IN THE SUPREME COURT OF FLORIDA

NO. SC02-2716

KENNETH STEWART

Petitioner,

v.

JAMES V. CROSBY, JR.
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (CORRECTED)

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PRELIMINARY STATEMENT

This is Mr. Stewart's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Stewart was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings will be referred to as "R. ____" followed by the appropriate page number. The record on appeal concerning the re-sentencing hearing afer remand will be referred to as “RS__” followed by the appropriate page number. The post-conviction record on appeal will be referred to as "PC-R. ____" followed by the appropriate page number.

All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Stewart has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Stewart, through counsel, accordingly urges that the Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Stewart's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel failed to raise the issue that counsel was ineffective at the sentencing phase; appellate counsel failed to raise that counsel was ineffective before trial and during the guilt phase; appellate counsel failed to raise that the competency hearing conducted by the trial court was unreliable; and appellate counsel failed to raise that Mr. Stewart was incompetent to proceed at all material stages.

Appellate counsel’s failure to present the meritorious issues discussed in this petition demonstrates that his

representation of Mr. Stewart involved “serious and substantial deficiencies.” Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Stewart. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on in direct appeal, but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied Mr. Stewart his fundamental constitutional rights. As this petition will demonstrate, Mr. Stewart is entitled to state habeas relief.

PROCEDURAL HISTORY

Kenneth Allen Stewart (hereinafter Stewart) was charged by information in the 13th Judicial Circuit, Hillsborough County Florida, on May 13, 1985, with two counts of attempted first degree murder, armed robbery and arson as to Michelle Acosta and Mark Harris. The victim, Mark Harris, developed pneumonia and subsequently died on May 12, 1985. Stewart was indicted by the grand jury on May 22, 1985, for first degree murder. The charges regarding both victims were consolidated for trial.

Stewart was tried before the Honorable John P. Griffin on August 25-27, 1986, in Hillsborough County, Florida. On August 27, 1986, the jury found Stewart guilty of first-degree murder, with a special verdict of felony murder, guilty of attempted second-degree murder with a firearm, guilty of robbery with a firearm, and guilty of second-degree arson.

The case proceeded immediately to the penalty phase hearing on August 27, 1986, in which the jury recommended that Mr. Stewart be sentenced to death by a vote of 10 to 2. The court followed the recommendation of the jury; however, it failed to make written findings in support of the death sentence. This Court remanded the case for written findings in support of the death sentence and its departure sentence on the armed robbery conviction. Stewart v. State, 549 So.2d 171 (Fla. 1989).

Upon remand, a hearing was held before the Honorable John P. Griffin on December 5, 1989. Attorney Barbas was reappointed to represent Stewart in the re-sentencing hearing based upon the purported conflict of interest by the Public Defender's Office. The Court continued the case to allow Mr. Barbas an opportunity to research case law support for allowing the court to consider additional mitigation that was not presented during the trial proceedings. On December 8, 1989, Mr. Barbas requested a continuance to allow him an opportunity to obtain for the court's consideration additional mitigating circumstances from Mr. Stewart's Department of Corrections records since his conviction. The court declined to take further testimony on the death sentence and set a sentencing hearing for December 21, 1989. On December 21, 1989, Mr. Barbas announced to the Court that there was nothing in mitigation to present upon review of Mr. Stewart's Department of Corrections records. The Court proceeded to hear argument from the state and defense on sentencing as to the armed robbery conviction. Mr. Stewart notified the Court, through counsel, that he was requesting additional time to present character witnesses on his behalf. Mr. Barbas acknowledged to the Court that this is the first time that he had heard of Mr. Stewart's desire to present character witnesses. Mr. Stewart responded that this is the first time

that he had an opportunity to give this information to counsel because he had never seen him since being transported to Hillsborough County. The Court denied Mr. Stewart's request indicating that he had plenty of time in which to prepare for the hearing. On December 21, 1989, reading from a prepared sentencing order, the Court re-sentenced Mr. Stewart to death for the first degree murder conviction and to life on the armed robbery conviction. The court found two aggravating circumstances: previous conviction of a felony involving use of threat or violence and capital felony committed in commission of a robbery. The court found three statutory mitigating circumstances: extreme mental or emotional disturbance (slight weight), impaired capacity (little weight), and age (little weight). Although the court mentioned "catch-all" mitigation related to "some sort of trauma" Defendant suffered at age 13, it was given no weight. On direct appeal, this Court affirmed Stewart's death sentence and remanded Stewart's armed robbery conviction to the lower court for imposition of a guideline sentence. Stewart v. State, 588 So.2d 972 (Fla. 1991).

On September 17, 1996, Mr. Stewart filed his Third Amended Motion to Vacate Judgments of Conviction and Sentence raising 26 claims. On April 2, 1997, the circuit court held a Huff hearing. On August 4, 1997, the circuit court entered an order

denying in part the majority of Mr. Stewart's claims for relief and granted an evidentiary hearing based upon ineffective assistance of counsel during the pretrial and guilty phase, the State's failure to produce jail records in violation of *Brady*, inadequate mental health assistance, and ineffective assistance of counsel during the penalty phase hearing. On December 17, 1998, and March 19, 1999, an evidentiary hearing was held on the proceeding four claims. On June 25, 1999, the circuit court entered an order denying Mr. Stewart's claims for relief. On July 21, 1999, the defendant gave timely Notice of Appeal of the circuit court's denial of his 3.850 motion. On September 20, 2001, rehearing denied November 26, 2001, this Court affirmed the circuit court's denial of post-conviction relief. Stewart v. State, 801 So.2d 59 (Fla. 2001).

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Stewart asserts that his conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr.

Stewart's case, substantial and fundamental errors occurred in his capital trial and sentencing. These errors were uncorrected by the appellate review process as shown below, and therefore Mr. Stewart is entitled to relief. Except as noted below, four points failed to include the issues which were presented in Mr. Stewart's Rule 3.850 motion and therefore were denied because they had not been raised on direct appeal. The failure of appellate counsel to raise these issues constituted ineffective assistance of counsel warranting relief.

ARGUMENT I

UNDER *APPRENDI AND RING* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTI0NAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The United States Supreme Court decided Ring v. Arizona, 122 S.Ct. 2428, ----, 2002 WL 1357257 on June 24, 2002. The Court held that the Arizona statute pursuant to which, following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determines the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty, violates the Sixth Amendment right to a jury trial in capital prosecutions; receding from Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511

(1990). If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt. A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. The court noted that the "right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished" if it encompassed the fact-finding necessary to increase a noncapital defendant's sentence by a term of years, as was the case in Apprendi, but not the fact-finding necessary to put him to death.

