

RONALD PATRICK SWINEY,)
Petitioner,)
-vs-)
STATE OF ALABAMA,)
Respondent.)

CASE NO: CC 88-77,60

MOTION TO DISMISS AND ANSWER TO RULE 32 PETITION

Comes now the State of Alabama, by and through the District Attorney for the Eighteenth Judicial Circuit, and moves this Court for an order dismissing the above-styled petition for post-conviction relief pursuant to Rule 32, Alabama Rules of Civil Procedure and as grounds therefore asserts the following:

1. The State of Alabama denies each and every allegation contained in the petition and demands strict proof thereof;
2. The Petitioner first alleges in Paragraph II.A. that a statement that was illegally obtained following the Petitioner's illegal arrest was later admitted into evidence at his trial in violation of Petitioner's rights as guaranteed by Article 1, Section 5,6 of the Alabama Constitution(1901) in the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution (and, as checked in Paragraph 32.A). Petitioner has failed to specify a proper factual basis for this ground of relief as he has alleged insufficient facts. "A bare allegation that a Constitutional Right has been violated in mere conclusions of law shall not be sufficient to warrant any further proceedings." Alabama Rules of Criminal Procedure, Rule 32.6(B);
3. Petitioner's allegations in Paragraph 32.A. are procedurally barred from review by application of Alabama Rules of Criminal Procedure, 32.2(a)(5), because this issue and/or issues could have been raised on appeal;

5/4/92 - Respondent's Motion to Dismiss is DENIED. Petitioner's Rule 32 Petition is hereby set for trial on August 17, 1992 at 9:00 A.M.

D. Al Crowson
D. Al Crowson, Circuit Judge

FEB 1992
RECEIVED & FILED
DAN REEVES
CIRCUIT CLERK
SHELBY COUNTY, ALA.

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4. Next, Petitioner alleges in Paragraph II.B. that the trial court's failure to allow defense counsel to voir dire venire members individually as to their opinions regarding capital punishment deprived the Petitioner of due process and a fair trial as guaranteed by the Constitutions of the United States and the State of Alabama. The Petitioner has failed to specify a proper factual basis for this ground of relief as he has alleged no specific fact or violation of a constitutional right. "A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." Alabama Rules of Criminal Procedure, Rule 32.6(B);
5. Petitioner's allegations in Paragraph II.B. is procedurally barred from review by application of Alabama Rules of Criminal Procedure, Rule 32.2(a)(5) because this issue could have been raised on appeal;
6. The Petitioner next alleges in Paragraph II.C. that he was denied the effective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Constitution and Laws of the State of Alabama. This issue is procedurally barred from review by application of Alabama Rules of Criminal Procedure, Rule 32.2(A)(5) because these issues could have been raised on appeal;
7. Petitioner's allegation that he was denied ineffective assistance of counsel is based upon several grounds. First, Petitioner alleges that trial counsel failed to adequately investigate and interview critical witnesses for the State. This is an issue which is not properly before the court on this review as it could have been raised on direct appeal. See Alabama Rules of Criminal Procedure, Rule 32.2(a)(4)(5). Next, Petitioner alleges that trial counsel failed to investigate or view the scene of the murder nor did he inspect, observe, or test any physical evidence that the State intended to offer into the trial of the case. This is an issue which is not properly before the

court on this review as it could have been raised on direct appeal. See Alabama Rules of Criminal Procedure, Rule 32.2(a)(4)(5). Further, the Petitioner alleges that the trial counsel did not adequately prepare or interview the defendant regarding the defense of his case and/or adequately prepare the defendant prior to testifying in his defense. This issue is not properly before the court on this review as it could have been raised on direct appeal. Alabama Rules of Criminal Procedure, Rule 32.2(a)(4) and (5);

8. Petitioner further alleges that trial counsel inadequately searched or prepared critical pretrial motions in the case. This is an issue which is not properly before the court on this review as it could have been raised on direct appeal. See Alabama Rules of Criminal Procedure, Rule 32.2(a)(4) and (5).;
9. Petitioner alleges that counsel was ineffective because he made no formal objections to pretrial motions filed by the State. Again, this issue is not properly before the court on this review as it could have been raised on direct appeal. See Alabama Rules of Criminal Procedure, Rule 32.2(a)(4) and (5);
10. Petitioner alleges that counsel was ineffective because he failed to adequately or properly conduct the voir dire of the jury. Again, this is an issue which is not properly before the court on this review as it could have been raised on direct appeal. See Alabama Rules of Criminal Procedure, Rule 32.2(a)(4) and (5);
11. Petitioner alleges that counsel was ineffective because he failed to object to prejudicial evidence and improper evidence. Again, this issue is not properly before the court as it could have been raised on direct appeal, Alabama Rules of Criminal Procedure, Rule 32.2(a)(4) and (5);

