IN THE SUPREME COURT OF FLORIDA

AUBREY DENNIS ADAMS,

Petitioner,

vs. CASE NO. 65853

STATE OF FLORIDA,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Respondent, the State of Florida in response to the Petitioner's Petition for Writ of Habeas Corpus and refutes the Petitioner's claim that appellate counsel was ineffective in the direct appeal in his case before this Court in prior case number 56,134 and in support thereof states as follows:

1. As to all grounds alleged appellate counsel was not ineffective as there can be no substantial and serious deficiency on the part of appellate counsel for failing to raise issues on appeal that would not have constituted reversible error and most would have been frivolous had they been raised. See, Scott v. Wainwright, 433 So.2d 974, 975 (Fla. 1983).

2. Appellate counsel was not ineffective for failing to raise the issue that the death penalty was based on a general verdict of guilt as the jury may have found no intent to kill on the part of the defendant. This Court on direct appeal clearly found evidence of premeditation. Adams v. State, 412 So.2d 850, 852-853 (Fla. 1982). Moreover, when the defendant commits the murder himself, Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) is not applicable. Funchess v. State, 449 So.2d 1283, 1286 (Fla. 1984). See, Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983).

3. Appellate counsel was not ineffective for failing to raise as error the jury instructions as to all the aggravating circumstances, as such instructions have been previously upheld.

Straight v. Wainwright, 422 So.2d 287 (Fla. 1982); Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983); Riley v. State, 433 So.2d 976, 979 (Fla. 1983).

4. Appellate counsel was not ineffective for failing to raise as error that the jury instruction allowed the jury to consider all degrees of homicide regardless of the evidence. These jury instructions have been upheld. Aldridge v. Wainwright, 433 So.2d 988, 990 (Fla. 1983).

5. Appellate counsel was not ineffective for failing to raise as error on appeal that the jury instructions were improper by requiring that the death penalty recommendation be agreed upon by seven or more jurors, even though six would have been sufficient to recommend life rather than death. Such action, if error could only be harmless as this Court has already held that such instructions do not violate the Federal Constitution. Riley v. State, 433 So.2d 976, 979 (Fla. 1983); Aldridge v. State, 433 So.2d 988, 990 (Fla. 1983).

6. Appellate counsel was not ineffective for failing to raise the issue on appeal that the trial judge failed to explain the nature of mitigating circumstances to the jury as such error if any could only be harmless. Pursuant to §921.141(2)(3), Fla. Stat., the jury renders only an advisory sentence. It is the judge who imposes sentence. The Petitioner has failed to demonstrate that the judge was somehow influenced by this instruction and has totally failed to demonstrate the requisite prejudice required by Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, ___ L.Ed.2d ___ (1984). Such jury override was found to be proper by the United States Supreme Court in Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, ___ L.Ed.2d ___ (1984). See, Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983).

7. Appellate counsel was not ineffective for failure to raise on appeal the issue of the constitutionality of the death penalty. Such attacks were not made by trial counsel below or preserved for appeal. Nor does Petitioner specify which particular attack should have been made, and more importantly he does not demonstrate how such a failure could

prejudice him, creating a reasonable probability that but for such an error the result of the proceeding would have been different pursuant to Strickland, supra, when the death penalty has been constantly upheld against numerous constitutional attacks and such a motion has a minimum chance of success.

8. Appellate counsel was not ineffective for failing to pursue on appeal suppression issues that are obviously frivolous as can be ascertained by the record below (IT 1058-1085).

9. Appellate counsel was not ineffective for failing to raise the issue of repeated readings of the indictment to the jury as it is entirely proper to inform the jury of the charges against a defendant and the jury was clearly instructed that such indictment is not to be considered as evidence in the case (RPCM 254).

10. As to all the claims of ineffective assistance asserted, the Petitioner has failed to meet the standards set forth in Strickland and has neither shown a substantial deficiency on the part of counsel nor demonstrated any prejudice from the failure to pursue these futile issues by appellate counsel.

WHEREFORE, the State of Florida respectfully requests that this Honorable Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kenneth R. Hart and Timothy B. Elliott of Ausley, McMullen, McGehee, Carothers & Proctor, Post Office Box 391, Tallahassee, Florida 32302, and Phillip J. Padovano, Esquire, 1020 East Lafayette Street, Suite 201, Post Office Box 873, Tallahassee, Florida, 32302, on this 10th day of September, 1984.

MARGENE ROPER
Assistant Attorney General