IN THE SUPREME COURT OF FLORIDA



ROY CLIFFORD SWAFFORD,

Petitioner,

v. CASE NO. 76769 ~~68,009~~

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO CONSOLIDATED
PETITION FOR EXTRAORDINARY RELIEF, ETC.

COMES NOW Respondent, Richard L. Dugger, by and through the undersigned counsel, pursuant to Fla.R.App.P. 9.100(h), in response to Swafford's Consolidated Petition for Extraordinary Relief, Etc., filed on or about October **15, 1990,** and respectfully moves this Honorable Court to deny any and all requested relief, including any stay of execution, for the reasons set forth in the instant pleading.

PRELIMINARY STATEMEN

On August 9, **1983,** Swafford was indicted for First Degree Murder, Sexual Battery and Armed Robbery (R **1509-1510).** The case proceeded to jury trial before the Honorable J. Kim Hammond October **28,** through November **6, 1985.** Swafford was convicted of First Degree Murder and Sexual Battery with great bodily harm (R **1658-59).** He was found not guilty of Armed Robbery (R 1660).

The penalty phase was November 7, 1985, after which the jury returned an advisory sentence recommending death by a vote of 10-2 (R 1661). The trial court followed the jury's recommendation and sentenced Swafford to death on November 12, 1985 (R 1617-19; 1663).

Swafford appealed his convictions and sentences to the Supreme Court of Florida, raising four issues. [1] The Supreme Court of Florida affirmed Swafford's convictions and sentences. Swafford v. State, 533 So.2d 270 (Fla. 1988). Certiorari was denied by the United States Supreme Court on March 27, 1989. Swafford v. Florida, 109 S.Ct. 1578 (1989). On September 7, 1990, Governor Martinez signed a death warrant and Swafford's execution is set for November 13, 1990.

On October 16, 1990, after receiving an eight day extension, Swafford filed his 3.850 motion for post-conviction relief, raising sixteen claims. [2] On October 15, 1990, Swafford

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[1] The issues raised on direct appeal were: (1) the trial court erred in denying Swafford's motion in limine, overruling his objections, and allowing into evidence testimony on collateral crimes; (2) the trial court committed reversible error in improperly restricting Swafford's presentation of evidence where such evidence was crucial to this defense; (3) the trial court's imposition of the death penalty violated Swafford's constitutional rights as follows: 3a) the trial court erred in finding the felony was committed to avoid arrest; 3b) the trial court erred in finding the felony was especially heinous, atrocious or cruel; 3c) the trial court erred in finding the murder was cold, calculated and premeditated; 3d) the trial court erred in finding the murder was committed during the commission of a felony; 3e) where the trial court relied on improper aggravating circumstances and found a mitigating circumstance, this court must vacate the death sentence and remand for resentencing; and 4) the Florida capital sentencing statute is unconstitutional on its face and as applied.

The claims raised in the motion to vacate are: 1) the state deliberately used false and misleading testimony and withheld

filed the instant petition for extraordinary relief, writ of habeas corpus, etc., presenting four primary claims for relief.

## ARGUMENT

THE INSTANT PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE DENIED; SWAFFORD'S CLAIMS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ARE WITHOUT MERIT, AND ALL OTHER CLAIMS ARE PROCEDURALLY BARRED.

This Court has, of course, repeatedly held that habeas corpus is not a vehicle for additional appeals of issues that could have been, should have been, or were raised on appeal or in other post conviction motions, or of matters that were not objected to at trial. See, e.g., Roberts v. State, 15 F.L.W. S450 (Fla. September 6, 1990); Mills v. Dugger, 559 So.2d 578 (Fla. 1990); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Clark v. Dugger, 559 So.2d 192 (Fla. 1990); King v. Dugger, 555 So.2d 355 (Fla. 1990); Parker v. Dugger, 550 So.2d 459 (Fla. 1989); Suarez v. Dugger, 527 So.2d 190 (Fla. 1988). The instant petition runs afoul of all of the above precedents, in that, but for any legitimately presented claim of ineffective assistance of

