stewart was again sentenced to death on November 21, 1990. This Court affirmed the death sentence on appeal. Stewart v. State, 620 So. 2d 177 (Fla. 1993).

Stewart's attorneys from CCR filed a number of pleadings arguing, among other things, that Mike Jones, Stewart's prior defense counsel, rendered ineffective assistance of counsel. (1/21-144; 2/207-377) Upon deposition, Michael Jones (who resigned from the Florida Bar to avoid an investigation) admitted that he was using cocaine during Stewart's trials, and was ineffective when he represented Stewart during the second penalty hearing. On May 4, 2000 the State stipulated to a third penalty phase, and Judge William Fuente signed the Order. (3/447-638)

Stewart's third penalty proceeding was held March 20-21, 2001, Circuit Judge Barbara Fleisher presiding.

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statute therefore mandates that we should have reduced Stewart's sentence to life.

(8/462) By a seven to five vote, the jury recommended death. (4/631) On May 31, 2001, the court held a "Spencer" hearing (11/1074), and sentenced Stewart to death August 6, 2001. (4/766-80; 11/1101-36)

Stewart filed a timely Notice of Appeal. (4/781) The Public Defender for the Tenth Judicial Circuit was appointed to represent him in this appeal. This Court has jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

STATEMENT OF THE FACTS

State's Case

Hillsborough Sheriff's Deputy Luis, a homicide detective, recalled that, at about 2:00 in the morning of December 6, 1984, he was called to the scene of a homicide in a remote area in the Lutz area of Tampa. He observed the body of a white male lying face down along the edge of the road. The man had blood and brain matter on the left side of his head. (8/520-22) The victim was later identified as Ruben Dario Diaz. (8/525)

During the autopsy, Dr. Charles Diggs determined that Diaz died from a gunshot wound to the left temple which traversed the brain. He found a second gunshot

wound behind his right eye. Deputy Luis observed "stippling," or powder burns on the victim, indicating close proximity of the gun. (8/525-27) Cocaine metabolites were found in the victim's system.[2] (8/531)

Dr. Charles Diggs, the medical examiner, viewed the body of Ruben Diaz at the scene. He observed that the deceased, lying face down along the side of the road, had suffered gunshot wounds. Upon turning the victim over, Dr. Diggs observed stippling at the site of one of the wounds, indicating that the shot was fired at close range -- probably within a foot or so. (8/590-601)

When he performed the autopsy, Dr. Diggs found two bullet wounds. One was located right where the hairline met the forehead on the left side of the head. The direction of the wound was left to right, and downward from front to back. It penetrated both hemispheres of the brain, lodging at the bottom of the brain. The second wound was located behind the left ear. This wound went from left to right, upward, with a slight back to front angle. There was no stippling around the second

[2] Deputy Luis recalled that they searched the victim's room and found a baggie containing a white powdery substance -- possibly cocaine, and a grassy substance which appeared to be marijuana. Luis found a cocaine straw in the pocket of the jacket Diaz was wearing when he was found. (8/532-33)

wound, indicating that the shot was fired from at least a foot away. (8/602-08, 612) The angles of the gunshots showed that one came from above, to the left of the victim, and the other from the left front. Any number of scenarios could produce those angles, but the shooter must have been higher than the victim, shooting down. The wounds would have rendered Diaz immediately unconscious; both would have been fatal. (8/609-14)

Randall Bilbrey lived in Tampa for about a year in 1984. (8/536) He met Kenny Stewart at a convenience store where Stewart was begging for change to buy beer. Stewart and Bilbrey were homeless and lived on the streets and in the woods. Stewart drank a lot and was usually intoxicated. He also used marijuana. (8/540-43)

Stewart allegedly told Bilbrey at that time that he had run out of money, and that he and another man decided to rob someone. They located a nice car at a bar, went inside and found the owner of car. They left the bar with the car owner and ended up on a gravel road about five miles away. They forced the man out of his car and down onto the ground and took a small bottle of cocaine and some money from him. Stewart's accomplice

kept yelling at Stewart to "shoot him, shoot him." Stewart shot the man twice. They left in the man's car, bought gasoline and some other things with the money, and burned the car at the mall.[3]

Bilbrey could not recall Stewart's description of the victim other than that he looked Mexican or Cuban. (8/536-40) Defense counsel read into the record and to the jury testimony given by Randall Bilbrey at a hearing on March 19, 2001. When defense counsel asked Bilbrey if he recalled Stewart telling him that he had been drinking before the shooting occurred, Bilbrey said he did. He did not think Stewart said how much he had to drink, but said he was just drunk or had been drunk for a long time. (10/866)

Michelle Acosta testified that, late on the evening of April 13, 1985, she and her friend, Mark Harris, both in their early twenties, were returning from the beach in Michelle's car. While driving north on Nebraska Avenue in Tampa, it started to sprinkle. They saw a man, whom she identified as the defendant, hitchhiking.

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[3] The victim's car was located by a deputy on his way to work that morning. He saw the car burning in the parking lot of the Floriland Mall in Tampa and called the fire department. (8/527-30)

Because it was raining, they made a U-turn to pick him up. Mark was in the passenger seat so opened the door and let Stewart in the back seat. Michelle said Stewart looked like a lost dog on the street, and was so drunk that his words were slurred. (8/555-58)

Stewart was not sure of his destination but was headed the way they were going. When they arrived at Fowler Avenue, they told him they were going to turn east and asked where he would like them to drop him off. Stewart said Fowler was all right. When they were at 22nd Street, Michelle pulled up to a gas station on the corner and told Stewart they would have to let him out because they were almost to their destination. Stewart asked if they could take him back a couple blocks. Michelle thought it strange that he did not know where he wanted to go. (8/548-49)

Because they were in no hurry, they agreed to take him where he wanted to go. They went back to 15th Street where Stewart told her to drop him off in front of a school. She pulled over in front of the school. Stewart then said, "Don't move, I have a knife." She and Mark did not move; they were silent and petrified. Michelle decided to do something, so put her foot on the

gas, then on the brake, to try to "get him off-centered" so she and Mark could jump out of the car and run. As soon as she put her foot on the gas, she felt a something hit her head, and felt pain. She heard two shots; then heard Stewart get out of the car and pull Mark out. He took her wrist and told her to get out of the car. (8/550-53)

Michelle had been shot in the back shoulder blade and hit over the head with the butt of a gun. She needed six stitches in her head. Mark was shot in the neck and was immediately paralyzed from the neck down. He lived for three weeks before dying, while still in the hospital, of pneumonia. (8/553-56)

James Harville testified that, in 1985, he managed a 7-11 in Hillsborough County. On April 18-19, 1985, he was working alone in the store. About 2:00 in the morning, two young men entered the store and approached the counter. The man directly in front of him stuck a pistol in his face and said, "This is a holdup." Before Harville could respond, he pulled the trigger.[4] The

[4] The jury was advised that Terry Lyn Smith, now deceased, told the police, after the shooting of Mr. Harville, that Stewart had ingested eight or nine beers before the shooting. (10/920)

gunshot struck him right between the eyes, knocking him unconscious. (8/619-21)

When he regained consciousness, he was unable to see because he was blinded by the blood in his eyes. He crawled along the counter to the telephone but could not see to dial. He sat down on the floor and began to pray for help. He heard the bell on the door jingle, and two men he knew found him lying there. (8/621-22)

The doctors advised his wife that they did not think he would live because he had lost so much blood. They said that, if he did live, he would be paralyzed the rest of his life. Gunshot fragments had blown up inside his head and would remain there permanently. Amazingly, Harville not only made it through the night but was released from the hospital in a week, with no permanent damage. (8/622)

Janine Diaz, the victim's teen-aged niece, read a victim impact statement prepared by the victim's brother and two sisters, telling what a wonderful brother Ruben Diaz was, how he was the center of their family, how devastated they were by his murder, and how they continued to miss him. (9/660-72) In accordance with a stipulation between the parties, the jury was informed

that Ruben Diaz transported drugs between Miami and Tampa; and that he sold drugs in Tampa for some period preceding his death." (10/920)

Defense Case

Susan Smith Moore, age 38, Kenneth Stewart's step-sister from South Carolina, testified that she first met "Kenny," who was a year younger that she, when they were four or five years old. Her mother was dating Bruce Scarpo who raised Kenny. She soon moved into the Scarpo household with her mother, her older sister and her brother. Susan thought Kenny was Bruce Scarpo's natural son until she was ten or eleven years old. (9/673-75)

They lived in a large house in Charleston. Scarpo was a bar owner and bookmaker, or "bookie," and made a good living. The atmosphere in the home was tense, however, because there was a lot of violence. Bruce Scarpo was violent, sometimes on a daily basis, toward his family and others. Even when there was no violence, the atmosphere was tense because they never knew when their stepfather would erupt. It was like walking on eggshells because they never knew what might "set him off." It could be something major or minor, such as

someone not flushing the toilet. (9/675, 679-80)

When Scarpo beat the girls, he would make them bend over, sometimes drop their pants, and he would beat them with a belt. When he beat the boys, it was as if they were grown men. He would beat them with his fists. They were not allowed to defend themselves. (9/680-81) The children were also disciplined by restrictions such as solitary confinement. They were only allowed out of their rooms to work or go to school, and for dinner. At times, the children were not fed while restricted to their rooms. When that happened, the other children would sneak food to the restricted child. They were not encouraged to be close because their stepfather would "play one against the other," by telling one of them that one of the others had told on him or her, or would be beaten if he or she did not confess to something. Because the children were encouraged to tell on one another, they tried to stay apart so they would not know what the others were doing. (9/681-83) Susan played with Kenny more than the others because of the similar ages. They had no friends other than kids that knew about their environment through their parents -- usually bar customers. (9/689)

Bruce Scarpo owned several nightclubs in Charleston. The Scarpo children were expected to clean up the bars Sunday mornings when they were closed. Their stepfather brought bar customers home in the afternoons, before the bars opened. When the bars closed at 2:00 a.m., he would bring home the people left in the bar, awaken the children, and require them to get up and cook breakfast for his guests. Sometimes Susan was awakened at night to get up and "deal" cards. Mr. Scarpo and his guests were always drunk and sometimes "barroom brawls" would break out at their house.[5] (9/683-85)

Sometimes the children went to Scarpo's bars at night to work and take out trash. The bars were crowded, rowdy and had bands. Everyone was drinking or drunk. They were sometimes violent. One afternoon, Susan's birthday party was held in a bar, during which Bruce Scarpo was stabbed and almost died. (9/685-86)

Bruce Scarpo was always armed. He had an extensive gun collection in the home and was armed with a pistol. On Sundays, he had poker and football parties at their

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[5] Kenny's older stepsister, Linda, testified similarly. She said that, when her parents wanted to close the bar, they brought all the drunks home with them. They would awaken the children to get up and make breakfast and to serve drinks. If these "drunks" made remarks that set Bruce off, he would get in a fight. (9/724)

house. The children bartended at these parties. (9/682-85) At one point, Bruce Scarpo served time in prison for racketeering, in connection with counterfeiting and book making. (9/690-91)

The children were encouraged to drink alcohol. They had wine with Sunday dinner even as small children. Scarpo told them he would rather they drink at home than sneak away and get in trouble. They had beer on tap at the house and always had a stocked bar. She and Kenny often bartended and would taste the drinks they made. Kenny started drinking alcohol at age four or five. He was caught sneaking liquor out of the house when he was about nine years old, to take it to school. (9/696-97)

Susan's mother, Joanne, and Bruce Scarpo usually slept during the day if they were home. They got up several hours before the bars opened and usually all ate dinner together. That was the only time they were all together. The atmosphere at dinner was tense. The children were afraid to talk during dinner because they never knew what would "set him off." (9/686-88)

When the parents were gone, they usually had maids or house-keepers in the house, most of whom were mean to the children. They did not last long in the Scarpo home

because Mr. Scarpo would soon accuse them of stealing money lying around the house and, in one instance, the newspaper, and would fire them. (9/688)

Susan's mother was also beaten in front of the children many times. Sometimes Mr. Scarpo wanted them to watch and other times she and Kenny watched without his knowledge from the other side of the louvered door between their bedrooms and the living room. They never knew how the beatings would affect them, or if their mother would leave, and did not want to be left behind. (9/692-93)

On two occasions, Susan and her mother left the Scarpo home. She was about eleven the first time. They hid out with friends in Charleston who did not know Bruce Scarpo; then went to Arizona and stayed with relatives of her mother whom Bruce did not know. They believed that if he found them, he would kill them. (9/690-92) Eventually, they returned home. When Susan was thirteen, her mother left again. Susan jumped out of her bedroom window and followed her. They stayed with relatives in Arizona. (9/693-94)

Susan described Kenny, when he was a child, as "mischievous" and "quiet," and "solemn." He was a clown

when they had company, but when no one was around, tried to hide and stay out of the way, as did the other children. Kenny was hyperactive when older. He had a lisp and mumbled a lot, making him hard to understand. He had a bedwetting problem and sometimes could not cope. (9/697-98)

Kenny was first punished for wetting the bed by having to sleep with no sheets, or having to take the sheets off the bed and wash them. Later, he was beaten and made to sit on his bed naked for hours and hours at a time. Mr. Scarpo seemed to perceive Kenny's bedwetting as a personal insult because he could not control it. (9/698)

They had a number of dogs as children, and a pony and some other animals. Kenny was nurturing and gentle with animals. He and Susan tried to help animals when they found them sick or injured. They had a burial ground in the yard. Kenny and Susan would have burial services when an animal died. (9/702-03)

Bruce Scarpo was mean to the animals and would beat and kick the dogs. One of the dogs became mean. He was put in a kennel where he "ripped the saliva glands out of the U.P.S. man," and attacked a kennel employee.

When Kenny became especially close to one of the dogs, Mr. Scarpo kicked the dog around and ended up shooting him. Kenny was upset, of course. (9/699-701)

During their childhood, Kenny believed Bruce Scarpo was his biological father, as did all the children. Kenny would talk about "his dad" being tough, and would stick up for "his dad" if someone wronged him. When he finally learned that Scarpo was not really his father, he was devastated. He went to Florida to stay with his maternal grandmother. Not long after Kenny left home, Susan ran away to a runaway shelter, and then lived with her brother, Jay. (9/703-05) The first time Susan told anyone about the abuse was at the runaway shelter. Until she sought counseling, she believed that all children were treated the way they were treated. (9/712-13) Because of her childhood, Susan still had a hard time trusting people or building relationships. She had been married four times and had been in and out of therapy all her life. (9/689-90)

During the past several years, Susan had corresponded with Kenny and visited him in prison. She intended to continue her contact with him because "he's my brother and I love him." Susan testified that her

mother and Bruce Scarpo later had two children together. Susan maintained contact with these children, who lived in Charleston. Scarpo and Susan's mother are deceased. (9/705-07)

Prior to Kenny's first trial in this case, Kenny's attorney called her. She was a real estate agent at that time and was with clients in her office. Thus, she asked the lawyer to call back after office hours, which he did. She did not know she was "testifying," so just answered questions she was asked. She was not asked about the abuse although she had anticipated that she would be. (9/707-15) After Kenny's first trial, she never knew she could tell anyone about the abuse, as it pertained to Kenny's situation, until she was contacted by an attorney two-and-a-half years before her testimony. (9/707-09)

Linda Arnold, Kenny's older stepsister, Germantown, Wisconsin, was about ten years old when she first met Kenny, who was then three or four years old. Her mother was seeing Bruce Scarpo, whom they believed to be Kenny's father, and Scarpo moved in with them. Shortly thereafter, they all moved to a house in Charleston, South Carolina. Initially, Linda thought Scarpo was

flamboyant and exciting. He owned a bar with a band where he took them. (9/716)

Linda's feelings changed. Scarpo would beat them with a belt -- often the belt buckle, and would verbally belittle and abuse them. He told her she was stupid. He abused all of the children and made them watch the other children being beaten. Although the children were bruised from the beatings, Scarpo was careful not to bruise the girls in places where the bruises might be seen. The boys would have black eyes, fat lips and other visible injuries. She recalled an episode when Scarpo put Kenny, who was eight or nine years old, in the garbage can, with the lid over him. Kenny was left in the garbage can for at least an hour. (9/719-21)

Linda tried to protect her mother. When her mother suffered a broken bone such as her nose, ribs, or collar bone, Linda would escape with her to a hotel for a couple days. Feeling relieved to be away, Linda would return from school to find a note that her mother had gone home and that she was to return home. Linda did not know why her mother returned to Scarpo but believed that he had such power over her that she believed he would not do it again or she was afraid he would harm

the children. (9/722-23)

Linda never saw Bruce Scarpo drink anything that was not alcoholic. He started the morning with whisky in his coffee. About noon, he would switch to beer and shots of amaretto. Linda was amazed that he was not a sloppy, falling-down drunk. (9/726)

On one occasion, Bruce Scarpo asked them to search the bloody dining room floor for a man's teeth that Scarpo had knocked out. He was told that, if they found the teeth within a certain period of time, the doctors could put them back in. The children went through the carpet inch by inch but never found any teeth. (9/725)

When Linda was 16 or just 17, she, Kenny, and her sister were home alone. She and her sister, who shared a bedroom, woke up to see a black man sitting on their bed. He told them not to scream. He hit her over the head and she lost consciousness. It turned out that there were two men; one was stealing guns and money while the other was checking the children's side of the house. Early the next morning, Bruce Scarpo, their mother, and brother, Jay, came home. They called the police; Scarpo was very angry. (9/731-33)

A bridge separated their end of the street from the

black neighborhood. Scarpo and her brother went into the black neighborhood where Scarpo shot out a number of windows in the homes there. He put a sign on the bridge, using the "N" word, that the black people were not allowed to cross the bridge; if they did, they would be shot. Jay and Kenny, who was about ten years old, were armed and did most of the bridge monitoring. (9/733-34)

When Linda's mother and her sister, Susie, left and went to Arizona, she knew where they were but did not tell Scarpo, who was very angry with her. A school friend told Linda that her parents would not allow her to associate with Linda anymore because of Linda's family situation. Linda broke down and was taken to a psychiatrist who said she should be hospitalized for a nervous breakdown, or else leave the area. She bought a ticket to Arizona where her mother and sister were staying. Before she left, Scarpo went to her best friend's house where she was hiding, with a gun. The friend's parents were able to persuade him that Linda was not there. They changed her reservations and their two sons drove her to the airport in Columbia, armed with guns in case Scarpo showed up. As it turned out,

Scarpo was at the Charleston airport when she would have left had they not taken her to Columbia. (9/727-30)

The psychiatrist suggested that she get a restraining order against Scarpo so she could go to the house to get her clothes. They spoke with a judge who said he would send a police officer with her. She then realized that she could not do that, however, because, she had previously seen Scarpo pay off a number of police officers in their home with gifts or money. She could not trust that she would not get a police officer that was indebted to her stepfather. Her stepfather might convince the officer that it was all a misunderstanding and he might leave her there. (9/734-35)

Before she left home, Linda learned that Kenny was not really Bruce Scarpo's son. On a cluttered desk in the house, she saw a social security check made out to Kenneth Stewart and Bruce Scarpo.
When she asked her mother who Kenneth Stewart was, she learned that Stewart was Kenny's real name, and that Bruce Scarpo was going to tell Kenny when the time was right; thus, she was not to tell Kenny about it. She had already left home when Kenny learned that Scarpo was

not his real father, but his guardian. (9/735-36)

Linda described Kenny in two ways. One was the Kenny who wanted to be a little kid and be happy, who liked to play practical jokes and laugh, and was sensitive to other people. He was that way mainly around the children. The other Kenny, most of the time, was sad, withdrawn, shy, and tried to stay out of the way.

