

IN THE SUPREME COURT OF FLORIDA

KENNETH ALLEN STEWART,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

Case No. SC08-2075

Lower Ct. No. 85-CF-5667

_____/

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of sixteen volumes. Volumes I through XI contain the documents filed with the clerk's office and will be referenced by the volume number and the designation "R". Volumes X-XVI contains the transcripts of the proceedings and will be referenced by the volume number and the designation "T". A hearing held on November 26, 2008 was omitted from the transcripts, but is contained in the attachments to the trial court's order and will be referenced by the volume number and the designation "R". In Volume II, the pagination by the clerk skips from p. 266 to 282.

STATEMENT OF THE CASE

Mr. Stewart was indicted by the grand jury for the Thirteenth Judicial Circuit, Hillsborough County, for the offense of first-degree murder on June 5, 1985. (I,R33-35) Mr. Stewart was charged with a violation of §782.04, Fla. Stat. (1985) in the death of Rueben Diaz on December 6, 1984. (I,R33-35)

A jury convicted Mr. Stewart of first degree murder and recommend death by vote of 12 to 0. (I,R41) The trial court imposed a sentence of death on October 3, 1986.

(I,R36-54) Mr. Stewart appealed to this Court, which reversed for a new penalty phase proceeding. See, Stewart v. State, 558 So.2d 416, 420 (Fla. 1990).

A second penalty phase was conducted in October 1990, which resulted in a unanimous jury recommendation of death.(I,R76) A death sentence was imposed on November 21, 1990. Mr. Stewart appealed his sentence to this Court, which affirmed. See, Stewart v. State, 620 So.2d 177 (Fla. 1993).

Post-conviction proceedings were begun, in which a claim was raised that defense counsel from the second penalty phase proceeding in 1990 was ineffective. Mr. Michael Jones, Stewart's attorney, admitted that he had used cocaine during Stewart's penalty phase proceeding and was ineffective. Jones ultimately resigned from the Florida Bar. The State stipulated to a third penalty phase proceeding.(I,R79)

Mr. Stewart was represented in the third penalty phase proceeding by Mr. Robert Fraser.(I,R79) The third penalty phase was held on March 20-21, 2001.(I,R79;Vol.VII and VIII) At the conclusion of the proceeding the jury recommended death by a vote of 7-5.. Mr. Stewart was

sentenced to death by the trial court on August 6, 2001.(I,R57-71) The trial court's written order reflects the following aggravating factors:

(1) The Defendant was previously convicted of a felony involving the use or threat of violence to the person. The trial court found that Mr. Stewart was convicted of Murder in Case No. 85-4825 and Attempted Second Degree Murder and Armed Robber in Case No. 85-4025. These convictions arose after Michelle Acosta and Mark Harris picked up Mr. Stewart who was hitchhiking. Mr. Stewart shot both Ms. Acosta and Mr. Harris. Mr. Harris later died of his injuries. Ms. Acosta's car was taken by Mr. Stewart and later set on fire.(I,R58)

(2) The capital felony was committed by a person previously convicted of a felon and under sentence of imprisonment. The court found that in June 1984 Mr. Stewart was in custody, but walked away and escaped.

(3) The capital felony was committed for pecuniary gain. The trial court found that Mr. Stewart and his co-defendant were out of money and decided to rob someone. They went into a bar and struck a conversation with Ruben Diaz. The three men left the bar together in Mr. Diaz's car. Several days later, Mr. Stewart and two other men

drove with Mr. Diaz to an isolated area, where Mr. Diaz was robbed of his money and some cocaine. Mr. Diaz was shot twice by Mr. Stewart.

The trial court's written order reflects the following mitigating findings of the court:

The trial court found that Mr. Stewart was not under extreme mental disturbance at the time of the shooting. Two defense experts testified that Mr. Stewart suffered from PTSD as a result of his traumatic childhood and was intoxicated at the time of the offense. The state expert testified that Mr. Stewart was not psychotic at the time of the offense, was not mentally ill, and did not suffer from any emotional disturbance. Dr. Merin testified that Mr. Stewart was not under extreme mental distress at the time of the murder. The trial court rejected a finding of extreme mental distress, but found that Mr. Stewart's mental health was impaired and his mental problems were further exacerbated by the use of alcohol and drugs. (I,R61) The trial court gave some weight to this factor.

The trial court rejected a finding that Mr. Stewart was unable to conform his conduct to the requirements of the law was substantially impaired. Two defense experts testified that Mr. Stewart's ability to conform his conduct

to the requirements of the law was substantially impaired as a result of his intense and cruel childhood, his alcohol abuse since age 12, and brushes with the law since a young teenager. Defense opinions were based, in part, on testing results from an IQ test and the MMPI.(I,R62) The State expert did not believe Mr. Stewart was unable to conform his conduct to the requirements of the law, but rather opined that Mr. Stewart had a character disorder and exhibited antisocial personality disorder.(I,R62) The trial court found that Mr. Stewart was not substantially impaired, but found that his capacity was impaired based on his background and gave some weight to this factor.(I,R63)

The trial court found and assigned some weight to the following factors: physical brutality against Mr. Stewart as a child, repeated physical brutality from family members and other witnesses by Mr. Stewart- Violence became a norm; Gross emotional stress between ages of three and twelve; inability to adapt to surroundings as evidenced by bed-wetting and other behaviors; and abuse by his aunt while in her care. (I,R63-64)

The trial court gave the following mitigating factors modest weight, finding they had been reasonable established but had been considered in the prior mitigating factors:

The total absence of a remotely acceptable role model, especially a father; the absence of a father during tender years; learning at age 12 that man he believed to be his father was his stepfather. (I,R65)

The trial court considered the following factors together and assigned them little additional weight beyond that previously given the aforementioned mitigation: abandonment by mother at age three; without a mother for some undefined period of time during his tender years; a crippling, life-long obsession with mother who abandoned him. (I,R65-66)

The trial court considered that Mr. Stewart had been inculcated to alcohol abuse as a child, was intoxicated at the time of the offense, and suffered long term alcohol abuse as evidence of impairment and gave these factors modest weight in addition to the previous consideration of these factors in other mitigation categories which had been given some weight. (I,R66)

The trial court gave little weight to low intelligence and 8th grade education, but found that these mitigators to be barely established. (I,R66)

Little weight was given to the mitigating factor of homelessness. (I,R66)

The trial court assigned modest weight to Mr. Stewart's remorse for the murder, his compassion for others while incarcerated, and spiritual development while incarcerated.(I,R67) The trial court also gave modest weight to additional incarceration totaling 130 years that Mr. Stewart had been sentenced to.(I,R67)

Little weight was given to a good prison record.

The trial court determined that the aggravating factors outweighed the mitigating circumstances and imposed a sentence of death.(I,R68) This Court affirmed the sentence in Stewart v. State, 872 So.2d 226 (Fla. 2nd DCA 2004).

The Office of Capital Collateral Regional Counsel [CCRC] filed a Motion to Vacate Judgment of Conviction and sentence on July 25, 2005, alleging twelve claims for relief.(I,R72-111) The State's Answer was filed on September 20, 2005.(I,R112-130) CCRC filed an Amended Motion to Vacate Judgment of Conviction on February 6, 2006, which deleted Claim XII, to which the State filed an Amended Answer on February 13, 2006.(I,R131-172; 173-177;187-203)

The trial court entered an order granting an evidentiary hearing on several claims alleged in the

amended motion following a hearing held on February 20, 2006.(I,R178-204) Of the eleven grounds for relief raised by CCRC, the trial court granted an evidentiary hearing on Claims I, II, III,IV,V,IX.(I,R181-184;187) The trial court denied an evidentiary hearing on Claims VI,VIII,X, and XI.(I,R181-183) The trial court reserved ruling on Claim VII until after the hearing.(I,R182;193) Claims I-III argued ineffective assistance of counsel in failing to obtain competent mental health assistance, adequately investigate and present mitigation evidence, and failing to conduct an adequate investigation into the background information obtained from Margaret Sawyer.(I,R179) Claim IV argued that Mr. Stewart's right to confrontation was violated during the cross-examination of Ms. Sawyer.(I,R179) Claim V argued that trial counsel was ineffective in failing to object to hearsay statements of Michelle Acosta and James Harville.(I,R179) Claim IX argued trial counsel was ineffective by conceding the three aggravating factors found by the trial court.(I,R179) Claim VII argued cumulative error.(I,R179)

The trial court issued a Final Order Denying Amended Motion To Vacate Judgment of Conviction And Sentence on

October 7, 2008.(II,R228-266; Attachments to Order II,R282-405, Vol.III,R406-606, Vol.IV,R607-807, Vol.5,R808-1008, Vol.VI,R1009-1170)

A timely Notice of Appeal was filed on October 20, 2008.(VI,R1171) An Amended Notice of Appeal, which corrected the case number was filed on October 31, 2008.(VI,R1177)

STATEMENT OF THE FACTS

The following summarizes the testimony presented at the hearings held in the lower court:

The first portion of the evidentiary hearing in this case was held on May 24, 2006, before circuit judge Barbara Fleisher.(Vol.X) An agreement was reached by the parties to conduct a deposition to perpetuate the testimony of defense witness Lillian Brown due to poor health.(X,T6)

Pastor Robert Vanhorne testified that he is currently the pastor at Trinity Lutheran Church in St. Petersburg, FL.(X,T20) Pastor Vanhorne was in St. Petersburg in 2001.(X,T27) He did not recall being contacted by attorney Robert Fraser.(X,T27) Pastor Vanhorne served as a pastor at Lutheran Church of the Redeemer in Charleston, South Carolina from 1970-1981, during which time Mr. Stewart and his family attended Redeemer.(X,T20) Mr. Stewart was in

his early teens.(X,T20) Pastor Vanhorne recalled that the Scarpo family was one of the strangest families he'd ever met, in particular Mr. Bruce Scarpo, Mr. Stewart's step father.(X,T20) Mr. Scarpo appeared to be a "wheeler-dealer" with a very different lifestyle from the middle-class families at the church.(X,T21,23) Pastor Vanhorne recalled having to accompany Mr. Scarpo several times to nightclubs or bars.(X,T21)

Pastor Vanhorne also visited the Scarpo home where Mr. Stewart was living.(X,T22) He recalled attending a post-baptismal event where he observed a very strange custom of pinning money to baby's clothing in an effort to show off.(X,T22) The event was a ruckus.(X,T23) The attendees were mostly friends of Bruce Scarpo, mainly police officers.(X,T23)

Pastor Vanhorne described the Scarpo home as not in good condition.(X,T23) The area it was located in was not very good.(X,T23) He was in the home two or three times.(X,T31) He did not see any abuse of the children.(X,T31)

Mr. Stewart was in the first communion class at Redeemer when he was in fifth or sixth grade.(X,T24) Pastor Vanhorne recalled that Mr. Stewart was frail, quiet,

withdrawn, and not very engaged.(X,T24) He was not a behavior problem. Mr. Stewart always seemed younger than his biological age.(X,T24)

Pastor Vanhorne would have appeared and testified for Mr. Stewart in 2001 if he had been asked to do so.(X,T28)

Sandra Hibbard testified that she lives in Florida and was at one time married to Mr. Stewart's biological father, Charles Stewart.(X,T35) Charles Stewart went by the nickname "Pete".(X,T35) Ms. Hibbard married Charles Stewart in 1967 when she was 16 and he was 29.(X,T35-36) The couple lived various places, but Stewart was not a stable family man.(X,T36) Stewart was a "five time loser"- meaning he had been to prison at least five times.(X,T43) He served time for breaking and entering and made most of his money by stealing.(X,T44)

Charles Stewart drank and would get violent when he drank.(X,T36) He was violent to Ms. Hibbard many times- he would blacken her eyes, cause bruises, and knocked her jaw out.(X,T37) Ms. Hibbard would leave him when he drank every few months, but would return.(X,T37) They had two children together, Charles and Terri.(X,T38) Charles never supported the children.(X,T43)

Ms. Hibbard did not know that Charles had a son,

Kenneth Stewart, until after they had been married for several months.(X,T36) She was told that Mr. Stewart was with his mother, Elsie, and Bruce Scarpo in South Carolina.(X,T36) Ms. Hibbard knew little about the marriage between Charles and Elsie.(X,T44) Charles told Ms. Hibbard that they had problems. Elsie drank, he would rob and buy her nice stuff, but she wouldn't care about the things and would ruin them.(X,T44). Ms. Hibbard assumed the relationship between Charles and Elsie was as violent as her relationship with Charles.(X,T45) Charles told Ms. Hibbard he was violent with Elsie because she would flirt a lot and he had a bad temper.(X,T46) Ms. Hibbard didn't know much about how Elsie treated her son- she had heard that one time Elsie burnt Mr. Stewart with a cigarette.(X,T46) Ms. Hibbard did not ever live with Mr. Stewart and did not see how he was treated by the Stewart family.(X,T47)

Ms. Hibbard learned that Mr. Stewart's mother died sometime in 1967.(X,T40) Ms. Hibbard knew that Charles met with Bruce Scarpo, but she didn't know what went on.(X,T40) Charles returned from South Carolina without Mr. Stewart.(X,T41)

