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IN THE SUPREME COURT OF FLORIDA



NO. _____

GERALD EUGENE STANO,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

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PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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## I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. Mr. Stano is a death-sentenced inmate, the petition presents constitutional issues which directly concern the judgment of this Court during that direct appeal process, and the petition challenges the legality of Mr. Stano's capital conviction and sentence of death. See Stano v. State, 460 So. 2d 890 (Fla. 1984). This Court has jurisdiction because the fundamental constitutional errors raised involve the direct appeal process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987).

The Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and the Court has not hesitated to exercise its inherent jurisdiction to remedy constitutional errors that undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. The petition involves claims of fundamental constitutional error, see Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984), and includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Downs, supra; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla.

1980). The petition also involves claims of ineffective assistance of counsel on direct appeal, see Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra, which this Court has jurisdiction to entertain. Knight v. State, 394 So. 2d at 999; Wilson, supra; Johnson, supra. This and other Florida courts have consistently recognized that the Writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Stano will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the Writ. Furthermore, an evidentiary hearing is necessary on the "book-rights" conflict of interest claim.

## II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Gerald Eugene Stano asserts that his capital convictions and sentences of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

## III. CLAIMS FOR RELIEF

### A. Issues Concerning Guilt/Innocence

### CLAIM I

MR. STANO'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE PROCEDURES SURROUNDING THE ENTRY OF HIS GUILTY PLEA

Mr. Stano's conviction and death sentence in this case were affirmed without any advocate discussing innocence[1] or drawing any court's attention to the constitutional errors attendant to the guilt determination.[2] Trial counsel stood by and provided no advice to Mr. Stano, as Mr. Stano, acting ostensibly on his own, entered pleas of guilty to two capital offenses without any agreement as to sentence, "waived" a Florida capital sentencing jury, and left his fate to a sentencing judge who had already revealed his belief that death was the proper sentence for Mr. Stano. All of this appeared in the direct appeal record, but appellate counsel stood as mute as trial counsel had and, through no tactic or strategy, unreasonably failed to discuss the defective guilt/innocence proceeding at all. As will be shown, the record on direct appeal revealed a) that Mr. Stano was acting pro se at the guilt/innocence proceeding, without having knowingly, intelligently, and voluntarily waived counsel, b) that Mr. Stano's right to counsel at the guilt/innocence proceeding

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[1]Not one piece of physical evidence has connected Mr. Stano to any of his purported offenses, and there was nothing introduced at guilt/innocence or sentencing here, other than Mr. Stano's words.

[2]In capital guilty plea cases, this Court is obligated to review the plea proceedings for error. "[T]he statutory provision that '[a] defendant who pleads guilty . . . with no express reservation of the right to appeal shall have no right to a direct appeal,' section 924.06(3), Florida Statutes (1985); Fla. R. App. P. 9.140(b), has no application in the context of capital review." Muehlman v. State, 503 So. 2d 310, 312 (Fla. 1987). See also Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982).

was denied, and c) that, to the extent counsel performed at trial at all, counsel affirmatively harmed Mr. Stano, and provided grossly ineffective assistance, which should have been brought to this Court's attention on direct appeal.

Furthermore, the plea colloguy failed to provide and elicit the information required for a knowing and intelligent plea, specifically omitting important safeguards explicitly detailed in Rule 3.172, Florida Rules of Criminal Procedure. See Claim II, infra. These violations of Mr. Stano's fifth, sixth, eighth, and fourteenth amendment rights were not brought to this Court's attention on direct appeal because appellate counsel unreasonably failed to discover and reveal the errors, and because appellate counsel operated under a fundamentally disabling conflict of interest.[3]

The error raised here is fundamental error. It is error occurring during the direct appeal process before this Court. It also demonstrates ineffective assistance of appellate counsel, which will be discussed in Claim V, infra. Habeas corpus jurisdiction is proper.

A. Mr. Stano's Plea Was Not Accompanied By Advice of Counsel, or By Proper Advice From the Court

1. Counsel Was Unable to Advise

Appellate counsel began the first argument of his brief before this Court by writing: "Appellant, upon advice of counsel, pleaded guilty to first degree murder in both cases and waived his right to a jury at the sentencing hearing." Appellant's Brief, p. 15. Appellate counsel during oral argument before this Court stated that the plea had been competently

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[3]Appellate counsel was also one of two "trial" counsel, and could not, without conflict, challenge on appeal attorney created error arising in the trial court. Furthermore, as has since been revealed, appellate counsel may have (and is definitely seeking) a financial interest in the outcome of Mr. Stano's cases. Using State of Florida Public Defender letterhead stationary, appellate counsel has solicited book rights from Mr. Stano. See attachment 1; see also Claim V, infra.

entered. This Court, based upon this degree of appellate advocacy, held that "although not raised on appeal, we find a competent basis for the trial court's acceptance of Stano's guilty pleas and the adjudications of guilt." Stano v. State, 460 So. 2d 890, 892 (Fla. 1984).

What appellate counsel told this Court was flat wrong. Mr. Stano did not enter any plea upon the advice of counsel. The record plainly shows that during the meager thirty-seven pages of transcript it took to enter pleas in two capital offenses, the only "advice of counsel" was that counsel was completely unable to offer any advice. Counsel, and the trial court, specifically allowed a guilty plea without advice of counsel, and appellate counsel's opposite representations to this Court were unreasonable.

