IN THE SUPREME COURT OF FLORIDA

GERALD EUGENE STANO, Appellant,	)	
vs.	)	Case No. 64,687
STATE OF FLORIDA, Appellee.	)	

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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

ARGUMENT

POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN LIMITING APPELLANT'S VOIR DIRE EXAMINATION OF THE VENIRE RESULTING IN A DENIAL OF DUE PROCESS AND THE RIGHT TO A FAIR TRIAL.

Appellant contends that it is not as clear as Appellee maintains that Ms. Erb had no preconceived opinion. In response to defense counsel's question as to how the pretrial publicity was going to effect her deliberations, she replied that she would, "Block it out". (R 135-136) This answer clearly implies that Ms. Erb had an opinion on the issues to be tried. Thus she meets the threshold question.

Appellee's extension of the rule prohibiting voir dire questions calling for a verdict in advance [Smith v. State, 253 So.2d 465 (Fla. 1st DCA 1971)] has no foundation in the law or in logic. Defense counsel's questioning in the instant case did not seek a promise to acquit or convict prior to trial based upon

certain facts. The question is simply an exploration of the juror's potential bias and her ability to be impartial.

Some of the cases relied upon by the appellee deal with excusals for cause and motions for change of venue. These are not issues in the case at bar. Rather, Appellant contends that the trial court improperly restricted his voir dire such that defense counsel could not intelligently exercise his preemptory challenges. Nor did Appellant have sufficient information to formulate certain challenges for cause. This restriction improperly denied Appellant his constitutional right to fair and impartial jurors.

POINT II

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE AT BOTH PHASES OF THE PROCEEDINGS WHERE SUCH EVIDENCE WAS CRUCIAL TO HIS DEFENSE THEREBY RESULTING IN A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT.

Appellant strongly disputes Appellee's contention that Dr. Stern's testimony was not proffered for the penalty phase. See Appellee's Brief, page 28. Appellant contends that the record clearly reflects that the proffered testimony of Dr. Stern and Officer Kappel was proffered and excluded at both the guilt and penalty phases of the trial. (R 1258-1262)

POINT III

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE, OVER OBJECTION, THE FORMER TESTIMONY OF JOHN AND EDITH SCHARF, CONTRARY TO ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION AND AMENDMENTS SIX AND FOURTEEN, UNITED STATES CONSTITUTION.

Appellee states that at a pretrial hearing, defense counsel made three objections to the state's motion to declare the witnesses unavailable. These three objections included: (1) the witnesses should be confronted at the time of trial; (2) the witnesses should be exhorted to testify short of having to put them in jail or impose a bond upon them; and (3) the court should not declare them unavailable based upon unanticipatory refusal. See Appellee's Brief, page 31. Appellee then maintains that at trial, defense counsel's only objection to the introduction of the previously transcribed testimony was "For those objections already noted...". See Appellee's Brief, page 32. Appellee then states that the only previous objections related to the premature nature of the state's motion to declare the witnesses unavailable. Appellant contends that this is error. Defense counsel's timely reminder to the trial court of its previous objections was sufficient to preserve this issue for appeal. (R 697)

Appellee submits that the timing of the parents' refusal to testify is irrelevant. Appellant strongly disagrees. It is clear from the record that the Scharfs were present at every court appearance and obeyed every court order. Mr. Scharf's testimony is not conclusive at to his absolute refusal

to testify at trial. (R 1320) Appellant is of the opinion that the Scharfs might very well have taken the stand and testified at trial if they had been so ordered.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S TIMELY AND SPECIFIC OBJECTION AND ALLOWING THE STATE TO CONDUCT AN EXTENSIVE, IRRELEVANT AND PREJUDICIAL CROSS-EXAMINATION OF THE APPELLANT DURING THE PENALTY PHASE AS WELL AS ENGAGE IN IMPROPER ARGUMENT THUS DEPRIVING APPELLANT HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Initially, Appellee submits that this issue is not properly preserved for appellate review. Defense counsel timely objected to the beginning of the prosecutor's line of improper cross-examination as being irrelevant. (R 1836) Once this objection was rebuffed, Appellant was not required to continue objecting and thus risk incurring the wrath of the court. Likewise, Appellant submits that defense counsel's contemporaneous objection that the prosecutor's argument was improper does preserve this issue for appeal. (R 1279) This is not a case where defense counsel failed to object at all. The trial court's rebuff of Appellant's objection and the court's allowance of continuing improper questioning and argument by the state resulted in a deprivation of Appellant's right to a fair trial. The trial court's rulings gave the state free rein to continue.

