IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
By ____ Deputy Clerk

LEO ALEXANDER JONES,

Petitioner/Appellant,

v. CASE NO. 73281

RICHARD L. DUGGER,

Respondent/Appellee.

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RESPONSE TO SECOND
PETITION FOR WRIT OF HABEAS CORPUS

The Respondent submits the following answer:

(1) The Office of the Capital Collateral Representative has notified the Respondent of its intention to raise the following claims on Mr. Jones' behalf:

(a) A claim of error under **Booth v. Maryland**, 107 S.Ct. 2529 (1987).

(b) A claim of error under **Caldwell v. Mississippi**, 472 U.S. 320 (1985).

(c) A claim of error under **Arango v. State**, 437 So.2d 1099 (Fla. 1983) or **Arango v. State**, 411 So.2d 172 (1982).

(d) A claim of error under **Gregg v. Georgia**, 428 U.S. 153 (1976).

(e) A claim of error under **Jackson v. Mississippi**, 443 U.S. 307 (1979).

(f) A claim of error under **Hitchcock v. Dugger**, 481 U.S. ____, 95 L.Ed.2d 347 (1987).

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(g) A claim of error under **Parkin v. State**, 238 So.2d 817 (Fla. 1970).

(2) Habeas corpus relief should not be granted on any of Mr. Jones' claims. We reject the claims, in order, as follows:

(A) **Booth v. Maryland** Claim

Mr. Jones did not preserve or appeal any claim for relief on the grounds of "victim impact" statements having been made. **Booth**, in addition to being reconsidered this term by the Supreme Court (**South Carolina v. Gathers**, 369 SE2d. 140 (1988), **cert. granted**, 44 Cr.L. 2048 (October 5, 1988)), is subject to our procedural bar rule. **Preston v. Dugger**, ____ So.2d ____, 13 F.L.W. 584 (Fla. 1988); **Daugherty v. State**, ____ So.2d ____, Case Nos. 73,256; 73,257 (Fla. 1988). Since Mr. Jones did not preserve this issue, raise it on appeal or raise it in either of his collateral proceedings, he cannot raise it now.

The State submits that a "**Booth**" claim is one which could have been raised by petition pursuant to Fla.R.Crim.P. 3.850. Jones filed such a petition and was granted liberal amendments thereto. Now, Mr. Jones falls within the time constraints of the rule and wishes to circumvent it by raising "3.850" claims in a habeas corpus petition.

This Honorable Court promulgated the time constraints of Rules 3.850 and 3.851 to promote efficient and timely litigation. To permit the rules to be blithely ignored by permitting the free substitution of state habeas corpus petitions for untimely 3.850 petitions would be to emasculate the rules and serve public notice to the defense bar that the Court does not and will not

stand by its own rules, thus inviting more dilatory litigation. See **Arango v. State**, 437 So.2d 1099 (Fla. 1983). Mere empty criticism of these tactics has not generated the respect which this Court deserves. We submit that sophistry ("death is different") cannot forgive abuse of the court or the system. The Court should refuse to consider this barred claim. **Darden v. Dugger**, ____ So.2d ____, 13 F.L.W. 196 (Fla. 1988); **Suarez v. Dugger**, ____ So.2d ____, 13 F.L.W. 386 (Fla. 1988); **Blanco v. Dugger**, 507 So.2d 1377 (Fla. 1987); **Johnson v. Wainwright**, 463 So.2d 207 (Fla. 1985); **Pannier v. Wainwright**, 423 So.2d 533 (Fla. 1982).

There is no evidence of any reliance by the sentencer (Judge Soud) or the advisory jury upon any "victim impact" statement.

The State called only **one** witness during the penalty phase, Sheriff Carson, who spoke **only** to the statutory aggravating factor of "disruption of a governmental function". The effect of this sniper-murder upon governmental activities is not the equivalent of "victim impact" as anticipated by **Booth**. The Sheriff's comments on (R 1502-1504) the effect of violence upon police officer performance and recruiting went only to illustrate "how" law enforcement activities are affected after an officer is killed.

Of course, the colloquy at 1502 shows us that the questions were "general" in scope and did not specifically address the murder of Officer Szafranski. Again, there was no objection and no appeal.

Thus, Jones cannot prevail, even on the merits, on this barred claim.

