

TABLE OF AUTHORITIES

| | <u>PAGE(S)</u> |
|--|----------------|
| <u>Cofield v. State</u> 275 Ala. 174, 153 So.2d 252 (1963)..... | 10 |
| <u>Ex parte Andrews</u> 406 So.2d 1045 (Ala. 1981)..... | 6 |
| <u>Ex parte Howell</u> 431 So.2d 1328 (Ala. 1983)..... | 8 |
| <u>Ex parte Phelps</u> 339 So.2d 124 (Ala. 1976)..... | 6 |
| <u>Howell v. State</u> 431 So.2d 1326 (Ala.Crim.App. 1982)..... | 8 |
| <u>Kuk v. State</u> 602 So.2d 1213 (Ala.Crim.App. 1992)..... | 12 |
| <u>Alabama Rules of Appellate Procedure</u> | |
| Rule 39(a)..... | 10 |
| Rule 39(c)..... | 6, 11 |
| Rule 39(c)(4)..... | 6 |

STATEMENT OF THE CASE

This case involves an appeal of a denial of a Rule 32 Petition For Relief From Conviction Or Sentence by the Circuit Court of Shelby County, the Honorable D. Al Crowson presiding.

The Petitioner, Ronald Patrick Swiney, was indicted, tried and convicted in the Circuit Court of Shelby County of the crime of capital murder for intentionally causing the deaths of Betty Snow Swiney and Ronnie Lynn Pate by one act or pursuant to one scheme or course of conduct, in violation of §13A-5-40(a)(10), Ala. Code 1975. The verdict was returned and Swiney was adjudged guilty on June 12, 1989. On June 13, 1989, it was stipulated that the State no longer sought the death penalty. The Circuit Court then sentenced Swiney to life imprisonment without the possibility of parole. (C. 2-3, 8, 62-63)

The Court of Criminal Appeals Court affirmed the judgment of conviction on August 3, 1990, issuing a memorandum opinion in the case. (C. 23, 30, 63) Swiney v. State, No. CR-89-95 (Aug. 3, 1990). Swiney's application for rehearing was overruled and his Rule 39(k) motion was denied on September 21, 1990. (C. 30) Swiney v. State, 572 So.2d 893 (Ala.Crim.App. 1990)(Table). His petition for a writ of certiorari was

Swiney filed notice of appeal on February 3, 1993.
(C. 7, 75-74)

On July 8, 1994, the Court of Criminal Appeals affirmed the denial of the petition. Swiney filed an application for rehearing and a Rule 39(k), A.R.A.P., motion on July 22, 1994. The application for rehearing was overruled and the Rule 39(k) motion was denied on September 9, 1994. Swiney filed a Petition for Writ of Certiorari on September 15, 1994.

ISSUE PRESENTED FOR REVIEW

SHOULD THE PETITION FOR A WRIT OF
CERTIORARI BE DENIED?

STATEMENT OF THE FACTS

For the purposes of this brief, the State relies upon the facts stated in the July 8, 1994, memorandum opinion of the Court of Criminal Appeals in this case, which was attached as an exhibit to the Petition for Writ of Certiorari, and the following additional facts:

The State never "responded in kind" or otherwise to either the Petitioner's reply brief or the Petitioner's application for rehearing in the Court of Criminal Appeals.

The Petitioner never testified at his trial that he was intoxicated at the time the offense was committed, nor did he otherwise indicate that he was under the influence of alcohol. He did testify that he went to a lounge shortly after 7:00 on the night in question to kill time and think and that he only stayed ten or fifteen minutes and only consumed two or three sips of a beer, that he then went to another lounge where he also stayed only ten to fifteen minutes and where he ordered one beer that he did not finish drinking, and that he then went to a pub where he ordered a beer but took only a few sips before leaving. (Trial R. 860-861) After that, Swiney testified, he went to the Alabaster Police Department at about 8:00 p.m. and then drove around a while before going to the home of one of the victims. (Trial R. 861-862) Other testimony firmly fixed the time of the shootings as occurring between 9:25 and 9:33 p.m. (Trial R. 396, 531, 734-738, 741-742)

The officer who testified that Swiney's gait was not normal was Lieutenant Stanley Oliver. (Trial R. 550-551, 568) He first saw Swiney that night at Swiney's sister's home at about 10:30 p.m. (Trial R. 552, 555-556) He testified that Swiney appeared sober at that time, but real quiet like he was stunned or in deep thought.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI
SHOULD BE DENIED.