He had a bed-wetting problem and their stepfather thought he did it on purpose. If Linda knew Kenny had wet the bed, she would try to wash the sheets and get them back on the bed before Scarpo found out. If she did not, however, Kenny would be restricted to his room. Sometimes, he had to sleep on the wet bed and sometimes he confined to his room, in his underwear, with no sheets on the bed. Sometimes he didn't even sleep on the bed. He was not permitted to come out for meals. Scarpo would have the children take bread and water to him; and they tried to sneak other things to him. All of the children were restricted at times but never to the extent that Kenny was for his bed-wetting problem. (9/737-38)

Kenny was 11 when Linda left home. She did not

return from Wisconsin to visit her mother until three years later when her little sister, Nicole, was born. She saw Kenny briefly but was not able to have a conversation with him. He seemed withdrawn. After that, she did not know where he was living. She saw her mother only twice after that visit, and did not see Kenny again until he was in prison. Since then, however, Linda had visited, corresponded with, and talked to Kenny on the phone. (9/735, 739, 742-43)

On cross-examination, Linda explained to the prosecutor that when she lived at home in Charleston, she had developed a coping mechanism called "disassociation," which meant that she separated her emotions from the situation. She was able to continue doing that until her daughter was raped in 1991, when all the memories and emotions "came crashing back."

Linda confirmed, however, that the memories as to which she had just testified, concerning Kenny, were not recently retrieved memories. The recently retrieved memories were of sexual abuse. Her daughter's experience brought back memories which sent Linda into a deep depression. She was hospitalized for a month in 1991; for another month in 1996, and again the past

spring. Twice, she was given electric convulsive therapy (shock treatments). She had been seeing a psychiatrist and a therapist since 1991. (9/740-43)

Linda was sexually abused by her stepfather, Bruce Scarpo. Although she remembered the sexual abuse even prior to 1991, she regained more memories after her breakdown. She was still unable to remember some areas of her past. She never reported the sexual abuse to the authorities, and was unable to tell even her husband "because it was terrible." She finally told her psychiatrist and therapist. Linda was an R.N. who did home care nursing. She was not working at the time, however. She received disability because of her emotional problems. (9/744-45)

Margie Sawyer of Tampa testified that she had known Stewart since about 1983. She met him while tending bar. At that time Kenny was about 19 and she was about 43. They became friends and eventually moved in together. Stewart was working as a server at a restaurant. After a couple months, he left that job. Her boss eventually asked her to leave because she was dating a 19-year-old man. She had a little money and Kenny had a job with a construction company. He worked

there for a couple months. He did not want her to work in a bar because she might meet someone else. He was very possessive. (9/772-776)

They had a very good relationship and talked a lot about his past and things in general. When he started drinking, however, he was a different person. When she had no job, Kenny was not working and their apartment cost $500 a month, Kenny started drinking more. They had to move, so stayed with people they knew for awhile. They went to South Carolina to try to get help from Bruce Scarpo twice. During these visits, Margie saw Scarpo lose his temper. He became very angry with one of his daughters -- Nicole or Angela, pulled her by the hair and slapped her a few times. Scarpo did not like Margie because she was older and he thought she was not a very good person. He told Kenny that he could work there, but he would have to ask "the woman" to leave. Scarpo's wife, Joanne, tried to get him to stay but Kenny said that if Margie could not stay, he would not stay either. (9/777-80)

When they returned to Tampa the second time, about 1984, they lived on the street or with people they met. They stayed in abandoned places and, sometimes, behind

McDonald's. Their homelessness lasted about a year. They finally found a small apartment where Kenny paid $50 a week. He worked as a roofer. Kenny did not have the right shoes, however, and fell off a steeple. Because he could not afford to buy the proper shoes, he lost the job. (9/780-83)

As time went on, Kenny's drinking became more frequent, especially when he was under pressure and neither of them had jobs. Margie wanted to get a job but Kenny did not think she should have to work, and was afraid she would leave him. He often went to his mother's grave. Margie went with him twice when they had a car. During the last six months or year they were together, he went there many nights, especially after he had been drinking. She tried to keep him from going, and sometimes followed him. It was disturbing to her that, at 2:00 or 3:00 in the morning, Kenny was drunk, staggering, and "wanting to go out there to see his mama." (9/783-85) When he was at his mother's grave, he would cry and swear that things would be back to normal some day. She did not understand what he was thinking although, at that time, he thought Scarpo had forced his mother to kill herself. He talked about his mother a

lot even when sober, although he could not tell Margie much about her because she died at such a young age.[6] (9/785)

In early December of 1984 (the time of the homicide), Margie was incarcerated. Kenny was drinking very heavily. When he was drunk, he would try to pick fights at the bar, or he would start thinking about what happened to his biological father and mother. He was certain that Margie knew something about his father's death. She knew only what one hears in a bar. Kenny believed Scarpo had something to do with the death of his father. (9/786-788)

Margie testified that Kenny had a very good nature

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[6] According to pleadings filed by CCR, Kenny's mother, Elsie Tate Stewart, committed suicide at age 25. She had already been married and divorced four times, always to men who brutalized her. She began drinking at age eight and became a stripper and prostitute at age 13. She drank during her pregnancy with Kenny, and was arrested for armed robbery when she was five months pregnant.

Kenny's father was in jail when he was born and his mother remarried when he was five months old. The new husband was extremely violent. Stewart's mother could not protect herself or her son from his violence. About a year later, she met and married Bruce Scarpo, so that HRS would not take Kenny, but soon took Kenny and left Scarpo to travel around the country with a new boyfriend, committing robberies. When she returned seven months later, Kenny was in terrible physical condition and was terrified from abuse. When he was about two years old, his mother left him with Bruce Scarpo, and he never saw his mother again. Scarpo was very angry that Elsie did not want him, and took it out on Kenny. His mother drank and continued to take drink and use drugs, until she committed suicide. (1/52-58) Thus, Kenny's memories of his mother must have been mostly fantasy.

when he was sober. He would give a person on the street a pack of cigarettes if he had the money; he was very good to everybody. At times, however, he became very violent with her when he was in a drunken rage. Usually, this happened because he thought she knew something about his "daddy's" death. She really did not know. (9/788)

Margie knew that Kenny committed some burglaries when they were living on the streets and needed money. After she returned from jail, however, he mentioned that he thought he had killed someone, "and he broke down." She did not know for sure because he was "totally mixed up half the time." When he talked to their friend, "Terry the street man," they would discuss it. She tried to calm him down rather than talking to him about killing someone. After Kenny was arrested in April of 1985, the police showed her a picture of a man lying down, which upset her because she did not believe he had really done it. (9/789-81)

Dr. Michael Maher, M.D. testified that his practice consisted of both a private and a forensic psychiatric practice in Tampa. He was board certified in psychiatry and forensic psychiatry. He held the position of

clinical assistant professor of psychiatry and behavioral medicine at the University of South Florida and had testified in twenty or thirty death cases. (9/753-60)

Dr. Maher evaluated Kenneth Stewart and the records from his prior legal cases. He performed a forensic psychiatric evaluation, which consisted of approximately an hour-and-a-half interview with Stewart concerning his case and circumstances a week earlier, and again the previous day for about twenty minutes. His relatively brief interviews were supplemented by extensive records generated by other doctors, concerning Stewart's background.[7] He reviewed statements and testimony by family members and others. He also reviewed police reports, statements made to police officers about Stewart, medical reports, and prior testimony. He used principles that enabled him to detect lying or malingering. (9/761-64)

Dr. Maher testified within a reasonable degree of medical certainty that, on the date of the homicide in

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[7] Dr. Maher said he had reviewed the records of Dr. Irving B. Weiner, Ph.D.; Dr. Walter Afield; Dr. Fay Sultan, Ph.D.; and Dr. Gerald Mussenden, Ph.D. (9/770)

this case, Stewart was "suffering from a very severe psychiatric disorder, specifically . . . post traumatic stress disorder," because of his extreme childhood abuse and trauma. Stewart was also intoxicated at the time, and "those factors had a very major impact on his ability to think, make decisions, and on his behavior." (9/764-65)

Dr. Maher explained that, learning that the man he believed was his father was really his stepfather led Stewart, then at the vulnerable age of 12 or 13, to question his childhood attitudes and beliefs. It set off an avalanche of changes. What Dr. Maher found most significant was that Stewart had the feelings and attitudes of a badly abused child in an isolated family, toward the abusing parent. He was proud of his father, bragged about him and how powerful and important he was; at the same time, he was terrified of his father and hated him. Thus, learning that Scarpo was not really his father led him to question many beliefs, feelings, and assumptions, which was natural for an abused child. (9/765-67)

Dr. Maher opined that, on the date of the homicide, Stewart lacked the capacity to conform his conduct to

the requirements of law as a result of his mental illnesses. He had substantial impairment to his capacity to conform his behavior to the requirements of law, and his ability to choose and do the right thing was very severely impaired. (9/767) Dr. Maher expounded:

> This is a child who was brought up in a family of intense and cruel violence that existed all the time . . . not simply a father who went overboard occasionally, but a father who was abusive to the point of inflicting torture on his family. . . . [T]his was the child who . . . ran away from home at 13; who began drinking alcohol at 12 and 13; who got in trouble with the law as a young teenager; who was sent to prison when he was 17; learned more about violent culture.
>
> There are literally hundreds of details that I could relate . . . that all led to this; but this is the person who was present at that time and place and committed this offense . . . and it is because of these aspects of his background that he was compelled in an unthinking reactive way to commit . . . this horrible event.

(9/767-68)[8]

Dr. Faye Ellen Sultan, a clinical psychologist from Charlotte, North Carolina, testified that, in her private practice, she saw, primarily, single adults and

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[8] Undersigned counsel has omitted the "ums" and irrelevant stuttering in this and other quotations in the brief.

couples, although she treated children in the context of their family situations. She did consultations and evaluations for the court system. Fifteen or twenty percent of her practice was forensic and the rest, clinical. She was on the faculty at the University of North Carolina, at Charlotte.

Dr. Sultan designed programs for prison systems, particularly in North Carolina, to treat people who had been abused as children and later committed violent crimes. She supervised alternatives to incarceration around the country and a North Carolina program to treat sex offenders. She researched the effectiveness of treatment models to deal with after-effects of childhood abuse on criminal behavior; and worked with studies to help identify personality traits of offenders with serious abuse histories. (10/867-69, 875)

Dr. Sultan worked on criminal cases, describing the effect of a crime on the victim and testifying about the victim's psychological damage. She evaluated people accused of crimes and had evaluated people accused of capital murder about 100 or 120 times. She testified in only 30 or 35 of those cases, in North and South Carolina, Florida, and Texas. She had testified for the

prosecution in a number of cases but not in any death cases, mainly because, in North Carolina, the State's evaluations are done by doctors who work for the State hospital system. (10/869-73)

Dr. Sultan was retained by the defense to evaluate Kenneth Stewart in 1993. She met with Stewart for a total of about twenty hours from 1993 to the present, on four or five separate occasions. She performed psychological tests so she would have some idea how his mind and thought processes worked. She reviewed his school records; jail records; attempted suicide records; and testimony of family members and others who were aware of the intoxication and behavior Stewart exhibited at the time of the crime.

In 1993, she administered the "Minnesota Multiphasic Personality Inventory" ("MMPI"), and an I.Q. test to see how well he read and comprehended. His I.Q. was in the low 90's -- the low end of the normal range, which was about an eighth grade reading level. (10/875-79) Dr. Sultan stated, within a reasonable degree of medical certainty, that Stewart committed the murder while under the influence of extreme mental or emotional disturbance. She based her opinion on Kenny Stewart's

lifelong history of mental illness. Members of his parents' and grandparents' generations suffered from serious bipolar mental disorders, manic depressive illness, and major depression. There is a very strong biological component to depression. Stewart had been severely depressed from at least his adolescence, and had made three serious suicide attempts. His thoughts and moods, and the clarity of his thinking and judgment, were deeply affected by mental illness. (9/879)

In addition to depression, Stewart had a "terrible, terrible substance abuse problem". He consumed large quantities of alcohol that would have been lethal to her -- sometimes more than a gallon a day on a regular basis. Alcohol affects a person's ability to control impulses, think clearly, and make one's behavior fit within a logical framework. She considered Stewart's alcoholism to be an extreme emotional disturbance. (10/879-81)

Stewart grew up in circumstances where he experienced tremendous loss, violence, and abandonment; he discovered as a young adolescent that the man he had viewed as a hero, even though he was very abusive, might have been responsible for the death of his parents. He

had many symptoms of post-traumatic stress disorder.

Dr. Sultan stated further that Stewart was not able to think situations through in a logical way; thus, his capacity to conform his conduct to the requirements of law was substantially impaired. He was not able to control inappropriate dangerous and violent impulses. Thus, his ability to conform his conduct in a way that would be expected in our society was greatly impaired. (10/881-82)

Stewart had reached a despairing crisis point in his life when he shot Ruben Diaz and Mark Harris. He was spending a lot of time at his mother's grave looking at the photograph of her that was embedded in her tombstone; he was sitting and drinking and listening to his mother order him to avenge her death. He deteriorated very rapidly during that period of time. Had Dr. Sultan examined him during the four or five months between the killings of Mr. Diaz and Mr. Harris, she believed that she would have seen him at the very bottom of his psychological functioning. (10/882-84)

Dr. Sultan did not question Stewart at length about the circumstances of the murders. (10/884) His memory was distorted because of his intoxication, and because

he read about the crimes and, to some extent, did not know whether his memories were a result of what he had read or what he remembered. Dr. Sultan noted that the recall of someone who has participated in such incidents is not likely to be very reliable; thus, she was more interested in knowing about the circumstance of Stewart's life at that time; what he was thinking and experiencing, and his psychological symptoms. Stewart was so depressed at the time of the murders that many of his thoughts and recollections were confused and distorted -- a symptom of major depression. Mentally ill persons are not the best source of information about themselves. Thus, Dr. Sultan's conclusions were based only ten for fifteen percent on what Stewart told her. She relied more on records, her own observations, testing, and things others like Bilbrey, Sawyer, and Stewart's sisters told her about Stewart's functioning. Dr. Sultan related that Margie Sawyer was very much aware of how much Stewart was drinking and the drugs he was taking, despite her own alcoholism. (10/885-89)

Although Stewart was physiologically capable of doing the things he was convicted of doing, he did not know what he was doing with a clear rational mind. His

ability to make choices that conformed to the requirements of law were much impaired, given his mental illness and level of intoxication. That mentally ill and intoxicated individuals can perform self-protective acts, does not mean the chain of events that took place was logical and rational, or would have happened without the mental illness. (10/889-891)

Lillian Brown, Kenny's aunt and the sister of his biological father, Charles Edward Stewart, testified that her brother, Kenny's father, had lived in Tampa, Florida. He married Elsie Helen Tate when he was about twenty years old, and his wife was younger. Even before the marriage, Mrs. Brown knew Elsie Stewart through her grandmother, Mrs. Berryhill. Elsie had been a stripper in Tampa since age thirteen. Kenny's father was a roofer, and also did construction and iron work. He had been convicted of burglary and had been to state prison several times. (10/892-95)

Charles and Elsie Stewart were married until 1963, the year Kenny was born.[9] His mother took care of Kenny at first; then her sister, Dorothy Stewart, took care of

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[9] See note 6, supra.

him for about six months. This aunt was very abusive toward Kenny. When she gave Kenny back to the courts, he was returned to his mother. He was about fifteen months old at that time. Kenny cried a lot, was not satisfied, and was very distraught and emotional as a baby. (10/896-98)

Kenny's mother married a man named Bruce Scarpo. They moved to Charleston, South Carolina. Mrs. Brown did not see Kenny again until he was nearly thirteen, when he returned to Tampa to live with his grandmother. During the summer, he stayed with Mrs. Brown for three months. Kenny was a normal boy at times and, at other times, he was very distraught. He wanted to know who he was, who his family members and relatives were. He was obsessed with finding out what happened to his natural parents. (10/898-900)

Mrs. Brown talked to Kenny about the deaths of his parents. He believed that his stepfather, Bruce Scarpo, had killed or had his father and mother killed. His grandmother and aunt told him that. Mrs. Brown also believed Scarpo was responsible for the deaths of Kenny's parents, although she knew his mother's death was officially a suicide. Her brother, Kenny's father,

had been killed in a Tampa barroom fight when Bruce Scarpo was living in South Carolina. He died from a gunshot wound to the heart. (10/906-07)

When school started, Kenny returned to live with his grandmother. He was in seventh grade, but did not finish the school year. Mrs. Brown did not know where Kenny went when he left his grandmother's house, and did not see him again until he was in the hospital after he had been arrested and had taken an overdose of drugs. Mrs. Brown continued to visit Kenny in jail.

