IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

v. Case No. SC08-2075

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

BILL McCOLLUM
ATTORNEY GENERAL

CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
carol.dittmar@myfloridalegal.com

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

This appeal challenges the denial of an initial motion for postcoviction relief filed by Appellant Kenneth Stewart on July 25, 2005 (V1/72-111). Stewart was convicted of the underlying murder offense and sentenced to death in 1986 (V1/36-40). In an opinion affirming the convictions but remanding for resentencing, this Court described the facts of this case as follows:

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

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

Stewart v. State, 558 So. 2d 416, 418 (Fla. 1990). This Court remanded for a new sentencing proceeding because the trial court had declined to give a requested jury instruction on the statutory mitigating factor of substantial impairment. Id., at 421-22.

The death penalty was imposed again at resentencing, and this Court affirmed the sentence on May 13, 1993. Stewart v. State, 620 So. 2d 177 (Fla. 1993). During subsequent postconviction proceedings, the State agreed to conduct a new sentencing hearing. The new sentencing was conducted on March 20-21, 2001 (V1/57; 2RS. V8-V11).[1] Stewart was represented by appointed counsel Robert Fraser (V1/79; V14/T421-22; 2RS. V3/540-41).

The State presented the testimony of the homicide detective Carl Luis; witness Randall Bilbrey; and medical examiner Dr.

[1] References to the record on appeal from this 2001 resentencing proceeding, Stewart v. State, Florida Supreme Court Case No. SC01-1998, will be designated as "2RS." followed by the volume and page number.

Charles Diggs to describe the Diaz murder (2RS. V8/519-535, 536-543, 590-618). The State also presented Michelle Acosta and James Harville, who had been shot by Stewart in separate, unrelated episodes shortly after the Diaz murder; in the Acosta shooting, Stewart had also shot and killed Acosta's friend, Mark Harris (2RS. V8/545-556, 619-623). Diaz's niece, who was born after Diaz had been killed, read a statement from the family, and the State admitted copies of Stewart's multiple prior convictions into evidence (2RS. V9/660-671, 672).

By the time of this resentencing, Stewart had completed his state court postconviction litigation pertaining to his other capital offense, the April, 1985 murder of Mark Harris. See generally Stewart v. State, 801 So. 2d 59 (Fla. 2001). As a result, much of the "new" mitigation evidence developed in that postconviction case with regard to Stewart's abuse at the hands of his stepfather, Bruce Scarpo, was incorporated into the defense case at this 2001 resentencing (2RS. V9/673-713, 716-747). In fact, Stewart's postconviction attorneys observed and participated in much of the resentencing (2RS. V9/715; V11/1074-85).

The defense presented the testimony of Stewart's stepsisters Susan Moore and Linda Arnold, and his aunt, Lillian Brown, who described Stewart's background and abusive childhood extensively (2RS. V9/673-713, 716-747; V10/892-910). According

to Moore and Arnold, Scarpo was extremely violent and beat all of the children frequently; the kids would also be forced to watch when Scarpo beat his wife, Joanne (2RS. V9/679-82, 692, 719-22). Lillian Brown, a paternal aunt, testified about Stewart's biological mother and father and Stewart's obsession with finding out what had happened to them (2RS. V10/896-902). Margie Sawyer, Stewart's girlfriend at the time of the murder, testified about Stewart's drinking habits, his relationship with his stepfather, his work history, and his obsession with the deaths of his biological mother and father (2RS. V9/772-791). According to Sawyer, Stewart was good natured when sober (2RS. V9/787, 789).

From the lay witnesses presented, the jury heard anecdotal evidence such as the time that Stewart forgot to take out the garbage so Scarpo put him in the trash can, with the lid on, for over an hour (2RS. V9/720-21); they also heard that Stewart was beaten and whipped with Scarpo's fist or belt on a regular basis; other inappropriate punishments included solitary confinement or withholding of food; Stewart had a lisp, was hyperactive, and wet the bed, for which he was beaten; Stewart and his siblings started drinking hard alcohol at the age of 9 or 10; the children would be forced to tend bar, cook and serve food, and deal cards when Scarpo's friends were at the home; Stewart was devastated to learn that Scarpo was not his real

father, and left home not long after that; and that Stewart was obsessed with finding out what had happened to his biological parents, and suspected that Scarpo was responsible for his mother's death (2RS. V9/679-84, 692, 695-98, 703-04, 719-22, 724, 737-38, 784-85, 787; V10/896-97, 900).

Stewart also presented testimony from psychiatrist Dr. Michael Maher and clinical psychologist Dr. Fay Sultan (2RS. V9/753-771; V10/866-891). Dr. Maher first met Stewart in March, 2001, and had talked to him less than two hours altogether, but had reviewed extensive records including documents from other doctors, family statements, and police reports (2RS. V9/761-62). Dr. Maher concluded that on December 6, 1984, Stewart had been suffering from a severe psychiatric disorder, Post-Traumatic Stress Disorder, due to his extreme childhood abuse (2RS. V9/764-65). Maher also concluded that Stewart was intoxicated at the time of the murder and that these factors had an impact on his ability to think and make decisions, as well as his behavior (2RS. V9/753). Maher characterized Stewart as being mentally ill and at a vulnerable age, and opined that Stewart's ability to conform his behavior to the requirements of law was substantially impaired (2RS. V9/766-67). According to Maher, Stewart's background compelled him in an "unthinking reactive way" to commit the Diaz murder (2RS. V9/768).

Dr. Sultan also characterized Stewart as mentally ill (2RS. V10/881). Sultan met Stewart in 1993 and conducted testing and an extensive record review before reaching her conclusions (2RS. V10/867, 876). Stewart demonstrated a normal IQ score, in the 90s, but had been severely depressed since adolescence (2RS. V10/877, 880). Sultan testified that Stewart's family history reflected generations of serious mental problems, and that Stewart's thoughts, moods, clarity of thinking, and judgment were all deeply affected by his mental illness (2RS. V10/880-81). In addition to his depression, she diagnosed Stewart as having a terrible substance abuse problem which affected his ability to control impulses and think clearly (2RS. V10/881). Sultan noted that Stewart had grown up with tremendous loss, abandonment, and violence, and that he had many symptoms of post-traumatic stress disorder (2RS. V10/881-82). Due to these factors, Sultan concluded that Stewart committed the Diaz murder while under the influence of extreme mental and emotional disturbances, and that his ability to conform his conduct to socially acceptable behavior was "greatly impaired" (2RS. V10/881-83). She felt the same conclusions would apply to Stewart's mental state during the subsequent murder of Richard Harris, as described by Michelle Acosta (2RS. V10/883). On cross examination, Sultan admitted that Stewart's actions in setting the car on fire in order to destroy evidence were "self-

protective acts," but she maintained that, despite Stewart's wanting to cover up something he had done wrong, he was not thinking clearly and rationally due to his intoxication (2RS. V10/889-891).