Charles Stewart died in 1971, when Ms. Hibbard was

pregnant with her youngest child.(X,T41) She and Charles were divorced and she had remarried.(X,T41) Charles Stewart was killed on his 34th birthday by a man he had fought with over \$.25 on a pool table in a bar.(X,T42) There was an outstanding warrant for him at the time of his death.(X,T44)

Charles Stewart had four siblings, all of whom died violently- two sisters in a car accident, one brother was stabbed to death in a bar fight.(X,T38-39) The siblings all had drinking problems.(X,T39)

Ms. Hibbard knew Estelle Berryhill, Elsie's mother.(X,T42) Estelle had a severe drinking problem and would drink whatever she could get a hold of, including sterno.(X,T42)

Charles Stewart [the son, Mr. Stewart's half brother], according to Ms. Hibbard, was currently in prison.(X,T38) He was always in trouble with the law.(X,T38) Terri Stewart has also had a lot of trouble with the law.(X,T38) Both children had trouble with drugs and alcohol.(X,T38)

Terri Stewart is Mr. Stewart's half sister.(X,T51) Their father is Charles [Pete] Stewart.(X,T51) Terri was 2 or 3 when Charles Stewart died and has no memory of him.(X,T51) Terri was raised by her mother, Ms. Hibbard,

and her grandmother.(X,T52) Her mother used drugs and drank- Terri was emotionally and physically abused.(X,T52) Terri Stewart was left on her own.(X,T53) She skipped school and got arrested for the first time at age 13 or 14.(X,T53) Terri began to drink and use drugs between 11 and 13.(X,T54) Terri had little contact with her father's family- she knew there are a few cousins and she met her Aunt Lillie once or twice.(X,T55) Terri met Mr. Stewart through jail.(X,T55) They have visited and exchanged letters.(X,T55) She never met Bruce Scarpo.(X,T58)

Terri testified that she has four children, but does not have custody of them.(X,T55-56) The State took them away and the children live with her mother and brother.(X,T56) Terri can't "get it together" and has no where to turn because her family is as "strung out as much as [she] is." (X,T56) Terri has been abused by her boyfriends and has acted violently toward them.(X,T57) She has been through the criminal justice system five or six times.(X,T58) She did not believe she was ever contacted by Mr. Fraser, but had attended court for Mr. Stewart several times.(X,T61)

Wanda Vetra testified that she is Mr. Stewart's maternal aunt.(X,T62) Ms. Vetra is the child of Estelle

Berryhill and James Vetra and is Elsie Tate's half sister.(X,T63) Elsie's mother was Estelle Berryhill, but Ms. Vetra did not know who Elsie's father was.(X,T63) Ms. Vetra was ten when she met Elsie for the first time.(X,T63) Elsie was twelve years older.(X,T63) Estelle Berryhill is living, but was diagnosed with Alzheimer's about six years earlier.(X,T64) Ms. Vetra has an older brother Johnny.(X,T64)

Ms. Vetra and her brother were taken from Estelle by the State and placed in foster care due to Estelle's alcohol problem.(X,T64) Ms. Vetra was in foster care from age 2 through age 14.(X,T65) Estelle did not visit Ms. Vetra, but Elsie secretly met with Ms. Vetra five or six times at a park. Elsie had Mr. Stewart with her one time.(X,T66) Mr. Stewart was very young, between 2 and 4.(X,T66) Ms. Vetra described Elsie as beautiful. Elsie brought her candy, a purse, and would give her money.(X,T66) Ms. Vetra had been told that Elsie died by being shot and committed suicide.(X,T71) Ms. Vetra did not believe Elsie would have committed suicide.(X,T71)

Ms. Vetra was returned to her mother at age 14 instead of going to the Ocala Girl's Home.(X,T68) She remained with Estelle until age 16, then married Charles Keller.

(X,T68) She did not finish high school.(X,T68) Ms. Vetra divorced Keller after five years and later married Thomas Avery. (X,T69) She and Mr. Avery have been married 27 years.(X,T69)

Ms. Vetra spoke to Bruce Scarpo by telephone once.(X,T69) She called Scarpo to find out where Mr. Stewart was.(X,T70) Scarpo threatened her, telling her he could have her "knocked off".(X,T70) The conversation was scary.(X,T70) Ms. Vetra and her family were scared of Bruce Scarpo and remain scared even after his death.(X,T71) Mr. Stewart told Ms. Vetra that he was scared of Bruce Scarpo(X,T77)

Mr. Stewart came to live with Ms. Vetra when he was in his twenties.(X,T71) Mr. Stewart drank some, but was sweet.(X,T72) Mr. Avery was trying to find Mr. Stewart a job.(X,T72) Mr. Stewart also lived with Estelle for a period of time.(X,T72) Estelle's husband Oliver would falsely accuse Mr. Stewart of taking things.(X,T75)

Ms. Vetra talked to Mr. Stewart about Elsie and her death.(X,T73) He was very sad and would cry a lot about his mother being gone.(X,T73) Ms. Vetra knew that Mr. Stewart went to Elsie's grave.(X,T74) Her headstone contains her picture.(X,T74) Mr. Stewart believed that

Bruce Scarpo had something to do with the death of his mother and father.(X,T77) The rest of the family somewhat believes this as well.(X,T78)

Ms. Vetra was never contacted by Mr. Fraser.(X,T78)

Susan Smith Moore currently lives in South Carolina.(X,T80) She considers Mr. Stewart her brother, but they are not biologically related.(X,T80) They were raised in the same household by Joanne and Bruce Scarpo.(X,T81) Joanne Scarpo is Ms. Smith's mother.(X,T81) Joanne has been dead for twenty years.(X,T82)

Ms. Smith met Mr. Stewart and Bruce Scarpo in Charleston, South Carolina.(X,T82) They moved in to the house that she, Joanne, her brother Jay and sister Linda lived in.(X,T82) Joanne and Bruce eventually had two children together, Nicole and Angela.(X,T82) Life with Joanne had been peaceful, quiet, and structured.(X,T86) Life with Bruce Scarpo was chaos, troubled, and violent all the time.(X,T86)

At first Ms. Smith described the relationship between Scarpo and Mr. Stewart as "stern".(X,T83) Mr. Stewart was treated like a possession.(X,T84) Scarpo disciplined Mr. Stewart by spanking, intimidation, beating, sending him to his room, and depriving him of food.(X,T84) Over time,

Scarpo began to discipline Ms. Smith and her siblings in the same manner.(X,T84,109) The children lived in a constant state of fear, never knowing how or when Scarpo would explode. (X,T109) Ms. Smith often feared that Scarpo would kill her while he beat her.(X,T106) He would hit her so hard it would knock her across a room.(X,T106)

Ms. Smith was sexually abused by Scarpo from a young age.(X,T129) When she was young, he would take baths with her and touch and feel her in an inappropriate way.(X,T129) Around age 11 he began touching her and making her touch him to teach her how not to get pregnant or end up a prostitute.(X,T130)

Scarpo also beat Joanne.(X,T85) Ms. Smith recalled Scarpo severely beating Joanne because he thought she was having an affair. Ms. Smith was about 5 when Scarpo made her watch while he held a gun to Joanne's head and threatened to kill her for cheating.(X,T85) Scarpo frequently beat Joanne if someone paid attention to her, whether or not she did anything.(X,T107) Scarpo alienated the children from Joanne because he was very possessive.(X,T87) When angry, Scarpo could do anything.(X,T106) Ms. Smith was aware of two times that Joanne tried to leave.(X,T115) Ms. Smith remembered

chasing her mother as Joanne ran down the street.(X,T115)
They ran into a neighbor's house and hid in a closet.(X,T115) Mr. Scarpo tore the elderly woman's house apart and Ms. Smith could see he had a shotgun in his hand.(X,T115-116) On another occasion Joanne and some of the children went to Arizona for about a week to Joanne's relatives.(X,T117) Joanne returned after Scarpo "promised her the world".(X,T130)

Ms. Smith recalled a particularly brutal incident involving Joanne and a man named Jimmy Meighan.(X,T117) Scarpo thought Joanne and Jimmy were having an affair. He beat Joanne, then had her get Jimmy to the house. Ms. Smith witnessed the beating and believed that Jimmy was killed.(X,T117-118) The kids were made to pick Jimmy's teeth from the carpet.(X,T118) Although Ms. Smith saw Jimmy's wife at Joanne's funeral, she never saw Jimmy again after the beating.(X,T118) Joanne got away and stayed gone for five or six months.(X,T119) Joanne took her kids, but Mr. Stewart was left with Scarpo.(X,T119) The family suspected that Mr. Scarpo made other people "disappear" as well.(X,T163)

Ms. Smith feared Bruce Scarpo when he was alive and continues to fear him after his death.(X,T88) Scarpo was

invincible.(X,T161) People who knew what Scarpo was doing were to afraid of him to try to help.(X,T120) Scarpo had so many friends that were police officers that seeking legal help was of no use.(X,T121)

Scarpo ran a bookie operation and owned several bars.(X,T89) Ms. Smith remembered Scarpo taking both she and Mr. Stewart to the bars he owned.(X,T90) On in particular, the Sands, was a strip bar/restaurant.(X,T90) Ms. Smith recalled staying at the bar in afternoons and into the evenings.(X,T90) Staying at Scarpo's bars was just a way of life.(X,T90) The kids were also made to the clean the various bars on the weekends.(X,T91)

At as young as six years old, the kids would serve as home bartenders for Scarpo's parties.(X,T91) The kids had easy access to alcohol and began drinking as young as six.(X,T92)

Growing up Mr. Stewart had a friend named "Toughie" that was the child of one of Scarpo's associates.(X,T94) The boys got in a lot of trouble, first skipping school and smoking, later shoplifting.(X,T94) Several times Mr. Stewart ran away to Toughie's house to avoid being beaten, but Joanne would always retrieve him .(X,T158-159)

Ms. Smith testified she did badly in school, although

it was a relief to go.(X,T101) She was aware that Mr. Stewart had similar problems in school-poor grades, in trouble, falling asleep in class.(X,T101) Discipline for poor grades or school misconduct ranged from restriction to the bedroom to being beaten with a belt.(X,T102) Neither parent offered assistance with homework, but Scarpo did refuse to let Ms. Smith be retained in third grade.(X,T102-103)

Scarpo disciplined Jay and Mr. Stewart differently from the girls.(X,T103) Scarpo beat the boys "like men".(X,T103) The child was not allowed to cry.(X,T103) Fists and punches were used in addition to belts, but the child was not allowed to fight back.(X,T103) The boys suffered bruises, a broken nose, black eyes, and Mr. Stewart once lost consciousness from a beating when he was five or six.(X,T104) Scarpo threw Mr. Stewart across the room for failing to take out the trash and Mr. Stewart passed out.(X,T104) Scarpo put the trash can over Mr. Stewart's head and left him while the family finished dinner.(X,T104) No one was permitted to intervene- if that happened you knew you would be beaten as well.(X,T105) This principle applied to Joanne as well.(X,T105)

Scarpo would discipline the kids if the toilet wasn't

flushed.(X,T110) He would rub feces in Mr. Stewart's face and force him to eat it.(X,T110) Mr. Stewart wet his bed well into his teenage years.(X,T110) Scarpo disciplined him severely for this.(X,T11-112) Finally, at age 12, Joanne took Mr. Stewart to a doctor and got some medication to help him stop.(X,T111)

Mr. Stewart also had a speech impediment.(X,T124) It was not treated and Scarpo would make fun of him.(X,T124)

Ms. Smith believed that Mr. Stewart was overly focused on his mother's death.(X,T160) He always wished she had taken him with her.(X,T160) He had several pictures of her that he hid under his mattress that he looked at constantly.(X,T160) At first the children, including Mr. Stewart, believed that Scarpo was his father.(X,T166) Ms. Smith recalled that when they learned that Scarpo was not Mr. Stewart's biological father Mr. Stewart's world fell apart.(X,T167) After finding out the truth, Mr. Stewart didn't care anymore- he began using drugs and alcohol, running away, and getting into big trouble.(X,T168) Scarpo would brag that he paid Charles Stewart money for Mr. Stewart- that he "bought Kenny".(X,T166-167) Scarpo told Mr. Stewart his mother had not wanted him.(X,T166)

Nicole Scarpo testified that she is the biological

child of Bruce and Joanne Scarpo.(X,T183) She considers Mr. Stewart to be her brother.(X,T184) Mr. Stewart was in and out of her home when she was an infant and several times as a small child.(X,T184)

Ms. Scarpo testified that as a child she feared her father and felt he was very "stern".(X,T184) Things were his way or no way.(X,T184) There was little love in the family.(X,T185) Scarpo believed that the way to raise children was to make them fear you.(X,T192) Scarpo was also an alcoholic who began drinking alcohol with his coffee in the morning and drank all day.(X,T191)

Mr. Stewart would have witnessed the violence that Scarpo directed as Ms. Scarpo as a child.(X,T186) Mr. Stewart would stay in the home and violence occurred on a daily basis.(X,T186) As young as six or seven, Ms. Scarpo would be backhanded across the face, beaten both clothed and unclothed with a belt, thrown against the refrigerator, choked, spit on, deprived of food, and verbally abused by Scarpo.(X,T187) If you cried, you got a worse beating.(X,T187)

