IN THE SUPREME COURT OF FLORIDA



WILLIAM MICHAEL SQUIRES,

Petitioner,

v. CASE NO. 76,101

RICHARD L. DUGGER,
Secretary, Department of Corrections
TOM BARTON, Superintendent,
Florida State Prison at Starke,

Respondents

**RESPONSE IN OPPOSITION TO 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**

COMES NOW the respondent, Richard L. Dugger, Secretary, Department of Corrections, by and through the undersigned Assistant Attorney General and hereby files this Response in Opposition to the 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 and would show unto this Court:

I. Procedural History

Appellant, William Michael Squires, was charged by indictment in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, on April **19, 19891** with the first degree murder of Jesse Albritton. Squires was also indicted for the armed robbery and kidnapping of

Albritton. This cause proceeded to trial on the indictment and on March 5, 1982, the jury returned a verdict finding Squires guilty as charged. Following the penalty phase of the trial, the jury returned a recommendation to the trial court that it imposed the death penalty upon Squires for the first degree murder charge. On March 5, 1982, the trial judge imposed the death penalty upon Squires for the first degree murder of Albritton. On March 15, 1982, the trial judge entered an order setting out his findings of fact in support of the imposition of the death sentence.

Trial trial judge found the following aggravating factors:

> 1. The capital felony was committed by a person under sentence of imprisonment.
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> 2. The defendant was previously convicted of another capital felony or of a felony involving the threat of violence to the person.
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> 3. The capital felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
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> 4. The capital felony was especially heinous, atrocious, or cruel.
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> 5. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

In mitigation the trial court found:

> . . . The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor . . .

> Evidence based solely on the defendant's own testimony supports the contention that the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (emphasis added).

Squires appealed his conviction to the Florida Supreme Court. The Public Defender in and for the Tenth Judicial Circuit was appointed to represent Petitioner. On appeal, Assistant Public Defender, Robert F. Moeller, raised the following issues:

> I. THE COURT BELOW ERRED IN PERMITTING THE STATE TO ELICIT, OVER DEFENSE OBJECTIONS, IRRELEVANT AND PREJUDICIAL TESTIMONY THAT APPELLANT HAS SHOT AND SHOT AT PEOPLE OTHER THAN THE ALLEGED VICTIM..
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> 11. THE COURT BELOW COMMITTED FUNDAMENTAL ERROR IN FAILING TO INSTRUCT THE JURY ON EXCUSABLE AND JUSTIFIABLE HOMICIDE.
>
> 111. THE COURT BELOW ERRED IN IMPOSING THE DEATH PENALTY UPON WILLIAM MICHAEL SQUIRES AFTER FINDING THAT HE DID NOT KILL, OR ATTEMPT TO KILL, OR INTEND TO CONTEMPLATE THAT LIFE WOULD BE TAKEN.
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> IV. SENTENCING WILLIAM SQUIRES TO DEATH VIOLATED HIS RIGHTS TO DUE PROCESS OF LAW AND EQUAL PROTECTION WHERE THE FACT THAT THE MURDER WAS COMMITTED DURING THE COURSE OF A ROBBERY AND KIDNAPPING WAS USED TO SUPPORT BOTH A FINDING OF GUILT OF FIRST DEGREE MURDER AND IMPOSITION OF THE DEATH PENALTY.
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> V. THE COURT BELOW ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCES THAT THE CAPITAL FELONY WAS ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL AND WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.
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> VI. THE COURT BELOW ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT APPELLANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR

THREAT OF VIOLENCE TO THE PERSON, AS THE EVIDENCE WAS INSUFFICIENT TO SUPP RT ITS FINDING, AND THIS FINDING CONSTITUTED AN IMPROPER "DOUBLING UP" WITH THE FINDING THAT THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

VII. THE COURT BELOW IMPROPERLY SENTENCED APPELLANT FOR BOTH FELONY-MURDER AND THE UNDERLYING FELONIES.

Squires' conviction and sentence were affirmed by the Florida Supreme Court on direct appeal. Squires v. State, 450 So.2d 208 (Fla. 1984).

A Petition for Writ of Certiorari was filed in the United States Supreme Court on August 7, 1984. As grounds for relief, Squires raises the following issues:

I. WHETHER IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE CONSTITUTION OF THE UNITED STATES AND ENMUND V. FLORIDA, FOR THE TRIAL COURT TO SENTENCE A PERSON TO DEATH AFTER FINDING AS A MITIGATING CIRCUMSTANCE THAT HE WAS AN ACCOMPLICE IN A CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR?

