IN THE SUPREME COURT OF FLORIDA

ROBERT D. HEINEY,

Appellant,

v. CASE NO. 74,099

RICHARD L. DUGGER,

Appellee.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Respondent answers as follows:

I. Procedural History

Robery Heiney murdered Francis May on the night of June 5-6, 1978. Heiney was indicted on August 24, 1978 (R 1,2) and tried in February of 1979. Heiney was convicted and sentenced to death. (R 245-250).

Heiney appealed the judgment and sentence to this Court, raising the following issues:

(1) Denial of his motion for judgment of acquittal.

(2) Denial of his motion in limine regarding the Texas shooting which preceded this murder.

(3) Denial of his motion for mistrial.

(4) Denial of his motion to recuse.

(5) The rendition of an allegedly erroneous jury instruction on circumstantial evidence.

(6) The absence of a "justifiable homicide" instruction.

(7) Whether the court erred in finding Heiney guilty of robbery with a deadly weapon.

(8) Whether the trial judge erred (including **Lockett** error) in overriding the jury's recommendation.

This Court affirmed the judgment and sentence. Heiney v. **State,** 447 So.2d 210 (Fla. 1984).

Heiney petitioned the United States Supreme Court for certiorari, raising only two issues:

(1) Whether Florida's jury override is constitutional.

(2) Whether **Lockett** evidence was improperly disregarded in overriding the jury's recommendation.

Certiorari was denied. **Heiney** v. **Florida,** ____ U.S. ____, 105 S.Ct. 303 (1984).

Heiney's case remained idle for years until, on January 2, 1987, Heiney filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The motion raised the following issues:

(1) "Unconstitutional" use of a jailhouse informant.

(2) Prosecutorial abuse of discretion is seeking an indictment.

(3) The constitutionality of jury overrides.

(4) Violation of **Miranda** rights by the police.

(5) Ineffective assistance of co-counsel (by permitting some bench conferences to go unrecorded).

(6) Guilt phase ineffective assistance of co-counsel.

(7) Co-counsel's failure to procure his own pathologist, fingerprint experts, handwriting experts and psychologists (or psychiatrists).

(8) Miscellaneous trial errors by co-counsel.

(9) **"Hitchcock"** error by the court.

(10) The constitutionality of the death penalty.

In April of 1987, a so-called "amendment" was filed raising these claims:

(11) State informant Tuszynski lied to the grand jury.

(12) "Williams Rule" error at trial.

(13) Ineffective assistance of counsel during the penalty phase.

From April of 1987 until April of 1989 the petition remained idle. The State was not asked to respond and did not do so. (The Attorney General's Office was never even served with the petitions).

On March 30, 1989, the Governor signed a death warrant on this case.

On April 12, 1989, Judge Wells denied relief on both "3.850" petitions finding them facially deficient.

The State moved for correction of Judge Wells' order on May 4, 1989, particularly as to its resolution of the **Hitchcock** issue, after conferring with the Office of the Capital Collateral Representative ("CCR").

CCR filed a motion to disqualify Judge Wells without notice to the State. The motion was accompanied by sworn affidavits from attorneys Mark Evans and Julie Naylor. Judge Wells recused himself and the case was transferred to Judge Gordon.

At about this time (the State's copy is not dated), CCR filed a "Consolidated Emergency Motion for Rehearing, Application for Post-Conviction Relief and Proffer in Support of Motion to Vacate Judgment and Sentence, Motion for Evidentiary Hearing and Application for Stay of Execution" along with a massive appendix.

This successive and time barred Rule 3.850 petition raised the following claims:

(1) State misconduct in not revealing the whereabouts of one Phillip Cook.

(2) State use of perjured grand jury testimony.

(3) A **Hitchcock** claim.

(4) The propriety of the jury override (based upon **Hitchcock** rather than **Lockett).**

(5) Ineffective assistance of psychiatric experts.

(6) Ineffective assistance of co-counsel.

(7) The constitutionality of the "Heinous, Atrocious and Cruel" instruction.

(8) Court "preclusion" of the cross-examination of David Benson.

