IN THE SUPREME COURT OF FLORIDA

GERALD E. STANO,

Appellant,

v.

CASE NO. 70,700

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE FACTS

A. SUSAN L. BICKREST

Gerald Eugene Stano was indicted by the Volusia County Grand Jury in case no. 83-188-CC, on January 18, 1983, for the premeditated murder of Susan Lynn Bickrest. (R 450)[1] The indictment alleges that Miss Bickrest was murdered on December 20, 1975 ". . . by manual strangulation and drowning". (R 450)

Miss Bickrest's body was found floating in the waters of Spruce Creek at approximately 4:30 p.m. on December 20, 1975. (R 189) Two fishermen discovered the body, one-quarter to one-half mile west of Moody Bridge. (R 189) Water marks on the bridge indicated tidal range or activity in the creek. (R 190) Moody Bridge is a small wooden bridge on Airport Road, a narrow dirt road, in a densely wooded, remote area of Volusia County, Florida. (R 191) Near the bridge, at the water's edge, Lieutenant Carl Clifford of the Volusia County Sheriff's Department, discovered a shoe. (R 193, 517, 518) This wooden, platform shoe matched the single shoe Miss Bickrest was wearing when her body was discovered. (R 193, 488, 518) The path leading to the creek where the shoe was found is surrounded by heavy brush, but the soil along the creek is sandy. (R 195)

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[1](R) refers to the record in the direct appeal, Stano v. State, 460 So.2d 890 (Fla. 1984). (T) refers to the record of collateral proceedings. As of this writing, the appendicies are not part of the record on appeal, so the original citations will be retained. (DA X,Y) refers to the appendix number and page number of defendant's appendix to the motion. (PA X,Y) refers to the exhibit and page number of the appendix filed with the answer.

On August 15, 1982, Gerald E. Stano executed a waiver of rights form (R 519), and gave an oral, taped statement to Daytona Beach Police Sergeant Paul Crow. (R 520-524) Stano stated that he followed Miss Bickrest home to the Derbyshire Apartments at about 3:00 or 4:00 a.m. on December 20, 1975. (R 520-521) Stano told the presentence investigation report writer that he forced Bickrest into the car at gunpoint (R 562), but the trial court granted the defense motion to preclude consideration of this statement in establishing any aggravating circumstance. (R 16, 23) Stano's statement to Crow indicates that after he followed her to the apartment complex, he "started talking to her" and "she climbed in (my car)." (R 521) Stano describes what transpired as follows:

> She started to get a little on the crabby side and ahh I just went ahead and hit, hit her face with my right hand it carries a school ring. I hit her and that shut her up for a little bit. . .
>
> (She was wearing) blue jeans, a brown leather-type jacket with some type of sandals . . .with like a inclined heel on them. (R 521)
>
> . . .(W)hen I hit her, I might have dazed her a little bit because she didn't say, she hadn't said anything for a long period of time. I may have stunned her a little bit. . . At one point when I, I had to stop for a rest stop right quick and ahh she tried to get out of the car, but I, I pushed, I pushed her back in the car and pushed the door locks down. I had door locks that if you got your hands a little sweaty or something you couldn't get them to (open). (R 523)
>
> . . .I just pulled over and strangled her . . . . I carried her. . . to a sandy area, a beach area. . .I though it looked like a pond and I put her down towards the water's edge. (R 521, 523)

Volusia County Medical Examiner Arthur Schwartz testifed at the sentencing hearing that the cause of death was suffocation (or asphyxia), which was caused by two methods: manual strangulation and drowning. (R 51) Injury to the tissues about the throat and larnyx, as well as circular marks on the skin consistent with fingernails, indicated manual strangulation. (R 36, 49-50) Drowning was indicated by over-inflation of the lungs, pulmonary edema (frothy material in the airway), and a brownish clay deposit in the throat. (R 36, 44) Dr. Arthur Botting, called by the defense, testifed that in his opinion, based on Dr. Schwartz's report only, there was insufficient evidence of drowning, but agreed with the conclusion that Miss Bickrest was strangled. (R 84-85)

Dr. Schwartz also testified that Miss Bickrest received facial injuries premortum. Her left eye was swollen and bruised. "There is an obvious triangular bruise beneath the left eye". (R 45) Her lower lip was injured and there were lacerations on her nose, all of which occurred before death. (R 46, 54) Susan Bickrest's death was described as "prolonged". (R 59)

On March 11, 1983, Stano entered a plea of guilty to the first degree murder of Susan Bickrest and proceeded to the penalty phase, where he personally waived an advisory jury. On June 13, 1983, this court entered the written findings of fact in support of the sentence of death. (R 621-625) Four aggravating circumstances exist: the defendant had previously been convicted of six counts of first degree murder; the murder was committed

while the defendant was engaged in kidnapping; the murder was especially heinous, atrocious or cruel; the murder was committed in a manner that was cold, calculated, or premeditated. §921.141 (5)(b)(d)(h)(i), Fla. Stat. (1983). Certified judgments and sentences established conviction of six separate counts of first degree murder. (R 493-516) The kidnapping was established by Stano's admissions that she tried to escape and he pushed her back in and pushed down the special car locks that sweaty hands could not open. The court found that the confinement was not merely incidental to the murder. The state established that Stano abducted the victim over seventeen miles. (R 197) The defense argued on direct appeal that this circumstance was improperly found and also assailed on appeal the findings in support of the aggravating circumstances that the murder was heinous, atrocious and cruel and committed in a cold, calculated or premeditated manner. (Initial brief of appellant at pgs. 36-40) Strangulation and pre-death blows, as well as Miss Bickrest's knowledge of her impending fate were cited to support the heinousness and cruelty of the murder. The location of the murder and lack of moral or legal justification indicated to the judge that the murder was cold, calculated and premeditated. Stano v. State, 460 So.2d 890 (Fla. 1984).

This court found three mitigating circumstances advanced by trial counsel. (R 32, 624) The defendant's "difficult early childhood as set forth in Dr. McMillan's report (attached to PSI)" was cited by the judge in mitigation, as was Stano's marital difficulties. (R 64) Also found as a mitigating

circumstance was "the confession and guilty pleas by the defendant to this and other murders." (R 624) The court found that these mitigating factors were far outweighed by the aggravating circumstances and sentenced Stano to death for the murder of Susan Bickrest.

B. MARY KATHLEEN MULDOON

Gerald Eugene Stano was indicted by the Volusia County Grand Jury in case no. 83-189-CC, on January 18, 1983, for the premeditated murder of Mary Kathleen Muldoon. (R 451) The indictment alleged that Miss Muldoon was murdered November 11, 1977, "by shooting . . . with a pistol and drowning. . ." (R 451)

Lieutenant Donald Goodson of the New Smyrna Beach Police Department answered a call on November 12, 1977, at 5:45 p.m. and found Miss Muldoon's body in a drainage ditch. (R 167-168). The area was described as very isolated and wooded. (R 168, 554-556) Turnbull Street, a dirt road, had a drainage ditch running along the south side of the street, with water about nine or ten inches deep. (R 168) There is tidal action in the ditch which emptied out into Turnbull Bay. (R 171)

The body of Mary Muldoon was face down in the ditch, with one arm extended and the other beneath the body. (R 171) The body was fully clothed. (R 527) Pieces of shells were embedded about the knees of her pants (R 71, 527) Miss Muldoon was several inches taller than Gerry Stano.

Dr. Arthur Schwartz, Volusia County Medical Examiner, testified that he performed the autopsy on Miss Muldoon. (R 62) The immediate finding was a penetrating gunshot wound to the

right temple. (R 62, 528) Powder burns around the wound indicated that it was made "near contact". "A small, well-marked cuff requires that the barrel of the gun be held either on the skin or very close to the skin; but not pressed tightly against it." (R 72). The bullet penetrated the temporal lobe of the right hemisphere of the brain. (R 63) The shells on the knees of her pants demonstrate that his shot was probably delivered as Miss Muldoon was kneeling, begging for mercy. Fragments of the bullet were recovered during the autopsy and admitted into evidence. (R 67, 530) Dr. Schwartz testified that death was "definitely not instantaneous"; and that Miss Muldoon could have lived up to an hour after the bullet entered her brain. (R 74) Based on the pulmonary edema in the lungs and airways, the over-inflation of the lungs, the water-soaked hands and silt and sand on the body, Dr. Schwartz concluded that drowning was an additional cause of death. (R 63, 69) Dr. Arthur Botting, called by the defense, testified that in his opinion, based solely on Dr. Schwartz's report and not on personal observation, there was insufficient evidence of death by drowning. (R 93)

Dr. Schwartz also noted superficial facial lacerations on Miss Muldoon's cheek and chin. (R 67, 529) As in the Bickrest case, this physical evidence corroborates Stano's confession.

