IN THE SUPREME COURT OF FLORIDA

RAYMOND STONE,

APPELLANT,

VS.

STATE OF FLORIDA,

APPELLEE.

_____/

CASE NO. 63,638

ON APPEAL FROM DENIAL OF MOTION TO VACATE BY THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, IN AND FOR UNION COUNTY, FLORIDA.

ANSWER BRIEF OF APPELLEE

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

Appellant, RAYMOND STONE, the criminal defendant in Stone v. State, 378 So.2d 765 (Fla. 1979), cert. denied, 449 U.S. 986 (1980) and the unsuccessful movant for post-conviction relief below, will be referred to as "Appellant". Appellee, the State of Florida, the prosecuting authority below, will be referred to as "Appellee".

References to the record of the motion to vacate will be designated "(RMV:)". References to the October 1, 1975, transcript of sentencing proceedings will be designated "(TP:)". Although no other specific references to earlier court records in this cause will be necessary, Appellee would request that this Court take judicial notice of these records.

All emphasis is supplied by Appellee unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's statement of the case, but rejects Appellant's statement of the facts insofar as it

incorporates the statement of the facts presented in his brief on direct appeal, which statement was not accepted in its entirety either by Appellee or by this Court. Appellee believes the great majority of those facts necessary for a resolution of the issue presented upon appeal are included in this Court's opinion upon direct appeal, Stone v. State, which Appellee accepts and adopts in its entirity.

ISSUE ON APPEAL

THE TRIAL JUDGE'S SUMMARY DENIAL OF APPELLANT'S MOTION FOR POST-CONVICTION RELIEF WAS PROPER BECAUSE APPELLANT HAD STATED NO CLAIM UPON WHICH RELIEF COULD HAVE BEEN GRANTED.

ARGUMENT

In his February 22, 1983, motion to vacate conviction and sentence, Appellant sought Fla.R.Crim.P. 3.850 relief on the following four loosely defined grounds:

Issue One: The alleged lack of jury impartiality;

Issue Two: The alleged ineffectiveness of trial counsel, particularly in failing to present exhaustive evidence of Appellant's background in mitigation at sentencing;

Issue Three: The alleged deficiencies in jury instructions and findings of aggravated factors at sentencing;

Issue Four: The alleged unconstitutionality of the Florida death penalty as applied.

(RMV: 1-44). The trial judge denied Appellant's motion without a hearing, finding essentially that Issues One, Three and Four had been de jure resolved adversely to Appellant by this Court

either in his direct appeal or in other recent cases; and finding essentially that Issue Two, the alleged ineffectiveness of trial counsel, had been de facto resolved by this Court upon direct appeal. (RMV: 48-50).

In assessing the propriety of the trial judge's summary denial of Appellant's motion, the Court should bear in mind its oft-cited axiom that the ruling of a trial judge must be upheld if he reaches the right result, regardless of his reasoning. City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428 (Fla. 1954); Cohen v. Mohawk, 137 So.2d 222 (Fla. 1962). Whether Appellant's Issues One, Three and Four were actually raised upon direct appeal as Appellant's Points I, V and VI, respectively[1], and passed upon by this Court, is problematic in view of the present ill-defined form of these Issues, and is irrelevant in view of the fact that issues which either were or could have been litigated at trial and upon direct appeal are not cognizable through collateral attack. Meeks v. State, 382 So.2d 673 (Fla. 1980); Spinkellink v. State, 350 So.2d 85 (Fla. 1977), cert. denied, 434 U.S. 960 (1977); Adams v. State, 380 So.2d 423 (Fla. 1980); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980); Hargrove v. State, 396 So.2d 1127 (Fla. 1981); Demps v. State, 416 So.2d 808 (Fla. 1982). The inquiry into the trial judge's summary denial of Appellant's Issues One, Three and Four thus

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[1]The Court is referred to the Brief of Appellant in this cause, filed by Assistant Public Defender David J. Busch on April 15, 1976.

ends, favorably to his action, with the mere observation that these issues undeniably could have been presented upon direct appeal.

The trial judge's summary denial of Appellant's Issue II, on the basis that the effectiveness of trial counsel had been de facto resolved by this Court upon direct appeal, presents a more complicated question. Initially, Appellee would note that there have arguably been several instances in which this Court has indicated that there may be exceptions to the rule of State v. Barber, 301 So.2d 7 (Fla. 1974), that the effectiveness of trial counsel cannot be evaluated upon direct appeal. See Gibson v. State, 351 So.2d 948 (Fla. 1977), cert. denied, 435 U.S. 1004 (1978), in which the Court, despite stating the State v. Barber rule, indicated upon direct appeal that the record would not support a finding that trial counsel's performance had reduced the trial to a farce; Valle v. State, 394 So.2d 1004 (Fla. 1981), in which the Court reversed a Defendant's conviction because legal errors committed by the trial judge had left defense counsel unprepared to proceed to trial; and Vagner v. Wainwright, 398 So.2d 448,452 (Fla. 1981), in which the Court stated in passing that "claims of denial of the effective assistance of counsel based on inadequacy or incompetence of retained counsel are cognizable as grounds for challenging convictions on appeal and collaterally"; cf Trushin v. State, 425 So.2d 1126 (Fla. 1982); see also Wright v. State, 423 So.2d 633 (5th DCA 1982). However, while Appellee will gladly accept as a preliminary endorsement of trial counsel's per-