In rebuttal to the mental mitigation evidence, the State presented the testimony of Dr. Sidney Merin, clinical and neuropsychologist (2RS. V10/921-952). Merin had examined Stewart in Sept. 1986, and had reviewed other documents and materials (2RS. V10/923, 926, 934). According to Merin, there are three general categories of mental conditions: mental illnesses, which involve a cognitive thinking disorder with bizarre and unusual thought processes that break with reality; emotional disturbances, which involve terribly uncomfortable feelings associated with hysteria, depression, obsession, phobias, etc.; and character or behavior disorders, which involve personalities that do not know how to handle their behavior and have difficulty following the rules of society (2RS. V10/928-933).

After evaluating Stewart and reviewing other material, Merin concluded that Stewart was not psychotic or mentally ill, but demonstrated characteristics associated with a behavior disorder due to antisocial features in his personality (2RS. V10/934). Merin noted that, although he did not observe Stewart to be depressed, the information he reviewed from other sources

indicated that Stewart suffered from depression which was, according to Merin, a mood disorder rather than a mental illness (2RS. V10/934, 943). Merin agreed with Sultan that Stewart had average intelligence and a history of substance abuse (2RS. V10/935, 940, 944). Merin also acknowledged that Stewart was under general distress due to his background circumstances, but testified that Stewart had lived with this level of distress most of his life; it was not extreme and did not present any unusual characteristics at the time of the murder, and it did not affect his thinking in terms of moral or legal issues (2RS. V10/942-43). Merin did not believe that Stewart's ability to conform his conduct to the requirements of law was substantially impaired (2RS. V10/944).

The jury returned a recommendation of death by a vote of seven to five (V1/57; 2RS. V4/629). A Spencer hearing was conducted on May 31, 2001, and on August 6, 2001, Judge Barbara Fleischer sentenced Stewart to death for the Diaz murder (V1/57-68; 2RS. V4/766-777, V11/1071-1100, 1101-1136). In her sentencing order, the judge found three aggravating circumstances: prior violent felony convictions (a prior first degree murder, two prior attempted murders, a prior aggravated assault, and two prior robbery convictions); under a sentence of imprisonment; and murder committed for pecuniary gain (V1/58-59). The court determined that the statutory mental mitigation

factors had been proven, and provided "some" weight to both factors even though the judge concluded that Stewart's disturbance was not extreme and his impairment was not substantial (V1/60-63). The court grouped and weighed other nonstatutory mitigation, including Stewart's childhood abuse and exposure to brutality (some weight), the lack of an acceptable father figure in childhood (modest weight; also weighed in conjunction with other mitigation), his mother's abandonment (little weight in addition to some weight given to same facts as nonstatutory mental mitigation), alcohol abuse and intoxication at the time of the crime (modest additional weight), low-normal intelligence (little weight), homeless (little weight), family history of mental illness and suicide attempts (already weighed, no additional weight), remorse (modest weight), compassion for others (modest weight), spiritual development during incarceration (modest weight), totality of other sentences (130 years in prison) on unrelated charges (modest weight), and good prison record (little weight) (V1/63-68). The court concluded that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death (V1/68).

On appeal, this Court affirmed the sentence on September 11, 2003. Stewart v. State, 872 So. 2d 226 (Fla. 2003).

On July 25, 2005, Stewart filed a motion to vacate pursuant to Florida Rule of Criminal Procedure 3.851 (V1/72-111). An

amended motion was filed on Feb. 6, 2006 (V1/131-172). Judge Fleischer granted an evidentiary hearing on six claims, all alleging ineffective assistance of counsel based on attorney Fraser's representation at the 2001 resentencing (V1/178-184).

On May 24, 2006, Stewart presented seven lay witnesses: Pastor Robert Van Horne (V10/T19-33); Sandra Hibberd (V10/T34-50); Terri Stewart (V10/T50-61); Wanda Vetra (V10/T61-79); Susan Smith Moore (V10/T80-182); Nicole Scarpo (V10/T183-196); and Linda Arnold (V11/T204-256). Pastor Van Horne knew the Scarpo family when he lived in South Carolina; he testified that they were "strange," and that Stewart, as a boy in the fifth or sixth grade, was not a behavior problem in communion class but was quiet and withdrawn (V10/T20, 24). Van Horne was not aware of any physical or sexual abuse in the Scarpo home (V10/T33).

Sandra Hibberd testified that she had been married to Stewart's biological father, Charles "Pete" Stewart (V10/T35). A few months into their 1967 marriage, Hibberd learned that Pete had a son that lived in South Carolina (V10/T36). Hibberd never knew Pete to visit Stewart and she did not describe any interaction between them (V10/T36). Her testimony discussed violence and alcohol abuse among Pete and his family members, most of whom also never knew Stewart (V10/T38-46). Sandra's daughter, Terri Stewart, also testified, but like Hibberd, Terri did not know Kenneth Stewart or discuss any interaction between

her father Pete and Stewart (V10/T50-61). Terri had no memory of Pete and testified mostly about her own problems, admitting that she probably would not have been found if someone had been looking for her in 2001 (V10/51, 54-58, 61).

Wanda Vetra is Stewart's maternal aunt and she testified about the family of Stewart's biological mother, Elsie Tate (V10/T62-68). Stewart stayed with Vetra for about three months when he was in his twenties; he was sweet and looking for work (V10/71-72). Stewart told her that Scarpo had been very violent, and that Stewart thought Scarpo had something to do with Elsie's death (V10/77).

Susan Smith Moore and Linda Arnold repeated much of the testimony they had offered at the 2001 resentencing (V10/80-182; V11/204-256). Following Moore's testimony, Judge Fleischer noted that she had already heard most of the testimony at the resentencing, and cautioned Stewart's attorneys about presenting repetitive testimony when Arnold was called as a witness (V10/T198-200). Moore and Arnold both testified that they had been sexually abused by Scarpo, although Stewart did not know of this abuse (V10/T128-31, 178; V11/T230-32). Before Moore testified at the resentencing, a defense investigator came to her house and spent two days with her to help her prepare to testify (V10/T179-80).

Nicole Scarpo was a younger stepsister that testified to abuse in the Scarpo home both while Stewart was living there and after he left home (V10/T184-194).

