SUPREME COURT OF FLORIDA

CARL PUIATTI,

Petitioner,

v. CASE NO. 74,865

STATE OF FLORIDA,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

I. Preliminary Statement

On or about March 1, 1990, petitioner Puiatti filed his Amended Petition for Writ of Habeas Corpus. On or about April 16, 1990, petitioner sought leave to submit a supplemental brief. On April 23, 1990, this Honorable Court entered its order permitting a supplemental answer brief by May 8, 1990. The Court has not ordered a response to the Amended Petition previously filed and respondent assumes that no response is required until further order or until the filing of the appellate papers following the disposition of the pending 3.850 motion in the circuit court.

II. Procedural History

Carl Puiatti and a codefendant Robert Glock were charged by indictment with first degree murder, kidnapping and robbery of Mrs. Sharilyn Richie. Trial by jury resulted in guilty verdicts and following a penalty phase proceeding the jury recommended a sentence of death. The trial court imposed death.

Puiatti took a direct appeal and the Florida Supreme Court affirmed the judgments and sentences. **Puiatti v. State**, 495 So.2d 128 (Fla. 1986). On certiorari, the United States Supreme Court granted the petition and remanded for further consideration in light of **Cruz v. New York**, 481 U.S. 186, 95 L.Ed.2d 162 (1987). See **Puiatti v. Florida**, 481 U.S. 1027, 95 L.Ed.2d 523 (1987). Following remand, the Florida Supreme Court again affirmed the judgment and sentence. **Puiatti v. State**, 521 So.2d 1106 (Fla. 1988), **cert. denied**, __ U.S. __, 102 L.Ed.2d 153 (1988).

On his direct appeal, Puiatti initially raised seven issues, then added another in a supplemental issue. A list of these issues is provided as Appendix "A" attached herewith.

III. WHETHER THE DECISION IN REILLY V. STATE, ___ So.2d ___, 15 F.L.W. S135 (Case No. 73,571 March 8, 1990) COMPELS THE GRANTING OF HABEAS CORPUS RELIEF.

In Reilly v. State, a direct appeal case, this Court reversed the conviction and remanded for a new trial. The Court explained:

> " . . . .Reilly now contends that the refusal to remove juror Blackwell for cause was reversible error. The problem is that juror Blackwell knew that a confession had been given. This might not require disqualification if the confession were going to be introduced into evidence. Here, however, the confession had been suppressed. Thus, juror Blackwell was aware of a fact that was inadmissible which was far more damaging to Reilly than anything which was actually introduced into evidence. While Mr. Blackwell subsequently gave the right answers with respect to whether or not he could be an impartial juror, it is unrealistic to believe that during the course of deliberations he could have entirely disregarded his knowledge of the confession no matter how hard he tried. Thus, we conclude that reversible error was committed by the failure to excuse juror Blackwell for cause.
>
> (emphasis supplied) (text at 135 - 136)

Reilly does not compel reversal for several reasons. First, the claim has been procedurally defaulted because it was an issue that could have been urged on direct appeal and was not. This Court has consistently explained that habeas corpus will not be permitted to be used as a vehicle for a second appeal. Porter v. Dugger, ___ So.2d ___, 15 F.L.W. S78 (February 15, 1990, Case No. 74,478); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); Clark v.

Dugger, ___ So.2d ___, 15 F.L.W. S50 (February 1, 1990, Case No. 74, 468); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

The respondent respectfully requests this Court to make a plain statement that it is denying relief for procedural reasons to satisfy the requirements of Harris v. Reed, 489 U.S. ___, 103 L.Ed.2d 308 (1989) and to insure that federal courts do not engage in second guessing this Court's ruling.

Moreover, even if the claim could be asserted now (and to the extent that Puiatti claims that his appellate counsel was ineffective), respondent would note that (1) appellate counsel is not deficient in failing to anticipate a future decision such as Reilly and (2) Reilly would not require relief since Puiatti's cumulative confessions were admitted into evidence, notsuppressed as in Reilly and thus the rationale of the latter case is inapposite.

IV. WHETHER THE DECISION IN OWEN V. STATE, ___ So.2d ___, 15 F.L.W. S107 (Case No. 68,550, March 1, 1990) REQUIRES THE GRANTING OF HABES CORPUS RELIEF.

