

**FILED**

SID J. WHITE

OCT 3 1990

CLERK, SUPREME COURT

By [Signature]  
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

NO. 76694

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SAMUEL RIVERA,

Petitioner,

v.

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

Respondent.

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PETITION FOR EXTRAORDINARY RELIEF AND  
FOR A WRIT OF HABEAS CORPUS

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LARRY HELM SPALDING  
Capital Collateral Representative  
Florida Bar No. 0125540

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Counsel for Petitioner

## INTRODUCTION

This case is in a tenuous posture. Petitioner is an indigent death-sentenced inmate entitled, at least statutorily, to the services of competent counsel during the litigation of the post-conviction action that will literally determine whether he shall live or die. See section 27.701, Florida Statutes (1989). The Governor has signed a death warrant in this case setting Petitioner's execution for November 28. Further, pursuant to Rule 3.851, "all motions and petitions for any type of post-conviction or collateral relief shall be filed" on or before October 24.

On October 2, CCR filed with this Court Petitioners' Consolidated Motion for Stays of Execution on behalf of both Samuel Rivera and Jason Dirk Walton. The consolidated motion explained CCR's budgetary and staffing problems and CCR's absolute inability to undertake representation of Petitioner under the expedited time periods attendant to Rule 3.851.

On October 3, Petitioner filed Defendant's Motion for a Stay of Execution and for Appointment of Conflict Counsel in the trial court, a copy of which is attached. Among other things, the Capital Collateral Representative pursuant to section 27.703, Florida Statutes (1989), certified a caseload conflict of interest which precludes representation of Petitioner by CCR.

The motion requested that the trial court appoint conflict counsel to be paid by the Board of County Commissioners. It also requested that Petitioner be granted 120 days after appointment to file all applicable state post-conviction pleadings. However, no Rule 3.850 motion has been filed.

CCR files this petition for writ of habeas corpus in order to invoke the habeas corpus jurisdiction of this Court. However, CCR has not had the opportunity to even obtain Petitioner's trial and sentencing transcripts, nor has it been able to do any investigation or research into Petitioner's case. This is not the type of representation envisioned by Rule 3.850. See Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). No CCR litigation team is available to be assigned to this case.

The Office of the Capital Collateral Representative (CCR) files this petition to invoke this Court's habeas corpus jurisdiction pursuant to Rule 9.100(a)(3) and article V, section 3(b)(9), Florida Constitution. CCR also specifically requests that this Court enter a stay of the execution scheduled for November 28. A stay of execution would permit the trial court sufficient time to appoint qualified conflict counsel who, once appointed, could be granted a reasonable period of time for the filing of post-conviction pleadings. CCR also requests that appointed conflict counsel be granted leave to amend or to supplement this petition, which admittedly has been filed pro

forma by CCR.

This Court's jurisdiction is invoked pursuant to the previously cited statutory and constitutional authorities. Petitioner requests that the Court enter a stay of execution recognizing that the trial court clearly has jurisdiction to appoint conflict counsel pursuant to section 27.703, Florida Statutes (1989). However, Petitioner also acknowledges that the trial court may arguably lack jurisdiction to enter its own stay of execution or to toll the time-limitation provisions of Rule 3.851 absent the filing of a Rule 3.850 motion. This latter action has not and cannot be undertaken by CCR.

JURISDICTION TO ENTERTAIN PETITION  
AND ENTER A STAY OF EXECUTION

A. JURISDICTION

Petitioner invokes the Court's authority on this habeas corpus action pursuant to Rule 9.100(a). This Court has original jurisdiction pursuant to Rule 9.030(a)(3) and article V, section 3(b)(9), Florida Constitution. The petition presents constitutional issues which concern the judgment of this Court during the appellate process, and the legality of the Petitioner's capital conviction and sentence of death. Petitioner was sentenced to death. Direct appeal was taken to this Court. The conviction and death sentence were affirmed. No

Rule 3.850 motion has been filed. Jurisdiction in this action lies with this Court.

