IN THE SUPREME COURT OF FLORIDA

NO. SC02-2716

KENNETH STEWART

Petitioner,

v.

JAMES V. CROSBY, JR.
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

The undersigned relies on the facts and arguments set out in Petitioner's Petition for Writ of Habeas Corpus (Corrected) with regard to all matters not specifically addressed herein.

References to the record are in the same form as in the Corrected Petition for Writ of Habeas Corpus. The record on appeal concerning the original court proceedings will be referred to as "R. _____" followed by the appropriate page number. All other references will be self-explanatory or otherwise explained herein.

ARGUMENT III

APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE ON DIRECT APPEAL THAT DEFENSE COUNSEL'S CONCESSION OF GUILT VIOLATED MR. STEWART'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In its response to Argument IV of Mr. Stewart's Petition for Writ of Habeas Corpus, Respondent states that habeas relief on this claim should be denied for the following reasons:

- this issue could not have been brought on direct appeal[1]; and

[1] Response to Petition for Writ of Habeas Corpus, p. 22.

- this claim would require "the development of facts at an evidentiary hearing, and therefore would not present an instance of ineffectiveness which could be apparent on the face of the record, citing Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990)."[2]

The petitioner asserts that neither of the above listed reasons for denial is supported by the record nor current law as applied to this case.

The Respondent argues that appellate counsel could not seek direct relief from this Court for the error which occurred when trial counsel conceded Mr. Stewart's guilt to the jury. While claims of ineffective assistance of counsel are most often addressed in post-conviction motions, there exist circumstances in which the deficiencies of trial counsel are so obvious and prejudicial that the harm inflicted rises to the level of fundamental error. See, Hargrave v. State, 427 So. 2d 713 at 715 (Fla. 1983) ("If an impropriety at trial rises to the level of a due process violation of a fundamental constitutional right, it may be considered fundamental error which can be raised on appeal in spite of a failure to object at trial.").

Additionally, Respondent contends that because Nixon was remanded for an evidentiary hearing on the issue of the

[2] Id. at p. 22.

defendant's consent to counsel's concession of guilt, as a theory of defense, this would suggest that the foregoing claim can only be raised in post-conviction proceedings. This reading of Nixon is erroneous and inconsistent with previous Court rulings. Counsel had a duty to raise the issue of trial counsel's denial of petitioners' fundamental constitutional right to have his guilt or innocence decided by the jury. The resulting harm to Mr. Stewart in the instant case is well recognized by the courts. See, e.g., United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Wiley v. Sowders, 647 F.2d 642 (6th Cir. 1981), cert denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.630 (1981); and State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985).

In Nixon, the defendant argued that trial counsel's concession of guilt resulted in a "complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel" and therefore constituted ineffectiveness per se as held in United States v. Cronic. See, Nixon v. State, 572 So.2d 1336, 1339 (1990). This court, citing Hattery,[3] which held that defense counsel is per se ineffective for conceding defendants' guilt unless the record shows the defendant

[3] People v. Hattery 109 Ill.2d. 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985).

consented to this strategy, sought to supplement the record in Nixon after finding the initial record on appeal insufficient to resolve the issue of consent. Id at 1339. This Court remanded the case to the circuit court for an evidentiary hearing on whether Nixon was informed of counsel's strategy to concede guilt in an effort to achieve leniency. Id. Ultimately, because the record remained incomplete as to whether Nixon was informed of trial counsel's strategy to concede guilt, this court declined to rule on the merits of this claim without prejudice so that it could later be raised in post-conviction. Id at 1340. The Court did not hold that a claim challenging trial counsel's strategy to concede guilt as a theory of defense was not reviewable on direct appeal.

During post-conviction proceedings in Nixon, the trial court hearing the defendant's subsequent post-conviction motion refused to grant an evidentiary hearing on the issue of the defendant's consent to counsel's strategy of conceding guilt. See, Nixon v. Singletary, 758 So.2d 618 (Fla. 2000) Therefore, when this Court considered the matter again in Nixon's post-conviction appeal, this Court "still [did] not have the answer it [had] been seeking for the last eleven years." Id at 624. Consequently, the matter was remanded by this Court for an evidentiary hearing in order to protect Nixon's right to due

process. Id.