(9) Court error in not letting Heiney represent himself as counsel.

(10) Court use of an "automatic aggravating factor".

(11) Court use of a non-statutory aggravating factor.

(12) Court use of burden-shifting penalty phase instructions.

The State moved for dismissal of this untimely successive petition. At this writing the rehearing motion, consolidated motion and motion to dismiss are all pending.

11. Argument

(A) Substantive Claims

This Honorable Court will find that the so-called "habeas-corpus" petition at bar is, in actuality, a back door attempt to obtain merits review of procedurally barred claims that should have been resolved on direct appeal or pursuant to Fla.R.Crim.P. 3.850. As such, this petition stands as yet another example of abuse of the writ.

It is settled law that writs of habeas corpus cannot be used as a substitute for direct appeal or as a vehicle for a "second" direct appeal. See **Parker** v. **Dugger**, 13 F.L.W. 695 (Fla. 1988); **Preston** v. **Dugger**, 531 So.2d 134 (Fla. 1988); **Blanco** v. **Wainwright**, 507 So.2d 1377 (Fla. 1987); **Steinhorst** v. **Wainwright**, 477 So.2d 537 (Fla. 1985); **Johnson** v. **Wainwright**, 463 So.2d 207 (Fla. 1985); **Messer** v. **Wainwright**, 439 So.2d 875 (Fla. 1983); **Pannier** v. **Wainwright**, 423 So.2d 533 (Fla. 1983); **Thomas** v. **Wainwright**, 486 So.2d 577 (Fla. 1986); **McCrae** v. **Wainwright**, 439 So.2d 868 (Fla. 1983). Proceedings under Fla.R.Crim.P. 3.850, of course, have supplanted the writ thus preventing use of the writ as a vehicle for a "second" or an untimely "3.850" petition. See Roy v. **Wainwright**, 151 So.2d 825 (Fla. 1963) (Rule 3.850 to displace or limit habeas corpus).

Mr. Heiney, well aware that his claims are largely barred, is attempting to flaunt the rules and overcome the procedural bars facing his claims by simply filing concurrent habeas corpus and (successive) "3.850" petitions. We suggest that this Honorable Court's rules and its established caselaw make it clear that Mr. Heiney's strategy must fail.

Claim I
(Jury Override)

Mr. Heiney wishes to use this petition as a vehicle for relitigating the propriety of the jury override at bar.

Mr. Heiney raised this claim on direct appeal and lost. Certiorari was denied. Rule 3.850 relief was denied. Mr. Heiney's complaint cannot be refiled in this habeas corpus petition.[1] Rule 3.850 proceedings are the proper vehicle for raising **Hitchcock** claims. **Hall v. State,** 14 F.L.W. 101 (Fla. 1989).

To the extent Heiney tries to argue **Hitchcock** v. **Dugger,** 107 S.Ct. 1821 (1987), we note that on direct appeal heiney argued the same issue relying upon **Lockett** v. **Ohio,** 438 U.S. **586** (1978) and is obviously engaged in nothing more than reargument of his appeal before a new panel of Supreme Court justices.

Without waiving these procedural defenses, the State would note the weakness of Heiney's so-called "non-statutory mitigating evidence.

Mr. Heiney has an extremely high IQ (at least 118) (R 90-91) and no real mental problems besides being manipulative and anti-social. (R 90-91). Indeed, next to Ted Bundy this defendant (who, like Bundy, argued caselaw, questioned witnesses

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[1] We do, however, object to Heiney's misstatement regarding **Spaziano** v. **Florida,** 468 **U.S.** 447 (1984). **Spaziano** clearly states that no constitutional right to jury sentencing exists and no constitutional "trappings" attach to the jury override procedure. Indeed, the Court refused to consider Spaziano's **Tedder** claim because it was an issue of **state law.**

and served as co-counsel) is one of the sanest and brightest men on death row.