Florida's Death Penalty Statutory Scheme Facially Violates the Federal Constitution:

In Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court recognized that for purposes of the Sixth Amendment, Florida's death penalty statute is indistinguishable from the statute invalidated in Ring:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the

> trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Id. 647-48. The Court reiterated this Sixth Amendment link between the Florida and Arizona capital sentencing schemes in Ring:

> In Walton v. Arizona, 497 U.S. 639 (1990), we found unavailing attempts by the defendant-petitioner in that case to distinguish Florida's capital sentencing system from Arizona's. In neither State, according to Walton, were the aggravating factors 'elements of the offense'; in both States, they ranked as 'sentencing considerations' guiding the choice between life and death. 497 U.S. at 648 (internal quotation marks omitted).

Ring v. Arizona, 2002 WL 1357257 *9 (U.S.).

In Ring, the State and its *amici* agreed that overruling Walton necessarily meant Florida's statute falls:

> "Walton was not an aberration. Proffitt, Spaziano, Cabana, Poland and *Clemons* each rejected Ring's basic premise. Hildwin v. Florida, 490 U.S. 638 (1989), made a similar finding, holding that although Florida state law required that a jury return an advisory sentencing verdict, the Sixth Amendment did not require the jury to specify the aggravating factors permitting imposition of a death sentence."

Brief of Respondent in Ring at 31.

> MS. NAPOLITANO: . . . it's not just the cases you listed, Your Honor, that I think would be implicitly overruled, but let me give you a list: Proffitt v. Florida, Spaziano, Cabana v. Bullock, which does allow the -
>
> QUESTION: But do you think it's perfectly clear - you

> cite a couple of Florida cases - that if the Florida advisory jury made the findings of fact that would be - make them - the defendants eligible for the death penalty, that that case would be covered by the decision in this case?
>
> MS. NAPOLITANO: Yes . . .

Tr. of Oral Arg. at 36.

> "If defendant's argument is accepted, it means a new sentencing trial for every capital case not yet final in Arizona, Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Montana, and Nebraska . . . ."

Brief Amicus Curiae, Criminal Justice Legal Foundation at 21-22.

Application of *Ring* to Florida's Sentencing Scheme:

The Florida Supreme Court has previously held that, "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). Ring overruled Walton, and the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989) (*per curiam*), which had upheld the capital sentencing scheme in Florida "on grounds that 'the Sixth Amendment does not require that the specific findings authorizing imposition of the sentence of death be made by the jury.'" Ring, slip op. at 11 (quoting Walton, 497 U.S. at 648, in turn quoting Hildwin, 490 U.S. at 640-641)). Additionally, Ring undermines the reasoning of the Florida Supreme Court's decision in Mills by recognizing (a) that Apprendi applies to capital sentencing schemes, Ring,

slip op. at 2 (“Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment”); Id. at 23, (b) that States may not avoid the Sixth Amendment requirements of Apprendi by simply “specif[ying] ‘death or life imprisonment’ as the only sentencing options,” Ring, slip op. at 17, and (c) that the relevant and dispositive question is whether under state law death is “authorized by a guilty verdict standing alone.” Ring, slip op. at 19.

Under Florida law, the court conducts a separate sentencing proceeding after which the jury renders an advisory verdict. Fla.Stat. §§ 921.141. The ultimate decision to impose a sentence of death, however, is made by the court after finding at least one aggravating circumstance. The jury recommends a sentence but makes no explicit findings on aggravating circumstances. Thus, 921.141(3) requires that the trial make two separate findings of fact by the trial judge before a death sentence can be imposed: the judge must find as a fact that (1) “sufficient aggravating circumstances exist” and (2) “there are insufficient mitigating circumstances to outweigh the aggravating circumstances.” Id. A defendant thus may be sentenced to death only if the sentencing proceeding “results in findings by the court that

such person shall be punished by death." Fla. Stat. 775.082(1). The statute is explicit that, without these required findings of fact by the trial judge, the defendant must be sentenced to life imprisonment.

Because the Florida death penalty statutory scheme thus requires fact-finding by the trial judge before a death sentence may be imposed, it is unconstitutional under the holding and rationale of Ring. Just as with the Arizona statute, the Florida statute is directly contrary to the rule enunciated in Ring and Apprendi that "[i]f a state makes an increase in a defendant's authorized punishment contingent on a finding of a fact, that fact . . . . must be found by a jury beyond a reasonable doubt." Just as with the Arizona statute, the Florida statute is explicit that a defendant "cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating circumstance exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Because the judge – and not the jury – must make specific findings of fact before a death sentence under Florida law, Ring holds squarely that the statute is unconstitutional under the Sixth and Fourteenth Amendments.

Florida Juries Do Not Make Findings of Fact:

The Florida Supreme Court has rejected the idea that a defendant convicted of first degree murder has the right "to have the existence and validity of aggravating circumstances determined as they were placed before his jury." Engle v. State, 438 So.2d 803, 813 (Fla. 1983), *explained in* Davis v. State, 703 So.2d 1055, 1061 (Fla. 1997). The statute specifically requires the judge to "set forth . . . findings upon which the sentence of death is based as to the *facts*," but asks the jury generally to "render an advisory sentence . . . based upon the following *matters*" referring to the sufficiency of the aggravating and mitigating circumstances. Fla. Stat. § § 921.141(2) & (3) (emphasis added). Because Florida law does not require that any number of jurors agree that the State has proven the existence of a given aggravating circumstance before it may be deemed "found," it is impossible to say that "the jury" found proof beyond a reasonable doubt of a particular aggravating circumstance. Thus, "the sentencing order is 'a statutorily required personal evaluation by the trial judge of the aggravating and mitigating factors' *that forms the basis of a sentence of life or death*." Morton v. State, 789 So.2d 324, 333 (Fla. 2001) (quoting Patton v. State, 784 So.2d 380 (Fla. 2000)).

As the Supreme Court said in Walton, "[a] Florida trial

court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton, 497 U.S. at 648. Because the jury's role is merely advisory and contains no findings upon which to judge the proportionality of the sentence, the Florida Supreme Court has recognized that its review of a death sentence is based and dependent upon the judge's written findings. Morton, 789 So.2d at 333; Grossman, 525 So.2d at 839; Dixon, 283 So.2d at 8.