In order for this Court to accept a case for review, an allegation that the decision of the appeals court is within the purview of one of the grounds stated in Rule 39(c), Alabama Rules of Appellate Procedure, is required. Rule 39(c), A.R.A.P.; Ex parte Andrews, 406 So.2d 1045 (Ala. 1981). As grounds for his petition, Swiney alleges conflict between the decision of the Court of Criminal Appeals in this case and prior decisions of the United States Supreme Court, this Court, and the Court of Criminal Appeals. Swiney's petition should be denied because he has failed to comply with the terms of Rule 39(c)(4), A.R.A.P., and/or because his allegations of a conflict cannot withstand scrutiny.

Under Rule 39(c)(4), A.R.A.P., a petition for writ of certiorari must quote that part of the prior decision with which conflict is alleged, or it must state specifically and with particularity wherein the present decision is conflicting with the prior decision cited. When this is not done, the petition should be denied. Ex parte Phelps, 339 So.2d 124 (Ala. 1976).

Swiney has asked this Court to review the decision of the Court of Criminal Appeals as to three claims of ineffective assistance of counsel: 1) failure to object to a jury instruction on reckless murder; 2) failure to request an instruction on reckless manslaughter as a lesser included offense; and 3) the cumulative effective of several alleged errors. Swiney's petition fails to quote any statements from any prior decisions which conflict with the opinion of the Court of Criminal Appeals in this case. It also fails to set forth specifically and with particularity wherein the opinion of the Court of Criminal Appeals allegedly is in conflict with any prior decisions with respect to claims 2 and 3, supra.

It does not appear that anything further need be said with regard to claim 3, except to dispute Swiney's factual assertion that his expert witness testified that defense counsel's errors had a cumulative effective of prejudicing Swiney. As set forth in the Statement of the Facts at page 5, supra, the witness testified that he could not say that the errors he alleged would affect the case and he concluded only that there was a possibility that they did. (R. 146-148)

With regard to Swiney's second claim, the petition alleges a conflict with the decision of this Court in Ex parte Howell, 431 So.2d 1328 (Ala. 1983). However, as is even reflected in the petition, Howell deals with considering an issue not argued in an appellant's original brief, not with issues that were never presented to the trial level court at all. The issue in Ex parte Howell had been preserved for review on appeal, it simply had not been argued in the appellant's original brief to the appellate court. See Howell v. State, 431 So.2d 1326, 1327 (Ala.Crim.App. 1982), and Ex parte Howell, 431 So.2d at 1329.

Although the Court of Criminal Appeals could have refused to considered the Petitioner's claim number 2, supra, on the additional basis that it was not argued on appeal until the Appellant's reply brief, the court actually refused to consider this claim for the sole reason that the claim had never even been presented to the circuit court. (ms.op. at 3) The Petitioner has not submitted any decision that conflicts with the actual decision of the Court of Criminal Appeals; he has not provided any case that holds that issues may be raised for the first time on appeal. Since Swiney has not presented any case that conflicts with the Court of

Criminal Appeals' decision as to his claim number 2, he has presented no basis for review of the Court of Criminal Appeals' decision on this point.

In connection with Swiney's request that this Court excuse his failure to argue his claim number 2 in his original brief, he states as one of his reasons therefor that this issue "has been argued at the Court of Criminal Appeals in the Petitioner's reply brief and application for rehearing to which the State has responded in kind." The State is unsure what is meant by the claim of a response in kind by the State, but wishes to advise the Court that it has never heretofore addressed the issue in question or responded to the Petitioner's reply brief or application for rehearing in any way.

It is the State's position that the Court of Criminal Appeals correctly decided that this issue is barred because it was not presented to the circuit court, and that the issue also is barred because it was not argued in the Petitioner's reply brief. The State did not waive these procedural defaults, either by "respond[ing] in kind" or otherwise.

The Petitioner also is in error in alleging that he asserted in his application for rehearing that the trial court had erred in denying his Rule 32 petition based on

trial counsel's failure to request a jury instruction on reckless manslaughter. Since this claim number 2 had never been presented to the trial court, it could not be claimed that the trial court had erred in refusing relief on such a claim, and, in fact, this entire matter only was presented to the Court of Criminal Appeals as a part of the Petitioner's claim number 1. (See Petitioner's Application for Rehearing and Argument of same, attached as an exhibit hereto).

