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IN THE SUPREME COURT OF FLORIDA

WILLIE C. HENRY,

Petitioner,

v. **Case No. 77,028**

RICHARD L. DUGGER, Secretary,
Department of Corrections,

Respondent.
_____/

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Petitioner, Willie C. Henry, is an inmate in the Florida prison system presently incarcerated at Glades Correctional Institution in Belle Glade, Florida . Petitioner Henry brought a petition for writ of mandamus in the circuit court in Leon County, challenging the Department of Corrections' denial of administrative gaintime under Section 944.276, Florida Statutes (1987), based upon a sexual battery conviction, which constituted one component of Henry's present overall commitment. In his initial petition, Henry appeared to contend that he previously had been convicted of sexual battery on two counts in 1977, but that his sentences had expired and he had been released from these sentences in 1978 from the Broward County Courthouse. (Appendix A.) The only case cited by Henry was Mayo v. Dugger, 535 So.2d 300 (Fla. 1st DCA 1988). In response to the petition, the Department filed documentation to show that Henry was received by the Department on May 31, 1977, having been sentenced to consecutive terms of 5 years and 15 years for False Imprisonment and Sexual Battery, respectively, in Case No. 76-4619 and to 10 years for Sexual Battery in Case No. 76-4213. (Appendix B.) The 10-year term in Case No. 76-4213 was to be served concurrently with the consecutive terms imposed in Case No. 75-4619. (Id.)

On June 23, 1978, Henry was returned to Broward County for a court appearance in Case No. 76-4619. (Id.) At the hearing, the Broward County state attorney announced a nolle prosequi of Case No. 76-4619 and the circuit court discharged Henry from that

case. (Id.) In error, Broward County officials released Henry, although his state prison sentence for the Sexual Battery offense in Case No. 76-4213 remained active. (Id.) On November 2, 1978, Henry was rearrested on new charges of Kidnapping and Robbery. (Id.) Henry was convicted of these new offenses and received a total of 65 years, to be served consecutively to his earlier conviction for Sexual Battery in Case No. 76-4213.

As it appeared from the petition that Henry believed that he was being denied administrative gaintime on the basis of the sexual battery conviction in Case No. 76-4619, which had been nolle prossed, the Respondent merely pointed to the as the continued viability of the second sexual battery conviction in Case No. 76-4213 as a component of Henry's active overall commitment as the "present" sexual battery conviction upon which the Department relied in denying Henry administrative gaintime. (Id.)

Although the show cause order of the circuit court did not permit a reply to the response, Henry nevertheless filed a reply in which he raised for the first time the possible applicability of Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA 1989). (Appendix C.) Henry contended that his sexual battery conviction had expired and was, therefore, a **prior** conviction which could not be used to bar him from receiving administrative gaintime, in light of the opinion in Miller, supra. (Id.) The circuit court subsequently denied Henry's petition for mandamus relief, and Henry appealed.

On appeal, Henry reasserted his belated argument that the

case of Dugger v. Miller was applicable when considering the sexual battery conviction which comprised the first component of Henry's overall active commitment. The Respondent reasserted the argument presented below, which, in essence, is that for the purposes of consideration of the award of administrative gaintime under Section 944.276, Henry's sexual battery conviction is a "present" rather than "prior" conviction, regardless of its placement in the overall commitment.

After briefing, the district court issued an order to the Respondent Appellee to clarify certain matters regarding Henry's sexual battery convictions and directed the Respondent Appellee to supplement the record with documentation from the Department of Corrections regarding Henry's sentences -- specifically, the Respondent/Appellee was directed to supply the district court with information regarding when each portion of the sentences imposed in Henry's cases was served, i.e., when the five-year false imprisonment sentence was served, when the consecutive fifteen-year sexual battery sentence was served, and when the concurrent ten-year sexual battery sentence was served. (Appendix D.) When it became apparent that the district court was going to consider Henry's argument under Miller, and in light of the district court's directive to clarify and to supplement the record with certain information, the Respondent/Appellee requested permission to supplement the record on appeal with additional factual information which would demonstrate the inapplicability of the Miller holding to the instant cause. (Appendix E.)