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material excuplatory evidence; 2) the state failed to disclose chapter 119 public records documents; 3) counsel was ineffective at trial; 4) counsel was ineffective at the penalty phase; 5) trial counsel's conflict of interest denied Swafford effective assistance of counsel; 6) Swafford's Bay County Public Defender had a conflict of interest; 7) security measures; 8) Swafford's prior conviction was invalid; 9) the judge and jury relied on victim impact evidence; 10) the trial court erred in weighing the aggravating and mitigating circumstances; 11) the penalty phase jury instructions shifted the burden; 12) the jury was misled as to its responsibility; 13) the state failed to establish the corpus delicti of sexual battery; 14) the cold, calculated and premeditated aggravating factor is unconstitutionally vague; 15) the heinous, atrocious and cruel aggravating circumstance is unconstitutionally vague; and 16) rule 3.851 violates Swafford's constitutional rights.

appellate counsel, all of the claims presented represent matters which are not cognizable on habeas corpus, and should be expressly found procedurally barred, in accordance with Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989).

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE IN FAILING TO PROVE SWAFFORD'S ADMISSION WAS IN FACT WILLIAMS[3] RULE EVIDENCE.

Swafford contends that the admission which he made to Ernest Johnson was the basis for his conviction and appellate counsel was ineffective for failing to prevail on this issue on direct appeal. It should be noted that Swafford alleged in Claim 1-A of his motion to vacate that he was convicted on the basis of Roger Harper's testimony and in Claim 1-B that the gun was the only evidence the state had to link him to the crime. He now argues that it was his admission which resulted in his conviction. He claims that appellate counsel was ineffective in preparing for this crucial point on appeal and in failing to prevail on this issue. Swafford faults appellate counsel for allowing the rationale of the Williams rule to be "convoluted into an admission." However, the trial court found from the inception of this case that the statement was admissible not only as Williams rule but also as an admission (R 656; 948-49; 951-953; 956). Although Swafford contends that appellate counsel did not "urge the claim" (petition at p. 13), appellate counsel strenuously argued against admissibility as an admission in his reply brief and this issue was before the court. This court issued a lengthy

[3] Williams v. State, 110 So.2d 654 (1959).

discussion in its opinion. Swafford v. State, 533 So.2d 270, 273-275 (Fla. 1988).

Swafford's attack on this court's opinion is an attempt to relitigate an issue which this court has already decided adversely to him. This is inappropriate in a habeas petition. Mills v. Dugger, 559 So.2d 578 (Fla. 1990); Parker v. Dugger, 550 So.2d 459 (Fla. 1989). He reargues the validity of the statement which is inappropriate in a habeas petition since habeas corpus is not a vehicle for additional appeals of issues that could have been, should have been, or were, raised on appeal or in other post conviction motions. Roberts v. State, 15 F.L.W. S450 (Fla. September 6, 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990).

The standard for effective appellate counsel on habeas review is the same as in Strickland v. Washington, 466 U.S. 668 (1984). That standard is that a defendant must demonstrate deficient performance and prejudice. Bertolotti v. Dugger, 514 So.2d 1095 (Fla. 1987); Johnson v. Dugger, 523 So.2d 161 (Fla. 1988). In order to prevail on a claim of ineffective assistance a defendant must show that counsel's performance fell below an objective standard of reasonableness and but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); Herring v. Dugger, 528 So.2d 1176 (Fla. 1988). As in Herring, counsel cannot be faulted for failing to convince more justices of his position. Couching this claim in terms of ineffective assistance of appellate counsel

should not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. King v. Dugger, 555 So.2d 355 (Fla. 1990). This court's opinion in Swafford v. State, 533 So.2d 270 (Fla. 1988) is correct and this court should not reverse itself.

CLAIM 2

THE STATE PROVED SEXUAL BATTERY BEYOND A REASONABLE DOUBT AND THIS CLAIM IS PROCEDURALLY BARRED. APPELLATE COUNSEL IS NOT INEFFECTIVE FOR NOT RAISING A MERITLESS ISSUE.

Swafford claims that the state failed to prove the crime of sexual battery beyond a reasonable doubt and appellate counsel was ineffective for failing to raise the issue on direct appeal. Appellate counsel was not ineffective for not raising a meritless issue. This issue is similar to Claim 13 in the motion to vacate. The evidence at trial showed that the victim's anus had lacerations and was covered with blood (R 768). The medical examiner testified it was very probable that the victim had been sexually molested (R 768). A material called acid phosphatase, a known constituent of seminal fluid, was identified in the swabs from the vagina and anus (R 769, 1020). The presence of acid phosphatase absolutely establishes the presence of the male organ in that area (R 779). The court denied the judgment of acquittal on basically the same grounds now alleged, stating that the issue of weight and credibility was a jury question (R 1261).