In this point on appeal, Appellant is not suggesting that the prosecutor not be allowed to argue surrounding circumstances in the penalty phase of other murders. (But See Point IX) However, it is the substance and manner of the prosecutor's questioning and argument to which Appellant complains. The state is permitted to cross-examine a defendant concerning matters

which are raised in mitigation but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the state. State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973). Therefore, cross-examination of the defendant during the penalty phase is not a proper source for evidence and argument concerning other murders. The cases upon which Appellee relies relate to evidence presented through means other than cross-examination of the defendant.

The fact that defense counsel relied upon the fact that Gerald Stano had two prior death penalties in the closing argument during the penalty phase cannot be used to justify this error. By the time closing argument arrived, the trial court had already allowed the improper cross-examination of the appellant and defense counsel was simply attempting to make the best of it.

Appellee further states that the prosecutor's argument does not assume facts not in evidence. See Appellee's Brief, pages 59-60. The state's argument to the jury dealt with the good possibility of the reversal of Appellant's previous two death sentences. The prosecutor did assume facts not in evidence when he, in essence, relayed the law regarding the effectiveness of trial counsel in the entry of guilty pleas to first-degree murder. Without the prosecutor's argument, the jury had no standard by which to judge the likelihood of success by Gerald Stano in his quest for post-conviction relief.

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S NUMEROUS OBJECTIONS AND ALLOWING CONTINUING TESTIMONY, EVIDENCE AND ARGUMENT CONCERNING SPECIFIC DETAILS ABOUT APPELLANT'S PRIOR CAPITAL CONVICTIONS RESULTING IN THAT EVIDENCE BECOMING A FEATURE OF THE PENALTY PHASE THEREBY DENYING APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

In urging that any error that may have occurred was harmless, Appellee points out that the trial court did not rely on any details of other murders in his written findings of fact in support of the death penalty. See Appellee's Brief, page 65. This clearly overlooks the enormous significance of the jury recommendation in our capital sentencing structure. This Court has stated that "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975). Thus, improperly admitted evidence which contributes to a jury recommendation of death cannot in any circumstances be deemed harmless.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED IN VIOLATION OF THE STATUTE, ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Despite Appellee's contention, Appellant submits that the record reveals that neither Dr. Carrera or Dr. Barnard examined the appellant in reference to this particular murder. The examinations conducted by these doctors were done prior to previous trials regarding unrelated crimes. (R 1211, 1242)

CONCLUSION

Based upon the foregoing cases, authorities and policies cited herein and in the initial brief, Appellant respectfully requests that this Honorable Court grant the following relief:

1. As to Point VI: Vacate the judgment and sentence and remand for discharge;

2. As to Points I, II, III, IV, V and VII: Vacate the judgment and sentence and remand for a new trial.

3. As to Points VIII and IX: Vacate the death sentence for the imposition of a life sentence or, in the alternative, for a new penalty phase;

4. As to Point X: Vacate the death sentence and remand with instructions to impose a life sentence; and

5. As to point XI: Declare the death penalty unconstitutional, vacate the death sentence and remand with instructions to impose a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to the Honorable Jim Smith, Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida and Mr. Gerald Eugene Stano, Inmate No. 079701, Florida State Prison, Post Office Box 747, Starke, Florida 32091 this 3rd day of October, 1984.

CHRISTOPHER S. QUARLES
CHIEF, CAPITAL APPEALS
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