

IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM HAMBLLEN,
Petitioner,

v.

CASE NO. 76,315

RICHARD L. DUGGER,
Respondent.

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FILED

JUL 16 1980

RESPONSE IN OPPOSITION TO
APPLICATION FOR STAY OF EXECUTION

FILED
JUL 16 1980
V. DEC

COMES NOW Respondent, Richard L. Dugger, by and through undersigned counsel and files this Response in Opposition to Hamblen's Application for Stay of Execution, and would show:

(1) Hamblen, as well as other death row inmates, to-wit: Jerry White, now assert that the willfull negligence and incompetence of the Department of Corrections caused the torture execution of Mr. Tafero, and that since "nothing has been done to correct the situation", it "will" happen again. Hamblen asserts further that "the events of Tafero's execution were not an accident but were the result of negligence. The DOC has taken no corrective action but has instead chosen to keep its files, records and machinery hidden. The DOC's refusal to make repairs is willfull, as the claim alleges." (Hamblen's motion).

(2) In Hamblen's supplemental application for stay of execution filed in the trial court, Hamblen maintained that since the State "did not ever offer to disclose the material" sought

and "in fact refused to abide by any of the many telephonic and written Chapter 119 requests that the CCR office has made" that the recent developments, to-wit: Barton's letter dated July 11, 1990, informing CCR that materials they sought had been compiled, mandated a stay in order that Hamblen's counsel could send an investigator to the Florida State Prison on July 13, 1990, "who shall inspect and copy the materials."

(3) It would appear CCR anticipates additional information will be forthcoming upon which to rely as evidence that CCR's original premise that the electrode in the headpiece utilized in electrocutions is faulty. Hamblen and others have submitted the affidavits of six inmates who said sometime prior to May 4, 1990, Tafero's execution, inmates may or may not have worked on the headpiece. The genesis of the headpiece controversy arose when the propoerted expert, Fred A. Leuchter, Jr., executed an affidavit on June 13, 1990, indicating that he had, in 1986, spoke with a Mr. Robin Adair concerning supplying equipment, specifically a new headpiece and leg electrode for Florida's electric chair.

Mr. Leuchter, in his affidavit, indicated that "after hearing that there were unusual circumstances involving the execution of Jesse Tafero, I contacted Mr. Barton's office on May 5, 1990, and inquired again as to the defective equipment originally discussed in 1986. At that time, Mr. Dexter advised me that the problem with the last electroction had not been corrected, and that the Department of Corrections was once again interested in retaining my services. . . ." (Hamblen's appendix at page 30).

Consequently, as a result of Mr. Adair's affidavit and Mr. Leuchter's affidavit, the concerns regarding the electrodes utilized in Florida's electric chair became the subject matter of much scrutiny. Not content with the official report that an inappropriate synthetic sponge had been substituted for the natural sponge in the chair headpiece, Hamblen, through his counsel, as well as other death row inmates, perpetuate the myth that DOC did not properly investigate nor discern the alleged irregularity which accompanied the Tafero execution on May 4, 1990.

As a result of this continuing allegation, a federal district court judge in Orlando on June 21-22, 1990, conducted an evidentiary hearing in the Buenoano case, exploring Hamblen's counsel's "speculation" as to the alleged malfunction in Tafero's execution. The court, after a full, two-day hearing, ascertained that based on the evidence presented by both the State and the defense:

The Court finds that the polyurethane sponge very likely burned and melted during the execution of Jesse Tafero, causing the smoke and flames. DOC officials have assured this Court that this form of artificial sponge will no longer be utilized in a Florida electrocution. In addition, the Court notes that Mr. Leuchter misquoted the statement contained in the affidavit of Dr. Kilgo in arriving at his opinion that the head electrode separated during Mr. Tafero's execution. Mr. Leuchter equated Dr. Kilgo's use of the term 'dislocation' in Dr. Kilgo's affidavit with the term 'separation'. In particular, the Court finds that Mr. Leuchter inaccurately surmised from Dr. Kilgo's reference to a 'dislocation of the electrode' that the head electrode must have separated in two pieces.

