IN THE SUPREME COURT OF FLORIDA

BOBBY FRANCIS,

Petitioner,

v.

TOM BARTON,

Superintendent,
Florida State Prison
Starke, Florida,

and

RICHARD L. DUGGER,

Secretary, Florida
Department of
Corrections

Respondents.

Case No.: 78068

EMERGENCY: DEATH WARRANT SIGNED, EXECUTION SCHEDULED FOR JUNE 19, 1991.

BRIEF OF AMICUS CURIAE VOLUNTEER LAWYERS' RESOURCE CENTER IN SUPPORT OF PETITIONER'S REQUEST FOR STAY OF EXECUTION AND FOR A WRIT OF HABEAS CORPUS

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I. Statement of Interest

Volunteer Lawyers' Resource Center of Florida, Inc. (VLRC) was established in November, 1988 for the purpose of providing support and assistance to private counsel who represent indigent death-sentenced individuals on a pro bono basis in collateral post-conviction proceedings. Several death-sentenced individuals represented by pro bono counsel assisted by VLRC were sentenced to death despite the fact that a jury recommended that they receive a sentence of life imprisonment. As a result, VLRC has a strong interest in this Court's application of its principles

relating to trial court overrides of jury life recommendations, and in the avoidance of the execution of an inmate where such an execution would be freakish and unusual.

VLRC also has a strong interest in issues surrounding the post-conviction representation of death-sentenced inmates. In particular, VLRC has an interest in securing judicial recognition of the principle that each death sentenced inmate is entitled to a full and fair opportunity to present claims for post-conviction relief to the courts, free of the time pressures imposed by litigation under a death warrant. Recognition of this principle is of great importance to VLRC if VLRC is to carry out the recommendation of the Supreme Court Committee on Postconviction Relief Proceedings in Capital Cases that it assist in obtaining pro bono counsel for ten new death penalty cases within the next year. See Report of the Supreme Court Committee on Postconviction Relief Proceedings in Capital Cases, May 31, 1991 at 3. In the absence of such recognition, recruitment of pro bono counsel will be extremely difficult.

II. Introduction

This amicus brief is submitted with the belief that it will assist the Court in resolving two of the claims presented in Mr. Francis' pending habeas corpus petition; his claim that it was not proper for the trial court to override the jury recommendation of life and his claim that Mr. Francis was denied

the effective assistance of counsel at the penalty phase of his capital trial.[1]

Amicus agrees with petitioner's assertion that the recent U.S. Supreme Court decision in Parker v. Dugger, 111 S.Ct. 731 (1991), when coupled with this Court's recent jury override decisions, particularly Cheshire v. State, 568 So.2d 908 (Fla. 1990), and Cochran v. State, 547 So.2d 928 (Fla. 1989), mandate that this Court revisit the question of whether Mr. Francis should be executed given the jury's life recommendation.[2] Clearly, as set forth in detail in petitioner's habeas petition, there was a reasonable basis for the jury recommendation.[3] With

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[1]In specifically addressing these issues, amicus is not suggesting that it believes that the other claims presented in the habeas petition are without merit. Specifically, amicus agrees that Mr. Francis was denied effective assistance of appellate counsel because of his counsel's failure to raise a claim that Mr. Francis' jury was selected in a racially discriminatory manner and because of appellate counsel's failure to raise a claim that Mr. Francis' double jeopardy rights were violated when the trial court, in overriding the jury recommendation of life, relied on an aggravating circumstance which the trial court had found not to have been established at Mr. Francis' previous trial.

[2]It is instructive to note regarding this recommendation that the jury that recommended life for Mr. Francis, a black defendant, consisted of 4 whites, 4 blacks, and 4 Hispanics. On the other hand, the Key West jury in Mr. Francis' second trial, which jury had recommended death, was all white.

[3]Certainly it would not have been unreasonable for the jury to have concluded that life was the appropriate penalty given Francis' assistance to correctional officers while in custody, the likelihood that he would adapt well to a prison environment, the circumstances surrounding the entire criminal episode including the crimes of violence committed by the victim toward two women which crimes precipitated Mr. Francis traveling to Key West, the lenient treatment by the state of a co-defendant and state witness, Charlene Duncan, who had previously received a mandatory minimum sentence of 25 years for her role in this

all deference, this Court's apparent attribution of the jury action to the emotional appeal of defense counsel's closing argument reflects the same type of misapprehension of the lower court record which was found constitutionally deficient in Parker, supra.[4] Amicus also concurs in petitioner's assertion that this Court's recent decision in Stevens v. State, 552 So.2d 1082 (Fla. 1989), mandates that the Court revisit its earlier holding that penalty phase counsel was not constitutionally ineffective. As petitioner emphasizes, it is difficult to understand how counsel, who by his own admission did little in preparation for the penalty phase, can be found to have rendered effective assistance despite the fact that this Court had earlier found that he had failed to present any evidence to support a

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offense, and the absence of any evidence presented to the penalty phase jury that Mr. Francis had any significant history of prior violent criminal activity.