On August 8, 1990, the First District Court of Appeal issued its initial opinion, in which the district court made a factual determination that similar to the defendant in Miller, Henry had fully served his sentence for his sexual battery conviction. (Appendix F.) The district court went on to affirm the decision of the circuit court on different grounds -- that is, the district court concluded that the repeal of Section 944.276(1)(c) and its replacement with Section 944.277(1)(c) which excluded from the award of early release credits any inmate who "[i]s convicted, or has been previously convicted, of committing or attempting to commit sexual battery . . ." was sufficient to deny Henry the administrative gaintime to which he would otherwise have been entitled. (Id.)

Both parties requested rehearing. The district court subsequently denied both rehearing motions on September 25, 1990, and denied the motion to supplement the record previously filed by the Respondent/Appellee. (Appendix G.) Additionally, the district court returned documents filed by the Respondent/Appellee in response to the district court's order to supplement the record, indicating that the district court's order requiring supplementation of the record was not intended to included documents outside the original record below. (Id.)

On November 6, 1990, without further request of the parties, the district court withdrew its order of September 25, and to a limited extent, granted Appellee's motion for rehearing by withdrawing its opinion dated August 8, 1990, and replacing it with

a revised opinion which added a footnote at page 2 of the opinion. (Appendix H.)

On December 3, 1990, Henry filed his Notice to Invoke Discretionary Jurisdiction and this proceeding ensued.

SUMMARY OF THE ARGUMENT

Petitioner Henry contends that jurisdiction in this case is conferred under the provisions of Artcle V, Section 3(b)(3) of the Florida Constitution; however, Petitioner fails to articulate the specific circumstnaces under this section which are applicable to this case.

While Respondent concedes that there may be a conflict presented on whether Florida's early release statutes are procedural, rather than substantive, and, therefore, do not operate in violation of the ex post facto clause, in that the decision in this cause follows Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990) and Blankenship v. Dugger, 521 So.2d 1097 (Fla. 1988), which are in direct and express conflict with Rodrick v. State, 567 So.2d 906 (Fla. 2d DCA 1990), this conflict issue is already under consideration by this Court in the cases of State v. Rodrick, Case No. 76,801; Porter and Burbank v. Dugger, Case No. 76,366; and Williams v. Dugger, Case No. 76,687. Therefore, no further purpose will be served by the Court's consideration of the issue in this cause.

Moreover, because the trial court and the district court did not have a full and adequate opportunity to consider the underlying issue in this cause --- that is, the applicability of the decision in Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989) -- this Court should decline to take jurisdiction of this case. See In re Beverly, 342 So.2d 481 (Fla. 1977). Henry raised the decision in a reply which

was not permitted in the circuit court, thereby precluding the Respondent from developing a factual record to demonstrate the inapplicability of the Miller decision with regard to Henry's circumstances. Because there was no development below, and the position of the Department was raised for the first time on appeal, the district court declined to consider the argument in reaching the decision in this case.

ARGUMENT

Petitioner Henry asserts that this Court may exercise its discretion to consider this case based upon Article V, s.3(b)(3), of the Florida Constitution, which provides that the Supreme Court:

> May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

Henry does not indicate which of the above circumstances are present which would confer jurisdiction of this cause. Henry merely states that he disagrees with the ex post facto analysis of the district court as it is applied to him. He then goes on to argue the merits of his cause on the basis of the First District's opinion in Dugger v. Miller, 538 So.2d 1236 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989).

Because Henry is a layman of the law, Respondent concedes that he may not recognize his burden to demonstrate under which of the specific provisions he is proceeding and why this Court should accept jurisdiction. However, even if Henry did understand this requirement, Respondent submits that there is no basis upon which this Court should exercise its discretionary jurisdiction. The sole provision under which Henry might proceed to invoke the jurisdiction of this Court would be through express and direct conflict among district court and supreme court opinions insofar as

the ex post facto analysis is concerned. Both this Court and the First District Court have held that Florida's early release statutes are procedural rather than substantive in nature and, therefore, do not offend the ex post facto clause of either the Florida or the United States Constitution. In Blankenship v Dugger, 521 So.2d 1097 (Fla. 1988), this Court specifically addressed the administrative gaintime statute appearing at Section 944.276; in Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990),[1] the First District relied on Blankenship when it addressed the provisional credits statute appearing at Section 944.277. Similarly, in the instant case, the First District Court has relied upon the decisions in Blankenship and Miller v. Dugger insofar as the ex post facto analysis is concerned.[2] Thus, there is no conflict with regard to these particular cases. Respondent notes, however, that there is presently a conflict between the First District and the Second District Courts of Appeal on this issue, since the Second District rendered its decision in Rodrick v. State, 567 So.2d 906 (Fla. 2d DCA 1990). In Rodrick , the Second District reached a conclusion contrary to that expressed in Blankenship and Miller v. Dugger when it declared the application of Section 944.277 to an inmate whose offense was committed prior

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[1] This case, Miller v. Dugger, 565 So.2d 846 (Fla. 1st DCA 1990), should not be confused with the case of Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989), which is also cited in this brief.

