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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FELIPE BURGOS,

Petitioner,

-vs-

SUPERINTENDENT NAPOLI,

Respondent.

**RESPONSE TO PETITIONER'S
REQUEST FOR A STAY**

Case No.: 07-CV-0125s

TO THE HONORABLE MICHAEL A. TELESKA, United States District Court

Judge for the Western District of New York:

1. WENDY EVANS LEHMANN, Assistant District Attorney for Monroe County, on behalf of Respondent James Conway, opposes petitioner's request for a stay. Petitioner has failed to establish good cause for not previously exhausting the claim he now is attempting to exhaust and his claim is entirely meritless.

2. This response is based upon personal knowledge and information and belief, the source of which is my conversations with members of my office and review of the contents of our file.

3. On or about November 11, 2007, petitioner filed a request to a stay his petition while he attempted to exhaust additional claims in State Court by means of a CPL § 440.10 motion.

4. Petitioner's request for a stay should be denied as he has failed to establish good cause as to why this claim was not previously exhausted. Additionally, petitioner's new claim is entirely without merit. See Rhines v. Weber, 544 US 269, 277 (2005).

5. The Supreme Court recently explained in Rhines v. Weber, *supra*, that a stay

of a habeas proceeding is only available in limited circumstances. 544 US at 277. Petitioner must establish good cause for his failure to previously exhaust his claim in state court; must establish that the claim is not “plainly meritless;” and also must establish that the delay was not the result of dilatory tactics. Rhines, 544 US at 277. Petitioner here has failed to meet this heavy burden.

6. Petitioner has failed to set forth any facts to support a finding of good cause for his failure to previously exhaust his ineffective assistance of counsel claim. Petitioner was in Supreme Court, Monroe County, in February, 1999. The facts supporting petitioner’s claim that he was denied effective assistance of appellate counsel would have been clear at that point, as would his claims regarding the theories of murder the jury was instructed to consider and his allegation of prosecutorial misconduct.. Petitioner offers no excuse for not filing the CPL § 440.10 motion until October, 2007, some eight and one-half years after the claim would have arisen. Good cause simply does not exist for the delay, therefore the request for a stay should be denied.

7. Additionally, petitioner’s CPL § 440.10 claims are “plainly meritless.” Petitioner clearly received effective assistance of counsel. Trial counsel provided exceptional representation. Petitioner’s claim that counsel failed to preserve a claim regarding the different theories of murder which the jury considered is without merit. As the Appellate Division, Fourth Department, held in deciding his direct appeal, the jury in this case was properly presented with two different theories of murder, intentional and depraved. People v. Burgos, 19 AD3d 1126 (4th Dept. 2005). Counsel cannot be faulted for failing to preserve a meritless issue. Additionally, petitioner’s claim that counsel was ineffective for failing to call a witness, is not supported by sufficient facts in him CPL §

440.10 motion and is otherwise a simple disagreement with trial strategy which should not be second-guessed by a reviewing court. In sum, trial counsel's performance was reasonable and he was not denied effective assistance of counsel.

8. Defendant's remaining contentions are not properly brought by way of a CPL § 440.10 motion as they concern matters which were contained on the record from his trial and were considered and rejected by the Appellate Division, Fourth Department on direct appeal. CPL § 440.10(2)(a) and CPL § 440.10(2)(c). Defendant's CPL § 440.10 is "plainly meritless."

CONCLUSION

Petitioner's motion for a stay should be denied.

Dated: December 21, 2007

Respectfully submitted,
MICHAEL C. GREEN
District Attorney of Monroe County
Ebenezer Watts Building/Suite 832
Rochester, New York 14614



WENDY EVANS LEHMANN
Assistant District Attorney

To: Felipe Burgos, 99-B-1427

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FELIPE BURGOS,

Petitioner,

-vs-

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Respondent.

CERTIFICATE OF SERVICE
BY MAIL

CYNTHIA A. BELLUCCO, is not a party to this action, is over the age of eighteen (18) years and resides at Rochester, New York.

That on the 21st day of December, 2007, deponent served one copy of the Response To Petitioner's Request For a Stay upon, Felipe Burgos, Inmate No. 99-B-1427, petitioner in this action at, Clinton Correctional Facility, Route 374, Cook Street, P.O. Box 2000, Dannemora, New York 12929-2000, by depositing a true copy of the same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: December 21, 2007

Cynthia A. Bellucco

CYNTHIA A. BELLUCCO

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