Since his incarceration almost 17 years earlier, she visited Kenny at Florida State Prison in Starke about once a month or at least every six weeks. They talked about their lives, past and future, world affairs, and Kenny's spiritualism. Kenny had become a very spiritual-minded person as to religion as a whole -- not just one religion but the spirituality of our lives.

She also talked to Kenny about her own problems and he gave her very sound advice. He helped her many times when she had devastating experiences in her life. Kenny had become calmer and more compassionate than when he was young. He was a completely different person, and his outlook on life was much more fulfilling. (10/901-

906)

STATE REBUTTAL

Dr. Sidney J. Merin, a psychologist specializing in clinical psychology and neuropsychology, was called by the State in rebuttal. Dr. Merin testified that he first met Kenny Stewart on the day of his conviction for the homicide in this case, in September of 1986. He was asked to evaluate Stewart. Dr. Merin met with Kenny on the morning of his first penalty phase for about an hour. They discussed Kenny's background and family life, but did not discuss the events surrounding the charge and his conviction.

Kenny described a love/hate relationship with his stepfather whom he believed for many years was his biological father. Kenny did not relate any severe degree of abuse, although he indicated that he had significant problems with his stepfather. At age 12, Stewart learned from his grandmother that his mother died when he was a small child. He learned that his stepfather was not his biological father; his mother had committed suicide; and his biological father had been shot when Stewart was less than a year old. He believed Scarpo was responsible for their deaths. (10/921-28)

Dr. Merin described mental illness per se as "an individual's break with reality," often diagnosed as schizophrenia, which is divided into a number of types. "Manic depression," a "bipolar disorder," has many elements of mental illness. On the other hand, "emotional disturbances," which are not actually mental illnesses and do not involve a break with or loosening of ties with reality, cause one to feel terribly uncomfortable. This category includes people who are hysterical, depressed, phobic, obsessive, or compulsive. An anxiety disorder is part of it. (10/928-32)

The third group is a "character or behavior disorder." These people walk the streets. They are not psychotic and do not necessarily have an emotional disorder, but their behavior may bring them into conflict with society. They may just have an unusual or strange way of living. Among the personality or behavioral disorders are "antisocial personality" and "borderline personality disorder," which include people who live on the margin of the rules and do not quite know how to handle themselves. Some people have a little of several types of mental disturbance. (10/932-33)

After reviewing documents and talking to Stewart, Dr. Merin concluded that he was not psychotic or neurotic ("disorders"), and had no breaks with reality. He did find characteristics associated with the antisocial behavior disorder in his personality. Although Dr. Merin had no reason to believe Stewart was coloring or omitting things, Stewart did not tell him as much as he eventually learned as to the extent of disturbance in Stewart's family. (10/934-35)

Dr. Merin opined that, at the time of the crime, Stewart was under "some general distress," but because he lived with distress pretty much all of his life, he did not characterize Stewart's emotional distress as extreme. Stewart was always dealing with his emotions from the past; in fact, Dr. Merin believed that was probably what prompted him to start drinking and using drugs early in life. Because Stewart always had a level of emotional distress, it didn't affect his thinking as to moral or legal issues. (10/941-43)

Dr. Merin deduced from things Stewart reported to others, that Stewart suffered depression, an emotional or affective disorder. Although Stewart had a history of alcohol dependence and, perhaps, polysubstance abuse,

Dr. Merin did not find his capacity to conform his conduct to the requirements of law "substantially" impaired.[10] (10/943-45) He agreed that Stewart's disturbance developed pretty much due to factors beyond his control, although his goal-directed behavior was planned. He agreed that Stewart was the end product of years and years of extreme emotional distress.[11] He admitted that some of what was reported by Stewart's step-sisters suggested some very significant emotional distress in Stewart's early life. Stewart's behavior took a decided turn for the worse at age 12 or 13 when he learned that his stepfather was not his real father. He had dreams of his mother -- fantasies of what she was like, what might have happened to her and, ultimately, believed that his stepfather had killed both his mother and father. Although that belief was corrected, he retained bitterness and resentment, and fantasized avenging their deaths. (10/945-48)

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[10] During Stewart's first penalty phase, Dr. Merin testified that Stewart was drunk at the time of the shooting and his control over his behavior was reduced by alcohol abuse. Stewart v. State, 558 So. 2d 416, 420 (Fla. 1990).

[11] Although Dr. Merin had testified to this previously, as suggested by defense counsel, and agreed that it was true, he would not admit that Stewart's emotional distress was "extreme" at the time of the homicide. (10/945-46)

Stewart told Dr. Merin that his earliest and maybe only memory of his mother was of her dressing him. In his repetitive dreams, he saw his mother in line at an airport and ran up to her. Just as he got to her, he would awaken. The dream reflected a trauma or yearning with respect to his mother who was the center of his universe at ages one to three. Initially, he thought his parents had divorced and his mother was not allowed to see him. Although he suspected she might have died, he hesitated to go with his step-father to the cemetery because, if he saw her gravestone, he could no longer fantasize that she was alive. At 10 or 12, he learned she was dead. Stewart was suicidal after that age. (10/948-51)

The prosecutor introduced into evidence a copy of Stewart's conviction for escape, upon which the aggravating factor of "under sentence of imprisonment" was based. Defense counsel published a portion of an affidavit from the escape case, stating that, on June 8, 1984, Stewart walked away from the Sheriff's Operation Center Garage where he was assigned trustee while in jail. Law enforcement searched for Stewart with "negative results." (11/989-90)

Following closing arguments and jury instructions, the jury recommended death by a 7 to 5 vote.[12] (4/631)

Allocution or "Spencer" Hearing

Harry Brody, attorney for the Capital Collateral Regional Counsel for the Middle District,[13] testified that he represented Kenneth Stewart for three years in both of his cases. During this time, he met with Stewart numerous times -- probably once a month, either at Union Correctional Institution or the Hillsborough County Jail. They had numerous telephone conversations. He knew Stewart as well as he had ever known any client. (11/1074-77)

Brody described Stewart as a "straightforward, quiet individual." He was concerned for members of his family rather than himself. He was especially concerned about

[12] When the jurors reached their decision, they wrote a note stating that the foreperson was unable to sign the verdict form. The judge called Ms. Mueller, who signed the note, to the bench. Ms. Mueller, the foreperson, had tried to sign the form but just couldn't make her hand go. She did not feel comfortable signing it. She was sorry. The judge gave the jury a new form and asked them to pick a new foreperson to sign it. (4/609)

[13] Brody had practiced law for about fifteen years. He was with CCR for over three years, until the beginning of the month of his testimony at this hearing. (11/1075-76)

his step-sisters, Linda and Susan, who had serious mental health problems. Whenever Stewart asked Brody to do something, it was for his aunt or his sisters rather than himself, which was unusual for a client on death row. Stewart was civil, polite and quiet. Brody said it had been a pleasure to represent Stewart. Stewart was very remorseful and had wept in front of Brody while discussing his cases. (11/1077-79)

Jeff Hazen, a lawyer who also worked for CCR, and represented Kenny, met with Stewart about once a month and knew him very well. He described Stewart as kind and more concerned with others than himself. Stewart was mature and honest and never lied to him. He described Stewart as "a good person." (11/1084-86)

Stewart always had a "soft spot" for children. When he looked at a picture of Mr. Hazen's new baby, he had tears in his eyes. He became emotional when telling Mr. Hazen about his sister bringing her two-year-old to the prison to see him. Hazen felt that it brought back thoughts about his own traumatic childhood. Stewart told him early in their relationship that he would like to help children or juveniles. He found it hard to live with his guilt for the damage he had done to people's

lives. (11/1086-88)

Rochelle Theriault, case manager for the Intensive Delinquency Diversion Services Program, Department of Juvenile Justice, testified that she worked with high risk children to prevent further delinquency. Most of these children were from abusive families and had alcohol and drug problems. (11/1080-81) Kenneth Stewart had contacted her because he wanted to write a book about juvenile delinquency for youthful offenders. He learned about her work through his aunt, Lillian Brown. She arranged for Stewart to speak with some of the "kids" she supervised. A week-and-a-half prior to the hearing, Stewart met with four offenders at the Hillsborough County Jail. He told them that crime was "not the way to go." He related his personal story, emphasizing the dangers and pitfalls of a criminal life-style. Stewart delivered his message well, and the kids were very impacted. Some of them told her they were going to change so they would not end up like Stewart. (11/1081-84)

Kenny Stewart told the judge that he had intended to speak but, because the Diaz family was not there, he would just give her a personal letter he had written.

He also gave the court his only disciplinary report since his incarceration. (11/1088-90)

SUMMARY OF THE ARGUMENT

Issue I: The trial judge erred by failing to instruct the jurors on the nonstatutory mitigation proposed by defense counsel; thus, encouraging them to give more weight to the statutory factors, and skewing the jury recommendation in favor of death.

Issue II: Florida's death penalty statute is unconstitutional on its face because it doesn't comply with the Sixth and Fourteenth Amendment requirements that a death qualifying aggravating factor be alleged in the indictment and found proven beyond a reasonable doubt by the jury. Violation of the Sixth Amendment right to jury trial is structural error that can never by harmless.

Issue III: The jury returned a death recommendation by only a seven to five vote. This Court should revisit and recede from prior case law holding that there is no constitutional infirmity in a jury's penalty recommendation of death returned by less than a substantial majority of the jurors. Thus, Stewart's death sentence should be vacated.

Issue IV: The sentencing judge failed to give sufficient weight to the substantial mitigation in this

case, most of which was unrebutted, because she relied unreasonably upon the testimony of Dr. Merin who saw Stewart for only one hour in 1986, and had insufficient evidence upon which to base his conclusions.

Issue V: Although the "other violent felony" aggravator may have made this one of the most aggravated of first-degree murders, this was not one of the least mitigated of murders. In fact, the opposite is true. This Court should reverse and remand for a life sentence because death is not proportionately warranted.

ISSUE I

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURORS AS TO THE NONSTATUTORY AGGRAVATORS PROPOSED BY DEFENSE COUNSEL.

The judge instructed the jury as follows:

> Among the mitigating circumstances you may consider, if established by the evidence, are,
> [O]ne, that the crime for which the defendant is to be sentenced, was committed while he was under the influence of extreme mental or emotional disturbance.
> Two, that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, was substantially impaired.
> Three, **any of the following circumstances that would mitigate against the imposition of the death penalty[:] any aspect of the defendant's character, record or background; any other circumstances of the offense**.

(10/1040-41) This third statutory mitigator is sometimes referred to as the "catch-all" mitigator. Permitting reference to the mitigating factors which are not specifically enumerated as "any other . . . circumstance . . . that would mitigate against the imposition of the death penalty" has the effect of undermining the validity of the Florida death penalty sentencing scheme, by suggesting to the jury which mitigating factors should be given more weight than others. It is, of course, exclusively the responsibility of the penalty phase jury

in a capital case to assign to each mitigating factor presented to them the proper weight, as the jury sees fit. Unfortunately, the nonstatutory mitigating circumstances, which were substantial in this case, were not submitted to them by the judge in a jury instruction.

Defense counsel requested that the trial court instruct the jury on all of the nonstatutory mitigators proposed. He proposed 13 mitigators for the jury to consider. (4/620) He argued at charge conference:

> MR. FRASER: Well, I have another [jury instruction] where I list the mental mitigat -- I mean, not the "mental" -- all the mitigators.
> THE COURT: I don't intend to -- to do that, unless there is no law that says I must instruct them individually on each mitigator, is there?
> MR. FRASER: We're entitled to an instruction on the theory of our defense.
> THE COURT: Uh-hum.
> MR. FRASER: That is the theory of our defense, that these are mitigators. . . .
>
> THE COURT: -- that -- that's covered by character trait, whatever; and I don't think there's a case out there that says that you're entitled to this instruction or that it's appropriate.
>
> * * * * *
>
> MR. FRASER: You're not going to, instruct -- you're not gonna give number six?
> THE COURT: No.
> MR. FRASER: This is -- this is the one I was referring to as the theory of defense argument -- instruction.
> THE COURT: And -- and you're not gonna be

> prevented from arguing all of these things; I'm just not gonna instruct them in this form. I think that the instruction says they're to consider any trait, characteristic, whatever and these are -- these are those. And, I don't think there's a case that says that this instruction even should be done -- given, so. If -- if you've got anything that shows I'm wrong, bring it forward tomorrow.
> Six is refused.

(9/821-25) Had the trial court given this instruction, the jurors would have had some idea what kind of mitigators they could find, and would have added authority to them, as the instructions did the statutory aggravating factors.

In actuality, those factors not specifically enumerated in the statutes have never been held to have any different weight under the law than the so-called "statutory" mitigating factors. To the contrary, the jury must be instructed upon, and must consider and weigh, any aspect of the offense or of the accused's character or record that are mitigating. Lockett v. Ohio, 492 U.S. 302 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Penry v. Lynaugh, 492 U.S. 302 (1989). When the jury is not instructed on the significant nonstatutory mitigators, they will not likely give them the weight they would give to a statutory mitigator.

Defense counsel tried to explain to the jury that the nonstatutory mitigation should be given the same consideration as statutory mitigation. He told the jury that,

> they're all statutory mitigators. If you find a fact in mitigation, then that is a statutory mitigator; there isn't any difference between the ones that her Honor's going to read you, the specific ones and the general ones. As a matter of fact, I submit to you that the psychological testimony established a so-called statutory mitigator, but then **the wrap-up instruction her Honor is going to give you about any other facet of his background and so forth is really the cornerstone of this case**.

(11/1015-16) On the other hand, the prosecutor pointed out to the jury during her closing argument that there were statutory and then there were nonstatutory mitigators, meaning that you are "allowed to consider anything, basically, that you've heard." She continued that "the statutory mitigators deal with extreme emotional distress and impairment -- substantial impairment of the ability to conform conduct to the -- to the law . . . ." (11/1005) Thus, she told the jury that the statutory mitigators were the mental ones, and the judge bootstrapped her statement by lumping all of the nonstatutory mitigation into one statutory mitigator.

At one time, the statutory aggravators and mitigators

were about even. Now, however, there are 14 statutory aggravators and only 7 statutory mitigators. §921.141, Florida Statutes. That is because the legislature continues to add more aggravators but adds no more mitigators. See §921.141, Florida Statutes (1999). Thus, if the jury does embark on a counting process, despite being instructed not to do so, and lumps all of the nonstatutory mitigation into one mitigator, the scales are clearly skewed toward death.

In Downs v. Moore, 801 So. 2d 906 (Fla. 2001), Justice Anstead addressed his concern with the "catch-all" mitigating circumstance. After discussing such United States Supreme Court decisions as Furman v. Georgia, 408 U.S. 238 (1972); Penry v. Johnson, 532 U.S. 782, (2001); Penry v. Lynaugh, 492 U.S. 302 (1989); Hitchcock v. Dugger, 481 U.S. 393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 492 U.S. 302 (1978); and Woodson v. North Carolina, 428 U.S. 280 (1976), he stated:

> Consistent with the U.S. Supreme Court's repeated concerns, juries should be provided with special guidance as to the type of nonstatutory mitigating factors that they may consider. Because the overly brief "catch-all" jury instruction neither mentions nor defines the various categories of nonspecific mitigation a Florida jury may consider, it may well be inadequate to provide for the type of

> individualized assessment of mitigation that the Supreme Court has mandated. The fact that the aggravation to be considered by a jury is highly specific underscores the problem. Section 921.141, Florida Statutes (2000), clearly identifies fourteen aggravating factors, which include everything from the nature of the crime and criminal record of the accused to the age and frailties of the victim. [fn16] On the other hand, the brief "catch-all" provision by its very brevity and general nature may actually diminish the jury's consideration of particular mitigation.[14] . . .

Downs, 801 So. 2d at 921 (Anstead, J., specially concurring).

