

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC96177

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KENNETH A. STEWART

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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## ARGUMENTS IN REPLY

### ARGUMENT I

#### THE LOWER COURT'S RULING FOLLOWING THE POSTCONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

1. **The Lower Court Erroneously Denied Appellant Relief On His Claim That His Counsel Provided Ineffective Assistance Of Counsel During His Trial And That He Was Prejudiced By Counsel's Actions, In Violation Of The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.**
  - A. **INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.**
    1. **Failure to present available lay witness mitigation.**

#### *The "Mystery Note"*

In its Answer Brief, the State repeatedly refers to a "mystery note" "allegedly" found in the trial attorney's file (Ans. Brief pp. 25, 36). This note clearly details the fact that Bruce Scarpo violently abused Mr. Stewart when Mr. Stewart was growing up under Scarpo's "care" (EX. 3 ). The note provides in pertinent part:

-Kenny forgot to take out trash on (sic) night - in middle of supper Bruce Scarpo hit Kenny with his fist and then started beating him over and over and he told him since he didn't want to take the trash out - He took the garbage can and stuck it over Kenny's head and made him sit in the kitchen while the rest of the family.... ate their dinner and could see him - Blood was dripping all over the kitchen floor. He had to sit that way for approximately two hours.

-He completely knocked Kenny out cold several times. When he beat him he always beat him with his fist.

-He was bruised up, Black eyes, Bloody nose, split lips and he even messed his teeth up - He never got medical ever.

-One time Susan (step-sister) lied and said Kenny pushed her off motorcycle - Bruce beat him severely and told him to get out.... (a neighbor) cleaned Kenny up - .... She took care of Kenny many times when Bruce beat him.

-Bruce required Kenny to bring home a disciplinary report from school daily. The teachers finally got so scared Bruce would one day kill Kenny, they started always putting good on the report so he wouldn't get beat. They had to ask Kenny why he was so beat up and bruised up.

(EX. 3).

At the evidentiary hearing, the trial attorney stated that the note contained precisely the sort of information that he would want to present to a penalty-phase jury in mitigation in a capital case (EH. 128). However, the trial attorney vehemently denied that he had ever seen the note and that the note could have been from his file (EH. 162-3).<sup>1</sup> The State's Answer Brief perpetuates this established falsehood by calling this note the "mystery note," thereby gingerly dancing around the implications of this serious, completely untrue, and totally unfounded allegation.

The testimony of the trial counsel's investigator established that the original note

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<sup>1</sup>Further, at the evidentiary hearing, the State even insinuated that this admittedly important note was planted by post-conviction counsel who had had control of the trial attorney's files since affirmation of Mr. Stewart's convictions and sentence (EH. 168-9).

in his file bore the crease marks characteristic of the way the investigator habitually folded and carried documents in his shirt pocket prior to inserting such documents in his file (EH. 214). Finally, during the investigator's testimony, the hearing judge advised counsel to move on from this issue and clearly indicated to the below-signed counsel that the defense had established that the note, which the trial attorney had denied having a copy of in his file and which the state attorney implied may have been planted, was in fact from the investigator's file (EH. 214). The hearing court admitted the note into evidence as part of the trial attorney's slim "penalty phase" file (EX. 3) and as part of the investigator's file (EX. 6).

Inexplicably, the Answer Brief continues to imply that there is some mystery about the source of the note, that the damning information in the note about Scarpo's abuse of Mr. Stewart was not known to the trial attorney at the time of trial, and, by continuing to call the source into question, that inclusion of the note in the trial attorney's file may be the result of some nefarious action. The record, however, clearly refutes these implications and requires instead a conclusion which calls into question the veracity of the testimony of the trial attorney. There is absolutely no remaining mystery about the note, which clearly put the trial attorney on notice that Bruce Scarpo, his "star" witness, was an egregious abuser of Kenny Stewart and a proper investigation would have yielded powerful mitigation evidence, as ultimately

propounded by Ms. Moore and Ms. Arnold at the evidentiary hearing, that the horrible and horrendous abuse of Mr. Stewart continued unabated from earliest childhood through Mr. Stewart's teenage years and even into his adult life.

