IN THE SUPREME COURT OF
THE STATE OF FLORIDA

JAMES A. CARD,

Petitioner,

v.

LOUIE L. WAINWRIGHT,

Secretary, Dept. of Corrections, State of Florida, Respondent

Case No. 68846

CAPITAL CASE: EXECUTION IS EMINENT, SCHEDULED FOR WEDNESDAY, JUNE 4, 1986, AT 7 A.M.

PETITION FOR EXTRAORDINARY RELIEF,
A WRIT OF HABEAS CORPUS AND A STAY OF EXECUTION

LARRY HELM SPALDING
Capital Collateral Representative

STEVEN H. MALONE
Senior Assistant

MARK A. EVANS
Assistant

Office of Capital Collateral
Representative
University of South Florida-Bayboro
140 7th Ave. So. Coquina Hall Room 216
St. Petersburg, Florida 33701
813-893-9186

I.

INTRODUCTION

This petition challenges the conviction and imposition of sentences upon the petitioner by a trial court acting without jurisdiction. The trial court was divested of jurisdiction when it changed venue to a different circuit, and was not empowered by any lawful authority to conduct a trial in the transferee circuit, but conducted the trial anyway. The facts are set forth more fully below.

II.

JURISDICTION

This Court's jurisdiction derives from the Constitution of the State of Florida. Article V, Sec. 3(b)(1), (7), and (9), and Rule 9.030(a)(3), Florida Rules of Appellate Procedure, and in Article 1, Sec. 16, of the Constitution of the State of Florida. While relief under Fla.R.Crim.P. 3.850 is available, the issue presented is one of jurisdiction which can be raised at any time in any court, and is appropriate for this Court to hear.

A writ of habeas corpus has been justly labeled "the great writ", because of its historic role as a guarantor of liberty. See Generally Allison v. Baker, 152 Fla. 274, 11 So.2d 578 (1943); W. Duker, a Constitutional History of Habeas Corpus (1982). For this reason, both the state and the federal constitutions explicitly provide for the writ. Florida Const. Art. V, Sec. 3(b)(9); Art. I, Sec. 13; United States Constitution Art. I, Sec. 9, clause 2. "Essentially, it is a writ of inquiry, an issue to test the reason or grounds of restraint or detention." Allison, 11 So.2d 579. Under our constitutional system, detention which violates the state or federal constitutional is illegal, and reviewable by writ of habeas corpus. The infringement of the fourteenth amendment to the United States Constitution, and Art. I, Sec. 9 and 14 of the State Constitution is therefore properly cognizable in this Court under Art. V. We have applied for an

original writ in this Court because of the fundamental nature of the jurisdictional claim. While the issue is also cognizable under Rule 3.850, the presence of jurisdiction in the trial court under Rule 3.850 does not divest this Court of its constitutionally authorized jurisdiction. See United States v. Hayman, 342 U.S. 205 (1952) (interpreting 28 USC Sec. 2255, the Model for Rule 3.850); Mitchell v. Wainwright, 155 So.2d at 68, 870 (Fla. 1963) (enactment of Rule 3.850 does not suspend the writ of habeas corpus if it affords the same rights available under the writ).

In addition to raising this claim as a "straight" habeas issue, petitioner alternatively contends his appellate attorney was ineffective for failing to raise the issue on appeal, where it also was cognizable. Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985); Knight v. State, 364 So.2d 997 (Fla. 1981). This Court has jurisdiction over claims of ineffective counsel on appeal. Art. V, Sec.(3)(b), (1), and (9), Constitution of the State of Florida.

III.

FACTUAL BASIS FOR RELIEF

The crimes for which the defendant was charged occurred in Bay County, Florida, and it was there he was indicted. (ROA 1-2, 9). Because of the widespread publicity in this case, trial counsel moved for change of venue (ROA 72). The motion was granted orally at a hearing conducted September 28, 1981 (R. 212-250, ROA 73). The Court entered a written order dated September 28, 1981, granting the venue changed and transferring venue from Bay to Okaloosa County, "pursuant to the provisions of Chap. 47, Fla. Stat." (ROA 80).

