IN THE SUPREME COURT OF FLORIDA

WILLIAM MICHAEL SQUIRES,

Appellant,

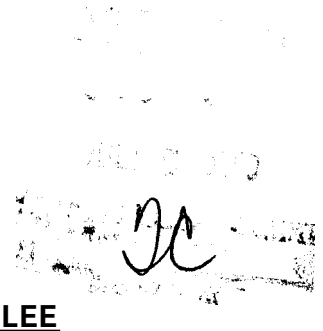
v.

STATE OF FLORIDA,

Appellee.

Original

Case No. 76152



BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

The instant brief addresses claims that appellee anticipates will be raised by appellant. Appellee requests, however, the opportunity to file an answer to any claims appellant may raise that were not previously raised or addressed herein.

STATEMENT OF THE CASE

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.
>
> **2.** The defendant was previously convicted of another capital felony or of a felony involving the threat of violence to the person.
>
> 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.

> 4. The capital felony was especially heinous, atrocious, or cruel.
>
> 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..
>
> II. 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.
>
> 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.

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.

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 SUPPORT 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 IMPOSITIOI OF THE DEATH PENALTY?

The petition was denied on October 9, 1984. Squires v. Florida, ___ U.S. ___, 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' TRAIL, 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 IX – 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 and this appeal ensued.

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.

An evidentiary hearing was held before the Honorable J.P. Griffing 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.

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.
>
> 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. This appeal ensued.

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).

SUMMARY OF THE ARGUMENT

As to Issue I - Under Florida law, the trial court should grant an evidentiary hearing only where one is warranted. It is the movant's burden to show his entitlement to a hearing.

Squires failed to meet the burden and as the records in the instant case conclusively show that he was not entitled to relief, the trial court correctly denied the motion without an evidentiary hearing.

As to Issue II - This claim has recently been rejected by this Honorable Court in Buenoano v. State. As Squires has failed to show any basis for this Honorable Court to overturn its prior resolution of this claim, Squires is not entitled to relief on this claim.

As to Issue III - The second claim raised by Squires is that his trial counsel was ineffective for failing to present nonstatutory mitigating evidence to the penalty phase jury. This claim is barred as it constitutes an abuse of the process and as it was untimely filed.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S REQUEST FOR AN EVIDENTIARY HEARING.

Under Florida law, the trial court should grant an evidentiary hearing only where one is warranted. Jones v. State, 446 So.2d 1059 (Fla. 1984). It is the movant's burden to show his entitlement to a hearing; it must be considered whether the movant would be entitled to relief if the allegations are true. Ramsey v. State, 408 So.2d 675 (Fla. 4th DCA 1981) and Johnson v. State, 362 So.2d 465 (Fla. 2nd DCA 1978). However, if the motion and the files in the record of the case conclusively show the defendant is entitled to no relief, then the motion can be denied without a hearing. Accord, *Rule* 3.850, *Fla.* R. *Crim. P.*; Porter v. State, 478 So.2d 33 (Fla. 1985); Middleton v. State, 465 So.2d 1218 (Fla. 1985).

Squires failed to meet the burden and as the records in the instant case conclusively show that he was not entitled to relief, the trial court correctly denied the motion without an evidentiary hearing.

ISSUE II

WHETHER 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 CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This claim has recently been rejected by this Honorable Court in Buenoano v. State, No. 76,150 (Fla. June 20, 1990). The majority of the Court held as follows:

> "Turning to the merits we note that the execution of condemned prisoners is clearly a matter within the province of the executive branch of government. Section 922.09, Fla. Stat. (1989). It must be presumed that members of the executive branch will properly perform their duties. The department of corrections conducted an investigation and concluded that irregularities in Tafero's execution were caused by the use of a synthetic sponge. We do not find that the record as proffered justifies judicial interference with the executive function to require an evidentiary hearing to determine the competence of the Department of Corrections to carry out Buenoano's execution. Death by electrocution is not cruel and unusual punishment, and one malfunction is not sufficient to justify judicial inquiry into the Department of Corrections' competence. See Louisiana ex rel Francis v. Resweber, 329 U.S. 459, 463 (1947)(plurality opinion).
>
> We affirm the denial of Buenoano's motion for post conviction relief. No petition for rehearing shall be permitted."

Buenoano v. State, No. 76,150, slip opinion at 4 (Fla. June 20, 1990) (per curiam).

This issue was subsequently presented to the United States District Court, Middle District of Florida, Orlando Division. As

a court within the federal system, the federal district court was not constrained by the same principles of separation of powers and deference to the State of Florida's executive branch which was the basis of this Court's decision in Buenoano. The federal court determined that the issue before it was whether the means selected by the State of Florida to carry out the statutory mandate of Florida Statute g922.10 was malfunctioning so that the execution of petitioner would be effected with unnecessary pain and suffering in violation of the Eighth Amendment's proscription against cruel and unusual punishment. See Buenoano v. Dugger, No. 90-473-Civ-Orl-19, slip op. (U.S.M.D.C. June 22, 1990) (attached as Exhibit A).

Because of the significant factual dispute surrounding the claim contained in the submission of the parties, the federal court held an evidentiary hearing on this claim on June 21 - 22, 1990. The federal court determined, based on the evidence presented at the hearing, that all equipment involved in electrocuting a condemned inmate is in proper working order.

> "Respondents have come forward to the satisfaction of this Court with sufficient evidence to negate any constitutional claim of cruel and unusual punishment and to negate the contention that the unusual events accompanying Mr. Tafero's execution will probably occur again."

See Buenoano v. Dugger, supra, slip op. at 81. (Exhibit A) Accordingly, as Squires has failed to show any basis for this Honorable Court to overturn its prior resolution of this claim, Squires is not entitled to relief on this claim.

ISSUE III

WHETHER 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.

The second claim raised by Squires is that his trial counsel was ineffective for failing to present nonstatutory mitigating evidence to the penalty phase jury. This claim is also barred as it constitutes an abuse of the process and as it was untimely filed.

First, ineffective assistance of trial counsel was raised and rejected on the merits in Squires' original **3.850** motion to vacate. In Spaziano v. State, **545** So.2d **843** (Fla. **1989),** the Florida Supreme Court affirmed the summary denial of a 3.850 motion where the defendant's initial motion alleged ineffective assistance of counsel during trial and the original penalty phase and the second petition re-alleged ineffective assistance of counsel at sentencing. The court held that where the initial motion for post conviction relief raises the claim of ineffective assistance of counsel, the trial court may summarily deny successive motions raising additional grounds for that ineffectiveness. See also Christopher v. State, 489 So.2d 22 (Fla. **1986).** The facts alleged in Squires' second claim were available to the defendant at the time of the original motion. Accordingly, this second successive motion is appropriate for summary denial.

Second, this claim is also barred under the two year provision of Rule **3.850.** Six years has elapsed since the judgment and sentence became final. No excuse has been asserted that would excuse this late filing. under Rule **3.850.** Lightbourne v. Dugger, **549** So.2d **1364** (Fla. **1989).**

CONCLUSION

Based on the foregoing, the State of Florida requests this Honorable Court to affirm the denail of appellant's motion for post conviction relief.

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. Regular Mail to the Office of the Capital Collateral Representative, **1533** South Monroe Street, Tallahassee, Florida **32301**, this 2 day of July, **1990.**

OF COUNSEL FOR RESPONDENT.