*Notice To Trial Attorney Of Scarpo Abuse At Time Of Trial*

The State still contends that the trial attorney's performance in the penalty phase of Mr. Stewart's trial was not deficient and that the trial attorney did not have notice of the Scarpo abuse at the time of trial (Ans. Brief pp. 35-7). However, as established above, the investigation of Mr. Fernandez revealed and the note in his investigative file, a copy of which was copied to the trial attorney, described the brutalization of Mr. Stewart by Scarpo. Further, Mr. Fernandez' testimony and his file indicate that Joyce Engle told Mr. Fernandez to speak to Lilly Brown about this abuse (EH. 204). Mr. Fernandez memorialized that information in his file, but the defense did not follow up or otherwise act upon the information (EH. 205-6). There is no information of record that indicates the investigators or the trial attorney asked anyone, particularly Mr. Stewart's siblings, about Scarpo's violence. Both Ms. Moore and Ms. Arnold affirmatively deny that the subject was ever raised with them (EH. 43, 78). Thus, the State's assertion that Mr. Fernandez would normally ask such questions is refuted by the record, although the testimonies of Mr. Fernandez and the trial attorney explicitly verify that both would consider such an inquiry an integral part of the effective

assistance of counsel in a capital case.

*Prejudice*

The record is clear that the trial attorney knew or should have known about Scarpo's abuse of Mr. Stewart but failed to present the true quality and quantity of Mr. Stewart's horrific childhood and upbringing to the judge or jury. The fictional alternative which was actually presented to the jury not only grossly understated the suffering of Mr. Stewart but it presented the jury with the fiction that Mr. Stewart actually had an oasis of relief after his time as an infant with a troubled mother (R. 644-6). Scarpo came into Mr. Stewart's life when Kenny was approximately 18 months old and exercised brutal dominion over Kenny for the majority of the rest of his life until he was 17, except for the year his mother ran off with the petty thief and the summer Kenny went to Tampa (R. 637, 647). As Susan Medlin-Moore testified, Scarpo's abuse began from earliest memory and lasted until the children ran away (EH. 9). Thus, at the penalty phase, all of the testimony presented created the illusion that Kenny Stewart had been nestled in the bosom of a loving father for the vast majority of his life. From this illusion, which the weight of the record now establishes as patently false, the jury would have concluded that Stewart had had a chance in life, had had the benefit of a caring and loving father and homelife, and was incorrigible despite his background. Further, the jury would have been more receptive to Scarpo's "bad seed" scenario and

to Dr. Afield's conclusion that Mr. Stewart was a "killer" by age 5 or 6 (R. 690), could not be rehabilitated (R. 691), and would kill himself in jail (R. 696).

In contrast to the State's contentions in its brief, the record in Mr. Stewart's case manifestly supports Mr. Stewart's claim that his trial counsel knew or should have known that Scarpo was the actual monster at the root of any presentation of mitigation and any competent mental-health evaluation, and that counsel's performance was deficient when he presented the jury with Papa Walton instead of Papa Doc Duvalier.

Mr. Stewart did not receive an individualized sentencing, the essence of a reliable sentencing phase. See Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995) (quality of mitigating evidence presented at hearing established that counsel's errors deprived defendant of a reliable penalty phase proceeding). As in Rose v. State, 675 So.2d 567 (Fla. 1996), the evidence presented in postconviction proceedings was far more compelling than that presented at trial. In Phillips v. State, 608 So.2d 778 (Fla. 1992), prejudice was established by strong mental health mitigation which was essentially un rebutted. Similarly, in Mitchell v. State, 595 So.2d 938 (Fla. 1992), prejudice was established by testimony identifying statutory and non-statutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse, and in Rutherford v. State, 727 So.2d 216 (Fla. 1998), this Court wrote that factors in the prejudice analysis are

the balance of aggravation and mitigation and whether the evidence presented at the hearing is cumulative. The strong new mitigation, had it been presented, shifts the aggravation/mitigation balance. In fact, the sentencing court found only two aggravating circumstances.<sup>2</sup> The sentencing court gave slight weight to the “extreme mental or emotional disturbance” mitigator and little weight to the “capacity to conform” mitigator. The sentencing court also gave little weight to the “age at the time of the crime” mitigator. The non-statutory, or “catch-all”, mitigation included only a finding that “the Defendant suffered some form of trauma at 13 when his mother committed suicide, two aunts were killed in a vehicular accident, and learned that Scarpo was his step-father and may have been involved in his blood father’s death.” The sentencing court heard and found none of the mitigation now presented.

As the hearing court’s Order finds, Susan Moore’s and Linda Arnold’s testimony regarding the “horrible” and “horrendous” abuse inflicted on Mr. Stewart is powerful and credible. The State’s contention in its Answer Brief that Mr. and Mrs. Scarpo are not alive to “rebut” their testimony is entirely speculative and ignores the findings of

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<sup>2</sup>In its Answer Brief, the State argues that a new sentencing court could consider Mr. Stewart’s other “capital” murder conviction, but fails to note that this is not a capital conviction at this time, as Mr. Stewart, by stipulation of the State, has been awarded a new penalty phase trial in that case on the ground of deficient performance of counsel, a drug addict, but considering the same mitigation presented in this case as the parties had agreed to admit the testimony considered herein in that proceeding before the evidentiary hearing was aborted and a new penalty phase conceded.

fact in the hearing court's order.

The State's brief also attempts to minimize the impact and extent of Moore's and Arnold's testimony by calling it cumulative. This is an utter distortion of the testimony presented at trial and at the hearing. At trial, Mr. Stewart was portrayed as enjoying an oasis from torment for the vast majority of his life, during which he lived under the brutal dictatorship of Bruce Scarpo. The evidence introduced at the evidentiary hearing portrays Mr. Stewart's true life and the brutality he endured as the possession of Bruce Scarpo.

*The Hearing Court's Findings Of Fact Regarding The Testimony  
Of Susan Medlin Moore, Linda Arnold, and Lillian Brown*

The State's Answer Brief fails to acknowledge that the hearing court found the testimony presented by Mr. Stewart at the evidentiary hearing to be credible. The hearing court found that, "Susan Moore testified about the extensive and horrible abuse that she, her siblings, Defendant, and her mother suffered at the hands of Bruce Scarpo, her step father" (PC-R 385). Ms. Moore would have testified to this horrible and horrendous abuse at trial but, in her phone deposition, taken while she was at her place of employment after she had arranged for a call at night so no one would be present to hear the horrible abuse she and Mr. Stewart had suffered, she wasn't asked about the abuse (EH. 43). Scarpo himself told her not to come to Tampa to testify. Id.

The hearing court also found credible Linda Arnold's testimony, "about Bruce

Scarpo's horrendous abuse of his wife and all the children, especially Defendant" (PC-R 386). She was called by the investigator during the trial, asked what she would share with him to help Defendant but was told she probably would not testify (EH. 65). Arnold wondered why the investigator bothered to call (EH. 78). She too would have been willing to testify, through she still feared Scarpo (EH. 78). The investigator did not ask her about child abuse (EH. 65).

Finally, Lilly Brown, Mr. Stewart's maternal aunt, testified at the evidentiary hearing about Scarpo's abuse of Defendant (EH. 82-85). She did not recall being contacted by an attorney or investigator but would have testified at trial (EH. 85).

[In fact, Mr. Fernandez's notes indicate he did talk to Joyce Engle, who advised him that Lilly Brown had told him of Scarpo's abuse, but that the investigator did not follow up on the information (EH. 206).]

After characterizing the abuse cataloged in the testimonies of Moore, Arnold, and Brown as "horrible" and "horrendous," the hearing court acknowledged that this evidence constituted "additional mitigating evidence of the horrible child abuse that Defendant suffered at the hands of Bruce Scarpo" (PC-R 387). The State's Answer Brief ignores this finding, particularly to the extent that the State still contends that the evidence introduced at the evidentiary hearing is cumulative to the evidence presented at the penalty phase. Further, the hearing court arguably mis-characterizes the

evidence as “additional,” since no evidence of abuse by Scarpo was presented at trial, except that characterized by Scarpo himself as “ordinary discipline,” part of Scarpo’s self-hagiographic presentation which turned Mr. Stewart’s penalty phase into a celebration of Scarpo’s parenting skills (R. 644-6).

*The Answer Brief Fails To Acknowledge Or Rebut The Evidence Presented At The Evidentiary Hearing*

As the State ignores or mis-states the evidence presented at the evidentiary hearing establishing that the trial attorney knew or should have known that Scarpo had horribly abused Mr. Stewart for many years, urges this court to question the source of the “mystery note,” and, as with the hearing court, fails to acknowledge the prejudicial effect of these deficiencies, the State’s Answer Brief does not address or attempt to rebut the devastating quantity and quality of the evidence presented at the hearing.

The evidentiary record is now clear on these unrebutted facts not presented to Mr. Stewart’s sentencing jury: Scarpo beat all his children with his belt or hands when they were small (EH. 9); as the children got older the beatings got worse (EH. 9); Scarpo beat Kenny with his fists, as if Kenny was a grown man (EH. 9); the beatings occurred in front of other family members (EH. 9); in one instance of common abuse, when Kenny failed to take the trash out Scarpo beat him, knocking him down, ordering him to stand, then knocking him to the floor repeatedly – finally, Scarpo put the trash

basket on his head and made him sit in the corner while the others ate (EH. 9-10); Kenny was beaten regularly (EH. 11); Kenny often had black eyes, bruises, and marks (EH. 11); the children would often have stripes on their arms and legs from Scarpo's belt (EH. 11); the beatings were unrelenting from earliest childhood to the time the children ran away (EH. 11); Scarpo abused the children mentally, physically, and sexually (EH. 17); Scarpo forced Kenny to sleep in urine when he wet the bed (EH. 19); Scarpo did not give Kenny medication prescribed for hyperactivity (EH. 20); if another family member tried to help Scarpo's victim, the beating was made twice as bad (EH. 20); Kenny was Scarpo's possession and, as a possession, his life was sad, lost, and brutal (EH. 22); Scarpo drank daily from morning to night (EH. 22); after a beating, the victim would be isolated in his or her room, with Scarpo often coming in for a follow-up beating (EH. 29); after a beating, the victim would have to clean up their blood and find missing teeth (EH. 25); if wounds were visible, the victim would be confined until the wounds or bruises healed (EH. 27); Scarpo put a gun to his wife's head during a fight and Susan and Kenny were forced to tell her goodbye because she was going to die (EH. 28); Scarpo chased Susan and her mother to a neighbor's house with a shotgun (EH. 29); when Mrs. Scarpo had an affair, Mr. Scarpo forced her to tell the sexual details to the children (EH. 30); Kenny' abuse was the most severe of Scarpo's victims because Kenny was a boy (EH. 37); Scarpo was

flamboyant, arrogant, and intimidating, and he exaggerated and often misrepresented the truth (EH. 55); Scarpo often implied Arnold was a doctor, although she was a nurse (EH. 55); Kenny often had black eyes, a bloody nose, fat lips, bruises, and cuts (EH. 58); Scarpo would beat Kenny with a belt, with his open hand, and fists, and would throw him across the room (EH. 58); if Kenny cried, the beating was increased (EH. 61); the victim could not get medical treatment (EH. 62); Scarpo broke his wife's collar bone, nose, and ribs, but she couldn't go to the doctor (EH. 62); Mrs. Scarpo masked black eyes and bruises with make-up (EH. 62); the children lived in constant fear (EH. 66); Scarpo put a gun to Linda's head after attacking her date (EH. 67-68); and Scarpo contended he had to be brutal with Kenny because Kenny came from "bad genes" (EH. 85).

The Answer Brief dismisses the quantity and quality of this evidence, which, had it properly been presented to the jury, would have changed the outcome of Mr. Stewart's trial.

### **3. Failure to obtain and/or present pertinent records.**

The State, and the hearing court, also fail to consider the fact that trial counsel failed to obtain numerous available records documenting Mr. Stewart's long-term drug and alcohol abuse and addiction and failed to provide this information to a mental health expert. The testimony of Dr. Sultan, which the hearing court did not address in its order, establishes what a properly prepared mental-health expert might have testified to at Mr. Stewart's trial.

Dr. Sultan had access to records, not referred to by Dr. Afield in his testimony, and to the testimony of and interviews with witnesses Arnold and Moore. Importantly, Dr. Sultan explains the prejudicial effect of Scarpo's trial testimony, which rebuts the existence of any possibility of abuse (EX. 1, p. 11). Dr. Sultan explains the importance to a mental-health clinician of true family background information (EX. 1, p. 11) and provides the accurate picture of methodical, unrelenting debasement, brutality, and dehumanization inflicted on Mr. Stewart by Scarpo that would be necessary to access the damage done to Mr. Stewart in his childhood (EX. 1, pp. 10-14).