The Advisory Verdict Is Not Based on Proof Beyond a Reasonable Doubt:

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, slip op. at 16. One of the elements that had to be established for Stewart to be sentenced to death was that "sufficient aggravating circumstances exist" to call for a death sentence. Fla. Stat. § 921.141(3). The jury was not instructed that it had to find this element proved beyond a reasonable doubt. In fact, it was not instructed on *any* standard by which to make this essential determination. Although Stewart's jury was told that individual jurors could consider only those aggravating circumstances that had been proved beyond a reasonable doubt, it was not required to find

beyond a reasonable doubt "whether sufficient aggravating circumstances exist to justify the imposition of the death penalty."

A Unanimous Twelve Member Jury Verdict Is Required under US Constitutional Common Law.[1] Florida's Capital Sentencing Statute Is Unconstitutional on its Face and as Applied:

"[T]o guard against a spirit of oppression and tyranny . . . trial by jury has been understood to require that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (cited in Apprendi (by its terms a noncapital case)).

It would be impermissible and unconstitutional to rely on the jury's advisory sentence as the basis for the fact-findings

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[1]In Cabberiza v. Moore, 217 F.3d 1329 (C.A.11 Fla.,2000) the court noted that the United States Supreme Court "has not had occasion to decide how many jurors, and what degree of unanimity, the Sixth and Fourteenth Amendments require in capital cases." Id. n.15. Duncan v. Louisiana, 391 U.S. 145 (1968), and Apodaca v. Oregon, 406 U.S. 404 (1972) were noncapital cases. Both cases cite in their first footnotes the applicable state constitutional provisions, which require twelve person unanimous juries in capital cases. The Florida constitution likewise requires twelve person unanimous juries in capital cases. The sentencing recommendation in this case was not unanimous.

required for a death sentence, because the statute requires only a majority vote of the jury in support of that advisory sentence. In Harris v. United States, 122 S. Ct. 2406, 2002 WL 1357277, No. 00-10666 (U.S. June 24, 2002), rendered on the same day as Ring, the U.S. Supreme Court held that under the Apprendi test "those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis." Id. at 14. And in Ring, the Court held that the aggravating factors enumerated under Arizona law operated as "the functional equivalent of an element of a greater offense" and thus had to be found by a jury. In other words, pursuant to the reasoning set forth in Apprendi, Jones, and Ring, aggravating factors are equivalent to elements of the capital crime itself and must be treated as such.

In Williams v. Florida, 399 U.S. 78, at 103 (1970), the United States Supreme Court noted that: "In capital cases, for example, it appears that no state provides for less than 12 jurors–a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions. In its 1979 decision reversing a non-unanimous six

person jury verdict in a non-capital case, the United States Supreme Court held that "We think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." Burch v. Louisiana, 441 U.S. 130, 138 (1979). The federal government requires unanimous twelve person jury verdicts. "[T]he jury's decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system." Andres v. United States, 333 U.S. 740, 749 (1948). See generally *Richard A. Primus, When Democracy Is Not Self-Government: Toward a Defense of The Unanimity Rule For Criminal Juries*, 18 Cardozo L. Rev. 1417 (1997).

Juror Unanimity is Required by Florida Constitutional Law:

Ring held that the existence of at least one statutory aggravating circumstance must be proven to a jury beyond a reasonable doubt. In essence, the aggravating circumstance is an essential element of a new crime that might be called "aggravated" or "death-eligible" first degree murder. The death recommendation in this case was not unanimous.

Florida requires that verdicts be unanimous. Although Florida's constitutional guarantee of a jury trial [Art. I, §§§§

16, 22, Fla. Const.] has never been interpreted to require a unanimous jury verdict, it has long been the legal practice of this state to require such unanimity in all criminal jury trials; Fla.R.Crim.P. 3.440 memorializes this long-standing practice: "[n]o [jury] verdict may be rendered unless all of the trial jurors concur in it." No statute or rule of procedure in Florida has ever expressly abolished this unanimity requirement for any criminal jury trial in this state. See *In re Florida Rules of Criminal Procedure,* 272 So.2d 65, 66-69 (Fla.1972) (Roberts, J., dissenting). It is therefore settled that "[i]n this state, the verdict of the jury must be unanimous" and that any interference with this right denies the defendant a fair trial. Jones v. State, 92 So.2d 261 (Fla.1956).

The Harmless Error Doctrine Cannot be Applied to Deny Relief:

As Justice Scalia explained in Sullivan v. Louisiana, 508 U.S. 275 (1993): "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." Sullivan, 508 U.S. at 278. Where the jury has not been instructed on the reasonable doubt standard, there has been no jury verdict within the meaning of the Sixth Amendment, [and] the entire premise of Chapman[2] review is simply absent. There

[2] Chapman v. California, 386 U.S. 18 (1967).

being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. Sullivan, 508 U.S. at 280. The same reasoning applies to lack of unanimity, failure to instruct the jury properly, and importantly, the lack of an actual verdict. Viewed differently, in a case such as this where the error is not requiring a jury verdict on the essential elements of capital murder, but delegating that responsibility to a court, "no matter how inescapable the findings to support the verdict might be," for a court "to hypothesize a guilty verdict that was never rendered . . . would violate the jury-trial right." Id., at 279. The review would perpetuate the error, not cure it.

In State v. Overfelt, 457 So.2d 1385 (1984), the Florida Supreme Court held "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.. . . To allow a judge to find that an accused

actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function. . . " Id. at 1387.

Stewart's Death Sentence Violates the State and Federal Constitutions Because the Elements of the Offense Necessary to Establish Capital Murder Were Not Charged in the Indictment

Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, 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." Jones, at 243, n.6. Apprendi v. New Jersey, 530 U.S. 466, 475-6 (2000), held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Ring held that a death penalty statute's "aggravating factors operate as 'the functional equivalent of an element or a greater offense.'" Ring, quoting Apprendi at 494, n. 19. In Jones, the Supreme Court noted that "[m]uch turns on the determination that a fact is an element of an offense, rather than a sentencing consideration," because "elements must be charged in the indictment." Jones, 526 U.S. at 232.