On October 8, 1982, Gerald Stano executed a waiver of rights form and wrote out a confession, admitting that he murdered Katy Muldoon. (R 557-559). This statement, in full, is as follows:

> I was driving down Seabreeze Boulevard on November of 1977, and stopped by the Silver

> Bucket. There I meet a young lady wearing a jacket and pants combination.[2]
>
> At that time I had her get into my green Plymouth, 1973 Satellite Custom and we headed for the beach, to party she thought.
>
> When we got to the beach the conversation turned to sex. She wanted no part of it, and I did. A small argument started and ended up with me hitting her in the head with my hand. I believe I knocked her half out because she didn't say anything after that. By that point I was on Dunlawton Avenue heading towards U.S. 1 South. Upon getting on U.S. 1 southbound I went towards New Smyrna. Coming to a spot in New Smyrna, I pulled over to the edge of the road. When I stopped the car she like jumped a little. I told her to open the door (on her side) and get out. I followed her by sliding over and getting out of the passenger side with my .22 automatic.
>
> Again an argument started but I hit her hard enough in the head, that she fell to the ground and that is when I shot her in the right side of the head with the .22 automatic, I used to carry with me under the seat, plus upon leaving the car I would put it in my waistband of my pants right above my right pocket.
>
> After this was done I got back into my car on the passenger side and proceeded back to Daytona Beach where I used to live. I was living at 875 Derbyshire Road, Derbyshire Apts. #120. I was driving a 1973 green Plymouth Satellite Custom four-door at that time a 102 inch C.B. antenna on the bumbers right side rear. (R 558-559)

This written statement was admitted without objection after its

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[2] Relying on the New Smyrna Beach Police Department report, defendant alleges that the last witness to see Katy Muldoon alive at 5:45 p.m. indicated she was wearing cut-off jeans. (DA 72, 7) However, this same report states that a pair of cut-offs were found on the bed in her room. (DA 72, 5) This confession is not time specific. It is reasonable to infer Miss Muldoon went home to change into warmer clothing after dark.

genuine character was established. (R 204)

In his statement to the presentence investigation report writer, Stano added the additional fact that he forced Miss Muldoon into his car at gunpoint. (R 563) However, the trial court granted the defense's motion to preclude consideration of this statement to establish any aggravating circumstance. (R 16, 23)

On November 12, 1982, Stano directed Lt. Goodson to the identical spot where Miss Muldoon's body was discovered. (R 174-179) Sgt. Paul Crow and Agent Elder were also present. (R 175) The group travelled south on U.S. 1, passing Turnbull Street. Stano directed the driver to turn around and they doubled back. Passing Turnbull Street the second time, Stano said that it could be the correct street, and at his direction, the driver turned onto Turnbull Street. (R 177) They drove about a mile down the street, and again, Stano told them to turn around. Stano directed them to stop. Goodson testified,

> We all exit the vehicle, and he starts walking back westward on the same street. We walked back perhaps two to three hundred yards. He stops, he looks around, walks over to the south side of the road where the ditch is at, looks in the ditch, looks around a little bit more, and indicates this is the spot where the body has been placed. (R 178)

The spot Stano indicated was the "exact location where we found the body." (R 178) Stano was not directed in any way to this location. (R 178).

On March 11, 1983, Stano entered a plea of guilty to the first degree murder of Mary K. Muldoon, and proceeded to the penalty phase where he personally waived an advisory jury. On

June 13, 1983, this court entered written findings in support of the sentence of death. (SR 3-6) Three aggravating circumstances exist: Stano had previously been convicted of six separate counts of first degree murder (R 532-553); the murder was especially heinous, atrocious or cruel, based upon repeated blows before death, the time the victim had to contemplate her fate and the senselessness of the murder; and that the murder was committed in a cold, calculated and premeditated manner based upon, inter alia, the execution-style shooting. §921.141 (5)(b)(h)(i), Fla. Stat. (1983). The judge found three mitigating circumstances: Stano's "difficult early childhood as set forth in Dr. McMillan's report", his marital difficulties, and the confession and guilty pleas. The court determined that these mitigating factors were far outweighed by the aggravating circumstances, and sentenced Stano to death for the murder of Mary Kathleen Muldoon.

C. OTHER CASES

The state contends that the only relevant inquiry in these two consolidated cases are the pleas of guilty to the murders of Susan Bickrest and Katy Muldoon. The voluntary, knowing and intelligent pleas foreclosed inquiry into the confessions in this case, much less confessions two years earlier in other, unrelated cases. However, to correct glaring omissions and errors in the defendant's characterization of the events following his initial arrest, the state would draw the court's attention to these facts also contained in the proffered appendix of appellant, yet glossed over.

On April 1, 1980, Stano was arrested for the aggravated

battery of Donna Hensley. On March 25, Hensley, a prostitute, was picked up by Stano, a former customer with a reputation for violent assaults on prostitutes. (DA 10) Stano went berserk and slashed her 30 times with a can opener, nail file and scissors. Hensley escaped and called for help.

The injuries inflicted on Miss Hensley were consistent with injuries inflicted on Mary Carol Maher, a local woman who had been found dead several weeks earlier. (DA 11)

On April 1, 1980, Detective Paul Crow questioned Stano about the Maher homicide. Stano was arrested at 10:00 a.m. (DA 11) Including booking and questioning, Stano confessed to the Maher murder three hours after arrest. (DA 10) Stano accurately described the stab wounds and directed Crow to the location of the body. (DA 10)

On May 9, 1980, Stano confessed to killing Toni Van Haddocks. (DA 20) Stano stated that he picked up Miss Haddocks on Ridgewood Avenue and agreed with her to have sexual intercourse for thirty dollars, even though he had no money. He stated that after having sexual relations, she was too quick to ask for renumeration, so he reached under his seat, retrieved a knife, and stabbed her. He deliberately chose a location near his brother's house "to get back at him." (DA 20, 25) Stano described Miss Haddocks, including the clothes she was wearing and the fact that she had a cast on her arm. The body had been disturbed by animals before it was found; no one but the killer knew the details Stano revealed.

The defendant's motion flatly stated that he is innocent[3] and implies that Crow provided the information to Stano rather than the other way around. The record on appeal and appendicies to the motions rebut this assertion. It is clear that Stano is the sole source of his sordid story.

a. On May 19, 1980, seven weeks after his arrest, and after the confessions in Maher and Haddocks, the following exchange took place:

> Lehman: What's it gonna take for Paul and myself to get to talk to this other Gerald? How are we gonna be able to bring him out where we can talk to him?
>
> Stano: Nothing, really, because he's ready to help. He feels that he's admitted to two of its that he done and that he has no objections if they ask him questions or anything else like that, about other people or other girls.

(DA 3,16)

b. Before being transported from state prison, before the four additional confessions on March 12, 1981, Stano writes:

> 3-3-81
>
> I have told dad about 3 or 4 other murders pertaining to the case.
>
> 1. A girl who had a poka doted bikini on at the time, around Cobb's Corner. She was killed the same way

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[3] Although most of the briefs are taken directly from the pleadings below, Stano's startling claim of innocence is conspicuously absent. (Compare T 3 with page 14, initial brief; compare T 69 with page 103, initial brief. Also absent are the allegations of "conspiracy".

as the other 2 girls were with a knife.

2. Another girl had on shorts and a shirt sandy brown hair or brown. And was killed the same way, with a knife. I believe she was put at high bridge or Bulow Ruins.

3. Another girl had on pants (jeans or slacks), plus a shirt (light in color). And was killed by the same way. I think she was put by the water treatment plant on Beach Street or around their some place.

4. One other girl about 18-20 was wearing blue satin pants and a white shirt, carrying a brown handbag, sandi brown hair, and whedge heels. She talked with an accent of some sort. She was also killed the same way as the others. I can't remember where she was barried.

Don, all of these girls were killed the same way. With a knife. They were all prostitutes from main St. and AlA (Atlantic Ave.)...I am sorry I wated so long but I was petrefied of the outcome of the electric chair.

I am quite sure about the murders cause they ring a bell in my mind (DA 16, 22).

c. After returning to prison, Stano again initiates further contact with Paul Crow. On June 6, 1982, he writes that he is ready to discuss more murders, and makes several demands, including that Crow escort him from prison directly to his one man cell at the Volusia County Jail. (DA 26) Then Stano writes:

6-6-82

...Please

> get back in touch with me as soon as possible about this. Because I would like to clear up your files for you.
>
> Paul, please realize where I am coming from. I want to help. But I can't do it up here. I will help you, if you help me. By that I mean, by telling you what you want to know about anything. I have had time to think about things up here. Please Paul, listen to me this time as you have done before...

d. Another of Stano's letters contained in his appendix 16, written to his attorney Don Jacobson, explains his method of murder:

> Don,
>
> This all started when I got married to my Ex-wife. She would worry every time we had sex and I would get mad because she would not have sex with me.
>
> So, I would get out of the house and go look for a girl around AlA and main St. D.B.
>
> When I would get a girl in the car, I would tell her I had plenty of money and would treat her good. Plus, I would pay her what she wanted plus $20.00/extra if she waited until we were done. The girls would always go along with me cause they trusted me. But when it came to pay for the services I got so hostile I said I would kill them. I was always thinking of my ex-wife cause we never had that good of a sex life together.
>
> I would always put my hand under the seat and say if you don't get out of my car I will kill you. So they would always get out and run for the road. This was always behind the church on halifax by the water, or behind the funeral parlor. I was always stopped in Daytona Beach for questioning about this and that. One night I was stopped for Rapping a girl and still had her clothes in my car when they stopped me on main st., by DBPD, but they let me go. It finally happened one night, I was so drunk when I picked up this girl, and she was so pissed

> off. That got me just as mad. I asked her for some sex and she said no and I saw red. Then I started to start stabbing and didn't quit. This happened in both cases of mine. I have previously strangled other girls in the car, but they managed to get away-name are unknown from / AlA and Main St.
>
> Also I have taken clothes off girls and told them to run or I would run them down with my car, or kill them.
>
> I also chocked my ex-wife more than once, even in front of her Aunt Bridget Ginfriddo plus slapped her at the time.
>
> Also a couple of black girls from 2nd/Ave. were affraid of me, cause of what they heard.
>
> Don any girl who works as a prostitute on AlA or Main St. can tell you what I due to the girls when they get in my car.