Heiney's use of alcohol (pg. 8) did not equate with alcoholism or brain damage. Heiney's conduct as co-counsel (pg. 8), even if impressive,, assuredly did not excuse his crimes. His criminal record, though non-violent (pg. 8) was extensive and reflected a corrupt history (see R 173-194) and an inability to benefit from probation or rehabilitation. CCR claims Heiney hugged his last (shooting) victim (pg. 8) and disposed of the weapon after shooting his victim. (pg. 8). This is not mitigating evidence. Finally, Heiney describes May's defensive wounds as "slight" (apparently because of the devastating effect of the first few hammer blows). This is not "mitigation".

Mr. Heiney's list of mitigating factors considered by the advisory jury is significant for only two reasons.

(1) This "mitigation" is every bit as weak and attenuated as the factors rejected by this Court in **Clark** v. **State**, 13 F.L.W. 548 (Fla. 1988) and **Lambrix** v. **State**, 13 F.L.W. 697 (Fla. 1988).[2]

(2) The petition is a black and white admission by Petitioner that the advisory jury considered non-statutory mitigating evidence despite the confusing **Hitchcock** instruction.

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[2] Mr. Heiney's reliance upon two federal district court cases, **Parker** v. **Dugger**, **supra**, and **Lusk v. Dugger**, **supra**, neglects to take into consideration the non-final nature of these pending cases (both are on appeal) and the fact that in each case a local federal judge, in violation of the rule in **Spaziano**, agreed to reapply the "**Tedder** Rule" - a state law rule the federal judge could not lawfully reapply. This federal intrusion into state law magnifies the importance of strict adherence to our procedural bars.

This issue is, however, procedurally barred and should clearly and unequivocally be rejected on that basis. Harris v. **Reed,** ____ U.S. ____, 57 U.S.L.W. 4225 (1989); **Marek** v. **Dugger,** ____ So.2d ____ (Fla. May 11, 1989), Case No. 73,278, and that basis **alone.**

Claim II
(Maynard v. **Cartwright** Issue)

This issue is procedurally barred and is presented here in complete disregard of this Court's decisions in **Atkins** v. **Dugger,** 14 F.L.W. 207 (Fla. 1989) and **Eutzy** v. **Dugger,** 14 F.L.W. 176 (Fla. 1989). No further discussion is necessary. **Harris** v. **Reed, supra.**

Claim III
(Limitation of Cross-Examination)

This claim was available both on direct appeal and at the time of Heiney's first "3.850" petition. It's appearance here is a clear abuse of the writ.

Claim IV
("Williams Rule" Claim)

This issue was resolved on direct appeal. It's inclusion here is procedurally barred and an abuse of the writ.

Claim V
(Right to Self Representation)

This claim could and should have been raised on direct appeala and thus is procedurally barred. It is interesting to note that this issue stands as a tacit admission both of competence and the lack of mental mitigating factors.

Claim VI
(State Use of Perjured Testimony)

This issue was known and litigated prior to trial. (Mr. Tuszynski was deposed by defense counsel, too). It was available on direct appeal and is procedurally barred.

Claim VII
(Non-Statutory Aggravating Factor)

The alleged "use" of a non-statutory aggravating factor could and should have been argued on direct appeal or in Heiney's first Rule 3.850 petition. Although the record clearly shows that only statutory factors were relied upon to support the death sentence. **Harris** v. **Reed, supra,** compels reliance upon the procedural bar attending this claim.

Claim VIII
(Burden Shifting)

The "burden shifting" argument presented in this claim is clearly procedurally barred, see **Atkins** v. **Dugger,** 14 **F.L.W.** 207 (Fla. 1989); **Preston** v. **Dugger,** 531 So.2d 134 (Fla. 1988); **Jones** v. **Dugger,** 533 So.2d 290 (Fla. 1988), and is obviously renewed in this case out of disregard for this Court's decisional law or simply in bad faith. Again, **Harris** v. **Reed, supra,** applies.

Claim IX
("Unrecorded Proceedings")

Heiney was co-counsel with Mr. Pascoe and, at times Mr. Pascoe may have handled conferences or hearings without Heiney present. There is no record that Heiney was unaware of these meetings and Heiney certainly never objected to them or raised this issue on direct appeal. The claim is procedurally barred

and, indeed, is not cognizable on habeas corpus. It should have been raised on direct appeal. (The transcripts relied upon by Heiney existed at that time).