Ms. Scarpo recalled one occasion that Mr. Stewart returned to the house with a woman named Margie Sawyer.(X,T192) Ms. Scarpo and her niece discovered a naked

woman [Ms. Sawyer] in an old prison bus in the backyard.(X,T193) There was a lot of violence during that visit.(X,T194)

No one could protect the children from Scarpo.(X,T188) Ms. Scarpo has suffered clinical depression, began drinking at an early age, and had difficulties all her adult life as a result of her abusive childhood.(X,T189-190)

Ms. Linda Arnold testified that she is the older sister of Ms. Smith and the daughter of Joanne Scarpo.(X) Ms. Arnold recalled being with Mr. Stewart in one of Scarpo's bars.(XI,T205) Ms. Arnold got hit in the head with a beer bottle and passed out.(XI,T206) No one would take Ms. Arnold home.(XI,T206) Arnold hated being in the bars because of the atmosphere.(XI,T206) Scarpo and Joanne would often bring people home with them after the bars closed.(XI,T223) This often led to a lot more violence in the home in the middle of the night.(XI,T223)

It was not uncommon for the children, even as young as five, to be left alone at home at night while Scarpo and Joanne were at a bar.(XI,T225) Ms. Arnold remembered being robbed one night while the parents were gone.(XI,T227-228)

Ms. Arnold remembered that Mr. Stewart often had trouble in school.(XI,T213) Ms. Arnold tried to help him

with his homework until she moved out of the house when she turned 18.(XI,T213) Mr. Stewart had a great deal of trouble with reading.(XI,T214) He often got in trouble and was beaten for not passing.(XI,T214) Scarpo would call him stupid and tell him he was ashamed of him.(XI,T215)

Ms. Arnold could recall that Scarpo was physically abusive to Mr. Stewart from about age three.(XI,T218) She remembered an incident before Scarpo and Joanne married where Ms. Smith and Mr. Stewart, who were around three or four, colored on the walls of an apartment.(XI,T218) Scarpo beat Mr. Stewart.(XI,T218)

MS. Arnold reiterated that Scarpo was abusive to all the children.(XI,T220) They were punished with beatings and it was not unusual for a child to be thrown to floor or against an object.(XI,T220) Scarpo was more violent with the boys, especially with hitting and punching.(XI,T242) Mr. Stewart was punished more than the other children.(XI,T250) Scarpo became increasingly violent towards all the children and Joanne.(XI,T221-223) Ms. Arnold recalled watching through slats in a louvered door with Ms. Smith and Mr. Stewart as Joanne was beaten by Scarpo.(XI,T223) The kids would watch to make sure Joanne was still alive.(XI,T224)

Ms. Arnold testified that she was sexually abused by Scarpo.(XI,T230) The abuse began when she was about fifteen and was made to be his "driver".(XI,T230) Ms. Arnold would drive Scarpo around and at times he would fondle her and kiss her, telling her he did this so she would know how to "handle a date". (XI,T230) Mr. Stewart did not know of the sexual abuse until later.(XI,T233)

When Ms. Arnold was around sixteen, Scarpo served roughly a year in prison in Alabama.(XI,T234) The kids did not know he had been in prison until he was released.(XI,T234) While he was incarcerated, Scarpo believed that Joanne had an affair.(XI,T234) Scarpo made Joanne describe the sexual relationship in great detail to the children, then beat her severely.(XI,T235) Scarpo also beat up the man.(XI,T234)

Despite becoming a registered nurse, Ms. Arnold suffers from severe depression and takes numerous medications.(XI,T257-258)

Attorney Robert Fraser testified on February 26, 2007, that he represented Mr. Stewart in 2001.(XIV,T421-422) Mr. Fraser has been a practicing attorney for 30 years.(XIV,T420) He believed he had tried 29 first-degree murder trials, half of which may have involved the death

penalty.(XIV,T421)

As to Claim III, Mr. Fraser testified that Margie Sawyer was a girlfriend to Mr. Stewart.(XIV,T423) He believed that Ms. Sawyer knew more about Mr. Stewart just prior to the crime than any other person.(XIV,T423) Ms. Sawyer was 24 years older than Mr. Stewart.(XIV,T423) She worked at a bar until Mr. Stewart insisted she quit because he was very jealous and possessive of her.(XIV,T423) Mr. Stewart had trouble holding a job and they became homeless for almost a year.(XIV,T423,425) Ms. Sawyer also knew that Mr. Stewart often visited his mother's grave when drunk.(XVI,T425)

Ms. Sawyer told Mr. Fraser that Mr. Stewart was often intoxicated.(XIV,T423) Mr. Fraser thought her testimony was helpful for the jury to understand the picture of Mr. Stewart as a person who had been destroyed by his childhood and to understand Dr. Maher's diagnosis of PTSD.(XIV,T424)

Mr. Fraser did not recall Ms. Sawyer being intoxicated on the day she testified in Mr. Stewart's trial.(XIV,T424) Mr. Fraser acknowledged that Ms. Sawyer had testified in 2001 that Mr. Stewart was not a happy go lucky drunk, but would pick fights- that he had a temper when drunk did not surprise Mr. Fraser.(XIV,T426) This would be consistent

with the defense at trial.(XIV,T426)

Ms. Sawyer had testified on cross-examination in 2001 that Mr. Stewart beat and choked her several times when he was drunk.(XIV,T426) Mr. Fraser felt this evidence was consistent with the defense that Mr. Stewart was a dysfunctional human being.(XIV,T427) It was consistent with the theme that "It was Bruce Scarpo all over again."(XIV,T441)

Mr. Fraser acknowledged that he did not object to cross examination testimony from Ms. Sawyer that Mr. Stewart had several prior "B&E" crimes from the 1980's.(XIV,T427) His reason for not objecting was because once out, you can't bring it back.(XIV,T427) He didn't move for a mistrial because he didn't feel it was egregious enough to warrant a mistrial and the evidence fit with the defense.(XIV,T427,442) The jury already knew of the other crimes, including another murder that was more serious than two "B&E".(XIV,T427-429)

On cross examination Mr. Fraser acknowledged that the State is limited to statutory aggravators.(XIV,T435) Although some of Ms. Sawyer's testimony might be an impermissible aggravator that you would not want the jury to hear, it didn't make a difference in this

case.(XIV,T436) Despite his testimony in this hearing that the evidence from Ms. Sawyer supported mitigation, Mr. Fraser did not list those instances from Ms. Sawyer's testimony in the written memorandum he provided to the court for sentencing.(XIV,T437) A list of mitigation was outlined in the memorandum, but those items were excluded from that list.(XIV,T437)

Mr. Fraser also acknowledged that he did not object to a comment allegedly made by Mr. Stewart that he might kill again that occurred during the cross examination of Ms. Sawyer.(XIV,T437) Mr. Fraser acknowledged that was not a good thing for the jury to hear.(XIV,T437,443) Mr. Fraser thought the statement might be more consistent with what Mr. Stewart's life was like before the murders.(XIV,T438) Finally, even Mr. Fraser admitted that statement had no "help value" to this case.(XIV,T444) The comment was non-statutory aggravation, but Mr. Fraser didn't believe it was very serious and that Ms. Sawyer did more good than harm.(XIV,T438) Mr. Fraser acknowledged that testimony about future dangerousness is prejudicial and that it can create prejudice that would require a new trial.(XIV,T439) That time of testimony would be something a jury could look hard at. (XIV,T440) He could have objected to the cross or

done a motion in Limine to exclude the statement about killing again.(XIV,T439) Mr. Fraser did not seek to the exclude the testimony, object or move for mistrial, or seek a limiting instruction.(XIV,T440) Mr. Fraser testified he had very little recollection of this case.(XIV,T444)

Mr. Fraser, responding to Claim V, testified that he did not object to Michelle Acosta's testimony because he did not believe it was hearsay as it did not go to the truth of the matter.(XIV,T430) The second reason he did not object was due to his policy of only making an objection if "something hurt" and this did not hurt the case.(XIV,T431) Mr. Fraser did not object to the testimony related to James Harville because he did not consider the testimony to be hearsay.(XIV,T432) Mr. Harville testified in a narrative form as to what he experienced and Mr. Fraser did not believe he could tailor that testimony.(XIV,T432)

Mr. Fraser also addressed Claim IX.(XIV,T432) Mr. Fraser testified he did not challenge the aggravating factors because there was nothing to argue about.(XIV,T433) The court found the aggravators had been established.(XIV,T434)

On November 28, 2006, Dr. Hyman Eisenstein testified

that he is a clinical psychologist and a board certified neuropsychologist.(III,R560;562) Dr. Eisenstein obtained postdoctoral training at Yale in neuropsychology.(III,R562) Dr. Eisenstein maintains a clinical practice in addition to forensic work.(III,T564) Dr. Eisenstein has conducted neuropsychological exams on criminal defendants ranging from those with juvenile offenses to those charged with first-degree murder.(III,R566)

Dr. Eisenstein was provided with four volumes of background material in Mr. Stewart's case.(III,R567) He reviewed the prior reports of Dr. Gamache, Dr. Afield, and Dr. Mussenden.(III,R568) He reviewed several court opinions, records from South Carolina, medical records from Tampa General Hospital, and a life history compiled by CCRC.(III,R568) Dr. Eisenstein testified that consideration of a full life history in addition to testing and data is necessary to completing an accurate neuropsychological assessment.(III,R572)

Dr. Eisenstein reviewed a 1980 and 1986 report from Dr. Mussenden.(III,R570) The 1980 report contained some psychological testing and the 1986 report was for a competency evaluation. Dr. Eisenstein felt the 1980 report was quite deficient- for example Dr. Mussenden's report

fails to report that Mr. Stewart had to repeat kindergarten, first grade, and third grade and instead stated that Mr. Stewart attended Oakland Elementary for grades 1-5.(III,R571) Dr. Mussenden was deficient in his review of the relevant materials.(III,R571) Dr. Mussenden reviewed only the most simple material- for example he failed to attempt to discern the reasons for the academic failures and only assumed that Mr. Stewart quit school after sixth grade.(III,R571) Dr. Eisenstein disagreed with Dr. Mussenden's conclusion that Mr. Stewart had no severe mental disturbance based on an MMPI he conducted.(III,R573) Dr. Eisenstein had the raw data from Dr. Mussenden's MMPI and found that the MMPI was anything but normal.(III,R573) Mr. Stewart's MMPI showed significant clinical indications of significant disturbance and severe psychopathology, both of which were two standard deviations above the mean for psychotic scales.(III,R573) Mr. Stewart, in 1980, had a profile of 8-7-6, which translates as being high elevations on schizophrenia, mania, and paranoia.(III,R573) Dr. Mussenden failed to discuss the actual results of the MMPI in his report.(III,R573) Dr. Eisenstein could not determine how Dr. Mussenden could reconcile the MMPI test with the report conclusions.(III,R573) The data from the

MMPI was a "big red flag" that there was something serious going on in a seventeen year old.(III,R573) Dr. Eisenstein found that the 1986 MMPI was valid.(III,R574-575)

Dr. Eisenstein believed the 1980 MMPI showed a antisocial personality disorder, but it was not the primary diagnosis.(III,R576) Generally, clinicians look to the top two or three scores as the primary diagnosis.(III,R576) In Mr. Stewart's case, antisocial was scored fourth, behind schizophrenia or social alienation/withdrawal, mania, and paranoia.(III,R576-577) By age 17, Mr. Stewart was in significant need of psychological treatment.(III,R578)

Dr. Eisenstein also reviewed a sanity evaluation from Dr. Walter Afield dated August 11, 1986.(III,R578) Mr. Stewart was now 23 years old.(III,R579) In 1986 Dr. Afield believed that Mr. Stewart was almost psychotic.(III,R579) There was clearly something going on in 1986 that Dr. Afield was very concerned about.(III,R580) Dr. Gonzalez saw Mr. Stewart nine days after Dr. Afield and found him competent, rational, and did not see any problems with Mr. Stewart.(III,R581) There was no indication that Dr. Gonzalez reviewed any background materials prior to rendering his opinion.(III,R582) Dr. Gonzalez's conclusions were inconsistent with those of Dr. Mussenden

and Dr. Afield. (III, R581)

In Dr. Eisenstein's opinion, the examinations that are conducted for competency and sanity/insanity at time of offense are really limited to the impression at the time of the interview. (III, R581) These types of evaluations would not include neuropsychological testing or attempt to diagnose. (III, R581) None of these doctors reviewed testing and other data from South Carolina obtained when Mr. Stewart was 15-16 years of age. (III, R584)

Dr. Eisenstein also reviewed a report from Dr. Gamache. (III, R582) Dr. Gamache did not conduct a clinical interview with Mr. Stewart, he just reviewed other medical documentation. (III, R582) Dr. Eisenstein believed that Dr. Gamache, based on statements made in his report, did review the 1980 MMPI. (III, R583) Dr. Gamache seemed to concur in the other findings regarding antisocial personality, but neglected to mention Dr. Afield's finding of psychopathology. (III, R583)