Additional testimony was taken on November 28, 2006, when Stewart's new postconviction expert, Dr. Hyman Eisenstein, testified on direct examination (V3/560-V4/688). According to Eisenstein, none of the eight prior mental health experts to have offered reports or opinions on Stewart were qualified to conclude, as some did, that Stewart did not have brain damage (V4/618; V13/T313-321, 342-44, 356). These eight prior experts were: Dr. Irving Weiner, a clinical and forensic psychologist that conducted neurological testing (V6/1150-51; V9/1453-57; V13/T311-314); Dr. Sidney Merin, a clinical psychologist specializing in neuropsychology (2RS. V10/921-952; V13/T405-06); Dr. Walter Afield, another psychologist that performed a neurological examination (V3/578; V13/315; see Stewart v. State, 801 So. 2d 59, 69 (Fla. 2001)); Dr. Gerald Mussenden, a psychologist (V3/568-577; V13/T310); Dr. Auturo Gonzalez, a psychologist (V3/568, 581; V13/T310); Dr. Michael Gamache, a clinical psychologist (V3/568; 582; V13/T310); Dr. Faye Sultan, a clinical psychologist (V13/T309, 319; 2RS. V10/866); and Dr. Michael Maher, a general and forensic psychiatrist (V13/359-406; 2RS. V9/753).

Dr. Eisenstein testified, as an expert in neuropsychology, that only a full, complete and comprehensive neurological battery of tests will reveal brain damage (V13/T342, 350-52). Eisenstein had not reviewed the resentencing testimony or findings by Dr. Maher or Dr. Sultan, but noted that they were not qualified to diagnose brain damage or the lack of brain damage (V13/T309, 343). When advised of the findings Maher and Sultan had discussed at the resentencing, Eisenstein generally had no quarrel with their conclusions (V13/T319-21, 334, 341). Eisenstein did not describe or define a "full" neurological battery of tests other than to observe that he had used a total of "maybe 50 -- 60 tests" in this case and it was vital to "give so many tests" (V3/587). Because the other experts had not conducted fifty to sixty tests or used tests specifically designed to measure brain impairment, they had not performed competently and could not offer a credible opinion as to whether Stewart has brain damage (V13/T313-14, 342-45, 350-52).

Dr. Eisenstein only discussed the test results he obtained which he felt were significant, and did not identify or describe the tests on which Stewart performed normally (V3/620). In all, he discussed fewer than ten of the tests he conducted, including the Wisconsin Card Sorting Test where Stewart performed well, in the high range (V3/620-641). Three of the other tests he discussed, the WAIS III, the Weschler memory scale, and the

WRAT, were part of the battery that had been given by Dr. Irving (V9/1454). According to Eisenstein, his testing consistently revealed indications of brain damage in the left hemisphere (V3/634, 641). Stewart's results on the WAIS III reflected a 13-point difference between the verbal and performance IQ scores, which Eisenstein found significant (V3/620-22, 628). Eisenstein diagnosed Stewart with two Axis I disabilities: Attention Deficit/Hyperactivity Combined Disorder, and Dementia Due to Head Trauma (V3/658-59). Eisenstein "deferred" on any Axis II diagnoses, which govern personality disorders, since they were not the "thrust of his evaluation," but noted that several probably applied (V3/659). Eisenstein suspected that Stewart was born with Fetal Alcohol Syndrome, in light of his mother's drinking history, but whether that contributed to the learning disabilities that led to his life-long frustrations is "anyone's guess" (V4/670). The symptoms and manifestations of his brain damage, ADHD, and dementia include failure, frustration, attention problems, irritability, poor impulse control, poor decision making, poor academic performance and deficits in higher executive functions such as planning, organizing, sequencing, and abstracting (V4/661-68).

Dr. Eisenstein's cross examination was conducted on February 26, 2007, since the State had not been provided the necessary information prior to Eisenstein's testimony to have

prepared an adequate cross examination (V3/539-42; V4/678; V12/T277-297; V13/T304). Eisenstein was asked about a report from Dr. Irving Weiner, indicating Weiner had conducted a full neuropsychological examination in March, 2001, and concluding that there was no indication that Stewart suffered organic brain damage or dysfunction (V6/1150-51; V9/1453-57; V13/T311-14). Eisenstein had not previously been aware of Dr. Weiner's report, but he testified that the battery of tests Weiner used were not sufficient to make any conclusion about the existence of brain damage (V13/T311-314).

Stewart's trial expert, Dr. Michael Maher also testified on February 26, 2007 (V13/T359-406). Dr. Maher repeated his prior opinion that Stewart's mental health history did not provide indications to support any further investigation into possible neurological deficits (V13/T364, 368-69, 381). Dr. Maher did not agree with Dr. Eisenstein's diagnosis of brain damage but described it as "overreaching" (V13/T371-72). Maher also did not agree with Dr. Eisenstein's conclusion that Dr. Weiner's evaluation had been inadequate; Maher testified that, even among neurological experts, a "complete" examination would be a matter of debate and decided on a case by case basis (V13/T369-71, 388). Maher reiterated that there were no red flags or indicators from Stewart's extensive history which suggested a need for additional neurological testing (V13/T368-69, 381,

397). He reviewed Eisenstein's results, test by test, and explained why the results did not support a finding of brain damage (V13/T371-77).

The State also presented testimony from Stewart's resentencing attorney, Robert Fraser (V14/T420-451). Mr. Fraser has practiced law for over 30 years, including representing more than 40 people charged with first degree murder, of which four are now on death row (V14/T420). He estimated that of the 29 murder cases to go to trial, probably half involved the death penalty (V14/T420-21). He is certified as a capital defense litigator and has been responsible for about ten to twelve penalty phases (V14/T421). Fraser discussed some of the evidence which he has been criticized for failing to object to; his policy is to only object when something is actually damaging to his case (V14/T423-31). Fraser had little recall of the details from Stewart's resentencing proceeding (V14/T444-45).

The evidentiary hearing concluded on September 16, 2008, when the court heard testimony about Stewart's postconviction CT and PET scan testing from Stewart's expert, Dr. Frank Wood (V15/T470-517, 544-47), and the State's expert, Dr. Larry Wilf (V15/T518-543). Dr. Wood discussed the pioneering work he has done using a Continuance Performance Activation Task as the PET scan is being given in order to research what variation of brain activity is "normal" (V15/T478-79). He used his technique to

obtain scans of Stewart's brain, and found that the ventricles of Stewart's brain, which are normally symmetrical, were not symmetrical; in addition, the left hemisphere was a bit shorter than the right, which is the opposite of a normal case but is not considered an abnormality in itself (V15/T480). He determined from the scans that Stewart has brain impairment to his left hemisphere, and concluded that the damage was chronic and long-standing, developed when Stewart was *in utero* (V15/T487). The damage would affect Stewart's ability to perform higher, integrative brain functions (V15/T490). Dr. Wilf, the medical director and chief imaging/radiologist for the group of doctors that contracts to read the scans performed at the mobile scanners that goes to the corrections facilities (V15/T519, 521), testified that Wood's technique was not part of the standard operating procedure at any radiology facility he was familiar with, and that Stewart's results were normal (V15/T522-23). Wilf acknowledged that he was not familiar with using PET scans to assess neuro cognitive functioning (V15/T535-36).

