IN THE SUPREME COURT OF FLORIDA

NO. 75847

EDUARDO LOPEZ,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND
FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

OFFICE OF THE CAPITAL
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Counsel for Petitioner

INTRODUCTION

This case is in a tenuous posture. Mr. Lopez is an indigent, death sentenced inmate entitled, at least statutorily, to the services of competent counsel during the litigation of the post-conviction action that will literally determine whether he shall live or die. See Fla. Stat. section 27.001, et seq. (1989). The Governor has signed a death warrant in this case; Mr. Lopez's execution has been scheduled for May 30, 1990, at 7:00 a.m. Further, pursuant to Rule 3.851, Fla. R. Crim. P., "all motions and petitions for any type of post conviction or collateral relief shall be filed" by April 30, 1990. Prior to the signing of the death warrant, the Office of the Capital Collateral Representative filed with the Eleventh Judicial Circuit Court in and for Dade County a Notice Relating to Death-Sentenced Inmate, advising that CCR could not provide effective assistance of counsel to Mr. Lopez (whose Rule 3.850 motion was due well into 1991) under the exigencies of a death warrant during the fiscal year of 1990. Further, on April 6, 1990, CCR filed with this Court -- in the cases of three inmates, including this inmate -- the Petitioners' Consolidated Motions for Stays of Execution and Motions for Appointment of Substitute Counsel. The consolidated motion explained CCR's budgetary and resource problems and CCR's absolute inability to undertake representation of these three inmates under the expedited time periods attendant

to Rule 3.851, and requested the entry of a stay of execution and the appointment of substitute counsel.

CCR now files this Petition for Writ of Habeas Corpus on behalf of Petitioner, in order to invoke the habeas corpus jurisdiction of the Court, because substitute counsel who can undertake this case during the pendency of a death warrant has not been located, and the Volunteer Legal Resource Center has indicated its inability to undertake the inmate's representation. However, CCR has not had the opportunity to even obtain transcripts of Mr. Lopez's trial and sentencing, nor has it been able to do any investigation or research into Mr. Lopez's case. This is not the type of representation envisioned by Rule 3.850. See Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). No CCR attorney is available who can even read the transcripts in the cases of these three inmates.

The Office of the CCR files this habeas corpus petition, invoking this Court's habeas corpus jurisdiction under Fla. R. App. P. 9.100(a)(3) and Article V, sec. 3(b)(9), Fla. Const., and respectfully prays that given these remarkable difficult circumstances this Honorable Court enter a stay of execution in order to afford petitioner proper post-conviction review. CCR also requests that the Court allow a reasonable period of time for amendment and/or supplementation of this petition, based on the circumstances now involved.

This Court's jurisdiction is invoked pursuant to the statutory and constitutional provisions noted above, and Petitioner requests that the Court enter a stay of execution and allow a reasonable time period for the location of substitute counsel, and/or allow a reasonable time period for the presentation of a professionally responsible amendment to his petition for a writ of habeas corpus and for the filing of a proper motion under Fla. R. Crim. P. 3.850.

As noted, the circumstances faced by CCR were set out in the Petitioners' Consolidated Motions for Stays of Execution and Motions for Appointment of Substitute Counsel, attached hereto as an Exhibit.

JURISDICTION TO ENTERTAIN PETITION AND ENTER A STAY OF EXECUTION

A. JURISDICTION

Petitioner invokes the Court's authority on this habeas corpus action pursuant to Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which concern the judgment of this Court during the appellate process, and the legality of the Petitioner's capital conviction and sentence of death. Petitioner was sentenced to death and direct appeal was taken to

this Court. The conviction and death sentence were affirmed. No Rule 3.850 motion has been filed. Jurisdiction in this action lies in this Court.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, and has not hesitated to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. The constitutional issues which Petitioner seeks to present in his post-conviction actions shall involve questions which go to the heart of the fundamental fairness and reliability of his capital conviction and sentence of death, and of this Court's appellate review.

This Honorable Court has the inherent power to do justice. As shown below, the ends of justice counsel the granting of the relief sought here, in order for the Court to assure its own proper review, and in order to provide this capital inmate with the opportunity to professionally responsibly pleadings on habeas corpus review and under Rule 3.850. This application is filed in this form because of the difficult circumstances described above now facing CCR, and because no attorney at the CCR office ahs been able to review anything other than the direct appeal opinions in the cases of these three inmates.

B. REQUEST FOR STAY OF EXECUTION

Petitioner requests that the Court enter a stay of his currently scheduled execution. CCR has no conceivable way of even knowing what the issues present in this case may be, has been able to conduct no investigation, has not been able to obtain or read anything pertaining to this case outside of the direct appeal opinion and portions of the trial court's findings supporting the death sentence. CCR believes that the issue presented below, along with others not yet ascertained, is present in Petitioner's case, and that it resulted in the denial of Petitioner's eighth and fourteenth amendment rights. This directly concerns the judgment of this Court on direct appeal. CCR also submits that there is present in this case a "violation of the Constitution[s] . . . of the United States, or of the State of Florida," and that other claims are present such that "the judgment or sentence is otherwise subject to collateral attack." See Rule 3.850. Therefore, CCR respectfully requests leave to amend and/or supplement this habeas corpus petition, and specifically requests leave to file a Motion to Vacate Judgment and Sentence pursuant to Rule 3.850 in excess of the time limitations of Rule 3.851, should no substitute attorney be recruited by the VLRC.

CLAIMS FOR RELIEF

This habeas corpus action presents, inter alia, the following issue. It is respectfully requested that leave to amend and/or supplement be granted.

CLAIM I

THE PENALTY PHASE JURY INSTRUCTIONS URGED THE JURY TO PRESUME DEATH APPROPRIATE, SHIFTED THE BURDEN TO PETITIONER TO PROVE THAT DEATH WAS NOT APPROPRIATE, AND LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), PENRY V. LYNAUGH, 109 S. CT. 2934 (1989), HITCHCOCK V. DUGGER, 107 S. CT. 1821 (1987), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

The jury in this case was instructed that it was to presume death to be the proper sentence once aggravation was proved, unless and until the defense presented enough in mitigation to overcome the aggravation. This instruction shifted the burden to Petitioner to prove that death was not appropriate, in violation of the fifth, sixth, eighth and fourteenth amendments.

It can be presumed that Mr. Lopez's sentencing jury was instructed per the pattern jury instructions, at the outset of the sentencing process:

> Now, the State and the Defendant may now present evidence relative to the nature of the crime and the character of the Defendant.

> You are instructed that this evidence, when considered with the evidence you've already heard, is presented in order that you may determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances if any.
>
> At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

(emphasis added).

If the pattern instructions were followed, the court's later instructions reiterated the erroneous standard:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence as to each count based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and, whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> * * *
>
> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Such a presumption, however, was never intended for presentation to a Florida capital sentencing jury. See Jackson v. Dugger, 837

F.2d 1469, 1473 (11th Cir. 1988)(emphasis added). To apply it before a jury is to eviscerate the requirement that a capital sentencing decision be individualized and reliable.

Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and preclude the consideration of mitigating evidence, unless and until such evidence outweighed the aggravating circumstances, violating the principles of Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Petitioner on the issue of whether he should live or die. This unconstitutional burden-shifting violated due process and the eighth amendment. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

The presumption applied in Petitioner's case effectively barred the jury from considering the statutory and nonstatutory mitigation that was present before it. This violates settled eighth amendment jurisprudence. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1978). The eighth amendment requires an individualized assessment of the appropriateness of the death penalty. Lockett. Petitioner was denied an individualized and reliable capital sentencing

determination because only the mitigation which outweighed the aggravation was to be given "full" consideration.