Justice Anstead continued to note that, just because defense counsel presents evidence and argues other mitigators to the jury does not mean that the jury will consider them without a specific instruction from the judge. Downs, 801 So. 2d at 921-22. In this case, the court's jury instruction suggested that those mental mitigators being argued by the defense were automatically entitled to less weight than the statutory circumstances because they were not specified and were all lumped into one mitigating factor. This violates Florida's death

[14] In footnote 16, Justice Anstead noted that the current set of statutory aggravators included three more than when Downs was sentenced. Thus, the statutory scheme was clearly expanding rather than narrowing the class of murderers subject to the death penalty. Because a single aggravator would qualify a defendant for the death penalty, few first-degree murder cases would not qualify.

penalty scheme and deprives the defendant of a fair trial by jury on the issue of his sentence, and renders the advisory verdict and resultant death sentence cruel or unusual punishment. Based upon this error, the case should be remanded for resentencing with a new jury.

ISSUE II

KENNETH STEWART IS ENTITLED TO A LIFE SENTENCE BECAUSE THE FLORIDA DEATH PENALTY STATUTE VIOLATED HIS DUE PROCESS RIGHT AND HIS RIGHT TO A JURY TRIAL WHICH REQUIRE THAT A DEATH QUALIFYING AGGRAVATING CIRCUMSTANCE BE ALLEGED IN THE INDICTMENT AND FOUND BY THE JURY BEYOND A REASONABLE DOUBT.

In Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2355 (2000), and Jones v. United States, 526 U.S. 227, 243 n.6 (1999), the United States Supreme Court held that, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 120 S.Ct. at 2362-63; Jones, 526 U.S. at 231. Basing its decision both on the traditional role of the jury under the Sixth Amendment and principles of due process, the Apprendi Court made clear that:

> [i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . it necessarily follows that the defendant should not -— at the moment the state is put to proof of those circumstances -— be deprived of protections that have until that point unquestionably attached.

530 S.Ct. at 2359. The Apprendi Court held that the same rule applies to state proceedings under the Fourteenth Amendment. 530 S.Ct. at 2355. These essential protections include (1) notice of the State's intent to establish facts that will enhance the defendant's sentence; and (2) a jury's determination that the State has established these facts beyond a reasonable doubt.

Stewart filed a "Motion for Statement of Particulars As to Aggravating Circumstances and Motion to Dismiss Indictment for Lack of Notice As to Aggravating Circumstances," which was denied. (3/551-552) He also filed a "Motion for Interrogatory Penalty Phase Verdict." (3/565-73) He argued this motion and provided the case of Delgado v. State, 776 So. 2d 233 (Fla. 2000). (11/1154)

> THE COURT: Next is motion for interrogatory penalty phase verdict.
> MR. FRASER: I have an argument and I just handed the Court a case, Delgado.[15]

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[15] In Delgado, this Court reversed and remanded for a new trial because it determined that the interpretation of the burglary

THE COURT: Is that the case that recently came out?

MR. FRASER: Yes, sir, this is on the rehearing.

THE COURT: That applies, does it not, to guilt phase, doesn't it?

MR. FRASER: Yes, sir. . . Delgado doesn't speak to this directly, but moving in this direction to where interrogatory verdicts in criminal cases just as they are by statute in civil cases for the simple reason what we have done so far to permit jury general recommendation without delineating on which aggravator they found and mitigator.

THE COURT: The law permits permission [sic] of death even under one of the aggravators.

MR. FRASER: I think we'll be a trifurcated system where we're going to start analyzing, and Delgado is the first step in that direction, if we start analyzing what the jury should have found, could have found and did find

THE COURT: I think the extension of that argument, if he should get a retrial on penalty phase, if the jury found that the two aggravators did not exist the State shouldn't have an opportunity to present them again.

MR. FRASER: That's exactly it. The case we have here in at least '90 and I think in the '86 the State was permitted to get in cold, calculated and premeditated, both Judge Griffin and Judge Lazzara wouldn't find those aggravators. So, we have a hybrid procedure, the jury was instructed for all we know all 12 or how many voted for death found cold, hybrid procedure, the jury was instructed for all we

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statute, argued by the State and on which the jury was instructed, was invalid as a matter of law. Accordingly, the defendant could not be convicted of burglary, or of felony murder in which burglary was the underlying felony. Because the jury rendered a general verdict, the Court could not tell whether it found Delgado guilty of premeditated or felony murder. Because of the possibility that the jury found Delgado guilty only of felony murder, the verdict was invalid because the felony murder theory, in that case, was invalid as a matter of law.

know all 12 or how many voted for death found cold, calculated and premeditated, and not the other two. There is no way of knowing with the process. I'm not going to waste the Court's time griping about it, but I think the interrogatory phase verdict is a simple straight forward way to determine precisely what the jury's recommendation is and why.

THE COURT: Is the law that the jury has to find each of these aggravators unanimously?

MR. FRASER: No, sir, I'm not suggesting that. But I think that if you have a situation you have three aggravators and nobody -- there is no aggravator where they find it by a majority vote. It's just a conceivable vote for death, you can have 12/0 for death, not having anyone making a -- just the majority simply lumping together, I think that's unlawful.

MR. FRASER: Not yet, but I submit this is where Delgado is taking us.

THE COURT: Ms. Williams, any comment from the State?

MS. WILLIAMS: Delgado is not new law.

THE COURT: It's a new case.

MS. WILLIAMS: It's a new case, but not law. This has been the law for quite some time. So, we may eventually, as Mr. Fraser gets to the point, where that type of verdict form is required, but it's not required now and I would ask the Court not to require that.

MR. FRASER: She is right, Delgado goes to Balliett vs. United States,[16] 1957 decision, and highlighted on pertinent page the rationale of the Supreme Court of Florida by having read the case it suddenly dawned on me there is certainly going to be an application of this rule to penalty phases. I don't see how it could be avoided. Under the circumstances I'll be happy

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[16] Defense counsel may have meant Yates v. United States, 354 U.S. 298 (1957), cited by the Delgado court, which holds that "a conviction under a general verdict is improper when it rests on multiple bases, one of which is legally inadequate." See Delgado, 233 So. 2d at 241.

> to draft one for the Court, but I don't think any prohibition in interrogatory verdict and it might be illuminating to the Court and Supreme Court, if it goes that far, as to exactly what their thinking was.
>
> THE COURT: I'll provisionally deny it without prejudice and you can readdress it some time to instruct the jury. . . OK, I'll deny it. (11/1154-58)

In Jones, 526 So. 2d at 250-51, the Court distinguished capital cases arising from Florida.[17] In Apprendi, 530 S.Ct at 2366, the Court observed that it had previously

> rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649 ... (1990)[.]

Thus, it appeared that the principles of Jones and Apprendi did not apply to state capital sentencing procedures. See Mills v. Moore, 786 So. 2d 532, 536-38 (Fla.), cert. denied, 532 U.S. 1015 (2001).

In Ring v. Arizona, 2002 WL 1357257 (June 24, 2002), however, the United States Supreme Court overruled Walton v. Arizona and held that the Sixth and Fourteenth Amendments to the United States Constitution require the

[17] Those cases were Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989).

jury to decide whether a death qualifying aggravating factor has been proven beyond a reasonable doubt.

A defendant convicted of first-degree murder may not be sentenced to death without an additional finding. At least one aggravator must be found as a sentencing factor. Like the hate crimes statute in Apprendi, Florida's capital sentencing scheme exposes a defendant to enhanced punishment —- death rather than life in prison —- when a murder is committed "under certain circumstances but not others." Apprendi, at 2359. This Court has emphasized that "[t]he aggravating circumstances" in Florida law 'actually define those crimes . . . to which the death penalty is applicable . . . .'" State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert denied sub nom., 416 U.S. 943 (1974).

Stewart was Sentenced to Death Without a Specific Jury Finding of an Aggravating Circumstance.

Kenneth Stewart was sentenced to death pursuant to section 921.141, Florida Statutes (1999), which does not require a jury finding that any specific aggravating factor exists. Section 921.141(2) governs the advisory sentence rendered by the jury in this case and provides as follows:

> (2) ADVISORY SENTENCE BY THE JURY. -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based on the following matters:
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

On its face, this statute does not require any express finding by the jury that a death qualifying aggravating circumstance has been proven. Moreover, this Court has never interpreted this statute to require the jury to make findings that specific aggravating circumstances have been proven. See Randolph v. State, 562 So. 2d 331, 339 (Fla.), cert. denied, 498 U.S. 992 (1990); Hildwin v. Florida, 490 U.S. 638, 639 (1989). Consequently, the statute plainly violates the Sixth and Fourteenth Amendment requirements of Jones, Apprendi, and Ring, and is unconstitutional on its face.

Stewart's case illustrates how section 921.141 violates the requirement that the jury must find a death qualifying aggravating circumstance. Pursuant to section 921.141, the jury was instructed to consider three aggravating circumstances: 1) under sentence of

imprisonment;[18] 2) prior conviction for a capital or other violent felony;[19] and 3) the crime was committed for pecuniary gain.[20]

The judge instructed the jury that it was their duty to

> render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

They were further instructed that,

> [s]hould you find sufficient aggravating circumstances do exist to justify the death penalty, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. . . .

and that,

> if one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

(11/1042) The jurors were instructed that it was not necessary that the advisory sentence of the jury be unanimous. (11/1043)

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[18] § 921.141(5)(a), Fla. Stat. (1999).

[19] § 921.141(5)(b), Fla. Stat. (1999).

[20] § 921.141(5)(f), Fla. Stat. (1999).

They were never instructed that all must agree that at least one specific death qualifying aggravating circumstance existed -- and that it must be the same circumstance. Thus, the sentencing jury was not required to make any specific findings regarding the existence of particular aggravators, but only to make a recommendation as to the ultimate question of punishment.

The jury ultimately returned an advisory sentence recommending by the bare majority of seven to five that the court impose the death penalty. The advisory sentence did not contain a finding that any specific aggravating circumstance (or even one aggravating circumstance) was found to exist. (4/631)

Consistent with the instructions given in Stewart's case, the seven jurors who recommended death, in the seven to five death recommendation, could have been made up of three jurors who found that the only aggravating circumstance proven beyond a reasonable doubt was a prior violent felony conviction;[21] two jurors who found only that

[21] While it might seen clear that Stewart committed another capital felony and two attempted murders, it is possible that one or more of the jurors thought that the State did not prove the other crimes during this proceeding, or that the shootings may have been accidental or cases of misidentification and thus refused to consider this aggravating circumstance.

Stewart committed the crime while under sentence of imprisonment;[22] and two jurors who found only that the murder was committed for pecuniary gain.[23] Thus, it is entirely possible that Stewart's jury recommended death without a finding by seven or more jurors that one or more particular death qualifying aggravating factors had been proven beyond a reasonable doubt. That result would clearly be unconstitutional under Ring.

Moreover, in the absence of an express finding by the jury that any aggravating circumstance had been proven beyond a reasonable doubt, there is no possibility of knowing whether any of the seven jurors who recommended death found the existence of any aggravating factor. It is entirely possible that one or more of those seven jurors completely disregarded the court's instructions and recommended death without even considering the aggravating circumstances. The death recommendation may simply reflect the personal opinion of seven jurors that death

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[22] Some jurors might have believed that Stewart's escape, which was merely his walking away from the parking garage while he was a prisoner at the Hillsborough County Jail, should not qualify as being under sentence of imprisonment because he was not in jail or on parole or probation at the time.

[23] The only evidence that Diaz was murdered for pecuniary gain was the questionable testimony of Randall Bilbrey. Diaz' car was burned at a mall which did not suggest that Stewart wanted to steal the car; thus, some jurors may not have found this aggravator.

was the appropriate penalty in this case without regard to the statutory requirements. That result would also be unconstitutional under Ring.

It is indeed likely in any case that some of the jurors will find certain aggravators proven which other jurors reject. What this means is that a Florida judge is free to find and weigh aggravating circumstances that were rejected by a majority, or even all of the jurors. The sole limitation on the judge's ability to find and weigh aggravating circumstances is appellate review under the standard that the finding must be supported by competent substantial evidence. Willacy v. State, 696 So. 2d 693, 695 (Fla. 1997).

An additional problem with the absence of any jury findings with respect to the aggravating circumstances is the potential for skewing this Court's proportionality analysis in favor of death. An integral part of this Court's review of all death sentences is proportionality review. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court knows which aggravators were found by the judge, but does not know which aggravators and mitigators were found by the jury. Therefore, the Court could allow aggravating factors rejected by the jury to influence

proportionality review. Such a possibility cannot be reconciled with the Eighth and Fourteenth Amendment requirement of reliability in capital sentencing.

The State Failed to Allege Aggravating Circumstances in the Indictment.

The Apprendi Court also found that an aggravating sentencing factor must be pled in the Indictment to support the death penalty. In Ring, at n.4, the United States Supreme Court pointed out that Ring did not contend that his indictment was constitutionally defective. As a result, the Supreme Court did not discuss that question in Ring. Because Ring overruled Walton, however, there is no valid reason why the Jones and Apprendi requirement that an aggravating factor must be pled in the indictment should not apply to capital cases. No aggravating sentencing factors were charged in Stewart's Indictment. (1/18)

The Ring decision essentially makes the existence of a death qualifying aggravating circumstance an element which the State must prove to make an ordinary murder case into a capital murder case. Because the Court applied the Jones and Apprendi requirement that a jury find the aggravating sentencing factor beyond a reasonable doubt to

capital cases in Ring, it would appear the Supreme Court should hold that the Jones and Apprendi requirement of alleging one or more aggravating sentencing factors in the indictment also applies to capital cases once that issue is before the Court. Thus, this Court should find that section 921.141 is unconstitutional on its face because it does not require a death qualifying aggravating factor to be alleged in a capital murder indictment. In the absence of an allegation of a death qualifying aggravating factor, an indictment does not charge a capital offense, and no death sentence can be constitutionally imposed.

This argument is also illustrated in Stewart's case. The only count of the indictment charged the first-degree premeditated murder of Ruben Diaz on December 5, 1984, with a firearm, while engaged in a robbery or attempted robbery, without alleging any statutory aggravating circumstance to qualify the offense as one for which the death penalty could be imposed. (1/18) Stewart was not charged or convicted of robbery or attempted robbery so the allegation, which was obviously intended to charge felony murder, could not qualified as an aggravating circumstance at that time. Furthermore, under Florida law, "[c]onviction on one count in an information [or

indictment] may not be used to enhance punishment for a conviction on another count." State v. McKinnon, 540 So. 2d 111, 113 (Fla. 1989); Sullivan v. State, 562 So. 2d 813, 815 (Fla. 1st DCA 1990). Therefore, the State could not rely on the allegations in the same count of Stewart's indictment to qualify the charge of first-degree murder as a capital offense.

Although we believe that Stewart adequately preserved this issue, it would be fundamental error even if not preserved. In Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983), this Court ruled that the facial constitutional validity of the statute under which the defendant was convicted can be raised for the first time on appeal because the arguments surrounding the statute's validity raised fundamental error. In State v. Johnson, 616 So. 2d 1, 3-4 (1993), this Court ruled that the facial constitutional validity of amendments to the habitual offender statute was a matter of fundamental error which could be raised for the first time on appeal because the amendments involved fundamental liberty due process.

In Maddox v. State, 760 So. 2d 89, 95-98 (Fla. 2000), this Court ruled that defendants who did not have the benefit of Florida Rule of Criminal Procedure 3.800(b), as

amended in 1999 to allow defendants to raise sentencing errors in the trial court after their notices of appeal were filed, were entitled to argue fundamental sentencing errors for the first time on appeal. To qualify as fundamental error, the sentencing error must be apparent from the record, and the error must be serious; such as a sentencing error which affected the length of the sentence. Id., at 99-100. Defendants appealing death sentences do not have the benefit of Rule 3.800(b) to correct sentencing errors because capital cases are excluded from the rule. Amendments to Florida Rules of Criminal Procedure 3.111(e) & 3.800 & Florida Rules of Appellate Procedure 9.020(h), 9.140, & 9.600, 761 So. 2d 1015, 1026 (1999).

The facial constitutional validity of the death penalty statute, section 921.141, Florida Statutes (1999), is a matter of fundamental error. The error is apparent from the record, and it is certainly serious because it concerns the due process and right to jury trial requirements for the imposition of the death penalty. Imposition of the death penalty goes far beyond the liberty interests involved in sentencing enhancement statutes.

Moreover, the use of a facially invalid death penalty statute to impose a death sentence could never be harmless error. A death sentence is always and necessarily adversely affected by reliance upon an unconstitutional death penalty statute, especially when the statute violates the defendant's right to have the jury decide essential facts. See Sullivan v. Louisiana, 508 U.S. 275, 279-282 (1993) (violation of right to jury trial on essential facts is always harmful structural error).

Thus, Florida's death penalty statute is unconstitutional on its face because it violates the due process and right to jury trial requirements that all facts necessary to enhance a sentence be alleged in the indictment and found by the jury to have been proven beyond a reasonable doubt, as set forth in Jones, Apprendi, and Ring. This issue constitutes fundamental error, and can never be harmless. This Court must reverse Stewart's death sentence and remand for a life resentence.

ISSUE III

THE COURT ERRED BY DENYING STEWART'S MOTION TO DECLARE THE FLORIDA DEATH PENALTY STATUTE UNCONSTITUTIONAL BECAUSE IT PERMITS A JURY TO RETURN A DEATH RECOMMENDATION BY A BARE MAJORITY VOTE.