Furthermore, Stano has reconfessed several times to anyone who would listen, at times when he is far removed from any possible outside influence. For example,

a. Stano reconfessed in full to these murders to the presentence investigation report writer, even adding details he did not tell Crow (R 561-562). Attached to the PSI are several psychiatric reports, wherein Stano reconfessed to various murders during his interviews with Drs. Carrera, Stern, Davis, and Barnard (R 585, 600-603, 607-614).

b. On November 28, 1983, in his testimony during the sentencing phase of his Brevard County murder trial, Stano freely admitted his guilt in all cases where judgments had been rendered, including the Bickrest and Muldoon murders. (PA 1)

c. Dr. Gerald Mussenden, a psychologist, examined Stano on September 25, 1983, in connection with the Brevard County murder,

and the resulting report was attached to the Brevard 3.850 motion as defendant's appendix 48. Stano told Dr. Mussenden that he murdered the women because they criticized his driving, appearance or intoxication, and that reminded him of his wife (PA 2, 7-9). Although Stano initially denied the Kathy Scharf murder for which he was about to stand trial, "he eventually did admit to this murder and proceeded to discuss his involvement" (PA 2,8). The Doctor's report concludes:

> In reference to the present charge involving Kathy Lee Scharf it appears that Gerald Eugene Stano did murder this woman and only confessed this to the examiner under intense interviewing techniques...At this time he is not grandious or susceptible to admitting to crimes he did not commit but rather is extremely protective of himself and wants to prolong any type of incarceration, electric chair, or any other type of punishment possible...At this time he is in excellent contact with reality and tried to save himself from as much punishment as possible. Overall, testing would indicate that Gerald Eugene Stano was truthful with this examiner regarding his convictions but withheld information regarding other crimes he may have done. In essence, it appears that there are other crimes that he has committed which he has not admitted to.

d. A few hours after his arrest, while waiting in a holding cell, Stano reconfessed to Officer J. M. Gaston. Officer Crow was nowhere in sight and had little time to exert any influence. Stano initiated the conversation, and stated that he had killed Maher because "I can't stand a bitchy chick."

Stano is unable to demonstrate a colorable showing of

factual innocence. A mere showing that other suspects were properly ruled out by the police in the present cases or that a victim had changed the clothes she was last seen in hardly supports a claim of innocence and puts no burden of refutation upon the shoulders of the state.

STATEMENT OF THE CASE

Gerald Eugene Stano was indicted by the Volusia County Grand Jury for both murders on January 18, 1983. (R 450-451) Stano was formally arraigned on February 8, 1983 (R 284). Stano personally requested Assistant Public Defender Howard Pearl to be assigned to his case. (R 285) Copies of the indictments were provided and Mr. Pearl waived the reading of the indictment. Stano, through his counsel, entered pleas of not guilty in each case. (R 286)

On March 11, 1983, Stano moved to withdraw his previously entered pleas of not guilty and to enter a pleas of guilty (R 289). Further, Stano announced, through counsel, his intention to waive a sentencing jury in the penalty phase. (R 289)

Mr. Pearl stated at the outset of the hearing that he had not yet received full discovery from the state, and therefore, he was ". . .not fully prepared to advise him as to whether the state has sufficient evidence to convict him or not. He is convinced that they do. . . .(H)e assured me that those statements (confessions) were made voluntarily . . .He feels that he wants to go forward and enter his plea rather than go through a trial. . . .He tells me that he does not want a trial." (R 290-291) The court then inquired,

> The Court: Mr. Stano, do you care to comment on what Mr. Pearl has just said?
>
> The Defendant: No. I believe everything was quite sufficient that he said.
>
> The Court: He stated things accurately?
>
> The Defendant: Yes.
>
> The Court: You're in agreement with what he

said?

The Defendant: Yes, sir., (R 291)

After the state explained that the discovery delay was due to the possible similar fact evidence of the other cases, and Mr. Pearl agreed that he had no objection, Stano was placed under oath. (R 291-293) Stano personally agreed that he was presently competent and competent at the time the offenses were committed and nothing to the contrary is suggested. (R 294-295)

The court explained the only two possible sentences, and explained in detail the usual bifurcated proceedings. (R 296) The judge explained:

> And they (the jury) listen to the evidence in mitigation and aggravation under Florida Statute 921.141. They come back with a recommendation as to life, or death, to the judge. And the decision is the sole decision of the judge. But under Florida law, the way its evolved, the judge is pretty well bound by the jury recommendation. . . .So, in essence, what you're doing is you're taking the jury out of the proceedings. Okay. Sir, do you understand that?
>
> The Defendant: Yes, sir.
>
> The Court: Okay, you have been through this with Mr. Pearl, have you not?
>
> The Defendant: Yes, Sir.
>
> The Court: Okay. Do you have any questions of me or Mr. Pearl at this time?
>
> The Defendant: None. (R 296-297)

The defendant then personally entered pleas of guilty in both cases. (R 298). The meaning of a guilty plea as an admission of guilt was explained and acknowledged by Stano. (R 299) The constitutional rights he was waiving were fully explained. (R 299-300). Stano thrice stated that the plea was completely

voluntary. (R 300, 303) Stano also testified that he was fully satisfied with the services of Mr. Pearl and had no complaints or questions. (R 303)

The state established a factual basis for the pleas. As to Mary Kathleen Muldoon, the state introduced Lt. Goodson's complaint affidavit (wherein Goodson states Stano orally confessed to committing Muldoon's murder to Goodson), the medical examiner's report, photographs, and an offense report, all without objection. (R 304-309) Further, the state introduced without objection Stano's written confession in the Muldoon case. (R 310). Stano admitted that the document was in his handwriting and genuine. (R 311) Stano admitted the truthfulness of the facts of the Muldoon case as outlined by the state and maintained his guilty plea. (R 312) The court specifically found that the plea was made knowingly, intelligently, and voluntarily with the advice of counsel, a competent attorney with whom Stano was satisfied. (R 312)

As to the Susan Bickrest case, the state established the factual basis through the affidavit, sheriff's department report, medical examiner's autopsy report, death certificates and photographs, all admitted without objection. (R 312-316) Stano affirmed the authenticity and truthfulness of his confession, which was also admitted. (R 317-318) The defendant then maintained his plea of guilty. (R 318) The court specifically found that the plea was knowingly, intelligently and voluntarily made, with the advice of competent counsel with whom Stano was satisfied. (R 318-319) Stano was adjudicated guilty of both

murders. (R 323)

The sentencing hearing was conducted June 8 through 10th, 1983. (R 1) Prior to the proceedings, the court mentioned two pending motions. (R 10, 615-619, 459-486) Attached to one of these motions were portions of the plea entered in 1981, where Stano entered three guilty pleas to three counts of first degree murder in exchange for the state not pursuing other murder cases, and for the state recommending sentences of life. (R 464) Certain statements made by Judge Foxman during the 1981 plea hearing necessitated inquiry of the defendant. (R 11) Stano was placed under oath, and stated that he had no objection to the judge presiding in these cases. (R 12) Stano further stated that he personally wanted to maintain his guilty plea and waiver of a sentencing jury. (R 13) Stano testified that he was satisfied with the services of his counsel and that he had no questions or complaints at all. (R 13)

The court then entertained the defense motion in limine regarding the presentence investigation report. The motion was granted to the extent that the court agreed that the PSI report would not be used by him to establish any fact in aggravation. (R 14-24)

The state presented testimony from several witnesses described above. The state and defense stipulated that if Dr. Ann McMillan had been available to testify, she would state her opinion to a reasonable medical certainty that the defendant commited the murders while under the influence of extreme mental or emotional disturbance, and that his ability to conform his

conduct to the requirements of the law was substantially impaired. (R 113-114) §921.141 (6)(b)(f), Fla. Stat. (1983). The state stipulated to the introduction of reports of prior psychiatric examinations conducted on Stano by Drs. Carrera, Bernard, and Stern in 1981. (R 117) The defense and state stipulated to the expertise of Drs. Carrera, Bernard, Stern and Davis (R 118-119), and indicated that these four psychiarists would be called jointly by the state and the defense. (R 119)

Dr. Carrera tesified that based upon two examinations of Stano in 1981, as well as a one hour examination that morning (R 120), in his professional opinion, Gerald Stano was not under the influence of extreme mental or emotional disturbance either when he murdered Susan Bickrest or Kathy Muldoon. (R 121-122). §921.141 (6)(b), Fla. Stat. (1983). He further opined that Stano's mental capacity was not substantially impaired when he committed either murder. (R 121-123) On cross-examination, Dr. Carrera said in making this diagnosis, he took into account several factors brought to his attention by Mr. Pearl including Stano's impoverished early childhood, unhappy marriage and alleged use of alcohol. (R 124-126) Mr. Pearl explored Stano's supposed "loss of control" and "anger" with the doctor. (R 124-129)