In the instant case, Mr. Stewart deserves the same protection of his due process rights as the defendant in Nixon. As the Respondent states that "[M]r. Stewart has never personally alleged that counsel did not have his consent to pursue this defense,"[4] Mr. Stewart unlike the defendant in Nixon, was never accorded an opportunity to have this Court consider his lack of consent because his appellate attorney failed to raise the issue on direct appeal. Mr. Stewart has never explicitly consented to trial counsel's concession of guilt during open or closing arguments. And there is no record indication that the Court inquired of Mr. Stewart as to his acceptance of this theory of defense, or of counsel's admissions that he discussed this theory of defense with Mr. Stewart and that he was in agreement with this strategy. Whereas, "an attorney has the right to make tactical decisions regarding trial strategy, the determination to plead guilty or not guilty is a matter left completely to the defendant."[5] Id at 623.

Additionally, this Court has made it clear that "not every situation permits trial counsel to make a concession on a

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[4] Response to Petition for Writ of Habeas Corpus, p. 23.

[5] Nixon citing Faretta v. California, 422 U.S. 806, 820, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

defendant's behalf without the defendant's consent." See, e.g., Atwater v. State, 788 So.2d 223, 231 (Fla. 2001) This Court emphasized that the concession in Atwater occurred **only** during rebuttal and after a "meaningful adversarial testing of the State's case." Id. Mr. Stewart's case is distinguishable from Atwater and more akin to Nixon. Not only did counsel make a concession of guilt in rebuttal to the State's closing as in Atwater, Mr. Stewart's trial counsel repeatedly conceded his guilt in his opening and closing statements as in Nixon. Mr. Stewart's counsel on at least eleven occasions made some overt comment as to Mr. Stewart's culpability to the crimes charged.[6] Thus, trial counsel was per se ineffective in failing to subject the state's case to a meaningful adversarial test and conclusively bolstered the State's witnesses and the evidence against Mr. Stewart. This performance by trial counsel did not provide the effective assistance of counsel as guaranteed to Mr.

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[6] **"Kenny and I are not saying his is not guilty"** (R. 281); **"We are not denying he shot some people"** (R. 281); **"We are not saying he is not guilty"** (R. 281); **"you will find him guilty"** (R. 281); **"I am not asking you in any respect to find him innocent"** (R. 512); **"my client is guilty"** (R. 527); **"He did an overt act which could give rise to an intent to kill"** (R. 527); **"I don't think there is any doubt about that"** (R. 527); **"I think he ended up committing the robbery"** (R. 527); **"He admits that"** (R. 527); **"He did something, wrong"** (R. 544); **"We are admitting that"** (R. 544).

Stewart by the Sixth and Fourteenth Amendments to the United States Constitution.

Finally, Respondent's suggestion that counsel now purports to concede Mr. Stewart's guilt by alleging ineffectiveness of counsel in failing to pursue a voluntary intoxication defense is inaccurate and an understatement of Mr. Stewart's claim. The Petitioner alleges in his Petition for Writ of Habeas Corpus that an instruction on voluntary intoxication would have been reasonable considering the testimony presented at trial.

CONCLUSION AND RELIEF SOUGHT

For the reasons discussed herein, Kenneth Stewart respectfully urges this Honorable Court to grant habeas relief and grant Oral Argument so that the matters discussed herein may be fully addressed before this Court.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to the State's Reply to the Petition for Writ of Habeas Corpus has been furnished by U.S. Mail, first class postage prepaid, to Carol M. Dittmar, Assistant Attorney General, Office of the Attorney General, 2002 N. Lois Avenue, Seventh Floor, Westwood Center, Tampa, Florida 33607 and Kenneth Stewart, DOC# 479774; Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026 on this _____ day of March, 2003.

_____
Daphney E. Gaylord
Assistant CCRC

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response to the State's Reply to the Petition for Writ of Habeas Corpus was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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Daphney E. Gaylord
Assistant CCRC