II. WHETHER A PERSON'S RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES ARE VIOLATED WHERE THE FACT THAT A HOMICIDE OCCURRED DURING THE COURSE OF A ROBBERY AND KIDNAPPING IS USED BOTH TO JUSTIFY A FINDING THAT THE PERSON IS GUILTY OF FIRST-DEGREE MURDER AND TO SUPPORT IMPOSITION OF THE DEATH PENALTY?

The petition was denied on October 9, 1984. Squires v. Florida, 469 U.S. 892, 83 L.Ed.2d 204, 105 S.Ct. 268 (1984).

Squires filed his initial 3.850 motion pro se. Subsequently, an amended motion to vacate judgments and sentences pursuant to *Rule 3.850, Fla. R. Crim. P.* was filed. In support of said motion, Squires made the following allegations:

ISSUE I - INTENTIONAL PROSECUTORIAL MISCONDUCT INCLUDING THE FAILURE TO PROVIDE BRADY MATERIALS AND THE DELIBERATE USE OF FALSE TESTIMONY AND ARGUMENT, FATALLY AND PREJUDICIALLY INFECTED MR. SQUIRES' TRIAL, IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE II - MR. SQUIRES WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS CONVICTIONS AND SENTENCE OF DEATH THEREFORE VIOLATE HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE III - CRITICAL TESTIMONY WAS TAKEN IN THE ABSENCE OF THE DEFENDANT WHICH VIOLATES HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE IV - THE ADMISSION OVER OBJECTION OF STATEMENTS MADE BY DEFENDANT DURING A POLYGRAPH EXAMINATION VIOLATED DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS, AND RENDERED HIS CONVICTION AND SENTENCE UNCONSTITUTIONAL.

ISSUE V - THERE WAS INSUFFICIENT EVIDENCE THAT MR. SQUIRES KILLED, ATTEMPTED TO KILL, OR INTENDED OR CONTEMPLATED THAT LETHAL FORCE WOULD BE USED, AND THEREFORE, THE IMPOSITION OF THE DEATH PENALTY VIOLATES MR. SQUIRES' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE VI - THE USE OF AN UNDERLYING FELONY TO SUPPORT BOTH A FELONY-MURDER CONVICTION AND AN AGGRAVATING CIRCUMSTANCE VIOLATES MR. SQUIRES' FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

ISSUE VII - THE PENALTY PHASE JURY INSTRUCTIONS, WHEN COUPLED WITH IMPROPER PROSECUTORIAL VOIR DIRE AND ARGUMENT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

ISSUE VIII - THE ERRONEOUS JURY INSTRUCTION THAT VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY CREATING THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE.

ISSUE X - THE DEATH PENALTY IN FLORIDA HAS BEEN IMPOSED IN AN ARBITRARY AND DISCRIMINATORY MANNER, ON THE BASIS OF FACTORS WHICH ARE BARRED FROM CONSIDERATION IN THE CAPITAL SENTENCE DETERMINATION PROCESS BY THE FLORIDA DEATH PENALTY STATUTE AND THE UNITED STATES CONSTITUTION. THESE FACTORS INCLUDE THE FOLLOWING: THE FACE OF THE VICTIM, THE PLACE IN WHICH THE HOMICIDE OCCURRED (GEOGRAPHY), AND THE SEX OF THE DEFENDANT. THE IMPOSITION OF THE DEATH PENALTY ON THE BASIS OF SUCH FACTORS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITES STATES CONSTITUTION AND REQUIRES THAT MR. SQUIRES' DEATH SENTENCE, IMPOSED DURING THE PERIOD IN WHICH THE DEATH PENALTY WAS BEING APPLIED UNCONSTITUTIONALLY, BE VACATED.

Contemporaneous with the filing of the Amended Motion to Vacate, Squires also filed a Motion for an Evidentiary Hearing and a Motion for Discovery. On June **4, 1986,** a hearing on the motions was held before the Honorable Judge M. William Graybill of the Thirteenth Judicial Circuit in and for Hillsborough County. (Cr. **936)** The motions were denied. On October 1, **1987,** this Honorable Court reviewed the denial of the Motion for Post Conviction Relief. Squires was denied relief on all but two points which were remanded to the trial court for an evidentiary hearing. Squires v. State, **513** So.2d **138** (Fla. **1987).**

An evidentiary hearing was held before the Honorable J.P. Griffin on April **8,** 11, **12** and **13, 1988,** on those two claims; ineffective assistance of counsel and discovery violations. The motion was denied on June **8, 1988.** The lower court's decision was affirmed by this Court on February **1, 1990.** Squires v. State, **558** So.2d **401** (Fla. **1990).**

On June 1, 1990, a second motion was filed pursuant to *Rule* 3.850 in the trial court. The claims presented are as follows:

> I. THE EXECUTION OF WILLIAM MICHAEL SQUIRES PURSUANT TO THE STATE OF FLORIDA'S CURRENT PROCEDURES FOR THE CARRYING OUT OF THE EXECUTION OF A SENTENCE OF DEATH SHALL CONSTITUTE UNNECESSARY CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDENCE PROVISIONS OF THE FLORIDA CONSTITUTION, AND BECAUSE THE FLORIDA DEPARTMENT OF CORRECTIONS CANNOT PROFESSIONALLY CARRY OUT THE EXECUTION OF A SENTENCE OF DEATH UNDER ITS CURRENT PROCEDURES WITHOUT UNNECESSARILY INFLICTING TORTURE AND PAIN UPON THE DEATH-SENTENCED PRISONER THE EXECUTION OF THIS DEATH SENTENCE SHOULD BE PROHIBITED AND STAYED.
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> 11. WILLIAM SQUIRES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This motion was summarily denied by the trial court on June 8, 1990. The instant petition for writ of habeas corpus was filed on June 5, 1990. The petition raises many of the issues presented on direct appeal or in the motion for post-conviction relief.

## Statement of the Facts

In its opinion affirming Squires' conviction and sentence, this Court set forth the salient facts as follows:

> On the evening of September 2, 1980, Jesse Albritton was abducted form the service station where he worked. Incident to the kidnapping, the service station was robbed of an undetermined amount of money and cigarettes. The next day Albritton's body was discovered in a wooded are in Hillsborough County. He had been shot five times at close range - once in the shoulder

with a shotgun and four times in the head with a pistol.

At the time of Albritton's murder, Squires was an escapee from the Florida State Prison System, having been sentenced to three consecutive life sentences. Tampa police apprehended Squires on December **24, 1980,** after receiving information of the fugitive's whereabouts from Mrs. Charlotte Chambliss . . .

At trial the state called Rex Seimer, a correctional officer at Lake Butler, and Robert Fain, a prison inmate. Both men testified that Squires admitted to them to killing Albritton. Detective Gerald [N]elms also testified that Squires had admitted to robbing the victim and to being present when Albritton was shot. However, Squires told [N]elms that he personally had not pulled the trigger. The state then offered the testimony of Terry and Charlotte Chambliss, both of whom confirmed that Squires was in Tampa on September 2, **1980,** the date of Albritton's abduction and murder. Mr. Chambliss told the court of seeing Squires with several pistols and a shotgun. He also observed several cartons of cigarettes in the back of defendant's automobile. Finally, Mr. Chambliss recounted a conversation he had with Squires during which Squires stated that he had run into trouble during a robbery and had to "dust one.'' Squires' defense was basically that of alibi, attempting through testimony and credit card records to place himself somewhere else when the crime was committed. Squires v. State, **450** So.2d **208, 210** (Fla. **1984).**

II.

Arqument in Opposition to Request for Stay of Execution

Although this Honorable Court has the power to grant the stay of execution, the State of Florida submits that the instant cause is not one which should be stayed. In Barefoot v. Estelle, **463 U.S. 880 (1983),** the Court addressed the issue of stays of execution and said:

> " . . . It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review -- which, if a federal question is involved, includes the right to petition this court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forms in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely."

The State of Florida submits that state habeas corpus proceedings, like the federal habeas corpus proceedings discussed in Barefoot v. Estelle, supra, are not vehicles in which to relitigate state trials. As will be demonstrated below, Squires is unable to show that any issue is likely to succeed on the merits. See White v. State, **458** U.S. **1301 (1982)**; O'Bryan v. State, **691 F.2d 706, 708** (5th Cir. **1982).**

In Autry v. Estelle, **464** U.S. **1 (1983),** the United States Supreme Court declined to implement a rule calling for an automatic stay of execution where a petitioner's first habeas corpus petition had been involved. Similarly, the State of Florida submits that there is no justification for an automatic stay of execution merely because a state habeas corpus petition has been filed. The state further submits that the instant case is not one which calls for the granting of a stay of execution.