Prior to the beginning of the penalty trial, defense counsel filed and argued Appellant's "Motion to Declare Section 921.141, Florida Statutes Unconstitutional Because Only a Bare Majority of Jurors is Sufficient to Recommend a Death Sentence" (4/588-590). The trial judge denied the motion. (4/588)

We recognize that this Court has previously found no constitutional flaw in Florida's provision allowing a simple majority of the jury to return a jury recommendation of death. Brown v. State, 565 So. 2d 304 (Fla.), cert. denied, 498 U.S. 992 (1990). The evolution of capital sentencing standards in the United States Supreme Court, however, including the cases of Ring v. Arizona, 2002 WL 1357257 (June 24, 2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); and Jones v. United States, 526 U.S. 227, 252-53 (1999) demand that this issue be revisited. (See Issue II, supra)

The jury's role in capital cases is controlled by the Sixth, Eighth and Fourteenth Amendments. The Supreme

Court has never specifically addressed whether a unanimous verdict is required in a capital case. The question of whether jury unanimity was constitutionally required for non-capital verdicts was the subject of Johnson v. Louisiana, 406 U.S. 356 (1972), in which the Court decided by a 5-4 vote that allowing conviction upon a 9-3 substantial majority of the jury was constitutionally permissible. Justice Blackmun's concurring opinion in Johnson emphasized the conditional nature of the approval:

> I do not hesitate to say . . . that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty. As Mr. Justice White points out . . . "a substantial majority of the jury" are to be convinced. That is all that is before us in these cases.

406 U.S. at 366.

Florida law requires unanimity at the guilt/innocence stage of a capital case. See, e.g., Williams v. State, 438 So. 2d 781 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956). It does not, however, require unanimity either to find individual aggravating circumstances or to render a recommendation of death, which is nonetheless entitled to great weight under Tedder v. State, 322 So. 2d 908 (Fla. 1975). In Apprendi v. New Jersey, 530 U.S. 466 (2000), and Jones v. United States, 526 U.S. 227, 243 n.6

(1999), the United States Supreme Court held that any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Apprendi, 530 U.S. at 436; Jones, 526 U.S. at 231. Ring v. Arizona, 2002 WL 1357257 (June 24, 2002), applied the Apprendi decision to capital cases. Stewart's jury recommended death only seven to five. If one more juror had voted for life, he would have had a life recommendation. If even one of these jurors did not find any aggravating factors, the court could not have imposed a death recommendation under Ring and Apprendi.

In the post-Furman era, the United States Supreme Court has emphasized that the death penalty cannot be constitutionally applied unless a rational distinction can be made between those defendants for whom death is appropriate and those for whom it is not. As Justice Stewart wrote in his plurality opinion in Woodson v. North Carolina, 428 U.S. 280 (1976):

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the

> determination that death is the appropriate punishment in a specific case.

428 U.S. at 305. In Eddings v. Oklahoma, 455 U.S. 104 (1982), Justice O'Connor elaborated:

> this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

455 U.S. at 118.

Clearly, a unanimous jury vote that death should be imposed in a given case suggests that almost any qualified jury would also find death to be the appropriate punishment. If, on the other hand, the jury vote for death is only 7-5, it suggests that other qualified juries might divide 6-6 or return a recommendation for life. In short, when less than a substantial majority of the jury finds death as the appropriate sentence for the defendant, the reliability of that determination as a reflection of the conscience of the community is questionable.

Espinosa v. Florida, 505 U.S. 1079 (1992) established that the Florida capital punishment scheme actually operates with the jury and judge acting as co-sentencers. Espinosa asserted that when a jury presumably weighs an invalid or nonstatutory aggravator, the judge

indirectly weighs it also by giving "great weight" to the jury's penalty recommendation. Therefore, a sentence of death can violate the Eighth Amendment requirement that capital sentencing not be arbitrary even if there is no fault in the judge's weighing of aggravating and mitigating circumstances. It is enough that the judge gave "great weight," as Florida law requires, to a jury penalty recommendation that was unreliable.

Similarly, when a sentencing judge gives "great weight" to a jury penalty recommendation that was returned by less than a substantial majority of the jurors, the judge is indirectly weighing a recommendation that is not sufficiently reliable to pass Eighth Amendment muster. Properly, the judge should give no weight to a bare majority death recommendation, but to do so would be contrary to Florida law. See, e.g. Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). As Espinosa points out, we must presume that the court followed Florida law and gave great weight to the jury recommendation. 505 U.S. at 1082.

Accordingly, this Court should recede from prior case law holding that there is no constitutional infirmity in a jury's penalty recommendation of death returned by less

than a substantial majority of the jurors. Stewart's sentence of death should be vacated and this case remanded to the trial court for further proceedings.

ISSUE IV

THE TRIAL COURT GAVE LITTLE WEIGHT TO A MYRIAD OF REASONABLY ESTABLISHED EVIDENCE BY DR MAHER AND DR SULTAN, INSTEAD RELYING ALMOST SOLELY ON THE TESTIMONY OF DR MERIN WHO SAW STEWART FOR ONLY ONE HOUR IN 1986 (2 YEARS AFTER THE HOMICIDE), AND WHOSE DIAGNOSIS WAS UNRELIABLE; AND ACCORDED INSUFFICIENT WEIGHT TO THE TWO STATUTORY MENTAL MITIGATORS AND TO MANY OF THE NONSTATUTORY MITIGATORS.

In her sentencing order, the trial judge summarized the testimony of defense experts Dr. Michael Maher and Dr. Ellen Sultan, but agreed with Dr. Sidney Merin who testified in rebuttal for the State who found the same sort of mitigation, but, unlike Drs. Maher and Sultan, did not believe it was "extreme" or "substantial" on the day of the homicide. (4/766-77) While Drs. Maher and Sultan had conducted a number of interviews with Stewart, had done some objective testing, and had interviewed various family members and witnesses, Dr. Merin saw Stewart for only one hour in September, 1986, between the guilt and penalty phases of his first trial. Dr. Merin did not know of the abuse to which Stewart's two step-sisters testified, did no objective testing (not enough time) and based his conclusions solely on what Stewart told him during that one hour, and information from police reports

and pre-trial documents.

Additionally, although the judge did not mention it, Dr. Merin was originally retained by the defense and had testified in both of Stewart's prior resentencings as a defense witness. Defense counsel apparently did not object to the State's calling Dr. Merin or at least there is mention of any objection in the record. In fact, the lack of any mention of this situation makes one wonder whether the judge was aware that Dr. Merin had been a defense witness, or whether the parties and judge had an out-of-court agreement.[24]

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[24] Dr. Merin's testimony was of paramount importance to the State in securing a death recommendation and sentence in this case. It would seem that his testimony was in violation of the attorney-client privilege as guaranteed by Fla. R. Crim. P. 3.216(a). Dr. Merin was retained by the defense in 1986 and 1990, and testified for the defense in Stewart's first two penalty phase hearings. He did not testify for the defense in this case; yet, he retained the information he learned from Stewart in the prior proceedings, and used it to benefit the State in this proceeding.

Generally, if the doctor becomes a witness, the attorney-client privilege is waived and he is subject to treatment as any other witness. Sanders v. State, 707 So. 2d 664 (Fla. 1998); Townsend v. State, 420 So. 2d 615, 618 (Fla. 4th DCA 1982); State v. Hamilton, 448 So. 2d 1007, 1008 (Fla. 1984); Morgan v. State, 639 So. 2d 6, 10 (Fla. 1994). Although the defense called Dr. Merin as a witness in Stewart's first two penalty hearings in this case, thus waiving the privilege as to those proceedings, Dr. Merin was not called by the defense in this proceeding; yet his testimony for the State was based entirely on the work he had done for the defense in this same case. The reason for this resentencing was the incompetence of defense counsel who engaged Dr. Merin for the prior sentencings, and failed to have Dr. Merin re-examine Stewart again prior to the first resentencing, despite his prior damaging testimony. Dr. Merin therefore brought a portion of the incompetent representation into this proceeding by testifying for the State when the defense excluded

Although the court ultimately found both statutory mental mitigators established, she gave them only "some" weight because she did not find them "extreme" or "substantial." Because of that decision, she gave the 23 non-statutory mitigators less weight than they merited because she had already considered them in finding the two statutory mental mitigators. (4/770-77) This clearly skewed the weighing process in favor of death. Moreover, her reliance on Dr. Merin's findings was clearly misplaced because Dr. Merin had insufficient information from which to draw such conclusions.

In Campbell v. State, 571 So. 2d 415 (Fla. 1990), this

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him as a witness.

It seems that Dr. Merin should not have been permitted to switch sides to testify for the prosecution. The State relied on Dr. Merin's inability, as a practical matter, to change his testimony from the prior two hearings. Side switching by experts is unacceptable in a trial to determine whether a man is to be put to death. Dr. Merin's testimony was the basis for the trial court's rejection of the other two experts' conclusions as to the severity of the mental mitigating circumstances. Without Merin's testimony, it is very unlikely that the State could have secured a death recommendation or sentence.

In Sanders v. State, 707 So. 2d 664 (Fla. 1998), this Court found Dr. Merin guilty of side-switching in a different manner. The Court held that the trial judge erred in allowing Dr. Merin to testify on behalf of the State, after he had first been appointed a confidential defense expert pursuant to Florida Rule of Criminal Procedure 3.216(a). This Court held that the State cannot make a defense expert its own witness when the attorney-client privilege has not been waived. Because Sanders did not waive the privilege, it was error to allow Dr. Merin to testify for the State. Id.

Court established standards of review for mitigation. First (1), whether a particular circumstance is truly mitigating in nature is a question of law subject to "de novo" review by this Court; (2) whether a mitigating circumstances has been established by the evidence is a question of fact subject to the "competent substantial evidence" standard; and (3) the weight given the mitigating circumstance is within the trial court's discretion, subject to the "abuse of discretion" standard of review. Ford v. State, 802 So. 2d 1121, 1135 (Fla. 2001) (citing Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997). **For the judge's findings to be sustained, they must be supported by "sufficient competent evidence in the record."** Ford, at 1133.

In Santos v. State, 591 So. 2d 160 (Fla. 1991), this Court cited the mandate of the United States Supreme Court in Parker v. Dugger, 498 U.S. 308 (1991), indicated its willingness to examine the record to find mitigation the trial court ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S. Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no

> mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored.

Santos, at 164; see also Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

In Santos, the trial court rejected the unrebutted testimony of Santos's psychological experts. This Court conducted its own review of the record and determined that substantial, uncontroverted mitigating evidence was ignored. The Court reversed and remanded Santos for the judge to adhere to the procedure required by Campbell. On remand, the judge again imposed death. This Court vacated the death sentence and remanded for life because the mental mitigation outweighed the contemporaneous capital felony. Santos, 629 So. 2d 838 (Fla. 1994); see also Crook v. State, 813 So. 2d 68 (Fla. 2002) (remanded because court erred by failing to find that Crook was borderline retarded and brain damaged).

In this case, the judge wrote a lengthy sentencing

order, setting out her reasoning. (4/667-77) The problem is that she unreasonably believed the testimony of Dr. Merin, and pretty much disregarded the findings of Drs. Maher and Sultan who had much more information upon which to base their evaluations of Stewart. In fact, Dr. Sultan, who had seen Stewart a number of times since 1993, had extensive experience working with prison programs for felons who had been abused as children -- like Kenny Stewart. She had also administered an I.Q. test, finding Stewart to be in the low end of the normal range, and the MMPI, a well-established test, to have an understanding of Stewart's capabilities and his general character. (10/875-79) Dr. Maher, a psychiatrist, had interviewed Stewart more recently and had studied test results and other diagnostic information by several other doctors who had evaluated Stewart over the years, in addition to Dr. Sultan. (9/761-64)

Although some of Dr. Merin's findings were reasonable, his conclusions did not follow from his information and findings. Furthermore, he saw Stewart only once, for an hour, nearly two years after the homicide, and had not seen him for 15 years. Dr. Merin apparently based his opinion that Stewart had antisocial tendencies on the

report of the crime and what Stewart told him about his family background, identity crisis, and his search for details as to the deaths of his natural parents. Because Dr. Merin was retained by prior defense counsel between Stewart's conviction and the penalty phase, which commenced the following day, he did not hear the testimony during the guilt phase of the trial. With no further information, Dr. Merin came up with the diagnosis that Stewart's primary problem was an antisocial behavior disorder. He admitted, however, that individuals can have several mental problems. Thus, even if Stewart had antisocial tendencies, which he likely had, he was also otherwise mentally disturbed.

An antisocial personality disorder, in itself, is a serious psychiatric diagnosis[25] and a nonstatutory mitigating circumstance. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Spencer v. State, 691 So. 2d 1062, 1063 (Fla. 1996). No evidence suggested, however, that Stewart had a personality disorder instead of post-traumatic stress disorder, chronic depression, long-term emotional distress, and impaired capacity due to long-term

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[25] See Kaplan and Sadock's Comprehensive Textbook of Psychiatry (4th Ed. 1985), p. 985.

alcoholism and substance abuse. Dr. Merin was not asked whether Stewart might have post-traumatic stress disorder in addition to a personality disorder, although this was a primary diagnoses of the other doctors. He might have agreed with this diagnosis because he did find that Stewart was emotionally disturbed because of his background.

As reasons to support her reliance on Dr. Merin's testimony rather than that of Drs. Maher and Sultan, she noted that Dr. Merin saw Stewart nearer the time of the murder, and she agreed with Dr. Merin that Stewart was not "extremely" mentally disturbed nor "substantially" unable to conform his conduct to the law, but rather, that he exhibited a character disorder with antisocial tendencies. It is questionable whether the judge calculated how long after the homicide Dr. Merin saw Stewart.[26] It was actually 22 months later -- just short of two years. See Stewart v. State, 620 So. 2d 177 (Fla. 1993). By then,

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[26] The judge stated as follows: 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 Rubin 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. (4/770)

Stewart had been in jail a long time, had been hospitalized for suicide attempts, and was sober and drug-free. His behavior was different than at the time of the crimes when he was drunk and had been on the streets without anchor for a number of years.

On the day of the homicide 22 months earlier, Stewart had been drinking whisky and using drugs at his mother's grave. His live-in girlfriend, Margie Sawyer, was in jail (prostitution?) and Kenny had been living on the streets most of the prior year. He had been "hanging-out" with Terry Lyn Smith, whom Margie referred to as their friend, "Terry, the street man," Stewart's accomplice in the subsequent convenience store robbery.[27] (9/789-80) Terry may have been Stewart's accomplice in the Diaz homicide too. See Stewart, 620 So. 2d 177. He may have been the bad influence that caused Stewart to advance from burglaries to homicide.

The trial court also came to conclusions which were not proved by the evidence -- that "the undisputed facts reveal a man who acted deliberately, out of anger and with

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[27] In Stewart's other case, after Stewart took Acosta's car, he picked up Terry Stewart who helped him empty the trunk before Stewart burned the car at the mall. See Stewart v. State, 801 So. 2d 59, 62 (Fla. 2001).

brutality.[28] He had a goal -- to meet his own needs. The needs of the stranger who crossed his path were of no concern to him." (4/770) Although the trier-of-fact might have drawn such conclusions from the evidence, the judge may not rely on speculation in sentencing the defendant to death. The evidence did not prove that Stewart acted out of anger or that he had no concern for the victim. To the contrary, the evidence revealed that he had substantial remorse for the damage he caused. (See Statement of Facts, <u>supra</u>.)

Stewart never told Dr. Merin about the abuse he suffered as a child, although Dr. Merin did not seem to doubt the veracity of the witnesses.[29] Dr. Merin admitted that the testimony of Stewart's two step-sisters was new evidence to him. Stewart was probably embarrassed about

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[28] Even if Stewart's actions were "deliberate," this does not prevent a finding that he qualified for the mental mitigators. If his conduct were not deliberate, this would not have been a capital offense. It would have been an involuntary homicide or possibly a crime of passion. If he did not know what he was doing, he would have lacked intent or have been innocent by reason of insanity.

[29] Dr. Merin's testimony at the first penalty proceeding in this case, provided to the judge for sentencing, reveals that Stewart did relate to Dr. Merin that his step-father disciplined him severely. When his step-mother learned that he took alcohol to school, he considered not returning home because of the discipline he feared from his step-father. (4/735-36) Because of the brief interview, he apparently did not go into enough detail to alert Dr. Merin to the abusive aspect of the discipline, and Dr. Merin did not have an opportunity to investigate further.

his childhood, especially the bed-wetting. It is well-known that it is often hard to get children to report parental abuse because they have been intimidated by the abuser, and because they are embarrassed and feel guilty about it. Even more telling, Scarpo was going to testify for him at his penalty phase hearing, and would not have admitted to abusing Stewart, which would have placed Stewart in an untenable position. Scarpo's wife, who was not Kenny's mother, would have supported her husband because of her fear of his violence. Stewart had undoubtedly been indoctrinated throughout his childhood to not speak of the abuse to others.

The trial judge is not a mental health expert. It is easy for her to say that Stewart's criminal behavior suggests an antisocial personality. An antisocial personality describes the personality of someone who commits crimes without much regard for the victim. In closing, the prosecutor told the jury that Stewart was

> diagnosed by Dr. Merin as having a behavior disorder, and that being an antisocial personality. **Well, we could probably have all figured that out from what we've heard**, but that's Dr. Merin's diagnosis . . .

(11/1006) In other words, it didn't take a mental health expert to make that diagnosis. Anyone would made that

diagnosis.