At the time of the venue change (and presently) Bay County was in the Fourteenth Judicial Circuit, and Okaloosa County was in the First Judicial Circuit. Sec. 26.021, Sec. 26.22 Fla. Stat. (1981), Sec. 26.021, Fla. Stat. (1982) supp. Judge W. Fred Turner is a circuit judge authorized to conduct trials only in

the Fourteenth Judicial Circuit.

Subsequent to the order transferring venue, the trial court, the Honorable W. Fred Turner presiding, entered a number of orders on substantive issues, and conducted the trial of the case in Okaloosa County, Florida, in the First Judicial Circuit.

The trial court had no jurisdiction to try this case in the first judicial circuit. It was authorized to serve only in the Fourteenth Judicial Circuit. Art. V, Florida Constitution. The only constitutional manner for this trial to have been held in the First Judicial Circuit was for a judge of that circuit to conduct the trial, or for the Chief Justice of the Florida Supreme Court to appoint Judge Turner to hear the case in the First Circuit, pursuant to Art. V, Sec. 2 of the Florida Constitution and Rule 2.030, Rules of Judicial Administration. Trial was conducted in the First Circuit by a judge of the Fourteenth Judicial Circuit, and the record demonstrates that the Chief Justice issued no order authorizing Judge Turner to conduct the trial in that circuit.

After Mr. Card was convicted in the First Judicial Circuit, Judge Turner issued an order transferring the file back to Bay County, Florida, the Fourteenth Judicial Circuit, and there imposed sentence. (R. 166-79). Judge Turner was also without jurisdiction to issue such an order at that time.

IV.

NATURE OF RELIEF SOUGHT

Mr. Card seeks immediate relief in the form of a stay of execution in order to preserve this court's jurisdiction over his constitutional claims, and this court's order granting a new trial or a new appeal.

V.

BASIS FOR RELIEF

A. THE CHANGE OF VENUE ORDER VESTED JURISDICTION IN THE TRANSFEREE COURT

Florida courts have uniformly held that a change of venue

vests the subject matter jurisdiction of the case in the transferee court. The only dispute involves what residual authority is left in the hands of the transferor court to rule on the case, and that dispute only concerns the period between when the order transferring venue is made and when the transferee court receives the files of the case.

In Church of Scientology of California, Inc., v. Cazares, 401 So.2d 810 (Fla. 2d DCA 1981) the court held that once a judge made the decision to change the venue of the case to another circuit, it must enter an order doing so and could not retain jurisdiction over the case while merely transferring the trial. The Cazares sued the Church of Scientology and Mary Sue Hubbard in the circuit court in Pinellas County. The defendants moved for a change of venue. The circuit court ordered the trial held in Volusia County, in a separate circuit, but also ordered that jurisdiction of the case would remain in Pinellas. The Second District Court of Appeal vacated the order. "Once the court determined [that the case should be transferred], it had to enter an order transferring the action to a court of the same jurisdiction in another county. Sec. 47.141, Fla.Stat. (1979). The court's authority at that point was limited to entry of an order transferring jurisdiction." Id. Accord, Kern v. Kern, 309 So.2d 563 (Fla. 2d DCA 1975); University Federal Savings and Loan Association, 201 So.2d 568 (Fla. 4th DCA 1967).

In University Federal Savings and Loan, the court stated "Upon the venue change, the Circuit Court in Dade County became vested with complete jurisdiction of the cause which was as full and complete as if the action had been originally commenced therein." 201 So.2d at 570.

The other district courts hold that while change of venue does transfer jurisdiction of the case, the court have residual authority to rule upon non-substantive matters until the transferee court has assumed jurisdiction at which point the transferee court has complete control of the action. Hertz

Corporation v. Pugh, 354 So.2d 965 (Fla. 3d DCA 1978); Ven-Fuel v. Jacksonville Electric Authority, 332 So.2d 81 (Fla. 3d DCA 1975) (jurisdiction vests with the transferee court upon receipt of the case file). The distinctions are irrelevant for the Card case since Judge Turner obviously ruled on substantive issues and made rulings after the transferee court obtained jurisdiction.