It is not sufficient that a capital defendant be allowed to introduce evidence in support of mitigating circumstances: "[t]he sentencer must also be able to consider and give effect to that evidence in imposing sentence." Penry, supra, 109 S. Ct. at 2951. The jury here, however, was instructed that death was presumptively the proper penalty unless the mitigation outweighed the aggravation. Under Florida law, however, a capital sentencing jury can impose life whenever the mitigation provides a "reasonable basis" for determining that a sentence of less than death is warranted. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Thus, the jury here could have imposed life, but could not but have thought themselves precluded from doing so by the presumption placed upon Petitioner.

The focus of a jury instruction claim is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 58 U.S.L.W. 4301, 4304 (March 5, 1990). Under this standard, the instructions involved in this case fail.

CONCLUSION

CCR apologize for the sloppiness of this presentation. Under the circumstances, there is no other choice. The circumstances have been described above, and it is respectfully submitted that the relief sought herein would be proper. A stay of execution, time to find substitute counsel, amend and/or supplement, and relief from the current filing deadlines of Rule 3.851 are proper.

WHEREFORE, Petitioner respectfully urges that the Court issue an order staying his execution, and that the Court grant the other relief sought by the CCR's previous filing (appended hereto). Petitioner urges that the Court grant him habeas corpus relief, or, alternatively a new appeal, for all of the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully Submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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By: Billy H. Nolas/SK
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Carolyn Snurkowski, Assistant Attorney General, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, and to Robert Neal Wesley, Acting Executive Director, Volunteer Lawyers' Resource Center of Florida, Inc., 805 North Gadsden Street, Suite A, Tallahassee, Floridad 32303-6313, this 16th day of April, 1990

Billy H. Nolas/SK
Attorney

ATTACHMENT 1

IN THE SUPREME COURT OF FLORIDA

ETHERIA VERDELL JACKSON, Petitioner, vs. RICHARD L. DUGGER, Respondent.	Case No. _____
EDUARDO LOPEZ, Petitioner, vs. RICHARD L. DUGGER, Respondent.	Case No. _____
WILLIAM TURNER, Petitioner, vs. RICHARD L. DUGGER, Respondent.	Case No. _____

PETITIONERS' CONSOLIDATED MOTIONS FOR STAYS OF EXECUTION AND MOTIONS FOR APPOINTMENT OF SUBSTITUTE COUNSEL

The Office of the Capital Collateral Representative (CCR) moves for stays of execution and for the appointment of

substitute counsel to provide post-conviction representation for Petitioners and shows:

1. Petitioners are prisoners presently under sentence of death in the State of Florida.

2. Petitioners are indigent and unable to pay the costs attendant to Rule 3.850 capital post-conviction proceedings or state habeas corpus proceedings.

3. Pursuant to the provisions of section 27.702, Florida Statutes (1989), Petitioners are entitled to legal representation by CCR. CCR is an agency in the judicial branch of state government charged with the statutory responsibility of providing legal representation in both state and federal capital post-conviction proceedings to any person convicted and sentenced to death in Florida who is unable to secure counsel due to his or her indigency. Part III, Chapter 27, Florida Statutes (1989), is the CCR enabling statute.

4. Pursuant to section 27.702, Florida Statutes (1989), a previous determination of indigency by any court in this State for the purposes of representation by a public defender is prima facie evidence of indigency for the purposes of representation by CCR. Petitioners have previously been adjudged indigent and remain unable to pay the costs attendant to their Rule 3.850 capital post-conviction proceedings or state habeas corpus proceedings.

5. Pursuant to the time-limitation provision of Rule 3.850, Petitioners would have been required to file post-conviction pleadings in 1991. However, on March 29, Governor Martinez signed death warrants against Petitioners setting their execution dates for May 30.

6. On January 3, CCR filed a Notice Relating to Death-Sentenced Inmate for each inmate in his applicable trial court. Among other things, CCR advised the court that CCR could timely file the post-conviction pleadings on behalf of Petitioners within the time permitted by Rule 3.850. CCR indicated, however, that it could not provide effective assistance of counsel to Petitioners if the Governor signed death warrants against Petitioners during the current fiscal year thereby converting scheduled 1991 proceedings into 1990 proceedings.

7. CCR further stated that it was prepared to continue to represent all death-sentenced inmates whose cases are presently being litigated by CCR attorneys. Additionally, CCR indicated it was prepared to represent all death-sentenced inmates whose Rule 3.850 motions are scheduled to be filed during the calendar year 1990.

8. Because of excessive workload and severely limited resources, CCR cannot, at least during the remainder of the current fiscal year, undertake the representation of Petitioners whose Rule 3.850 motions were scheduled to be filed in 1991.

9. CCR cannot undertake the representation of Petitioners because the Governor has signed death warrants against Petitioners which have significantly shortened the two-year time limitation imposed by the Supreme Court of Florida. The early death warrants have activated the provisions of Rule 3.851 which provide that all pleadings must be filed in the state courts within thirty (30) days of the date of the signing of the warrants.

10. CCR is currently responsible for the direct representation of more than 100 death-sentenced inmates whose pleadings are in various stages of capital post-conviction litigation in both the state and the federal courts. Moreover, the Supreme Court of Florida, by letter dated November 27, 1985 (Attachment A), has indicated that CCR is presumed to be counsel for all indigent death-sentenced inmates whose direct appellate proceedings have been concluded.

11. The following figures are derived from The Spangenberg Report prepared by The Spangenberg Group, West Newton, Massachusetts, at the behest of the American Bar Association. As this Court is aware, The Spangenberg Report reflects the total number of attorney hours necessary to provide effective assistance of counsel to a death-sentenced inmate in post-conviction litigation. These findings have been adopted by the American Bar Association, The Florida Bar Association, the Florida Legislature and the Criminal Justice Act Division of the

Administrative Office of the United States Courts.

Court Level	Total Lawyer Time
Florida Circuit Court	500 hours
Florida Supreme Court	200 hours
United States Supreme Court	100 hours
Federal District Court	500 hours
Eleventh Circuit	300 hours
United States Supreme Court	100 hours

In summary, The Spangenberg Report has been accepted as the definitive time and expense analysis in capital post-conviction litigation. It is recognized by the Florida Legislature for the purpose of evaluating the annual CCR appropriation request (see Attachment B). It is also recognized by the Administrative Office of the United States Courts as the standard by which to evaluate requests for attorney's fees in federal death penalty habeas corpus cases. (For a more detailed discussion of the time and expense analysis in capital post-conviction litigation as well as the development of the CCR funding formula, see "A Caseload/Workload Formula for Florida's Office of the Capital Collateral Representative" [prepared by The Spangenberg Group, February, 1987].)

12. According to the FY 1990-91 Legislative Budget Request, CCR is funded at approximately 45% of the sum designated by The Spangenberg Group as necessary to provide effective assistance of counsel to Florida's death-sentenced inmates (see Attachment C).

13. CCR has endeavored to meet its statutory responsibilities by requiring attorneys, investigators and support staff to work an extraordinary number of hours each week (see 1989 Work Statistics, Attachment D). Indeed, these statistics indicate that approximately 27 employees have undertaken the tasks normally required to be performed by 43 employees (see CCR Calendar, Attachment E).

14. During recent months, this pace has taken a heavy toll on CCR staff. We have had resignations as a result of a mild heart attack, ulcers, and a nervous breakdown. In the past two (2) months, we have had three (3) attorneys resign, and a fourth is terminating his employment on May 1. Two (2) of these attorneys whose time sheets regularly reflect 75-80 hours a week resigned as a result of total burnout and exhaustion. One (1) of these attorneys, in her exit interview, stated she is leaving CCR to work with a capital resource center in another state primarily because she has been promised that she would not be required to work more than 40-45 hours a week with a maximum caseload of six (6) cases a year. In contrast, she has been responsible for as many as six (6) cases a month at CCR. The second attorney, in his exit interview, stated that the long hours away from home was a contributing factor to his current separation from his wife. Other attorneys are near exhaustion and have expressed concerns about their ability to provide effective assistance of counsel under the present circumstances

(see, e.g., letter from Judith Dougherty, Assistant Capital Collateral Representative, dated January 29, 1989, Attachment F).

15. The Spangenberg caseload formula structures CCR in terms of specific litigation teams composed of two (2) attorneys, one (1) investigator and one (1) secretary. This formula is in conformity with the American Bar Association "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" adopted by the House of Delegates in 1989. The litigation team concept as developed by CCR and The Spangenberg Group as well as the agency's initial funding request using the formula were predicated upon the policy of former Governor Bob Graham that called for the signing of two (2) death warrants with executions scheduled on the same date with a maximum of four (4) active death warrants at any one time.

16. The six (6) litigation teams funded by the Legislature in 1987 were intended to be sufficient to handle each of the four (4) death warrants (one [1] litigation team assigned to each warrant case), and the nonwarrant or new cases (two [2] litigation teams assigned to this task). Governor Bob Martinez, however, has chosen to accelerate the number of active death warrants from a maximum of four (4) during the Graham era to as many as thirteen (13) during the latter weeks of 1989. While the determination of the number of death warrants to be signed is within the Governor's executive authority, CCR has received only continuation budgets during the past two (2) fiscal years at a

time when one new death sentence is imposed in Florida each week which has caused the agency to fall further and further behind in its ability to maintain its caseload.

17. On March 16, the Supreme Court of Florida filed orders to show cause in Medina v. State, No. 73,856 (Fla., March 16, 1990), and Lara v. State, No. 73,888 (Fla., March 16, 1990). The crux of these two (2) orders directed CCR to explain why appellate briefs in these two (2) cases were substantially past due.

18. CCR in its explanations to the Supreme Court of Florida stated that while CCR fully appreciates the frustration of the Court as a result of the delay in filing these appellate briefs in a timely manner, CCR is simply unable to meet all of its responsibilities in the trial courts, in this Court, the federal district courts, the United States Court of Appeals for the Eleventh Circuit and the United States Supreme Court with the current level of staffing and funding. This frustration is shared not only by the courts, but also by the counsel directly responsible for the litigation of these cases. Admittedly, the number of active death warrants and scheduled evidentiary hearings has totally preoccupied CCR staff at the expense of our appellate practice before the Supreme Court of Florida and the United States Court of Appeals for the Eleventh Circuit.

19. Because CCR could not adequately handle all warrant and nonwarrant cases in a timely manner, CCR was required to prioritize its caseload as follows:

a. Cases under active death warrant,

b. Cases subject to the Rule 3.850 two-year time limitation,

c. Cases scheduled for evidentiary hearing in either the trial court or the federal district court,

d. Oral arguments in the Supreme Court of Florida, the United States Court of Appeals for the Eleventh Circuit, and nonevidentiary hearings before federal district courts and state circuit courts,

e. Appellate briefs and petitions in the Supreme Court of Florida, the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States,

f. Memoranda of law in the circuit courts or the federal district courts,

g. Rule 3.850 motions in secondary litigation in the trial courts, and

h. Appellate briefs in secondary litigation in the district courts of appeal.

20. Consequently, in order to address the expressed concerns of this Court and the United States Court of Appeals for the Eleventh Circuit, CCR has determined that it must re-prioritize its litigation responsibilities. If appellate briefs

in this Court and the United States Court of Appeals for the Eleventh Circuit as well as nonwarrant evidentiary hearings are to be a priority, then CCR cannot undertake the representation of any new clients for a limited period of time.

21. CCR is aware that it is extremely difficult to find local counsel who both meet the guidelines for the appointment and performance of capital post-conviction counsel as adopted by the American Bar Association and who are also willing to handle capital post-conviction litigation. For this reason and because the Legislature has never appropriated funds for the payment of attorney's fees for non-CCR counsel, CCR has requested the assistance of the Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC), a federally-funded, not-for-profit corporation organized to recruit and to assist volunteer attorneys in capital post-conviction litigation. The VLRC has represented to CCR that it is presently in the process of attempting to recruit volunteer counsel to represent these Petitioners.

22. The VLRC has represented to CCR that it believes it can recruit volunteer counsel within the next 60 days if this Court grants stays of execution and directs that post-conviction pleadings be filed in the appropriate courts within 120 days. Alternatively, CCR is prepared to undertake the representation of Petitioners if this Court grants the stays of execution, directs that post-conviction pleadings be filed in the appropriate courts within 120 days, and the VLRC has been unable to recruit

volunteer counsel within the specified 60 days.

23. CCR recognizes that either solution has drawbacks. Nonetheless, the CCR staff can only perform a finite amount of work. The CCR staff has accomplished herculean tasks far beyond that which can be reasonably expected. We are aggressively attempting to recruit attorneys to fill five (5) existing and two (2) possible vacancies. The new attorneys who have been recruited and those who will be recruited cannot begin their employment at CCR until August 1, which is within the next fiscal year and is immediately after the Florida Bar examination has been administered. Additionally, CCR is lobbying the Legislature to increase both our staff and funding. The Governor for the first time in three years has recommended that CCR receive additional positions. These four (4) recommended new positions for FY 1990-91 include two (2) attorney positions. Until CCR is back at a full complement of attorneys, however, to attempt to undertake the representation of Petitioners would be a violation of the Code of Professional Responsibility, Rule 4-1.16. The comment to the Rule provides:

> A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

24. In order for this Court to grant relief, two (2) questions must be answered:

a. Does the Office of the Capital Collateral Representative have a sufficient caseload conflict to warrant the

granting of motions for the appointment of substitute counsel?

b. If CCR cannot provide effective assistance of counsel to Petitioners because of a caseload conflict, what is the best method to ensure that counsel is provided without unduly delaying these proceedings?

25. The Florida Bar Special Commission to Study Practical Aspects of Death Sentence Appeals established by immediate past president Rutledge Liles has been deliberating for several months ways in which to improve capital litigation in the State of Florida. Among other things, the Special Commission has adopted tentative findings concerning CCR. The specific findings contained in the draft report are:

a. This Commission endorses, in concept, efforts in the United States Congress to adopt an expedited procedure for capital post-conviction litigation.

b. The Office of the Capital Collateral Representative (CCR) is critically understaffed and underfunded. The agency cannot adequately address its current caseload. Adoption of an expedited capital post-conviction process would further exacerbate the staffing and funding situation at CCR.

c. The Legislature, as a predicate to participation by the State of Florida in any expedited habeas corpus procedure adopted by Congress, should appropriate the necessary resources and funding for CCR to provide effective assistance of counsel to its clients.

d. The Legislature should provide a special line item within the Justice Administrative Commission appropriation for funds for private counsel in cases in which CCR has a direct or caseload conflict of interest.

e. State trial judges and federal district judges should schedule nonevidentiary or status conferences in all capital post-conviction cases, particularly those under active death warrant, to determine which claims, if any, require the introduction of evidence. The evidentiary hearing, if required, should be scheduled separately at a reasonable time after the nonevidentiary or status conference.

f. Regardless of whether legislation is enacted by Congress designed to expedite habeas corpus proceedings, the Supreme Court of Florida should consider amending Rule 3.851 to provide for an initial round of capital post-conviction litigation without the intervention of a death warrant.

26. There should be no dispute, as found by the Special Commission, that CCR is critically understaffed and underfunded. For example, most attorneys' time sheets for the month of March reflected work in excess of 300 hours. Attorneys can only maintain this level of activity for so long, as demonstrated by the recent number of attorney resignations. Additionally, these work hours have resulted in deteriorating health for those attorneys who remain to the extent that one (1) attorney has been instructed by her physician to remain in bed on sick leave for

one (1) week. Because this attorney is lead counsel in a case presently under warrant, she has not only been unable to take sick leave but has also been required to work an inordinate number of hours in order to prepare for a scheduled evidentiary hearing under warrant in the trial court.

27. Finally, the Caseload Statistics for Calendar Year 1989 (Attachment G) indicate the substantial litigation activity undertaken by CCR in both the state and federal courts, including litigation under 40 death warrants. These statistics represent actual new cases. A new case is defined as an appearance in a particular court during the calendar year 1989. The statistics do not reflect the total number of pleadings and briefs filed in a court, the number of evidentiary hearings and appellate oral arguments conducted and other like activity. Similarly, the statistics do not reflect cases in which an appearance was entered before 1989, but in which litigation is continuing in the applicable court without advancing to the next stage. The CCR method of case counting differs from that of the public defenders in that CCR does not "anticipate" cases, e.g., counts based upon projected litigation, but rather counts actual work product. Even these statistics, however, demonstrate that CCR undertook 102 such new cases in 1989 alone.

28. In summary, the Capital Collateral Representative has determined that he cannot direct his attorney staff to undertake additional representation of new clients for the remainder of

this fiscal year. To do so would further jeopardize the health of attorneys presently on staff and would, in all probability, result in the rendering of ineffective assistance of counsel to the Petitioners and in the denial of Petitioners' rights to full and fair post-conviction proceedings which comport with the requirements of due process. See Holland v. State, 503 So. 2d 1250 (Fla. 1987).

28. The granting of the requests for stays of execution and for a reasonable time to prepare post-conviction pleadings is consistent with the recommendations of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (the Powell Commission) and the American Bar Association Task Force on Death Penalty Habeas Corpus, and the tentative findings of the Florida Bar Special Commission. Pursuant to Rule 3.850, a specific time period has been established for the filing of capital post-conviction pleadings. The signing of death warrants in these cases has created the chaos which so concerned Justice Powell and led him to conclude that the present system "diminishes public confidence in the criminal justice system." In contrast, the Commission found

> Judicial resources are expended as the prisoner must seek a stay of execution in order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution. . . . The merits of capital cases should be reviewed carefully

> and deliberately, and not under time pressure. This should be true both during state and federal collateral review.

Powell Commission Report, 45 Cr. L. Rptr. at 3240.

29. The Powell Commission concluded, as did the American Bar Association Special Task Force and The Florida Bar Special Commission to Study Practical Aspects of Death Sentence Appeals, that the following goal should be sought:

> Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant.

Id.

30. CCR has not had the opportunity to investigate any potential claims which could be raised on behalf of these Petitioners, nor to do any research, nor to read any transcripts, nor even to obtain these Petitioners' records. Notice of a potential problem in these cases was provided to the applicable trial courts on January 3.

31. This motion is filed in good faith and not for the purpose of delay. CCR has not filed, and cannot file, substantive pleadings in either the trial court or this Court. If we were to do so, the pleadings would be merely pro forma and not based upon individualized research or investigation. CCR must request that stays of execution be entered in order to protect Petitioners' rights to be heard.

32. If new counsel is to be appointed to represent the

Petitioners, then they must be provided a reasonable opportunity to prepare highly complex capital post-conviction pleadings. The Spangenberg Report suggests that the average time needed to prepare a Rule 3.850 motion to vacate judgment of conviction and sentence of death is 500 attorney hours. This time does not include additional time needed to prepare a habeas corpus pleading in the Supreme Court of Florida.

33. Given CCR's caseload conflict, CCR could not have filed this motion at an earlier date because CCR indicated it fully intended to represent the Petitioners <u>if</u> death warrants were not signed during the current fiscal year. The purpose of the Notices was to advise the State of Florida of a <u>potential</u> problem. The problem, however, is no longer potential, but is rather a reality. If as noted by Justice Powell, the fundamental requirement of the criminal justice system is fairness, then the circumstances of these cases dictate that stays of execution be granted.

34. These are 1991 cases absent the signing of death warrants. Where the death penalty is involved, fairness means a searching and impartial review of the propriety of the conviction and sentence. The Petitioners will be deprived of "fairness" if substitute counsel are not granted a reasonable period of time to prepare post-conviction pleadings for both this Court and the trial courts.

35. Because of the existing caseload conflict, CCR suggests two (2) primary alternatives for addressing the problem. The first would be to grant stays of execution and to request that the VLRC continue its efforts to recruit volunteer pro bono counsel to represent these Petitioners. This alternative has several advantages:

a. It would permit an organization with expertise in recruiting volunteer counsel to locate attorneys who both meet the guidelines for the appointment and performance of capital post-conviction counsel as adopted by the American Bar Association and who are also willing to handle capital post-conviction litigation.

b. While volunteer counsel may request court costs allowed by law which are incurred in a Rule 3.850 proceeding, pro bono counsel do not request attorney's fees.

c. Volunteer counsel would have the benefit of consulting services provided by the VLRC which has expertise in capital post-conviction litigation.

36. The second alternative would require CCR to undertake representation of Petitioners during the next fiscal year which begins July 1 in the event the VLRC cannot recruit volunteer counsel for any or all of these Petitioners. While both the VLRC and CCR believe volunteer counsel can be recruited for Petitioners if stays are granted and a reasonable period of time is allowed for the filing of post-conviction pleadings, this

alternative ensures that there will not be an unreasonable delay in litigating the Petitioners' claims.

37. As a final alternative, the trial courts can appoint substitute counsel upon a certification by CCR of a caseload conflict pursuant to the provisions of section 27.703, Florida Statutes (1989). CCR suggests this only as a last alternative, however, because:

a. CCR believes it would be exceedingly difficult for any trial court to appoint counsel who meet the American Bar Association's guidelines and who are also willing to represent an inmate under active death warrant.

b. Although section 27.703 specifies that appointed counsel shall be paid from dollars appropriated to the Office of the Capital Collateral Representative, CCR has never been appropriated funds for this purpose.

c. Although the Department of Legal Affairs has taken the position that appointed counsel under these circumstances can be paid by the Board of County Commissioners of the county where the judgment and sentence were entered, CCR is concerned about placing an obligation on a county which could approximate $80,000 for attorney's fees alone in each case. This figure is based upon 500 attorney hours in the trial court at $100 an hour and 300 attorney hours in the Supreme Court of Florida at $100 an hour. The attorney hours are derived from The Spangenberg Report. Additionally, it is our understanding that attorney's

fees in capital cases in the State of Florida have a range of $50 to $100. Moreover, the United States Court of Appeals for the Eleventh Circuit authorizes the payment of Criminal Justice Act funds in capital cases at the rate of $100 an hour for both in-court and out-of-court time. See State's Motion to Vacate Stay of Execution in Parker v. Dugger, No. 74,978 (Fla., November 9, 1989), filed by Assistant Attorney General Mark C. Menser. See also Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980), Schwarz v. Cianca, 495 So. 2d 1208 (Fla. 4th DCA 1986), In Re: Directive to the Public Defender of the Seventh Judicial Circuit, 6 F.L.W. 324 (Fla. 1981); In Re: Directive to the Public Defender of the Eleventh Judicial Circuit, 6 F.L.W. 328 (Fla. 1981), and In Re: Directive to the Public Defender of the Fifteenth Judicial Circuit, 6 F.L.W. 327 (Fla. 1981).

38. The CCR staff is at a breaking point. Ethically, CCR attorneys cannot undertake the representation of these Petitioners at this time.

WHEREFORE, CCR respectfully requests that stays of execution be entered in each of these cases with the requirement that post-conviction pleadings be filed in all applicable state courts within 120 days. The VLRC has graciously agreed to provide whatever assistance it can in recruiting volunteer counsel for these Petitioners. Should that effort prove unsuccessful within 60 days, however, CCR will undertake the representation of these Petitioners in order to ensure that no unnecessary delay will

occur in the preparation and litigation of these capital post-conviction proceedings. The granting of this relief will not prejudice the State of Florida but will ensure that these Petitioners will receive adequate representation before the courts of this State in the presentation of their collateral claims.

I certify that a true copy of the foregoing Motion has been furnished by United States Mail, first class, postage paid, to all counsel of record on April 6, 1990.

LARRY HELM SPALDING
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Florida Bar No. 0125540

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