IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,144

CLEO DOUGLAS LECROY

Petitioner.

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida

Respondent.

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RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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COMES NOW Respondent, Richard L. Dugger, by and through undersigned counsel and files this response to Petitioner's writ and motion for stay of execution;

STATEMENT OF THE CASE AND FACTS

Respondent relies on the facts as outlined by this Court in Petitioner's direct appeal. LeCroy v. State,533 So.2d 750 (Fla. 1988). Prior to the direct appeal,this case was before this Court regarding the voluntariness of Petitioner's statements. LeCroy v. State, 461 So.2d 88 (Fla. 1985).

The symbol R denotes the record from Petitioner's direct appeal. The symbol App. denotes refrence to the attached appendix.

I

ARGUMENT

RESPONSE TO REQUEST FOR STAY OF EXECUTION AND FOR ADDITIONAL TIME TO AMEND OR SUPPLEMENT THIS PETITION.

Petitioner asks this Court to grant a stay of execution because the Office of the Capital Collateral Representative has been unable to conduct any research or investigation into Petitioner's case.

A stay of execution should not be regarded as an automatic remedy simply upon request, Mulligan v. Zant, 531 F. Supp. 459, 460 (M.D. GA. 1984), inasmuch as the State has a legitimate interest in the finality of litigation including capital litigation. Witt v. State, 387 So.2d 925 (Fla.1980), cert. denied, 449 U.S. 1067 (1981). In other words "justice, though due the accused, is due to the accuser also," Snyder v. Massachusetts, 291 U.S. 97, (1934), and justice delayed is justice denied, United States ex rel. Geisler v. Walters, 510 F.2d 887, 893 (3rd Cir. 1975).

Although Petitioner's counsel claims to have had little time to prepare and present argument it should be noted that Petitioner's direct appeal has been final since July 3, 1989 when the United State's Supreme Court denied certiorari. Petitioner has failed to demonstrate the need to for a stay of execution. Troedel v. State, 479 So.2d 736,737 (Fla. 1985).

II

ARGUMENT

THE PENALTY PHASE JURY INSTRUCTIONS ARE A CORRECT STATEMENT OF FLORIDA'S SENTENCING PROCEDURE AS WELL AS CONSTITUTIONALLY PERMISSIBLE.

Petitioner claims that the standard jury instructions create an impermissible presumption that death is the appropriate penalty. The argument further alleges that this impermissible presumption shifts the burden of proof to Petitioner to prove that death is not the appropriate sentence and precludes consideration of mitigating evidence.

Initially it should be pointed out that Petitioner is barred from raising this claim as there was never any objection at trial nor was this claim raised in either of his two direct appeals. Adams v. State, 543 So.2d 1244,1249 (Fla. 1989); Smith v. Dugger, 15 FLW 81,83 (Fla. February 15, 1990).

Petitioner's claim is equally unavailing on the merits as well. The actual instructions given at Petitioner's resentencing were an accurate description of Florida's sentencing scheme (R 3714-3718)(App.A). Bertolotti v. Dugger, 883 F.2d 1503,1524 (11th Cir. 1989). Furthermore the challenged instructions have withstood constitutional challenge. Bertolotti v. Dugger, supra; Adams v. State, supra. Contrary to Petitioner's assertions otherwise, the jury nor the judge was

barred from considering any of the evidence presented in mitigation.(App.A). As a matter of fact, the court stressed that the circumstances in mitigation were unlimited. (R 3717). Jackson v. State, 530 So.2d 269,273 (Fla. 1988). The United States Supreme Court has reaffirmed this holding in Blystone v. Pennsylvania, 4 FLW Fed. S99 (U.S. February 28, 1990).

In summation Petitioner's claim is both procedurally barred and completely without merit. Petitioner has failed to demonstrate any need for further review by this Court.

CONCLUSION

WHEREFORE Respondent respectfully requests that this Court DENY both the stay of execution as well as the writ of habeas corpus.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Response to Petition for Extraordinary Relief and for a Writ of Habeas Corpus" has been forwarded by United States Mail to: LARRY H. SPALDING, CHIEF ASSISTANT CAPITAL COLLATERAL REPRESENTATIVE, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 15th day of June, 1990.

Of Counsel

A P P E N D I X

punishment should be imposed upon the Defendant for his crimes of first-degree felony murder in Count 1 and first-degree premeditated murder in Count 2.

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the Defendant and on the evidence that has been presented to you in this proceeding today.

Count 1:

The aggravating circumstances that you may consider in Count 1 are limited to any of the following that are established by the evidence:

Number one: Cleo Douglas LeCroy has previously been convicted of another capital offense or of a felony involving the use of violence to some person and

Number two: The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery.

Count 2.

The aggravating circumstances that you may consider in Count 2 are limited to any of the following that are established by the evidence:

Number one: Cleo Douglas LeCroy has been previously convicted of another capital offense or of a felony involving the use of violence to some person.

The crime of first-degree felony murder is a capital felony. The crime of robbery with a firearm is a felony involving the use of violence to another person and

Number two: The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery and

Number three: The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest and

Number four: The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

This aggravating circumstance requires a heightened degree of premeditation exceeding that which is necessary to support proof of first-degree premeditated murder.

As to both Counts 1 and 2, if you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances do exist that outweigh the aggravating circumstances.

Among the unlimited mitigating circumstances you may consider, if established by the evidence are:

Number one: Cleo Douglas LeCroy has no significant history of prior criminal activity and

Number two: The age of the Defendant at the time of the crime and

Number three: Any other aspect of the Defendant's character or record and any other circumstances of the offense.

Each aggravating circumstance should be established beyond a reasonable doubt before it may be considered by you in arriving at your decision.

Where the same conduct gives rise to two or more aggravating circumstances, that conduct can only be considered as one aggravating circumstance.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.

A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant.

If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence and the law.

You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

Before you ballot you should carefully weigh, sift and consider the evidence and all of it realizing that human life is at stake and bring to bear your best judgment in reaching your advisory sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Appendix" has been forwarded by United States Mail to: LARRY H. SPALDING, CHIEF ASSISTANT CAPITAL COLLATERAL REPRESENTATIVE, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 15th day of June, 1990.

Of Counsel