Dr. George W. Barnard concurred with Dr. Carrera's opinions as to the non-existence of these factors. (R 132-136) Both doctors based their opinion that Stano was able to control his anger from various facts including his asportation of the victims over twenty miles, as well as initial outbursts of violence

followed by control to the point Stano could drive to a secluded spot to further attack his prey. (R 146-148)

Dr. Fernando Stern testified, based upon his 1980 examination of Gerald Stano and an interview the day before, in his professional opinion, both murders were committed while Stano was under the influence of extreme mental or emotional disturbance. (R 152-153) However, Dr. Stern was of the opinion that "he knew it was criminal." (R 154)

Dr. Robert Davis testified that he counseled Gerald Stano three times in 1976 for marital problems, and examined him psychiatrically in 1980 and the preceding day. (R 156) He was unable to state an opinion as to whether the murders were committed under the influence of extreme emotional or mental disturbance, however, he agreed with all the other doctors' testimony that Gerald Stano appreciated the criminality of his conduct. (R 158)

After further testimony, both sides rested their case. (R 227). The defense asked the court to consider the previously filed motion to preclude the imposition of the death penalty. (R 231, 459-486) The defense agreed that when the previous three life sentences were imposed in consideration for not pursuing three other homicides ". . . it had been made clear that there was no deal by which it could be said that, in any future cases, that a life sentence was promised." (R 231) The judge agreed that was his memory of the prior cases.

After arguments, the court reserved sentencing until June 13, 1983. In his remarks at sentencing, Judge Foxman noted that

Stano then had eight convictions of first degree murder. None of the cases had any discernible motive. "These murders are completely senseless." (R 329) Judge Foxman then sentenced Gerald Stano to death in each case. (R 330-332) Written findings of fact in support of the death penalty were filed contemporaneously, a separate sentencing order for each case, 83-188-C and 83-189-C. (R 621-625; SR 3-5) The court also entered an order denying the motion to preclude the imposition of the death penalty. (R 620)

Notice of appeal was timely filed on July 8, 1983. (R 634). The two cases were consolidated for purposes of appeal. The public defender was appointed to represent Stano on appeal. (R 632)

Assistant Public Defender Christopher Quarles, the Chief of Capital Appeals Division of the Seventh Judicial Circuit, Office of the Public Defender, filed the initial brief in the direct appeal on January 3, 1984. Appellant argued that the sentence of death in each case was improper for several reasons: the court improperly found certain aggravating circumstances to exist, failed to find statutory mitigating circumstances concerning mental capacity, and failed to give proper weight to the mitigating circumstances that were established, and improperly sentenced Stano to death. Appellant relied on Dr. Ann McMillan's report, admitted by stipulation, since she was the only psychiatrist who was of the opinion that both mental mitigating factors were present, and relied on Drs. Stern and Davis to establish one of the factors. Appellant argued that Dr.

McMillan's diagnosis was more credible based upon her extensive evaluations of Stano.[4] Dr. McMillan's report was specifically cited by the court as a mitigating circumstance in both cases.

Mr. Quarles also argued on appeal that the trial court improperly denied the motion to preclude consideration of the death penalty, authored by Mr. Quarles. (R 459-486) This argument relied upon Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), for the proposition that proportionality review, comparing these two murders to the prior six murders for which Stano had received life sentences, demonstrated that the facts of the Muldoon and Bickrest murders were no more compelling than the murders for which he received life sentences. Appellant argued that the same prosecutor, the same judge, the same set of circumstances were present in 1981 and 1983, therefore, Stano should be sentenced to life imprisonment for these two murders.

On September 2, 1981, Gerald Stano entered pleas of guilty to the first degree murders of Mary Carol Maher (case no. 80-1046-CC), Toni Haddocks (case no. 80-2489-BB), and Nancy Heard (case no. 81-2508-CC). These crimes were committed, respectively in January, 1980, February, 1980 and January, 1975. Based upon several psychiatric evaluations, Stano was found competent to stand trial in 1981. (R 466) The written plea negotiations entered in these cases were that Stano enter pleas of guilty in each of these three cases, in exchange for the state not seeking

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[4] In his motion for post-conviction relief, Stano directly contradicts his evaluation of Dr. McMillan's expertise presented on appeal.

the death penalty. (R 467) Further, the state agreed to "nol pros" the aggravated battery involving Donna Hensley, (R 480), and agreed not to prosecute Stano for the murders of Linda Hamilton, Ramona Neal and Jane Doe. (R 485)

A sentencing jury was waived in the instant case in part as a tactical decision to insure that these two cases would be in the same posture as the prior three cases from 1981: the same judge, the same prosecutor, the same plea/confession, the same circumstances of murder. The strategy was clear to try to compel Judge Foxman to give Stano life sentences in 1983, just as he had done in 1981.

The Supreme Court of Florida affirmed Stano's conviction and sentences on November 1, 1984. Stano v. State, 460 So.2d 890 (Fla. 1984). (PA 5) Appellant moved for rehearing on November 13, which was denied on January 13, 1985. Mandate issued February 19, 1985.

On or about March 15, 1985, Assistant Public Defender Christopher Quarles filed a Petition for Writ of Certiorari in the United States Supreme Court. The primary allegation in this petition was that the Supreme Court of Florida approved the sentence of death based upon aggravating circumstances that had not been established beyond a reasonable doubt. The petition for writ of certiorari was denied on May 13, 1985.

On November 6, 1986, Governor Bob Graham signed a death warrant in both the Muldoon and Bickrest cases, effective noon, Wednesday, the 26th day of November, 1986 and ending noon, Wednesday, the 3rd day of December, 1986.

The motion to vacate the judgments and sentences in these two consolidated cases was filed on Sunday November 30, 1986. A hearing on the motion was conducted the morning of December 1, 1986, and a stay of execution entered so that further argument could be presented.

On March 12, 1987, the state filed its answer to the motion, with accompanying appendix. A traverse was filed April 3.

A hearing was held before Judge Foxman on April 9, 1987. Four days later, the court entered an order denying all relief. Stano moved for rehearing, which was denied after a response by the state.

Notice of appeal was timely filed, and this appeal follows.

SUMMARY OF ARGUMENTS

POINT I

The motion, answer, record on appeal and argument presented by counsel below conclusively demonstrate that Stano was not entitled to any relief, including an evidentiary hearing.

POINT II

Stano's counsel was not ineffective for failing to attack the prior convictions used in aggravation because he had no duty to act as collateral counsel. Florida law is clear that a defendant cannot attack convictions used to establish this aggravating circumstance. Even if counsel had successfully attacked the prior convictions, this aggravating factor is still proper in this case because Stano was being sentenced for two murders. The Bickrest conviction establishes this factor in the Muldoon case and vice versa, so no prejudice can be established.

Counsel adequately investigated these cases by requesting and reviewing discovery materials and by conducting depositions. His client's insistence on immediately entering a plea of guilty necessarily limited the scope of reasonable investigation, and counsel was not required to further investigate given his competent client's desire to plead guilty.

The record conclusively refutes any allegation that the pleas or confessions were involuntary. Stano has failed to sufficiently allege either deficient performance or prejudice such that the outcome of the proceedings would have been any different.

POINT III

The record conclusively refutes the claim that Stano did not knowingly and intelligently waive a jury during the sentencing

phase. Stano is unable to establish that Mr. Pearl rendered ineffective assistance of counsel in regard to his advice to waive a sentencing jury.

POINT IV

This issue should have been raised on direct appeal, and so is now procedurally barred. His claim that his voluntary statements to his own mental health experts were improperly introduced because he was not advised of his Miranda rights is unavailing under Buchanan v. Kentucky, infra. Stano requested the mental examination and jointly introduced the report into evidence, vitiating any concern under Estelle v. Smith, infra.

POINT V

The issue of the appropriate use of the presentence investigation report could and should have been raised on direct appeal and is now procedurally barred. The record relects that the PSI was used to establish only mitigating evidence, so Stano cannot establish prejudice.

POINT VI

The issue of whether the trial judge should have recused himself has been waived, and the court properly found this claim barred. The defense affirmatively requested the judge to hear these cases upon inquiry by the court. No motion to disqualify was filed nor was the issue raised on appeal.

POINT VII

Appellant cannot attack the competency of his counsel via the competency of mental health experts who presented evidence on his behalf. The test he uses to criticize Dr. Ann McMillan was not a part of the record in the original case but only appeared after collateral attacks began.

POINT I

THE TRIAL COURT CORRECTLY CONCLUDED THAT NO EVIDENTIARY HEARING WAS NECESSARY.

In the order denying 3.850 relief, the trial judge stated that he had "...reviewed the original circuit court files, the defendant's 3.850 motion, with appendix; the state's preliminary response and main response with appendix, the defendant's traverse, and the entire record on appeal, all of which are incorporated herein..." (T 250) The court's order quoted extensively from the record and addressed each claim separately, then concluded that the record, files and pleadings conclusively demonstrate the defendant was not entitled to an evidentiary hearing or any other relief. (T 258) On appeal, appellant contends that he was entitled to an evidentiary hearing.