12. Petitioner further alleges that trial counsel failed to object to the court's erroneous instruction to the jury as to reckless murder when such was not a lesser included offense of the crime charged. Again, this is an issue which is not properly before the court on this review as it could have been raised on direct appeal pursuant to Alabama Rules of Criminal Procedure, Rule 32.29(a)(4) and (5);
13. Alternatively, with regard to Petitioner's various allegations as to ineffective assistance of counsel based on counsel's performance at the trial level, the Petitioner has failed to establish that counsel's performance was any way deficient or below the level of competence expected of attorneys in criminal cases. Attorney's cannot be expected to invent facts or pursue a course not supported by the facts or law. Counsel's performance was within the range of competence demanded of attorneys in criminal cases. Petitioner has failed to establish any facts which would substantiate the burden of persuasion imposed on this claim to ineffective assistance of counsel as provided in Strickland v. Washington, 466 U.S. 668, 104 Sup.Ct. 2025(1984). The requirements of Strickland v. Washington have not been established such as to afford Petitioner the relief sought;
14. Next, Petitioner makes various allegations as to ineffective assistance of counsel based on counsel's performance at the appeal level. The Petitioner has failed to establish that counsel's performance was any way deficient or below the level of competence expected of attorneys in criminal cases. Attorney's cannot be expected to invent facts or pursue a course not supported by the facts or law. Counsel's performance was within the range of competence demanded of attorneys in criminal cases. Petitioner has failed to establish any facts which would substantiate the burden of persuasion imposed on this claim to ineffective assistance of counsel as provided in Strickland v. Washington, 466 U.S. 668,

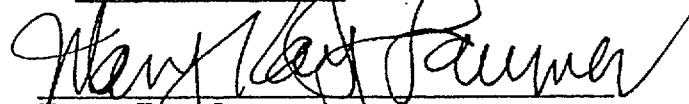
104 Sup.Ct. 2025(1984). The requirements of Strickland v. Washington have not been established such as to afford Petitioner the relief sought;

15. Next, in Paragraph II.D. Petitioner alleges that critically damaging and prejudicial hearsay evidence was admitted during the Petitioner's trial in violation of the Petitioner's right to due process and a fair trial under the Alabama and U.S. Constitutions. This issue is procedurally barred from review by application of Alabama Rules of Criminal Procedure, Rule 32.2(a) because this issue could have been raised on appeal;
16. In Paragraph II.E. Petitioner alleges that critically damaging evidence regarding a hearsay act allegedly had been committed by the Petitioner was admitted during the Petitioner's trial in violation of Petitioner's constitutional rights. This is an issue also which is not properly before the court on this review as it could have been raised on direct appeal. Alabama Rules of Criminal Procedure, Rule 32.2(a)(4) and (5);
17. The Petitioner next alleges that the prosecuting attorneys engaged in acts of misconduct which resulted in a denial of Petitioner's rights under the U.S. Constitution and the Alabama Constitution. This issue is procedurally barred from review by application of Alabama Rules of Criminal Procedure, Rule 32.2(a)(5) because this issue could have been raised on appeal;
18. The Petitioner alleges the trial court incorrectly and improperly instructed the jury that reckless murder was a lesser included offense contained in the indictment against the Petitioner in violation of State and Federal guarantees. This issue is procedurally barred from review by application of Alabama Rules of Criminal Procedure, Rule 32.2(a)(5) because this issue could have been raised on appeal;

19. The Respondent requests further opportunity and leave of court to respond to any and all allegations or arguments alleged and any and all briefs filed by trial counsel pursuant to this Rule 32 Petition;
20. The Respondent further requests that the court allow and grant such other further and alternative relief as is just, equitable and proper under the law of the State of Alabama and the United States of America.

The above premises considered, the State respectfully request this Court to summarily dismiss the above-styled petition for post-conviction relief.

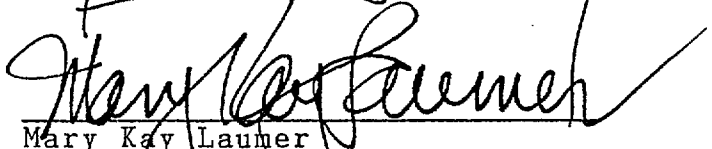
Done this the 6th day of February, 1992


Mary Kay Laumer
Assistant District Attorney
Eighteenth Judicial Circuit
Shelby County, Columbiana
Alabama 35051

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the above and foregoing has been served upon counsel for petitioner, Lawrence B. Sheffield, Jr., and Lawrence B. Sheffield, III, 730 Frank Nelson Bldg., Birmingham, Alabama 35202 (205) 328-1365 in open court on this the 6th day of February, 1992.

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Mary Kay Laumer
Assistant District Attorney
Eighteenth Judicial Circuit