An antisocial personality, however, does not mean that one does not have a myriad of other mental disabilities which caused it. Other evidence in the case reveals that there was much more to Stewart's personality and actions than a propensity for criminal behavior. In fact, the testimony of Stewart's aunt, step-sisters and his lawyers from CCR suggest that his real personality was truthful, compassionate, and kind, and that he committed the crime only because he was very mentally and emotionally, drunk and using drugs. Not even Dr. Merin suggested that Stewart was a "con man." The judge and Dr. Merin seem to have relied on first impressions, rather than considering the totality of the evidence.

It was virtually impossible for Dr. Merin to have made a valid diagnosis of Stewart based on what little information he had, the short time he interviewed Stewart, and the lack of any testing or investigation into Stewart's past. Having testified twice for the defense, however, he could not very well change his opinion when called by the State to testify in this case. The prosecutor did not need to ask Dr. Merin to see Stewart again because his prior defense testimony was so helpful

to the State. Thus, the State had the perfect rebuttal testimony, which would have been hard to come by had the prosecutor been required to find another mental health expert to evaluate Stewart.

On the other hand, Drs. Maher and Sultan talked with Stewart for many hours and, in Dr. Sultan's case, many years. Dr. Sultan was an expert in prison-related psychiatry, especially in cases of childhood abuse. She performed various tests to obtain a more objective impression of Stewart's abilities and personality traits. Dr. Sultan had seen Stewart four or five times since 1993 -- eight years prior to this proceeding, and spent twenty hours with him. Thus, even though these doctors saw Stewart some years after the homicide, they spent much more time with him, obtained much more information about his childhood, and relied upon objective testing to support their opinions. Although Dr. Maher did not see Stewart until about a week before this resentencing, because Stewart was not available to evaluate sooner, he studied the evaluations of other doctors over the years.

The judge failed to note that Dr. Merin's testimony was not totally opposed to that of the other doctors, with the exception of his conclusions as to the severity of the

mental mitigators on the day of the homicide. He testified that Stewart's emotional disturbance was probably what prompted him to start drinking and using drugs early in life. He said Stewart lived with extreme mental distress pretty much all of his life. Dr. Merin leaped from this conclusion, however, to the further conclusion that Stewart's emotional distress was not extreme on the day of the homicide because he was used to dealing with emotions from the past. It would seem that Dr. Merin concluded that, because Stewart had not killed anyone before, despite his emotional disturbance, he was not extremely disturbed or substantially impaired. On the other hand, Dr. Sultan believed that Stewart deteriorated, without treatment, from the time he killed Diaz until he shot Acosta and Harris, and that these months were the bottom point of his mental functioning.

Defense counsel reminded Dr. Merin of his earlier testimony, in 1986 and/or 1990, that Stewart was the end product of years and years of **extreme** emotional distress:

> Q [DEFENSE]: Would you also say that he's the end product of years and years of extreme emotional distress?
>
> A [DR. MERIN]: Not -- well, I hate to use the word "extreme," but certainly emotional distress. And on the basis of what I read later,

> some of what had occurred, at least reported by the stepsisters, would suggest some very significant emotional distress early in his life.
>
> Q Well, getting back to the word "extreme," do you recall testifying in an earlier proceeding that he's the end product of years and years of extreme emotional distress?
>
> A I probably said that. I would agree with that now too.
>
> Q So your testimony is to the effect that at the time of the actual shooting of Ruben Diaz, he wasn't under extreme emotional distress?
>
> A That is correct. Although his behavior was an end product of extreme emotional distress; but at the time of the -- the shooting, as I understand it, his behavior was quite different.

(10/945-48) In her sentencing order, the trial judge omitted the word "extreme." (4/1770)

In Hurst v. State, 819 So. 2d 689 (Fla. 2002), this Court reiterated that, when a defendant has been abused as a child, it is still mitigating, even if he is grown and the abuse has stopped:

> In Nibert, this Court found that the trial court erred when it found "possible" mitigation where the defendant had undergone years of physical and psychological abuse as a child, but then dismissed the mitigation because the defendant was now an adult. Nibert, 574 So. 2d at 1062. We rejected this analysis as inapposite because "[t]he fact that a defendant has suffered through more than a decade of psychological abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end.

Hurst, 819 So. 2d 689 (citing Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Lifelong abuse causes lifelong

problems. It is often said that a child's personality is formed during the first six years of life. Stewart was physically abused, even as a fetus, by a mother who drank and was arrested for armed robbery during her pregnancy. He may have been addicted to alcohol at birth, which would explain why he was a discontented and fussy baby. He was abused and neglected my his mother, her abusive husbands and boyfriends, and his aunt, even as an infant.

Much later, he was diagnosed with attention deficit disorder in relation to his bedwetting problem, but no testimony indicates that he received treatment for it. His natural mother committed suicide at age 25, which shows that she too was depressed. Dr. Sultan noted that depression is genetic, which is generally recognized today. Even Dr. Merin mentioned this in his testimony. The judge listed this defense-proposed mitigator but merely said she had considered it in her findings as to the two mental mitigators; she did not mention the genetic possibility in those findings.

Although Dr. Merin agreed that Stewart had a history of alcohol dependence and, perhaps polysubstance abuse, he did not feel that Stewart's capacity to conform his conduct to the requirements of law was "substantially"

impaired, again because Stewart was used to functioning while drunk. He failed to discuss the possibility that Stewart's long-term drinking affected his brain and worsened his depression. In fact, he did not discern that Stewart was depressed at the first interview, although he agreed that this was the case during his testimony in this proceeding. Dr. Merin noted that bipolar depression may be considered mental illness.

The trial judge did not agree with Dr. Maher that Stewart was "compelled" to commit the crime, thus taking his statement out of context. Dr. Maher explained that Stewart was raised in a home of "intense and cruel violence," started drinking heavily at age 12 or 13, ran away from home at age 13, began committing crimes and was sent to prison at age 17, where he learned more about violent culture. It was because of these aspects of his background that he was "compelled in an unthinking and reactive way to commit these offenses." Dr. Maher did not mean that Stewart was forced to commit the crime, but that he reacted to forces beyond his control.

Dr. Merin testified that Stewart's emotional disturbance was pretty much beyond his control. There is a thin distinction between "beyond his control" and

"compelled." Yet, Dr. Merin refused to agree that Stewart's emotional distress was "extreme." When Stewart was extremely emotionally disturbed all of his life, how then did he become less seriously disturbed the day he committed the crime? Dr. Merin's theory is pretty much refuted by evidence that, earlier on the day of the homicide, Stewart drank a bottle of whisky at his mother's grave.[30]

The judge did not agree with Dr. Sultan's conclusions. She stated that, "[b]ased on the totality of [Dr Sultan's] 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." (4/771) **What was it about Dr. Sultan's cross-examination that the judge did not like?**

> Q [PROSECUTOR]: Dr. Sultan, when you talked to Mr. Stewart, was he able to tell you what happened in each of these murders and in each of these events when he shot individuals?
> A [DR. SULTAN]: It was not my job to question him at length about that; he was able to tell me something about the circumstances of his life and about some memories he had of the actual events.

[30] Dr. Merin testified at an earlier proceeding that Stewart drank as much as a gallon of liquor a day, along with some beer, and thought he also smoked marijuana the day of the homicide. Early in that day, he went to his mother's grave, which he had done since he was twelve years of age. (4/694)

His memories were distorted by that point, because he had been so highly intoxicated. He had also read some things about the crimes and so he did not know in part whether his memories were a result of what he had read or what he was, himself, remembering.

Q To what extent did you attempt to determine that?

A Not a great deal of -- determination. It really wasn't essential to my investigation.

Q Well, in trying to determine whether he was so intoxicated that he didn't really -- that he was operating under extreme mental disturbance, wouldn't it have been important to know just precisely what he recalled about each of those incidents?

A Let me see if I can answer your question. The recall of someone who has participated in those incidents is not likely to be very reliable. So that from my perspective as an examiner that wouldn't have a very central focus for me. What I was interested in knowing about was the general circumstance of his life around that time what he was thinking, what he was experiencing, what psychological symptoms he had. Mr. Stewart was depressed enough during that time that many of his thoughts and recollections are quite confused and distorted; that's a symptom of major depression.

Q But you relied upon his memories and his representations of how he was during that time period, in order to make that diagnosis of major depression, correct?

A I would say that relying on Mr. Stewart's reporting, probably, was maybe 10 or 15% of my coming to those conclusions. Again, people with mental illness are not

the best source of information about themselves particularly in examination. It was the records that I reviewed, my own observations of him, the psychological testing, hearing things that other people had to say about his functioning that really provided that data to me.

Q Okay. I understand that. What other people did you talk to who were with him during

that time period who were able to talk -- to give you a description of how he was then?

A I read a description of his behavior by Mr Bilbrey who was around him at that time; I've spoken with Margie Sawyer and read testimony that she has given. I talked to both of his sisters, Susan and Linda, about the general development of his mental illness and about the circumstances of his life, which, certainly, would factor into his psychological state at the time of the offense.

Q All right. But his sisters, Susan and Linda, at the time that these offenses occurred, had not seen him in probably 12 years; isn't that correct?

A That's correct.

Q All right. And, Ms. Sawyer, by her own account, was probably as drunk or drunker than -- than Mr. Stewart during that time period, correct?

A She drank a great deal. She was very aware, however, of how much he was drinking and the kind of drugs he was doing.

Q And, in fact, Mr. Bilbrey's testimony was pretty clear that Mr. Stewart related to him that he had a good memory of what he had done that night to Mr. Diaz, correct?

A Yes. I think he told him some things about that. Yes.

Q In fact, that he remembered forcing Mr. Diaz to lay on the ground and robbing him and shooting him in the head twice?

A Yes. I think that was part of Mr. Bilbrey's testimony.

Q And he remembered to tell Mr. Bilbrey that he had taken the car and set it on fire to get rid of any evidence that was in the car?

A That's what Mr. Bilbrey testified to, yes.

Q So even though Mr. Stewart may have been under the influence of alcohol that night, he, certainly, knew what he was doing and he remembered what he was doing -- what he had done; isn't that correct?

A I'm not sure exactly how to go there with you. Let me see what I can do. People who are highly intoxicated, are capable of committing motor behaviors, okay? He was capable of doing

physiologically the things that he has been convicted of. Was he-- did he know what he was doing with a clear rational mind? Absolutely not.

Q Oh, he did -- he didn't?

A No, he did not.

Q It's not rational for him to take evidence and destroy it so nobody can tie it back to him?

A That certainly --

Q Is that an irrational act?

A -- that is certainly a self-protective act. What I'm saying is that the ability to make choices that conform to the requirements of our society, would have been very, very impaired, given his mental illness and given his level of intoxication.

Q Are you aware that -- or was he able to tell you, or -- or were you made aware of any -- by anything that you've read, that he did the same thing with Michelle Acosta's car?

A Yes, I was aware of that.

Q And that he took it to the exact same spot and set it on fire to get rid of any evidence that he may have left inside?

A I didn't know about the location of the car.

Q And that has no affect upon your diagnosis?

A I can't -- I can't say that it has no affect on my diagnosis. What I can say is that depressed people, mentally ill people, drunk people, intoxicated people from other substances are capable of performing acts that would be viewed as self-protective; but it doesn't mean that the chain of events that took place is a logical chain, is a rational chain or is a set of events that would've taken place without that mental illness and without those disabilities.

Q But it does indicate that he knew what he did was wrong and he was trying to cover it up?

A It does indicate to me that, after the fact, he knew that he wanted to cover it up, yes.

(10/884-891)[31]

A clue as to the judge's criticism of Dr. Sultan's testimony may be extricated from her observation that, "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 Miss Sawyer, Mr. Bilbrey, the Defendant's sisters, Miss Moore and Miss Arnold, and in very small measure on Mr. Stewart's own reporting." Apparently, she thought that Stewart's account of the crime was more important than information gleaned from her observations of him and interviews of those who knew him, or perhaps she wanted to hear a confession.

If the judge was disturbed because Dr. Sultan did not question Stewart more about the crime, then she ignored the fact that Dr. Merin did not question Stewart about the crime at all. (10/921-28) Like Dr. Sultan, he was more concerned with Stewart's life and what led up to the crime. Dr. Sultan had talked to Stewart about the crime to some extent because she related that his memory of the

[31] This is Dr. Sultan's cross-examination in its entirety.

facts was not too good.[32] Dr. Merin based his testimony on what Stewart told him, his impressions of Stewart during his one-hour interview in 1986, and court documents. There were no medical reports or tests to review at that time; nor had he reviewed medical reports by the defense experts prior to his testimony in this proceeding, because the prosecutor asked that he be allowed to sit in during their testimony for this reason, which he did.

The sentencing judge dismissed the testimony of Stewart's step-sisters because "neither sister knew anything significant about the Defendant after he was twelve or thirteen years old." She disregarded the fact that these were the only witnesses who knew Stewart during the formative years of his life. Were it not for his violent childhood, he would not have been the person he was when he committed the crime. One's actions are to a large extent determined by previous life experiences. No one should be judged solely by one day in his life, or

[32] Dr. Merin testified at an earlier proceeding that Stewart recalled very little about that day. (4/694)

even one year in his life.

Even if none of the mental health experts had testified, the testimony of Kenny's two stepsisters concerning his childhood was enough to explain why he was mentally unstable at the time of the offense. During his formative years, Kenny's primary role model, Bruce Scarpo, whom he erroneously believed to be his father, was always drunk, extremely violent, abusive and brutal, and always armed. He beat his wife and children regularly and severely.

When Stewart was ten, his stepfather armed him with a gun and ordered him to threaten and, perhaps, shoot any black neighbors who came across the bridge by their house. He was forced to watch his stepfather beat his stepmother, siblings and pets, often for something insignificant or for which they were not responsible. He had little basis from childhood to appreciate the criminality of any behavior. After all, his step-father behaved in a criminal manner all the time. He was imprisoned for book-making.

The prosecutor and the judge both noted that Stewart's sisters did not see him from age 11 to age 21. The judge stated that no one knew what happened to him during those

years. This is not entirely true. We know that Stewart ran away from home at about age 13 when he learned that Scarpo was not his real father; and that he was extremely disillusioned and wanted to find his real identity. He left school and his grandmother's Tampa home in about seventh grade. He was on the street, was an alcoholic, took drugs, committed burglaries, was arrested and went to prison at age 17.

We know that Stewart was in jail in 1984, at age 20, and that he escaped by walking away from the sheriff's parking garage. Soon afterwards, he met Margie Stewart whom he lived with for two years, which included the year that he committed this and the other crimes of violence. Margie told the jury quite a lot about those years. Stewart tried to determine whether Bruce Scarpo was responsible for the deaths of his natural parents. He longed for his mother and often visited her grave when he was drinking. Stewart's aunt testified that Kenny was obsessed with his biological mother at age 13. Margie Sawyer testified that he was similarly obsessed during the two years they lived together. Stewart told Dr. Merin

about it.[33] Thus, there is no reason to think this obsession did not continue throughout his teen years. These years did not improve his outlook on life. He twice tried to kill himself in the jail after the homicides. Thus, he placed little value on his own life.

The trial judge dismissed Margie Sawyer's testimony because "Ms Sawyer was drinking heavily at the time of the murder and was barely functioning herself." Margie lived with and loved Kenny Stewart for two years. Her testimony showed that she knew him well and that her memory of those years was still good. It seems ironic that the trial judge did not believe Stewart's alcoholism substantially affected his ability to know what he was doing when he shot Diaz, but Margie's alcoholism impaired her memory and destroyed her credibility as to Stewart's character for a two-year period.

Also ironic is the trial court's finding that "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 a long

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[33] Dr. Merin knew even more about the missing years from what Stewart told him during his interview in 1986. Many details are included in the transcript of his first testimony, which defense counsel appended to his sentencing memo for the judge's edification.

time," after she had relied substantially upon Bilbrey's testimony concerning the details of the crime. The judge accepted more or less verbatim all of Bilbrey's testimony about Stewart's alleged confession to him, except that Stewart shot the victim because his accomplice was screaming, "shoot him, shoot him." The judge thought that was "self-serving," on Stewart's part.[34] This is extremely selective because the judge questioned the only thing Stewart allegedly told Bilbrey that was not very incriminating.[35] She stated that,

> much of the information about [Stewart's] 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 Miss Sawyer about it. . . [36]
>
> 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

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[34] Bilbrey testified at an earlier sentencing that Stewart drank twenty 6-packs of beer a day, smoked marijuana and was drunk most of the time. (1/680)

[35] Had Dr. Sultan relied substantially on what Stewart told her, rather than relying on what she learned from others and from testing, the judge would have discounted her testimony because Stewart's statements were "self-serving."

[36] Margie Sawyer testified that Stewart told her nothing other than that he thought he had killed someone. He was so confused and mixed up that she did not know whether to believe him.

> wanted.[37] 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 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 moved to shoot the victim from another angle. **Although the Defense wants this 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. . . .

(4/771-72) The judge attributed the decision to locate the victim and kill him to Stewart alone. Bilbrey testified that Stewart **and his accomplice** made these decisions.[38]

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[37] It is absurd to believe that the judge thought Stewart wanted the victim's car. Had he wanted it, he would have merely stolen it and would not have burned it. The "gist" of Bilbrey's testimony was that Stewart and his accomplice sought out the car owner because they believed he would have money and/or drugs.