Dr. Eisenstein noted that as early as 1978, when Mr. Stewart was in 10th grade, there were indications of significant problems. (III, R585) There were significant academic problems and below grade level learning despite an IQ of 101. (III, R585; 587; 593) Results from a Bender-Gestalt

test showed an absence of perceptual motor difficulties, not indicative of organic difficulties.(III,R585) By age fifteen, Mr. Stewart had difficulty seeing solutions to problems.(III,R590) Mr. Stewart could not seem to see any options but negative ones for his life and the school opined that he would likely end up incarcerated.(III,R590-91) At age sixteen, Mr. Stewart was described by a school psychologist as "small size 14, moderately anxious, and depressed."(III,R595) Mr. Stewart attempted to commit suicide at age sixteen.(III,R595) There was evidence of repetitive behavior.(III,R597) Mr. Stewart did not adjust well and needed constant supervision and structure in order to behave appropriately.(III,R598) Mr. Stewart was observed to have a "split personality", to have a quick temper, to lying, and having substance abuse problems.(III,R599) Dr. Eisenstein did not believe that Mr. Stewart had the ability to make the changes necessary to avoid this dire prediction.(III,R591)

Thirty years ago it was not uncommon to diagnose brain damage from the result of a single test, however that is not considered acceptable practice today.(III,R586;589) Numerous tests are now given in an effort to isolate what part of the brain is damaged and to ascertain the total

level of brain function.(III,R586) Dr. Eisenstein administers 50-60 tests prior to making a diagnosis.(III,R587) The early testing, while Mr. Stewart was still in South Carolina, did not indentify his problems.(III,R594) Dr. Eisenstein believed the observations about Mr. Stewart and his behavior was correct, but no effort was made to determine the reason for the behavior.(III,R597-598)

Dr. Eisenstein, in addition to reviewing older records, also interviewed various individuals.(III,R605) He spoke with Susan Moore, Linda Arnold, and Nicole Scarpo(III,R605) He reviewed an affidavit of Bruce Scarpo, who was deceased.(III,R605) He also interviewed Wanda Vetra and Rita Stewart, Mr. Stewart's third wife.(III,R605) The purpose of these interviews was to obtain background information, establish timelines, events, perceptions, and to attempt to verify events.(III,R605) The interviews were conducted separately in order to ensure reliability and to prevent a "group consensus".(IV,T610)

For example, Dr. Eisenstein learned from Linda Arnold that Mr. Stewart idolized Bruce Scarpo.(III,R606) Ms. Arnold confirmed that Mr. Stewart had a bed-wetting problem from age three on for which he was subject to severe

discipline by Scarpo.(IV,R607) Dr. Eisenstein confirmed that Scarpo's method of child rearing was strict discipline and punishment for misbehavior was physical beatings, emotional punishment, and isolation.(IV,R608) Ms. Arnold described Mr. Stewart as hyperactive, having had problems in school, and instances consistent with severe learning disability.(IV,R608) The treatment used to deal with Mr. Stewart's childhood problems was clearly inappropriate.(IV,R609) The punishments constituted child abuse.(IV,R610)

From Susan Moore Dr. Eisenstein received further confirmation about the extremely abuse discipline from Scarpo.(IV,R610) Moore believed that Mr. Stewart suffered the worst and received the worst because Scarpo considered him a possession.(IV,R610) Dr. Eisenstein found it of note that Moore and the other children did not realize their experiences were abnormal.(IV,R611) Mr. Stewart did not have a chance.(IV,R611)

Dr. Eisenstein found Wanda Vetra's interview striking in how she described the circumstances surrounding Mr. Stewart's birth and the conditions she and her siblings suffered.(IV,R613) Ms. Vetra is Mr. Stewart's aunt and the sister to his mother, Elsie Tate.(IV,T612) Dr. Eisenstein

noted that Elsie Tate was raised by various family members due to the severe alcoholism of her mother and father.(IV,R613) The father was largely absent, working on a ship most of the year.(IV,R613) Mr. Stewart was born when Elsie was quite young.(IV,R613) It was reported that he was born with "double pneumonia".(IV,R654) No hospital records exist.(IV,R654)

Mrs. Rita Stewart described Mr. Stewart as stressed out and that he goes on a "roll, like a cycle".(IV,R615) It is difficult for him to process information.(IV,R615) He has problems with impulse control, is frigid, loyal, and a straight shooter.(IV,R615) Mrs. Stewart knew from speaking to family members that Elsie Tate worked as a barmaid and had an alcohol problem.(IV,R615) In all likelihood Elsie drank while pregnant with Mr. Stewart.(IV,R615)

Dr. Eisenstein noted that Elsie's drinking was corroborated in the affidavit from Scarpo.(IV,R616) He described her drinking as constant, drinking that never subsided.(IV,R616) Scarpo believed Elsie began drinking as early as age eight.(IV,R672) Elsie had mental problems that were exacerbated by her drinking.(IV,R672) Scarpo also claimed that Elsie was a drug user "who tried just about

everything".(IV,R672) Scarpo believed she attempted suicide two dozen times in the last three years he knew her.(IV,R672) There is a strong indication that Mr. Stewart was born with Fetal Alcohol Syndrome.(IV,R654)

Dr. Eisenstein also conducted a clinical interview with Mr. Stewart.(IV,R646) Dr. Eisenstein noted that Mr. Stewart rambles- there is no bottom line.(IV,R650) He has difficulty staying focused and staying with a single story line.(IV,R650) This is significant as it demonstrates an inability to make decisions, to look at a situation and make the best decision or choose the solution that makes the most sense.(IV,R651) Mr. Stewart is easily overloaded and his verbal responses lack clarity.(IV,R652) The rambling is clearly a sign of learning disabilities.(IV,R652)

Dr. Eisenstein also noted that there was emotional crying when Mr. Stewart talked about his biological mother and his reaction to learning that Scarpo was not his father.(IV,R653) It appeared that the trauma of 35 years ago was as if he was currently living it.(IV,R653) This issue is not resolved today.(IV,R653)

Mr. Stewart told him that he had been knocked unconscious by Scarpo on at least four or five occasions,

the duration between one and five minutes.(IV,R646) These incidents mostly occurred when he was between 10 and 12 years old.(IV,R646) The synergistic effect of the head injuries must be considered.(IV,R656) The cumulative effect of the head injuries would help explain some of the behaviorally observations.(IV,R656)

Mr. Stewart outlined his problems in school.(IV,R646) He did not graduate from high school, has not obtained a GED, and never attended much past sixth grade.(IV,R646) He failed first and third grades.(IV,R647) Mr. Stewart stated he was hyperactive and the clown of the class.(IV,R647) He recalled one doctor prescribing a cup of coffee as treatment for the hyperactivity.(IV,R647) Dr. Eisenstein recalled old literature that had outlined a theory that coffee was a curative measure for hyperactivity years ago since it was a stimulant.(IV,R647) Current medications, such as Ritalin, are stimulants that produce a rebound effect similar to coffee.(IV,R647) Coffee didn't work and Mr. Stewart was unfocused, daydreamed, and was easily distracted.(IV,R648)

Mr. Stewart was regularly beaten by Scarpo from age seven or eight.(IV,R648) Scarpo was an alcoholic and physical abuse correlated to his alcohol consumption.

(IV,R648) Mr. Stewart had his eyes blackened, bruises, and other injuries that were covered up as "sports injuries".(IV,R649) Mr. Stewart feared that Scarpo would kill him and believed he had "superhuman" strength.(IV,R649) Mr. Stewart did not believe he could tell anyone or that anyone could help him.(IV,R650) The feeling of isolation and helplessness is very common, according to Dr. Eisenstein, in abused children.(IV,R650)

Mr. Stewart stated he started drinking alcohol in bars and at school bus stops.(IV,R649) One of the worst beatings he got was for drinking.(IV,R649)

Dr. Eisenstein noted Mr. Stewart had a third suicide attempt in 1985 at age 23, where he overdosed on anti-depressant medication and was taken to Tampa General.(III,R601) A second attempt had occurred a few months earlier.(III,R602)

Unlike the previous psychologists, Dr. Eisenstein administered a complete battery of neuropsychological tests to Mr. Stewart.(IV,R617) Previous testing had consisted of only brief intellectual testing for academic purposes, some bits and pieces of personality testing measures, and some psychiatric interviews.(IV,R618)

It would not be expected that a person would perform

poorly on each neuropsychological test.(IV,R618) Poor performance on every test would only occur if the individual had dementia or was faking very badly.(IV,R619) A person will perform poorly on tests that correlate to which area of the brain is damaged.(IV,R619)

The brain is divided into two lobes- the right and left hemispheres.(IV,R619) Each lobe is further divided into different sections, such as the frontal lobes, the temporal lobe around the ears, the parietal lobe, and occipital lobe.(IV,R620) The lobes are not only different in terms of left and right, but differ in functionality.(IV,R620) A band of fibers called the corpus callosum connects the two hemispheres much like a bridge.(IV,R638) Different areas of the brain can be impaired while other areas are not.(IV,R620) Testing alone cannot identify the source of the brain injury or damage.(IV,R656)

Dr. Eisenstein administered Weschler Adult Intelligence Scale [WAIS] to Mr. Stewart and found that he scored 98, average intelligence.(IV,R622) IQ is not indicative of brain impairment.(VI,R622) The test was a valid measure.(IV,R624) In various other tests Mr. Stewart ranged from the upper 95% to the lowest 5%, depending on

the area of the brain being tested.(IV,R625-626) With an IQ of 100 or that range, a person with no brain damage would be expected to perform with parity on neuropsychological tests if the both sides of the brain are operating at full capacity.(IV,R628) That did not occur with Mr. Stewart.(IV,R628)

As the neuropsychological testing progressed, Dr. Eisenstein found Mr. Stewart had a very well developed right side of the brain in terms of artistic abilities, but the left side of the brain had deficiencies and evidence of brain damage.(IV,R627) The behavioral issues that Mr. Stewart exhibited were consistent with left hemisphere damage.(IV,R627) For example, there were statistically significant deviations between verbal comprehension and perceptual organization- verbal skills are left brain and perceptual organization is a right brain function.(IV,R628) Left brain impairment would be indicative of Mr. Stewart's poor school performance since education focuses on left brain skills.(IV,R629)

Dr. Eisenstein noted that Mr. Stewart had difficult processing multiple bits of information at a time.(IV,R630) He performed better on memory tests if presented only one item at a time and had significant time to respond. (IV,R

630) With multiple tasks, the brain would shut down and he could not complete processing tasks.(IV,R630) Multitasking requires the use of the left brain.(IV,R630) The left hemisphere would shut down and prevent the right hemisphere from doing its job.(IV,R631)

Dr. Eisenstein administered a battery of tests called the Halstead-Reitan battery, the hallmark of neuropsychological testing.(VI,R632) The measures of these tests really corroborate and are indicative of where brain impairment lies, where the area of dysfunction and disability is located.(VI,R632) Trail A tests require right brain functioning, Trail B utilizes left brain functioning.(IV,R633) Mr. Stewart performed poorly on Trail B tests and measures.(IV,R633-634) These tests showed impairment in the left hemisphere, both frontal and temporal lobes.(IV,R634) Left hemispheric impairment was consistent throughout all the testing.(IV,R634)

Mr. Stewart had 51 errors on the Halstead Category test, a score indicative of brain impairment in the frontal lobe.(IV,R625) The test measures the ability to identify solutions to problems and processing new information.(IV,R635)

The strongest indicator of left hemisphere impairment

was exhibited by Mr. Stewart's performance on the Tactile Performance Test.(IV,R636) The test measures the ability to use sensory input when blindfolded.(IV,R637) The test is performed with each hand separately, then hands together.(IV,R637) For most individuals, the brain is crossed- the left brain controls the right hand and vice versa.(IV,R637) Mr. Stewart was slow using the right hand- taking over eight minutes to complete a six minute test.(IV,R639) He completed the task with his left hand [right brain controlled] in three minutes, faster than expected.(IV,R639) The test took over five minutes when both hands were used.(IV,R639) Completion with both hands should take two minutes.(IV,R639) The tests results confirmed left hemisphere damage that also blocks the right hemisphere from functioning properly.(IV,R640-641)

Dr. Eisenstein examined various works of art done by Mr. Stewart that were admitted as defense exhibits 1A-K.(IV,R645) The right brain would be the area utilized for artwork.(IV,R645)

In summary, the neuropsychological testing confirmed that Mr. Stewart has left hemisphere brain damage and the problem is compounded by communication issues between the two hemispheres.(IV,R641) Dr. Eisenstein believed that the

brain damage existed from a very young age.(IV,R657) The behavioral ramifications of this type of brain damage are the inability to process information in an organized, coherent manner.(IV,R668) This leads to problems in thinking behavior, how one responds to situations, decision making, poor impulse control, irritability, inflexible thinking, constriction of affect in unproductive and damaging ways such as alcohol abuse, and the lack of intention.(IV,R668)g Alcohol consumption in someone with Mr. Stewart's brain damage would be "lethal", even in small quantities.(IV,R671) Alcohol would raise the level of disinhibition to the level of so little thinking that the instant offenses could occur.(IV,R671) Mr. Stewart's behaviors were not planned or willful- no one would want this type of disability.(IV,R657)