Claim X
(Trial Transcript)

Grasping at straws, Heiney now alleges (years after appeal) that his trial transcript was incomplete and unreliable. (Heiney also decries the absence of a grand jury transcript).

Rhetorical and hyperbole laden protestations of "inaccuracy" (pg. *79)* and "incomprehensibility" (pg. *79)* aside, Heiney's claim cannot be supported with actual or even realistic examples of "what" is missing and "how" he was prejudiced.

Any deficiency in the transcript could and should have been raised on direct appeal. See e.g. Johnson v. State, 442 So.2d 193 (Fla. 1983). It was not and therefore is procedurally barred.

Claim XI
(Jury Instruction)

This issue is one that was raised on direct appeal and cannot be reargued by habeas corpus (as a "second appeal"). The claim is procedurally barred.

Claim XII
("Automatic Aggravating Factor")

Again, this issue is procedurally barred as one that could have been raised on direct appeal, if preserved. **Harris** v. Reed, **supra.**

Claim XIII
(Improper Death Sentence after Plea Bargain)

This claim is procedurally barred as one that could and should have been raised on direct appeal but was not.

(B) Ineffective Assistance of Appellate Counsel

For the convenience of the Court, the State has separated Mr. Heiney's eleven claims of "ineffective assistance of appellate counsel" for specific review.

It is apparent from the petition that the charges are strategic rather than well-founded. Mr. Heiney is obviously attempting to open his substantive, but procedurally barred, claims to merits review through the rubric of a claim against counsel. This tactic has not been successful in the past and should not be indulged at this time. Indeed, the filing of baseless attacks upon counsel for strategic reasons should be condemned.

Mr. Heiney's eleven claims are all phrased in the same boilerplate language and are merely perfunctory. Never does Mr. Heiney discuss relevant caselaw, including **Strickland** v. **Washington,** 466 **U.S.** 688 (1984). We, however, shall do so.

Strickland requires counsel to be so ineffective as to be the equivalent of "no counsel at all" before relief can be granted. Error by counsel, even if unreasonable, will not satisfy the test for ineffectiveness. Rather, the petitioner must show both error and prejudice to his case. "Prejudice", in turn, means an actual **probability** of a different outcome "but for" the unreasonable error by counsel. Indeed, on appeal,

"ineffectiveness" is more difficult to establish than at trial due to the many presumptions inuring in favor of the judgment and sentence. See e.g., **Strickland** v. **Washington, supra; Julius v. Johnson,** 840 F.2d 1533 (11th Cir. 1988); **Preston** v. **Dugger,** 531 So.2d 134 (Fla. 1988); **Johnson** v. **Dugger,** 523 So.2d 161 (Fla. 1988); **Stano** v. **Dugger,** 524 So.2d 1018 (Fla. 1988); **Suarez** v. **Dugger,** 527 So.2d 190 (Fla. 1988); **Jones** v. **Dugger,** 533 So.2d 290 (Fla. 1988); **Herring** v. **Dugger,** 528 So.2d 1176 (Fla. 1988); **Doyle** v. **Dugger,** 525 So.2d 993 (Fla. 1988); **Lambrix** v. **Dugger,** 529 So.2d 1110 (Fla. 1988); **Gore** v. **Dugger,** 532 So.2d 1048 (Fla. 1988).

Appellate counsel is not required to raise every colorable claim on appeal but, rather, must select those which he considers strongest **at the time. Julius v. Johnson, supra: Smith v. Murray,** 477 **U.S.** 527 (1986); **Jones** v. **Barnes,** 463 **U.S.** 745 (1983). In fact, it is bad strategy for counsel to dilute his strongest arguments by raising every possible claim. **Atkins** v **Dugger,** 14 F.L.W. 207 (Fla. 1989).