The court entertained legal argument at a hearing on Sept. 18, 2008 (V16/T551-617). On Oct. 8, 2008, the court rendered an extensive Final Order, denying all relief (V2/228-266 [Order]; V2/267-V6/1170 [attachments]). This appeal follows.

SUMMARY OF ARGUMENT

Issue I: The court below properly denied Stewart's allegation of ineffective assistance of counsel at resentencing based on the alleged failure to discover and present evidence of organic brain damage. The court determined, following an evidentiary hearing on the issue, that Stewart failed to establish either deficient performance or any prejudice.

Issue II: The court below properly denied Stewart's allegation of ineffective assistance of counsel at resentencing based on the alleged failure to discover and present all mitigating evidence. The court determined, following an evidentiary hearing on the issue, that Stewart failed to establish either deficient performance or any prejudice.

Issue III: The court below properly denied Stewart's allegation of ineffective assistance of counsel at resentencing based on the failure to object to the cross examination of Marjorie Sawyer. Following an evidentiary hearing, the court did not determine whether counsel's performance was deficient but concluded that Stewart failed to establish any prejudice.

ARGUMENT

ISSUE I

THE COURT BELOW PROPERLY DENIED STEWART'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO PRESENT EVIDENCE OF ORGANIC BRAIN DAMAGE.

Stewart initially challenges the trial court's denial of his claim that his resentencing attorney rendered constitutionally ineffective assistance by failing to discover and present evidence that Stewart suffered from organic brain damage. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; the burden is on the defendant to show otherwise. Strickland, 466 U.S. at 689. See generally Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000).

The record in this case reflects that, at the time of Stewart's resentencing, Stewart had been evaluated by a number of mental health experts for a variety of reasons. Stewart had been involved in criminal behavior since he was a teenager, and had an extensive history in the criminal justice system. Dr. Eisenstein discussed his review of reports by other doctors,

including a 1980 report from Dr. Mussenden, when Stewart was 17 years old; another report from 1986, also by Dr. Mussenden; 1986 sanity and competency reports from Dr. Afield and Dr. Gonzalez; and a report from Dr. Gamache which discussed prior psychological findings (V3/568-582).

At the initial 1986 penalty phase in this case and at the 1990 resentencing, Dr. Merin was the defense mental health expert to present mitigation. Stewart, 620 So. 2d at 179; Stewart, 558 So. 2d at 420. Dr. Merin is board certified in neuropsychology and has a reputation for being well prepared in court; Dr. Maher believed that, if Merin had seen any indication that neurological testing needed to be done, he would have done it (V13/T405-06). Dr. Walter Afield, a psychiatrist, had examined Stewart in 1986 and testified extensively in Stewart's other capital case, for the killing of Mark Harris; Afield also concluded that Stewart did not have any neurological damage Stewart, 801 So. 2d at 69.

At the 2001 resentencing in this case, trial defense counsel Bob Fraser presented two mental health experts, Dr. Michael Maher and Dr. Faye Sultan, to assist the jury in weighing the mitigation available due to Stewart's mental state. These experts were both familiar with Stewart's prior medical and mental health history (V13/T363-64; 2RS. V9/761-62, 770; V10/876-77). Both Dr. Maher and Dr. Sultan testified that

Stewart is mentally ill and that the statutory mental mitigators applied in this case (2RS. V9/764-67; V10/880-84). Dr. Maher and Dr. Sultan also testified that Stewart suffered from Post Traumatic Stress Disorder, depression, and a substance abuse disorder (2RS. V9/764-65; V10/880-82). In addition, before the resentencing, Fraser retained Dr. Irving Weiner, a neuropsychologist, for the purpose of conducting neurological testing (V6/1150-51; V13/T311-13). Dr. Weiner conducted a battery of tests, interviewed Stewart, and concluded that there was no neurological damage (V6/1150-51; V9/1453-57; V13/T311-13).

In rejecting Stewart's claim of ineffectiveness, the court below held as follows:

> As to Defendant's allegation that counsel performed deficiently for failing to investigate and present brain damage mitigation, the Court finds the evidence conclusively refutes his allegation. Dr. Weiner's letter to Mr. Fraser notes that Mr. Fraser specifically asked him to evaluate Defendant for "any indications of neuropsychological impairment that might indicate organic brain damage or dysfunction," and Dr. Weiner did not find any evidence of organic brain damage or dysfunction. Additionally, Mr. Fraser consulted two qualified mental health experts, Dr. Maher and Dr. Sultan, who did not find or testify that Defendant had brain damage. Dr. Maher testified that further neuropsychological testing was unnecessary and, therefore, he did not recommend such testing to Mr. Fraser. He also testified that he reviewed the reports of several other mental health experts, and none of those experts recommended further neuropsychological testing. Therefore, the Court finds Defendant has failed to show counsel performed ineffectively regarding brain damage mitigation when

he specifically requested an evaluation for potential brain damage or dysfunction and his own mental health experts did not diagnose brain damage or otherwise advise counsel to pursue that avenue. *See Darling*, 966 So. 2d at 377 ("This Court has established that defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire."); *Hodges v. State*, 885 So. 2d 338, 348 (Fla. 2004) ("In light of evidence demonstrating that counsel pursued mental health mitigation and received unusable or unfavorable reports, the decision not to present the experts' findings does not constitute ineffective assistance of counsel."). Consequently, the Court finds trial counsel performed a reasonable investigation into Defendant's mental health and background as required. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Consequently, the Court further finds Defendant has failed to show how counsel performed deficiently under *Strickland*.

Moreover, the Court finds Defendant was not prejudiced by counsel's failure to present brain damage mitigation evidence. As to the brain damage testimony presented during the instant proceedings, the Court notes that although Defendant presented evidence of possible brain damage, neither Dr. Eisenstein nor Dr. Wood testified that the brain damage, even in conjunction with Attention Deficit Hyperactivity Combined Disorder and/or alcohol abuse, caused Defendant to be under the influence of extreme mental or emotional disturbance at the time he committed the capital felony or that it otherwise substantially impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. Moreover, as the Court noted above, Dr. Weiner performed a neuropsychological evaluation of Defendant and found no indication of organic brain damage or dysfunction. Consequently, the Court finds the evidence Mr. Fraser presented during the penalty phase proceedings, including the testimony of two mental health experts who found the existence of those two statutory mitigators, was more powerful and compelling mitigation than that which

> Defendant claims Mr. Fraser failed to present. Even if Defendant is arguing that trial counsel should have presented brain damage mitigation as well as the other evidence presented, the Court notes such testimony would then have contradicted and undermined the findings and testimony of the other defense experts. Therefore, the Court finds Defendant has failed to show the outcome of the proceedings would have been different had Mr. Fraser presented evidence of brain damage mitigation to the jury or the Court. *See Strickland v. Washington*, 466 U.S. 668, 695 ("When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.").

