IN THE SUPREME COURT OF FLORIDA

ROY ALLEN HARICH,

Petitioner,

vs. Case No. 73931

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

Respondent.

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, STAY OF EXECUTION AND STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Respondent herewith files its response in this cause by and through the undersigned counsel and asks this court to deny any and all requested relief and in support thereof states as follows:

I. PROCEDURAL HISTORY

Facts relevant to this case are set out in this court's opinion on direct appeal. Harich v. State, 437 So.2d 1082 (Fla. 1983) and in the answer brief filed herein from the denial of post-conviction relief.

II. ARGUMENT

Petitioner's first claim for relief is that the penalty phase instructions unconstitutionally shifted the burden to petitioner to prove that death was an inappropriate sentence by virtue of prosecutorial argument and judicial instructions which informed the jury that death was the appropriate sentence unless "sufficient mitigating circumstances exist that outweigh aggravating circumstances" (R 859, 914). Petitioner relies on the recent decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc) as a change in law to excuse earlier presentation of the claim. Petitioner also hopes to provoke a stay by bootstrapping on Blystone v. Pennsylvania, 88-6222 in which certiorari has been granted by the United States Supreme Court.

As recently as yesterday this court in Eutzy v. State, No 73, 894 (Fla. March 28, 1989) found such claim procedurally barred as an issue that could have been raised on direct appeal and should have been raised within the two year period under Florida Rule of Criminal Procedure 3.850 as the facts underlying the claim should have been known within that period and prior to direct appeal. See, also, Jones v. Dugger, 533 So.2d 290 (Fla. 1988). Certainly they could have been known at the time Harich filed his first Rule 3.850 motion. There has long been a state law basis for this claim, see, Jackson v. Wainwright, 421 So.2d 1385, 1388 (Fla. 1982), and no excuse to await the decision in Adamson. Dugger v. Adams, 3 FLW Fed S105 (Feb. 28, 1989). Moreover, the decisions of intermediate federal courts are not susceptible to retroactive application. Witt v. State, 387 So.2d 922, 930 (Fla. 1980). The granting of certiorari in an unrelated case does not create a sufficient change in the law to delay finality. Moreover, the Pennsylvania death penalty statute is different than Florida's. The Pennsylvania statute mandates "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance ... and no mitigating circumstance." Com. v. Blystone, 549 A.2d 81 (Pa. 1988). Any decision in Blystone would have no ramifications as to this state.

The second claim for relief presented by petitioner is that the murder was not cold, calculated and premeditated as defined by Rogers v. State, 511 So.2d 526 (Fla. 1987). Petitioner contends that since his direct appeal and first Florida Rule of Criminal Procedure 3.850 motion this court in Rogers redefined the "cold, calculated and premeditated" aggravating circumstance to require proof beyond a reasonable doubt of a careful plan or prearranged design. Rogers is thus a change in law requiring not only reconsideration of this aggravating factor in petitioner's case but resentencing since this factor is not supported by the evidence. Petitioner also reasons that the "cold, calculating and premeditated" aggravator is also defective under Maynard v.

Cartwright, 108 S.Ct. 1853, 1959 (1988) since at the time of petitioner's sentencing there was no principle limiting application of the factor as required under Maynard.

Respondent would first submit that the petitioner has chosen the wrong vehicle to bring this claim to the attention of the court. The purpose for Florida Rule of Criminal Procedure 3.850 is to provide a method of reviewing a conviction based on an alleged major change of law. Witt v. State, 387 So.2d 922 (Fla. 1980). Appellate courts are reviewing, not fact-finding courts. Hall v. State, 14 FLW 101, 103 (Fla. March 9, 1989).

In Rogers this court defined the cold, calculated, and premeditated aggravating factor as requiring proof beyond a reasonable doubt that the murder was the result of a careful plan or prearranged design. 511 So.2d 526 (Fla. 1987). Prior to Rogers it was acknowledged that this aggravating circumstance was not to be utilized in every premeditated murder prosecution but applies in those murders which are characterized as execution or contract murders or witness-elimination murders, although that description is not all inclusive. What has always been required for application of this aggravating circumstance is heightened premeditation. Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984) Rogers simply held that such heightened premeditation must bear the indicia of "calculation" something already obvious from the aggravating factor itself (cold, calculated and premeditated). Such definitional fine-turning would have no altering affects upon the application of this factor as no time frame has been juxtaposed upon such careful planning or prearranged design so as to make this factor apply to only a new class of cases. In Eutzy v. Dugger, No. 73,790 (Fla. March 28, 1989), this court acknowledged that the holding in Rogers did not amount to a"jurisprudential upheaval" requiring retroactive application and that the definition of the term "calculated" adopted in that case was merely an "evolutionary refinement" in the law which is inadequate to abridge the finality of judgment. Thus, the holding in Rogers is not a change in law so as to allow the raising of this claim in a second petition for writ of habeas

corpus. Maynard v. Cartwright, provides no change of law basis to raise this claim as that case applies only to the aggravating factor that the homicide was heinous, atrocious or cruel. Jones v. Dugger, 533 So.2d 290 (Fla. 1988). The contention that this factor is defective under Maynard because at the time of sentencing there was no principle limiting application of the factor is a frivolous one and has been previously litigated and rejected, see Harich v. Wainwright, 813 F.2d 1082, 1102 (11th Cir. 1987), and deserves no reconsideration.

Petitioner's third claim for relief is that the "heinous, atrocious and cruel" aggravating circumstance was applied to his case without articulation or application of a narrowing principle in violation of Maynard v. Cartwight, 108 S.Ct. 1853 (1988).

This court has previously barred such claim as one that should have been raised on direct appeal or in a first Rule 3.850 motion. Hall v. State, 14 FLW 101, 103 n.1 (Fla. March 9, 1989). In this case it also could have been raised in a prior habeas petition. This claim is procedurally barred. Petitioner cannot claim the novelty of his legal claim as cause for not having raised the issue earlier because the Supreme Court in Cartwright specifically based its holding on a reading of Godfrey v. Georgia, 446 U.S. 420 (1980), which was released prior to the time of trial. Richardson v. Johnson, 3 FLW Fed. C142 (11th Cir. Jan. 17, 1989). The lower court Cartwright cases were also available, see, Cartwright v. State, 695 P.2d 548 (1985) and Cartwright v. State, 708 P.2d 592 (1985), so that there was a state law basis to raise the claim as well under Dugger v. Adams, 3 FLW Fed. S105 (Feb. 28, 1989). That there was a basis for bringing this claim prior to Maynard is evidenced by the fact that the claim was previously raised (this aggravating factor was attacked on direct appeal and this same argument raised on the first Ruled 3.850 motion, which this court found barred) and decided, see, Harich v. Wainwright, 813 F.2d 1082, 1104 (11th Cir. 1987) and all arguments now made could have been raised and decided previously and do not warrant reconsideration.

As the above arguments aptly demonstrate there is no basis for relief and no reason to stay the pending excecution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Extraordinary relief, for a Writ of Habeas Corpus, Stay of Execution and Stay of Execution pending disposition of Petition for Writ of Certiorari has been furnished by mail to: John Chapman, Esquire, Larry Helm Spalding, and Billy H. Nolas, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FL 32301, on this 29th day of March, 1989.

MARGENE A. ROPER
Of Counsel