Counsel's performance is not to be evaluated by hindsight. **Strickland, supra.**

Appellate counsel, Mr. Corin, raised eight issues in an oversized appellate brief. If Heiney's complaint is to be taken seriously, Mr. Corin apparently was supposed to file a three hundred page brief raising eleven additional claims. This contention is, at best, unreasonable. If we examine Heiney's eleven specific issues in order we find:

Claim II
(Maynard v. Cartwright)

The issue of whether Florida's capital sentencing instruction violated **Godfrey** v. **Georgia,** was litigated while Heiney's appeal was pending and was resolved against the defense. **Barclay** v. **Florida,** 463 U.S. 939 (1983). Heiney cannot allege or show that the same result would not have been obtained in his case.

Claim III
(Limitation of Cross)

Appellate counsel is faulted for not appealing the issue of whether the trial judge erred in excusing a witness (Benson) after the defense-team would not initiate cross-examination.

Mr. Heiney poses some speculative questions (not necessarily impeachment or even within the scope of Benson's direct exam) that he claims Benson "might" have answered - but he offers nothing to show Benson would have answered these questions or otherwise aided the defense.

The fact is, the record on this issue was arguably too weak to support an appeal. For reasons unknown, the defense would not initiate cross despite urgings from the bench. At (R 793), Mr. Pascoe says he told Heiney "not to cross him", a comment that could be interpreted as "not crossing Judge Wells" or "not crossing David Benson", we cannot tell. The latter interpretation would, however, explain "why" no questions were asked of Benson and "what" Heiney and Pascoe were discussing for so long. (In this regard, we note that the trial court agreed to hold Benson subject to defense recall (R 782) but Benson was never called back to the stand).

The right to cross examine witnesses is not unfettered and certainly cannot justify defense misconduct. The question of whether Judge Wells abused his discretion would have been central to any appeal. See **Delaware** v. **Fensterer,** 474 U.S. 15 (1985); **Delaware** v. **Van Arsdall,** 475 **U.S.** 673 (1986), yet even now no abuse has been shown.

Heiney cannot satisfy **Strickland** on this record issue:

(1) Heiney may not have even wanted to question Benson.

(2) Heiney has yet to proffer any cogent cross of Benson.

(3) Heiney cannot show how this peripheral witness would have won him an acquittal.

(4) Heiney has not shown error by appellate counsel or resulting prejudice to his case.

Claim IV
(Williams Rule)

Appellate counsel **did** raise the state court's denial of the defendant's motion in limine regarding the Texas shooting (see Appellant's brief, Issue II), but did not raise the recently unearthed "Williams Rule" claim.

To the extent that Heiney refers to the Texas-shooting evidence as "baseless accusations that serious crimes had been committed" his petition defies reality. Both sides, at trial, admitted the Texas incident. To say that an appellate lawyer had some duty to brief illusory issues and develop some non-record information to support them defies common sense.

Claim V
(Self Representation)

This was a weak appellate issue given the fact that Heiney's **Faretta** motion was granted and Heiney actively participated in his trial. Indeed, the record does not even support the notion that Heiney was not present at unrecorded bench conferences or that he objected to co-counsel (Mr. Pascoe) handling said conferences for him.

Claim VI
(Grand Jury)

The hyperbole laden attack upon Tom Tuszynski contained in the petitioner's 3.850 petition and this action fails to establish any record sufficient to attack the competence of appellate counsel.

First, we must bear in mind the fact that the grand jury proceedings were never transcribed. Thus, we do not know whether Tuszynski lied or whether the State established less than probable cause to indict Heiney.[3] Appellate counsel cannot manufacture a record.

Second, since Tuszynski did not testify at trial, yet Heiney was convicted, any grand jury error was arguably harmless. **United States v. Mechanik,** 475 U.S. **66** (1986); **Costello v. United States,** 350 U.S. 359 (1956); **Bank** of **Nova Scotia v. United States,** 487 U.S. ____, 101 L.Ed.2d 228 (1988).

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[3] The record clearly shows that Judge Wells felt there was sufficient evidence to indict Heiney even without Tuszynski's testimony - thus defeating any appeal anyway. (R 455).

Given the lack of transcripts, the court finding of sufficient evidence even without Tuszynski's testimony and the presumption of harmless error created by the trial itself, it is plain to see why appellate counsel would not devote much time to this issue.