Buenoano v. Dugger, Order dated June 22, 1990, page 81, n.35.

The court further found that:

The head and leg electrodes have been inspected and tested by an electrician who was not in the employ of DOC. This individual, who was qualified as an electrician at the hearing without objection, testified that both electrodes were without defect and, in fact, were excellent conductors of current. Accordingly, this Court finds that the electrodes are in sufficient condition to properly conduct the high voltage electricity for which they were designed. Other testimony reflects that the proper type of sponge has now been employed.³⁴

³⁴ Contrast to the testimony presented by the Respondents, the Court finds the testimony presented by Petitioner to be unreliable. In particular, Fred Leuchter offered several theories of the cause of Mr. Tafero's unusual execution, based, **inter alia**, upon the post-mortum photographs of Tafero's corpse, the news accounts of the electrocution, the report to the Governor and the information supplied to him by another witness for Petitioner, Robin Adair. E.g., Petitioner's exhibits 10-16. Mr. Leuchter testified that he felt the problem in Mr. Tafero's execution arose from a defective head electrode and that the same problem might occur during subsequent executions including the execution of Petitioner.

Buenoano v. Dugger, Order dated June 22, 1990, pages 80-81.

With regard to post-Tafero execution testing, the court observed:

Furthermore, the evidence presented at the hearing demonstrated that the DOC has tested, or had tested, an insured that all equipment

involved in electrocuting a condemned inmate is in proper working order. Respondent's have come forward to the satisfaction of this Court with sufficient evidence to negate any constitutional claim of cruel and unusual punishment and to negate the contention that the unusual events accompanying Mr. Tafero's execution will probably occur again.

Buenoano v. Dugger, Order dated June 22, 1990, page 81.

Following the June 21-22, 1990, hearing in federal court in the **Buenoano** case, Hamblen's counsel secured the affidavits of six inmates at Florida State Prison who may or may not have seen the headpiece being repaired in April 1990. That is the sum total of their observations.¹

Contemporaneous to these events, a similar challenge to Alabama's electric chair occurred. Therein, in the **Wallace Norrell Thomas** case, Mr. Thomas asserted that:

Alabama's use of an antiquated electric chair with untrained personnel was resulting in physically and psychologically torturous executions that violated the Eighth Amendment's prohibition against cruel and unusual punishment.

An evidentiary was held in the United States District Court for the Southern District of Alabama on July 9, 1990. As a result of the evidentiary hearing conducted therein, the District Court Judge, Alex Howard, Jr., made a number of findings of fact and

¹ Additionally, CCR, counsel for Buenoano and now for Hamblen, had full opportunity and did explore the credentials and work contracts of the master electrician Tom Brandies. They now argue that Mr. Brandies' testimony was inaccurate. The finder of fact; to-wit: Judge Fawsett, decided the credibility issues regarding Mr. Brandies' testimony. The nit-picking engaged herein does not and can not change that result. Moreover, CCR did not need the public record statute to ascertain whether Mr. Brandies ever worked on DOC projects. Mr. Brandies testified that he did and the firm for which he does contract work also had DOC contracts. **Buenoano** hearing, p. 682-63, cross-examination pps. 747-751.

conclusions of law and concluded that Alabama's electric chair could be utilized in a constitutional manner. (Attached hereto and made a part hereof as Respondent's Appendix "A" is a copy of Thomas v. Jones, Case No. **90-0517-AH-C**, dated July 10, 1990).

Included in the Alabama's response to said allegations was an affidavit prepared by Fred A. Leuchter. (Attached hereto and made a part hereof as Respondent's Appendix "B" is a copy of the affidavit of Fred A. Leuchter, executed on July 5, 1990). Mr. Leuchter's affidavit reflects that he had testified as an expert witness in the Buenoano case in Orlando, Florida, on June **21-22, 1990**, and that his contact with Alabama was as "a result of his contacting the Alabama Department of Corrections concerning the problems that arose in the Horace Franklin Dunkins' execution on July **14, 1989**." As a result of his entrepreneurship, Mr. Leuchter contracted to build a new electric chair for Alabama. However, as the affidavit reflects, Mr. Leuchter's new electric chair would not be ready in time for the execution of Mr. Thomas set for **12:01** a.m., July **13, 1990**. Mr. Leuchter's affidavit reflects:

Alabama's electrocution equipment is old, but it is the same type of equipment that most electrocution states have and use to carry out electrocutions. As long as everything is done correctly by the Department of Corrections personnel carrying out the electrocution, there will be not [sic] problem with the operation of Alabama's electric chair. The problem which, in my opinion, existed with the electrodes during Florida's electrocution of Jesse Tafero earlier this year does not exist in Alabama. So long as the electrodes of Alabama's electric chair are put on the inmate tightly, there will be no problem with these electrodes.

There is nothing about Alabama's existing electrocution system that poses any danger that pain and suffering will be inflicted upon an inmate during an execution. More specifically, there no reason to believe that anything will occur during the scheduled execution of Mr. Thomas that will cause him to feel pain.

I have signed a contract with the Alabama Department of Corrections to install a new electrocution system. That new system cannot be finished and installed for at least three months. **The new electrocution system is not being installed because the present one cannot be expected to perform in a competent and humane fashion.** Instead, the new electrocution system is being installed because the existing system is old and will eventually have to be replaced because the new system will make is easier on the Department of Corrections employees who are charged with carrying out an execution.

Leuchter's July 5, 1990, affidavit, pages 3-5. (emphasis added).

The Eleventh Circuit Court of Appeals, in **Thomas v. Jones**, Case No. 90-7471, decided July 11, 1990, denied all relief to Mr. Thomas and specifically held:

Two issues have been raised in this successive petition. The first deals with the Alabama electric chair, its age, condition and the staff which maintains and operates it. The district court held an evidentiary hearing, considered extensive testimony and exhibits, made and entered findings of fact and conclusions of law and denied relief. The record fully supports these findings. . . .

The requested relief is denied.

(Attached hereto and made a part hereof as Respondent's Appendix "C" is the Order of the United States Court of Appeals for the Eleventh Circuit).

On July 12, 1990, Thomas' counsel filed an emergency stay motion in **Thomas v. Jones**, in the Supreme Court of Alabama, asserting that:

5. On July 10, 1990, the federal district court denied Mr. Thomas' petition and motion for stay of execution. In so doing, the court relied on the representations and conclusions of two State experts that the electrocution should proceed as scheduled.

6. Today, one of those experts, Fred A. Leuchter, came forward to say that in his opinion the electrocution should not go forward. Mr. Leuchter designs electrocution equipment for numerous states and is familiar with the apparatus in place in Alabama. **Mr. Leuchter has stated in the affidavit attached to this motion that Alabama's electric chair is old and subject to failure, that it is difficult to use, and that there is substantial room for human error in the operation of the equipment.** These conclusions shatter the State's assertions and were not known to the federal court when it considered this question.

7. On the contrary, the federal court relied on an earlier affidavit of Mr. Leuchter to find that Alabama's electric chair will effect a humane execution if 'properly operated'. **Thomas v. State, No. 90-1517-AH**, S.D. Alabama July 10, 1990, slip opinion at 16, 17-18. It further relied on the representations of the State's engineering expert, Michael Morse, **id**, who had reached his own conclusions about the ability of the chair to perform properly after consulting Mr. Leuchter. (Transcript of July 9, 1990, hearing, at 196).

8. The State's expert also disclosed today that he had proposed to Alabama prison officials immediately after the execution in this case had been scheduled that he could supervise the scheduled execution with the assistance of a technician, clean and inspect the equipment and otherwise minimize the risk of potential error in the execution. The Department of Corrections was very receptive to this proposal and approved Mr. Leuchter's supervision of the scheduled execution.

Nonetheless, the proposal was rejected by state officials.

9. Mr. Leuchter now reveals that his contract to build a new electric chair, and the State's promises, have been withdrawn. Mr. Leuchter contends that he has been an unknowing instrument of the State in this litigation. The critical opinions which he has made known today were not presented earlier to any court.