Dr. Eisenstein believed that Mr. Stewart has two Axis I diagnosis: Attention Deficit/Hyperactivity Disorder under section 314.01 of the DSM IV and Axis I Dementia Due to Head Trauma under section 294.11 of the DSM IV.(IV,R659) Dr. Eisenstein believed there were also some Axis II personality disorders, but he deferred on those.(IV,R659-661) The psychological ramifications of Attention Deficit/Hyperactivity Disorder gives one few options. You

are not mentally organized, you are a social misfit, you don't have friends, the world shuts down on you.(IV,R661) You become fixed at a certain point and cannot develop emotionally.(IV,R662) It is horribly restricting.(IV,R662) In Mr. Stewart these issues are developmental, from early childhood and are still persistent in terms of impairment.(IV,R664) Brain damage would exacerbate this disorder.(IV,R669)

Dementia Due to Head Trauma is characterized by direct pathophysiological consequences of head trauma, the degree of which depends on the type of cognitive impairment or behavioral disturbances.(IV,R665) Symptoms include facial, attention problems, irritability, anxiety, depression, affective lability, apathy, increased aggression, and other personality changes.(IV,R665) It can occur concurrently with alcohol or substance intoxication.(IV,R665) In the DSM IV, head trauma is lumped in with other severe neurological disorders.(IV,R666) The DSM IV does not contain a separate category per se for brain damage.(IV,R666) The dementia element is not that associated with Alzheimer's disease, but rather a impairment in the executive functioning performance of the brain-planning, organizing, sequencing,

and abstracting.(IV,R667) It is impairment in the frontal lobe functioning.(IV,R667) Dr. Eisenstein recommended a PET scan be done.(IV,R676)

The State conducted the cross-examination of Dr. Eisenstein on February 26, 2007.(XIII) Dr. Eisenstein testified that he believes the death penalty is warranted in rare situations.(XIII,T306) He was originally hired by CCRC.(XIII,T306)

Dr. Eisenstein restated the family members he interviewed.(XIII,T308) He believed that the background and home life of Mr. Stewart was extremely abusive, primarily by Bruce Scarpo.(XIII,T308)

Dr. Eisenstein reviewed the reports and/or testimony of the other doctors who evaluated Mr. Stewart with the exception of Dr. Sultan, Dr. Merin, and Dr. Maher from the other death penalty case where Mr. Stewart is the defendant.(XIII,T309-310)

Dr. Eisenstein had not seen a report from Dr. Eric Weiner.(XIII,T311) After a brief review of Dr. Weiner's report in court, Dr. Eisenstein believed that Dr. Weiner had done some neuropsychological tests on Mr. Stewart.(XIII,T313) It appeared that Dr. Weiner concluded there was no brain damage or dysfunction.(XIII,T313) Dr.

Eisenstein did not dispute the results from the tests that Dr. Weiner performed, but he did dispute Dr. Weiner's conclusion because Dr. Weiner did not perform a complete neuropsychological exam.(XIII,T313) Dr. Weiner did not do a full memory exam, he used only four subtests.(XIII,T344) Dr. Weiner did not administer the tests designed to detect brain impairment.(XIII,T345) A diagnosis of brain damage cannot be made with an incomplete neuropsychological exam.(XIII,T344) A partial neuropsychological exam would not be accepted in scientific community as adequate for diagnosis.(XIII,T350-351) Dr. Weiner's report would not alter Dr. Eisenstein's opinion which was based on complete testing.(XIII,T314) Mr. Stewart would be perfectly capable of functioning normal in certain areas and still having significant brain damage.(XIII,T346)

Dr. Eisenstein did not review Dr. Merin's testimony from the original penalty phase that diagnosed Mr. Stewart with anti-social personality disorder.(XIII,T318)

Dr. Eisenstein did not quarrel with Dr. Sultan's conclusion that Mr. Stewart suffered from extreme depression.(XIII,T319) He agreed it was possible that Mr. Stewart had borderline personality disorder.(XIII,T319) He agreed that Mr. Stewart was intoxicated at the time of the

offense.(XIII,T319) Dr. Eisenstein agreed with Dr. Sultan that both statutory mental health mitigators were established in this case.(XIII,T320) Dr. Eisenstein noted that Dr. Sultan is a psychologist, but is not a neuropsychologist and does not have the necessary training to conduct a neuropsychological exam.(XIII,T434)

Dr. Eisenstein did not review Dr. Maher's testimony from the original penalty phase.(XIII,T320) He would not disagree with Dr. Maher's conclusion that Mr. Stewart might suffer from PTSD.(XIII,T320) Post-traumatic stress disorder is consistent with poor decision making and impulsive behavior.(XIII,T322) A person with ADHD can have PTSD.(XIII,T348) Dr. Eisenstein did not believe that PTSD was the driving force behind the offense.(XIII,T335) The driving force behind what happened in this case is the brain damage.(XIII,T349) The diagnosis of ADHD, PTSD, alcohol abuse, and anything else are behavior manifestations caused by the brain damage.(XIII,T349) He agreed that Mr. Stewart was under the influence of alcohol at the time of the offense.(XIII,T321) Dr. Eisenstein noted that Dr. Maher is a psychiatrist and is not qualified to conduct a neuropsychological exam.(XIII,T343) Similarly, Dr. Afield and Dr. Gonzalez are also

psychiatrists and would not be able to diagnose brain damage without a complete neuropsychological exam. (XIII, T343)

Dr. Michael Maher testified for the State that he is a licensed psychiatrist. (XIII, T359) He can do some limited psychological testing, but certainly cannot do a neuropsychological exam. (XIII, T384) At the request of defense counsel Robert Fraser, Dr. Maher evaluated Mr. Stewart, spending only about two hours with him. (XIII, T363; 386) He did not do any psychological testing at all of Mr. Stewart. (XIII, T386) None of the previous psychologists had done a complete neuropsychological exam. (XIII, T388) Dr. Maher believed that Dr. Weiner did some neuropsychological testing and believed that it was adequate. (XIII, T388) Dr. Maher admitted that neuropsychologists would probably disagree as to what amount of testing would be deemed adequate. (XIII, T389) Dr. Maher admitted that he is not an expert in neuropsychological testing and does not know that would be considered acceptable in that field. (XIII, T393)

Dr. Maher reviewed police reports, historical background records, some limited school history, and some

legal documents like depositions.(XIII,T363) He reviewed some statements from family members and interviewed Mr. Stewart.(XIII,T363)

Dr. Maher's original opinion is unchanged.(XIII,T364) Dr. Maher believed that Mr. Stewart was competent to proceed to trial and was not insane at the time of the offense.(XIII,T365) He believed that Mr. Stewart suffered from PTSD as a result of his abusive childhood and that was a mitigating factor.(XIII,T366) Dr. Maher recommended some testing be done by a psychologist, but did not recommend any specific tests.(XIII,T366) Dr. Maher agreed that alcohol ingestion would make the behavior aspects of organic brain damage worse.(XIII,T394)

Dr. Maher has made the diagnosis of organic brain damage based on interviews with other clients and family in the past.(XIII,T367) He would also need a limited neurological examination.(XIII,T368) Dr. Maher did not feel that neuropsychological testing was necessary for Mr. Stewart because there were not sufficient indicators in his history to justify that testing.(XIII,T369)

Dr. Maher did not agree with Dr. Eisenstein about the existence of a bright line regarding how much testing is sufficient.(XIII,T370) Dr. Maher reviewed Dr. Eisenstein's

raw data and believed that it presented a more detailed picture of Mr. Stewart's strengths and weaknesses and his brain functions, cognitive functions, and personality in a testing environment.(XIII,T371) Dr. Maher did agree that the testing supported a finding of ADHD or brain damage, but the diagnosis wasn't proper.(XIII,T372;378;381)

Dr. Maher opined that PTSD and ADHD overlapped and it would not be appropriate to diagnose both.(XIII,T379) Dr. Maher thought a diagnosis of PTSD was "more compelling".(XIII,T380) ADHD is more common.(XIII,T381) A diagnosis of ADHD could "dilute" a diagnosis of PTSD.(XIII,T381) Dr. Maher would admit that a PET scan would be important and would provide graphic evidence for a jury to consider.(XIII,T394) Dr. Maher agreed that the existence of organic brain damage, ADHD, PTSD, a history of depression, a history of severe physical abuse and emotional abuse, and alcohol would, in combination, certainly result in someone committing a capital crime.(XIII,T394)

Dr. Maher admitted he was not familiar with some of the tests Dr. Eisenstein administered, such as the Tactile Performance Test.(XIII,T373) Dr. Maher is not, in any way, an expert in neuropsychological testing.(XIII,T393)

Dr. Eisenstein reiterated that he had deferred on the Axis II diagnosis in this case.(XIII,T336) Antisocial personality disorder would be an Axis II diagnosis.(XIII,T336) Dr. Eisenstein deferred on this diagnosis because it ranked fourth on the MMPI.(XIII,T338)

Dr. Frank Wood testified at a continuation of the proceedings on September 7, 2008.(XV,T470) Dr. Wood is a neuropsychologist who just recently retired as professor emeritus from Wake Forest.(XV,T470-474,505) Dr. Wood's CV was admitted into evidence.(XV,T471) Dr. Wood believed he had testified on a forensic level in 50-60 cases involving brain imaging.(XV,T475) Dr. Wood has primarily been consulted as a defense expert, but in about half of the cases he evaluates he finds no abnormalities.(XV,T505) A PET scan can tell you whether a person's brain is abnormal and where, it alone cannot give a narrow range of the behavioral possibilities but can determine the behavioral significance of the areas of the brain that are affected.(XV,T506-507)

In this case Dr. Wood went to FSP and administered the behavioral activation procedures that accompany a PET scan using a portable truck scanner.(XV,T476-477) Dr. Wood also obtained a CT scan to observe structural images of Mr.

Stewart's brain.(XV,T477) The PET scan measures the activity of the brain, both in location and intensity.(XV,T477) An MRI was done at a different time.(XV,T478) Dr. Wood intentionally did not receive any information about Mr. Stewart prior to the test in order to ensure as pure and independent finding as possible.(XV,T509) Dr. Wood did not review the findings of any other doctor, including Dr. Eisenstein, prior to performing the test and interpreting the results or prior to testifying.(XV,T509)

Dr. Wood administered a computerized assessment tool, the Continuanace Performance Activation Task.(XV,T478) In this test a radioactive glucose solution is injected into the subject, a standard activation procedure to get subjects' brains engaged in a way understood and utilized in clinical research.(XV,T499) Dr. Wood uses a database he has acquired consisting of 107 normal PET scans in order to estimate the range of variation that may be observed during testing.(XV,T479) Dr. Wood believes this data is a benchmark for normal scans against which other scans can appropriately be compared as there are not that many databases.(XV,T479) Others have asked to utilize this database.(XV,T500) The database is made available as a

collegial courtesy and as required by the federal government.(XV,T500) Some researchers use their own database.(XV,T501)

Dr. Wood's research results and his database have been published and accepted in the scientific community.(XV,T501) They have never been objected to or challenged.(XV,T501) There are others who have not heard of Dr. Wood's body of work and are not in a position to either accept or reject it.(XV,T501) The research uses sound techniques and utilizes state-of-the-art technology to answer specific questions about the brain.(XV,T503) Dr. Wood receives federal grants to conduct his research based on the review and reports of his peers.(XV,T502) To some degree, his research is pioneering.(XV,T503) It is peer reviewed.(XV,T502) Dr. Wood's database would not be used by a radiologist searching for disease.(XV,T502) The testing process that Dr. Wood utilizes differs from a nuclear radiologist in a more standard PET scan.(XV,T511) His tests are more sensitive than those performed without an activation task.(XV,T511) Dr. Wood's tests must have the subject remain awake.(XV,T511) Dr. Wood believed that Mr. Stewart's abnormalities would be discernible in a regular PET scan.(XV,T513)

A computer technician runs a computer which converts the scans into a three dimensional brain image.(XV,T480) Dr. Wood observed the image from Mr. Stewart's scan and found it to be standard with state-of-the art technology.(XV,T480)

Dr. Wood looked at the MRI and CT scan as well, and observed that Mr. Stewart has an enlarged left lateral ventricle compared to the right lateral ventricle.(XV,T480) Normally, the ventricles are symmetrical, but Mr. Stewart's are not.(XV,T480) Dr. Wood also noted that the left hemisphere of Mr. Stewart's brain is shorter than the right.(XV,T480) This is exactly the opposite of what is found in a normal brain.(XV,T480)

The PET scan is a scan of brain activity that requires the consumption of sugar across the whole expanse of the brain.(XV,T481) It is a map of the areas of the brain and to the degree to which they are activated by a particular task.(XV,T481) Scans are compared to each other to determine whether or not an abnormality is present.(XV,T481) Six images of Mr. Stewart's PET scan were admitted into evidence.(XV,T482;491 [Defense Exhibit 3A-D]) These images are from certain sections of the upper middle part of the brain.(XV,T483) Exhibit 3C showed a dark area

I the middle of the brain which included the lateral ventricles, a thinner area on the outside of the brain in the gray matter cerebral cortex where computing functions are performed. Mr. Stewart's brain was abnormal because a normal brain would have activation all around the rim and no activation in the middle. Mr. Stewart has larger area of no activation, smaller and smaller area of intense activation, and a gap in activation in the left side.(XV,T493) Image 3D showed a much thinner left side of the brain in the cerebral cortex with enlarged ventricles.(XV,T494) Image 3E showed two gaps in the left hemisphere toward the bottom of the brain.(XV,T494) In scan 3A, the top most scan, the asymmetry between the hemispheres begins to normalize.(XV,T495)