[2] As Petitioner Henry has noted in his jurisdictional brief, the Respondent does not necessarily concur with the First District's application of the Blankenship and Miller v. Dugger holdings to the specific facts of this cause.

to the enactment of the statute to be barred by the ex post facto clause of the United States Constitution. However, this Court should decline to utilize this case to resolve the conflict created by Rodrick as there are presently three cases pending on the Court's docket in which this conflict is either directly or indirectly raised. See State of Florida, Richard L. Dugger v. Jeffrey Rodrick, Case No. 76,801; Christopher Porter and Raymond Burbank v. Richard L. Dugger, Case No. 76,366; and Billy Williams v. Richard L. Dugger, Case No. 76,687. No further purpose will be served if the Court accepts jurisdiction of this case and allows briefing on the merits as the issue can be more expeditiously decided in one of the above cases.

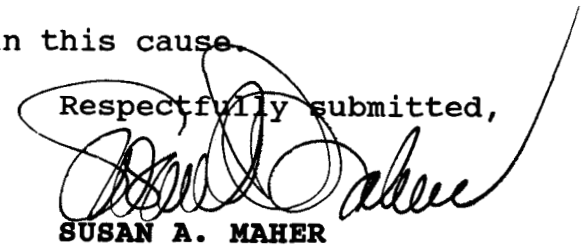
Moreover, this Court should decline to review this cause as it contains questions which the lower courts did not have a full and adequate opportunity to consider. See, In re Beverly, 342 So.2d 481, 489 (Fla. 1977). As indicated in the Statement of the Case and Facts, the Petitioner first presented his argument relying on the case of Dugger v. Miller, 538 So.2d 1286 (Fla. 1st DCA), review denied, 547 So.2d 1209 (Fla. 1989), in a reply before the circuit court which was not authorized. Henry's belated argument precluded the Department from developing the factual record necessary to demonstrate that the Dugger v. Miller case was not applicable to Henry's circumstances. Although the district court made a factual determination that Henry had technically satisfied the sentence for his sexual battery conviction and, thus, appeared similarly situated to the inmate in the Dugger v. Miller case, the

Court specifically amended its original opinion to recognize that the Department of Corrections has interpreted Section 917.012, Florida Statutes, in such a fashion that an inmate may still be eligible for, or still be subject to, treatment under the statute, even though that inmate may have technically satisfied his sentence for the sexual offense. (Appendix H at footnote 1.) The district court declined to consider this argument, however, as it considered it to be one raised for the first time on appeal. Respondent believes that the decision in Dugger v. Miller, supra, should not have been considered by the district court at all as such consideration required development of a factual record to support the Department of Corrections' interpretation and application of Chapter 917 with regard to sex offense convictions which represent satisfied components of overall active commitments. Because Henry improperly raised the decision in Dugger v. Miller in a reply which was not permitted, the Department was not afforded an opportunity to develop the factual record or address the applicability of the Miller decision. Because neither the trial court nor the appellate court had a full and adequate opportunity to consider the issues in this case, this Court should decline to exercise its discretionary jurisdiction, even if it considers conflict apparent between the decisions of the First and Second Districts regarding the ex post facto issue raised in this cause.

CONCLUSION

Wherefore, for the foregoing reasons, this Court should decline to exercise its discretion to review the decision of the First District Court of Appeal in this cause.

Respectfully submitted,



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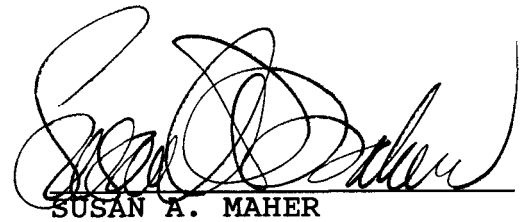
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF ON JURISDICTION** has been furnished by U.S. Mail to **WILLIE C. HENRY, #044006**, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430, on this 18th day of March, 1991.



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