IN THE SUPREME COURT OF FLORIDA

RAYMOND STONE,

Appellant,

vs. CASE NO. 63,638

STATE OF FLORIDA,

Appellee.

_____/

On Appeal From Denial Of Motion To Vacate By The Circuit Court Of The Eighth Judicial Circuit, In And For Union County, Florida.

REPLY BRIEF OF APPELLANT

FLORIDA INSTITUTIONAL LEGAL SERVICES, INC.

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ARGUMENT

THE COURT BELOW ERRED IN SUMMARILY DISMISSING THE MOTION TO VACATE AS A MATTER OF LAW.

As to Issues One, Three and Four, Stone recognizes, as did the trial court, that most of these points were passed upon in the course of this Court's review of the case on direct appeal, but, again, he asks the Court to review the issues in light of subsequent state and federal caselaw. The sub-issues which were not raised on direct appeal concern the challenge to the standard practice of instructing the jury on lesser included offenses regardless of evidentiary support, challenged as a violation of Hopper v. Evans, ___ U.S. ___, 102 S.Ct. 2049 (1982) (¶16A, Motion to Vacate, RMV 34-35) and the challenge to the statute as applied because of racial, gender, geographic and economic disparity (¶15B, Motion to Vacate, RMV 35). The Hopper issue has been decided adversely on the merits in several recent capital cases on appeal from denials of Motions to Vacate or in original proceedings in this court, procedurally in the same posture as Stone. See, e.g., Hitchcock v. State, 432 So.2d 42 (Fla. 1983); Riley v. State, ___ So.2d ___, 8 F.L.W. 190 (Fla. 1983); Aldridge v. State, ___So.2d ___, 8 F.L.W. 203 (Fla. 1983). Unconstitutional application of the

statute is a proper subject for collateral attack. Henry v. State, 377 So.2d 692 (Fla. 1979).

As to Issue Two, involving ineffective assistance of counsel, the only exceptions to the rule that this issue must first be presented to the trial court for the making of an appropriate record for review are cases in which the ineffectiveness is already apparent on the record, for example, where conflict of interest is apparent, as in Foster v. State, 387 So.2d 344 (Fla. 1980), or where counsel has been rendered ineffective by operation of law as in Valle v. State, 394 So.2d 1004 (Fla. 1981). In Foster, defense counsel also represented a co-defendant who testified against Foster at trial and whose charges were dropped in open court immediately after her testimony. In Valle, counsel was forced to a first degree murder trial twenty-four days after arraignment without being able to complete discovery for guilt or penalty phases. Prejudice, observed this Court, was clear from the record. Valle, 394 So.2d at 1008.

In comparing this Court's opinion on direct appeal in Stone v. State, 378 So.2d 765 (Fla. 1979), with the allegations of the Motion to Vacate, it is clear that the record before the Court on direct appeal was insufficient to support a determination one way or the other on the issue of effectiveness of counsel.

In Gibson v. State, 351 So.2d 948 (Fla. 1977), cited by the State at Answer Brief, page 4, this Court ruled that the record as it existed did not show ineffectiveness at penalty phase (there having been no showing of what counsel could have presented in mitigation) and that a brief argument at penalty phase was not per se ineffective. The State also cites out of context a passage from Vagner v. Wainwright, 398 So.2d 448 (Fla. 1981), (Answer Brief, page 4) to support its contention that claims of ineffective assistance of counsel should be raised on direct appeal, implying, of course, that since Stone did not do so, the issue is waived. Vagner involved the question of ineffectiveness of retained versus appointed counsel and this Court held 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, to the same extent as are such claims pertaining to appointed counsel.
>
> Vagner, 398 So.2d at 452.

The rule of State v. Barber, 301 So.2d 7 (Fla. 1974) still stands: except in rare cases, claims of ineffective assistance of counsel cannot be raised on direct appeal.

As to the substance of the claim itself, the State would place Stone in a lethal Catch-22: his pleadings are

either conclusory (Answer Brief, page 7, ¶1) or too detailed (Answer Brief, page 7, ¶2). (Where the State finds forty-three allegations of ineffectiveness is a mystery, other than perhaps by counting each lettered paragraph.) Knight v. State, 394 So.2d 997 (Fla. 1981) requires each specific act or omission to be detailed in the pleadings. See also Washington v. State, 397 So.2d 285 (Fla. 1981). A defendant cannot merely allege what counsel failed to do; he must show what counsel could have done had he acted. Stone has demonstrated by the Appendix to his Motion to Vacate and by pertinent references to the Appendix quoted in the Motion the kinds of evidence that counsel could have uncovered and presented had he made the effort to do so. Through the affidavits of several prominent members of the criminal defense bar, Stone has met the second requirement of Knight: showing a substantial deficiency below that of competent counsel.

As to prejudice: Raymond Stone, born Walter Herron, was raised in abject poverty in a garbage dump in Caruthersville, Missouri, one of the poorest, most desolate areas in the entire country. He lived in filth with his father, brothers and a sister in the body of a cast-off pick-up truck. His mother died under mysterious circumstances, probably at the hand of his father. Raymond and the other children were physically abused by their father; they roamed the streets of Caruthersville barefoot and in rags selling paper flowers they had made. The townspeople were

aware of the children's deplorable condition. No one did anything. The children remained at the mercy of their father. Raymond Stone and one brother were involved in the killing of another child whose lunch money they had been taking in order to have money to appease their father who otherwise would beat them. From that time on, Raymond Stone was sent from institution to institution in Missouri with not one offering the help he desperately needed. He was given at least five electroshock treatments in 1955 alone. He was consistently described as being of extremely low intellectual ability and as being severely emotionally disturbed because of his family situation. People who befriended him when he was out of prison report that he was extremely hardworking, protective and loyal, readily responsive to the least showing of kindness toward him.

