IN THE SUPREME COURT OF FLORIDA

NO. 76039

JIM ERIC CHANDLER,

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

BILLY H. NOLAS
Chief Assistant Capital
Collateral Representative
Florida Bar No. 806821

Counsel for Petitioner

INTRODUCTION

This case is in a tenuous posture. Mr. Chandler is an indigent, death sentenced inmate. He is therefore 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. Chandler's execution has been scheduled for July 10, 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 May 30, 1990. Prior to the signing of the death warrant, the Office of the Capital Collateral Representative filed with the Nineteenth Judicial Circuit Court in and for Indian River County a Notice Relating to Death-Sentenced Inmate, advising that CCR could not provide effective assistance of counsel to Mr. Chandler (whose Rule 3.850 motion was due well into 1991) under the exigencies of a death warrant during the fiscal year of 1990. Further, CCR filed with this Court the Petitioner's Motion for Stay of Execution and Motion for Appointment of Substitute Counsel. The consolidated motion explained CCR's budgetary and resource problems and CCR's absolute inability to undertake representation of Mr. Chandler, whose filing date would not even have been in effect until well into 1991, 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 Lawyers' 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. Chandler's trial and sentencing, nor has it been able to do any investigation or research into Mr. Chandler'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 transcript in Mr. Chandler's case. A motion for substitution of counsel and for a stay of execution was filed in this Court yesterday, explaining the difficult circumstances involved.

The Office of the CCR now 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 remarkably 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 Petitioner's Consolidated Motion for Stay of Execution and Motion for Appointment of Substitute Counsel, filed yesterday.

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 was affirmed and death sentence was vacated and remanded for a resentencing. Petitioner was

resentenced to death and this Court affirmed the death sentence on appeal. No Rule 3.850 motion has been filed to date in this case. Such a motion was not due until well into 1991. 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 file professionally responsible pleadings on habeas corpus review and under Rule 3.850. This application is filed in this form because of the difficult circumstances previously described now facing CCR, and because no attorney at the CCR office has been able to review anything other than the direct appeal opinions in this case.

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. Chandler'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.
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> * * *
>
> 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, because consideration of mitigation is constrained unless and until such evidence outweighs the aggravating circumstances. This violates 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 apologizes for the sloppiness of this presentation. Under the circumstances, there is no other choice. The circumstances have been described previously, 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 previously filed motion for stay. 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

BILLY H. NOLAS
Chief Assistant Capital
Collateral Representative
Florida Bar No. 806821

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

By: Larry Helm Spalding by Billy H Nolas
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, Robert Neal Wesley, Acting Executive Director, Volunteer Lawyers' Resource Center of Florida, Inc., 805 North Gadsden Street, Suite A, Tallahassee, Florida 32303-6313, and to Michelle Russell, Assistant General Counsel, Office of the Governor, The Capitol, Tallahassee, Florida 32399-1050 this 23 day of May, 1990.

Larry John Spalding by Billy H. Nash
Attorney