111.

Respondent does not contest the jurisdiction of this Honorable Court to entertain a petition for a writ of habeas corpus where such petition presents cognizable matters. However, the instant petition presents mostly matters which this Honorable Court will not consider on habeas review.

In McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), this Court recognized that "the purpose of the ancient and high prerogative writ of habeas corpus is to inquire into the legality of a prisoner's present detention." Habeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal. This Court further noted in McCrae, that;

> "Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal."

Id. at 870

Thus, to the extent that petitioner is again asking this Court to exercise its jurisdiction over issues not legally cognizable on habeas review, this Court should decline to do so.

IV.

Response in Opposition to Claims Raised by Petitioner

Petitioner raises eleven claims that he alleges entitles him to a stay of execution. Respondent denies any of the foregoing claims call for a granting of a stay of execution.

Further, it should be noted that claims I, 11, III, V, VII, VIII and X were raised wholly or in part on direct appeal or in the motion for post-conviction relief or both. As habeas corpus does not serve as a vehicle to relitigate issues previously presented, these claims should be summarily denied. Each of these claims will be addressed individually.

Claim I - As his first claim of relief, petitioner asserts that the court below erred in failing to instruct the jury regarding the admission of "Williams-rule" evidence and that appellate counsel was ineffective for failing to raise this claim on appeal. Squires claims that appellate counsel failed to argue this contention on appeal and that this Honorable Court failed to consider it. To the contrary, appellate counsel did challenge the trial court's failure to instruct the jury. (Initial Brief of Appellant, p. 48) As the state noted in its answer brief on direct appeal, trial counsel did not request the instruction on "Williams-rule" evidence and in fact stipulated to the instructions as given. (Tr 71 - 100, 215 - 255)

Further, this Honorable Court in Squires v. State, 450 So.2d 208 (Fla.), cert. denied, 469 U.S. 892 (1984), held that the evidence was admissible. This Court also noted that defense counsel had stipulated to the jury instructions and was, therefore, precluded from challenging those instructions on appeal.

Accordingly, appellate counsel cannot be held ineffective for not prevailing on a non-meritorious issue that was raised

even without proper objection below. Bolender v. Dugger, 15 F.L.W. S311 (Fla. May 17, 1990) As previously noted, habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised on direct appeal or which were waived at trial. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987).

Claim II - Petitioner challenges the penalty phase instructions given to the jury concerning the finding of aggravating circumstances. Initially, it must be observed that this claim is clearly procedurally barred. Failure to preserve an issue at trial or raise it on direct appeal procedurally bars the habeas corpus court's consideration of the issue. Parker v. Dugger, 537 So.2d 969 (Fla. 1989). No objection was raised to the trial court below at the time of the instructions. The failure to object to the standard jury instructions results in procedural default. In Smalley v. State, 546 So.2d 720 (Fla. 1989), this Honorable Court rejected, on direct appeal, the claim now asserted by petitioner collaterally. The court explained the failure to object results in a procedural bar obviating relief and went on to hold, for the benefit of the bench and bar in future cases, that the claim now asserted under Claim II has no merit in the State of Florida.

Further, this argument has also been squarely rejected with respect to the Maynard v. Cartwright, 486 U.S. 356 (1988), line of reasoning. Smalley, supra. The standards championed by petitioner are those used by the appellate court in their review of death sentences. There is no requirement that the jury be

instructed on the appellate standards in the penalty phase of a capital trial. Again, review is not appropriate because this claim could have been, should have been, and, in fact, partially was, raised on direct appeal and because no objection was made to the instructions as given. See also, Buenoano v. Dugger, 15 F.L.W. **5196** (Fla. April **5, 1990**); Bolender v. Dugger, **15** F.L.W. **S311** (Fla. May **17, 1990**)

Further, as collateral counsel concedes, the jury was not instructed on heinous, atrocious and cruel or cold, calculated and premeditated. Squires cannot predicate error on the deficiencies of an instruction when that instruction was not given. And no objection was made at trial. Failure to preserve an issue at trial or raise it on direct appeal procedurally bars the habeas corpus court's consideration of the issue. Parker v. Dugger, **537** So.2d **969** (Fla. **1989**). Furthermore, this Honorable Court upheld all of the aggravating factors on appeal. As this Honorable Court recently stated in Porter v. Dugger, **15** F.L.W. **S78** (Fla. February **15, 1990**):

> "Habeas corpus is not to be used to relitigate issues that have been determined in a prior appeal. [cites omitted] As this Court has stated previously: 'Defendants whose sentences of death have been affirmed cannot challenge their sentences again and again each time the death sentence of a later convicted murder is reduced to life imprisonment.' Sullivan v. State, **441** So.2d 609, **614** (Fla. **1983**). Using a different argument to relitage the same issue is inappropriate."