Section 794.011(1)(h), Fla. Stat. (1990) defines the crime of sexual battery as oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal

penetration of another by an object. The trial court did not err in denying the motion for judgment of acquittal and the state proved the corpus delicti of the crime.

Swafford argues that because there was no intact sperm there was no sexual battery. The sexual battery statute clearly provides that what is required is union or penetration. The medical examiner testified that the only way for acid phosphate to be in the area from where he took the swab was for the male organ to have been in that area. He argues that there was no acid phosphatase in the anal orifice; however, the medical examiner testified that there was acid phosphatase in the swabs taken from the anal orifice (R 769). Abrasions and blood were found on the anus. Swafford also argues that an abrasion of the anal orifice without acid phosphatase is consistent with consensual sexual relationships. Not only does this argument defy common logic but it is a misstatement of the facts since the medical examiner said there was acid phosphatase in the anal swabs and lacerations consistent with a sexual battery. Swafford concedes that the trial court denied a judgment of acquittal. The court was entirely correct.

This court has recently decided a similar case on sufficiency of the evidence. [4] Duckett v. State, **15** F.L.W. **S439** (Fla. September **14**, 1990). Duckett asserted that the evidence was subject to two reasonable constructions, one consistent with guilt and the other consistent with innocence. This court stated

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[4] The victim was clothed in that case, also.

that because the case involves solely circumstantial evidence, the following standard must be applied:

> One accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of a reasonable doubt. It is the responsibility of the State to carry this burden. When the State relies upon purely circumstantial evidence to convict an accused, we have always required that such evidence must not only be consistent with the defendant's guilt but it must also be inconsistent with any reasonable hypothesis of innocence. Davis v. State, 90 So.2d 629, 631 (Fla. 1956) (citations omitted); see also Cox v. State, 555 So.2d 352 (Fla. 1989); Thomas v. State, 531 So.2d 708 (Fla. 1988); McArthur v. State, 351 So.2d 972 (Fla. 1977). Consequently, the state has the burden to prove that the evidence. presented is inconsistent with any reasonable hypothesis of innocence. The state contends that it has satisfied its burden of proof. We agree, concluding that the following facts satisfy the test in Davis: (1) the victim as last seen in Duckett's patrol car; (2) the tire tracks at the murder scene were consistent with those from Duckett's car; (3) no one saw Duckett, the only policeman on duty in Mascotte, from the time he was last seen with the victim' until the time he met the victim's mother at the police station; (4) numerous prints of the victim were found on the hood of Duckett's patrol car, although he denied seeing her on the hood; (5) a pubic hair found in the victim's underpants was consistent with Duckett's pubic hair and inconsistent with the others in contact with the victim that evening; and, (6) during a five-month period, Duckett, contrary to department policy, had picked up three young women in his patrol car while on duty and engaged in sexual activity with one and made sexual advances toward the other two.

> Duckett argues that: (1) while the vehicle which left the tire tracks had driven through a mudhole, no debris was found on his car; (2) although considerable bleeding resulted from the sexual battery, no traces of blood were found in his car; and (3) those who observed him after midnight found him to be neat and clean as though he had just come on duty. We conclude that neither these facts nor Duckett's blanket denial of involvement with the victim or the three young women is sufficient to raise any hypothesis of innocence, given the total circumstances in this case.

In the present case, the evidence which the state presented showed that the victim was last seen at the FINA station. A person similar in description to Swafford in a car similar to the one he was driving were seen leaving the station with a woman. Swafford was in possession of the murder weapon which had been stolen in Nashville where Swafford lived. He made statements to Ernest Johnson about committing a similar offense. He made a statement that he was a murderer. He would have to pass the FINA station on the way to his campsite, and the body was found 1.1 mile from the campsite.

Swafford contends that the significance of the sexual battery conviction was apparent during the penalty phase where it provided two aggravating factors to the state. However, this court based its finding of heinous, atrocious and cruel not only on the sexual battery but also on the abduction, mental anguish, nine shots and "wanton atrocity" of firing nine bullets into the victim's body, most of them directed at the torso and extremities. Swafford v. State, 533 So.2d 270, 277 (Fla. 1988).