The State and this Court (Stone, 378 So.2d at 773) have actually construed Stone's mental history as an aggravating rather than mitigating circumstance, a practice condemned by the Supreme Court of the United States in its recent decisions of Zant v. Stephens, ___ U.S. ___, 51 U.S.L.W. 4891 (June 22, 1983) and Barclay v. Florida, ___ U.S. ___, 51 U.S.L.W. 5206 (July 6, 1983).

It is reasonable to assume that a jury of persons of reason and a modicum of compassion may well have recommended a life sentence had they been apprised of Stone's background.

See, for example, the cases discussed in Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L. Rev. 299 (1983). Goodpaster discusses the Georgia case of Bernardino Sierra, a man who was "mean, big, and ugly," who had done "evil and inhuman things": in eight hours he had committed twelve robberies, two maimings and three torturous killings. It was revealed at penalty phase that as a child, he was often beaten with a wire whip by a drunken father. He would be forced to sleep under the house; often he had no food. He foraged in garbage cans. He had a beautiful child of his own. Given that information, the jury spared Sierra's life. Stone's counsel should have conducted a thorough investigation so that he could have made an informed choice of what to present to the jury. As it was, there was no strategy because there was no information.

A new wrinkle has been added to this problem by the serendipitous discovery, on June 24, 1983, of a Memorandum in the central files of the Department of Corrections indicating that some psychiatric records from Stone's prison files had been given to the State Attorney two days before penalty phase. Yet, as indicated in the Motion to Vacate, ¶14A (W)-(Y), defense counsel had been told that there were no such records in the prison files. Stone has filed a Motion to Relinquish Jurisdiction alleging a violation of

Brady v. Maryland, 373 U.S. 83 (1963).

Counsel's performance cannot be excused because Stone told the court to sentence him to death. That statement was made ten weeks after the jury's death recommendation, to the court at the moment of sentencing, as Stone expressed his belief that his trial had not been fair and that the penalty had already been decided.

Counsel at the time of actual sentencing did have two sets of psychiatric records in his possession. Although those psychiatric reports are not the only evidence Stone now presents to the court, they do indicate the kind of investigation that should have been undertaken. Counsel at sentencing noted that the jury took longer to recommend penalty than to determine guilt. (TS 10) With witnesses who would have testified about Raymond Stone's life, witnesses who were available but never approached, a vote for life would have resulted, and the court would have been bound absent clear and convincing evidence that the vote for life was totally unreasonable. Spaziano v. State, ___ So.2d ___, 8 F.L.W. 178 (May 27, 1983); Tedder v. State, 322 So.2d 908 (Fla. 1975).

The court apparently recognized some of the evidence as being potentially mitigating but did not feel able to consider it in determining sentence, a situation similar to that which arose in Eddings v. Oklahoma, 455 U.S. 104 (1982).

The court mentions Stone's history nowhere except to negate the absence of the mitigating factor of insignificant prior criminal history. The court discusses only the statutory mitigating circumstances in its sentencing order.

The State assumes that defense counsel's so-called "soft sell" approach was a strategic decision. Stone contends that counsel simply was ill-prepared to argue forcefully because he did not conduct a thorough investigation.

In Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), cited by the State to support its position that an evidentiary hearing was unnecessary, the court stated that a strategic decision will be presumed absent evidence introduced to overcome the presumption. In Stanley, a hearing had been held in state habeas proceedings but the trial attorney had not been called as a witness to explain his actions. Therefore, the presumption of a strategic decision had not been overcome and counsel was not found ineffective. Interestingly, in Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), decided the same day as Stanley, the case of Stanley's co-defendant Thomas was remanded for a hearing on why the trial attorney had not been called as a witness in the state habeas proceedings.

The State has failed to address the systemic problem of the Public Defender's office during preparation for Stone's trial or the fact that an attorney admitted to the

bar for a matter of only a few months, with limited trial experience, and totally without assistance was assigned to defend a capital case. Counsel was not likely to render and did not render effective assistance of counsel.

At the heart of effective representation is the independent duty to investigate and prepare. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1798 (1983). When an attorney fails to conduct a substantial investigation into any of his client's plausible lines of defense, the attorney has failed to render effective assistance of counsel. Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B 1982), en banc, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3871, No. 82-1554.

Counsel did not conduct any investigation whatsoever into Stone's background to explore possible areas of mitigation, except to request psychiatric reports from the Department of Corrections. He did not render effective assistance of counsel.

The Motion to Vacate should not have been denied without affording Stone an opportunity to prove his allegations.

CONCLUSION

This Court should reverse the decision of the trial court and grant the Motion to Vacate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Appellant has been furnished by U.S. Mail to John W. Tiedemann, Assistant Attorney General, Suite 1502, The Capitol, Tallahassee, Florida 32301, this 4th day of August, 1983.

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