In Owen v. State, the Court held on direct appeal of a conviction that a confession had to be suppressed when the police pressed the accused to talk after the defendant said, "I don't want to talk about it." Owen does not compel relief sub judice.

Risking redundancy, respondent continues to rely on the well-established rule in Florida that a substantive claim may not be considered in a post-appeal habeas petition as if the habeas corpus vehicle were a second appeal. See cases cited, supra, at

page 3. The Court should forthrightly declare that relief is denied for reasons of procedural reasons. Harris v. Reed, supra.

To the extent that petitioner is urging a claim of ineffective appellate counsel for the failure to urge a different argument than the one he utilized on direct appeal, the claim must fail as he can demonstrate neither a deficiency nor a reasonable probability of a different outcome as required by Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984).

Appellate counsel did litigate in a competent manner the contention that introduction of the codefendant's confession violated the precepts of Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 4786 (1968); Puiatti v. State, 495 So.2d 128 (Fla. 1986), vacated, Puiatti v. Florida, 481 U.S. 1027, 95 L.Ed.2d 523 (1987), affirmed, Puiatti v. State, 521 So.2d 1106 (Fla. 1988), cert. denied, ____ U.S. ___, 102 L.Ed.2d 153 (1988).

In issue II of the appellate brief counsel had urged:

> "Carl Puiatti's motion to suppress post-arrest statements was improperly denied where it was established that the statements were the product of an illegal detention."

This Court rejected the claim, tersely noting, "we find that there was probable cause to make Puiatti's arrest." 495 So.2d at 130.

Habeas counsel may not successfully attempt to relitigate the same or similar argument on the basis that his is better. See, Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Quince v. State, 477 So.2d 535 (Fla. 1985); Stano v. Dugger, 524 So.2d 1018 (Fla. 1980).

Even if appellate counsel had been inclined to follow the suggestion now offered by collateral counsel, he would not have prevailed. An extensive suppression hearing had been conducted at trial (R 450 - 786), the motion to suppress (R 159 - 162, 213 - 214) did not urge the grounds now advocated so the issue may not have been adequately preserved for appellate review and Puiatti himself testified at the suppression hearing that he understood his rights (R 712), he did not tell the police he wanted a lawyer (R 719 - 720), he declined the opportunity to converse with Assistant Public Defender Norgard. (R 721) The trial court found the confession to be voluntary. (R 784)

Any argument that appellate counsel may have urged on direct appeal regarding an involuntary confession or denial of request for counsel would have failed since either it was not urged and preserved in the trial court or there was contrary support in the record to warrant rejection of the claim. Cf. Herring v. Dugger, 528 So.2d 1176 (Fla. 1988).

The claim that Puiatti wanted to cut off questioning and see a lawyer is belied by the record. Puiatti testified that at no time did he ask the officers he wanted a lawyer. (R 719 - 720) He decided not to talk to lawyer Norgard that night. (R 721)

Officer Wiggins testified that he told Glock and Puiatti they still had the right to talk to a lawyer who was available and they told him they did not want a lawyer and if they wanted one they would call one the next day. (R 651) Defense lawyer Norgard confirmed that Puiatti did not want to talk to him that evening. (R 689)

The instant case is totally dissimilar to Owen, supra, where the accused did seek to cut off questioning and appellate counsel would not have succeeded in urging the claim on appeal. See Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988) (appellate counsel not ineffective for failing to brief issue not properly preserved for appellate review); Doyle v. State, 526 So.2d 909 (Fla. 1988) (appellate counsel not ineffective for failing to raise meritless issue); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989) (even if claim properly preserved for appellate review; competent counsel may decide it is more advantageous to raise only the strongest points, not every conceivable issue, lest the impact of stronger points be diluted.); see also Francois v. Wainwright, 470 So.2d 684 (Fla. 1985)(even if issue should have been raised, the omission did not undermine appellate process so as to deprive defendant of a meaningful appeal.)