formance this Court's comment that "[n]either the judge nor defense counsel could be faulted for the absence of the (psychiatric) reports at the jury phase of the sentence hearing", 378 So.2d 765,773, Appellee will here neither defend nor disown the trial judge's conclusion that this comment justified a summary denial of Appellant's collateral ineffectiveness claim, inasmuch as this denial can be more readily sustained on the independent basis that Appellant's allegations of ineffectiveness were legally insufficient to compel an evidentiary hearing.

The Florida standards for assessing whether the performance of counsel in a given situation amounts to legal incompetency were laid down by this Court in Knight v. State, 394 So.2d 997, 1001 (Fla. 1981) as follows:

> First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading.
>
> Second, the defendant has the burden to show that this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. As was explained by Judge Leventhal in DeCoster III: [United States v. DeCoster, 624 F.2d 196 (D.C.Cir.1979)] "To be 'below average' is not enough, for that is self evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 215. We recognize that in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.
>
> Third, the defendant has the burden to show that this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the

> outcome of the court proceedings. In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error. This requirement that a defendant has the burden to show prejudice is the rule in the majority of other jurisdictions. [Footnote omitted].
>
> Fourth, in the event a defendant does show a substantial deficiency and presents a prima facie showing of prejudice, the state still has an opportunity to rebut these assertions by showing beyond a reasonable doubt that there was no prejudice in fact. This opportunity to rebut applies even if a constitutional violation has been established. Chapman v. California, 386 U.S. 18,87 S.Ct. 824, 17 L.Ed. 2d 705 (1967); DeCoster III.

'[P]ursuant to a rule 3.850 motion, a prisoner is entitled to an evidentiary hearing [for the purpose of evaluating an incompetence of counsel claim under these standards] unless the motion and files and records in the case conclusively show that he is entitled to no relief."[2] Meeks v. State, 382 So.2d 673, 676. This Court has long recognized that a movant for post-conviction relief must "set forth facts, rather than conclusions, showing the basis for relief in order to warrant a hearing to determine the truth or falsity of such facts." State v. Barton, 194 So.2d 241,242-243 (Fla. 1967) If the motion contains nothing more than nonspecific, vague, conclusory allegations of incompetent representation which either would not entitle the movant to relief even if taken as true, or which are refuted by the record, the movant has failed to present a case of incompetency as a matter of law and a denial of the claim without an evidentiary hearing is proper. See State v. Reynolds, 238 So.2d 598 (Fla. 1970); Muhammad v. State, 426 So.2d

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[2]emphasis in original.

533 (Fla. 1982); Washington v. State, 397 So.2d 285 (Fla. 1981); Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982). The failure of the trial judge to attach a copy of the record to his order rejecting such a motion does not constitute reversible error where, as here, the reviewing court possesses a copy of this record. See Goode v. State, 403 So.2d 931 (Fla. 1981).

Under these standards, the allegations of trial counsel's ineffectiveness contained in Appellant's Issue Two, being conclusory and either uncompelling if taken as true or refuted by the record, were clearly legally insufficient to warrant an evidentiary hearing. As a threshold matter, Appellee would note that Appellant has alleged trial counsel to be ineffective on forty-three distinct counts. For three reasons, Appellee does not deem it necessary to reply to each of these claimed incompetencies individually.

First, in earlier times, this Court several times indicated its disapproval with an appellant's unpersuasive practice of filing numerous assignments of error, see, e.g., Vaughan's Seed Store v. Stringfellow, 48 So. 410 (Fla. 1908), and Redditt v. State, 84 So.2d 317 (Fla. 1955), affirmed, 88 So.2d 126 (Fla. 1956), and Appellee would assert that the filing of numerous allegations of ineffectiveness is similarly, one might say presumptively, unpersuasive. Logic is the life of the law, and it is scarcely logical that an ordinary layman, let alone a trained attorney, could commit forty-three distinct Knight v. State incompetencies during the course of even a very demanding proceeding. Secondly, many of the forty-three broad brushed claims of incompetency are

in reality merely disguised attempts to secure review over the merits of the trial judge's decisions. Just as the cry of fundamental error cannot be employed as an "open sesame" for the Court's direct consideration of matters not preserved for appellate review, State v. Smith, 240 So.2d 807,810 (Fla. 1970), so too the cry of ineffectiveness of counsel should not be employed as an "open sesame" for this Court's collateral consideration of such matters. Absent a showing of both a valid cause for a defendant's failure to timely raise a claim and actual prejudice resulting therefrom, collateral consideration of the claim is absolutely barred. See Wainwright v. Sykes, 433 U.S.72 (1977). See also Engle v. Isaac, 456 U.S. 107 (1982); United States v. Frady, 456 U.S. 152 (1982); Davis v. McAllister, 631 F.2d 1259 (5th Cir. 1980), cert. denied, 452 U.S. 907 (1981); Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); United States ex. rel. Caruso v. Zelinsky, 689 F.2d 435 (5th Cir. 1982). Even a full-fledged "allegation of ineffective counsel is not sufficient to satisfy the "cause requirement". Washington v. Estelle, 648 F.2d 276,278; see also Jones v. Jago, 701 F.2d 45 (6th Cir. 1983).

Thirdly, on direct appeal, this Court noted that Appellant had "confessed and expressed a desire to be executed". 378 So.2d 765,773. Just before sentencing, moreover, Appellant told the trial judge to "give me the death sentence if you pass any sentence at all on me" (TP:7). To obtain relief from a death sentence under Knight v. State, a defendant must ultimately show that but for an alleged dereliction of counsel, he would likely

have avoided such a sentence. How can a defendant make such a showing when, like Appellant, he has asked for death?

Although Appellee will not respond to each of the claimed incompetencies individually, Appellee will respond to the thrust of Appellant's major theme, repeated in innumerable variations, that trial counsel was ineffective for failing to present exhaustive evidence of Appellant's deprived and depraved early years at sentencing. Taking as true for the time being the claim that trial counsel wholly failed to attempt to use Appellant's background to advantage, the allegation that such action constituted ineffectiveness simply does not follow. Presumably, Appellant's present counsel would have had trial counsel apprise the jury of this information with the expectation that the jury would believe that Appellant's past prevented him from effectively controlling his actions in committing the murder and that he therefore was to be pitied.[3] But again, logic is the life of the law. It is far more likely that the average jury, having already convicted a defendant of a cold-blooded murder, if convinced that a "parade of horribles" from the defendant's distant past did indeed prevent him from controlling his actions in committing the murder, would determine that this past would irrevocably control the defendant's future acts and that he should therefore be executed. This being so, counsel cannot be faulted here for failing to put on "mitigating" evidence that Appellant

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[3] Appellant's failure to directly allege any nexus between his past and the crime itself defeats his attempted reliance upon this Court's holding in Holmes v. State, 429 So.2d 297 (Fla. 1983) that evidence of a psychological disturbance at the time of a capitol felony is relevant in mitigation. See also Eddings v. Oklahoma, 455 U.S. 104 (1982).

as a young man had a low I.Q., that he had homosexual tendencies, that he grew up in a reformatory, and that he fantasized getting revenge. An attorney who went forward with such evidence would face a far more compelling ineffectiveness rap! Such evidence would have strengthened, not shaken, the jury's obvious conclusion that the problem with Appellant was neither societal nor mental, but moral.

Moreover, the assumption that trial counsel did not effectively seek to use Appellant's past to his advantage is refuted by his understated generalized references to Appellant's troubled background during the sentencing proceedings (TP:8-11). That counsel's soft-sell did not prevent the imposition of a death sentence does not create a prima facie case of ineffectiveness, contrary to Appellant's apparent belief. As the 11th Circuit recently stated:

> In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. Washington v. Watkins, 655 F.2d at 1355; Easter v. Estelle, 609 F.2d 765 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See United States v. Guerra, 628 F.2d 410 (5th Cir. 1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); Buckelew v. United States, 575 F.2d 515 (5th Cir. 1978); United States v. Beasley, 479 F.2d 1124,1129 (5th Cir.), cert. denied, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965). Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. Baty v. Balkcom, 661 F.2d 391,395 n.8 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3948 (1982); Baldwin v. Blackburn, 653 F.2d 942,946 (5th Cir. 1981).

Ford v. Strickland, 696 F.2d 804,820 (11th Cir. 1983). For other cases supporting Appellee's proposition that an evidentiary hearing was unnecessary in this case, see Washington v. State, holding that an allegation that counsel failed to request psychiatric reports did not require an evidentiary hearing, and Muhammad v. State (accord). See also Williams v. Maggio in which claimed incompetencies of trial counsel in pretrial preparation and in failing to call character witnesses were held insufficient to require an evidentiary hearing, and Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), in which an allegation that trial counsel failed to argue the defendant's past in mitigation was similarly disposed of. See generally Adams v. Balkcom, 688 F.2d 734 (11th Cir. 1982).

In sum, the trial judge's summary denial of Appellant's motion for post-conviction relief was proper because Appellant had stated no claim upon which relief could have been granted. Appellee requests that this Court affirm this denial and afford all the finality within its power to the sentence long ago imposed by the trial court. See Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980).

CONCLUSION

WHEREFORE, Appellee submits that the trial judge's summary denial of Appellant's motion for post-conviction relief be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee has been furnished by U. S. Mail to Ms. Susan Cary, 2614 S.W. 34th Street, Gainesville, Florida, 32608, this 12th day of July, 1983.

John W. Tiedemann

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