Like the Fifth Amendment to the United States Constitution,

Article I, section 15 of the Florida Constitution provides that "No person shall be tried for a capital crime without presentment or indictment by a grand jury." Florida law clearly requires every "element of the offense" to be alleged in the information or indictment. In State v. Dye, 346 So. 2d 538, 541 (Fla. 1977), The Florida Supreme Court said "[a]n information must allege each of the essential elements of a crime to be valid. No essential element should be left to inference." In State v. Gray, 435 So. 2d 816, 818 (Fla. 1983), the Florida Supreme Court said "[w]here an indictment or information wholly omits to allege one or more of the essential elements of the crime, it fails to charge a crime under the laws of the state." An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." Gray, 435 So.2d at 818. Finally, in Chicone v. State, 684 So. 2d 736, 744 (Fla. 1996), the Florida Supreme Court said "[a]s a general rule, an information must allege each of the essential elements of a crime to be valid."

The most "celebrated purpose" of the grand jury "is to stand between the government and the citizen" and protect individuals from the abuse of arbitrary prosecution. United States v. Dionisio, 410 U.S. 19, 33 (1973); *see also* Wood v. Georgia, 370

U.S. 375, 390 (1962). The shielding function of the grand jury is uniquely important in capital cases. See *e.g.,* Campbell v. Louisiana, 523 U.S. 392, 399 (1998) (recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge not made by the indictment is a denial of due process of law. State v. Gray, *supra, citing* Thornhill v. Alabama, 310 U.S. 88 (1940), and De Jonge v. Oregon, 299 U.S. 353 (1937).

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Stewart's right under Article I, section 15 of the Florida Constitution, and the Sixth Amendment to the federal Constitution were violated. By wholly omitting any reference to the aggravating circumstances that would be relied upon by the State in seeking a death sentence, the indictment prejudicially hindered Stewart "in preparation of a defense" to a sentence of death. Fla. R. Crim. Pro. 3.140(o).

Lastly, the Petitioner, Mr. Sewart, is entitled to the

benefit of Apprendi and Ring under Witt v. State, 387 So.2d 922, 929-930 (Fla. 1980).

ARGUMENT II

APPELLATE COUNSEL FAILED TO RAISE ON APPEAL MERITORIOUS ISSUES WHICH WERE PROCEDURALLY BARRED BECAUSE THEY SHOULD HAVE BEEN RAISED ON DIRECT APPEAL. AS SUCH, MR. STEWART'S CONVICTIONS AND SENTENCES ARE UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT UNDER THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS UNDER THE FLORIDA CONSTITUTION.

Under the dictates of Strickland v. Washington, 466 U.S. 668 (1984), appellate counsel has the "duty to bring to bear such skill and knowledge as will render the [appeal] a reliable adversarial testing process." Strickland, 466 U.S. at 688. Appellate counsel's failure to raise the meritorious issues addressed in this petition prove that his advocacy was "serious and substantially deficient" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986).

1. Appellate counsel was ineffective in failing to raise on appeal that Counsel was ineffective at the sentencing phase because he failed to conduct a reasonable investigation into possible mitigation.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a

capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigation evidence and prepare available mitigating evidence for the sentencer's consideration. See e.g., State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000); Rose v. State, 675 So.2d 567, 571 (Fla. 1996); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988).

Where counsel does not fulfill the duty to investigate and prepare, the defendant is denied a fair adversarial testing

process and the proceedings' results are rendered unreliable. See, e.g., Harris v. Dugger; Middleton v. Dugger. No tactical motive can be ascribed to attorney omissions which are based on ignorance, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. Harris v. Dugger; Stevens v. State; Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991).

Counsel failed to adequately investigate and prepare for the penalty phase without which no individualized consideration could occur. Phillips v. State, 608 So.2d 778, 783 (Fla.1992) (ineffective assistance of penalty-phase counsel where, although counsel presented some evidence in mitigation, he did not present a large amount of evidence including defendant's childhood riddled with abuse). Thus appellate counsel was ineffective in failing to raise this issue on direct appeal.

Defense counsel testified at the evidentiary hearing that his primary contact in obtaining witnesses was through Bruce Scarpo (PC-R. 113). He relied on Mr. Scarpo to provide a list of witnesses and information regarding Mr. Stewart’s background. However, the Defense witnesses presented during the penalty hearing provided only a dim and superficial glimpse into Stewart’s life and background. Had counsel performed a reasonable investigation, a wealth of information regarding the

incomprehensible abuse that Stewart suffered throughout his life would have been presented to the jury.

During the penalty phase, the defense called Bruce Scarpo who testified as to Stewart's abuse as an infant and toddler by his biological mother. He testified that after marrying Stewart's mother she ran off with a young man taking Stewart with him (R. 637). Stewart's mother would often call him requesting money and on one occasion told him that Stewart had only eaten a hotdog in three days (R. 639). When Stewart's mother returned with him, he had on an Army uniform with only one button, wax hanging out of his ear, dirty hair, and he had lost eight pounds (R. 639). Stewart's mother subsequently abandoned him with Scarpo who obtained custody of him through a family court in Tampa, Florida (R. 640). Scarpo further described the abuse of Stewart during this time as being made to stand in the corner for hours at a time or beating his back (R. 641, 644). When Stewart would get into trouble he would ask Scarpo if he would have to stand in the corner or beat his back? To this Scarpo would respond, No (R. 644). Scarpo described Kenny's childhood as fairly happy. His family was like the Waltons (R. 646). Scarpo further evidenced this happiness through family photos which showed how happy Kenny was while in Scarpo's care between the ages of five and thirteen as

contrasted to family photos after the age of thirteen(R. 646, 655-9). Scarpo related that Stewart was placed on medication because he was a little hyper; however he cured him by not giving him the medication but a cup of coffee in the morning before he went to school (R. 646). Scarpo testified that he and Stewart did father and son activities and Stewart idolized him (R. 653, 673). On cross examination, Scarpo emphatically denied ever abusing or mistreating Stewart and affirmed that he had been a good father to Stewart (R. 672-3). At the age of thirteen, Scarpo testified that Stewart's maternal grandmother told Stewart that Scarpo was not his biological father. Stewart was also told of his mother's apparent suicide and that she was a lesbian. Stewart also learned that his biological father had been murdered outside a bar and that an uncle had also been murdered. Stewart subsequently ran away from Scarpo's home to Tampa, Florida, where he resided temporarily with his maternal grandmother (R. 646-653). Scarpo testified that when his grandmother learned that Stewart's social security check was minimal, she no longer wanted to care for Stewart and he was subsequently returned to his care. (R. 650). The remaining defense witnesses corroborated the testimony of Scarpo in describing how happy Stewart was while in Scarpo's care but upon learning the truth about his parentage and their deaths, his

behavior changed.

