IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO,

Petitioner,

v. CASE NO. 72,403

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

_____/

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR A STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR ORAL ARGUMENT

The State of Florida hereby responds to the petition for extraordinary relief and for a writ of habeas corpus, etc., and requests that this honorable court deny any and all requested relief. In support thereof respondent states as follows.

A. PROCEDURAL HISTORY

After being arrested for aggravated battery in 1980, Stano confessed to having murdered numerous women. He pled guilty to six counts of first-degree murder and, pursuant to a plea agreement, received six consecutive life sentences. He later pled guilty to two homicides in Volusia County and went to trial for the murder of yet another woman in Brevard County, and currently has received a total of three death sentences. On appeal this court affirmed those sentences. Stano v. State, 460 So.2d 890 (Fla. 1984) (guilty pleas); Stano v. State, 473 So.2d 1282 (Fla. 1985) (trial). In late 1986, the governor signed a death warrant for Stano on his guilty plea death sentences. Stano then filed a Florida Rule of Criminal Procedure 3.850 motion, and the trial court granted a stay in order to conduct an evidentiary hearing. Following several preliminary hearings and conferences, the court decided that the record conclusively demonstrated that no evidentiary hearing needed to be held and denied the motion for post-conviction relief. In the motion it was alleged that trial counsel was ineffective in that if he had made a proper investigation, Stano would not have pled guilty;

that counsel did so little as to leave Stano without counsel, thereby rendering his plea and waiver of his rights involuntary; that counsel should not have allowed the introduction of psychiatric reports based on Stano's unwarned statements; that counsel should have had mental health experts appointed to assist in preparing a defense; and that counsel should have precluded any use whatsoever of the presentence investigation report. On appeal from the denial of post-conviction relief, this court determined that the claims of ineffectiveness of counsel and involuntariness of the guilty pleas were precluded as attempts to go behind the pleas, and that an evidentiary hearing was not required as the record demonstrated conclusively that post-conviction relief was not warranted as Stano insisted upon pleading guilty despite the advice of his attorney, and indicated that his previous confessions and admission were made voluntarily. Stano v. State, 520 So.2d 278 (Fla. 1988).

B. CLAIMS FOR RELIEF

I. It is now alleged that appellate counsel was ineffective for failing to discuss the defective guilt/innocence proceeding, which appeared in the direct appeal record, which reflected that trial counsel stood by and provided no advice to Stano, (because no discovery had been conducted), who acted on his own and entered pleas of guilty to two capital offenses without any agreement as to sentence, waived a capital sentencing jury and left his fate to a sentencing judge who had already revealed his belief that death was the proper sentence. Trial counsel is further faulted for indicating to the court that Stano had been adjudicated guilty of ten rather than six other murders. Appellate counsel, apparently, is also faulted for not discussing the fact that the trial court informed Stano after he had entered his guilty pleas of the rights he gave up and was not told that he had the right not to be compelled to incriminate himself, and that he could not only confront but could also have counsel cross-examine witnesses. Stano was also told that by pleading guilty he limited his ability to appeal. It is contended that appellate counsel should have argued, as well, that this is not

true in a capital case in Florida as Stano could have challenged his confessions, lost, pled guilty and still have raised that defense on appeal.

Stano's first claim is almost entirely a repetition of the issues raised in the Rule 3.850 proceeding. The gravamen of this claim is appellate counsel's failure to recognize egregious fundamental constitutional error appearing on the face of the trial record, to wit: ineffective assistance of trial counsel.

Ineffective assistance of trial counsel is not cognizable on direct appeal when the issue has not been raised before the trial court and ruled upon. State v. Barber, 301 So.2d 7 (Fla. 1974). An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made. Haverty v. State, 258 So.2d 18 (Fla. 2d DCA 1972). There are rare exceptions where appellate counsel may successfully raise the issue on direct appeal because the ineffectiveness is apparent on the face of the record, and it would be a waste of judicial resources to require the trial court to address the issue. Stewart v. State, 420 So.2d 862 (Fla. 1982) (claim that trial court's failure to grant a continuance prior to sentencing so that another psychological examination could be performed on the defendant denied him the effective assistance of counsel); Foster v. State, 387 So.2d 344 (Fla. 1980) (denial of motion for separate reprsentation where a risk of conflicting interests is apparent on the record). This case does not fit within the rare exception. Moreover, in Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987), this court declined to expand this exception by holding that not only may the issue of ineffective assistance of trial counsel be raised on direct appeal, but that it must be raised on direct appeal, i.e., appellate counsel is ineffective for failing to do so.