The left hemisphere of the brain specializes in verbal processing and understanding how things go in a sequence.(XV,T488) The left hemisphere contains the higher level cognitive processing areas and is the place where visual, auditory, and tactile sensory information is collected and interpreted.(XV,T488) The highest intellectual areas of the brain are on the left side.(XV,T489) The left hemisphere is the area of the brain that lets us have "good sense".(XV,T489) If the left

hemisphere doesn't function properly, behavior will not make good sense.(XV,T489) In contrast, the right hemisphere of the brain controls more simultaneous processes.(XV,T488)

It was Dr. Wood's opinion that the abnormalities to Mr. Stewart's brain were chronic and not of recent origin.(XV,T487) Dr. Wood believed the abnormalities had probably developed *in utero*.(XV,T487) Dr. Wood's findings would corroborate a finding by a neuropsychologist of impairment in higher functions, particularly integrative functions.(XV,T490)

The State called Dr. Larry Wilf, a nuclear medicine physician.(XV,T518) Dr. Wilf works for ICON [Integrated Community Oncology Network], which is a group of oncological physicians in Jacksonville, FL.(XV,T519) He is a clinician, not a researcher.(XV,T533) It is his job to diagnose.(XV,T533) Dr. Wilf does not do forensic evaluations.(XV,T533) This was the first time Dr. Wilf testified in court.(XV,T527)

Dr. Wilf reviewed the PET scan from Mr. Stewart that was taken on May 9, 2007 and interpreted that scan as normal.(XV,T519,522) Dr. Wilf testified that the fluids in the brain were normal.(XV,T534) The cortical sulci patterns

were normal.(XV,T535) Mr. Stewart did not have dementia, Alzheimer's, or a brain tumor.(XV,T535) The only time Dr. Wilf would assess a brain scan qualitatively would be to determine dementia.(XV,T535) Dr. Wilf was completely unfamiliar with assessing a brain for neuro cognitive issues.(XV,T535) Dr. Wilf agreed that Dr. Wood's testimony about the potentiality for cognitive impairment in Mr. Stewart based on the PET scan was accurate, something that Dr. Wilf was unfamiliar with assessing.(XV,T536) Dr. Wilf would recommend that someone other than himself conduct that type of assessment, as he stated in this report.(XV,T537) Dr. Wilf has never spent time with or consulted with a neuropsychologist.(XV,T537) He has never worked with a neuropsychologist to identify some type of brain abnormality.(XV,T537) Dr. Wilf's only knowledge about neuropsychology came from observing this trial.(XV,T537) Dr. Wilf learned what he knows about this type of testing from Dr. Wood and some limited reading material written by Dr. Wood that was given to him by the State.(XV,T538) Dr. Wilf has never published in this area like Dr. Wood. (XV,T538) Dr. Wilf has never sat on peer review committees in this area like Dr. Wood.(XV,T538) Dr. Wilf does not read or keep abreast of research in the area

of Dr. Wood's expertise.(XV,T541) He has never read the numerous books and journal articles published by Dr. Wood.(XV,T541) Dr. Wilf admitted that he was not in a position to critique Dr. Wood or his conclusions.(XV,T539) Dr. Wilf's job is to look for masses or tumors in a brain, not to asses neuro cognitive functioning.(XV,T542) Ultimately, the trial court found Dr. Wilf's testimony to be unpersuasive since he was unfamiliar with the neurocognitive and emotional/anger issues addressed in this case.(II,R245)

Dr. Wood returned to the stand.(XV,T544) Dr. Wood testified that he studies scans from the point of view of whether anything can be determined about the abnormalities that can be associated with abnormalities of behavior.(XV,T544) This has been a area of "fervent" investigation for 20 or 30 years.(XV,T544) It is a narrow and detailed field of specialty study.(XV,T544)

Dr. Wood performs a different type of PET scan that the low stimulus test used by Dr. Wilf for two reasons.(XV,T545) First, he interprets the scan from what he already knows based on the previous research and his database.(XV,T545) Second, Dr. Wood must make a quantitative analysis and measure this scan against a

normal scan, again not something Dr. Wilf does. (XV, T545)

SUMMARY OF THE ARGUMENT

ISSUE I: The trial court erred in finding that trial counsel was not ineffective in failing to present evidence that Mr. Stewart has organic brain damage. Subsequent complete neuropsychological testing demonstrated the presence of organic brain damage in the left hemisphere, a finding confirmed by the administration of both a PET and CT scan. Clear evidence of organic brain damage contradicted the prior testimony of defense mental health experts Maher and Sultan. The error is prejudicial because the existence of organic brain damage coupled with the testimony from Dr. Eisenstein and Dr. Wood about the behavioral and psychological effects of that type of damage in conjunction with other specific mental health and behavioral factors present in Mr. Stewart strengthens the statutory mental health mitigators and undercuts the State's prior arguments regarding the basis and strength of these mitigators. The nature of this mitigation is such that had it been considered in the prior proceedings, the result would likely be different.

ISSUE II: The trial court erred in finding that the mitigation evidence presented at the evidentiary hearing

was cumulative to mitigation evidence previously presented. The evidence presented in this proceeding was not duplicative or repetitious. The mitigation evidence presented in this proceeding rebutted the State's previous arguments about the veracity and quality of the abusive environment suffered during the Scarpo years and presented new mitigation evidence about the environment, prenatal conditions affecting Mr. Stewart, and congenital mental health difficulties present in Mr. Stewart's biological parents and biological stepsiblings that had not been presented in earlier proceedings. The nature of this evidence is such that had it been considered, it is likely that the sentencing result would have been different.

ISSUE III: The trial court's finding that Mr. Stewart was not prejudiced by trial counsel's failure to object to the cross-examination of Marjorie Sawyer was not a strategic decision where the testimony about future dangerousness [i.e., that Mr. Stewart could kill again] and prior uncharged crimes was evidence of impermissible aggravation. There is a reasonable probability that the proper exclusion of that highly inflammatory testimony would have altered the jury recommendation and casts doubt on the fairness of the penalty phase proceedings.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING THAT TRAIL COUNSEL'S FAILURE TO DISCOVER AND PRESENT EVIDENCE OF ORGANIC BRAIN DAMAGE WAS NOT INEFFECTIVE AND ERRED IN RULING THAT THE CONCLUSIVE EVIDENCE OF ORGANIC BRAIN DAMAGE WOULD NOT HAVE YIELDED A DIFFERENT SENTENCING OUTCOME

In this issue Mr. Stewart asserts that trial counsel was ineffective in failing to obtain a complete neuropsychological examination and PET scan which, had it been done, would have established that Mr. Stewart has organic brain damage in the left hemisphere of his brain. Further, the nature of the organic brain damage directly affected Mr. Stewart's behavior at the time of the crime and the mitigation, both statutory and non-statutory in his case.

The standard for review falls under the purview of Strickland v. Washington, 466 U.S. 668 (1984), which established a two-prong test for determining whether or not counsel provided legally effective assistance of counsel. Under Strickland a defendant must identify specific acts or omissions of counsel that are "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. The defendant must then establish prejudice by showing that there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Prejudice in the context of penalty phase errors is shown where, absent the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. See, Gaskin v. State, 737 So.2d 509, 516 n.14 (Fla. 1999). In applying the Strickland standard to this case, this Court must answer three questions: (1) Did the evidence presented at the evidentiary hearing establish that Mr. Stewart has organic brain damage that existed at the time of the earlier proceedings?; (2) should trial counsel, through reliance on the mental health experts he utilized, have sought the testing that ultimately was done that establishes organic brain damage or was the diagnosis of the previous experts wrong, thus denying counsel and Mr. Stewart competent mental health assistance?; and (3) does absolute evidence of organic brain damage coupled with evidence as to the effects of that damage on Mr. Stewart and the offense impair confidence in the outcome of the proceedings or shift the balance between the aggravating

and mitigating circumstances? Mr. Stewart submits that an affirmative answer to each of these questions is established and the trial court's denial of relief was error.

The first question, whether or not it was conclusively established that Mr. Stewart has organic brain damage that was present at the time of the offense and during the subsequent prosecution, is undeniably answered in the affirmative. The testimony presented at the evidentiary hearing on this issue was established by Dr. Frank Wood. Dr. Wood performed a PET scan utilizing methods accepted in the scientific community for use in a forensic capacity. Dr. Wood's unchallenged and unrebutted testimony was that Mr. Stewart suffers from organic brain damage which is chronic and developmental in origin-present *in utero*. While the State attempted to rebut Dr. Wood's testimony, the trial court held that the rebuttal testimony of Dr. Wilf was not persuasive, especially considering that Dr. Wilf admitted that he was not familiar with and had never administered or interpreted a PET scan in the manner required for this proceeding. Dr. Wood testified that damage to this area of the brain impairs the ability of the brain to make decisions that make good sense and allows

behavior to happen that does not appropriately meet the circumstances one is presented with. The left brain is critical for intellectual and cognitive functioning. Dr. Eisenstein, who opined without benefit of the PET scan that Mr. Stewart had organic brain damage to the left hemisphere, reached his conclusions after administering a full battery of neuropsychological testing. Dr. Eisenstein was the first mental health professional to complete a full battery of testing- the previous psychologists who diagnosed Mr. Stewart including Dr. Maher, Dr. Sultan, and Dr. Weiner reached their conclusion without the necessary benefit of a full testing assessment. Dr. Eisentein testified extensively as summarized previously in the Statement of the Facts about the effect of organic brain damage in the left hemisphere and how that damage would have impacted Mr. Stewart at the time of the offense. Dr. Eisenstein also testified how the existence of brain damage would establish both statutory mental health mitigators and provide other non-statutory mitigation. Contrary to any assertion in the sentencing order that the existence of brain damage in this case was only "possible", the uncontroverted evidence based upon complete testing and brain imaging is that Mr. Stewart has organic brain damage

that significantly impairs his ability to function and affected his ability to conform his conduct to the requirements of the law. Having conclusively established the presence of brain damage since or prior to birth, the next question is whether or not it was reasonable for trial counsel to have utterly failed to have a complete neuropsychological battery of tests performed which would have disclosed the unrefuted evidence of organic brain damage and whether the mental health experts met a reasonable degree of competency in testing and diagnosing Mr. Stewart.

In this case trial counsel utilized two experts to testify that had been secured by CCRC- Dr. Sultan and Dr. Maher, neither of whom was a neuropsychologist and neither of whom performed any neuropsychological testing on Mr. Stewart. Since no testing was done, it is no surprise that Sultan and Maher did not find organic brain damage. Sultan admitted this was not her area of expertise. Maher simultaneously defended his original opinion and diagnosis that had been rejected by the trial court in 2001 while arguing that neuropsychological testimony was not necessary, that a full battery of neuropsychological tests are never necessary to determine whether brain damage

exists, that Dr. Eisenstein's testing and diagnosis of organic brain damage was not only not necessary, but was wrong, and that he [Maher] was not qualified to administer neuropsychological testing. The State did not recall Dr. Maher to defend his conclusions after the PET scan was performed that conclusively established organic brain damage.

The State also presented evidence that trial counsel had asked Dr. Irving Weiner to examine Mr. Stewart in 2001 for organic brain damage. A letter dated March 21, 2001 from Weiner to trial counsel was admitted by the State. Dr. Weiner advised trial counsel that he administered seven tests, one of which measured IQ, one was an achievement test, a memory test, and a verbal fluency test, and screening test reliant on drawing, the Bender-Gestalt. The only neuropsychological test done was a "Stroop Neuropsychological Test".(VI,R1149) Dr. Weiner noted that Mr. Stewart was made to wear handcuffs during the testing, which impeded his performance, but was disregarded by Dr. Weiner. Dr. Eisenstein insisted that Mr. Stewart perform the 50 or more tests that he administered without handcuffs.

Dr. Weiner did not find any evidence of brain damage

based on the minimal testing he did. Dr. Weiner opined that Mr. Stewart's IQ was 100, that he had average memory functioning, believed it was acceptable to and did ignore identified language deficits.(VI,R1150-1151)

Dr. Eisenstein's neuropsychological exam consisted of the administration of between 50 and 60 tests.(III,T586) A full battery of tests is necessary because different tests measure different brain functions. Strong performance on one test does not rule out a deficiency in another area of the brain.(III,R585-587;IV,R618)) By way of explanation, Dr. Eisenstein noted that Mr. Stewart's IQ score of 101 was completely inconsistent with his academic performance- a red flag for brain damage/neurological issues.(III,R585-595) Both Dr. Eisenstein and Weiner scored Mr. Stewart's IQ similarly- 98 and 100.(IV,R622;VI,R1150) Dr. Eisenstein found Mr. Stewart to fall into the gifted range on visual/spatial areas, again consistent with the visual/special testing performed by Dr. Weiner- visual/special abilities are governed by the right side of the brain and Mr. Stewart has damage on the left side of the brain.(IV,R625;VI,R1151) Dr. Eisenstein found a very well-developed right brain and very deficient left brain. Dr. Weiner performed only right brain testing and found no

brain damage. Dr. Weiner's report does not identify any testing done that tested left brain functions.(VI,R1149-1152) The State did not call Dr. Wiener to challenge Dr. Eisenstein's testing or findings, nor did Dr. Wiener defend his diagnosis in light of the PET scan results. The examinations of Sultan, Maher, and Weiner did not meet the level of competency required in the field of neuropsychology and neuropsychological testing, thus they failed to provide competent mental health services to Mr. Stewart and trial counsel

The Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida Constitution require that a criminal defendant receive the benefit of competent mental health assistance during his penalty phase as established by Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). A qualified mental health expert is consistent with the adversarial nature of the fact-finding process. Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir.1990). Implicit in the acknowledgement of the need for a competent mental health expert is the recognition that the mental health expert must make the correct diagnosis utilizing the appropriate type and number of screening tools as accepted

within the appropriate scientific community in order to reach the correct diagnosis. The mental health expert must make the correct diagnosis in order to competently assist defense counsel in the preparation and presentation of mitigating evidence. Correct diagnosis through competent and correct testing by the mental health professional must be a prerequisite to a determination of whether or not the mental health expert performed within the mandated constitutional boundaries required in capital cases.