This Court has consistently maintained a vigilant control over capital cases, exercising a special scope of review, and has not hesitated to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness or correctness of the capital trial or sentencing proceedings. The constitutional issues which Petitioner seeks to present in his post-conviction actions shall involve questions which go to the heart of the fundamental fairness and reliability of his capital conviction and sentence of death and of this Court's appellate review.

This Court has the inherent power to do justice. The ends of justice counsel the granting of the requested relief in order for the Court to assure its own proper review, and in order to provide this capital inmate with the opportunity to professionally-responsible pleadings on habeas corpus review and under Rule 3.850. This application is filed in this form because of the difficult circumstances now facing CCR, and because no attorney at the CCR office has been able to review anything other than the direct appeal opinions in this case.

B. REQUEST FOR STAY OF EXECUTION

Petitioner requests that the Court enter a stay of his currently scheduled execution. CCR has no conceivable way of even knowing what the issues present in this case may be, has been able to conduct no investigation, has not been able to obtain or read anything pertaining to this case outside of the direct appeal opinion and portions of the trial court's findings supporting the death sentence. CCR believes that the issue presented below, along with others not yet ascertained, is present in Petitioner's case, and that it resulted in the denial of Petitioner's eighth and fourteenth amendment rights. This issue directly concerns the judgment of this Court on direct appeal. CCR also submits that there is present in this case a "violation of the Constitution[s] . . . of the United States, or of the State of Florida," and that other claims are present such that "the judgment or sentence is otherwise subject to collateral attack." See Rule 3.850. Therefore, CCR requests on behalf of appointed conflict counsel leave to amend or to supplement this habeas corpus petition and specifically requests leave to file a Rule 3.850 in excess of the time limitations of Rule 3.851.

CLAIMS FOR RELIEF

This habeas corpus action presents the following issue. It is requested that leave to amend or to supplement be granted.

CLAIM I

THE PENALTY PHASE JURY INSTRUCTIONS URGED THE JURY TO PRESUME DEATH APPROPRIATE, SHIFTED THE BURDEN TO PETITIONER TO PROVE THAT DEATH WAS NOT APPROPRIATE, AND LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), PENRY V. LYNAUGH, 109 S. CT. 2934 (1989), HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

The jury in this case was instructed that it was to presume death to be the proper sentence once aggravation was proved, unless and until the defense presented enough in mitigation to overcome the aggravation. This instruction shifted the burden to Petitioner to prove that death was not appropriate, in violation of the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

It can be presumed that Petitioner's sentencing jury was instructed in accordance with the standard jury instructions at the outset of the sentencing process:

Now, the State and the Defendant may now present evidence relative to the nature of the crime and the character of the Defendant.

You are instructed that this evidence, when considered with the evidence you've already heard, is presented in order that you may determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances if any.

At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(emphasis added).

If the standard jury instructions were followed, the court's later instructions reiterated the erroneous standard:

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 as to each count 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.

\* \* \*

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

Such a presumption, however, was never intended for presentation to a Florida capital sentencing jury. See Jackson v. Dugger, 837



F.2d 1469, 1473 (11th Cir. 1988) (emphasis added). To apply it before a jury is to eviscerate the requirement that a capital sentencing decision be individualized and reliable.

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and preclude the consideration of mitigating evidence, unless and until such evidence outweighed the aggravating circumstances, violating the principles of Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Petitioner on the issue of whether he should live or die. This unconstitutional burden-shifting violated due process and the eighth amendment. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

The presumption applied in Petitioner's case effectively barred the jury from considering the statutory and nonstatutory mitigation that was present before it. This violates settled eighth amendment jurisprudence. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). The eighth amendment requires an individualized assessment of the appropriateness of the death penalty. Lockett. Petitioner was denied an individualized and reliable capital sentencing

determination because only the mitigation which outweighed the aggravation was to be given "full" consideration.