Based upon the clear procedural default, this Honorable Court should reject and summarily deny this claim.

Claim III - Again petitioner is urging a claim that was raised on direct appeal. Habeas Corpus petitions are not to be used for additional appeals on questions which could have been, should have been or were raised on direct appeal. And, again, counsel cannot be ineffective for failing to raise a claim he did indeed raise.

Claim IV - The argument as presented by Squires misrepresents the facts of this case and the law. In Grossman v. State, 525 So.2d **833** (Fla. **1988),** this Court established a procedural rule that all written orders imposing a death sentence be prepared prior to the oral pronouncement of the sentence for filing concurrent with the pronouncement. This rule of procedure became effective thirty **(30)** days after the Grossman decision became final. Mr. Squires was sentenced six years before this rule became effective. This Court also noted in Grossman that where the judge's written findings were made prior to the certification of the appellate record to the court, Grossman was not entitled to reversal. In the instant case, the sentencing order was issued eleven (11) days after the oral pronouncement. Thus, Squires is not entitled to relief because this rule of procedure did not become effective until well after this order was rendered and because the written order was rendered prior to the certification of the record. Further, appellate counsel cannot be held ineffective for not raising a nonmeritorious claim. Bolender v. Dugger, supra.

Claim V - As his fifth claim petitioner challenges the jury instructions claiming that they shifted the burden of proof to him to prove that death was inappropriate. Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989), this Court specifically held that this claim is procedurally barred, as it is an issue that could have been and should have been raised on direct appeal. See also, Eutzy v. State, 541 So.2d 1143 (Fla. 1989)(a claim that Florida's death penalty statute is unconstitutional because it imposes an unlawful presumption that death is the appropriate penalty based upon the Adamson v. Ricketts, decision is procedurally barred because it could have been raised on direct appeal.) As to the merits of the claim, this Honorable Court in Hamblen v. Dugger, 546 So.2d 1039, 1041 (Fla. 1989), clearly rejected this argument. Based on the foregoing, petitioner is not entitled to relief on this claim.

Claim VI - Petitioner also claims that he was denied effective assistance of counsel on direct appeal in violation of his Sixth, Eighth and Fourteenth Amendment rights and their Florida counterparts. While petitioner is correct that habeas corpus petition is the appropriate vehicle for raising ineffective assistance of appellate counsel claims in a capital case, this Court in McCrae v. Wainwright, supra, has held that habeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal. In McCrae, this Court specifically opined that:

> " . . . Allegations of ineffective appellate counsel therefore should not be allowed to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal."
>
> Id. at **870.**

Accord, Porter v. Dugger, **15** F.L.W. **S78** (Fla. February **15, 1990);** Bolender v. Duqqer, **15** F.L.W. **S311** (Fla. May **17, 1990).**

In addition to the general allegations of ineffective assistance of counsel contained in each of the claims raised and addressed in this petition, Squires is also alleging that trial counsel's failure to put on the record several bench conferences constitutes a denial of access to the transcript that is incompatible with effective appellate advocacy. He claims there was no adversarial testing. This claim is based entirely on speculation and innuendo rather than on a clear factual basis upon which relief may be predicated. There is no assertion that appellate counsel was precluded from raising a particular error due to these bench conferences or that such error would have been apparent to appellate counsel. Further, it is incumbent upon defense counsel to make known all challenges on the record. Any failure to do so is a challenge to the effectiveness of trial counsel, not appellate counsel. No such challenge was raised to the trial counsel's effectiveness in the *Rule 3.850* proceedings below. Appellate counsel cannot be held ineffective for failing to raise claims on direct appeal which were not properly preserved and were not apparent on the record. Suarez v. Duqqer, 527 So.2d **190, 193** (Fla. **1988);** Bertolotti v. Duqqer, **514** So.2d **1095** (Fla. **1987).**

Squires therefore has failed to demonstrate that counsel's performance was deficient and that the deficient performance effected the outcome of the proceedings. Buenoano v. Dugger, 15 F.L.W. S196 (Fla. April 5, 1990).