Dr. Sultan, based on juvenile records, also traces Mr. Stewart's alcohol use and dependence back to age 12 and notes that, by age 16, he was heavily dependent on alcohol and drugs (EX. 1, p. 14). Mr. Stewart's drug and alcohol abuse continued until

he was jailed (EX. 1, p. 14).

Dr. Afield, at trial, was not provided with Mr. Stewart's history of drug and alcohol abuse (EH. 244). Dr. Sultan disagreed with Dr. Afield's pronouncement to the jury that Stewart could never be rehabilitated because he would have to be sober and under treatment before such an assessment could have any validity (EX. 1, p. 15). Dr. Sultan also disputes Afield's testimony that Mr. Stewart was a killer by age 5 or 6 (EX. 1, p. 16). Like Afield, Dr. Sultan found the applicability of the statutory mental-health mitigators, but she also identified numerous non-statutory mitigators, including that Mr. Stewart suffered from attention deficient disorder, from neurologic dysfunction, from torture inflicted by Scarpo from Mr. Stewart's entire pre-adult life, from the impact of watching his step-sisters and step-mother beaten and abused, from the fact he grew up with no basic support systems, and from severe alcohol and drug use and dependence (EX. 1, pp. 19-20).

Finally, Dr. Sultan opined that Mr. Stewart's ability to form specific intent or to premeditate was impaired by substance abuse (EX. 1, p. 21).

#### **4. Failure to prepare mental health expert**

Dr. Afield testified at trial without any knowledge of Mr. Stewart's history of alcoholism and drug abuse. He had no reports regarding Mr. Stewart's two suicide attempts while incarcerated at the Hillsborough County Jail. He had no reports

regarding the medical treatment Mr. Stewart received at the hospital following those suicide attempts. Perhaps most importantly, Afield was not aware of any abuse suffered by Mr. Stewart or his sisters at the hands of Bruce Scarpo (EH. 247-8). [Part of Afield's preparation and the basis of his opinion was that he sat through the testimony of Bruce Scarpo (R. 699).]

Dr. Afield would have expected trial counsel to provide him with jail records or the records of Mr. Stewart's long history of drug abuse, if counsel had those records (EH. 262). Had he been provided them, they would have been identified in his report, but they were not (EH. 244).

While Dr. Afield did find the statutory mental-health mitigators, he could not advise the jury on Mr. Stewart's drug and alcohol addiction or on the psychological impact of the relentless abuse of Bruce Scarpo spanning Mr. Stewart's entire life with Scarpo (EH. 247-8).

At the evidentiary hearing, trial counsel evinced shock and surprise at Afield's unsolicited testimony that Stewart is not rehabilitable and that he was a killer by age 5 or 6 (EH. 144). It does not take an expert to consider what impact such testimony would have on a jury weighing life or death.

Had counsel provided Dr. Afield with the records showing Mr. Stewart's history of drug and alcohol abuse and had counsel and Dr. Afield properly investigated and

presented the testimony of Ms. Arnold, Ms. Moore, and Ms. Brown, testimony Dr. Afield himself testified was important and relevant, Dr. Afield's finding of mental-health mitigation would have been supported by a full and accurate record and, then, have been more forcefully and convincingly presented to the jury. As an expert's opinion is only as strong as the foundation and premises upon which it is based, a jury presented with the full facts of Mr. Stewart's life, a life in which there had been no respite from violence and no opportunity for rehabilitation, would have recommended life.

The State's contention that Mr. Stewart bases his argument on a preference for Dr. Sultan's testimony misses the essential point that trial counsel did not provide Dr. Afield with readily available records of long-time alcohol and drug abuse and with an accurate life history and history of abuse, nor did Dr. Afield independently seek this information. The resulting prejudice of these failures is that Dr. Afield could not testify to substantial non-statutory mitigation and could, conversely, testify recklessly about the Defendant's prospects for rehabilitation.

Dr. Afield may now insist that his opinion would not have changed had he received this information, but he also contends that his opinion would have been reinforced. (EH. 257-8). Therefore, he acknowledged at the evidentiary hearing that his opinion would have been more convincing to the jury had it been supported by the

facts (EH. 258).

Had Dr. Afield rendered competent mental-health assistance, the jury would have been able to consider powerful non-statutory mitigation that no reasonable strategy in the penalty phase would justify keeping the jury in the dark about.