(V2/246-249).

Stewart now asserts that the court erred, alleging that trial counsel's failure to discover and present evidence of Stewart's organic brain damage was unreasonably deficient performance. According to Stewart, counsel should have understood that the prior mental health evaluations were inadequate because eventually, an expert consulted in 2006 was able to opine that Stewart has brain damage. On this record, Stewart presents the classic scenario of having secured a more favorable expert in postconviction in an attempt to expand the mental mitigation offered at the resentencing.

In this case, the evidence is undisputed that trial counsel consulted several mental health experts and specifically requested that a neuropsychological examination be conducted. Dr. Maher specifically advised counsel that, in light of the

neuropsychological testing by Dr. Weiner in 2001, no further testing was necessary. Although Stewart now asserts his attorney should have done more, there was no evidence presented below to support the suggestion that any reasonable attorney at the time of Stewart's resentencing would have ignored the advice of the defense experts and secured additional testing.

Trial counsel have great discretion in determining whether and how to present mental health evidence. Jones v. State, 928 So. 2d 1178 (Fla. 2006). In addition, many cases have recognized that the presentation of more favorable mental health testimony in postconviction does not render counsel's investigation into mitigation ineffective. Pace v. State, 854 So. 2d 167, 175 (Fla. 2003); Davis v. State, 875 So. 2d 359, 372 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 504 (Fla. 2003); Asay v. State, 769 So. 2d 974, 985-86 (Fla. 2000); Pietri v. State, 885 So. 2d 245, 261 (Fla. 2004) (no ineffective assistance where counsel made reasonable efforts to secure a mental health expert to examine the defendant for mitigation purposes); Jones v. State, 732 So. 2d 313, 320 (Fla. 1999); see also, Davis v. Singletary, 119 F.3d 1471, 1475 (11th Cir. 1997) (noting that, "mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that counsel was ineffective for failing to produce that expert at trial").

Even the cases noted and analyzed by Stewart have rejected this claim, recognizing more favorable mental health testimony in postconviction does not equate to a finding of ineffective assistance of counsel. See Reese v. State, 34 Fla. L. Weekly S296 (Fla. March 29, 2009); Sexton v. State, 997 So. 2d 1073 (Fla. 2008) (rejecting similar claim involving the same defense attorney and the same mental health experts); Darling v. State, 966 So. 2d 366 (Fla. 2007); Hitchcock v. State, 991 So. 2d 337 (Fla. 2008). Stewart attempts to distinguish Reese, Darling, Sexton, and Hitchcock factually since the legal principles recognized in those cases clearly compel the denial of this claim. He claims that Darling supports a finding of ineffectiveness in this case because Darling's claim was only rejected because the trial expert, while providing an incomplete and inaccurate evaluation, nonetheless happened upon the correct diagnosis, so the jury had not been misinformed. However, Darling's claim was not simply rejected due to a finding of lack of prejudice; this Court directly recognized that Darling's counsel had acted reasonably in relying upon the expert, and no deficient performance could be attributed to an attorney that reasonably relies upon the advice of their chosen expert.

Stewart repeatedly asserts that his case is different because, unlike other cases, "the first diagnosis that found no brain damage was completely wrong and the correct diagnosis of

brain damage is unrebutted" (Appellant's Initial Brief, p. 77). However, the suggestion that Dr. Maher's resentencing testimony was "wrong" because Maher did not find Stewart to suffer from brain damage is not supported by the record. While Dr. Eisenstein and Dr. Wood testified at the postconviction hearing that Stewart's neurological testing and PET scan results indicated the presence of brain damage, Dr. Maher continued to believe, even after reviewing Stewart's postconviction information, that Stewart does not suffer from brain damage (V13/T364, 368-69, 371-72, 386, 401). Of course, Maher's opinion is shared by numerous other mental health experts who have evaluated Stewart over the course of the last twenty years. See Stewart, 801 So. 2d at 69 (rejecting claim in Stewart's other capital case that his attorney had been ineffective for failing to prepare the mental health expert for that penalty phase, noting that Dr. Walter Afield had conducted psychological and neurological testing and found no evidence of brain damage or psychosis).

While Stewart would prefer to focus this Court's attention on the issue of the existence of brain damage, the actual issue for consideration is whether trial counsel was ineffective for accepting the advice of his trial expert witnesses. Stewart has not provided any factual basis or legal analysis to support a finding of ineffectiveness on the facts of his case. Clearly,

this is not a case where counsel merely failed to explore the possibility of mental mitigation, or where counsel declined to consider whether brain damage existed. Counsel specifically presented a psychiatrist and a clinical psychologist, and secured a separate neurological expert that was not called as a witness after determining that no brain damage existed.

There was no evidence presented below as to what reasonably competent counsel would have done in 2001 after receiving multiple expert opinions refuting the existence of brain damage. Even Dr. Eisenstein agreed that there would be no "red flags" or indicators, from the testing previously conducted, of any need for any additional testing; while he noted a thirteen-point discrepancy between Stewart's verbal and performance IQs, the intelligence testing conducted by Dr. Weiner in 2001 showed a verbal IQ of 98 and a performance IQ of 102 (V6/1150-51; V9/1453-57). The fact that one new expert, years later, in 2007 feels that 50 or 60 different neurological tests need to be conducted as a matter of routine before testing will be considered "complete" does not compel a conclusion that counsel will be deemed ineffective if he did not seek such testing before trial.

The Constitution does not require an attorney to seek substantial and extensive neurological testing every time that a defendant faces the death penalty. A "reasonable performance"

does not dictate a laundry list of such hard and fast rules but is defined by the knowledge and experience of competent trial attorneys at the time of the challenged proceeding. Stewart has made no attempt to assess his attorney's actions through the appropriate standards of review, he merely posits that a new finding of brain damage in postconviction is sufficient to establish that his attorney was ineffective for presenting an expert that concluded there is no brain damage.