Two cases also apply the same rule to criminal cases. In Ellard v. State, 280 So.2d 459 (Fla. 1st DCA 1973) and Talbot v. State, 283 So.2d 47 (Fla. 4th DCA 1973) the Fourth District Court of Appeal held that, where the venue of a case was moved upon motion of the defendant and ordered returned to the original circuit for sentencing upon completion of the trial, the order to return was improper and that the jurisdiction of the case remained in the circuit court in which the trial took place. "We conclude that once the cause was transferred to and actually tried in the Criminal Court of Record for Polk County, jurisdiction remained in that court for the purpose of adjudication and sentencing." 283 So.2d at 47.

The rule established in these cases applied to Mr. Card's case as well. At the latest, once the clerk at the First Judicial Circuit Court in Okaloosa County received the case file for Mr. Card, the jurisdiction of the case vested in the First Judicial Circuit. Any order not issued by a judge of the First Judicial Circuit or a properly appointed temporary judge would have no legal effect.

> B. THE POWER TO ASSIGN JUDGES TO TEMPORARY DUTY IN CIRCUITS OUTSIDE THEIR OWN LIES EXCLUSIVELY WITH THE CHIEF JUSTICE OF THE FLORIDA SUPREME COURT AND THE FAILURE TO OBTAIN SUCH ASSIGNMENT RESULTS IN A LACK OF JURISDICTION OVER THE CASE BY THE PRESIDING JUDGE.

Article V, Section 2 of the Constitution of the Sate of Florida states:

> (b) The chief justice of the supreme court shall be chosen by a majority of the members of the court. He shall be the chief administrative officer of the judicial system. He shall have the power to assign justices or judges, including consenting

> retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief justice of a judicial circuit the power to assign judges for duty in his respective circuit.

Florida Const. Article V, Sec. 2

The predecessor to this section was discussed in State ex rel. Jones v. Wisehart, 245 So.2d 849 (Fla. 1971). The older provision enumerated the positions over which the chief justice had the power of assignment. "This section authorized the chief justice . . . temporarily to assign circuit judges to judicial service on the Supreme Court, a District Court of Appeal, or another circuit court. . ." Id. at 852. In Wisehart, the court held that a statute authorizing the assignment of circuit judges by the chief judge of the circuit to temporary duty on lesser criminal courts did not violate this section of the Florida Constitution. The Florida Supreme Court noted "the Legislature is free to enact statutes in this area, so long as they are not inconsistent with the Rules of this court implementing the authority of the chief justice granted by Section 2 of Article V. . . ." Id. at 853.

Wisehart stands for the exclusivity of the power granted to the chief justice to assign judges to temporary duties. While the legislature may be free to provide for temporary assignments not of the sort mentioned in Article V, Section 2, the chief justice alone is allowed to make temporary assignments mentioned in this article. The revision of the Article in 1972 simply expanded the number of positions over which the chief justice has assignment power, and the temporary assignment of a circuit judge to another circuit is within the plain meaning of the section.

Given the exclusivity of the assignment power, it is clear that a judge has no power on his own to temporarily assign himself to another judicial circuit. A plain reading of Section 2 can yield no other interpretation, and standard practice in Florida when a judge transfers jurisdiction and wishes to follow

the case is for the judge to apply to the chief justice for a temporary assignment. The failure of Judge Turner to obtain such an assignment can only mean that he had no authority or jurisdiction to try cases in the First Judicial Circuit. He was not elected to serve there, and he had no valid temporary assignment to do so. He tried the case without jurisdiction to do so.

C. JURISDICTION REMAINS WITH THE TRANSFEREE COURT FOR SENTENCING.

Transfer of the case for sentencing back to Bay County violates case law on change of venue. Once jurisdiction vests with the transferee court, it should remain with that court for sentencing. See Talbot v. State, 283 So.2d 47 (Fla. 4th DCA 1973); Cole v. State, 280 So.2d 44 (Fla. 4th DCA 1973).