Petitioner may perhaps be of the view that whenever this Court periodically publishes a decision that constitutes a change requiring reconsideration and representation of issue that might have been or were earlier urged. And presumably there is little to disabuse petitioner and others similarly situated of attempting to do. Respondent would urge the Court to continue to remind the Bench and Bar as it did in Porter v. Dugger, supra, that a habeas petitioner cannot simply return to court after each new decision and attempt to compare his case to the newly-decided case. To permit such an approach would be to allow a capital

defendant to hold the criminal system hostage by seeking never-ending comparisons and would render nugatory any principle of finality. This has been recognized in Spinkellink v. Wainwright, 578 F.2d 582, 604 - 605 (5th Cir. 1978):

> First, every criminal defendant sentenced to death under Section 921.141 could through federal habeas corpus proceedings attack the statute as applied by alleging that other convicted murderers, equally or more deserving to die, had been spared, and thus that the death penalty was being applied arbitrarily and capriciously, as evidenced by his own case. The federal courts then would be compelled continuously to question every substantive decision of the Florida criminal justice system with regard to the imposition of the death penalty. The intrusion would not be limited to the Florida Supreme Court. It would be necessary also, in order to review properly the Florida Supreme Court's decisions, to review the determinations of the trial courts. And in order to review properly those determinations, a careful examination of every trial record would be in order. A thorough review would necessitate looking behind the decisions of jurors and prosecutors, as well. Additionally, unsuccessful litigants could, before their sentences were carried out, challenge their sentences again and again as each later-convicted murderer was given life imprisonment, because the circumstances of each additional defendant so sentenced would become additional factors to be considered. The process would be never ending and the benchmark for comparison would be chronically undefined.

The Court too has evinced a concern for finality. See Witt v. State, 387 So.2d 922, 925 (Fla. 1980).

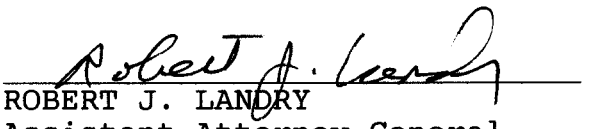
> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an

> end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.
>
> (text at 925)

See also Johnson v. State, 536 So.2d 1009, 1011 (Fla. 1988) (the credibility of the criminal justice system depends upon both fairness and finality).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 24 day of May, 1990.

Robert J. Landry
OF COUNSEL FOR RESPONDENT.

APPENDIX A

ISSUE I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING CARL PUIATTI'S MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CO-DEFENDANT.

ISSUE II. CARL PUIATTI'S MOTION TO SUPPRESS POST-ARREST STATEMENTS WAS IMPROPERLY DENIED WHERE IT WAS ESTABLISHED THAT THE STATEMENTS WERE THE PRODUCT OF AN ILLEGAL DETENTION.

ISSUE III. CARL PUIATTI WAS DENIED HIS RIGHT TO A FAIR TRIAL BY THE PROSECUTOR'S INFLAMMATORY AND PREJUDICIAL STATEMENTS TO THE JURY.

ISSUE IV. THE TRIAL COURT ERRED BY OVERRULING A DEFENSE OBJECTION TO THE PROSECUTOR'S CLOSING ARGUMENT WHICH ADVISED THE JURY THAT THEY COULD PRESUME PREMEDITATION FROM MR. PUIATTI'S INVOLVEMENT IN A FELONY MURDER.

ISSUE V. THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE ADVISORY JURY CONCERNING SPECIFIC NON-STATUTORY MITIGATING CIRCUMSTANCES.

ISSUE VI. THE TRIAL COURT ERRED BY SENTENCING CARL PUIATTI TO DEATH BECAUSE THE PENALTY WEIGHING PROCESS INCLUDED INAPPLICABLE AGGRAVATING CIRCUMSTANCES AND EXCLUDED APPLICABLE MITIGATING CIRCUMSTANCES THEREBY RENDERING MR. PUIATTI'S DEATH SENTENCE UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

ISSUE VII. THE EXCLUSION FROM THE TRIAL STAGE OF PROSPECTIVE JURORS OPPOSED TO THE DEATH PENALTY RESULTED IN A CONVICTION-PRONE JURY AND DENIED CARL PUIATTI HIS SIXTH AMENDMENT RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

Puiatti added in a supplemental brief the issue:

BECAUSE A SIGNIFICANT PORTION OF THE PENALTY PHASE PROCEEDINGS IN THIS CASE WERE CONDUCTED ON A SUNDAY, THE RESULTANT DEATH SENTENCE IS VOID AS A MATTER OF FLORIDA LAW.