Moreover, Stewart has exaggerated the testimony presented below by asserting not only that his evidence of brain damage was undisputed and uncontroverted, but that the damage "significantly impairs his ability to function and affected his ability to conform his conduct to the requirements of the law" and repeatedly suggests that the testimony from Dr. Eisenstein and Dr. Wood provided further support for the finding of the statutory mental mitigating factors (Appellant's Initial Brief, pp. 67, 68). However, Dr. Wood never addressed statutory mitigation and Dr. Eisenstein only agreed on cross examination with the prior experts' findings that the mental mitigation existed based on the disorders they had identified; neither expert suggested that the "new" evidence of alleged brain damage provided any basis for finding statutory mitigation. Stewart's assertion that Dr. Eisenstein was the "first" mental health expert to complete a full battery of testing (Appellant's

Initial Brief, p. 67), was similarly disputed below; Dr. Maher testified that there is a difference of opinion among experts as to what constitutes a "complete" neurological battery and that the testing conducted by Dr. Weiner was adequate (V13/T369-71, 388). Although Stewart's attorneys went to the effort of keeping Dr. Eisenstein available for rebuttal and consulted with him following Dr. Maher's testimony, there was no challenge to Dr. Maher's opinion that even among neurology experts, there is no set, standard, defined "full" neurological battery of tests for every case. Dr. Maher testified that any number of tests, including such things as liver enzyme testing, were available, but "[a] proper examination needs to draw a line between what is reasonable and necessary, what is required in the clinical or particular forensic situation and what is not" (V14/T369).

Similarly, although Stewart asserts "there is no question that Dr. Weiner made an incorrect diagnosis based on substandard testing criteria," this is merely the opinion of his new postconviction expert and is not reflected in the factual findings by the trial court. The court below did not find that brain damage had been established or that Dr. Maher had been "wrong" about the need to seek further neuropsychological testing. The Final Order entered below consistently referred to the evidence of "possible" brain damage that had been admitted. (V2/247-49).

Significantly, even taking the testimony of Stewart's postconviction experts at face value to support a finding of brain damage, the court below concluded that the testimony did not provide persuasive mitigating value. In finding that there was no possible prejudice with regard to counsel's presentation of the mental mitigation, the court observed:

> As to the brain damage testimony presented during the instant proceedings, the Court notes that although Defendant presented evidence of possible brain damage, neither Dr. Eisenstein nor Dr. Wood testified that the brain damage, even in conjunction with Attention Deficit Hyperactivity Combined Disorder and/or alcohol abuse, caused Defendant to be under the influence of extreme mental or emotional disturbance at the time he committed the capital felony or that it otherwise substantially impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law. Moreover, as the Court noted above, Dr. Weiner performed a neuropsychological evaluation of Defendant and found no indication of organic brain damage or dysfunction. Consequently, the Court finds the evidence Mr. Fraser presented during the penalty phase proceedings, including the testimony of two mental health experts who found the existence of those two statutory mitigators, was more powerful and compelling mitigation than that which Defendant claims Mr. Fraser failed to present. Even if Defendant is arguing that trial counsel should have presented brain damage mitigation as well as the other evidence presented, the Court notes such testimony would then have contradicted and undermined the findings and testimony of the other defense experts. Therefore, the Court finds Defendant has failed to show the outcome of the proceedings would have been different had Mr. Fraser presented evidence of brain damage mitigation to the jury or the Court. *See Strickland v. Washington*, 466 U.S. 668, 695 ("When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would

> have concluded that the balance of aggravating and mitigating circumstances did not warrant death.").

(V2/247-48).

The court's factual finding that, regardless of the existence of any brain damage, Stewart's resentencing mitigation was "more powerful and compelling" than the postconviction testimony he presented is necessarily fatal to his claim of prejudice.

Stewart attempts to counter the trial court's rejection of prejudice by speculating about what Dr. Harry McClaren, the State's expert in the Hitchcock case, would agree to if considering Stewart's mental health history. His speculation is unfounded and a distraction. He notes that McClaren is credited with testifying that a thirteen-point split between verbal and performance IQs can be significant; but McClaren did not testify in this case, Dr. Maher did testify and according to Dr. Maher, the split would need to be at least twenty points to be statistically significant (V13/T385). Stewart's attempt to have this Court become a fact-finder by citing evidence noted in other cases is necessary because the testimony actually presented to the factfinder below was insufficient for relief.

Stewart also criticizes the State for failing to offer surrebuttal testimony from Dr. Maher or Dr. Weiner to confirm that their opinions would not be changed by the PET scan results

obtained by Dr. Wood, but again this line of reasoning is not persuasive. The record reflects that the parties encountered a great deal of difficulty in securing the PET and MRI tests and results; the evidentiary hearing was delayed over a year by the trial court's generous accommodation of additional time so that Stewart could offer this testimony. The State had no interest in creating additional delay and expense by presenting a witness to testify, presumably, that his testimony is unchanged. Obviously, if Dr. Maher and/or Dr. Weiner did change their opinions based on Dr. Wood's testing, Stewart could have presented their testimony acknowledging that they were previously mistaken. Stewart is not entitled to an inference that Maher and Weiner would agree with Wood's finding of damage in the absence of any affirmative testimony to the contrary any more than the State is entitled to the opposite inference. Consequently, Stewart's burden to establish the existence of brain damage is not satisfied by his attempt to rely on the absence of expert testimony offered by the State in surrebuttal.

Stewart also asserts that the postconviction testimony "directly contradicts" the opinion reflected in the sentencing order about Stewart's ability to act in a coherent, relevant and goal directed manner, yet the facts of Diaz's murder clearly establish Stewart's ability to think and act in a coherent, relevant, and goal directed manner. Stewart was able to

identify an appropriate victim to rob, someone with money and a nice car; he was able to plan and carry out a ruse of going into the bar to meet the owner, getting acquainted with Diaz, and securing an opportunity to rob and murder him in an isolated location; he was able to understand that he needed to cover up the evidence of his crime by leaving the scene and setting Diaz's vehicle on fire in a different location. This was not an impulsive or spontaneous crime, and the planning and deliberation involved provide even more reason for the sentencers to conclude that any evidence of brain damage did not provide compelling mitigation, and the aggravating factors continue to vastly outweigh the mitigation available.

Stewart does not explain how the sentencing judge could have reweighed the aggravating and mitigating factors, resulting in a different outcome, in light of the court's finding that the initial mitigation was more compelling than the postconviction mitigation. Instead, Stewart suggests that the seven-to-five jury recommendation compels a finding of prejudice, as the outcome could be changed by only one juror. On the facts of this case, the jury recommendation attests to the quality of the defense case for mitigation, and indicates the effectiveness of counsel's representation. Compare Mungin v. State, 932 So. 2d 986, 1002-03 (Fla. 2006) (rejecting similar IAC claim in case with 7-5 jury recommendation for death); Miller v. State, 926

So. 2d 1243, 1253 (Fla. 2006) (rejecting similar IAC claim, noting counsel's overall strategy, "actually resulted in five votes by the jury against the death penalty in a case that involved a brutal beating"); Suggs v. State, 923 So. 2d 419 (Fla. 2005); Pace, 854 So. 2d at 173-74.