Furthermore, the Petitioner never requested rehearing as to the actual point of decision on his claim number 2. He never asked the Court of Criminal Appeals to reconsider its decision that this claim was procedurally barred because it had not been presented to the circuit court.

A decision of a court of appeals may be reviewed by this Court on a petition for writ of certiorari only after the court of appeals has overruled an application for rehearing on the point or issue involved. Rule 39(a), A.R.A.P.; Cofield v. State, 275 Ala. 174, 153 So.2d 252 (1963). This Court should decline to review the decision on Swiney's claim number 2 both because Swiney has not presented any proper basis for review

under Rule 39(c) and because no application for rehearing was made as to this point of decision.

The Court also may wish to note some pertinent facts with regard to the Petitioner's claim number 2 which demonstrate a reason for the rule requiring issues to be presented to the trial court before they can be argued on appeal. The Petitioner argues his claim as though it were a foregone conclusion that defense counsel rendered deficient performance that prejudiced the defendant in not submitting a charge on reckless manslaughter. Since the issue was not presented to the Circuit Court, however, the record contains no testimony from defense counsel as to why such a charge was not requested, although the trial record does reveal one obvious possible reason -- that there was no legitimate basis for such a charge. By Swiney's own testimony (the only evidence on this point), he had consumed no more than a few sips more than one beer (and possibly less than one beer) over a period of about an hour that ended about an hour and a half before the crime was committed. (See Statement of the Facts, page 4, supra)

Without Swiney's claim number 2, the Petition also fails to present any conceivable basis for review of the Court of Criminal Appeals' decision as to the

Petitioner's claim number 1. In fact, the Petition fails to present any legitimate reason to review the decision of the Court of Criminal Appeals as to the Petitioner's claim number 1 in any event.

The Petitioner's argument with regard to claim number 1 is, in substance, that there would have been a conflict between the decision of the Court of Criminal Appeals in the instant case and that Court's decision in Kuk v. State, 602 So.2d 1213 (Ala.Crim.App. 1992), if defense counsel had requested and obtained a charge on reckless manslaughter in his case as occurred in Kuk. On its face, this does not present a conflict with a prior appellate decision as required for review under Rule 39(c)(4), A.R.A.P.

In addition, the Petitioner's premise is incorrect. The decision in Kuk was based upon a conclusion that the jury in that case, by following the trial court's instructions in that case, might easily have convicted Kuk of an offense with which he had not been charged instead of an applicable lesser included offense of reckless manslaughter. The Petitioner in the instant case simply ignores the majority of the opinion of the Court of Criminal Appeals in the instant case wherein it is demonstrated that the trial court's instructions in

this case were very different from the ones in Kuk and presented no possibility that the jury could have convicted Swiney of an offense with which he had not been charged nor been influenced in its verdict by the trial court's instruction on reckless murder.

In evaluating Swiney's petition, the State also asks the Court to note that Swiney's attorneys at the evidentiary hearing in this case refused to waive the attorney-client privilege between Swiney and his trial counsel. In so doing, they refused to allow trial counsel to fully explain his actions. It is the State's position that this clearly was improper and provides an independent basis for rejecting Swiney's claims on appeal.

A claim of ineffective assistance of counsel requires by its very nature a waiver of the attorney-client privilege to the extent necessary for counsel to justify his actions. A party obviously may not come before a court with a complaint and then invoke a communication privilege with the person accused in order to prevail. If the Court grants the writ, it should be aware that the State will argue, inter alia, that Swiney waived his claims of ineffective assistance of counsel by refusing to waive the attorney-client privilege with trial counsel.

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 1994, I served a copy of the foregoing on the Attorneys for the Petitioner, by placing same in the United States Mail, first class postage prepaid and addressed as follows:

Lawrence B. Sheffield, Jr.
Lawrence B. Sheffield, III
John A. Lentine
Sheffield, Sheffield, Sheffield
& Lentine, P.C.
323 First Nelson Building
Birmingham, AL 35203.

Margaret S. Childers
MARGARET S. CHILDERS
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

0427JB