This Court has addressed the use of PET scans and post-conviction claims in several recent cases. However, none of these cases presents the issue presented in this case- clear evidence that an incorrect diagnosis on the question of brain damage was made by the earlier mental health expert and that incorrect diagnosis is now rebutted by conclusive and irrefutable evidence of brain damage. Mr. Stewart's case is distinguishable from cases that this Court has recently addressed which have found no error in the failure of trial counsel to obtain a PET scan as a result of the failure of mental health professionals to direct that neuropsychological testing be performed or in failing to obtain a PET scan to present evidence of brain damage when the existence of brain damage was not

conclusively established in the post-conviction setting.

This Court has found that trial counsel is entitled to rely upon the evaluations conducted by qualified mental health experts, even when those prior evaluations were not shown to be as complete as other experts may desire. There is, however, a difference between an incomplete exam that yields the same diagnosis and an incomplete exam that leads to an absolutely wrong diagnosis as happened with Mr. Stewart. The cases where defense counsel relied upon an incomplete evaluation are distinguishable from this case because in this case the incomplete evaluation led to a completely wrong diagnosis and false testimony to the jury that Mr. Stewart did not have brain damage. For example, in Reese v. State, 34 Fla. L. Weekly S296 (Fla. March 29, 2009), trial counsel had Reese examined by Dr. Harvey Krop prior to trial. Dr. Krop testified extensively at penalty phase about Reese's biography and testified that Reese's mental state was seriously impaired at the time of the crime. No neuropsychological testing was requested by trial counsel prior to penalty phase and Krop did not perform or recommend any. During post-conviction proceedings, Dr. Krop testified that he should have done neuropsychological testing at the time of trial. Krop

testified in post-conviction that since the penalty phase he did do neuropsychological testing on Reese and the results indicated that Reese might have frontal lobe impairment. Krop could not conclusively say that Reese had frontal lobe impairment and the opinion of this Court does not indicate that brain damage was confirmed by a PET scan or other brain imaging. Krop testified in post-conviction that the existence of possible frontal lobe impairment would not change his opinion regarding the existence of serious emotional disturbance. Not only was Krop's diagnosis not confirmed by a PET scan, the State presented evidence from Dr. Tannahill Glen that the neuropsychological testing did not indicate Reese had frontal lobe impairment and another State expert testified that the MRI of Reese was normal. Mr. Stewart's case is distinguishable on two critical points from Reese—Mr. Stewart's brain damage is proven through both neurological testing and a PET scan, it is not just possible damage as was testified to by the defense experts in Reese. Second, the State in Reese presented competent evidence to rebut the possible brain damage through expert testimony and confirmatory a MRI. The State did not rebut the presence of significant brain damage in this case. The

trial court found the State's expert called in rebuttal to be "unpersuasive" and did not utilize Dr. Wilf's opinion. Further, the State did not recall either Dr. Maher or call Dr. Weiner to support their clearly erroneous determinations in light of the PET scan.

This Court found that Reese was not prejudiced because extensive testimony had been presented at the penalty phase about Reese's psychological profile and the factors affecting his mental and emotional state. That did not happen in this case. The testimony presented in Mr. Stewart's 2001 penalty phase pales in comparison to the testimony presented at the evidentiary hearing, both in quality, quantity, and content. Unlike Reese, Mr. Stewart's presentation of the confirmed existence of organic brain damage to the left hemisphere of his brain, the impact that damage had on his mental and psychological capabilities, and how that brain damage interacted with other factors present at the time of the murder such as alcohol consumption is sufficient to undermine confidence in the outcome of the proceedings. A comparison of the testimony at penalty phase with the evidentiary hearing testimony clearly demonstrates that neither Dr. Sultan or

Dr. Maher testified extensively about Mr. Stewart's background and psychological profile to the extent that Dr. Eisenstein was able to do.

Similar to Reese, this Court found that no error in the presentation of mental health mitigation occurred in Sexton v. State, 997 So.2d 1073 (Fla. 2008) where defense counsel focused on a PET scan that showed brain dysfunction.[Sexton and Mr. Stewart were represented by the same trial attorney] In post-conviction Sexton presented the testimony of a different neurologist who did not dispute the findings of the penalty phase PET scan that showed limbic system deficits, but felt that the penalty phase experts, the same Dr. Irving Weiner and Dr. Frank Wood, should have focused their testimony to emphasize a different effect of limbic brain damage. In acknowledging that Sexton's trial attorney knew brain damage was usually a very persuasive mitigator, this Court found no error in the manner in which the evidence of brain damage was presented. The bottom line was that the trial attorney recognized the importance of brain damage as a mitigator, followed through with sufficient neuropsychological testing to warrant a PET scan, obtained a PET scan that confirmed brain damage, and presented the evidence of brain damage to

the jury. Clearly doctors make mistakes- Dr. Weiner happened to use the correct tests to diagnose right hemisphere brain damage in Mr. Sexton and failed to utilize the correct tests to diagnose left hemisphere brain damage in Mr. Stewart. Mr. Sexton's jury at least got to hear that he had brain damage, whereas Mr. Stewart was denied that opportunity.

In Darling v. State, 966 So.2d 366 (Fla. 2007), trial counsel did not order a neuropsychological exam after the defense mental health expert did not suggest one. During post-conviction proceedings evidence was presented of possible organic brain damage based only on neurological testing, but there was no evidence of confirmatory organic brain damage from a PET scan or MRI. The State presented evidence that the defendant's behaviors could be the result of child abuse and not brain damage. For the same reasons that Reese and Sexton differ from this case, so does Darling- the first diagnosis that found no brain damage was completely wrong and the correct diagnosis of brain damage is unrebutted.

Likewise, this case differs substantially from Hitchcock v. State, 991 So.2d 337 (Fla. 2008), where the testimony from the evidentiary hearing showed that a post-

conviction neuropsychological exam indicated the presence of frontal brain damage, but the results of any imaging or opinion as to the extent of any impairment at the time of the crime was not been presented. Neuropsychological testing had not been recommended by Dr. Toomer in 1996 during an evaluation of the defendant due to Hitchcock's performance on the Bender-Gestalt. Hitchcock's score on the Bender-Gestalt test that did not indicate further testing was needed.

Coincidentally, Dr. Eisenstein pointed out in his testimony that Mr. Stewart performed adequately on the Bender-Gestalt given to him by Dr. Weiner because it addresses the right side of the brain related to drawing and Mr. Stewart does not have damage in that area. Dr. Eisenstein testified in this case that he did not believe that adequate performance on the Bender-Gestalt was sufficient to forgo additional neuropsychological testing. Coincidentally, Dr. Eisenstein's opinion about the Bender-Gestalt as a screening tool is shared by the state's expert in Hitchcock, Dr. Harry McClaren. The State presented evidence from Dr. McClaren at the post-conviction hearing in Hitchcock that the Bender-Gestalt is a very rough screening tool that screens for evidence of organicity or

brain damage and Hitchcock's scores on the Bender-Gestalt did not indicate significant reasons to pursue further testing. However, Dr. McClaren noted that in Hitchcock's case there was a significant spread between verbal and performance scores on the WAIS-III that had been administered in 1996. This spread would have indicated a need for further neuropsychological testing, despite the good Bender-Gestalt score, and that need should have been communicated to defense counsel.

Coincidentally, the WAIS-III testing performed by Weiner in this case showed a similar point spread between verbal and performance scores that the State expert in Hitchcock felt would be an indicator that further neuropsychological testing might be needed because brain dysfunction could be the cause of such a spread. If trial counsel in this case had used state expert Dr. Harry McClaren, a recommendation for neuropsychological testing would have been made based on the results of Mr. Stewart's WAIS-III. In this case Dr. Weiner apparently missed the indicators what would signal a need for additional testing not only according to Dr. Eisenstein, but also according to the published summary of testimony from Dr. McClaren in Hitchcock.

Dr. McClaren, despite believing that neuropsychological testing should have been done on Hitchcock in 1996, noted that neuropsychological testing done in 1984 and 1988 did not indicate any abnormalities. At most the most current neuropsychological testing done in the current post-conviction proceedings showed only some possibility of some degree of organicity and some possibility that the possible brain damage may have contributed to the defendant's violent nature. Mr. Stewart proved far more the some possibility of organicity that was established in Hitchcock- Mr. Stewart proved through brain imaging that he has organic brain damage and proved through the testimony of Dr. Wood and Dr. Eisenstein the extent to which that damage existed at the time of the crime and the extent such damage would have on Stewart. Because there is no question that Dr. Weiner made an incorrect diagnosis based on substandard testing criteria, Mr. Stewart did not receive effective assistance of his mental health expert and trial counsel was unable to render effective assistance of counsel. The answer to the second question is yes, trial counsel was ineffective due the ineffective performance of the mental health experts who failed to correctly recommend neuropsychological testing and brain

imaging that would ultimately demonstrate that Mr. Stewart has organic brain damage that affected him at the time of the crime.

The final question that this Court must consider is the prejudice that resulted from the errors outlined above. The question is whether there is a reasonable probability that the balance between mitigation and aggravation would have been different or has the confidence in the 2001 jury recommendation of 7-5 been undermined? Would the evaluation of the statutory mental health mitigators and the inclusion of the existence of organic brain damage as a non-statutory mitigator have altered the balance of mitigation and aggravation for sentencing and proportionality review? The answer to all is yes.

The jury recommendation was based on the evidence heard in March 2001. The jury was told by Dr. Maher and Dr. Sultan that Mr. Stewart did not have brain damage. (VI, R1026-1044) The jury was not told that Mr. Stewart's brain cannot function properly. The jury was told the basis for Mr. Stewart's difficulties was the emotional damage he suffered due to childhood abuse and alcohol/drug abuse. (VI, R1038; 1080-1083) Dr. Maher, in his 18 total pages of testimony told the jury he reached his

conclusions after a one hour evaluation with Mr. Stewart and a second twenty minute interview the day before he testified, and the review of documents provided by defense counsel.(VI,R1034;1042) Dr. Sultan, in her 14 pages of testimony related to Mr. Stewart, testified that she was asked by defense counsel to identify the factors that existed in his life at the time of the offense that might have contributed to his 1984 behaviors.(VI,R1076) Dr. Sultan told the jury she spent twenty hours with Mr. Stewart, reviewed a lot of records and did some psychological testing- an IQ test and the MMPI.(VI,R1076) Dr. Sultan did no neuropsychological testing and her testimony regarding her background, training and experience did not establish her to be a neuropsychologist.(VI,R1071-1075)

The State argued to the jury in 2001 that the only mitigation was alcohol and child abuse.(VI,R1120) The State suggested that Mr. Stewart's abusive childhood should be discounted because the testimony of the two stepsisters was not credible and made up only to help Mr. Stewart.(VI,R1120-1123) The State argued that State expert Dr. Merin's testimony accurately described Stewart's mental health.(VI,R11126) This, however, has proved to be

incorrect.

"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). The 2001 penalty phase jury did not receive accurate information about the true nature of Mr. Stewart's mental disabilities and the fact that he has been brain damaged since birth. Seeing is believing. In such a close vote, it cannot be said with assurance that the jury vote would not have been different if the jury knew of the Mr. Stewart's true condition and had seen the PET scan images.

In the 2001 sentencing order the trial court held that the evidence did not establish that Mr. Stewart was under the influence of extreme mental or emotional disturbance at the time of the murder. Instead the trial court found impaired mental health exacerbated by the use of alcohol and drugs and gave this non-statutory mitigator some weight. (I,R61) The trial court was also not reasonably convinced that Mr. Stewart's ability to conform his conduct to the requirements of law was substantially impaired. (I,R63) The trial court combined some background

factors related to abuse and gave some weight to impairment due to abuse.(I,R63) A key component of the trial court's rationale for rejecting the statutory mitigators and the degree of weight assigned to the reduced factors was the belief that Mr. Stewart acted with clear decision-making ability referred to in the sentencing order as "coherent, relevant, and goal directed" and that he suffered only a personality disorder with no attendant brain damage.(I,R61-63;66) The testimony of Dr. Eisenstein and Dr. Wood directly contradicts the belief that Mr. Stewart had the ability to act in a coherent, relevant goal directed manner. The testimony at the post-conviction hearings was that left hemisphere brain damage, when combined with alcohol would result in a lethal combination of factors that would negate the ability for Mr. Stewart to act in a coherent, relevant and goal-directed manner.

