

IN THE SUPREME COURT OF FLORIDA
CASE NO. 76,694

FILED
SID J. WHITE

OCT 22 1990

CLERK SUPREME COURT
By *[Signature]*
Deputy Clerk

SAMUEL RIVERA,
Petitioner,

vs.

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

RESPONSE TO PETITIONER'S MOTION FOR
STAY OF EXECUTION AND PETITION FOR
EXTRAORDINARY RELIEF AND FOR A WRIT
OF HABEAS CORPUS

Respondent.

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The Respondent, Richard L. Dugger, pursuant to Fla.R.App.P. 9.100(h), hereby files this response to the Petitioner's Petition for Extraordinary Relief and For a Writ of Habeas Corpus and Consolidated Motion for Stay of Execution, and, states the following:

1. On September 24, 1990, the Governor signed a death warrant for the Petitioner. Execution has been scheduled for November 28, 1990. The Warrant expires on December 4, 1990.

2. On October 2, 1990, the Petitioner filed a Consolidated Motion for Stay of Execution in this Court. This motion recited CCR's financial problems and requested that this Court enter a stay and instruct the trial court to appoint "conflict counsel" (due to CCR shortage of staff) to be paid by the Board of County Commissioners, and direct the conflict counsel to file post-conviction pleadings within 120 days after appointment. The next

day, on October 3, 1990, admittedly in order to invoke this Court's jurisdiction for entry of a stay, Petitioner filed a Petition for Writ of Habeas Corpus. See petition at p. 2. In this petition CCR stated that, "no attorney at the CCR office has been able to review anything other than the direct appeal opinions in this case." See petition at p. 4. Nevertheless, the Petition states that since, "[I]t can be presumed that Petitioner's sentencing jury was instructed in accordance with the standard jury instructions," there is a claim that said instructions shifted the burden of proof as follows:

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.C.T. 2934 (1989),
HITCHCOCK V. DUGGER, 107 S.C.T. 1821
(1987), AND MILLS V. MARYLAND, 108 S.C.T.
1860 (1988).

See petition at p. 6.

3. The Respondent respectfully submits that the petition for writ of habeas corpus and the relief requested, including the grant of a stay, should be denied. This Court has consistently held that petitions for writ of habeas corpus cannot be used to litigate issues which should have been raised

on direct appeal. Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987); White v. Dugger, 511 So.2d 554 (Fla. 1987). In fact, in the following cases, litigated by CCR, this Court has expressly held that the particular claim herein, burden shifting in the penalty phase jury instructions, is not cognizable on habeas corpus. See Jones v. Dugger, 533 So.2d 290 (Fla. 1988); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989); Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989); Porter v. Dugger, 559 So.2d 201 (Fla. 1990); Smith v. Dugger, 15 F.L.W. S81 (Fla. Feb. 15, 1990), Mills v. Dugger, 559 So.2d 578 (Fla. 1990); Correll v. Dugger, 558 So.2d 422 (Fla. 1990); Buenoano v. Dugger, 559 So.2d 1116 (Fla. 1990); Bolender v. Dugger, 564 So.2d 1057 (Fla. 1990). As Petitioner has offered no cause why these precedents are not applicable, the Respondent submits that the instant Petition for Habeas Corpus should be dismissed. As there is no colorable claim for relief in the Petition for Writ of Habeas Corpus, the motion for stay based thereon should also be denied. See Spalding v. Dugger, 526 So.2d 71, 73 (Fla. 1988) ("In order for this Court to grant a stay of execution, there must be an appeal or habeas corpus pending before this Court ...").

4. The Respondent would also note that the Petitioner is being afforded remedies in accordance with Spalding, supra at 73 ("any claim by Spalding that is unable to provide effective assistance of counsel for defendants he representes must be individually addressed by the trial court in each case). On October 3, 1990, Petitioner also filed a "Defendant's Motion for

a Stay of Execution and for Appointment of Conflict Counsel" in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. On October 5, 1990, Attorney J. Rafael Rodriguez was specially appointed to represent Petitioner in capital collateral proceedings, by the Honorable Judge Roy T. Gelber.^{1, 2} Upon information and belief, Counsel Rodriguez immediately obtained the Petitioner's files and began to diligently investigate post-conviction proceedings. On October 16, 1990, pursuant to the State's motion, these proceedings were transferred before the Honorable Martin Greenbaum, the original trial judge in this cause. On October 18, 1990 a hearing was held before Judge Greenbaum.^{3, 4} Due to the diligent pursuit of this cause by Counsel Rodriguez, the parties agreed and the trial judge concurred with the waiver of the October 24, 1990 time limit of Fla.R.Crim.P. 3.851 for the filing of post-conviction pleadings by Petitioner, until November 19, 1990. Petitioner's counsel in good faith represented that he will file a post-conviction motion on or before November 19, 1990. A tentative status hearing has been scheduled for November 26,

¹ This special appointment was prior to the receipt of any of the mail served documents by the Respondent and without any written notice of hearing.

² The State, unaware of the appointment of counsel, filed a Response, opposing the request for stay, on October 7, 1990.

³ The hearing took place at 2:00 p.m., October 18, 1990. The Respondent has been unable to obtain a transcript as of this date but will provide this Court with a copy upon receipt of same.

⁴ The Dade County Attorney's Office and CCR were notified and did appear at this hearing.


1990, when, upon request, a stay of execution will be entertained after consideration of the substantive pleadings to be filed. The parties are also scheduled for a further hearing on October 25, 1990, where a determination of payment of costs and attorneys' fees is to be made.

5. The Respondent thus respectfully submits that a blanket order by this Court granting a 120 day stay as requested by CCR is unwarranted, as this cause is being orderly pursued in the trial court in accordance with Spalding, supra, and, the only claim raised in the Habeas Corpus petition in order to invoke this Court's jurisdiction, is not cognizable in that proceeding.

WHEREFORE, the Respondent, Richard L. Dugger, respectfully requests that this Court deny the Petitioner's Petition for Extraordinary Relief and for a Writ of Habeas Corpus, and, the Consolidated Motion for Stay of Execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO PETITIONER'S MOTION FOR STAY OF EXECUTION AND PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS was furnished by mail to J. RAFAEL RODRIGUEZ, Esq., Madison Circle, 3191 Coral Way, Suite 405, Miami, Florida 33145, LARRY HELM SPALDING, Capital Collateral Representative, Office the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301 on this 19th day of October, 1990.



FARIBA N. KOMEILY

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