During the evidentiary hearing, a vastly different picture of Stewart's childhood was told to the Court. The true story of Stewart's childhood was nothing like the Waltons as presented to the sentencing jury and court. Susan Moore's, a.k.a. Susan Medlin, deposition was read into the record during the penalty phase hearing. She testified during the evidentiary hearing that she came to live with Stewart and Scarpo when Stewart was approximately three or four (PC-R. 6). She subsequently left home at the age of fifteen because there was quite a bit of abuse (PC-R. 8). She further described how she witnessed Scarpo beat Stewart with his fists like he was a grown man (PC-R. 9) and recalls one incident when Scarpo beat Stewart over the table and then dumped the trash can over his head and made him sit in the corner while the family finished dinner (PC-R. 9-10). Moore would not describe Stewart's as always smiling between the ages of five and thirteen and further admits that Scarpo was mentally, physically and sexually abusive (PC-R. 17-18). She further relayed that Stewart had a bed wetting problem and Scarpo would make Stewart sleep on the soiled sheets for days, would try to humiliate him in front of others, call him names, or make him sit on the bed for days with just his soiled underwear on (PC-R. 18-19). When Stewart continued to wet the

bed, Scarpo began to beat him (PC-R. 19). Eventually Joanne Scarpo took Stewart to the doctor and learned that Stewart was hyperactive and would have to be placed on Ritalin (PC-R. 19-20). Moore further described Scarpo's heavy drinking as being everyday from morning until night (PC-R. 22-3). Moore described the beatings as being sever enough to draw blood and similar to a trial phase where after the first beating you would be sent to your room until Scarpo came to beat you again for your extended punishment during the sentencing phase (PC-R. 24). The children would also have to clean up their own blood (PC-R. 24) or stay in the house if they had black eyes (PC-R. 22). Moore described an incident when she and Stewart were small. Joanne and Scarpo were fighting and Scarpo picked her and Stewart up and placed them on the counter. He told them to say goodbye because he was going to kill their mother (PC-R. 28). On cross examination, Moore testified that she answered the questions that were asked her during her trial deposition (PC-R. 42). She denied ever being asked about the abuse (PC-R. 43). On redirect she reiterated that Stewart was abused by his mother and father (Scarpo). As far as Scarpo was concerned Stewart was his possession so he was beaten more severely than Joanne's children (PC-R. 50). She also stated that when the investigator called she was prepared to answer questions about the abuse and had

made arrangements for them to call her at work after hours so that she could have some privacy (PC-R. 50).

Linda Arnold testified during the evidentiary hearing that Scarpo was flamboyant, intimidating, and overly impressive. As he did during the penalty phase hearing, he would tell people she graduated from medical school when in fact she went to nursing school (PC-R. 54). She stated that they were abused verbally, emotionally, physically, and sexually (PC-R. 55) and that she ran away from home at the age of eighteen. She stated that the beatings with the boys were more severe because Scarpo was not afraid to leave bruises (PC-R. 58). She describes the beatings evidenced through black eyes, bloody noses, fat lips, bruises, or cuts, from being slapped, punched, pushed, thrown across the floor, or beat with a belt (PC-R. 58). She recalled one occasion taking a beating for Stewart because he had just received a beating a few days earlier and was still bruised (PC-R. 59). She further relayed that when Stewart did something it was more embarrassing because he was Scarpo's son (PC-R. 549). Arnold further testified that when Stewart was being disciplined for bed wetting and made to stay in his room, he was only given bread and water to eat (PC-R. 61). They also have all witnessed Scarpo abuse Joanne and they would watch from under the door to see what was going on and when it was over they would go back to

bed (PC-R. 63). She recalls being contacted by an investigator and being asked some general questions regarding her relationship with Stewart (PC-R. 64) and she denies ever being asked about Scarpo's abuse (PC-R. 75). She also describes Scarpo's excessive drinking (PC-R. 65).

Lille Brown testified that Scarpo told her that he was brutal to Stewart because he had come from a mother and father with bad genes (PC-R. 84). He further described how he would hit Stewart with his fist or place garbage cans over his head (PC-R. 85).

Mr. Barbas testified during the evidentiary hearing that he had been practicing primarily criminal law for the past eleven years. He had previously handled first degree murder cases as an Assistant State Attorney; however death was not sought. Prior to defending Stewart he had handled an additional seven cases as a defense attorney (PC-R. 103-7). Prior to the trial his investigator Sonny Fernandez had a massive heart attack and his wife and partner, Diane knew something of the case so she took over and actually was the one who assisted him at the trial (PC-R. 109). Barbas further testified that Scarpo never mentioned how he treated Stewart other than as a son and was unaware of Scarpo's mistreatment (PC-R. 123-4). Barbas admitted that if he had information of Scarpo's abuse that he would have

considered this important and would have presented it to Dr. Afield even if the information did not change his clinical diagnosed because it may have a direct impact on the jury for sympathy (PC-R. 128-9). Barbas further denies having seen a note in his file which details the abuse by Scarpo and can't conceive knowing this and not making Dr. Afield aware of it (PC-R. 16203). Barbas again acknowledges that this information about Scarpo's abuse would have helped a substantial amount (PC-R. 164). On cross examination Barbas testified that Stewart never told him about the abuse and he had no reason to believe that Scarpo abused Stewart (PC-R. 185) and Stewart never contradicted that fact (PC-R. 186). He also testified that if Fernandez had been told about the abuse, he would have told him (PC-R. 188). Barbas recalls speaking to Stewart's sister and she never told him about the abuse (PC-R. 189).

Sonny Fernandez testified at the evidentiary hearing that he interviewed Joyce Engle on July 17, 1986 and she relayed information regarding Scarpo's abuse during that interview (PC-R. 203-4). The substance of Engles's statements relayed to her from Stewart were that Scarpo would beat the shit out of him. He had to be a man. Scarpo would knock him in the stomach, knock him down, bruise him and beat him up. Fernandez also had a note in his file to call Lillie Brown entered July 17, 1986,

however he does not recall if he ever contacted her (PC-R. 205). Fernandez had no independent recollection of pursuing any information regarding Scarpo's abuse of Stewart. However he did state that he would have normally asked about abuse (PC-R. 216). His investigator file which was introduced during the hearing, shows no record of affirmative or negative response with regards to any questions about abuse although he had conducted interviews with both Arnold and Moore after interviewing Engle.