The presentation of evidence in the post-conviction proceedings below undercuts the trial court's original sentencing rationale as to the balance of mitigation and aggravation and casts significant doubt on the confidence that can be placed in the bare majority jury vote. There is a reasonable probability that had the jury had the benefit of the testimony of Dr. Wood, the images of Mr.

Stewart's PET scan, and the testimony of a mental health expert that had administered a full battery of neuropsychological tests such as Dr. Eisenstein and who was able to testify about the impact the brain damage had on both statutory and non-statutory mitigation, the recommendation would have been different. Just a single juror would have been necessary for a life sentence.

The evidence presented by Dr. Wood and Dr. Eisenstein was not simply additional evidence to what had been presented previously by Dr. Sultan and Dr. Maher at penalty phase. A picture is worth a thousand words- the PET scan pictures provide clear proof that Mr. Stewart has brain damage and that the result of that damage significantly affected Mr. Stewart's capacity to conform his conduct to the requirements of the law. The testimony from the evidentiary hearing shows the great escalation the effect the brain damage would have on Mr. Stewart's emotional reactions and the level of emotional disturbance he was under in 1984. Dr. Maher's belief that Mr. Stewart is not brain damaged cannot withstand the documentary evidence of the PET scan- he is simply wrong. Dr. Maher may have disagreed with Dr. Eisenstein, but there is little room for disagreement with the images from the PET scan- they are

worth a thousand words and those uncontradicted images do not support Dr. Maher's opinion. The evidence presented at the evidentiary hearing completely undermined the State's closing argument against mitigation to the 2001 jury- that Mr. Stewart might have had a bad childhood and drank too much, neither of which diminished his ability to consciously choose his path and completely control his behavior. The testimony of Dr. Eisenstein and Dr. Wood undermines any confidence that may be placed on the testimony of Dr. Merin as presented by State during penalty phase. The undisputed evidence of organic brain damage through the PET scan was not cumulative and not merely an additional factor to be considered. The proof of the existence of brain damage leads to a completely different picture of who Mr. Stewart is and what his limitations are. While the trial judge may discount the opinions of Dr. Wood and Dr. Eisenstein, these two experts presented uncontroverted evidence of neuropsychological organic brain damage. This qualifies as mitigation. Mr. Stewart is entitled to a new penalty phase where the correct presentation of neuropsychological evidence is available to the jury. Parker v. State, 3 So.3d 974 (Fla. 2009).

ISSUE II

THE TRIAL COURT ERRED IN DENYING MR. STEWART'S
CLAIM THAT COUNSEL WAS INEFFECTIVE IN FAILING
TO INVESTIGATE AND PRESENT ALL AVAILABLE
MITIGATION

The trial court denied relief on Mr. Stewart's claim that trial counsel failed to adequately investigate and present mitigation evidence by finding that the testimony presented at the evidentiary hearing 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 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 he grief over and obsession with his biological mother." (II, R250) The trial court's order fails to address numerous other mitigation witnesses that testified at the evidentiary hearing whose testimony was not cumulative to the prior penalty phase and fails to recognize the importance of a well-developed penalty phase in contrast to the bare bones presentation of evidence from previous witnesses Linda Arnold and Susan Moore in 2001.

As in Issue I, the standard of review applicable to this claim is found in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which requires the defendant to show deficient performance by counsel and to demonstrate that the fairness and reliability of the outcome is undermined. Both prongs of Strickland present mixed questions of law and fact, so this Court employs a plenary standard of review, deferring to the trial court's factual findings that are supported by substantial competent evidence and reviewing the trial court's legal conclusions de novo. Sochor v. State, 883 So.2d 766, 771-71 (Fla. 2004) After an evidentiary hearing, deference is given to the factual findings of the trial court as long as they are supported by competent substantial evidence. McLin v. State, 827 So.2d 948, 954 n.4 (Fla. 2002). In this issue, the factual findings of the trial court are sparse at best, and, as demonstrated below, are not supported by substantial competent evidence. Thus, the trial court's denial of relief should be reversed by this Court and a new penalty phase ordered.

In the 2001 penalty phase, in addition to the mental health testimony from Dr. Sultan and Dr. Maher, which was addressed in Issue I, trial counsel presented the testimony

of four witnesses: Lillian Brown [paternal aunt], Susan Moore [stepsister], Linda Arnold [stepsister], and Marjorie Sawyer[girlfriend].

Ms. Brown testified she knew a little bit about Mr. Stewart's biological mother, Elsie Tate, and his biological father, Charles Stewart.(VIII,T1357) She testified Elsie was a stripper and Charles worked construction. Charles had problems because he "robbed".(VIII,T1357) Ms. Brown testified Mr. Stewart was cared for at one point by her sister Dorothy, who was very abusive.(VIII,T1358) Ms. Brown described Mr. Stewart as a very emotional baby that cried a lot, so Dorothy returned him to Elsie.(VIII,T1358) Elsie gave him to Scarpo.(VIII,T1358) Ms. Brown saw Mr. Stewart again when he was 12 or 13 and came to live with his grandmother, Estelle Berryhill. Mr. Stewart had intense interest in Elsie.(VIII,T1360) Mr. Stewart stayed less than a year. Ms. Brown did not see him again until he was arrested.(VIII,T1360)

Linda Arnold and Susan Moore testified about the abuse in Scarpo's household until the point in time that Mr. Stewart left. (Moore:VIII,T1273-1288; Arnold:VIII,T1288-1300) Neither knew anything about Mr. Stewart's biological parents, family, or other biological relatives.

During closing arguments, the State discounted Mr. Stewart's abuse, claiming it was not brought forward until he was in trouble and only came from his two stepsisters.(VIII,T1397) The State argued their testimony should be viewed quite skeptically because they were family and the abuse wasn't that bad.(VIII,T1398) The State argued that there was no information about Mr. Stewart from age 11 on.(VIII,T1398)

In the evidentiary hearing the testimony of numerous witnesses who did not testify previously, including Pastor Robert Vanhorne, Sandra Hibbard, Wanda Vetra, Terri Lynn Stewart, and Nicole Scarpo was presented.(IX and X) Contrary to the trial court's order, the testimony of these witnesses was not cumulative to previous testimony and provided critical non-statutory mitigation evidence. The trial court's order fails to specifically address the testimony of these witnesses or to analyze how their testimony was cumulative. The trial court's determination that this testimony was cumulative should be disregarded because it is not supported by competent, substantial evidence.

Pastor Vanhorne, who knew the Scarpo family in Charleston, provided independent corroboration of the

bizarre and violent nature of Bruce Scarpo.(X,T19-33) Not only did his testimony establish Scarpo's dubious reputation in the community, it provided independent corroboration of Mr. Stewart's struggles that did not come from Arnold or Moore. Pastor Vanhorne's testimony would have been critical in the 2001 penalty phase as it rebutted the State's assertion that Arnold and Moore were exaggerating about the abusive nature of Scarpo and the bizarre behavior that went on in the household in an effort to help Mr. Stewart. Pastor Vanhorne's testimony would further corroborate the testimony of Dr. Eisenstein about the existence of brain damage in a youthful Stewart.

The testimony of Sandra Hibbard [a former wife of Charles Stewart] and Wanda Vetra [maternal aunt] focused on Mr. Stewart's biological parents.(X,R34-49;61-79) Through their testimony it was established that both Elsie Tate and Charles Stewart had significant mental health problems, severe alcohol and drug addictions, the probability that Mr. Stewart suffered from fetal alcohol syndrome, the abusive nature of Estelle Berryhill who cared for Mr. Stewart when he was a teenager, and the extreme alcoholism that existed in both the maternal and paternal grandparents. Sandra Hibbard was also able to testify that

her children [Mr. Stewart's half brother and sister] also had significant mental health and addiction issues, thus reinforcing the hereditary factors that Mr. Stewart would contend with that would not necessarily have been experienced by Arnold and Moore because they are not biologically related to Mr. Stewart or Scarpo. Terri Lynn Stewart [biological half sister] testified about her struggles with alcohol and mental illness, thus reinforcing the hereditary pattern. (X,T50-61)

In addition, Linda Arnold and Susan Moore testified a second time in the post-conviction proceedings. Contrary to the findings of the trial court, their testimony was not merely cumulative. Their testimony at the evidentiary hearing more than doubles in length their testimony at the 2001 penalty phase. Page constraints foreclose another summary of their testimony at the evidentiary hearing, however their testimony is thoroughly outlined in the Statement of Facts of this brief. A comparison between this testimony and the abbreviated 2001 testimony demonstrates that the 2001 testimony was, at best, barebones in nature and did not adequately flush out the depth of uninterrupted violence that went on in the childhood of Mr. Stewart. The trial court's order makes no

effort to outline the differences between the 2001 penalty phase testimony and the evidentiary hearing testimony to support the conclusion that the testimony was cumulative.

The obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated. State v. Lewis, 838 So.2d 1102, 1113 (Fla. 2002). As this Court noted in Parker v. State, 3 So.3d 974 (Fla. 2009), that the ABA requires that investigations into mitigation should "comprise all efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be produced by the prosecution." See also, Ragsdale v. State, 798 So.2d 713, 716 (Fla. 2001), State v. Riechmann, 777 So.2d 342, 350 (Fla. 2000).

As in Parker, trial counsel hardly presented a "bare bones" rendition of Mr. Stewart's background, despite having the benefit of investigative work from two prior penalty phases. None of the witnesses who testified at the evidentiary hearing were difficult to locate, yet were able to make significant contributions to the existence of non-statutory mitigation and rebut the argument by the State that the childhood and alcohol abuse presented by only Moore and Arnold was fabricated. Trial counsel also failed

to uncover evidence of Elsie Tate's severe mental illness and alcoholism, which was critical to Dr. Eisenstein's establishment of fetal alcohol syndrome and an organic causation for brain damage in Mr. Stewart. Mr. Stewart was deprived of a reliable penalty phase by the failure of trial counsel. There was no tactical basis for not presenting the mitigation evidence presented at the evidentiary hearing. Asay v. State, 769 So.2d 974, 985 (Fla. 2000).

But for the errors of trial counsel in failing to present evidence of additional compelling non-statutory mitigation, especially coupled with the failure of trial counsel to present this evidence in conjunction with uncontroverted evidence of organic brain damage, it is probable that Mr. Stewart would have received a recommendation of life from the jury. It is also probable that this Court's analysis of the proportionality of the death sentence imposed would have been different. A new penalty phase is required.

ISSUE III

THE TRIAL COURT ERRED IN FINDING THAT MR. STEWART WAS NOT PREJUDICED BY COUNSEL'S DEFICIENT PERFORMANCE IN FAILING TO OBJECT TO THE CROSS-EXAMINATION OF MARJORIE SAWYER WHICH ALLOWED THE PRESENTATION OF

EVIDENCE OF NON-STATUTORY AGGRAVATION

During the 2001 penalty phase, trial counsel called Marjorie Sawyer as a witness. During cross-examination, the State elicited without objection that Ms. Sawyer believed that Mr. Stewart might kill again, had beaten and choked her, and had committed other burglaries that he had never been charged or convicted of. (VII,T1316) Mr. Stewart asserted in his motion for post-conviction relief that trial counsel was ineffective in failing to object to this testimony and in failing to request limiting instruction be given to the jury. The trial court, after hearing the testimony of trial counsel, found that there was no strategic reason for trial counsel to have failed to object to this testimony, but found that Mr. Stewart was not prejudiced by counsel's deficient performance. (II,R252)

The standard of review is that set forth in Issues I and II. This Court must only review the question of prejudice, wherein Mr. Stewart must demonstrate but for the acknowledged deficient performance, the probable sentencing outcome would be different.

The introduction of evidence of Mr. Stewart's criminal history and future dangerousness constitutes a non-

statutory aggravator- it is clearly improper for a prosecutor to elicit this evidence on cross-examination. See, Poole v. State, 997 So.2d 382 (Fla. 2008); Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996); Teffeteller v. State, 439 So.2d 849 (Fla. 1983). The danger in the admission of such improper non-statutory aggravation is that it creates a risk that the jury will give undue weight to such information in recommending a death sentence. Poole, *Ibid*.

The trial court's finding that there was no prejudice in Mr. Stewart's jury hearing that he had committed numerous uncharged crimes and that his girlfriend believed he might kill again is error. The very real probability existed that the jurors would and did place undue weight on this inflammatory evidence. Given that the jury recommendation was 7/5, it cannot be said that the proper exclusion of this evidence would not have changed the sentencing outcome, especially when considered in light of the errors argued in Issues I and II. The order denying relief as to Claim III should be reversed and a new penalty phase ordered.

CONCLUSION

Based upon the forgoing citations of law and arguments presented, the order of the trial court denying relief should be reversed and a new penalty phase ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been furnished by U.S. Mail to the Office of the Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, FL 33607-7013 this ____ day of May, 2009.

CERTIFICATE OF FONT COMPLIANCE

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

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