Claim VII
(Non-Statutory Aggravating Factors)

Since Heiney's sentence was not predicated upon non-statutory aggravating factors **and** since the advisory jury recommended a life sentence, this illusory issue was not a vital addition to any appeal. Indeed, the issue apparently was not preserved by trial counsel, thus negating this claim.

Claim VIII
(Burden Shifting)

This issue was not preserved by trial counsel and thus could not have been argued on appeal.

We note, however, the essentially irrationality of Mr. Heiney's position andn the underlying error in **Jackson** v. Dugger, 837 F.2d 1469 (11th Cir. 1988) and **Adamson** v. **Ricketts, 865** F.2d 1011 (9th Cir. 1988); et al.

The guilt phase of a criminal trial is significantly and constitutionally different from the penalty phase. In the guilt phase, no burden of proof falls upon the defendant becausede he caries the presumption of innocence. Thus, he can be acquitted even if he presents no evidence.

The penalty phase of a trial is an equitable proceeding, not a criminal proceeeding, in which no presumptions attach **ab**

initio, but to which presumptions may attach based upon the weight of the evidence. Unbridled discretion to ignore the evidence is **not** permitted because that would result in arbitrary and capricious death sentences (or life sentences). At the other end of the spectrum, "mandatory" death sentences upon **conviction** are also improper because they violate the Eighth Amendment guarantee of individualized sentencing.

Proper capital sentencing falls into the middle ground known as "guided discretion". **Lockett v. Ohio,** 438 **U.S.** 586 (1978). Telling a jury (which is not even the sentencer - we note) to base its recommendation upon the weight of the evidence is merely "guidance" per **Lockett** and nothing more. It is merely a "narrowing function". **Lowenfield v. Phelps,** ____ **U.S.** ____, 98 L.Ed.2d 568 (1987). Indeed, as it stands our system creates "asymmetry on the side of mercy". **Stanley v. Zant,** 697 F.2d 955 (11th Cir. 1983).

By indulging Mr. Heiney's bit of sophistry, the Court would be "taking the bait" of institutionalizing unbridled grants of mercy no matter the evidence, thus setting up Florida for a "gaffing" (to continue the analogy) on the prongs of **Furman v. Georgia,** 408 **U.S. 238** (1972).

This is the true intent of these **"Adamson"** claims. By fooling the court into ruling that sentences can be justified **without regard** to the weight of the evidence, the stage can be set for a final assault on capital justice as "arbitrary and capricious".

There is nothing wrong with "guided discretion", (especially directing a **non-sentencer** such as the advisory jury). There is no "presumption" akin to the presumption of innocence benefitting a murderer after he has been convicted. There is, in turn, no demonstrable prejudice to Heiney's case due to counsel's failure to raise this issue on appeal. Of course, as noted above, the issue was not preserved anyway.

Claims IX and X
(Unrecorded Conferences)

The non-recording of bench conferences would not compel a new trial absent some showing that the trial transcript was completely useless or that Heiney's appeal could not proceed. **Johnson** v. **State, 442** So.2d **193** (Fla. 1983). The issue of Heiney's presence at every single side-bar and bench conference was not preserved by objection from Heiney who, as co-counsel, certainly could have done so.

Again, **Strickland** has not been satisfied.

Claim XII
("Automatic" Aggravating Factors)

Appellate counsel cannot be faulted for failing to appeal this illusory issue which, to date, has never been accepted in any Florida case. The propriety of capital justice in felony murder cases is now beyond dispute. Here, of course, the evidence supported premeditated murder so, in addition to the frivolity of Heiney's legal arguments, his petition fails due to the operative facts.

Claim XIII
(Plea Bargain)

It is palpably incredible to suggest that plea negotiations can control post-conviction sentencing. Appellate counsel cannot be faulted for not raising such a specious argument.

Conclusion

Absent any legal or factual basis for relief, habeas corpus should not be granted.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Judy Dougherty, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301; and to the Honorable Judge Gordon, 1250 North Eglin Parkway, Shalimar, Florida 32579, this 17th day of May, 1989.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL