IN THE SUPREME COURT OF FLORIDA

NO. 72475

LARRY HELM SPALDING, Capital Collateral Representative; NORMAN PARKER, JR.; DAN EDWARD ROUTLY; ERNESTO SUAREZ; DANIEL KARR JOHNSON and ROBERT PEEDE,

Petitioners,

v.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida; THE HONORABLE FREDRICKA G. SMITH, Judge, Eleventh Judicial Circuit in and for Dade County; THE HONORABLE CARVEN ANGEL, Judge, Fifth Judicial Circuit, in and for Marion County; THE HONORABLE HUGH D. HAYES, Judge, Twentieth Judicial Circuit, in and for Collier County; THE HONORABLE GILES P. LEWIS, Judge, Fourth Judicial Circuit, in and for Clay County; and THE HONORABLE MICHAEL CYCMANICK, Judge, Ninth Judicial Circuit, in and for Orange County,

Respondents.

REPLY TO
PETITION FOR EXTRAORDINARY RELIEF,
FOR A WRIT OF PROHIBITION,
AND FOR A WRIT OF MANDAMUS

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
MARTIN J. McCLAIN
CARLO OBLIGATO
JUDITH DOUGHERTY
JULIE NAYLOR

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904)487-4376; 488-7200

I. INTRODUCTION

This Court's order of May 26, 1988, directed the attorney general to address with particularity whether the Florida Supreme Court has jurisdiction to grant the relief petitioners request.

II. JURISDICTION

This Court's authority to grant the requested relief derives from Art. V, Sec. 3(b)(7)(8) of the Florida Constitution and Rules 9.100(a) and 9.030(a)(3) of the Florida Rules of Appellate Procedure. Moreover, this Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d 1163, 1165 (Fla. 1985), and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. See Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 1987).

III. ARGUMENT IN REPLY

The State's response in this matter concedes that "this court [sic] has original jurisdiction to entertain petitions for writ of mandamus or prohibition, . . ." Id. at 2. It would be inconsistent if the State were to take the opposite position since the State has itself petitioned this Court for writs of prohibition in the context of post-conviction proceedings. See State v. Crews 477 So.2d 984 (Fla. 1985)(state application for writ of prohibition and motion to vacate stay); State v. Schaeffer, 467 So. 2d 698 (Fla. 1984)(state applications for writ of prohibition to prevent Circuit Court from granting stay). Rather than contest this Court's jurisdiction, the state instead argues that petitioners "simply fail [] to state a basis upon which relief may be granted" Id. at 2. In this regard, the State is wrong: petitioners' plea for relief is clearly meritorious

and requires that this Court exercise its inherent authority to grant extraordinary relief.

The Governor has created an intolerable situation by his having signed an extraordinary number of death warrants, all active simultaneously. His policy effectively acts to deprive petitioners of their rights to due process of law, equal protection and effective assistance of counsel.

Florida Rule of Criminal Procedure 3.850 provides every state prisoner an unqualified right to challenge his conviction and sentence. The State asserts that a "3.850 motion is civil in nature," thus this is "dispositive" as to whether petitioners are entitled to the relief they seek. Id. at 6. Whether such a motion is civil or criminal is of no consequence.

In Holland v. State, 503 So. 2d 1250, 1252 (Fla. 1987) this Court recognized that the right to due process of law governs motions for post-conviction relief under Fla.R.Crim.P. 3.850. See also Evitts v. Lucey, 69 U.S. 387, 401 (1985):

> [W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution -- and, in particular, in accord with the Due Process Clause.

The creation of Capital Collateral Representative resulted in a state protected entitlement to counsel for the purpose of pressing collateral legal proceedings commenced in a timely manner. This interest is likewise protected by due process. This state-created procedure guaranteeing the right to pursue post-conviction proceedings cannot be defeated by a constitutionally ineffective lawyer. Under the present circumstances, relating to the Governor's policy of signing death warrants, CCR may itself be unable to render effective assistance of counsel, see Strickland v. Washington, 466 U.S. 668, 687 (1984)(government "interfere[nce]...with the ability of counsel to make independent decisions about how to conduct the defense");

United States v. Cronic, 466 U.S. 648 (1984). Cf. Brown v. Allen, 344 U.S. 443, 486 (1953)(State interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S.Ct. 2639, 2646 (1986) (interference by state officials as external impediment to counsel's effective representation); see also Amadeo v. Zant, ___ U.S. ___, No. 87-5277 (May 31, 1988), slip op. at 6 (external factor impeding counsel's efforts).

Petitioners' "fundamental interest in [their] own li[ves] need not be elaborated upon." Tennessee v. Garner, 471 U.S. ___, 85 L.Ed. 2d 1, 8 (1985). The "finality of the deprivation," Logan v. Zimmerman Brush, 455 U.S. at 434, is unmatched. See Gregg v. Georgia, 428 U.S. 153, 187 (1976). Florida's statute creating CCR and delineating its responsibility constitutes a protected liberty interest in professionally adequate representation to which all indigent death row inmates are entitled. Denial of this state created right amounts to a deficiency of constitutional magnitude under the state and federal constitutions.

The state makes the preposterous argument that petitioners are not entitled to relief because they have created their own dire predicament.

> Each has, or will have, elected to institute further litigation in their cause. In doing so, they should not now be permitted to utilize the circumstances they have created to dictate how the trial courts will entertain their motions for post-conviction relief.

Response at 4 (emphasis added).

It should be patently obvious that the crisis is due to the extraordinary and arbitrary number of death warrants that the Governor has signed. The state surely cannot expect individual litigants to forego their rights to file post-conviction motions merely to slow the tempo of such litigation, thereby abandoning any and all challenges to their convictions and sentences of

death. Furthermore, it is patently improper to penalize a person for the exercise of a liberty interest. Cf. Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961); Griffin v. California, 380 U.S. 609 (1965).

ACCESS TO THE COURTS

Article I, Sec. 21 of the Florida Constitution guarantees access to the courts "without sale, denial, or delay." Rule 3.851 is intended "to provide more meaningful and orderly access to the courts when death warrants are signed." In re Florida Rules of Criminal Procedure, Rule 3.851, 503 So. 2d 320, 321 (Fla. 1987). Once established, access to the courts pursuant to these due process rights must be "adequate, effective, and meaningful," Bounds v. Smith, 430 U.S. 817, 822 (1977). See also, Giarratano, et.al v. Murray, slip op. No. 87-7518 (4th Cir. June 3, 1988) slip op. at 8 (state must provide death row inmates legal counsel in their state post-conviction proceedings; legal assistance presently available fails to meet constitutional requirement of meaningful access as set forth in Bounds).

It would be inconsistent on the one hand for this Court to hold that due process governs state post-conviction proceedings, see Holland v. State, supra, and to mandate that petitioners shall have meaningful access to the courts, but on the other hand, deny the extraordinary relief applied for -- this is the only means by which either of the former can be guaranteed.

MOTION FOR COSTS

This Court has the authority and responsibility to order the expenditure of public funds in order to protect and enforce the exercise of petitioners' rights to challenge their convictions and sentences under Rule 3.850. For example, in Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978), this court stated:

> Every court has inherent power to do all things that are necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The

> doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights

Rose, supra at 137 (footnotes omitted). Rule 3.850 is designed to remedy constitutional violations, the most fundamental of rights. The Florida Supreme Court has time and again reaffirmed this inherent power, specifically as regards the rights of the criminal defendant. See Makemson v. Martin County, 491 so. 2d 1109 (Fla. 1986)("In order to safeguard that individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.")

The authority of the courts to grant this petition derives from both Florida Statutes sec. 939.15 ("Costs paid by county in cases of insolvency,") and the Florida Rules of Criminal Procedure. The first sentence of the Rules expressly states: "These rules shall govern the procedure in all criminal proceedings in state courts . . . including proceedings under Rule 3.850 hereof. . . ." Rule 3.010, Fla. R. Crim. P. See also Fla. R. Crim. P. 3.111(4) and 3.220(k); Saintil v. Snyder, 417 So. 2d 784, 785 (3rd DCA, 1982)("that an indigent defendant is represented by a private attorney retained by his family or friends rather than the public defender or other counsel appointed by the court provides no basis for departing from the requirements that the county pay the reasonable costs of defense."); Guy v. State, 473 So. 2d 234 (2d DCA 1985)(even though defendant's mother retained private counsel, defendant still had right to have trial court rule on motion to be declared "partially indigent' so that county might be required to pay

discovery costs).

This Court and the Circuit Courts posses the authority to authorize payment of costs and expenses for the litigation of post-conviction actions. Indeed there are numerous examples where Circuit Courts have awarded costs to enable indigent death sentenced prisoners to present claims fully and fairly in Rule 3.850 proceedings. E.g., State v. Routly, No. 79-1270-CF-A-01, 5th Judicial Circuit, Marion county (Judge Carven Angel); State v. White, 95h Judicial Circuit, Orange county, Case No. 81-1132, (Judge Lawrence R. Kirkwood); State v. Peek, 10th Judicial Circuit, Polk County, Case # 78-445, (Judge John H. Dewell); State v. Combs, 20th Judicial Circuit, Lee County, Case No. 79-465-CF, (Judge Thomas Reese); State v. Blanco, 17th Judicial Circuit, Broward county, Case No. 82-453 CFA, (Judge Stanton S. Kaplan); State v. Groover, 4th Judicial Circuit, Duval County, Case No. 82-1659-CF, (Judge R. Hudson Olliff). See also Ake v. Oklahoma, 105 S. Ct. 1087 (1985).

Finally, the State's reliance on the language of 27.702, Florida Statutes, that the CCR shall represent its clients "without additional compensation" is misplaced. This phrase was extracted from 27.51, Florida Statutes, which was designed to prohibit the public defender from receiving a supplemental salary or benefits from either the county or a municipality. CCR is not requesting such benefits. Litigation costs attendant to a defendant's full and fair opportunity to be heard are governed by no such provision but must be considered under the standard mandating full and fair access to courts as set forth in cases such as Bounds v. Smith, supra, Rose, supra, and Holland v. State, supra.

As petitioner Spalding sets out in the original petition, the Governor's present policy in signing death warrants has had a devastating financial impact upon CCR without the benefit of additional appropriations having been received. CCR's budget is

now depleted and there is no money to cover the costs of further litigations. Without funds CCR's ability to render effective assistance of counsel is seriously compromised if not nullified.

CONCLUSION

Based on the reasons set out above, this Court should either: (1) issue stays of execution and order Respondents not to proceed on evidentiary hearings until after the new fiscal year begins; or (2) direct the Respondent courts to enter stays of execution and not to conduct evidentiary hearings until after the new fiscal year; or (3) order the Respondent courts to enter stays of execution unless the appropriate Boards of County Commissioners agree to pay the litigation expenses incurred by CCR forthwith in the course of representing Petitioners.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904)487-4376

BY: Larry H. Spalding

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by (U.S.MAIL) Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, this 6 day of June, 1988.

Larry H. Spalding
Attorney