Counsel's failure to pursue this line of mitigation evidence was deficient. See Rose v. State, 675 So.2d 567, 571 (Fla. 1996); Porter v. Singletary, 14 F.3d 554, 557 (11th Cir. 1994). It is also unpersuasive that Barbas testified that he had no indication through Stewart that Scarpo was abusive when in fact, his retained investigator had interviewed at least one witness who relayed of Scarpo's abuse towards Stewart, and a copy of that interview appears in the attorney file. In addition, a copy of a letter from Stewart to Fernandez dated July 19, 1986, appears in the trial attorney file and Stewart mentions his father's negative feelings towards him, his lack of concern, and negligence towards him.

The responsibility to conduct a reasonable investigation into possible mitigation rests with counsel. Mr. Stewart's case is distinguishable from cases in which the defendant has

attempted to hinder counsel's efforts in discovering and presenting mitigation. See e.g., Rutherford v. State, 727 So.2d 216, 225 (Fla. 1998); State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000); Asay v. State, 769 So.2d 974 (Fla. 2000). In Stewart's case he did not prevent counsel from pursuing possible mitigation, in fact there are no records or notes in Attorney Barbas or Fernandez file that they ever asked Stewart about abuse and he denied ever being abused by Scarpo. Nor are there notes which would indicated that Moore and Arnold were asked about abuse and they denied being abused by Scarpo. In fact, the short notes contained within Fernandez files when speaking with Moore and Arnold further support that he did not spend more than a few minutes talking with them over the telephone or that he asked them any questions about Scarpo's relationship with Stewart or his treatment of him. It would appear that the substance of defense counsel's strategy was based on his contact with Scarpo who made it appear, as Dr. Afield testified during the penalty phase hearing, that Stewart had a break from abuse when he lived with Scarpo.

The evidence presented at the evidentiary hearing is not cumulative. Scarpo gave only a scant description of purported negligence that Stewart had endured while absent from his home for a few months. He also emphatically denied ever mistreating

or abusing Stewart which also indicates that the information is not cumulative. More importantly, although Dr. Afield testified at the evidentiary hearing that his clinical diagnosis of Stewart would not have change had he been provided this additional information, he would not have further characterized Stewart's life as being pretty bad in the beginning and once being in Scarpo's home for eight years as pretty normal and peaceful. The truth about Stewart's life was never presented to the jury or court. Mr. Stewart lived his entire life in a war zone. His mother was negligent and irresponsible and left him in the hands of a deranged man. Stewart was Scarpo's property and he was treated accordingly. It was not cumulative that Stewart was punched, knocked down, thrown, made to sit for days soiled or sleep on soiled sheets. It was not cumulative that he was often left with black eyes, a bloody nose, fat lips, bruises or cuts and only given bread and water to eat. It was not cumulative that he had to witness his stepmother being physically abused and made to sit and tell her goodbye while his father threatened to kill her. This was not the normal happy childhood that was presented to the jury and court through Dr. Afield and Scarpo. As such, the information is not cumulative and the failure of counsel to properly investigate and present this information to the jury undermined the adversarial system

and as a result Stewart's death sentence is unreliable.

2. Appellate counsel was ineffective in failing to raise on appeal that counsel was ineffective pre-trial and during the guilt phase in failing to prepare and present evidence of Stewart's voluntary intoxication in defense of the first-degree murder and armed robbery charges.

At the time of Mr. Stewart's conviction, voluntary intoxication was a viable defense to the specific intent crimes of first-degree murder and robbery. Gardner v. State, 480 So.2d 91 (Fla. 1985); Occhicone v. State, 570 So.2d 902 (Fla. 1990). Furthermore, a defendant has the right to a jury instruction on the law applicable to this theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Mellins v. State, 395 So.2d 1207 (Fa. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981); cf. Bryant v. State. A voluntary intoxication defense must be pursued by competent counsel if there is evidence of intoxication, even under circumstances where trial counsel explains that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So.2d 348 (Fla. 4th DCA 1985).

Mr. Barbas testified at the evidentiary hearing that voluntary intoxication could have been used as a defense to both robbery and first-degree murder (PC-R 111). Mr. Barbas failed to use the available evidence of Mr. Stewart's voluntary

intoxication to assert this viable defense because when preparing the defendant to testify at trial, the defendant told him that his original plan was to shoot the people that picked him up hitchhiking (PC-R 179). A voluntary intoxication defense would not have been inconsistent with any theory of purported defense as argued by Mr. Barbas' in closing or contrary to the evidence presented at trial. Thus, his testimony that he considered asserting voluntary intoxication, but rejected it because of Mr. Stewart's alleged statement to him is not reasonable considering the evidence available to him. For example, Ms. Acosta's testified that "[A]fter we had introduced each other, I realized his speech was slurred, then I knew that he was probably on something" (R. 296). Upon stopping the vehicle so that Mr. Stewart could exit, he indicated to the victims that he had a knife (R. 298, R. 312). Acosta subsequently testified on cross that she thought Stewart was drunk (R. 311). Detective George L. Lease, who testified at trial, was deposed on April 23, 1986, and testified that Acosta indicated that it appeared like he (Stewart) had been drinking. And at times his voice, slurred his speech. Terry Lynn Smith, who testified at trial, gave a statement to the Tampa Police Department on April 19, 1985, and stated that Stewart drank quite heavily...he was nuts. I don't think he...knows what he

does when he does them because he's drunk most of the time. Additionally, Dr. Mussenden, could have provided testimony that on the day of the crime, Mr. Stewart had been drinking a substantial portion of the day and finished off a gallon of whisky while sitting at his mother's grave (R. 902-3). The testimony of Barbas is contrary to all accounts by the victim, police, co-defendant, and all mental health officials who evaluated Stewart. Other than Barbas' testimony, there are no record indications through notes, reports, or pleadings which indicate that it was Stewart's plan to shoot and rob the victims or that Barbas abandoned this strategy upon preparation of the defendant for any trial testimony nor did Barbas produce any such records during the evidentiary hearing. In addition, Barbas testified during the evidentiary hearing that his trial strategy to convince the jury the shooting was accidental was born out of the testimony of Acosta who stated that the defendant was intoxicated or drunk when he brought out the knife (PC-R. 117).