The facts are: In Stewart's 2001 resentencing, Dr. Maher testified that the horrendous abuse Stewart suffered as a child resulted in Post Traumatic Stress Disorder, and that, as a result, Stewart was impulsive, had poor impulse control, and a reduced ability to think and make decisions (2RS. V9/753). Dr. Sultan testified that Stewart was mentally ill and suffered from depression and a substance abuse disorder; as a result, Stewart was impulsive, had poor impulse control, and a reduced ability to think clearly (2RS. V10/877-882). The State's expert, Dr. Merin, testified that Stewart was not mentally ill but suffered from antisocial personality disorder (2RS. V10/934). The judge found that Dr. Merin was more credible, noting that the facts of the case did not suggest an impulsive crime, but one that was coldly planned and smoothly executed (V1/60-63).

In postconviction, Stewart presented Dr. Eisenstein, who testified that Stewart has damage to the left hemisphere of his brain, from unknown causes but possibly from being beaten by his stepfather and/or because his mother consumed alcohol when she was pregnant with him, and as a result Stewart has learning

disabilities that caused him to fail in school, then experience great frustrations which, combined with the alcohol he consumed on the night of Diaz's murder, resulted in Stewart being impulsive, having poor impulse control, and an inability to plan, sequence, and organize (V4/659-70). Stewart also presented Dr. Wood to testify that his method of conducting PET scan tests reveals that the left hemisphere of Stewart's brain is larger than it should be and his sugar uptake showed reduced brain activity in some areas, conditions which Dr. Wood believed existed before Stewart was born (V15/T478-87). Dr. Wood described the manifestations of the damage as taking away Stewart's ability to use "good sense" (V15T/488-89). The same judge specifically found that the mitigation provided by the two postconviction doctors was less compelling than the mitigation provided by the resentencing doctors who were less credible than Dr. Merin. No prejudice is possible on these facts.

Stewart has failed to demonstrate any error in the trial court's rejection of his claim that Bob Fraser provided ineffective assistance of counsel at resentencing for failing to discover and present evidence of organic brain damage. The record fully supports the court's conclusions that Fraser performed reasonably and that, even if he had performed differently in this regard, there is no reasonable probability

of a different outcome. This Court must affirm the denial of relief on this issue.

ISSUE II

THE COURT BELOW PROPERLY DENIED STEWART'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO PRESENT ALL EVIDENCE OF MITIGATION.

Stewart next asserts that his resentencing attorney, Bob Fraser, was ineffective for failing to present additional mitigating evidence. Once again this claim was denied following an evidentiary hearing, so the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo.* Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

The record reflects that the family and lay witnesses presented at the postconviction evidentiary hearing provided substantially the same testimony as to Stewart's childhood and background as that presented to the jury at his resentencing. Some of the postconviction witnesses had actually testified at the resentencing, and other witnesses merely corroborated the evidence presented previously. In denying this claim, Judge Fleischer outlined testimony from the 2001 resentencing as well as the evidentiary hearing (V2/230-238), and determined "that the testimony presented during the instant proceedings was essentially cumulative in that the penalty phase witnesses testified in detail to Defendant's extremely tense, violent and abusive childhood at the hands of Scarpo as well as Defendant's

consumption of alcohol beginning at the age of five or six, Defendant's devastation upon learning that Scarpo was not his biological father, Defendant's alcohol abuse, his violent behavior when he drank alcohol, and his grief over and obsession with his biological mother" (V2/245-46, 250). The court further concluded that Stewart "failed to show that any of the additional mitigation evidence presented would have changed the outcome of the proceedings as required under *Strickland*" (V2/250-51). These findings are supported by the record, and should not be disturbed on appeal.

Stewart claims that the court's rejection of this issue failed to address evidence relating to mental health and substance abuse problems occurring in Stewart's biological parents, family, and other relatives. However, such evidence does not provide any mitigating value since it does not reduce Stewart's own moral culpability. To the extent that familial problems impacted Stewart's life and the commission of Diaz's murder, they were fully explored at the resentencing. The fact that Stewart's biological parents and their families had substance abuse and mental health issues which Stewart was not exposed to and did not know about is not surprising or persuasive as mitigation.

Stewart cites to Parker v. State, 3 So. 3d 974 (Fla. 2009), and states that trial counsel in this case presented little more

than a "bare bones" outline of Stewart's past. A review of the resentencing proceeding refutes this suggestion. At the resentencing, both Susan Moore and Linda Arnold testified extensively about Stewart's childhood (2RS. V9/673-714; 716-747). Significantly, the testimony by Moore and Arnold, along with the other mitigation presented at the resentencing, compelled the trial court to find and weigh numerous mitigating factors in determining the appropriate sentence. In fact, Judge Fleischer found and weighed both statutory mental health mitigators, as well as twenty-three other, nonstatutory mitigating factors (V1/57-68; 2RS. V4/766-777); Stewart, 872 So. 2d at 228-29. Clearly, more than a "bare bones" presentation would have been necessary to compel the finding of twenty-five mitigating factors.

In contrast, in the Parker case, the trial court did not find any statutory or nonstatutory mitigating factors to apply. In discussing the "bare bones" mitigation case presented at trial by Parker, this Court stated, "Also important to Parker's claim of ineffective assistance by penalty phase counsel is the fact that on direct appeal this Court concluded that the evidence presented at the penalty phase was not enough to support the establishment of *any* nonstatutory mitigators." Parker, 3 So. 3d at 984 (emphasis in original). In this case Stewart has not identified a single mitigating factor that could

be found by a sentencer based on the mitigation presented in postconviction which was not already found and weighed based on the testimony from the resentencing.

Stewart now claims that the postconviction testimony of Pastor Van Horne, Sandra Hibberd, Wandra Vetra, Terri Lynn Stewart, and Nicole Stewart provided new mitigation that was not cumulative to the resentencing but corroborated and reinforced the evidence of abuse by Bruce Scarpo, as well as offering information never previously disclosed about Stewart's other biological relatives. However, most of these witnesses never observed Stewart in the Scarpo home; while Van Horne suggested that the family had some unusual practices, he testified that he had no indication that Stewart or the other children in the home were being abused (V10/T33). The other witnesses simply related mental health and substance abuse problems by Stewart's natural mother and father, who were not involved in Stewart's life after his toddler years. There was no attempt to connect any of this evidence to Stewart's life and circumstances and no indication as to any affect this family history may have had on the commission of the crime.