It is not sufficient that a capital defendant be allowed to introduce evidence in support of mitigating circumstances: "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, supra, 109 S. Ct. at 2951. The jury, however, was instructed that death was presumptively the proper penalty unless the mitigation outweighed the aggravation. Under Florida law, however, a capital sentencing jury can impose life whenever the mitigation provides a "reasonable basis" for determining that a sentence of less than death is warranted. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Thus, the jury could have imposed life, but could not but have thought themselves precluded from doing so by the presumption placed upon Petitioner.

The focus of a jury instruction claim is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 58 U.S.L.W. 4301, 4304 (March 5, 1990). Under this standard, the instructions involved in this case fail.

CONCLUSION

CCR apologizes for filing this pro forma pleading. Under the circumstances, however, there is no other choice. Nonetheless, it is submitted that the relief sought is both necessary and proper. A stay of execution, time to appoint conflict counsel, time to amend or to supplement, and relief from the current filing deadlines of Rule 3.851 should be granted if Petitioner is to be afforded due process and equal protection of the law.

I certify that a true copy of the foregoing petition has been furnished by the United States Mail, first class, postage prepaid, to all counsel of record on October 3, 1990.

LARRY HELM SPALDING  
Capital Collateral Representative  
Florida Bar No. 0125540

OFFICE OF THE CAPITAL COLLATERAL  
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(904) 487-4376

By: 

Counsel for Petitioner



government charged with the statutory responsibility of providing legal representation in both state and federal capital post-conviction proceedings to any person convicted and sentenced to death in Florida who is unable to secure counsel due to his or her indigency. Part III, Chapter 27, Florida Statutes (1989), is the CCR enabling statute.

4. Pursuant to section 27.702, Florida Statutes (1989), a previous determination of indigency by any court in this State for the purposes of representation by a public defender is prima facie evidence of indigency for the purposes of representation by CCR. Defendant has previously been adjudged indigent and remains unable to pay the costs attendant to his Rule 3.850 capital post-conviction proceeding or state habeas corpus proceeding.

5. Pursuant to the time-limitation provision of Rule 3.850, Defendant would have been required to file post-conviction pleadings on or before August 15, 1991. However, on September 24, Governor Martinez signed a death warrant against Defendant setting his execution date for November 28.

6. CCR is unable to undertake the representation of Defendant because:

a. The Governor has signed a death warrant against Defendant which has significantly shortened the two-year time limitation imposed by the Supreme Court of Florida. The early death warrant has activated the provisions of Rule 3.851 which provide that all pleadings must be filed in the state courts

within thirty (30) days of the date of the signing of the warrant.

b. On August 28, the Administration Commission (the Governor and the Cabinet) issued a Resolution which, among other things, implemented a temporary hiring freeze effective September 1. This hiring freeze will remain in effect at least until October 9 unless extended by the Administration Commission, a not unlikely prospect. As a direct result of the hiring freeze, CCR cannot fill four (4) attorney positions which constitute 25% of its attorney staff. (A fifth attorney, Jerome Nickerson, has submitted his resignation effective October 31. The reason for the resignation has been stated as total exhaustion and burnout. Unless lifted, the hiring freeze will be applicable to this attorney position as well.) Additionally, CCR has been required to withdraw an employment offer to a prominent law school professor who is on sabbatical and who was tendered an offer of employment specifically to write appellate briefs which are currently overdue in the Supreme Court of Florida.

c. CCR has been notified by the Governor's Office of Budget and Planning that its FY 1990-91 appropriation will be reduced by 5%. If current revenue projections continue to decline, as many economic analysts predict, then it is anticipated that this year's appropriation will be reduced by yet another 5% to 10%. The 5% figure will eliminate the new attorney positions created for CCR. The 10% projection would

significantly reduce even further the inadequate dollar amount budgeted in the FY 1989-90 appropriation.

d. The Governor's Office of Budget and Planning has revised its method of releasing funds for agencies. Prior to the current fiscal crisis in state revenues, funds were released quarterly which permitted some flexibility in budgeting. This procedure has been modified to provide for only monthly releases.