10. Mr. Leuchter is very concerned that his previous affidavit considered by the federal court has improperly influenced the outcome of federal litigation concerning the Alabama electric chair and Mr. Thomas' scheduled execution. Mr. Thomas has claimed that the Alabama electric chair is old and defective. Widespread burns on the bodies of those most recently electrocuted reveal excessive amperage and suggest electrical leakage and other misuse. **The botched execution of Horace Dunkins in 1989--in which prison staff plugged the chair in incorrectly the first time, thus subjecting the inmate to a form of "mock" execution--is indicative of the lack of knowledge and training of the execution team staff.** Mr. Thomas has claimed that the chair is difficult to operate and that there is ample room for a similar grievous error such as that which occurred during the electrocution of Horace Dunkins.

11. **The federal court determined that Alabama's personnel could properly carry out their duties (despite having thoroughly botched the execution of Horace Dunkins through their ineptitude) by reliance on the expert opinion of Mr. Leuchter who today states that his opinion is that Mr. Thomas' execution should be stayed.**

(Attached hereto and made a part hereof as Respondent's Appendix "D" is the Emergency Stay Motion in **Thomas v. Jones** with the accompanying affidavit of Mr. Leuchter retracting his earlier affidavit that Alabama's electric chair was in working order).
(Emphasis added).

There can be little doubt that Mr. Leuchter, to whom Hamblen's counsel has relied, gives "expert" testimony as to what is wrong with Florida's electric chair based on financial arrangements. He is an opportunist (See Appendix "E"), and his allegations regarding the "flawed" electrodes" used by the Florida's DOC to operate the electric chair are predicated on this man's incredible speculation.

Hamblen has made much to do about the fact that DOC has failed to comply with its public records request. That assertion should not be the excuse or the method to hold the State hostage when the underpinnings of the claim presented by Buenoano, Squires, White and Hamblen is sheer speculation.

Beyond per adventure, pursuant to this Court's recent decisions, CCR, representing death row inmates, has the right to view non-exempt records of DOC.² Their efforts at acting on their public records request has been anemic. There has not even been a dollop of effort prior to this eleventh hour flurry.³

Moreover, any contention that the Department of Corrections has willfully and neglectfully maintained Florida's electric chair is without evidentiary support.⁴ To suggest that this Court has abrogated its responsibility as set forth in **Marbury v.**

² See attached Respondent's Appendix "F" - list of copies provided pursuant to public records request, July 13, 1990.

³ Hamblen, et al., have complained that they did not have access to viewing the electric chair. No where in the Public Records Act is inspection or testing of Florida's electric chair required.

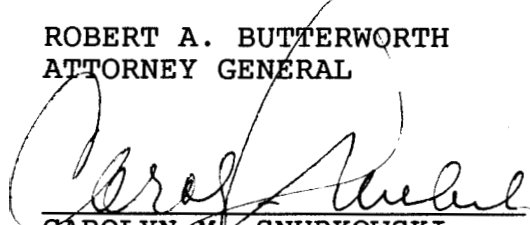
⁴ Judge Fawsett found to contrary. **Buenoano v. Dugger, supra,** p.81.

Madison, 5 U.S. (1 Cranch) 137 (1983), is error. Note: Palsgraf v. Long Island Railroad Company, 249 N.Y. 511, 164 N.E. 564, 59 A.L.R. 1253 (N.Y. October 9, 1928) (the risk reasonably to be perceived defines the duty to be obeyed).

Based on the foregoing, it is respectfully submitted that Hamblen's application for stay of execution should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

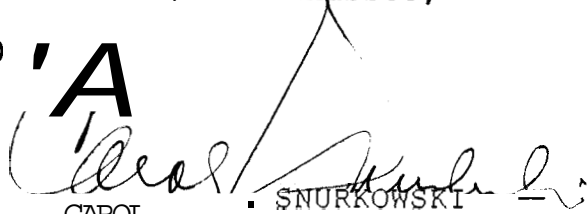

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Billy Horatio Nolas, Esq., Office of the Capital Collateral Representative 1533 South Monroe Street, Tallahassee, Florida 32301, this 14th day of July, 1990.


CAROLYN M. SNURKOWSKI
Assistant Attorney General