Swafford also contends appellate counsel was ineffective for failing to raise this issue on appeal. In raising this claim under the guise of ineffective assistance of appellate counsel, Swafford is attempting to reargue the sufficiency of the evidence, which is inappropriate on habeas review. Roberts v. Dugger, 15 F.L.W. S450 (Fla. October 6, 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). As discussed above, this issue has no merit even if it could be entertained at this point. Furthermore, this court makes an independent review of the record and the sufficiency of the evidence pursuant to Florida Rule of Appellate Procedure 9.140(f), so this court has already reviewed the sufficiency of the evidence. Swafford v. State, 533 So.2d 270 (Fla. 1988). Counsel cannot be deficient for failing to raise a meritless issue. See, Hill v. Dugger, 556 So.2d 1385 (Fla. 1990); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Roberts v. Dugger, 15 F.L.W. S450 (Fla. September 6, 1990); Smith v. Dugger, 15 F.L.W. S481 (Fla. September 6, 1990). Swafford also complains that appellate counsel was ineffective in failing to correct the state's nonfactual representations to the court that there was no question of sexual molestation. As previously discussed, there was ample evidence of sexual battery, and appellate counsel did not misrepresent facts. The fact that there was no pubic hair evidence is not surprising since the car was not located until approximately a year and one-half after the murder and had been sold to another party (R 884-891). The argument that Paul Seiler repudiated his testimony is an attempt to relitigate an issue which was argued on appeal and should not

be argued at this point. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); King v. Dugger, 555 So.2d 355, 360 (Fla. 1990); Clark v. Dugger, 559 So.2d 192 (Fla. 1990). There is no evidence that Seiler repudiated his testimony. Rather, his recollection was somewhat cloudy, which is understandable since the instant trial occurred more than three years after Seiler reported this incident. Further, this argument was never presented to the trial court, and appellate counsel cannot be faulted for failing to raise claims that are not preserved, nor can appellate counsel be faulted for failing to raise a meritless issue. Suarez, supra. This claim is procedurally barred and relief should be denied.

CLAIM 3

THE ISSUE OF VICTIM IMPACT EVIDENCE IS PROCEDURALLY BARRED AND WITHOUT MERIT. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR NOT RAISING A BARRED AND MERITLESS ISSUE.

Swafford claims that his death sentence must be vacated because during the trial and sentencing proceedings the dictates of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2259, 96 L.Ed.2d 440 (1987), and South Carolina v. Gathers, ____ U.S. ____, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), were violated. He also claims that appellate counsel rendered ineffective assistance in failing to brief this claim on appeal.

There was no contemporaneous objection to any of the remarks now at issue. Although Swafford states that "defense counsel for Mr. Swafford objected during portions of the state's repeated introduction of victim impact evidence." (Petition at

27), Swafford makes no record cite of any objection and it is not the state's duty to glean the entire record which he contends contains repeated introduction of victim impact evidence. There was no objection to the alleged victim impact statement cited at R 1435, 1436, 1438, 1439, 1443-45 or 1466-67. (Petition at 21-24). Thus, this claim is procedurally barred on habeas corpus, as a legion of this Court's precedents expressly hold. See, Roberts v. State, 15 F.L.W. S450 (Fla. September 6, 1990); Squires v. Dugger, 564 So.2d 1074 (Fla. 1990); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Clark v. Dugger, 559 So.2d 192 (Fla. 1990); Parker v. Dugger, 550 So.2d 459 (Fla. 1989).

Even if this could be considered as a "merits!' claim, the testimony he cites concerning the Panama City offense is not Booth [5] testimony. See, Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990). The comment by the prosecutor is not a reference to any impact on the victim's family.

Given the lack of contemporaneous objection preserving the point, appellate counsel cannot be deemed ineffective for failing to present this matter on appeal. See Squires, supra (appellate counsel not ineffective for failing to brief unpreserved Booth claim); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990) (same). Counsel is not ineffective for not raising a meritless issue. See, Correll v. Dugger, 556 So.2d 1385 (Fla. 1990); Duest v. Dugger, 555 So.2d 849 (Fla. 1990).

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[5] Booth v. Maryland, 482 U.S. 496 (1987).