Of course, Stewart's argument on this issue does not specifically identify any new mitigating evidence relating to Stewart's background for consideration. Despite the fact that the court below denied this claim finding that the

postconviction nonstatutory mitigation was cumulative to the evidence presented at the resentencing, Stewart avoids any real analysis of the relative nature of the evidence by indicating that the postconviction evidence is fully described in the Statement of the Facts and that page limits foreclose any attempt to further summarize the testimony. Stewart merely submits that the testimony of Moore and Arnold "more than doubles in length" by the time of postconviction, inferring that trial counsel apparently should have simply continued to ask questions for the sake of asking questions. The court below determined that much of the "new" testimony was irrelevant (V10/132-38, 155-56, 162-64, 185, 195; V11/210, 212). Notably, at the conclusion of the evidentiary hearing below, counsel for Stewart chose to not even address this claim in his closing argument, candidly acknowledging that presentation of lay witnesses in postconviction was substantially cumulative to what had been presented at the 2001 resentencing (V16/T601-02).

Finally, Stewart fails to address the trial court's express finding that consideration of any additional mitigation offered in postconviction would not have changed the outcome of this case. This is a factual finding which, standing alone, defeats Stewart's claim. The postconviction judge entering this finding was the same judge that imposed the death penalty in 2001, and was clearly in the best position to determine whether any

"additional" mitigation offered in postconviction could have impacted the balance of aggravating and mitigating factors as considered at the resentencing. Given this finding, Stewart cannot demonstrate any possible prejudice, and the trial court's denial of relief on this claim must be affirmed.

ISSUE III

THE COURT BELOW PROPERLY DENIED STEWART'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO OBJECT TO THE CROSS EXAMINATION OF MARJORIE SAWYER.

Stewart's last issue challenges the trial court's denial of his claim that Bob Fraser provided ineffective assistance of counsel by failing to object to the prosecutor's cross examination of defense witness Marjorie Sawyer. This claim was also denied following an evidentiary hearing; so the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

Stewart asserts that the court below found his attorney performed deficiently by failing to object, and consequently this Court need only consider the question of possible prejudice. To the contrary, the order entered below does not make a finding as to the reasonableness of counsel's performance. The court concluded that because Mr. Fraser could not specifically recall his thought processes during Ms. Sawyer's testimony, "the Court will not find that his failure to object to the statement [that Stewart had said he might kill again] was a strategic decision" (V2/252). This does not equate to a finding that Mr. Fraser performed deficiently. There is, of course, a strong presumption that counsel did perform reasonably, and a record which merely fails to reveal a

strategic decision is insufficient to rebut this presumption. See Strickland; Chandler v. State, 848 So. 2d 1031, 1045-46 (Fla. 2003).

Fraser testified at the evidentiary hearing that Ms. Sawyer's testimony did not surprise him; Stewart had a temper when he was drinking, and he knew the State would bring that out (V14/T426). It would not be all that damaging, since it was consistent with the defense theme that Stewart was dysfunctional due to his PTSD (V14/T426-27). He was sure he heard the testimony, and even in hindsight did not believe it to be egregious but part of the mural of Stewart's life (V14/T438, 444). His policy is not to object unless testimony really costs something and hurts the defense (V14/T430-31). He testified that he did not object to Sawyer's comment that Stewart had said he might kill again because the jury already knew there were two murders, and he had a vague memory of talking to Sawyer and he thought this comment had been made after the Diaz murder, the first one (V14/T428). Given this context, it didn't bother him that the jury heard it, "That's a tough call that you make when you're sitting there trying one of these cases" (V14/T442). Fraser discussed weighing the how much a comment might hurt or help and stated that he always made a considered decision in weighing whether or not to object, but he had no specific recall of a particular weighing process at the moment that Sawyer's

comment was made in this case, so the court below declined to find that the failure to object "was a strategic decision" (V2/252; V14/T442-46). He still felt that, on balance, Sawyer did the defense more good than harm, for a lot of reasons (V14/T438).

There is no evidentiary support for any suggestion that every reasonable attorney would have objected to Sawyer's testimony. Although Stewart claims the comment that Stewart had indicated he might kill again was improper future dangerousness evidence, the comment was not offered as a nonstatutory aggravating factor but was offered to provide a context within which the jury could properly assess the mitigation Sawyer offered. Even assuming the comment could be construed as improper, as Mr. Fraser noted at the hearing, requesting a mistrial or curative instruction might only serve to highlight the comment. The court noted below that, because there was no indication when the comment was made and the jury was aware, in fact, that Stewart had "killed again," it was "not necessarily a comment on future dangerousness" (V2/253).

It is clear that the court below chose to address only the prejudice prong of Strickland rather than analyze the constitutional necessity of an objection to Sawyer's comment. The court concluded, "the Court finds Defendant has failed to show that but for counsel's allegedly deficient performance, the

outcome of the proceedings would have been different" (V2/254) (emphasis added). The court carefully analyzed why any prejudicial effect would be minimal, noting that the jury was aware that Stewart had killed more than once; the State did not argue uncharged crimes or future dangerousness as nonstatutory aggravation but in fact advised the jury that they could only consider the three aggravating factors which actually applied; and the court carefully instructed the jury on the limits of what could be considered in aggravation (V2/253-54). The court also cited cases where similar comments, in similar contexts, have been found to be harmless. See Allen v. State, 662 So. 2d 323 (Fla. 1995).

Notably, at the evidentiary hearing below, Stewart's attorney acknowledged that the comments he was challenging would not meet the standard required for fundamental error (V14/450). This Court has recognized that counsel cannot be found ineffective for failing to object to comments that do not amount to fundamental error. Chandler v. State, 848 So. 2d 1031, 1045-46 (Fla. 2003).

In response to this analysis, Stewart offers only that similar comments have been found to be egregious in other cases, and that the jury recommendation was only seven to five. He concludes that "it cannot be said that the proper exclusion of this evidence would not have changed the sentencing outcome,"

but that is not the appropriate standard for assessing prejudice. Stewart does not assert a reasonable probability that a life sentence would have been imposed, had Mr. Fraser objected to Sawyer's comment. He has failed to meet his burden of establishing any possible prejudice on these facts.

For these reasons, the trial court's rejection of this claim of ineffective assistance of counsel must be affirmed.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the Order denying postconviction relief entered below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Andrea M. Norgard, Esq., Norgard & Norgard, P.A. P. O. Box 811, Bartow, Florida, 33831, this 10th day of August, 2009.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

s//Carol M. Dittmar
CAROL M. DITTMAR
SENIOR ASSISTANT ATTORNEY GENERAL
Florida Bar No. 0503843
Concourse Center 4
3507 East Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
carol.dittmar@myfloridalegal.com

COUNSEL FOR APPELLEE