[38] At Stewart's original trial, Terry Lyn Smith testified that Stewart told him a somewhat different story about the Diaz homicide in which Diaz picked up Stewart who was hitchhiking. Stewart, 558 So. 2d at 418. This sounds suspiciously like the Acosta/Harris shooting. Margie Stewart's testimony that Stewart talked about having killed a man with their friend, "Terry, the street man," suggests that Smith may have been the accomplice in this homicide. Smith was with Stewart when he robbed and shot Mr. Hargrave, and was arrested, and was with him when he burned Acosta's car. See Stewart v. State, 801 So. 2d 59, 72 (Fla. 2001)(Shaw, J., concurring in part and dissenting in part). At the time of this penalty proceeding, Terry Lyn Smith had died (10/920), thus eliminating any evidence other than Bilbrey's version of what Stewart allegedly told him about the homicide. Despite the judge's assumption that Stewart brought a gun, the gun may have belonged to the accomplice or to the victim. Because the victim smuggled drugs between Tampa and Miami, he most likely kept a gun in his car to defend himself.

The judge's observation that "Dr. Merin's opinion has remained unchanged since he testified in 1986" highlighted her failure to note that Dr. Merin had learned little or nothing new since 1986. He was unaware of much of Stewart's family background and had not seen nor talked with Stewart for 15 years. It is no wonder his opinion had not changed. Moreover, having been retained by the State based upon his former testimony in this case, Dr. Merin could not very well change his opinions without alienating the State. Dr. Maher testified within a reasonable degree of medical certainty that, on the date of the homicide, Stewart was "suffering from a very severe psychiatric disorder, specifically . . . post traumatic stress disorder," because of his extreme childhood abuse. Stewart was also intoxicated. "[T]hose factors had a very major impact on his ability to think, make decisions, and on his behavior." Dr Maher opined that, on the day of the homicide, Stewart lacked the capacity to conform his conduct to the requirements of law. His ability to choose to do the right thing was very severely impaired. (9/764-67)

Dr. Sultan stated, within a reasonable degree of medical certainty, that Stewart committed the murder while

under the influence of extreme mental or emotional disturbance. She based her opinion on Stewart's lifelong history of mental illness. Stewart was highly traumatized because he had grown up in circumstances where he experienced tremendous loss, violence, and abandonment. He discovered as an adolescent that the man he viewed as a hero, even though he was abusive, might have been responsible for the death of his natural parents. Moreover, members of his parents' and grandparents' generations suffered from serious bipolar mental disorders, manic and major depression, and there is a very strong biological component to depression. Stewart had made three serious suicide attempts. His thoughts, moods, clarity of thinking and judgment were deeply affected by mental illness. Dr. Sultan agreed with Dr. Maher that Stewart had many symptoms of post-traumatic stress disorder. (10/881-82)

Dr. Sultan noted that Stewart had a terrible substance abuse problem. He consumed large quantities of alcohol -- sometimes more than a gallon a day, on a regular basis. Alcohol affects one's ability to control impulses, think clearly, and make one's behavior fit within a logical framework. She also considered that to

be an extreme emotional disturbance.[39] (10/879-81) Stewart was unable to think situations through in a logical way. Because he was not able to control inappropriate and dangerous violent impulses, his ability to conform his conduct to the requirements of law was substantially impaired. (10/881-82)

Although a trial judge is generally permitted to believe or disbelieve the witnesses, the judge rejected Dr. Maher and Dr. Sultan's conclusions with insufficient evidence to support the rejection. A sentencing judge's findings should be rejected when "they are based on a misconstruction of undisputed facts and a misapprehension of law". Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990); see also, Walker v. State, 707 So. 2d 300, 318-19 (Fla. 1997); Larkins v. State, 655 So. 2d 95,101 (Fla. 1995). The judge misconstrued the effects of Stewart's abusive childhood, revealed by his sisters, his girlfriend, and the mental health experts.

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[39] In Nibert, 574 So. 2d at 1063, this Court found that evidence of chronic and extreme alcohol abuse "is relevant and supportive of the mitigating circumstances of extreme mental or emotional disturbance and substantial impairment of a defendant's capacity to control his behavior." Thus, Dr. Sultan was correct in finding that Stewart's drinking problem also supported the mental and emotional disturbance mitigating factor.

The judge unreasonably based her fact-finding on the testimony of Dr. Merin who did not have an opportunity to comprehensively evaluate Stewart. She gave little weight to the undisputed testimony of Stewart's sisters who had knowledge of his childhood and character development; or Margie Stewart, who lived with Stewart for two years at the time of the homicide. She rejected the well-founded reasoning and findings of two highly qualified experts who had much more opportunity than did Dr. Merin to evaluate Stewart and to understand why he committed the homicide.

There was no reasonable basis for Dr. Merin's opinion that, because Stewart lived with emotional distress (and was the end product of "extreme" emotional distress) and his capacity to appreciate the criminality of his acts was always diminished by alcohol, he was not extremely nor substantially affected by these disabilities on the day of the homicide. Dr. Merin's testimony was also contradictory. He testified that some patients with mental illness seem normal "until you tap into an area and get all of this bizarre delusional material," but determined that Stewart was not mentally ill in one hour, because Stewart did not **show** any psychotic or neurotic behavior. Dr. Merin admitted that Stewart suffered from

depression and had tried to commit suicide, but said depression was simply a mood disorder, after having testified that manic depression or bipolar disorder had many elements of mental illness. He was clearly unable to determine, with any certainty, the type or degree of Stewart's depression in an hour. Actually, he did not notice the depression, but learned of it from others.

The judge's findings (ie, that Stewart acted deliberately and knew what he was doing) sound suspiciously like she based her decisions on the insanity standard.[40] One does not need to be so substantially impaired that he does not know what he is doing to qualify for the impaired capacity mitigator. Total annihilation is not required. One who does not know what is going on either lacks the necessary intent to commit the crime or is legally insane. The insanity standard cannot be used to determine the weight of mitigation. See Campbell, 571 So. 2d at 418-19; Ferguson v. State, 417 So. 2d 631 (Fla. 1982) (that Ferguson knew difference between right and wrong, could recognize criminality of his conduct and make

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[40] The judge found that Stewart was able to "reason and make deliberate choices." (4/775) Nevertheless, this ability may have been substantially impaired, by his intoxication, the effects of long-term alcoholism on his brain and his mental state.

voluntary intelligent choices did not negate mental mitigation).

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. . . Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions may be deserving of some mitigation of sentence because of his mental state.

State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973).

The court's faulty conclusions as to the mental mitigation is especially critical in light of the fact that the statutory mental mitigators are two of the weightiest mitigating factors -- those establishing mental imbalance and loss of psychological control." Santos v. State, 629 So. 2d 838, 840 (Fla. 1994). Moreover, because she considered the rest of the mitigation along with the mental mitigators, she gave the other mitigation diminished weight, even though much of it deserved substantial weight.

The judge found most of the proposed nonstatutory mitigation reasonably established, but failed to give it the weight it deserved. Because she had considered it when weighing the mental mitigators, she gave it less weight. The problem is that she gave the two mental

mitigators only "some" weight because she agreed with Dr. Merin that Stewart's mental distress was not "extreme" or his impaired capacity "substantial," not because she did not believe some of the other mitigation, such as childhood abuse, deserved great weight. She then decreased the weight she accorded even the weightiest of nonstatutory evidence because she also considered it as part of the statutory mental mitigation. This makes her order confusing and skews the proportionality review.

After discussing the two mental mitigators, the trial court addressed the remainder of defense counsel's proposed mitigators. She considered them in related groups. As to:

3. Physical brutality against Mr. Stewart as a child;

4. Repeated physical brutality against family members and others witnessed by Mr. Stewart. Vi

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5. Gross emotional stress between the ages of three and t w
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6. An inability to adapt to his surroundings was evidenced by bed-wetting and other behaviors; and

9. Abuse by his aunt while in her care,

the judge was "reasonably convinced" that the mitigating factors were established. She gave each mitigating factor only "some" weight, however, because these factors were considered and given weight in all of the suggested mitigators she had just discussed -- the mental mitigators. Had the judge given the mental mitigators great weight, her decision to decrease the weight she gave them separately would be understandable, but that was not the case. These mitigators -- the horrendous emotional and physical abuse and trauma Stewart endured as a child, and the fear he carried with him throughout his childhood, were worse than any abuse undersigned counsel has encountered in any case. Yet the trial judge accorded

them only "some" weight -- not because she did not consider them weighty, but because she also considered them along with the mental mitigation -- an illogical reason because she did not give the statutory mental mitigation great weight.

The judge also considered the following mitigators together:

> 7. The total absence of a remotely acceptable role model, especially a father;
> 11. The absence of a father during his tender years;
> 14. Learning at age twelve that the man that he believed to be his father was actually his stepfather.

The judge found these mitigators reasonably established. Again, because she had considered them together with the other mitigators, she gave them only modest weight.

The trial judge considered collectively:

> 8. Stewart's abandonment by his mother at age three;
> 10. That he was without a mother for some undefined period of time during his tender years; and
> 19. His crippling, lifelong obsession with the mother who abandoned him.

The judge was reasonably convinced of the existence of these mitigators but, again had already considered and given some weight to them while considering the mitigators she had already addressed. The Court therefore gave these

substantial mitigators little additional weight. Kenny's abandonment as a baby and his later obsession over the mother he lost before he ever really knew her, were the primary causes of his problems, without which the homicide might never have occurred. They deserved great weight.

The judge collectively considered the mitigation of

> 12. Inculcated alcohol abuse as a child;
> 13. Intoxication at the time of the Diaz and Harris/Acosta shootings; and
> 18. Long-term alcohol abuse.

Again, the court was reasonably convinced that Stewart was impaired to some extent and gave modest weight to each of these mitigating factors, in addition to the weight she had already afforded these factors when considering the prior mitigators, particularly the mental mitigators. The fact that Stewart was born to an alcoholic mother who drank excessively during her pregnancy; was surrounded by alcohol during his infancy and childhood; that his stepfather owned several bars, had the house well-stocked with alcohol, and had Kenny bartend for Scarpo's drunken friends, explains his alcoholism. Stewart's long-term alcoholism contributed greatly to the way Stewart lived and the crimes he committed and, thus, should have been given more than "some" weight.

The Court gave Stewart "the benefit of a doubt," in finding established the proposed mitigators of

> 15. Low-normal intelligence; and
> 16. Eighth grade education.

She gave them little weight. Although these were not among the weightier mitigators, because Stewart was not retarded, it should be noted that the statutory age mitigator was not proposed nor considered although some courts have found the age of 21 (Stewart had been 21 for three months) mitigating. Stewart's age, together with his lack of education, warrant more than "a little" weight.

The judge considered established the mitigator that Stewart was (17) homeless at approximately age twenty, but gave it little weight because she thought he brought it on himself. She failed to note that his entire life was sculpted by his horrendous childhood which made it difficult for him to support himself.

> 20. Mental illness for two proceeding generations and during his early 20's, evidenced by suicide attempts and inability to function normally, homelessness and criminal behavior.

Again, the judge said she had considered this factor and, therefore, it was not new. Accordingly, she gave no additional weight to this proposed mitigator. As

discussed previously, the judge failed to address the hereditary nature of depression and mental illness -- that Stewart's natural mother committed suicide; both of his natural parents committed criminal acts and, thus, Stewart's mental problems may have been genetically induced. His inability to live a law-abiding life may well have been genetically pre-determined.[41] Abandoned by his mother at age two or three, then raised in a violent and abusive home, he had little chance in life.

The Court considered Stewart's (21) remorse for the killing of Mr. Diaz. She read Stewart's letter and accepted his statement of remorse. She considered the testimony Stewart's CCR lawyers who testified that Stewart was genuinely contrite about the pain he had caused and the damage he had done to others. The Court was reasonably convinced this mitigator was proven and gave it modest weight. She considered (22) Stewart's compassion for others while in prison, in accordance with the testimony of Harry Brody, Lillian Brown, Rochelle Theriault and Jeff Hazen, was reasonably convinced of this

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[41] Dr. Merin agreed that depression may be chemically determined, and that outwardly-expressed anger may be brain-related. He admitted that Stewart's disturbance was pretty much beyond his control. (10/945-46)

factor and gave it modest weight. Likewise, she was reasonably convinced of (23) Stewart's interest in the spiritual, developed during incarceration, and gave it modest weight.

She considered that (24) Steart had been sentenced on unrelated charges to 130 years in prison, based on a stipulation between the parties, with an additional thirty years of sentences to run concurrent with the hundred and thirty years. The Court was reasonably convinced of this mitigating factor and gave it modest weight. She failed to consider that Stewart also had an additional death sentence which would insure that he would never be released from prison. If the other death sentence were vacated, Stewart would be sentenced to at least another life sentence (unless he was discharged for insufficient evidence). The weight given this mitigator may be based on one's belief as to the purpose of punishment.

The trial court judge considered and gave "little weight" to

(25) Stewart's good prison record. She noted that:

> The Department of Corrections' records reflect the Defendant's good prison record and the Court is therefore reasonably convinced of this mitigating factor. The Court has given little weight to this factor.

(4/777) This is clearly error. Good conduct while incarcerated reflects potential for rehabilitation -- a recognized mitigating factor. See Skipper v. South Carolina, 476 U.S. 1 (1986); Songer v. State, 544 So. 2d 1010 (Fla. 1989); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). In Menendez v. State, 419 So. 2d 312 (Fla. 1982), testimony that Menendez demonstrated a capacity for rehabilitation may have made the difference between life and death.

Although the potential of rehabilitation does not lessen the defendant's culpability for the crime committed, it is "clearly mitigating in the sense that it might serve as a basis for a sentence less than death." Cooper, 526 So. 2d at 902 (citing Skipper v. South Carolina, 476 U.S. 1 (1986) (conduct in prison mitigating for same reason)). Evidence as to the possibility of rehabilitation is so important that its exclusion requires reversal. Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982); Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987); Nibert, 574 So. 2d at 1062; Campbell, 571 So. 2d at 419 n.4; Songer, 544 So. 2d at 1011-12 (positive change and self-improvement while in prison). Although not excluded in this case, the judge gave it little weight for no noted

reason.

The Court failed to consider substantial evidence that Stewart was subject to rehabilitation and had in fact already changed dramatically while in prison. Although she purported to have considered this evidence, she apparently disregarded Stewart's aunt's testimony that Stewart had changed significantly, the testimony of two lawyers from CCR who had worked with Stewart for over three years, and a juvenile justice worker who testified that Stewart had met with a potential juvenile delinquents that she supervised, attempting to persuade them to stay away form a life of crime. Had she taken this testimony into account, she should have given this mitigator substantial weight. It seems that the judge believed that, no matter how much Stewart had changed, it did not mitigate the crimes he committed. This is clearly error. Although positive change does not excuse the crime, it mitigates it.

Had Dr. Merin re-examined Stewart prior to his 1990 penalty rehearing, and again before this proceeding, he would have had a totally different impression of Stewart. He admittedly did not know about the abuse that the step-sisters related, but said it did not change his

conclusions. Because he had twice testified for the defense (retained by a lawyer who rendered ineffective assistance), and had been hired by the State to rebut the defense witnesses in this proceeding, he could not very well change his testimony and opinions midstream.

In Nibert, 574 So. 2d 1059, 1061, Dr. Merin re-examined the defendant many years later and found that he had been substantially rehabilitated. Dr. Merin testified that he tested Nibert before the first trial and retested him 2 1/2 years later. He found substantial improvement. He attributed the first set of results to the effect of alcohol on Nibert's brain. He attributed Nibert's improvement to the drying out and rehabilitation of the brain. Vacating Nibert's death sentence, this Court relied upon Dr. Merin' opinion, supported by batteries of tests. 574 So. 2d at 1062-63.

If Dr. Merin had seen Stewart again before this resentencing, he would have found improvement. Dr. Merin interviewed Stewart 22 months after the homicide in this case, and 15 months after the Harris homicide, when Stewart had only been off the streets for only 15 months. During that time, he had taken at least one overdose of medication in an attempt to commit suicide. His brain

must have been affected by all the alcohol and drugs consumed. Perhaps if Dr. Merin had evaluated Stewart 15 years later, he would have found Stewart's brain "dried out and rehabilitated" like Nibert's. The state, as beneficiary of the judge's sentencing errors, cannot meet its burden of showing beyond a reasonable doubt that the error could not have played a part in her sentencing decision. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). For the foregoing reasons, Stewart's sentence should be vacated and the case remanded for a life sentence, based on the substantial mitigation. Alternatively, the case should be remanded to the trial judge to re-evaluate and reweigh the mitigation in accordance with standards set out by this Court.

ISSUE V

THE DEATH PENALTY IS DISPROPORTIONAL COMPARED WITH OTHER CAPITAL CASES BECAUSE OF THE SUBSTANTIAL MITIGATION IN THIS CASE.

> [I]n **less than a week in April, 1985**, Kenneth Stewart murdered one person and attempted to murder two others. If the first aggravating factor had been the only aggravating factor presented, this Court would impose a sentence of death.

(4/777) In imposing the death penalty in this case, the

trial judge considered only one week in the life of Kenneth Stewart -- a life that consisted of barely 21 years at the time of the homicide. In so doing, she ignored the rest of his life, both before and after the crimes. "Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review **to consider the totality of circumstances**...." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), cert. denied, 498 U.S. 1110 (1991) (emphasis added). This, she failed to do.