(B) **Caldwell** Claim

Mr. Jones' **Caldwell** claim is also procedurally barred. **Pope v. Wainwright**, 496 So.2d 798 (Fla. 1986); **Foster v. Dugger**, 518 So.2d 901 (Fla. 1987). In any event, **Caldwell** does not apply to Florida. **Daugherty v. State, supra**. We submit, to protect our judgment from federal intrusion, that the procedural bar be enforced without ruling on the "merits".

(C) **Arango** Claim

We assume Mr. Jones is relying upon **Arango v. State**, 411 So.2d 172 (Fla. 1982), in some ill-considered effort to relitigate his appeal and not **Arango v. State**, 437 So.2d 1099 (Fla. 1983), which condemns these tactics.

Apparently, relying upon **Arango**, Jones wants to question the "shifting" of the burden of proof during the penalty phase. As **Arango** makes clear, Jones could and should have preserved this issue at trial, raised it on appeal, or at least tried to raise it in his first "3.850" or his first state habeas corpus petition. The **Arango** case also addressed the issue of warrantless entry into a suspect's home. Mr. Jones briefed this issue on direct appeal and cited to **Arango**. Therefore, the **Arango** case was known to him and there is no excuse for any new arguments relying upon **Arango** at this time. Of course, reargument of the "warrantless entry" issue in a second successive habeas petition is obviously improper.

This "burden shifting" argument has already been rejected as procedurally barred in **Clark v. State**, 13 F.L.W. 549 (Fla. 1988) (Mr. Clark even had the same counsel as Mr. Jones), and clearly the same result applies in this case.

Finally, and without waiving the procedural bar, we note that this claim was rejected in **Lowenfield v. Phelps**, ____ U.S. ____, 98 L.Ed.2d 568 (1988).

(D) **Gregg v. Georgia** Claim

Again, as in **Clark**, Jones' counsel is just filing every possible claim with a "broad brush" without regard to the law. **Gregg v. Georgia** antedates this case by many years. Any "**Gregg**" claim is procedurally barred. Death is not "cruel" or "unusual" and its application in Florida has been repeatedly upheld. Again, Jones is abusing the writ.

(E) **Jackson v. Virginia** Claim

Mr. Jones' claim regarding the sufficiency of the evidence to support the aggravating factor of "cold, calculated and premeditated" murder is simply a reargument of his direct appeal under a later case citation. It is in every sense of the word an abuse of the writ.

(F) **Hitchcock** Claim

Jones was tried in October of 1981, two years after the condemned "Hitchcock" instruction was abolished and three years after **Lockett v. Ohio**, 438 U.S. 586 (1978). Although "procedural

default" has not been applied to those who were tried under the "Hitchcock" instruction, there is no reason **not** to apply the default rule to inmates such as Mr. Jones.

Hitchcock's inapplicability to this case was recognized indirectly, but "on the merits" in **Jones v. Wainwright**, 473 So.2d 1244, 1246 (1985). We note that the record on appeal, at page 1573, contains the following instruction as to mitigating evidence:

> Number Two: You may consider any other aspect of the defendant's character or record or any other circumstance of the offense.

The sentencer's order also reflects consideration of the entire record including all statutory and non-statutory "evidence".

Jones' claim is procedurally barred now as it was before. In addition, it is facially without merit.

(G) **Parkin** Claim

Mr. Jones has indicated an intention to file a claim pursuant to **Parkin v. State**, 238 So.2d 817 (Fla. 1970). The **Parkin** case addresses issues of insanity and self-incrimination. Assuming that Jones will rely on **Parkin** for its discussion of self-incrimination, we note that this issue has already been fully litigated on appeal and on collateral attack. As noted before, habeas corpus is not a vehicle for second appeal or a second collateral attack. Jones has simply shaded and refiled the same issue previously litigated and cannot be heard at this time.

(3) This response is being prepared at 11:00 p.m. on November 7, 1988. Mr. Jones' execution is just seventy-two (72) hours away. The issues Jones has chosen to raise are all issues he has known about for at least four years. There is no excuse for the late filing of these claims other than a general desire to create litigation and force the courts to grant him a stay of execution. This Honorable Court originally scheduled argument in this case for October 12, 1988. The Courts' rules, case law and scheduling requests have all been ignored. Mere commentary that "the writ has been abused" means nothing (see **Clark v. Dugger, supra**). The appropriate sanction must be imposed if the Courts' rules are to merit any respect. The State suggests that these eleventh hour, procedurally barred claims should not be entertained and that no stay of execution should be entered.

Respectfully submitted,

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