e. As this Court is aware, the most time-consuming and expensive stage of the capital post-conviction process is the investigation, research and litigation of Rule 3.850 motions. It is at this stage that records must be gathered, witnesses located and interviewed, experts retained and detailed investigation of all circumstances surrounding the offense conducted.

f. CCR is presently undertaking to prepare eight (8) Rule 3.850 motions excluding Defendant's case. Four (4) of these cases are under active death warrant in addition to a fifth death warrant proceeding involving a successor federal habeas corpus petition.

g. CCR is already deficit spending without undertaking this new Rule 3.850 proceeding. As of the date of the filing of this motion, CCR has a negative balance (\$15,044) in the Other Personal Services (OPS) category, i.e., if no further expenditures are incurred in October, CCR is already in a substantial deficit position for the month. Likewise, CCR has a

balance of \$3,281 in the Expense category for the month of October. This agency has expenses which average \$49,267 a month. Parenthetically, a major expense item for CCR is air travel. CCR has been advised that airline tickets are expected to increase approximately 30% over the next 90 days because of the crisis in the Middle East.

h. Specifically as to Defendant, the Assistant Capital Collateral Representative who was assigned primary responsibility for all CCR Hispanic clients transferred to another state agency effective August 31. Although CCR has interviewed bilingual attorney applicants, the current hiring freeze prohibits CCR from tendering any offers of employment. Consequently, CCR does not have a replacement attorney available on staff who is sufficiently fluent in Spanish to communicate with Defendant who, CCR is advised, does not speak English.

7. In addition to the foregoing, the Supreme Court of the United States returned from its recess on October 1. The first Monday in October generally results in the issuance of several denials of petitions for writ of certiorari which in turn are shortly followed by the signing of successor death warrants. CCR has clients with petitions pending before the Supreme Court of the United States who may fall into this category. Successor death warrants must take a priority to new cases.

8. In summary, pursuant to the provisions of section 27.703, Florida Statutes (1989), the Capital Collateral



Representative certifies a conflict of interest which precludes representation of Defendant by CCR. To undertake the representation of Defendant would require CCR to continue to deficit spend at a time when we have been instructed by the Governor's Office of Budget and Planning to reduce expenditures. More importantly, to undertake this case would further jeopardize the health of attorneys presently on staff and would, in all probability, result in the rendering of ineffective assistance of counsel to the Defendant and in the denial of Defendant's rights to full and fair post-conviction proceedings which comport with the requirements of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987).

9. Without a full complement of attorneys, to undertake the representation of Defendant would be a violation of the Code of Professional Responsibility, Rule 4-1.16. The comment to the Rule provides:

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

10. The Florida Bar Special Commission to Study Practical Aspects of Death Sentence Appeals established by former president Rutledge Liles has prepared its preliminary draft delineating ways in which to improve capital litigation in the State of Florida. Among other things, the Special Commission found that CCR is critically understaffed and underfunded. For example, most attorneys' monthly time sheets reflect work in excess of 300

hours. Attorneys can only maintain this level of activity for so long, as demonstrated by a turnover rate in attorney positions of 257% since CCR opened October 1, 1985. Additionally, these work hours have resulted in deteriorating health for those attorneys who remain.

11. The granting of the request for a stay of execution and for a reasonable time to prepare post-conviction pleadings is consistent with the recommendations of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (the Powell Commission) and the American Bar Association Task Force on Death Penalty Habeas Corpus, and the preliminary draft of the Florida Bar Special Commission. Pursuant to Rule 3.850, a specific time period has been established for the filing of capital post-conviction pleadings. The signing of a death warrant in this case has created the chaos which so concerned Justice Powell and led him to conclude that the present system "diminishes public confidence in the criminal justice system." In contrast, the Commission found

Judicial resources are expended as the prisoner must seek a stay of execution in order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution. . . . The merits of capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review.

Powell Commission Report, 45 Cr. L. Rptr. at 3240.

12. The Powell Commission concluded, as did the American Bar Association Special Task Force and The Florida Bar Special Commission to Study Practical Aspects of Death Sentence Appeals, that the following goal should be sought:

Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant.

Id.