An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc)(ineffective assistance in failure to present theory of self-defense).

Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers. Trial counsel's failure to request a voluntary intoxication instruction violated the defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Thus appellate counsel was ineffective in failing to raise this issue on direct appeal.

3. Appellate counsel was ineffective in failing to raise on appeal that the competency hearing was unreliable.

Though this Court held this issue was procedurally barred in the appeal of the circuit court's denial of Mr. Stewart's 3.850 motion for post-conviction relief, it is raised herein to preserve the issue for federal review. Stewart, 801 So.2d 59, 64 (Fla.2001).

4. Appellate counsel was ineffective in failing to raise on appeal that Mr. Stewart was incompetent to proceed at all material stages.

The conviction of an incompetent defendant denies him or her the due process of law guaranteed in the Fourteenth Amendment. Pate v. Robinson, 383 U.S. 375 (1966). "A defendant's allegation that he or she was tried while incompetent therefore claims that the state, by trying him or her for and convicting him or her of a criminal offense, has engaged in certain conduct covered by the Fourteenth Amendment, namely without due process of law." James v. Singletary, 957 F.2d 1562, 1573 (11th Cir.

1992); Pate, 383 U.S. 375 (1966). Mr. Stewart was denied his constitutional right not to be tried while incompetent. During the pendency of trial, Mr. Stewart lacked a rational and factual understanding of the proceedings and was incapable of dealing with counsel with a reasonable degree of rational understanding. Dusky v. United States, 362 U.S. 402 (1960)(emphasis supplied); Hill v. State, 473 So. 2d 1253 (Fla. 1985).

Defense counsel testified during the evidentiary hearing that "Mr. Stewart never showed any emotion when I talked to him of any kind. He would communicate. It would be very limited and it would be on a , I recall times when he did not understand what I was saying. Because of the reaction normally when you speak to somebody like you're doing you nod, you acknowledge that I'm speaking to you. Mr. Stewart didn't do that. He would speak and was coherent but he showed no emotion. He showed no knowledge when he spoke to me (PC-R. 119-120). Mr. Barbas was aware that Mr. Stewart tried to commit suicide twice while in the Hillsborough County Jail. Mr. Barbas failed during those times to request a competency hearing and/or have Mr. Stewart evaluated for competency to proceed (PC-R. 120).

ARGUMENT III

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL THAT DEFENSE COUNSEL'S CONCESSION OF GUILT VIOLATED MR. STEWART'S SIXTH AND FOURTEENTH AMENDMENT

RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

To establish that counsel was ineffective, Strickland v. Washington, 466 U.S. 668 (1984) requires a defendant to demonstrate (1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance, and (2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result". Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

"Obvious on the record" constitutional violations occurred during Mr. Stewart's trial which "leaped out upon even a casual reading of the transcript", yet appellate counsel failed to raise this error on appeal. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel's failure to raise this meritorious issue addressed herein prove his advocacy which involved "serious and substantial deficiencies" which individually and "cumulatively" establish that "confidence in the outcome is undermined". Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla.1986); Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985).

In opening statement, before any evidence was presented,

defense counsel told the jury that Mr. Stewart was guilty. Defense counsel's concession of guilt denied Mr. Stewart due process, a fair trial, and a right to a jury verdict under the Fourteenth Amendment to the United States Constitution. In addition, defense counsel's concession of guilt denied Mr. Stewart effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. When counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, Mr. Stewart was denied his Sixth and Fourteenth Amendment rights that makes the adversary process itself unreliable. Strickland v. Washington, 466 U.S. 668 (1984); United State v. Cronic, 466 U.S. 648, 659 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Nixon v. State, 758 So.2d 618 (Fla. 2000).

In defense counsel's opening statement, he told the jury:

> Ladies and gentlemen, our case is the State's case. We will produce no evidence. Kenny Stewart will not testify. We will be relying on the State's case, and, primarily, as Mr. James just indicated, on what Michelle Acosta will testify to (R. 281).
>
> **Kenny and I are not saying that he is not guilty**. We are not saying that, ladies and gentlemen. **We are not denying that Kenny shot some people**. Two people, to be exact. Mark Harris and Michelle Acosta. We are not denying that (R. 281).
>
> Ladies and gentlemen **we are not saying he is not guilty**. What we are saying is that after you listen

to the Court's instructions of what the lesser-included offenses are in some cases, **you will find him guilty of a lesser crime in some instances and you will find him guilty of some of the crimes charged**. But I am not going to tell you which ones, because that is your job (R. 282).

In closing, defense counsel argued:

[N]ow you must decide my client's guilt. **I wish you to please notice I said "my client's guilt." Because I am not asking you in any respect to find him innocent**. He had a gun and he shot two people. And I am not justifying that in any respect. And **I am not saying he is innocent**. But I have said it, I implied it on voir dire. . . , I said it in opening statement. That has not changed (R. 512).

We don't know why Kenny says he has a knife when he has a gun. Mark Harris' is wearing jewelry. She is wearing jewelry, a necklace. A watch. He didn't grab those. He just takes the car that was subsequently burned (R. 518).

As Mr. Skye has so aptly pointed out, the medical examiner, he didn't shoot them in the head. He shot them in the upper back (R. 523).

But **I submit to you, my client is guilty** but not of the crimes charged (R. 527).

On Michelle Acosta, **I think he is guilty of aggravated battery**. I don't think he ever had any intent of killing her. **But he did an over act towards here during the commission of a felony which would give rise to an intent to kill here**. She was shot with bullets (R. 527).

I don't think there is any doubt about that (R. 527).

On the arson, I think Terry Smith did it. On the robbery, **I think he ended up committing the robbery because he ended up taking the car. He admits that** (R. 527).

> As to Mark Harris, I don't justify the shooting. I am not saying you should justify the shooting (R. 527). **I think at the very most, Kenny is guilty of second-degree murder** in regards to Mr. Harris. But not first. I mean, there is even a good argument that Kenny might be guilty of manslaughter (R. 528).

On rebuttal, defense counsel argued:

> The shooting was accidental (R. 540).
>
> I submit to you, ladies and gentlemen, **at most, Kenny is guilty of second-degree murder** (R. 540).
>
> **He did something wrong. We are admitting that**. He should be punished for that wrong (R. 544).