In the recent decision of Squires v. State, 12 F.L.W. 512 (Fla. Oct. 1, 1987), this court stated, "Since the court neither held an evidentiary hearing nor attached any portion of the record to the order of denial, our review is limited to determining whether the motion on its face conclusively shows that Squires is entitled to no relief." Id. Appellee respectfully suggests that this order incorporates by reference the appellate record, files and pleadings, and therefore this court's review in this case is not limited to the motion itself. Moreover, in Lightbourne v. State, 471 So.2d 27 (Fla. 1985), this court determined that it was not error to fail to attach a copy of the record to the order denying relief, citing Goode v. State, 403 So.2d 931 (Fla. 1981). When rule 3.850 was amended in 1984, the judge was given the option of ordering a

response from the state before determining whether an evidentiary hearing was necessary. The Florida Bar Re: Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907, 908 (Fla. 1984). Indeed, this court has ruled in some instances that an examination of the record is required. See, Steinhorst v. State, 498 So.2d 414 (Fla. 1986). Therefore, appellee respectfully suggests that this honorable court may review the entire record, pleadings and argument of counsel to determine whether summary denial of the motion was appropriate.

The law is clear that when the motion and record conclusively demonstrate that the movant is not entitled to relief, the motion may be denied without an evidentiary hearing. Riley v. State, 433 So.2d 976 (Fla. 1983); Foster v. State, 400 So.2d 1 (Fla. 1981). Numerous decisions from this court have affirmed denials of 3.850 motions in death cases without an evidentiary hearing; recent cases include DeLap v. State, 505 So.2d 1321 (Fla. 1987); Agan v. State, 503 So.2d 1254 (Fla. 1987); Herring v. State, 501 So.2d 1279 (Fla. 1986); Stano v. State, 497 So.2d 1185 (Fla. 1986); Parker v. State, 491 So.2d 532 (Fla. 1986); James v. State, 489 So.2d 737 (Fla. 1986); Harich v. State, 484 So.2d 1239 (Fla. 1986); Troedel v. State, 479 So.2d 736 (Fla. 1985); Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985). None of these cases were successive motions; all involve summary denials of the first motion for post-conviction relief. There are, of course, many decisions before 1985 upholding denials of 3.850 motions without evidentiary hearings, but these cases are illustrative of

the point that there is nothing extraordinary about summary denials of motions for post-conviction relief in capital cases.

Of the eight claims raised in the motion, the court found that Stano had either waived consideration of the issues by failing to object or raise the issue on appeal, or found that the record conclusively refuted all claims except the ineffective assistance of counsel claim, and, as will be discussed more fully in Point II, infra, correctly determined that no relief was warranted on this or any claim. Stano is unable to demonstrate that he was prejudiced because the alleged errors of counsel "...played no part in the balancing of aggravating and mitigating factors..." DeLap v. State, 505 So.2d at 1323. The trial court correctly concluded that no evidentiary hearing was necessary because the record conclusively demonstrates that Stano is entitled to no relief.

POINT II (CLAIM I)

COUNSEL RENDERED EFFECTIVE ASSISTANCE OF COUNSEL, STANO CANNOT ESTABLISH EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

Stano claims that he was denied effective assistance of counsel at critical stages of the proceedings. This claim is based primarily on the allegation that the confessions were unconstitutionally obtained, and counsel's failure to investigate, discover, and attack the confessions on the basis of these alleged infirmitites was unreasonable. He alleges that the state withheld the exculpatory evidence that the confessions were coerced, and/or counsel was ineffective for failing to discover this "fact".

There is authority for the proposition that the voluntariness of a guilty plea is an issue that could and should be raised on direct appeal. Robinson v. State, 373 So.2d 898 (Fla. 1979); Elledge v. State, 432 So.2d 35 (Fla. 1983); Washington v. State, 362 So.2d 658 (Fla. 1978); Trawick v. State, 473 So.2d 1235 (Fla. 1985). But see, Mikenas v. State, 460 So.2d 359 (Fla. 1984). Stano seeks to circumvent this prohibition, however, by phrasing the issue as one of ineffective assistance of counsel.

A large portion of Stano's attack is addressed to the prior convictions used in aggravation. He contended that counsel was embroiled in a "collusion" or "conspiracy" with Dr. Ann McMillan, Paul Crow, and Mr. Pearl's co-counsel, Don Jacobson (T 26). As a result of this "partnership", it is alleged that Mr. Pearl failed to attack the prior convictions out of a "conflict of interest." This position is incorrect for several reasons.

First, Florida law is clear that a defendant cannot attack

the convictions used to establish this aggravating circumstance in this murder case. Mann v. State, 482 So.2d 1360 (Fla. 1986); James v. State, 489 So.2d 737 (Fla. 1986); Adams v. State, 449 So.2d 819 (Fla. 1984). It is not error to refuse to delay this case until Stano can attack the prior convictions. Mann, supra.

The logic behind this rule is readily apparent. Many murderers have serious prior criminal histories. It is unreasonable to wait until all direct appeal, collateral attack and federal habeas corpus proceedings have been fully litigated before the sentence for the murder is enforced. A defendant who is sentenced to death for murder and who received sentences of incarceration for other crimes has no right to serve out all terms of incarceration before being executed. Elledge v. State, 432 So.2d 35, 36 (Fla. 1983); Whitney v. State, 132 So.2d 599 (Fla. 1961).

Second, this court has repeatedly held that certified copies of the judgment and sentence are alone enough to establish the aggravating circumstance of prior violent felony convictions. § 921.141(5)(a), Fla. Stat. (1983), Tompkins v. State, 502 So.2d 415 (Fla. 1986). The validity of the certified convictions is not subject to attack, but is conclusively established by the self-authenticating documents.

Even were such an attack permissible, the alleged "collusion" has been presented verbatim in the motions filed in Brevard County, Alachua County, and Bradford County. Each court to rule on the issue to date has summarily rejected it (PA 3, PA 4, PA 7). It is not ineffective to fail to raise a claim with no merit

whatsoever.

Third, the prior life sentences were vital to the strategy based on Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982). A unique aspect of defendants' cases at that time was that they were procedurally similar: all were predicated upon confessions and guilty pleas, and they all resulted in life sentences.[5] Counsel determined that the most likely strategy to obtain life sentences in these cases was to duplicate the procedural stance of 1981: the same judge, prosecutor and defendant, the same confession, plea and waiver of advisory jury. The motion in limine preserved the issue for review by placing the proportionality argument squarely before this court. This tactical decision was reasonable based upon the circumstances that existed in 1983. See, Lara v. State, 475 So.2d 1340 (Fla. 3d DCA 1985); State v. Bolender, 503 So.2d 1247 (Fla. 1987).

Last, even if counsel had attacked the prior convictions used in aggravation, and successfully vacated all prior judgments and sentences, this aggravating factor could still be properly found because Stano was being sentenced in this case for two murders. The prior convictions are relevant here only because they established one aggravating circumstance, to wit: "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

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[5] Subsequent to the two death sentences imposed herein, defendant stood trial in Brevard County, Florida, and was found guilty of the first degree murder of Kathy Scharf. This conviction also resulted in a sentence of death.

§921.141(5)(b), Fla. Stat. (1983) Only one conviction is needed to establish this aggravating factor. Since Stano was being sentenced for two murders, each case can support the factor in the other case. The Bickrest conviction is a prior capital conviction in the Muldoon case and vice versa. It is of no moment that the Bickrest murder occurred first; prior conviction means prior to sentencing. See, Ruffin v. State, 397 So.2d 277 (Fla. 1981). Not only did Mr. Pearl have no duty to act as collateral counsel, even if he had attacked the prior convictions, this aggravating factor would still have been found, so Stano cannot establish the second independent prong of the Strickland test because he cannot show any prejudice.

Moreover, there are several other aggravating factors in each case, balanced against no statutory mitigating circumstances and the nonstatutory mitigating factors of a bad infancy and failed marriage. There is no possibility that the sentence would have been anything other than death. A death sentence is presumed to be the appropriate penalty when one aggravating circumstance is established. State v. Dixon, 283 So.2d 1 (Fla. 1973) A death sentence supported by at least one valid aggravating circumstance need not be set aside due to any alleged insufficiency of some other aggravating factor. Davis v. State, 461 So.2d 67 (Fla. 1984); Zant v. Stephens, 462 U.S. 862, 884 (1983); Lindsey v. Smith, 1 F.L.W. Fed.C 871, 877 (11th Cir. June 12, 1987).

Turning to the instant cases, the legality of the confessions is not a cognizable issue; the plea foreclosed any inquiry into the confessions. Trawick v. State, 473 So.2d 1235 (Fla. 1985).

Even if such inquiry were possible, such issues should have been raised on direct appeal and are now waived. See, Muehleman v. State, 503 So.2d 310 (Fla. 1987). "A defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing." McMann v. Richardson, 397 U.S. 759, 771 (1970).

It is well established that the voluntariness of a confession need be established only be a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477 (1972). Stano told Mr. Pearl that the confessions were wholly voluntary, that he was guilty of the offenses he was charged with, and that he did not want to go to trial (R 290-303). In light of this record evidence, it is clear that counsel's assistance was within the range of reasonable professional assistance.