A proper and more effective remedy is already available for ineffective assistance of trial counsel under Rule 3.850. If the issue is raised on direct appeal, it will not be cognizable on collateral review. Appellate counsel cannot be faulted for

preserving the more effective remedy and eschewing the less effective." By raising the issue in the petition for writ of habeas corpus, in addition to Rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this court with redundant material." Blanco, supra, 507 So.2d at 1384; see, Stano v. State, 520 So.2d 278 (Fla. 1988). Further, having raised the issue by virtue of a Rule 3.850 motion, it should have been entirely raised and disposed of at that time, and the little incidents to such claim now brought to the court's attention are procedurally barred as an attempt at piecemeal litigation. Wainwright v. Sykes, 433 U.S. 72 (1977). This case is undistinguishable from Blanco, and constitutes the essence of a second bite at the apple.

II. It is alleged that Stano's plea was predicated upon inaccurate information and, thus, not knowingly and intelligently entered, which error was reflected in the direct appeal record. This is again a rehash of claims collaterally litigated in the Rule 3.850 motion. See, pages 68, 79-82 of record on appeal from denial of post-conviction relief: motion to vacate judgment and sentence. Moreover, this court previously found a competent basis for the trial court's acceptance of Stano's guilty pleas and the adjudications of guilt. Stano v. State, 460 So.2d 890, 892 (Fla. 1984).

In any event, no untoward result has been reached. Stano's appeal was the subject of plenary review and Stano, having admitted the facts of the crimes and the voluntariness of his statements and having insisted on entering a plea regardless of the consequences, would have had no pretrial matters to raise on appeal in any event. Moreover, Stano was aware of such rights not only through his attorney, but by virtue of prior pleas in the Maher, Van Haddocks and Heard cases (R 469-direct appeal). Four days before the entry of these pleas in Volusia County. Stano entered a written plea agreement in the Alachua and Bradford County cases, of which this honorable court can take judicial notice. This written plea establishes that Stano had been fully advised of all constitutional rights he was giving up

by pleading guilty. [Appendix 1, see also R 1430-1439, 3.850 appeal--Stano v. State, 520 So.2d 278 (Fla. 1988)]. The trial judge in open court readvised Stano of these rights, including that he was relinquishing the right to cross-examine witnesses and to not testify against himself. Furthermore, Stano's subsequent trial in Brevard County demonstrates he can exercise such rights when so inclined.

III. It is alleged in this claim that it was fundamental error for the trial court to consider the PSI to negate mitigation. This again is a virtual rehash of Claim IV raised in the motion for post-conviction relief and previously considered and rejected by this court. (See, record on appeal from denial of post-conviction relief, pages 89-95.) No further consideration by this court is warranted. See, Stano v. State, 520 So.2d 278, 281 (Fla. 1988). Moreover, it is clear that such evidence can be offered to rebut mental status defenses. See, Buchanan v. Kentucky, 107 S.Ct. 2906 (1987).

IV. Stano claims that the application in both cases of the aggravating factor that the murder was committed in a cold, calculated and premeditated manner violates ex post facto constitutional protections. § 921.141(5)(i), Fla. Stat. (1983). He contends appellate counsel was ineffective for failing to raise this claim on direct apeal. In fact, appellate counsel **did** raise this claim on direct appeal at page 48 of the initial brief as follows:

> Application of this aggravating circumstance (§ 921.141(5)(i) Fla. Stat. (1979) to this particular defendant is violative of his constitutional protections against ex post facto laws, since the crimes were committed in 1975 and 1977, while the statute was amended in July, 1979. (citations omitted) This contention is raised in spite of this Court's holding in Combs v. State . . .

It is simply untrue that this claim "was challenged by trial counsel but not by appellate counsel." (Petition, page 18). Since this exact claim was presented on direct appeal, counsel hardly could be ineffective for allegedly not raising it. A petition for writ of habeas corpus is not to be used as a vehicle

for obtaining a second appeal; it is unnecessary to revisit the same arguments already rejected by this court in this and other cases. See, Adams v. Wainwright, 484 So.2d 1211 (Fla. 1986); Foster v. Wainwright, 457 So.2d 1372 (Fla. 1984).

