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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RONALD PATRICK SWINEY, AIS #154406X,)	
)	
Petitioner,)	
)	
vs.)	CIVIL ACTION NO.
)	96-P-2823-S
)	
CHARLIE JONES, Warden; THE ATTORNEY GENERAL FOR THE STATE OF ALABAMA,)	
)	
Respondents.)	

RESPONDENTS' ANSWER TO SUPPLEMENT TO PETITION

Come the Respondents, by and through the Attorney General of the State of Alabama, and in response to the supplement to Swiney's petition filed February 18, 1998, state as follows:

In their original answer, Respondents requested this Court order Swiney to amend ground 3 of his petition and specify the portions of the State's closing arguments which Swiney feels his trial counsel was ineffective for failing to object to. On February 2, 1998, this Court granted Respondents' request. On February 18, 1998, Swiney filed his amended petition in compliance with the Court's order. Respondents answer the amended petition as follows:

1. Respondents deny each and every material allegation of the petition as amended and demand strict proof thereof.
2. Respondents aver that Swiney's incarceration is valid and constitutional.



3. Respondents deny that Swiney is in custody in violation of the Constitution or laws of the United States.

4. Respondents aver that Swiney's petition as amended fails to state claims cognizable under 28 U.S.C. §2254.

5. Respondents aver that the claims contained in Swiney's amended petition are due to be denied and dismissed with prejudice pursuant to the doctrine of procedural default.

EXHAUSTION

6. Although Swiney has never fully exhausted these claims in state court, he would be prevented from doing so now by state procedural rules. The statute of limitations pursuant to Rule 32.2(c), Alabama Rules of Criminal Procedure, and the successive petition rule, Rule 32.2(b), Alabama Rules of Criminal Procedure, foreclose any relief on these grounds in state court. Swiney's claims are procedurally defaulted because he did not raise these allegations of ineffective assistance of counsel in his state post-conviction pleading. For the purpose of adjudication of this petition, Swiney's amended claims are effectively exhausted. Snowden v. Singletary, 135 F. 3d 732, 736 (11th Cir. 1998).

MEMORANDUM BRIEF

7. Swiney quotes thirteen sentences from forty-six recorded pages of the State's closing arguments at trial [Exhibit A, R. 920-939, 965-991] and alleges trial counsel was ineffective for not objecting to these statements.

8. These allegations of ineffective assistance of counsel are barred by the doctrine of procedural default because they were not raised in Swiney's post-conviction proceedings. Swiney did raise an allegation of ineffective assistance of counsel for failing to object to the State's closing argument in his Rule 32 petition. He specifically alleged in his petition only the prosecutors' comments concerning character evidence of the deceased and the prosecutors' personal beliefs and experiences as improper. He specified the alleged improper statements as those recorded at pages R. 938 and 989-90 of the trial transcript. [Exhibit E, C. 46-47] At the hearing conducted on Swiney's petition, he specifically referenced the statements challenged in the petition. [See Exhibit E, R. 125-129] In his brief on appeal of the denial of his Rule 32 petition, Swiney argued only the comments specified in his pleading and at the evidentiary hearing. [See Exhibit F, p. 32] In its memorandum opinion, the Alabama Court of Criminal Appeals addressed only the specific allegations made by Swiney. [See Exhibit H, pp. 6-7] The statements alleged as error in this petition differ from the statements challenged by Swiney in state proceedings.

9. The doctrine of procedural default provides that a state prisoner seeking relief by petition for writ of habeas corpus in the federal courts is

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barred from relief on claims the prisoner failed to raise in state court or failed to raise in an appropriate state procedural manner. Wainwright v. Sykes, 433 U.S. 72, 89-91 (1977). Absent a showing of cause to excuse the failure to raise the claim and a showing of actual prejudice, a petitioner is precluded from relief.

10. Application of the procedural default rule generally requires that the state court clearly and expressly find the claim barred under state procedural rules so it is apparent the claim was dismissed on independent and adequate state grounds. Harris v. Reed, 489 U.S. 255, 263 (1989). Where the claim was never properly presented to the state courts and is raised in a federal habeas corpus petition for the first time, however, the federal court may apply the procedural default rule. Waldrop v. Jones, 77 F.3d 1308, 1314 (11th Cir. 1996), citing Teague v. Lane, 489 U.S. 288, 297-299 (1989). See also Kennedy v. Herring, 54 F.3d 678, 684 (11th Cir. 1995), and Hill v. Jones, 81 F.3d 1015, 1024 (11th Cir. 1996).

11. Swiney has offered no cause or actual prejudice to prevent application of the procedural default doctrine. His allegations of ineffective assistance of trial counsel for failing to object to the specific remarks of the prosecutor are due to be denied and dismissed with prejudice.

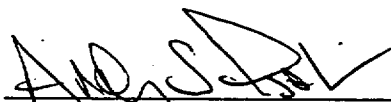
CONCLUSION

The claims contained in Swiney's amended petition are barred under the doctrine of procedural default. Respondents reassert all defenses raised in

their original answer. Based on the original answer and this supplemental answer, Respondents assert that Swiney's petition for writ of habeas corpus is due to be denied and dismissed with prejudice.

Respectfully submitted,

BILL PRYOR
ATTORNEY GENERAL
BY:

A handwritten signature in black ink, appearing to read "ANDY S. POOLE", written over a horizontal line.

ANDY S. POOLE
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 1998, a copy of the foregoing was served on the petitioner by placing the same in the United States Mail, first class postage prepaid and addressed as follows:

Ronald Patrick Swiney
AIS #154406X
Holman Correctional Facility
Holman 3700
Atmore AL 36503-3700



ANDY S. POOLE
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery AL 36130-0152
(334) 242-7300