## **5. Conclusion**

The State's Answer Brief fails to acknowledge or refute the new evidence presented at the evidentiary hearing on the issue of the prejudicial nature of trial counsel's deficient performance in presenting mitigation to Mr. Stewart's judge and jury. The evidence presented at the evidentiary hearing is not cumulative to the trial testimony, could and should have been presented at the trial, and would have effected the outcome of the trial.

The touchstone of due process under Lockett v. U.S., 438 U.S. 586 (1978), is the mandate that the jury should know the person whose life is in the jurors' hands. Mr. Stewart's jury recommended death after hearing the sanitized Bruce Scarpo story, not after hearing the truth about the hell Mr. Stewart endured. This Court should not accept the State's contention, or the hearing court's erroneous conclusion that the "horrible" and "horrendous" abuse now of record constitutes a mere accumulation of a few new facts which would not change the outcome of Mr. Stewart's penalty-phase. Due process mandates that a jury hear the real evidence before recommending whether

the State should imprison Mr. Stewart for life or take his life.

Although the State's Answer Brief caustically tried to minimize the testimony about Scarpo's abuse as a "parade of horrors," the State fails to explain why the omission of the essential evidence is not prejudicial. In its order, the hearing court also fails to offer any explanation for its conclusion. The reason for the State's and hearing court's silence on the question is that the evidence is in fact powerful and there is a substantial likelihood that, had the jury heard the true story, the jury would have recommended life.

**B. INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE**

The State contends that the trial attorney made a strategic choice not to present a voluntary intoxication defense. In support of this argument, the State notes that the trial attorney felt that neither Mr. Stewart nor the expert witness offered viable support for the defense of voluntary intoxication— despite the fact that Dr. Afield testified that Mr. Stewart drank a fifth of whiskey at his mother's grave shortly before the incident (EH. 245). Further, trial counsel testified that he thought that he would have to put Mr. Stewart on the stand, although Ms. Acosta's eyewitness testimony indicated Mr. Stewart was drunk or loaded, and her testimony and cross-examination should have been sufficient to require an instruction on the voluntary intoxication defense.

The State and the trial attorney contend that this would open the door for experts

who examined Mr. Stewart regarding his competency to stand trial to provide details of Mr. Stewart's recall of the details of the shooting (EH. 118). Trial counsel felt he had to go only with his strategy of accidental shooting although trial counsel and the State seem to concede that there would be no conflict with the defense of accidental shooting and voluntary intoxication.

The extent of the State's argument seems thus to be that, because the trial attorney articulated a choice he says he made, the requirements of Strickland v. U.S., 466 U.S. 668 (1984) are satisfied. The State does not explain what specifically was in the reports that trial counsel feared nor even on what basis such reports would be admissible. Regarding his concerns for calling Mr. Stewart as a witness, neither the State nor trial counsel explain why that would be necessary.

Perhaps the most important aspect of this issue is that counsel does not have strategic latitude to waive a viable defense that is supported by the record. Based upon Ms. Acosta's testimony there was record evidence that Mr. Stewart was severely impaired at the time of the shootings. The trial attorney also knew that Mr. Stewart drank a bottle of whiskey, just prior to the shootings.

The trial attorney's testimony and the State's assertion that counsel's decision was strategic ignores the fact that the failure to request an instruction on voluntary intoxication when such an instruction was supported by the evidence did not benefit

Mr. Stewart's defense. Further, both the State and trial attorney have failed to articulate or explain the specific threat that the assertion of such a defense or request for such an instruction would have posed.

The cases cited by the State are inapposite as well because they are founded on an informed strategic decision being made. Rutherford; Rose. The postconviction record is clear that trial counsel did not investigate Mr. Stewart's history of alcoholism and drug abuse. Without such an investigation, trial counsel could not make an informed decision. The State has not argued or annunciated how the assertion of a voluntary intoxication defense would have hurt Mr. Stewart's case, particularly since there was already evidence of Mr. Stewart's diminished capacity in the record through the testimony of Ms. Acosta.

### **CONCLUSION**

Based upon the foregoing arguments and upon the record, Mr. Stewart respectfully urges this Court to vacate his convictions and sentence, and to remand the case for a new trial, for a new penalty phase, or for such other relief as the Court deems proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished to all counsel of record on October 11, 2000.

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