Even if cognizable, no relief is warranted. In order to fall within the ex post facto prohibition, two factors must be present; first, the law must apply to events occurring before its enactment and second, the law must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed 2d 17 (1981). Stano argues that "(t)he relevant 'event' in this instance was the murder of Titus Walters which occurred four years prior to the legislatively enacted change to section 921.141(5) at issue in this case" (Petition page 20). See, Francis v. State, 473 So.2d 672 (Fla. 1985). The state will assume that Stano is arguing that the relevant events are his murders of Susan Bickrest in 1975 and Katy Muldoon in 1977, the victims in these two consolidated cases. The state recognizes that these two murders occurred prior to the effective date of the statute's subsection on July 1, 1979.

Although Stano recognizes this honorable court's decision in Combs v. State, 403 So.2d 418 (Fla. 1981), he fails to note a post-Weaver case, Preston v. State, 444 So.2d 939 (Fla. 1984). In Preston, this honorable court addressed the argument that application of this factor constituted an ex post facto application of the law, and held that:

> The state asserts that this argument has been previously rejected by this Court in Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). We agree that Combs did determine this issue. We held in Combs that this aggravating circumstance could be retroactively applied with **we found that it did not change the substance of the sentencing law to the detriment of capital offenders.** See also Justus v. State, 438 So.2d 358 (Fla. 1983). We must reject appellant's argument. (emphasis added)

Preston, 444 So.2d at 946. Stano's claim that this court has "never conducted a complete and proper analysis . . . of whether

(the law) operate(s) to the disadvantage of a defendant . . ." (petition, page 22), must fail in light of Preston. The Weaver case was specifically cited by this court in the Preston case, such that this court squarely addressed the issue. See also, Dobbert v. Florida, 432 U.S. 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 91977). It certainly cannot be said that but for the application of this section, Stano would have received a sentence of life in view of the several other aggravating circumstances found in these cases. Id. at 2299. Stano has failed to demonstrate that there is a reasonable probability that the sentencing outcome would have been any different. Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This very issue **was** raised by appellate counsel on direct appeal, and so this claim lacks any basis in law or fact.

V. Stano claims his appellate counsel was ineffective for failing to raise the previous four issues. The state will rely on the arguments heretofore presented to demonstrate that counsel's performance was neither deficient nor did the alleged omissions undermine confidence in the fairness or correctness of the appellate result. Strickland v. Washington, supra.

The only new allegation raised in Claim V is that appellate counsel had a "conflict of interest" because he "made an appearance as counsel in trial court" and because over two years after his representation termination, he wrote a letter to Stano inquiring about an autobiographical book. As to the first allegation, it is clear that counsel's failure to challenge the plea had nothing to do with the motion to preclude imposition of the death sentence. This motion was Mr. Quarles' only "appearance" as trial counsel, and was filed two months **after** the plea on June 6, 1983 (R 462). This motion was filed to preserve the proportionality argument on appeal, which Mr. Quarles did raise as Point II of the initial brief. See, Stano v. State, 460 So.2d 890 (Fla. 1984).

More than two years after Mr. Quarles' representation of Stano terminated (see, Stano v. Florida, 471 U.S. 1111, 105 S.Ct.

2347, 85 L.Ed.2d 863 (1985), Mr. Quarles wrote this letter to his former client. Stano admits that "[t]his letter does not conclusively show a conflict of interest at the time of the direct appeal . . . " (Petition, page 30). It is clear, as even Stano admits, that this claim fails to demonstrate a conflict of interest at the time of the direct appeal. Stano has failed to demonstrate either deficient performance or undermined confidence in the correctness of the appellate result.

ORAL ARGUMENT

Respondent urges this court to dispense with oral argument under the circumstances of the present case. Nothing new or concrete has been presented to this court for consideration. Oral argument was granted and heard by this court on appeal from the denial of post-conviction relief where the majority of these redundant claims were raised and entertained. No purpose would be served by further argument. Execution is scheduled for May 19, 1988 at 7:00 a.m. The granting of oral argument on claims already fully adjudicated would only cause delay in the filing of a federal habeas petition (Mr. Olive has indicated to District Judge Patricia Fawsett that he will not file a federal petition until he has received an order from this court), and prompt an unwarranted stay of execution in federal court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Response has been furnished by mail and electronic transmission to Mark Olive, Capital Collateral Representative, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301, this 16th day of May, 1988.

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Of Counsel