The substance of defense counsel's statements in opening, closing, and rebuttal were the functional equivalent of a guilty plea. Thus, Mr. Stewart was also denied due process and the right to a fair trial in violation of the Fourteenth Amendment when the trial court failed to conduct an inquiry or establish on the record that Mr. Stewart knowingly, intelligently, and voluntarily consented to a concession of guilt as a defense and that he understood the consequences of conceding to such a defense. Nixon v. State, 758 So.2d 618 (Fla. 2000), citing cases, United States v. Cronic, 104 S. Ct. 2039 (1984); see e.g, Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981)(petitioner was deprived of effective assistance of counsel when defense counsel admitted petitioner's guilt, without first obtaining petitioner's consent to the strategy); People v. Hattery, 109 Ill. 2d 449, 488 N.E.2d 513 (Ill. 1985) (defense counsel is per

se ineffective where counsel conceded defendant's guilt, unless the record shows that the defendant knowingly and intelligently consented to this strategy), cert. denied, 106 S. Ct. 3314 (1986); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C. 1995) (it is per se ineffective assistance of trial counsel where counsel admits defendant's guilt without the defendant's consent), cert. denied, 106 S. Ct. 1992 (1986); see also Harvey v. Duggger, 656 So.2d 1253, 1256 (Fla. 1995); Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983).

As the Court analyzed in Nixon at 622 (Fla. 2000), the question is whether or not Mr. Stewart's counsel failed to subject the State's case to a meaningful adversarial testing? If the Court finds that counsel did fail in this regards, then counsel is ineffective per se and prejudice is presumed. U.S. v. Cronic at 658-60 (1984). In the case at bar, counsel was ineffective per se. Counsel openly pled Mr. Stewart as guilty in his opening statement. He further diminished the responsibility of the state in proving Mr. Stewart's guilt beyond a reasonable doubt. There no longer was a question that Mr. Stewart was present during the crimes or that he was responsible for shooting both victims and stealing Ms. Acosta's vehicle and possessions. During closing and rebuttal arguments, counsel further reiterated Mr. Stewart's criminal

responsibility. Although counsel did argue that Mr. Stewart was guilty perhaps at most of second degree murder as to Mark Harris, he had sufficiently pled Mr. Stewart to a robbery conviction, which could also be used to convict Mr. Stewart for first degree murder under the felony murder doctrine as charged and to the attempted murder of Michelle Acosta. Thus counsel's performance was per se ineffective. See Smallwood v. State, 809 So.2d 56 (Fla. 2002) (When counsel concedes the defendant's guilt to any of the charged offenses, counsel is per se ineffective under Nixon if the defendant did not consent, and prejudice need not be shown.)

As this Court has previously held, sometimes there exists a tactical decision on counsel's part to admit guilt during the guilt phase. See McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984); Brown v. State, 755 So.2d 616 (Fla. 2000) (Holding that defense counsel's tactical decision to concede guilt to lesser homicide charge was reasonable in light of defendant's confession). Of course, the dividing line between a sound defense strategy and ineffective assistance of counsel is whether or not the client has given his or her consent to such a strategy. Nixon at 623, citing cases, Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981); Jones v. State, 110 Nev. 730, 877 P.2d 1052

(1994); State v. Anaya, 134 N.H. 346, 592 A.2d 1142 (1991); State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1995). Although the attorney has the right to tactical decisions regarding trial strategy, the decision to plead guilty or not is the defendant's right to choose. See Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)(analyzing ultimate decisions made by the defendant). The Due Process Clause does not allow counsel to decide, absent the defendant's consent, to admit facts that amount to a guilty plea. Nixon at 623, citing Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed. 314 (1966).

During rebuttal argument, defense counsel for the first time alleges an accidental shooting and simulates for the jury how this accident may have occurred. Also during the evidentiary hearing on direct examination, counsel states that his trial strategy was to show that the shooting was an accident developed solely on the basis of Michelle Acosta's testimony.

Q: What was your strategy in Mr. Stewart's case?

A: Trying to convince the jury that the shooting was accidental. It was not an intentional act on his part even though there was a felony murder indictment.

Q: So, it was your strategy to concede guilt?

A: No, sir, you don't concede guilt.

Q: Well, you acknowledged that he did the shooting.

A: Yes, sir, that's not acknowledging guilt though.

Q: Right. What . . . caused you to develop that strategy that it was an accidental shooting?

A: Primarily from Michelle's Acosta's testimony [.].

Q: So your basic argument was to argue that he was frightened by her jerking forwards?

A: Not frightened but accidentally shooting.

(PC-R. 116-118). This line of defense is totally contrary to the evidence presented during trial and counsel's statements to the jury. Counsel from the beginning told the jury that Mr. Stewart was guilty and that the jury would find him guilty of some crimes as charged and some lesser included crimes. Counsel never alludes to the fact that the shooting may have been an accident until rebuttal argument. No witnesses were questioned regarding the shooting being a possible accident or the possibility that the gun malfunctioned and/or misfired. In fact, counsel did not take a deposition from the ballistics expert until the first day after the trial had commenced (PC-R. 156) in preparation for his testimony the following day. This last minute attempt by counsel to develop a trial strategy would not amount to the right to effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution nor the right to a fair trial or due process as guaranteed by the Fourteenth Amendment of the United States

Constitution.

The present case is distinguishable from the cases decided since Mr. Stewart's direct appeal. Specifically, in Atwater v. State, 788 So.2d 223, 231-2 (Fla. 2001), the Court has held that defense counsel's concession only in rebuttal that the defendant was guilty of a lesser included offense did not usurp the defendant's right to plead not guilty to the charged offense. Thus counsel's performance was not per se ineffective. In Mr. Stewart's case, the concession was not made only in rebuttal to the State's closing argument that the evidence might support the lesser offense, it was made repeatedly and conclusively in opening statement and in the initial closing argument. Defense counsel's concessions of guilt, without Mr. Stewart's consent denied Mr. Stewart his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Absent such an adversarial testing, Mr. Stewart's conviction is unreliable in violation of the Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CONCLUSION AND RELIEF SOUGHT

For the reasons discussed herein, Kenneth Stewart respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus Corrected has been furnished by U.S. Mail, first class postage prepaid, to Carol M. Dittmar, Assistant Attorney General, Office of the Attorney General, 2002 N. Lois Avenue, Seventh Floor, Westwood Center, Tampa, Florida 33607 and Kenneth Stewart, DOC# 479774; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of January, 2003.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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