The following excerpts from the guilty plea proceedings reveal that Mr. Stano was not only entering a plea "blind" in that there was no agreement on sentence, but also "blind" because no one was looking out for him:

> [DEFENSE COUNSEL PEARL]: Before proceeding, Your Honor, as I have told Mr. Stano I would do, there are a couple of things I would like to inform the Court about in his presence that might appropriately be made a part of the plea dialogue.
>
> At this time, Your Honor, I have not yet received full discovery[4] from the state with respect to these cases and, therefore, am not prepared to say that I know all of the substantive facts concerning these two killings. The delay has been because much of the materials has not yet been received by the State and Mr. Nixon told me he would like

[4]As the direct appeal record reveals, Mr. Pearl had not been provided with "discovery" at all at the time of this March 11, 1983, guilty plea. Discovery was not provided until May 2, 1983, long after this plea and shortly before the sentencing hearing was to have occurred (R. 454). This late discovery prompted defense counsel to seek a continuance of the sentencing proceeding, id., but the complete absence of discovery drew barely a raised eyebrow on the day of plea.

to gather everything up at once and submit it to me rather than in installments. I agreed with that.

THE COURT: So, you're not complaining, you're just stating this for the record.

MR. PEARL: No, that is not a complaint. I'm just making my position clear in Mr. Stano's presence about the entry of this plea; that is to say, that I am 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.

I have spoken with Mr. Nixon. I have confidence, certainly, in his integrity and honesty, and he assures me that the State can independently establish the corpus delecti in both of these cases. And Mr. Stano tells me that that is so.

Further, I have asked him about the admissions or confessions that he has made to Detective Paul Crow. And he assures me that those statements were made voluntarily, they were made competently, and intelligently after warning of his rights and that, therefore, there does not exist a good possibility that either of his admissions could be suppressed on a hearing.

He feels that he wants to go forward and enter this plea rather than go through a trial or even a delay at this time.

I have agreed that certainly he has the right to do so, but that he should know, and it should be on the record, that I am not fully prepared at this time as his attorney to advise him with respect to the advisability of a trial or not.

He tells me he does not want a trial.

THE COURT: Okay.

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. 289-291).

> MR. PEARL: Well, Your Honor, in addition to that, at the time I filed my Motion for Discovery[5] and our office went to the State to examine its file, it was explained to us that, at that time, certain evidence had not yet, or reports had not yet been received from the lab and that they would prefer that we waited and got all of the evidence at one time, to which we had no disagreement or objection whatever.

(R. 293).

2. The Trial Court Failed Properly To Advise Mr. Stano

The trial court then informed Mr. Stano, after he had entered his guilty pleas, of the rights he gave up by entering a plea of guilty. These rights comprised four and one-half lines of transcript:

> By pleading guilty, you're waiving your right to a jury trial as to guilt or innocence; at that trial, to be represented by a counsel; the right to confront witnesses against you; your right to compel the attendance of those who will testify on your behalf.

(R. 299). Mr. Stano was not asked if he wished to relinquish even this limited list of rights, and he was not asked if he knew what they meant. He was simply told that by pleading guilt, he was "waiving" (whatever that means) those rights. Mr. Stano was not told, inter alia, that he had the right not to be compelled to incriminate himself,[6] and that he not only could "confront" but could also have counsel cross-examine witnesses. See Rule 3.172, Florida Rules of Criminal Procedure.

Finally, Mr. Stano was told:

> Once you plead guilty, you waive any defenses you might have. You severely restrict and limit your ability to appeal.

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[5]This (unanswered) Motion for Discovery was the only motion filed by counsel before the guilty plea was entered.

[6]Mr. Stano had done little else but incriminate himself. It is unsettling and was patently unconstitutional for the trial judge to accept pleas without having, in public, away from police interrogation, and on the record, informed Mr. Stano that he did not have to incriminate himself any more.

(R. 300). This is not true in a capital case in Florida. Mr. Stano, for example, could have challenged his confessions, lost, pled guilty, and still raised that "defense" on appeal.

After a factual basis for the plea (Mr. Stano's confession) was stipulated, the plea was accepted.

B. Mr. Stano Acted Pro Se At a Capital Plea, Without a Knowing, Voluntary, and Intelligent Waiver of Counsel, and/or He Was Denied Counsel at this Critical Stage of the Criminal Proceeding, In Violation of His Sixth, Eighth, and Fourteenth Amendment Rights

Mr. Stano was entitled to counsel at the time of entering a guilty plea. Boykin v. Alabama, 395 U.S. 238 (1969); White v. Maryland, 373 U.S. 59 (1963). The reason Mr. Stano was entitled to counsel was not so that counsel could dumbly attend the plea hearing, but so that counsel could advise:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 287 U.S. 45, 69 (1932).

The direct appeal record plainly reveals that defense counsel did not advise Mr. Stano, because he could not advise Mr. Stano. No discovery had been conducted, and counsel admitted that

> [H]e [Mr. Stano] should know . . . that I am not fully prepared at this time as his attorney to advise him with respect to the advisability of a trial or not.