The judge may not be permitted to ignore the passage of time between the original sentencing in the fall of 1986 and this resentencing 17 years later, in determining whether death was the appropriate sentence. The trial court is required to consider the totality of the circumstances which included not only the homicides Stewart committed in December, 1984, and April, 1985, but also his horrendous infancy and childhood, and the seventeen years since the homicides occurred, in which he had demonstrated amazing rehabilitation. Instead, the judge based her sentence solely upon her perception of

Stewart's character at the time of the crime.[42]

In this case, the court found only three aggravators: (1) Stewart was previously convicted of another violent felony; (2) the crime was committed while he was under sentence of imprisonment; and (3) the crime was committed for pecuniary gain. HAC and CCP were "conspicuously absent." Although Stewart was convicted of another capital felony, it were committed a few months after the instant offense and before Stewart was apprehended, while he still suffered from the same mental and emotional impairments that caused him to commit this homicide. Dr. Sultan called this period the bottom of his emotional functioning, during which he deteriorated in his ability to function. The other two aggravators were not particularly weighty. In fact, the judge gave the "under sentence of imprisonment" aggravator only modest weight. It was an unarmed, nonviolent "walk-away" escape in which no one was at risk. The "pecuniary gain" aggravator is very common in first-degree murder cases and, thus, is not the one of the more serious aggravators.

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[42] Her view of his character at that time was based primarily upon the details of the crime and the other felonies Stewart was convicted of committing five months later. Despite her reliance on Stewart's behavior during less than five months of his life, she stated that she did not know much about Stewart at that time.

To suggest that death is always justified when a defendant has previously has been convicted of another murder is "tantamount to saying the judge need not consider the mitigating evidence at all in such instances." Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). The United States Supreme Court has consistently overturned cases in which the mitigating evidence was ignored. Id. (citing Hitchcock; Eddings; Lockett). Thus, a prior homicide conviction does not automatically mandate the death penalty. See, e.g., Crook, 813 So. 2d 68; Almeida, 748 So. 2d at 933; Cooper, 739 So. 2d 82; Garron, 528 So. 2d 353 (Fla. 1988); Santos, 629 So. 2d 838; Cochran, 547 So. 2d at 928.

In Cochran, the jury was not told that the defendant committed a second homicide four days before the one for which he was on trial. 547 So.2d at 934. Without this knowledge, the jury recommended life. The judge, however, imposed the death penalty, primarily because of the second homicide, as did the judge in this case. Although this Court agreed that the judge was permitted to consider the second homicide in weighing the aggravating and mitigating factors, it found that the extensive mitigation in the case made the jury's recommendation reasonable. Stewart's

jury recommended death by only a bare majority -- seven to five. Had the jurors not known of the other homicide, they probably would have recommended a life sentence, as did the jury in Cochran. The case would then be nearly identical to Cochran except that Stewart had much more extensive mitigation.

In Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988), the defendant, while attempting to rob a bank, shot and killed a deputy sheriff and wounded another deputy. The trial judge found five aggravators and three mitigators. In accord with the jury's recommendation, he sentenced Fitzpatrick to death. This Court upheld the aggravators and mitigators but reduced Fitzpatrick's sentence to life, finding that his was not the sort of unmitigated case contemplated by Dixon. The Court noted that the "heinous, atrocious and cruel," and the "cold, calculated and premeditated," factors were conspicuously absent. 527 So.2d at 812. See Hurst, 819 So. 2d 689 (Fla. 2002) (aggravators included, "importantly, the very serious heinous, atrocious and cruel aggravator"); Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999) ("[HAC and CCP], of course, are two of the most serious aggravators set out in the statutory sentencing scheme and, while their

absence is not controlling, it is not without some relevance to a proportionality analysis.")

The arbitrary and capricious imposition of the death penalty violates both the United States and Florida Constitutions. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring); Dixon, 283 So. 2d 1. Because of the uniqueness and finality of death as a punishment, its application is reserved for only those cases where the most aggravating and least mitigating circumstances exist. Terry v. State, 668 So. 2d 954, 956 (Fla. 1996); Dixon, 283 So. 2d at 7; see Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999) (proportionality review requires that circumstances be both the most aggravated and least mitigated). Thus, this Court's proportionality review is two-pronged -- to compare the case with other cases to determine if the crime is **both** the (1) most aggravated, **and** (2) least mitigated. Almeida, 748 So. 2d at 933; Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999). This case is not among the least mitigated, but among the **most** mitigated, of capital offenses. Thus, Stewart's sentence should be reduced to life because of his mental and emotional illness, post-traumatic stress disorder,

alcoholism, substance abuse, childhood trauma, great potential for rehabilitation and other mitigation.

In a capital case, the sentencing judge and the reviewing court "may determine the weight to be given relevant mitigating evidence." Campbell v. State, 571 So. 2d 415, 419 (Fla. 1990), quoting Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982). As reiterated in Walker v. State, 707 So. 2d 300, 318 (Fla. 1997), the trial court must consider and weigh all mitigating evidence found anywhere in the record to determinate whether to impose the death sentence. This Court is not bound to accept the trial court's findings "when . . . they are based on misconstruction of undisputed facts and a misapprehension of law." Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990).

Despite the fact that the judge did not consider the mental mitigators "extreme" and "substantial," she did find these mental mitigators reasonably established, and accorded them "some" weight. Mental mitigation is the important mitigation and must be accorded a significant amount of weight. See, e.g, Larkins v. State, 739 So. 2d 990 (1999); Snipes v. State, 733 So. 2d 1000 (1999);

Santos, 629 So. 2d 838. In Larkins v. State, 655 So. 2d 95, 100 (Fla. 1995), this Court reversed, in part because the trial judge misconstrued expert testimony as to whether the defendant qualified for the "impaired capacity" mental mitigator. In this case, the court's assessment of the totality of the circumstances, and the reliability of the death sentence she imposed, were all profoundly affected by her misperception of the evidence concerning the mental mitigators, and the resulting affect upon her weighing of the myriad nonstatutory mitigation. (See Issue IV) This Court must review the findings to properly determine proportionality.

The case of Cooper v. State, 739 So. 2d 82 (Fla. 1999), in which this Court reversed for a life sentence on proportionality review, bears much resemblance to this case. In both cases, the court found three aggravators. The aggravators in both cases included the prior capital felony and pecuniary gain aggravators. Cooper had committed another capital murder several days later, while Stewart had committed another capital murder five months later. The third aggravator in Cooper was CCP which is one of the most serious aggravators. Larkins v. State, 739 So. 2d 90, 95 (Fla. 1999). The third aggravator in

Stewart's case was that he was under a sentence of imprisonment which was that he escaped from the Hillsborough County Jail by walking away from his trustee job in the parking garage. The judge gave this aggravator only moderate weight. Thus, Stewart's third aggravator was not nearly as serious as was Cooper's although, in both cases, the aggravators were sufficient to support the death penalty had there not been such substantial mitigation.

The reverse, of course, was true. In both cases, the judge found substantial mitigation, including mental disturbance, childhood abuse and trauma. Both Cooper and Stewart were physically abused and threatened with guns by their fathers. Cooper was thrown against the refrigerator and Stewart was repeatedly beaten with Scarpo's fists, and was not allowed to defend himself.

Both judges found the two mental mitigators although, in Stewart's case, the court gave them only "some" weight because she agreed with Dr. Merin (rather than Drs. Maher and Sultan) that they were not "extreme" or "substantial" on the day of the homicide. (See Issue IV) Stewart had a lot more evidence of alcoholism, from a very young age, which must have affected his brain, and distorted his

thinking and judgment. Moreover, he may have had a genetic predisposition for alcoholism and depression. He was extremely intoxicated on the day of the homicide. While Cooper's experts diagnosed brain damage, Stewart's experts diagnosed post-traumatic stress disorder which, clearly, is a disorder of the brain. Also, Stewart had long-term depression and was suicidal. Dr. Merin testified that bipolar depression may be considered mental illness, although he did not diagnose a particular type of depression.

In Stewart's case, the court found all 23 proposed nonstatutory mitigators, giving most of them moderate, some or little additional weight because she had considered them in arriving at her decision as to the weight of the mitigators.[43] She found:

> 1. Extreme mental disturbance at the time of the shooting (some weight);
> 2. Unable to conform his conduct to the requirements of the law at the time of the shooting (some weight);
> 3. Physical brutality against Stewart as a child (some weight);
> 4. Stewart witnessed repeated physical brutality against family members and others; violence became a norm (some weight);

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[43] Both defendants were young. Cooper was 18 and Stewart was 21, by only three months. Stewart's sentencing judge was not asked to consider or instruct on the age mitigator.

5. Gross emotional stress between the ages of three and twelve (some weight);

6. An inability to adapt to his surroundings was evidenced by bed-wetting and other behaviors (some weight);

7. The total absence of a remotely acceptable role model, especially a father (modest weight);

8. Stewart was abandoned by his mother at age three (little additional weight);

9. Abuse by his aunt while in her care (some weight);

10. That he was without a mother for an undefined period of time during his tender years (little additional weight);

11. The absence of a father during his tender years (modest weight);

12. Inculcated alcohol abuse as a child (modest weight);

13. Intoxication at the time of the Diaz and Harris/ Acosta shootings (modest weight);

14. Learning at age 12 that the man that he believed to be his father was actually his stepfather (modest weight);

15. Low-normal intelligence (little weight);

16. Eighth grade education (little weight);

17. Homeless at approximately age 20 (little weight);

18. Long-term alcohol abuse (modest weight);

19. His crippling, lifelong obsession with the mother who abandoned him (little additional weight);

20. Mental illness for two proceeding generations and during his early 20's, evidenced by suicide attempts and inability to function normally, homelessness and criminal behavior (no additional weight);

21. Remorse for the killing of Diaz. (modest weight);

22. Stewart's compassion for others while incarcerated (modest weight);

23. Stewart's interest in the spiritual developed during incarceration (modest weight);

24. Stewart had been sentenced on unrelated charges to 130 years in prison, with an additional

thirty years of sentences to run concurrent with the hundred and thirty years. (modest weight);

25. Stewart's good prison record (little weight).

(4/670-77)

As in Cooper, the three aggravating factors were sufficient to make the cases among the more aggravated cases, but the many substantial mitigators, including the important mental mitigators, made the cases among the **most** mitigated of cases, rather than the least mitigated. Additionally, in Cooper, the jury recommended death by an 8 to 4 vote while Stewart's jury recommended death by only a 7 to 5 vote.[44] Thus, the second prong of proportionality review was not met and Stewart too must be given a life sentence.

The extensive and substantial mitigation in this case makes the death penalty disproportionate because such mitigation has in the past warranted a life sentence in similar cases such as Almeida, Cooper, Cochran, Fitzpatrick, and Livingston v. State, 565 So. 2d 1288,

[44] The closeness of the jury's penalty vote is a relevant factor for this Court to consider in its proportionality determination. See Almeida v. State, 748 So. 2d 922 (vote of 7-5); Cooper v. State, 739 So. 2d at 86 (vote of 8-4); Jones v. State, 705 So. 2d 1364, 1366 (Fla. 1998) (7-5).

1292 (Fla. 1990) (Livingston killed convenience store clerk during robbery, shot at another woman in store, and burglarized a residence earlier in day; although jury recommended death, Court found that Livingston's youth, marginal intelligence, abusive and neglectful childhood, and problems with drugs and alcohol counterbalanced two aggravators and remanded for life). Stewart's mental problems and alcoholism were based on the most violent and horrible childhoods one could imagine. His childhood was clearly related to the crime because the trauma he experienced caused his post-traumatic stress disorder, depression, and alcoholism.

Stewart's step-mother and the children were at the mercy of the mood or whim of Bruce Scarpo. They were in constant fear that Scarpo would suddenly turn on one of them. (9/692-93) He always carried a gun and used it to threaten people, including his step-children. He was almost always drunk. Perhaps worse, Scarpo humiliated Kenny. When Stewart wet his bed, a result of an untreated medical problem, his father made him sleep on wet sheets or no sheets, and sit naked on his bed for hours or days at a time. (9/ 712-13) Scarpo sexually abused one or both of Kenny's step-sisters; whether he sexually abused Kenny

is unknown.[45]

Throughout his childhood, Kenny refused to believe that his real mother, whom he barely remembered, was dead; he had recurring dreams about finding her. When he learned at age twelve that his stepfather was not his biological father, he was devastated and became suicidal. His drinking increased dramatically. He began to search for his identify. His grandmother told him his stepfather arranged to have his parents killed, which he believed for years.

On his own at age thirteen, he was unable to support himself so starting committing burglaries. He had seen nothing but alcoholic rages, violence and criminality during his childhood. Thus, he ended up in prison at age seventeen. At age nineteen, he met an alcoholic woman old enough to be his mother (Margie), and lived with her for two years, sometimes on the streets. During this time, he often went to his mother's grave at night with a bottle of whisky, and fantasized about her. While Margie was in

[45] His sister, Linda, testified that Scarpo sexually abused her. His other sister, Susan, testified at a hearing in Stewart's other case that Scarpo also sexually abused her but that she did not know whether he sexually abused Kenny. Stewart v. State, 801 So. 2d 59, 72 (Fla. 2001)(Shaw, J., concurring in part and dissenting in part, in a separate opinion with which Anstead and Pariente, JJ, concurred).

jail and Stewart was living on the streets, he committed this homicide. He was at the bottom of his psychological functioning. (10/884)

In Almeida, 748 So. 2d at 933, this Court vacated the death sentence and reversed for the imposition of a life sentence, sustaining one aggravating factor and substantial mitigation. The Court determined that the CCP aggravator was not supported by the evidence. The valid aggravator was Almeida's prior violent felony -- the murder of two prostitutes several weeks before.

In this case, as in Almeida, Stewart had an extremely brutal and violent childhood and vast mental mitigation, as discussed above. Like Almeida, Stewart was young (barely 21 while Almeida was 20); the crimes occurred during a brief period of his life, and the jury recommended death by only a 7 to 5 vote.

When there is substantial mitigation, the Court has found death disproportionate even when there are several aggravators. See, e.g., Cooper v. State, 739 So. 2d 82 (three aggravators -- prior capital felony, pecuniary gain and CCP); Robertson v. State, 699 So. 2d 1343 (Fla. 1999) (two aggravating factors, one of which was HAC); Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993) (two aggravators,

one of which was HAC, and prior attempted murder where victim later died from his injuries); Fitzpatrick, 527 So. 2d at 812 (five aggravator without CCP or HAC, and three mitigators).

Kenny also had good personality traits. A desire to help others was found mitigating in Songer v. State, 544 So. 2d 1010, 1012 (Fla. 1989). See also Maxwell v. State, 603 So. 2d 490, 491 (Fla. 1992); Campbell, 511 So. 2d at 419 n.4. Kenny's sisters testified that Kenny loved animals and tried to help them if they were sick or hurt. Margie Sawyer testified that he would help anyone if he had the money. Both of his CCR lawyers and his aunt testified that his main interest in life now was in helping others.

Of further importance, Stewart had shown, over fifteen years in state prison, that his potential for rehabilitation was good. He had only one disciplinary report, and had recently spoken to a small group of potential juvenile delinquents about the consequences of crime. He had plans to write a book to encourage juveniles from abusive homes to avoid a life of crime. His aunt and both CCP lawyers testified to Stewart's exemplary behavior in prison; his concern for others; his

extreme remorse and guilt for what he had done; his honesty and his desire to do something to make up for the damage he had caused the families of his victims.

Future usefulness is very powerful mitigation. Turning the lives of other young people around can only be described as the strongest form of rehabilitation. Clearly, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988); Holsworth v. State, 522 So. 2d 348, 354-55 (Fla. 1988). Evidence as to the possibility of rehabilitation is so important that its exclusion requires reversal. Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987); Simmons v. State, 419 So. 2d 316, 320 (Fla. 1982). Kenny Stewart had already demonstrated his potential to be of help to others.

As in Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990), there is no need for reweighing because this Court can determine on the record that the death penalty is disproportionate. The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first degree murders. Almeida, 748 So. 2d 922 (Fla.

1999); Cooper, 739 So. 2d at 85; Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998).

To warrant the ultimate penalty, the crime **must also be among the least mitigated of first degree murders**. Cooper, 739 So. 2d at 85-86. In the instant case, the mitigating evidence is as strong as in Crook, Cooper and Robertson, 699 So. 2d at 1347.

This Court cannot conclude that this is one of the least mitigated first-degree murders it has reviewed. The mitigation is extremely compelling, substantially unrebutted, and causally connected to the crime. This is not a case which turns on the resolution of conflicting evidence. The only conflict was in the severity of Stewart's mental illness at the time of the homicide, which is a conflict in opinion, based on substantially the same evidence.

Here, in contrast to Cooper, virtually all of the mitigating evidence is unrebutted. The judge's sentencing order does not purport to resolve conflicting evidence but only to explain that she found Dr. Merin's opinion more credible than those of the other experts. The judge simply ignored the fact that he had insufficient evidence

to make his purported diagnosis. Because this Court is not bound by the judge's errors of law or fact, Pardo, it can properly apply the proportionality standard to this record.

Compared to other defendants, this case presents overwhelmingly compelling mitigation. There is no way that this case can be found to be "one of the least mitigated" of first-degree murders. Because of the significant mitigation, the death penalty is unwarranted as a matter of law. For this reason, the Court should remand this case for imposition of a life sentence.

CONCLUSION

For the reasons set out above, Stewart's death sentence should be vacated and his case remanded for imposition of a life sentence because it is not one of the least mitigated of capital cases; in fact, it is one of the most mitigated. In the lesser alternatives, his case should be remanded for a new penalty proceeding with a new jury, or for resentencing by the judge, giving great weight to the mental mitigation.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this ______ day of September, 2003.

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Respectfully submitted,

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