

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' OBJECTIONS TO MAGISTRATE JUDGE'S  
FINDINGS AND RECOMMENDATION

Come the Respondents, by and through the Attorney General for the State of Alabama, and enter the following objections to the Magistrate Judge's Findings and Recommendation entered in this cause on June 23, 1998.

1. Respondents agree with the magistrate judge's finding that Swiney's claims are without merit and the recommendation that petition for writ of habeas corpus be denied. Respondents agree with the findings of facts and conclusions of law made by the

magistrate judge. Respondents enter this objection for the sole purpose of requesting this Court find a procedural default that bars claim number seven in addition to the default found by the magistrate judge.

2. Swiney alleges the trial court denied him a fundamentally fair trial by instructing the jury on the lesser included offenses of reckless murder and intentional murder. The magistrate judge found this claim procedurally barred because Swiney did not raise it on appeal from the denial of his Rule 32 petition. (Magistrate judge's findings and recommendation, pgs. 15-16)

3. This claim is also procedurally barred because it was not raised on direct appeal. A substantive claim concerning jury instructions is barred from review in a Rule 32 proceeding under Alabama procedural law if it was not raised at trial or on appeal. Rule 32.2(a)(3) and (5), Alabama Rules of Criminal Procedure. Swiney raised no issue on direct appeal concerning the trial court's instructions to the jury. (Magistrate Judge's Findings and Recommendation, pg. 1; Respondent's Exhibit B)



4. Application of the procedural default rule generally requires the last state court addressing a claim clearly and

expressly find the claim barred on the state procedural rules so it is apparent the claim was denied on independent and adequate state grounds. Harris v. Reed, 489 U.S. 255, 260-261, 263 (1989). As noted by the magistrate judge, Swiney raised no substantive issue concerning jury instructions on appeal of the denial of his Rule 32, but argued only ineffective assistance of counsel. (Magistrate Judge's Findings and Recommendation, pg. 14)

5. The last state court to rule on Swiney's claim concerning the trial court's jury instructions was the Shelby County Circuit Court. In denying Swiney's Rule 32 petition, the court found all of Swiney's allegations, other than those alleging ineffective assistance of counsel, were precluded. "The court finds that the issues raised by petitioner, other than his attack on his counsel could have and should have been raised on appeal." (Respondent's Exhibit E, pg. 63; Magistrate Judge's Findings and Recommendation, pg. 3)

The magistrate judge's findings and recommendation are correct and due to be adopted by this Court. The findings should be supplemented by a holding that, in addition to the procedural default found by the magistrate judge, claim seven is also

procedurally defaulted because Swiney did not raise this issue on direct appeal of his conviction.

Respectfully submitted,

BILL PRYOR  
ATTORNEY GENERAL

BY:

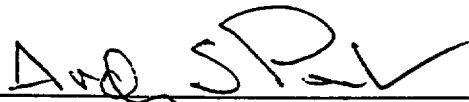
A handwritten signature in black ink, appearing to read "Andy S. Poole", is written over a horizontal line.

ANDY S. POOLE  
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 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 Unit 3700  
Atmore, AL 36503

  
\_\_\_\_\_  
ANDY S. POOLE  
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