In the recent case of Colorado v. Connelly, 107 S.Ct. 515 (1986), the United State Supreme Court rejected the claim that a confession was involuntary because of the defendant's defective mental condition. "Indeed, the Fifth Amendment privelege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coersion.'" Id. at 523, quoting Oregon v. Elstad, 470 U.S. 298, 305 (1985). The voluntariness of a confession depends on the absence of police overreaching. Therefore, even if the "partnership" between Dr. McMillan, Don Jacobson and Detective Crow could be established, and assuming that any such "partnership" continued from 1980 to infect the present cases, only Paul Crow's participation is relevant. The allegations of Stano that Crow's interrogation

falls within the "more subtle forms of psychological persuasion" is an insufficient basis for relief because these interrogation techniques do not rise to the level of improper police coersion. Id. at 520. See, Cannady v. State, 427 So.2d 723 (Fla. 1983); Martin v. Wainwright, 770 F.2d 918, 924-927 (11th Cir. 1985); Moran v. Blackburn, 781 F.2d 444 (5th Cir. 1986); Jarrell v. Balkcom, 735 F.2d 1242 (11th Cir. 1984).

Stano's argument that his counsel should have suppressed the confessions given to Paul Crow neglects one very important aspect of these cases: Stano's confessions erupt as quickly and abundantly as mushrooms. In the Muldoon case, Stano gave a second confession to Lieutenant Goodson. See, Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) (assuming that attorney rendered ineffective assistance in failing to present additional argument for suppression of the initial confession, defendant was not prejudiced thereby, where second confession was given to another police officer and would have been admissible.) Moreover, Stano reconfessed to both cases to the presentence investigation report writer, reconfessed to several psychiatrists and reconfessed again to newsreporter Kathy Kelly. In the Brevard County trial, Stano took the stand and again admitted his guilt to both of these murders.

Although the involuntariness claim is based on matters foreclosed from review, assuming that the claim can be entertained as an ineffective assistance of counsel claim, the first inquiry to evaluate this claim is what duty does an attorney owe a client who insists on pleading guilty. Counsel's advice need only

satisfy the minimal level of constitutionally adequate assistance.

> The right to competent plea bargain advice is at best a privilege that confers no certain benefit, unlike the fifth amendment's bar to admission of involuntary confessions. An accused may make a wise decision even without counsel's assistance, or a bad one despite superior advice from his lawyer. The Supreme Court has commented that the unpleasant choice is one the defendant ultimately must make for himself, and that the decision is often inescapably grounded on uncertainties and a weighing of intangibles. Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984).

See also, Foster v. Strickland, 707 F.2d 1339, 1343 n. 3 (11th Cir. 1983); Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985). Federal courts require counsel's advice to be patently erroneous before a plea will be invalidated on the basis that it was not made knowingly and intelligently. See, United States v. Rumery, 698 F.2d 764 (5th Cir. 1983). There is no allegation here that Mr. Pearl gave advice that was obviously wrong. Counsel has no duty to advise a defendant of the collateral consequences of a guilty plea. A claim such as this one which is predicated on inadequate advice concerning collateral issues such as parole eligibility "cannot rise to the level of constitutionally ineffective assistance." United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985); State v. Ginebra, 12 F.L.W. 322 (Fla. July 2, 1987)

The crux of the issue before the court in this argument is the voluntariness of the plea, which in turn depends upon whether

counsel's advice was within the range of competence demanded of criminal attorneys. McMann, supra; Hill v. Lockhart, infra. Whether the focus is on counsel's alleged ineffectiveness or the voluntariness of the plea, the same standard is applied: the two part test announced in Strickland v. Washington, 466 U.S. 668 (1984). McMann, supra. See, Hill v. Lockhart, 106 S.Ct. at 369-370.

The record before the court negates the allegation that the plea was involuntary. See, Mikenas, supra. United States v. Russell, 716 F.2d 955 (11th Cir. 1985). The Supreme Court of Florida affirmed these convictions on appeal, presumptively approving the validity of the pleas. Stano v. State, 460 So.2d 890 (Fla. 1984). See, Muehleman v. State, 503 So.2d 310 (Fla. 1987).

In taking the pleas, this court complied with Florida Rule of Criminal Procedure 3.170(j). Stano repeatedly stated that the pleas were wholly voluntary, and not the product of any express or implied threats or promises (R 291-303). He stated he fully understood the nature of the charges and the consequences of the pleas. See, United States v. Bell, 776 F.2d 965 (11th Cir. 1985). The plea proceedings in this case conclusively demonstrate that the plea was made voluntarily, knowingly and intelligently. "The best evidence that defendant understood and voluntarily entered his plea of guilty came from his own lips when the court asked whether any threats were made to force him to plea and the defendant replied, 'No sir. I make 'it willingly.'" Holmes v. State, 374 So.2d 94, 947 (Fla. 1979) See also, United States v.

Downs-Morgan, 765 F.2d 1534 (11th Cir. 1985).

A detailed plea proceeding refutes the claim a defendant swore falsely when entering the plea. Miller v. Turner, 658 F.2d 348 (11th Cir. 1981). Ordinarily, a defendant cannot repudiate testimony given under oath when pleading guilty. United States v. Sanderson, 595 F.2d 1021 (5th Cir. 1979). Where, as here, a defendant states during the plea colloquy that he was not coerced, that he has fully discussed the case with an attorney with whom he is satisfied, and that the plea is voluntary, he is bound by those answers and no evidentiary hearing is necessary. Rogers v. Maggio, 714 F.2d 35, 38 n. 5 (5th Cir. 1983); Rogers v. Wainwright, 394 F.2d 492 (5th Cir. 1968); United States v. Russell, supra.

Mr. Pearl rendered effective assistance of counsel. In the last term, the United States Supreme Court affirmed the summary denial of a claim of ineffective assistance arising out of a guilty plea. Hill v. Lockhart, 106 S.Ct. 366 (1986). The Court emphasized the need for finality of guilty pleas, and explained that "every inroad on the concept of finality undermines confidence in the integrity of our procedures." The trial court noted that the claim of innocence "is in direct contradiction to other testimony given under oath by the Defendant....His recantation is very untimely." (T 257) The court summarized the need for finality as follows:

> The Court is now left with a seemingly unending dilemma. It cannot rely on what happens in front of it. I cannot rely on plain spoken English

> language. Will the defense repudiate its present version of events in future court proceedings?
>
> This Court refuses to be placed in this unending dilemma. There is a need for finality and certainly. (See Hill v. Lockhart, 106 S.Ct. 366 (1986) and U.S. v. Timmreck 441 U.S. 750, 60 L.Ed. 634, 99 S.Ct. 2085 (1979) (T 257)

The second half of the Strickland test, that the defendant establish prejudice from counsel's alleged errors, advances the fundamental interest in the finality of guilty pleas. The Court held:

> [I]n order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 106 S.Ct. at 370.

It is clear from the record that Gerald Stano insisted on pleading guilty and insisted on not going to trial (DA 16, R 291). None of the alleged errors negate this position that Stano personally maintained from the very beginning. This court need not reach the performance component of the test when it is clear that the prejudice component cannot be satisfied. Maxwell v. State, 490 So.2d 927 (Fla. 1986). See, Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986).

Neither can Stano establish that counsel's performance was deficient in any way. In Agan v. State, 503 So.2d 1254 (Fla. 1987), this Court addressed a case almost exactly like this case,

even defense counsel was the same. The trial court denied Agan's motion for post-conviction relief without an evidentiary hearing. The trial judge was the same judge who had accepted Agan's guilty pleas in 1983.[6] Agan alleged that he was denied effective assistance of counsel because of counsel's failure to investigate. This Court affirmed the summary denial, stating:

> The record of the proceedings shows that, against the advice of counsel, appellant pled guilty thus relieving the state of the burden of proving guilt. An investigation into whether there were doubts about guilt was rendered pointless by the apppellant's own act. If appellant had pled not guilty, then there would have been some purpose for an investigation by counsel...We cannot know what evidence and argument defense counsel would have uncovered and presented had he been authorized by this client to undertake such a course of representation. The appellant himself forebade it. We therefore find that the trial court was correct in denying the motion without a hearing. Id.

Any further investigation into Stano's murders was foreclosed by his insistance on entering a plea. It cannot be ineffective assistance of counsel, then, to accede to Stano's desire, and cease further investigation. The defendant's decision necessarily limited the scope of the investigation. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982). The only claim concerning the plea is that

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[6] Mr. Agan is not the first competent capital defendant to plead guilty and be sentenced to death. Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1986); Quince v. State; 477 So.2d 535 (Fla. 1985); Daugherty v. State, 419 So.2d 1067 (Fla. 1982); Mikenas, supra; Washington, supra.

it was involuntary because of alleged ineffective assistance of counsel; there is no allegation Stano was incompetent to enter the plea, indeed, there is nothing to suggest incompetence. The record before the court negates the allegation that the plea was involuntary.

Stano suggests that pleading "straight up", without any agreement on the sentence is per se ineffective assistance of counsel. (Initial brief, page 114) Despite the opinion of one assistant state attorney who knew nothing of these cases, and who was writing to Louie Wainwright to obtain a favor in connection with another case, the state's position is and always has been that Howard Pearl rendered effective assistance of counsel. Several capital defendants have pled guilty without entering plea bargains and received sentences of death. (see footnote 6, supra)

Incidental to this claim, Stano contends that the state withheld the exculpatory evidence that the confessions were coerced. This issue is "simply irrelevant" in view of the plea. Agan, supra. Although due process requires disclosure of evidence favorable to the accused under Brady v. Maryland, 373 U.S. 583 (1963), defendants have "no general constitutional right to discovery in a criminal case." Weatherford, v. Bursey, 429 U.S. 545, 559 (1979). Stano has failed to allege facts sufficient to demonstrate that the outcome of the proceedings would have been any different. Lindsey v. Smith, 1 F.L.W. Fed. C. 871, 877 (11th Cir. June 12, 1987).

Contrary to appellant's assertions, the record reflects that Mr. Pearl did investigate these cases. Cf. Kimmelman v. Morrison,

106 S.Ct. 2574 (1986) Counsel need not "pursue every path until it bears fruit or until all available hope withers." Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984). Mr. Pearl asked for and received "voluminous discovery materials." (R 453-454) Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980). He took several discovery depositions. (R 454) Several psychiatrists who had previously examined Stano conducted more examinations, immediately before the sentencing hearing in this case. In light of this record evidence, it cannot be maintained that Mr. Pearl failed to investigate. He evaluated potential avenues of investigation and advised his client of their merit. (R 291-303) The defendant's decision to immediately enter a guilty plea foreclosed further investigation and necessarily limited the scope of the investigation required for competent assistance of counsel. Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982)

Stano has failed to sustain his burden of showing the pleas were not voluntarily and knowingly entered. Mikenas, supra. Stano has not established that "manifest injustice" will occur if he is not permitted to withdraw his pleas. LeDuc v. State, 415 So.2d 721 (FLa. 1982). The record clearly indicates that the plea was voluntary so no evidentiary hearing is warranted. United States v. Russell, 716 F.2d 953 (11th Cir. 1985). Stano is unable to show counsel's performance was deficient, or that but for any alleged ineffectiveness he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, supra. No relief was warranted on these claims; there is no mass-murderer exception to the finality of guilty pleas.

POINT III (CLAIM II)

THE RECORD DEMONSTRATES A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF A JURY.

Stano claims that he did not knowingly and intelligently waive a jury at trial or sentencing. This claim is predicated on the allegation that Mr. Pearl did not investigate the cases and that the court did not fully advise Stano of the constitutional rights he was giving up. The record refutes these allegations. See, Mikenas v. State, 460 So.2d 359 (Fla. 1985); Washington v. State, 362 So.2d 658 (Fla. 1978). In the order denying relief, the trial court quoted extensively from the record, then found that "the record conclusively shows the Defendant's right to a jury as to guilt or innocence, and as to sentencing, were explained to the Defendant and he validly waived a jury."

The trial court fully apprised the defendant of the significance of the jury at each phase. (R 289-291; 296-299) A waiver of jury trial is inherent in the plea, and this plea fully complied with the requirements of Florida Rule of Criminal Procedure 3.170(j). Boykin v. Alabama, 395 U.S. 238 (1969), Williams v. Wainwright, 604 F.2d 404 (5th Cir. 1979). After being apprised of his constitutional rights, Stano maintained his pleas of guilty. (R 299-300) The plea was taken in chambers (on the record) at Stano's request and without objection. (R 329) The record therefore belies Stano's contention that he did not knowingly and voluntarily waive a jury.

Stano complains that the waiver of the jury was flawed because he was not specifically advised about the state's burden

of proof and right to not testify against himself. There was no objection posed on this ground to the trial court. Nevertheless, the state notes that during the 1981 plea, Stano was specifically advised of both of these rights. (R 469) Stano cannot establish prejudice. Hill v. Lockhart, 106 S.Ct. 366 (1986).

This is an issue that could have and should have been raised on direct appeal, and is therefore not a cognizable ground for relief. Stano should have moved to withdraw his plea on this ground, which would have then been subject to review on direct appeal. Elledge v. State, 432 So.2d 35 (Fla. 1983).

A defendant is not constitutionally entitled to a sentencing jury. Spaziano v. Florida, 468 U.S. 447 (1984). Therefore, this issue does not present a claim of fundamental proportions.

Appellee disputes the characterization of Stano's status as "pro se". No Faretta warnings were necessary because Stano was represented by counsel. For the reasons explained in Point I, supra, appellee maintains appellant was afforded competent assistance of counsel.

To the extent that Stano assails the waiver on the basis of counsel's alleged ineffectiveness, the state contends that Stano received effective and professional assistance such that the waiver was intelligent. The waiver of a trial by jury by plea of guilty and a waiver of sentencing jury was a sound tactical decision within the range of reasonable choices under the circumstances. Holmes v. State, 429 So.2d 298 (Fla. 1983); Quince v. State, 477 So.2d 535 (1985).

Counsel's advice to waive a jury was within the range of

reasonable professional assistance because Stano personally insisted on pleading guilty. In the recent decision of Agan v. State, 503 So.2d 1254 (Fla. 1987), this Court determined that it was reasonable to conduct no investigation[7] when the defendant insists on pleading guilty.Even if Mr. Pearl conducted no investigation, in light of Stano's steadfast refusal to go to trial, his conduct would be reasonable.

Defendant is also unable to establish prejudice for the same reason. Hill v. Lockhart, 106 S.Ct. 366 (1986) requires a defendant to establish that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Stano adamantly refused to go to trial. (DA 16, 26) (R 13; 289-303) Perhaps he wanted to spare his family the embarrassment and humiliation. Surely he knew that the result was a foregone conclusion because he knew he was guilty. The Brevard County case illustrates that Stano knew his rights and could exercise them if he so desired. The fact is that Stano insisted on not going to trial; his counsel cannot be ineffective for honoring his client's demand.

At the hearing April 9, 1987, counsel agreed that "to a certain extent, this claim is record bound." (T 201, 233) However, counsel for Stano argued that because of ineffective

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[7] The state contends counsel did investigate the case. Contrary to defendant's assertion, a fair reading of the transcript establishes that counsel had been provided discovery and was fully apprised of the factual circumstances. Mr. Pearl represented Stano in 1981 and had personal knowledge of the case from its inception.

assistance of counsel, Stano had entered into a "plea bargain" with Detective Crow that all confessions would lead to life sentences. (T 202) The plea hearing in this case conclusively rebuts any suggestion that Stano was promised anything in exchange for his voluntary pleas of guilty to the murders of Katy Muldoon and Susan Bickrest. (R 300)

The record demonstrates that Stano's waiver of a jury was fully knowing, intelligent and voluntary. (R 296-300) Mikenas v. State, supra. Washington v. State, supra.

POINT IV (CLAIM III)

AN ALLEGATION OF A VIOLATION OF ESTELLE V. SMITH, 451 U.S. 454 (1981) IS NOT COGNIZABLE IN A MOTION FOR POST-CONVICTION RELIEF.

Stano contends in argument four that he was not informed of his constitutional rights before making statements to mental health experts, and therefore it was improper to introduce those statements during the state's case in the sentencing proceeding.

In Estelle v. Smith, 451 U.S. 454 (1981), the United States Supreme Court held that communications made during a court-ordered psychiatric examination are testimonial in nature and that such examinations must be treated the same as custodial interrogations by the police. Id. at 467-468. The Court excluded the psychiatrist's testimony because the defendant was not advised prior to the examination of his right to remain silent or that his statements could be used against him.

This issue is barred from review because it was never objected to prior to sentencing, at the sentencing hearing, or on direct appeal. Wainwright v. Sykes, 433 U.S. 72 (1977); Quince v. State, 477 So.2d 535 (Fla. 1985); Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 1986). Stano raised an issue that was virtually identical to this one in ground five of his Brevard County motion for post-conviction relief. (PA 4) The trial court and Supreme Court of Florida determined that this issue should have been raised on direct appeal. Stano v. State, 497 So.2d 1185 (Fla. 1986). The trial court in this case rejected this claim on the same basis. (T 256)

Even if the issue were cognizable in this proceeding, no

relief would be warranted. In Battie v. Estelle, 655 F.2d 692, 699 (5th Cir. 1981), the fifth circuit enumerated five factors that must be present for Smith to apply: the defendant must be in custody; the testimony must constitute interrogation; the testimony must be conducted by an agent of the state; the agent must fail to advise the defendant of his constitutional rights; an the defendant must neither request the exam nor introduce psychiatric evidence. Id. at 699-700.

Smith is inapplicable here for two reasons. First, Stano clearly introduced psychiatric evidence. The defense offered Dr. McMillan's report in evidence. (R 113-114) Drs. Carrera, Bernard and Stern were jointly called by the state and defense. (R 119) Their reports were offered in evidence by the defense. (R 117)

Second, the mental health experts were necessary to the defense and not "agents of the state." These reports were vital in attempting to establish statutory mitigating factors and formed the basis for nonstatutory mitigatng factors found by the court. The protections of Estelle v. Smith, do not apply unless the psychiatrist is "essentially an agent of the state...A different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." 45 U.S. at 472 n. 10. See also, Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).

Even if this claim were not procedurally barred pursuant to Quince, supra, no relief is warranted under the recent United States Supreme Court decision of Buchanan v. Kentucky, 107 S.Ct. 2906 (1987). This case held that the introduction of a

psychiatric report concerning the mental state of a homicide defendant, discussing the crimes for which he is charged, did not violate the defendant's right against self-incrimination where the examination testimony was offered for the limited purpose of rebutting the defendant's mental status defense of extreme emotional disturbance. It is clear from the evidence and argument presented at the sentencing hearing that Stano attempted to establish these mental mitigating circumstances. Therefore, the testimony of Doctors Barnard and Carrera was properly admitted under Buchanan v. Kentucky.

To the extent that the opinions of Doctors Barnard and Carrera are criticized because their evaluations took place the morning before the sentencing proceedings, the state responds that both doctors had extensively examined Stano on several prior occasions. These prior examinations included extensive testing of Stano. (R 600-604, 609-614)

POINT V (CLAIM IV)

COUNSEL RENDERED EFFECTIVE ASSISTANCE OF COUNSEL IN REGARD TO THE PRESENTENCE INVESTIGATION (PSI) REPORT.

Defense counsel made a motion in limine after the PSI was filed. (R 615-619) This motion was granted in that the PSI was used to establish only mitigating evidence and was not used to support any aggravating circumstance. (R 621) Despite this achievement, Stano contends counsel was ineffective for precluding all consideration of the PSI report. (T 89,94)

Since the PSI was used to establish only mitigating evidence and since portions of the report were specifically cited by the trial court as mitigating evidence, Stano is unable to establish that he was prejudiced in any way by counsel's alleged deficiency. Hill v. Lockhart, 106 S.Ct. 366 (1986), Strickland v. Washington, 446 U.S. 668 (1984).

The state contends that the issue of the appropriate use of the PSI could and should have been raised on direct appeal since it was preserved by the motion in limine. See, Lightbourne v. State, 471 So.2d 27 (Fla. 1985); Quince v. State, 477 So.2d 535 (Fla. 1985). Stano is merely couching the issue in terms of ineffective assistance of counsel to avoid a valid claim of default. Sireci v. State, 469 So.2d 119 (Fla. 1985); Quince, supra.

For the first time on appeal, appellant cites Booth v. Maryland, 107 S.Ct. 2529 (1987), but provides no precise allegation of error. It is clear this case is readily distinguishable from Booth v. Maryland. Katy Muldoon was an

orphan who was raised in several foster homes. Her parents were dead and her brothers could not be located. Susan Bickrest's parents did provide a written statement, including the opinion that "Gerald Stano should be sentenced to death. He could then experience the fear and helplessness that all of this victims felt when he chose to end their lives. Like Gerald Stano, we would also feel no remorse upon his death..." (R 580)

These statements differ from the victim impact statements condemned in Booth. First, the defense counsel in Booth moved to suppress the VIS on the ground that the extensive emphasis on the personal lives of the victims and horrific impact the crime had on the victim's family was irrelevant and inflamatory. No such motion was made here. Second, the offending portions of Maryland's VIS included the emotional trauma suffered by the family and the personal characteristics of the victims. Here, the focus of the PSI was clearly on the defendant. Third, there was no jury in this case. We can assume that the sentencer did not allow extraneous considerations to infect the sentencing process. Last, the comments of the Bickrests did not rise to the level of vituperative attack on the defendant condemned in Booth. It cannot be said that these opinions were "emotionally charged" and therefore violative of the eighth amendment.

POINT VI (CLAIM V)

THE TRIAL JUDGE, SUA SPONTE, RAISED THE ISSUE OF RECUSAL AND ALL PARTIES, INCLUDING THE DEFENDANT, REQUESTED THE COURT TO HEAR THE CASE IN AN OBVIOUS TACTICAL DECISION TO PLACE THESE TWO CASES IN THE EXACT SAME POSTURE AS THE PRIOR CASES WHERE LIFE SENTENCES WERE IMPOSED.

Based upon certain statements made during the sentencing in the Maher/Haddocks/Heard cases in 1981, Stano claims that the trial court should have recused itself.

The court specifically inquired on the record of defense counsel and the defendant if there was any objection to Judge Foxman presiding in these cases. (R 11-12) All parties agreed. Therefore, the issue of whether the judge should have recused himself has been waived. Hayes v. Rogers, 378 So.2d 1212 (Fla. 1979). Wainwright v. Sykes, 433 U.S. 72 (1977). No cause for the default can be established because the defense wanted Judge Foxman to hear these cases. Engle v. Issac, 456 U.S. 107 (1982). No motion to disqualify was ever filed. § 38.10, Fla. Stat. (1983). The trial court found this claim barred.

Stano also procedurally defaulted this issue by failing to raise it on direct appeal. See, Card v. State, 497 So.2d 1169 (Fla. 1986). No cause or prejudice can be established for the default. There was a motion in limine in the record containing the basis for a claim on this issue, which could and should have been raised on direct appeal.

The record refutes the allegation that all of Stano's confessions were premised on the promise that no death sentence would be imposed. (R 300) During the plea colloquy, Stano swore

that there was no plea bargain as to the sentence. Mikenas v. State, 460 So.2d 359 (Fla. 1985). The court's compliance with Florida Rule of Criminal Procedure 3.170(j), demonstrates that the plea was made knowingly, intelligently and voluntarily. Quince v. State, 477 So.2d 535 (Fla. 1985); Boykin v. Alabama, 395 U.S. 238 (1969); United States v. Russell, 716 F.2d 955 (11th Cir. 1985).

POINT VII (CLAIM VI)

DEFENDANT CANNOT ATTACK THE COMPETENCY OF HIS TRIAL COUNSEL VIA THE COMPETENCY OF THE MENTAL HEALTH EXPERTS PRESENTING EVIDENCE IN HIS BEHALF.

Stano contends that Mr. Pearl provided ineffective assistance of counsel "vis-a-vis mental health experts". He contends that it was an unreasonable omission to fail to re-evaluate competency before entering his plea.

The state contends that, "...defense counsel was not obligated to seek additional (psychiatric) opinions in the hopes of fabricating a defense." Holmes v. State, 429 So.2d 297, 300 (Fla. 1983); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Finney v. Zant, 709 F.2d 643 (11th Cir. 1983). There was no evidence to suggest that Stano was incompetent, therefore, counsel was not ineffective for failing to investigate further. Card v. State, 497 So.2d 1169 (Fla. 1986); Clark v. State, 467 So.2d 699 (Fla. 1985); Agan v. State, 503 So.2d 1254 (Fla. 1987). "Since defense counsel was bound to seek out such (psychiatric) expert testimony only if evidence existed calling into question (Stano's) sanity, Ake v. Oklahoma, 105 S.Ct. 1087 (1985); Christopher v. State, 416 So.2d 450 (Fla. 1982), we cannot now find fault in counsel's decision..." Bush v. State, 505 So.2d 409,410 (Fla. 1987) Furthermore, the evaluation by several mental health experts for the June, 1983, sentencing hearing was a nunc pro tunc evaluation of competency at the March, 1983 plea. See, Mason v. State, 489 So.2d 734 (Fla. 1986).

Defendant assails Dr. Ann McMillan, a defense expert, as "fundamentally deficient." This claim was presented verbatim in the Brevard County motion for post-conviction relief. (PA 3, 47) When it was presented in that forum, both the trial court and the Supreme Court of Florida rejected the issue as one which could have or should have been raised on direct appeal. Stano v. State, 497 So.2d 1185 (Fla. 1986). This procedural bar was honored by the United States District Court. Stano v. Dugger, Case No. 87-753-CIV-ORL-19 (August 25, 1987). Additionally, this claim was rejected in the Bradford and Alachua County cases. The state urges this honorable court to reject this claim on the same ground, as did the trial court.

The state contends that no prejudice can be established because the trial court specifically relied upon Dr. McMillan's report to establish a mitigating circumstance. Counsel was able to persuade the court to find significant mitigating evidence on the basis of Dr. McMillan's report and so his performance was not deficient under the Knight/Strickland standard.

The state notes that on direct appeal, Stano claimed that Dr. McMillan's reports were entitled to more weight than the other doctors. The defendant is not foreclosed from presenting inconsistent defenses, nonetheless, the present complaint rings hollow when compared to Stano's former song of praise for Dr. McMillan.

The state finds most significant the fact that the basis for the attack now launched on Dr. McMillan is a report that was not included in her report before the trial court, a report that was

added after collateral proceedings began and is of most dubious origin. The reports of Dr. McMillan received into evidence contains no report entitled "Comparison of Gerald Stano's Psychological Profile With Those of Convicted Mass Murderers". This report contained no Megargee "Charlie" sub-type. (Compare defendant's appendix 18 with R 588-599) To the extent that Dr. McMillan's interpretation of the MMPI is criticized, the state could note that her ultimate conclusion was that Stano was "faking bad."

Counsel was able to utilize the favorable aspects of Dr. McMillans' report. The trial court expressly based a mitigating factor on the information contained in her report. Appellant failed to establish that either Dr. McMillan or Mr. Pearl were ineffective. The trial court correctly denied an evidentiary hearing on the basis of these legally insufficient allegations.

CONCLUSION

Based on the foregoing argument and authority, appellee respectfully requests this honorable court to affirm the summary denial of the motion for post-conviction relief in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by mail, to Mark E. Olive, Office of the Capital Collateral Representative, 225 W. Jefferson Street, Tallahassee, Florida 32301, this 19th day of October 1987.

Belle B. Turner

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Of Counsel