Swafford argues that Jackson v. Duqqer, 547 So.2d 119 (Fla. 1989) requires consideration of this claim. The court's decision in Jackson, does not dissolve the procedural default rule vis-a-vis Booth claims. The Jackson court's retroactive application is limited to the facts of that case where the Booth issue was raised at trial and on direct appeal and addressed by the court in that appeal. Porter v. Duqqer, 559 So.2d 201 (Fla. 1990); Clark v. Duqqer, 559 So.2d 192 (Fla. 1990); Accord, Adams v. State, 543 So.2d 1244 (Fla. 1989) (Booth claims are procedurally barred if not objected to at trial or raised on direct appeal); Eutzy v. State, 541 So.2d 1143, 1145 (Fla. 1989) ("there is nothing in Booth which suggests that that decision should be retroactively applied to cases in which the claim was not preserved by a timely objection").

Ineffective assistance of counsel, as defined in Strickland v. Washinqton, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), has, in any event, not been demonstrated. The trial in this case took place in 1985, and the Booth decisionwas rendered in 1987. In Jackson v. Duqqer, 547 So.2d 1197, 1198-1199 (1989), the Florida Supreme Court held that Booth constituted a "change in law." It is well established that counsel cannot be deemed ineffective for failing to anticipate a change in law. See Stevens v. State, 552 So.2d 1082, 1085 (Fla. 1989). If the state of the law at the time of appeal is such that there was no merit to the argument which appellate counsel is faulted for not raising, there is no deficient performance. Hill v. Duqqer, 556 So.2d 1385 (Fla. 1990). This claim is procedurally barred and/or otherwise deserving of summary denial.

## CLAIM 4

WHETHER THE PENALTY PHASE INSTRUCTIONS SHIFTED THE BURDEN TO THE DEFENDANT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

Swafford claims that the death sentence must be vacated because the instructions given the jury at the penalty phase allegedly impermissibly shifted the burden of proof onto the defense. This Court has consistently held that claims of this nature are not cognizable on habeas corpus. White v. Dugger, 15 F.L.W. S392 (Fla. July 17, 1990); Squires v. Dugger, 564 So.2d 1074 (Fla. 1990); Bolender v. Dugger, 564 So.2d 1057 (Fla. 1990); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Mills v. Dugger, 559 So.2d 578 (Fla. 1990); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989); Jones v. Dugger, 533 So.2d 290 (Fla. 1988).

The defendant attempts to come in under Hamblen v. Dugger, 546 So.2d 1039 (Fla. 1989), stating that it reflects that claims such as the instant one should be addressed on a case by case basis in capital post-conviction actions. Hamblen provides no relief for Swafford as it involved a claim that appellate counsel was ineffective for failing to raise the burden shifting issue, and thus provides no basis for avoiding the procedural bar. Swafford further attempts to come in under Hitchcock v. Dugger, 481 U.S. 393 (1987), claiming that it worked a change in the law as it was decided after his trial. This issue does not present a pure Hitchcock claim, in which (1) efforts to introduce

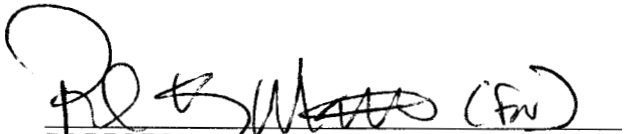
nonstatutory mitigating evidence were thwarted or (2) both the judge and jury were under the impression that nonstatutory mitigating evidence could not be considered. Adams, supra. Consequently, Hitchcock provides no basis for avoiding the procedural bar either. Neither does Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), require relief. Adamson is a decision of an intermediate federal court such that it would not apply retroactively even if applicable to Florida's sentencing process. Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Clark v. Duqqer, 559 So.2d 192 (Fla. 1990); Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980); Eutzy v. State, 541, So.2d 1143 (Fla. 1989).

Again, this is an attempt to raise an issue which should have been raised on appeal and relief should be denied. Roberts v. Dugger, 15 F.L.W. S450 (Fla. September 6, 1990); Mills v. Duqqer, 559 So.2d 578 (Fla. 1990).

WHEREFORE, for the aforementioned reasons,. Swafford's Consolidated Petition for Extraordinary Relief, Etc., should be denied in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Consolidated Petition for Extraordinary Relief, etc. has been furnished by U.S. Mail to Jerome Nickerson, Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 25 day of October, 1990.

Barbara C. Davis
Of Counsel