13. CCR has not had the opportunity to investigate any potential claims which could be raised on behalf of Defendant, nor to do any research, nor to read any transcripts, nor even to obtain Defendant's records.

14. This motion is filed in good faith and not for the purpose of delay. CCR has not filed, and cannot file, substantive pleadings in either this court or the Supreme Court of Florida. If we were to do so, the pleadings would be merely pro forma and not based upon individualized research or investigation. CCR must request that a stay of execution be entered in order to protect Defendant's rights to be heard.

15. If new counsel are appointed to represent the Defendant, then they must be provided a reasonable opportunity to prepare highly complex capital post-conviction pleadings. The Spangenberg Report prepared at the request of the American Bar Association specifically for CCR suggests that the average time needed to prepare a Rule 3.850 motion to vacate judgment of

conviction and sentence of death is 500 attorney hours. This time does not include additional time needed to prepare a habeas corpus pleading in the Supreme Court of Florida.

16. CCR is in the process of investigating and drafting Rule 3.850 motions in eight (8) new cases, excluding that of the Defendant. Given CCR's caseload conflict, CCR could not have filed this motion at an earlier date because CCR anticipated that as many as five (5) of these cases would be undertaken by volunteer pro bono counsel. This belief was predicated upon a joint recruitment campaign initiated to assist CCR in June by the Volunteer Lawyers' Resource Center of Florida and the American Bar Association Capital Punishment Project. Unfortunately, the extensive 3-month recruiting campaign conducted by these two (2) organizations proved to be totally unsuccessful. Additionally, CCR could not have predicted the fiscal crisis of the state resulting from the shortfall in general revenues. If as noted by Justice Powell, the fundamental requirement of the criminal justice system is fairness, then the circumstances of this case dictate that a stay of execution be granted.

17. This is a 1991 case absent the signing of a death warrant. Where the death penalty is involved, fairness means a searching and impartial review of the propriety of the conviction and sentence. The Defendant will be deprived of "fairness" if conflict counsel are not granted a reasonable period of time to

prepare post-conviction pleadings for both this Court and the Supreme Court of Florida.

18. CCR reluctantly takes this course of action because:

a. CCR recognizes that it is exceedingly difficult for any trial court to appoint conflict counsel who meet the American Bar Association's guidelines for the appointment of capital post-conviction attorneys and who are faced with the possibility of representing an inmate under active death warrant.

b. Although section 27.703 specifies that appointed counsel shall be paid from dollars appropriated to the Office of the Capital Collateral Representative, CCR has never been appropriated funds for this purpose. (See attachment.) The Department of Legal Affairs, however, has taken the position that conflict counsel under these circumstances should be paid by the Board of County Commissioners of the county where the judgment and sentence were entered. See State's Motion to Vacate Stay of Execution in Parker v. Dugger, No. 74,978 (Fla., November 9, 1989). See also Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980), Schwarz v. Cianca, 495 So. 2d 1208 (Fla. 4th DCA 1986), In Re: Directive to the Public Defender of the Seventh Judicial Circuit, 6 F.L.W. 324 (Fla. 1981); In Re: Directive to the Public Defender of the Eleventh Judicial Circuit, 6 F.L.W. 328 (Fla. 1981), and In Re: Directive to the Public Defender of the Fifteenth Judicial Circuit, 6 F.L.W. 327 (Fla. 1981).

20. The Capital Collateral Representative having certified an inability to litigate this case because of understaffing and a lack of funds also concludes that CCR attorneys cannot ethically undertake the representation of Defendant at this time.

WHEREFORE, CCR respectfully requests that a stay of execution be entered in this case, that this Court appoint bilingual conflict counsel to be paid by the Board of County Commissioners, and that conflict counsel be directed to file post-conviction pleadings in all applicable state courts within 120 days after appointment.

I certify that a true copy of the foregoing Motion has been furnished by United States Mail, first class, postage paid, to all counsel of record on October 2, 1990.

LARRY HELM SPALDING  
Capital Collateral Representative  
Florida Bar No. 0125540

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