Claim VII - Mr. Squires claims that his death sentence rests upon an unconstitutional automatic aggravating circumstance in that he was prosecuted on the dual theory of felony murder, and premeditated murder and the underlying felony was used as an aggravating circumstance. Again, this is an issue that was presented on direct appeal and ruled upon by this Court contrary to the appellant's position. Again, habeas corpus is not a vehicle for obtaining a second appeal of issues which were raised, or should have been raised on direct appeal or which were waived at trial. Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987). Further, contrary to Squires' contention, there are no recent changes in the law that would mandate a finding by this Court that this claim should be revisited. Bolender v. Dugger, supra.

Claim VIII - Petitioner acknowledges that this Honorable Court has held adversely to him on his claim that the sentencing jury was misled by instructions that inaccurately diluted their sense of responsibility. King v. Dugger, 15 F.L.W. 11 (Fla. January 4, 1990). This claim is also procedurally barred as a direct appeal issue. Further, it was presented to the trial court in the *Rule 3.850* proceeding and the trial court's denial of the claim was affirmed by this Court on appeal from the 3.850. Squires v. State, 513 So.2d 138 (1987).

Claim IX - As his ninth claim, Squires suggests that the prosecutor's statements that sympathy and mercy towards Mr. Squires were improper consideration was in violation of the Sixth, Eighth and Fourteenth Amendments. This is an issue that is also procedurally barred as it could have been and should have been raised on direct appeal. Further, this decision has been decided contrary to petitioner's position by this Court and by the United States Supreme Court. Porter v. Duqqer, 15 F.L.W. S78 (Fla. February 15, 1990); Saffle v. Parks, 498 U.S. __, 108 L.Ed.2d 415, 110 S.Ct. 1257 (1990).

Accordingly, not only is this issue procedurally barred, but petitioner would not be entitled to relief on the merits of the claim.

Claim X - Squires claims that contrary to Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), that his jury was erroneously instructed that a verdict of life must be made by a majority of the jury. First, this issue is procedurally barred as it is an issue that could have and should have been raised on direct appeal. Demps v. State, 515 So.2d 196 (Fla. 1987); Bertolotti v. State, 534 So.2d 386, 387 n. 2 (Fla. 1988); Jones v. Duqqer, 533 So.2d 290, 292 (Fla. 1988). Caldwell is not such a change in the law as to give relief in postconviction proceedings. Foster v. State, 518 So.2d 901 (Fla. 1987), or to overcome the procedural bar. Demps v. State, supra. This claim was not raised on Mr. Squires direct appeal, but was presented on his first 3.850 motion. The claim was rejected by the trial court. That decision was affirmed by this Court.

Further, petitioner is not entitled to relief on the merits of the claim as this claim has been consistently rejected in Florida. Combs v. State, 525 So.2d 853 (Fla. 1988 ; Daugherty v. State, 533 So.2d 287 (Fla. 1988).

Claim XI - As his last claim, Squires urges this Court to find that his right to a fundamentally fair trial was violated when the state presented impermissible victim impact information. Again, this issue is procedurally barred as no objection was made to the statement and as this type of claim is cognizable on direct appeal. Parker v. Dugger, 550 So.2d 459 (Fla. 1989).

In Smith v. State, 15 F.L.W. S81 (Fla. February 15, 1990), this Honorable Court rejected a similar claim when the evidence was not presented in the penalty phase. This is true because both Booth v. Maryland, 482 U.S. 496 (1987), and its progeny require that a sentence of death be imposed based upon permissible aggravating factors and victim impact statements are not valid aggravating factors. However, here as in Smith, supra, there was simply no way to find that these matters now complained of had any bearing on the way the aggravating and mitigating circumstances as instructed by the trial judge at the penalty phase. See Parker v. Dugger, supra. The evidence complained of in the instant case was all presented during guilt phase and was not objected to by trial counsel.

Further, this claim cannot be asserted based on appellate counsel's failure to raise this issue on appeal as the failure to object to statements at trial precludes raising a Booth-claim on

this basis. Parker v. Dugger, supra; Daugherty v. State, 533 So.2d 287, 289 (Fla. 1988); Preston v. State, 531 So.2d 154, 160 (Fla. 1988).

WHEREFORE, based on the foregoing facts, arguments and citations of authority, the petition for writ of habeas corpus should be summarily denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
CANDANCE M. SUNDI
Assistant Attorney General
Florida Bar ID# 0445071
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 27 day of June, 1990.

OF COUNSEL FOR RESPONDENT.