(R. 291). Mr. Stano was not advised to plea or not to plea. He was left completely on his own to make that decision in a capital case.[7] As the direct appeal record shows, Mr. Stano pled guilty with no agreement as to sentence, before a judge who had told him that he wanted to sentence him to death (R. 476).

The trial court had only two constitutional options regarding this pro se indigent defendant, and missed them both. First, the trial court could have postponed the plea proceedings until such time as counsel was prepared to offer advice to his client. Second, the trial court could have determined whether Mr. Stano wished to waive counsel, and whether he was able to proceed pro se. Such a waiver may not be presumed from a silent record, but must affirmatively appear. Carnley v. Cochran, 369 U.S. 506 (1962). Before any such waiver can affirmatively appear, there must first be a penetrating and comprehensive inquiry of the defendant to determine, among other things, whether he or she is aware of the "dangers and disadvantages of self-representation." Faretta v. California, 422 U.S. 806, 835 (1975).

While this Court found the plea had been entered upon advice of counsel, no advice in fact occurred. Mr. Stano was acting without advice, the defense attorney and the trial court know it, and no corrective measure of any kind was undertaken. These actions violated Mr. Stano's sixth, eighth, and fourteenth amendment rights. A denial of counsel requires reversal, without inquiry into prejudice.

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[7]A defendant would need to know two things before entering a plea. First, a defendant must be advised regarding his or her chances at trial versus chances upon a plea. Second, a defendant must be advised about what constitutional rights he or she would have at trial, and how a plea affects the exercise of those rights. The attorney provides the former information, and the trial court must ensure that the latter is provided. The direct appeal record showed that neither type of information was provided.

C. The Direct Appeal Record Revealed That Trial Counsel Was Grossly Ineffective During the Entry of the Guilty Plea

Trial counsel did not stop at giving no advice. Counsel gave completely wrong advice to his client and prejudicially wrong information to the trial court after the pleas had been entered -- counsel told the trial court that Mr. Stano had been convicted of twice as many murders than he had in fact been convicted of:

> Now, is there any objection to adjudication at this stage?
>
> MR. PEARL: None, Your Honor.
>
> THE COURT: All right.
>
> Is the State agreed on a 18 May as a target date?
>
> MR. NIXON: Yes, Your Honor.
>
> THE COURT: Okay.
>
> All right. As to -- may I see the other file?
>
> As to Case 83-189-CC, that being the Muldoon case, I'm prepared to adjudicate the defendant. Anything in bar or preclusion of adjudication?
>
> MR. PEARL: The only thing that crosses my mind, Your Honor, which is not really in bar or preclusion of sentence, is that Mr. Stano has very recently been indicted in Brevard County for one charge of first-degree murder as to which the death penalty is very much in issue. I don't know whether an adjudication at this time would further aggravate any defenses or any sentencing considerations which may arise in that county. However, I believe there were --
>
> (Discussion off the record between Mr. Pearl and the defendant.)
>
> MR. PEARL: He's already been adjudicated guilty on something like ten. I'm not at all sure that this would actually act as prejudicial to him and, therefore, Your Honor, I see no reason why he can't now be adjudicated and represent to the Court that there is nothing in bar or preclusion of adjudication at this time.

(R. 321-22). This was absurd. Of course the adjudications here could be (and were) used to "aggravate" the Brevard County case,

but, more importantly, it was completely counterproductive and patently unnecessary to even inform this trial judge of the newly indicted case. And Mr. Stano had been "adjudicated" in six, not ten, other cases, as the direct appeal record revealed. Trial counsel, not content simply to be quiet, had to speak and remove all doubt about his absolute incompetence to be handling the plea. There is no possible way that any competent counsel could be "not at all sure" that new murder convictions would not "act as prejudicial to him," and at least accuracy would seem important.

Complete lack of preparation and confessed ignorance, affirmative offering of harmful information that was incorrect, and total ignorance of the use of adjudication to "aggravate" other cases -- this is the appellate record of trial counsel's incompetence at plea which could have been presented to this Court upon direct appeal. One simply does not open one's mouth in order affirmatively to hurt one's client. See Douglas v. Wainwright, 714 F.2d 1532, 1553 (11th Cir. 1983)("a vital difference exists between not producing any mitigating evidence and emphasizing to the ultimate sentencer that the defendant is a bad person or that there is no mitigating evidence."). Ineffectiveness like this -- that jumps from the record -- can be raised on direct appeal. It hardly needs any non-record support. See Foster v. State, 387 So. 2d 344, 345 (Fla. 1980); see also Stewart v. State, 420 So. 2d 862, 864 (1982)("Because the facts on which this claim [ineffective assistance of counsel] is based are evident on the record before this Court, this contention is cognizable on appeal"). Consequently, appellate counsel had available several strong challenges to the plea, but ignored them. While this Court has held that appellate counsel generally cannot be said to have been ineffective for having failed to raise trial counsel ineffectiveness, see Blanco v.

Wainwright, ___ So. 2d ___ (Fla. 1987), petitioner believes that under the facts of this case, a different rule should apply.

Appellate counsel raised no challenge to the guilty plea proceedings, when there were several bona fide challenges available. With so many challenges appearing on the face of the direct appeal record, it can only be concluded that counsel unreasonably failed critically to examine the guilty plea proceedings. No valid tactic or strategy could lead to a total abdication of the responsibility zealously to represent a client on appeal, and the failure to have challenged trial counsel's effectiveness is at least further evidence of appellate counsel's ineffectiveness. See Claim V, infra.

CLAIM II

THE TRIAL COURT DID NOT PROVIDE A RECORD FROM WHICH IT CAN BE CONCLUDED THAT MR. STANO KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO TRIAL, AND, CONSEQUENTLY, THE GUILTY PLEA IN THIS CASE VIOLATED MR. STANO'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS[8]

Mr. Stano had a basic problem with his fifth amendment right. If police asked him to waive it, he would, apparently, repeatedly. During the course of his plea proceeding, Mr. Stano's own attorney thrice stopped the proceedings sua sponte to ask Mr. Stano to incriminate himself, and Mr. Stano did.[9]

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[8]This Claim, like Claims I-IV, raises fundamental error in this Court's direct appeal process. It also forms a part of the predicate, for Claim V, ineffective assistance of appellate counsel.

[9]While the State was attempting to establish a factual basis for the plea, defense counsel refused to allow admission of a rights waiver and statement until he was sure it was proper: he asked his client in open court if the signatures were authentic, and then he said "no objection." R. 311. Counsel revealed his total abdication of responsibility when he asked his own client if he had seen certain photographs, and then told the court:

(footnote continued on following page)

Without any question, the issue in Mr. Stano's case was whether he knew anything about the fifth amendment. Police said he did.

The trial court never asked. Two guilty pleas to capital murder were accepted by a trial judge who never told Mr. Stano that at trial he could not be forced to incriminate himself, or that by pleading guilty he was waiving that right. The plea colloquy was wanting in other important regards as well, but this omission is bold indeed.

A. What Mr. Stano Was Told By the Judge on the Record

Mr. Stano was informed by the trial judge that the following would occur, upon entry of a guilty plea:

> By pleading guilty, you're waiving your right to a jury trial as to guilt or innocence; at that trial, to be represented by a counsel; the right to confront witnesses against you; your right to compel the attendance of those who will testify on your behalf.

(R. 299). Mr. Stano was not asked if he wished to relinquish even this limited list of rights, and he was not asked if he knew what they meant. He was simply told that by pleading guilty, he was "waiving" (whatever that means) these rights.

Finally, Mr. Stano was told:

> Once you plead guilty, you waive any defenses you might have. You severely restrict and limit your ability to appeal.

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(footnote continued from preceding page)

> "I'm authorized to say three of the photograhs have previously been examined by and identified by Mr. Stano in connection with his consultations with Detective Crow."

R. 314. Consultations? Clearly Mr. Stano was operating pro se, and all involved let it happen. Then counsel asked Mr. Stano in open court if he had voluntarily confessed, and upon a yes response, had no objection to the confessions being introduced. R. 316-17.

Throughout the guilty plea proceeding, the fifth amendment was discarded without one question regarding Mr. Stano's knowledge of his right to assert it.

(R. 300). This is not true in a capital case in Florida. Mr. Stano, for example, could have challenged his confessions, lost, pled guilty, and still raised that "defense" on appeal.

B. What Mr. Stano Should Have Been Told

1. The Procedure Required of Trial Judges Under Rule 3.172, Was Not Followed

To determine voluntariness, a trial judge shall do the following:

> RULE 3.172. Acceptance of Guilty or Nolo Contendere Plea
>
> (c) Except where a defendant is not present for a plea, pursuant to the provisions of Rule 3.180(c), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he understands the following:
>
> . . . .
>
> (iii) That he has the right to plead not guilty or to persist in that plea if it has already been made,[10] and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to compel attendance of witnesses on his behalf, the right to confront and cross-examine witnesses against him and the right not to be compelled to incriminate himself.
>
> (iv) That if he pleads guilty, or nolo contendere without express reservation of right to appeal, he gives up his right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but he does not impair his right to review by appropriate collateral attack.[11]
>
> (v) That if he pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further

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[10]Underlined portions indicate information not provided Mr. Stano.

[11]This was said, sort of, and without the underlined portion, but it was wrong; this section does not apply in a capital case.

> trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (vi) That if he pleads guilty or nolo contendere, the trial judge may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury;

For a defendant who the police claim gave up every constitutional right known, it would have been an especially good idea for a neutral judge to have advised and inquired about self-incrimination, cross-examination, presumption of innocence, burden of proof, and all other constitutional rights waived by a plea of guilty. It cannot be said that the guilty plea was knowingly, voluntarily, and intelligently entered when even the colloquy provided by the Rule is not followed. Mr. Stano certainly had no appreciation for his fifth amendment rights. The judge failed even to inquire if he knew what the fifth amendment was.

2. Mr. Stano Was Not Precluded From Raising Guilty Plea Issues On Appeal, But He Was Informed Incorrectly By the Trial Court That in This Capital Case If He Pled Guilty He Waived All Defenses

In a confession case resulting in a guilty plea, this Court reviews the entire record for constitutional error. This review includes inquiry into matters that preclude the entry of the plea, Anderson v. State, 420 So. 2d 574, 576 (Fla. 1982)("[I]f the predicate for the judgment of conviction is substantially impaired by the inclusion of an inadmissible statement, it is proper and necessary for this Court, in a death case, to review the record and determine whether that statement was in fact inadmissible." (nolo contendere case)); Muehleman v. State, 503 So. 2d 310, 312 (Fla. 1987)(Florida Rule 9.140(b), regarding no right to appeal a guilty plea, has "no application in the context of capital review"), and into matters surrounding the plea itself:

> The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprisal of all the attendant constitutional rights waived. In effect, he is asserting a right of review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea. The only type of appeal that requires this type of review is a death penalty case.

Robinson v. State, 373 So. 2d 893, 902 (Fla. 1979). But Mr. Stano was advised by the trial court that he could, in effect, preserve and appeal nothing vis-a-vis guilt/innocence, once a plea was entered. This was completely false.

As far as Mr. Stano was informed, if he challenged his arrest, confessions, Brady violations, discovery violations, or right to counsel issues, lost, and then pled guilty, no right of review was possible. Someone who was convinced that the trial court would provide no relief on pre-trial matters could only assume that he or she had no appeal rights upon the entry of a plea, which simply was not true. As we now know, there are allegations that there were severe problems with the confessions, Brady violations, and other constitutional claims available, see Stano v. State, 420 So. 2d 278 (Fla. 1988), but Mr. Stano was told that he could not appeal those matters if he lost and pled.

The plea was thus not knowingly and intelligently entered. It was predicated upon wrong information. The direct appeal record showed this error on its face, and Mr. Stano's fifth, sixth, eighth, and fourteenth amendment rights were violated.

## CLAIM III

IT WAS FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT ERROR FOR THE TRIAL COURT TO CONSIDER THE P.S.I. TO NEGATE MITIGATION

The P.S.I. in this case was a vicious potpouri of hearsay, emotionalism, inaccuracies, and unconstitutionally obtained statements. Victims' families reported their grief. A plethora of uncharged and unprovable offenses were discussed. Unwarned

statements from Mr. Stano to the P.S.I. examiner were sprinkled throughout. Psychiatric and psychological reports from 1980 and 1981, at which time Mr. Stano could have had no idea that they could be used against him in this 1983 case, were presented to and considered by the judge. This was all supposed to be alright, because the judge purportedly used the P.S.I. only to establish or rebut mitigation.

This was fundamental error, appearing on the face of the direct appeal record. The Court repeatedly stated that the P.S.I. would be used to negate mitigation (R. 21, 23, 222). In this case, such a procedure meant absolute doom. As is plain, mitigation is unlimited. Anything that reduces the seriousness of an offense, or calls for a punishment less than death, is mitigating. A victim's family calling for life imprisonment is mitigating. Four previous homicides rather than 38 is mitigating. Mental illness as opposed to no mental illness is mitigating. Consequently, all of the content of the P.S.I. was available for use to negate mitigation. This was unconstitutional.

Information taken in violation of the fifth amendment cannot be considered at all at sentencing. Estelle v. Smith, 451 U.S. 472 (1981). The direct appeal record here revealed a plain Estelle v. Smith violation. (R. 563, 615, 18, 21, 23). Information revealing victim impact ("[W]e have had to live every day of our lives with this tragedy;" "These deaths committed by a hateful criminal that had no respect for human life;" "[W]e would also feel no remorse upon his death," (R. 577-88) (comments by parrents of victim)) has no place, i.e., -- negating mitigation -- in capital sentencing. Booth v. Maryland, 107 S. Ct. 2203 (1987). Scores of unverified, unchallengable, and non-rebuttable crime descriptions have no place in capital sentencing proceedings.

The fact that this "evidence" was purportedly only used to "negate" mitigation is of no moment. In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) modified on rehearing, 706 F.2d 311 (11th Cir. 1983), cert. denied, 78 L.Ed.2d 697 (1983), the court vacated a death sentence when the trial judge received the report of a psychologist prior to imposing sentence. In Proffitt, as in this case, the trial judge's statement that the report was considered "for the limited purpose of ascertaining whether it supported the psychiatric mitigating circumstances" did not cure the error. Proffitt, 685 F.2d at 1255.

Furthermore, the report was that it was based on statements obtained from the Petitioner without a knowing and voluntary waiver of his right to remain silent, or his right to counsel. In Estelle v. Smith, 451 U.S. 472 (1981), the United States Supreme Court held that a death sentence could not stand where it was based on psychiatric testimony obtained without a knowing and voluntary waiver of fifth and sixth amendment rights. So should the court here. It is clear that Estelle applies retroactively. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981).

## CLAIM IV

THE APPLICATION OF F.S. SECTION 921.141(5)(I) VIOLATED DUE PROCESS, AND EX POST FACTO CONSTITUTIONAL PROTECTIONS.

At the time of the offenses commited herein, F.S. Section 921.141(50(i) was not in existence. Its application in this case was challenged by trial counsel, but not by appellate counsel. The application of (5)(i) violated Mr. Stano's constitutional rights.

### A. The History Of Section 921.141(5) And The Court Decisions Interpreting It

Section 921.141(5)(i), as enacted, states the following:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

Sec. 921.141(5)(i), Fla. Stat. The addition of this factor to Florida's capital sentencing statute occurred when the Florida Legislature enacted Chapter 79-353, Laws of Florida. This law became effective on July 1, 1979, after the offenses herein. The Senate Staff Analysis and Economic Impact Statement explains the reason that the Legislature enacted this provision:

> Senate Bill 523 amends subsection (5) of s. 921.141, Florida Statutes, by adding a new aggravating circumstance to the list of enumerated ones. The effect of the new aggravating circumstance would be to allow the jury to consider the fact that a capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification.

The staff report explained that in two cases, Riley v. State, 366 So. 2d 19 (Fla. 1978) and Menendez v. State, 368 So. 2d 1278 (Fla. 1979), the Florida Supreme Court had clearly found that a trial court determination that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification did not constitute an aggravating factor under Florida's capital sentencing statute as it then existed.

Additionally, just after the enactment of the statute, this Court revised its opinion in Magill v. State, 386 So. 2d 1188 (Fla. 1980) (revised opinion). In its revised opinion, the Court specifically deleted its prior statement that a "cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder." The change made by the Court in response to Mr. Magill's motion for rehearing on that very point demonstrates that such evidence never supported independently the finding of any of the original eight aggravating factors. See id.

Similarly, in Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), the Court, consistent with its statements in Riley, Menendez, and demonstrated by the revision of Magill, observed that premeditation, which was "cold and calculated and stealthily carried out," was not evidence relevant to any of the original

eight aggravating factors in the statute and that an aggravating factor based on that finding was invalid under Florida law. See id. It is therefore clear that prior to the enactment of Chapter 79-353, Laws of Florida, this Court would not allow an aggravating factor based solely facts showing "a cold, calculated design to kill" to stand as the foundation for any of the original eight aggravating factors.

In Miller v. Florida, the Supreme Court set out the test for determining whether a criminal law is ex post facto. In so doing, the Court, for the first time, harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977) and Weaver v. Graham, 450 U.S. 24, 101 U.S. 960 (1981):

> ...As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id., at 293.

Id. at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(i) operated as an ex post facto law in Mr. Stano's case.

B. Section 921.141(5)(i) Is Retrospective

A law is retrospective if it "appl[ies] to events occurring before its enactment," Weaver v. Graham, 101 S. Ct at 964. The relevant "event" in this instance was the murder of Titus Walters which occurred four years prior to the legislatively enacted change to sec. 921.141(5) at issue in this case. As Miller explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S.

Ct at 2451 (citations omitted). The relevant "legal consequences" include the affect of legislative changes on an individual's punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S. Ct. at 2451 (citations omitted).

The change in the sentencing statute in this instance did change the legal consequences at sentencing: Mr. Stano's trial judge become empowered to consider and apply an additional statutory aggravating factor. As the Court demonstrated in its Riley, Menendez, and Lewis decisions and implied by the revision of its opinion in Magill, under the prior statute, facts solely demonstrating heightened premeditation would never have supported the finding of a statutory aggravating factor. Only after enactment of Chapter 79-353 did such facts take on an independent legal consequence.

The Combs court never directly addressed the retrospectivity of sec. 921.141(5)(i). To the extent that it did so indirectly, it apparently recognized that there were legal consequences to the newly enacted statute:

> In our view, [the new statute] adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and...without any pretense of moral or legal justification.

Combs v. State, 403 So. 2d at 421. Section 921.141(5)(i) is therefore retrospective.

C. Section 921.141(5)(i) Substantially Disadvantaged Mr. Stano

Combs v. State, 403 So. 2d 418 (Fla. 1981), held that the addition of sec. 921.141(5)(i) to the capital sentencing procedure did not constitute an ex post facto law because it did not disadvantage the defendant:

> What, then, does the paragraph add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an

> aggravating circumstance, the premeditation must have been "cold, calculated and ... without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Id. at 421. In arriving at this decision, the Combs court erred because it never conducted a complete and proper analysis of the new law. The Combs court merely observed that the new law limited the use of premeditation at the penalty phase. The Combs court did not examine the challenged provision to determine whether it operate to the disadvantage of a defendant as the Miller decision now clearly requires. See Miller v. Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for enactment of the challenged provision and the change that the challenged provision brought to prior statute to determine whether the new provision operated to the disadvantage of Mr. Miller. Id. In applying that analysis, to the challenged provision at issue here, it is clear that the new provision is "more onerous than the prior law" (Dobbert v. Florida, 97 S. Ct. at 2299) because it substantially disadvantages a capital defendant. Id.

1. The Legislature Intended To Disadvantage A Capital Defendant By Enacting A Law Creating A New Aggravating Factor

When the legislature enacted Chapter 79-353, it expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. Specifically, the drafters of the legislation wanted to address concerns created by this Court in its decisions in Menendez and Riley. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge based solely on facts showing that a murder was committed in a cold, calculated and premeditated manner.

As explained above, prior to enactment of this legislation, this Court had refused to allow such facts, standing alone, to justify the finding of any of the eight original aggravating factors. Id. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging a capital defendant.

2. The Change Which Sec. 921.141(5)(i) Imposed On The Sentencing Statute In Effect At The Time Of The Offense Operates To The Disadvantage Of A Capital Defendant

The change which the new law brought to the sentencing statute operates to the disadvantage of a capital defendant. In Mr. Stano's case, the trial judge applied the new aggravating factor and gave it substantial weight in making the determination that death was the appropriate sentence.

Under the law in effect at the time of the murder in this case, the trial judge would not have been empowered to increase the probability of a death sentence in this manner because Florida sentencing law strictly limits consideration of aggravating factors to those enumerated in the statute. See e.g. sec. 921.141 (5). The Combs court recognized this principle, but failed to give it proper significance for purposes of ex post facto analysis. See Combs v. State, 403 So. 2d at 421. The weight given to an aggravating factor greatly affects the determination of whether a capital defendant receives life or death as does the cumulative weight accorded all aggravating factors found in imposing a death sentence (see e.g. Section 921.141), but the Combs decision did not address this issue. Under Miller, this omission is error.

If a disadvantage caused by the affect of a new law is purely speculative, it is not onerous for purposes of ex post facto analysis. See Dobbert v. Florida, 97 S. Ct. at 2299 n. 7. But, the increased exposure to a death sentence identified above is demonstrably not speculative under Florida's capital

sentencing procedures. In Miller, the Supreme Court rejected the respondent's argument that a change in the sentencing statute for non-capital defendants was not disadvantageous simply because a defendant could not demonstrate "definitively that he would have gotten a lesser sentence." Miller v. State, 107 S. Ct. at 2452.

Similar to the Miller defendant, Mr. Stano was subjected to the probability of a more enhanced sentence at trial because of the new law. In this instance, however, the more severe sentence was death instead of life. He was therefore "substantially disadvantaged" by a retrospective law. The change to the capital sentencing statute operates in an additional manner to substantially disadvantage Mr. Stano.

D. The Change To The Capital Sentencing Statute Alters A Substantial Right

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S. Ct. at 2452. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must determine whether or not statutory aggravating circumstances outweigh any mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the judge, by operation of the new law, applied an additional statutory aggravating factor.

For the foregoing reasons, the law as applied to Mr. Stano at his sentencing hearing was ex post facto, and his sentence of death is therefore void. Miller v. Florida, 107 S. Ct. 2446. (1987).

C. Issues Concerning Appellate Counsel Ineffectiveness

CLAIM V

MR. STANO WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S UNREASONABLE FAILURE ADEQUATELY TO RAISE CLAIMS I-V, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The appellate-level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, ___ U.S. ___, 105 S. Ct. 830 (1985). Appellate counsel must function as "an advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S. Ct. at 835, n.6 (1985). An indigent, as well as "the rich man, who appeals as of right, [must] enjoy the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1962) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S. Ct. at 835 (quoting Strickland v. Washington, 104 S. Ct. 2052 (1984)). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae." Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, ____ U.S. ____ , 104 S. Ct. 2039 (1984). Counsel is crucial, not just to provide the legalese unavailable to the lay person, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S. Ct. at 835, n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an

advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of a "mere friend of the court assisting in a detached evaluation of the Appellant's claim." Lucey, 105 S. Ct. at 835. Counsel must "affirmatively promote his client's position before the court . . . to induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982) ("Unquestionably a brief containing legal authority and analysis assists an appellate court in providing a m re thorough deliberation of an appellant's case.")

This Court has long protected the right of indigents to effective appellate representation. In Barclay v. Wainwright, 444 So. 2d 956 (Fla. 1984), this Court granted a new appeal where counsel's "representation on appeal fell below an acceptable standard." The court there, upon Mr. Barclay's new appellate record, briefing, and argument, reversed Barclay's death sentence, and ordered that a life sentence be imposed. Even more recently, this Court recognized that a new appeal is available whenever appellate counsel's deficiencies cause a prejudicial impact on the petitioner by "compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome. . . ." Harris v. Wainwright, ____ So. 2d ___ (Fla. 1985).

While there is no federal constitutional right to an appeal generally, Jones v. Barnes, 103 S. Ct. 3308 (1983), the eighth amendment demands meaningful appellate review in capital cases. To ensure that death sentences are imposed in an even-handed, rational, and consistent manner, as opposed to wantonly and freakishly, prompt and automatic appellate review is required. Gregg v. Georgia, 428 U.S. 153 (1976) (opinion of Stewart, Powell and Stevens, JJ.); Profitt v. Florida, 428 U.S. 242

(1976). If effective assistance of appellate counsel is a constitutional imperative in cases in which the constitution does not even require an appeal, it follows a fortirari that enhanced effectiveness is required when the appeal is required by the eighth amendment.

This principle is now embodied in this Court's eighth amendment jurisprudence. This Court recently outlined counsel's special duties in capital cases, and the reasons for their attachment:

> [T]he basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a a breach of this professional duty in any case; in a case involving the death penalty it is the very foundation of justice.

Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985). This Court specifically recognized the power of an advocate to unearth latent defects in complex death penalty proceedings:

> The role of an advocate in appellate procedures should not be denigrated. Counsel for the State asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Id. (emphasis added).