In Wasley v. State, 254 So.2d 243 (fla. 4th DCA 1971), an indictment was filed in the Ninth Judicial Circuit. Upon defendant's motion, the cause was transferred to the Sixth Judicial Circuit. Judge Cooper of the Ninth Circuit received assignment for temporary duty in the Sixth Circuit from the chief justice of the Florida Supreme Court. After his appeal failed, the defendant filed for post-conviction relief. The Fourth District Court held that when a judge had been properly given a temporary assignment to another circuit to remain with a case on change of venue and sentences the defendant in that court, a motion to vacate judgment should be filed in the court in which sentence was passed, not with the judge who passed sentence.

In Mr. Card's case, the judge transferred the action back to Bay County where it had originated and sentenced Mr. Card there. The transfer was invalid by Talbot and Cole. Jurisdiction remained in the First Judicial Circuit. Even if Judge Turner had jurisdiction to try the case in the First Circuit, his order of transfer was invalid. In Talbot and Cole, the court held that the transfer was for administrative convenience only, and that jurisdiction remained in the circuit to which the venue was changed. 283 So.2d at 48 and 280 So.2d at 45. Thus even if

Judge Turner had jurisdiction to hear the case his order did not remove the jurisdiction of the First Circuit.

D. THIS ISSUE IS COGNIZABLE NOW, AND WAS APPROPRIATE TO RAISE ON APPEAL

A failure of jurisdiction may be raised at any time. In Waters v. State, 354 So.2d 1277, (Fla. 2d DCA 1978), the defendant raised the jurisdiction of the court on appeal of an order modifying the terms of his probation. The defendant was charged with receiving stolen property in Hillsborough County Circuit Court. The Information failed to allege the value of the stolen property in the defendant's possession. The defendant pled guilty and was placed on probation. Over a year later, the court ordered his probation modified, and the defendant challenged the jurisdiction of the circuit court for the original charge since circuit courts have no jurisdiction over misdemeanors, and it was unclear from the charge that the value of the property made the crime a felony. The Second District Court of Appeals vacated the order. "Since lack of subject matter jurisdiction is fundamental error, it can be raised at any time." Solomon v. State, 341 So.2d 537 (Fla. 2d DCA 1977). Id. at 1278. See also Styles v. State, 465 So.2d 1369 (Fla. 2d DCA 1985) (Challenge to excess jurisdiction may be raised in a motion to vacate a sentence); Talbot v. State, 283 So.2d 47 (Fla. 4th DCA 1972) (District Court raised jurisdiction issue sua sponte).

E. THE CONVICTION AND SENTENCE ARE UNCONSTITUTIONAL

If a convicting court lacks jurisdiction, the conviction obviously violates the due process clause of the Fourteenth Amendment to the United States Constitution. In Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983), the petitioner had been convicted of robbery with firearms. The petitioner had been charged with this offense, but the court had reduced the charge to robbery by assault. It later revived the firearm charge. Petitioner claimed that this revivication was improper because the court lost subject matter jurisdiction over the charge when

it reduced it. The Fifth Circuit concludes "An absence of jurisdiction in the convicting court is, as Lowrey claims, a basis for federal habeas corpus relief cognizable under the due process clause. Branch v. Estelle, 631 F.2d 1233 (5th Cir. 1980); Bueno v. Beto, 458 F.2d 457, 459 (5th Cir.) cert. denied 409 U.S. 884 (1982); Murphy v. Beto, 4166 F.2d 98, 100 (5th Cir. 1969)." 696 F.2d at 337.

F. CONCLUSION

This Court should entertain this claim as either fundamental error, or hold appellate counsel ineffective for failing to raise it. A stay should be granted, and a new appeal or trial ordered.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

STEVEN H. MALONE
Senior Assistant

MARK A. EVANS
Assistant

Office of Capital Collateral
Representative
University of South Florida-Bayboro
140 7th Ave. So. Coquina Hall Room 216
St. Petersburg, Florida 33701
813-893-9186

By: Larry H. Spalding
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Gary Printy, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida, 32301, this the 2 day of June, 1986.

Larry H. Spalding
Counsel for Defendant