Absent a conflict of interest, Petitioner must show 1) specific errors or omissions which show that appellate counsel's

performance deviated from the norm or fell outside the range of professionally acceptable performance; and that 2) the deficiency of that performance compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result. In Claims I-V, Petitioner had satisifed this burden.

In Wilson, this Court recognized that when an attorney "fails to present his client's case in its most favorable posture," and makes needless and pointless concessions which increase the likelihood of client conviction or aggravated punishment, the adversarial system of criminal justice has shifted disturbingly askew. In Wilson, appellate counsel conceded before this Court that his client was guilty of first degree murder as here and "quite possibly" deserved the death penalty. Mr. Stano's appellate attorney made equally damaging concessions by not ever challenging the defective plea proceeding to the sentencer in this case, and appellate counsel unreasonably failed "to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the alleged deviations from due process." Id.

Appellate counsel did not have to be anything but reasonable to notice fundamental error "evident on the record before this Court." Stewart v. State, 420 So. 2d 862, 864 (Fla. 1982). Failure to note and raise these fundamental claims was prejudicial. As in Matire v. Wainwright, in Claims I-V, supra, the issues "leaped out" on even a casual reading of the record, involved per se reversal, and were incomprehensibly ignored. 811 F.2d 1433. The adversarial testing process failed in Mr. Stano's direct appeal.

Appellate counsel simply said nothing about the guilty plea. Whether this is because appellate counsel made an appearance as counsel in the trial court (R. 461), and thus had a conflict of

interest in challenging his own actions, or because appellate counsel simply was ineffective, makes a difference in the prejudice standard. Because of appellate counsel's service as trial counsel too, this created a conflict of interest, requiring less prejudice to be proven. Certainly had Claims I-IV been raised before this Court, a different result would have occurred.

Another potentially pernicious reason for not raising guilt/innocence issues lies in appellate counsel's attempt to make money off of a book by Mr. Stano. After the appeal terminated, the following letter was mailed to Mr. Stano, on public defender letterhead stationery:

June 12, 1987

Gerald Eugene Stano
#A092118
P.O. Box 747
Starke, Fla. 32091

Dear Jerry,

Sorry to hear about your latest warrant. I trust and hope that everything will work out. It was unclear from the newspaper if this was for the Volusia County or Brevard County case. I tried to make an appointment to see you but was unsuccessful since you've already been moved to death watch. Is this the new procedure? I sure don't think it will be any fun spending all summer on death watch. I hope that you're holding up well. If there's anything that I can do, please let me know.

I want to broach a subject that is somewhat delicate. A friend of mine (also an attorney in the Public Defender's Office here) has approached me with an idea about a book. The book would be autobiographical in nature; basically your story as told by you. The attorney, Len Ross, also has a part-time private practice. He would do the writing and take care of all of the business end. He would draw up a contract for you to sign. The guarantee would be that the book would not be published until your death, whether through execution or natural causes. If this idea offendss you in the least, please just say no and take no personal offense. I do not, by any means, want to talk you into anything.

You would also have final approval on any finished product. <u>Half of the profits would be divided between Mr. Ross and myself</u>. The other half would be divided between the

families of the victims and your parents (or whoever you may want to get them). Mr. Ross is convinced that the civil judgment from Volusia County would pose no problem. He is also convinced that any statute relating to book, movie, or television profits being collected by criminals would pose no problem.

Attorney-client privilege would prohibit us from revealing anything that we learned from you until after your death. This would all be covered in the contract. I certainly do not want you to agree to this without discussing it with the attorney handling your case from Capital Collateral Representative. I also would like to discuss this matter with your current lawyer, especially if he or she has any questions or concerns. I am a little apprehensive about my role in this project. I certainly don't want to lose your friendship over this matter. I do think it would be a good opportunity for you to set the record straight. It would also provide some means for compensating the families of the victims. I know that in the past you have expressed support of a similar idea regarding the HBO show.

Well, think about it and let me know what your reaction is. I will be waiting to hear from you.

Sincerely,

Christopher S. Quarles
Assistant Public Defender

(Attachment 1). While counsel stated he was apprehensive about his "role in this project," his only role is his contact to Mr. Stano, developed through the attorney-client relationship. Mr. Ross was going to do all the work. This letter does not conclusively show a conflict of interest at the time of the direct appeal, but it does show appellate counsel's interest in "[h]alf of the profits," and it is highly germane to protection of Mr. Stano's constitutional rights for a factfinder to determine when this monetary interest first arose, how it affected counsel's actions, and why a state public defender office would solicit book rights from a client. A stay of execution should enter, and a magistrate should be appointed to take testimony. Confidence in the integrity and reliability of the direct appeal process has been undermined.

## CONCLUSION

WHEREFORE, Mr. Stano respectfully requests a stay of execution, that the writ issue and that his conviction and sentence be vacated.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

LISSA J. GARDNER
Staff Attorney

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By: _____
Counsel for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Belle Turner, Assistant Attorney General, Beck's Building, 4th Floor, 125 N. Ridgewood, Daytona, Beach, Florida 32014, this 13 day of May, 1988.

_____
Attorney