[4]Amicus does not concede that it is inappropriate in assessing the reasonableness of a jury recommendation of life for a court to consider whether arguments premised on morality may have resulted in the jury action since ultimately the question of appropriateness of a death sentence involves a moral determination of whether an individual, given his conduct, has forfeited his right to live. In addition, it is ironic that this Court, in the absence of any prosecutorial objection to defense counsel's closing, would find it improper and attribute the jury recommendation to counsel's improper closing, given this Court's frequent assertion that the failure of defense counsel to object to allegedly improper prosecutorial comment essentially forecloses later consideration of that question. Finally, counsel's closing at petitioner's second trial at which the jury recommended death was of a similar nature as his closing in petitioner's third trial. This suggests that the jury recommendation in the third trial was attributable to the evidence of Mr. Francis' prison behavior, the treatment of a co-defendant and other mitigation, see n.3 above, not presented at the second trial where nothing was presented in mitigation at the penalty phase.

recommendation of a life sentence. In this regard, this Court's reliance on the life recommendation to support a conclusion that counsel rendered effective assistance is in direct conflict with its subsequent holding that a failure to offer any evidence in support of a life recommendation is ineffective assistance. Stevens, supra.

Amicus then believes that petitioner has presented compelling arguments as to why this Court should revisit its earlier rulings permitting the execution of Mr. Francis. As this Court stated in Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986), the Florida Supreme Court "will revisit a matter previously settled by the affirmance of a conviction or sentence . . . in the case of error that prejudicially denies fundamental constitutional rights." It should be self-evident that this principle is particularly compelling in cases where an individual faces execution, notwithstanding the merits of his claims, if the Court does not revisit an earlier ruling.

Amicus has sought to appear in this matter, however, not because it wishes simply to reiterate the positions espoused in Mr. Francis' habeas position. Rather, it has done so for two purposes. First, it wishes to bring to the Court's attention empirical data regarding the judicial resolution of Florida cases in which an individual such as Mr. Francis has been sentenced to death, notwithstanding a jury recommendation of life. It believes that this data clearly establishes that the execution of Mr. Francis would be freakish and unusual, thus strongly

suggesting that this Court revisit its earlier override determination. Second, amicus wishes to inform the Court of the circumstances surrounding the trial court resolution of Mr. Francis' ineffective assistance of counsel claim, and the presentation to this Court of Mr. Francis' first habeas corpus petition. Specifically, the ineffective assistance claim, which was litigated in Mr. Francis' initial Rule 3.850 motion by the Office of the Capital Collateral Representative (CCR), was considered under the pressure of an impending execution date[5] at a time when death warrants were outstanding on five other CCR clients, necessitating the holding of other evidentiary hearings under warrant and the filing of other substantial post-conviction pleadings. The habeas corpus petition was likewise prepared by CCR under warrant. The Special Supreme Court Committee on Post-Conviction Relief Proceedings in capital cases, chaired by Justice Overton, has recently commented on the problems of litigating capital cases under such circumstances and has made recommendations to deal with same. It has rightly concluded that the first round of post-conviction review should not be litigated under the pressures of a pending execution date, in part because of concerns that the pressures of a death warrant may compromise the fairness of the process and the reliability of the outcome. Yet, Mr. Francis' ineffective assistance of counsel and other

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[5]Former Governor Martinez signed a warrant for the execution of Mr. Francis on September 15, 1987, setting his execution date for the week of November 13-20, 1987. The hearing on his post conviction pleadings in the trial court began at 1:00 p.m. November 12, and ended on November 13, 1987.

post conviction claims were litigated under circumstances which were the antithesis of those recommended by the Special Supreme Court committee. Amicus believes that this fact also strongly suggests that the Court revisit its earlier effective assistance of counsel determination and should be considered in the context of the other claims presented in petitioner's habeas petition.

Empirical Data Regarding The Judicial Resolution of Florida Capital Cases In Which Juries Recommend Life

Since the enactment of Florida's present death penalty statute in 1972, the Florida Supreme Court has considered 123 cases in which a death sentence had been imposed by a trial court notwithstanding a jury recommendation of life. Of these 123 cases, in 33 the death sentence was affirmed, in 74 it was determined that death was improper and a life sentence was entered, and in 16 cases either the conviction was reversed[6] or the matter was remanded for resentencing.[7] The 33 cases in which the death sentence was affirmed by this Court encompass 32 individuals since one individual[8] has had his override affirmed twice by this Court. In addition, in four of the five override

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[6]In 11 of the 16 cases, the conviction was reversed, see appendix A. None of these individuals are presently on death row.

[7]In 5 of the 16 cases, the matter was remanded for resentencing.

[8]The one individual is Thomas Ziegler.

cases[9] in which this Court remanded for resentencing, a death sentence was again entered which was affirmed by this Court. Finally, in four cases in which this Court initially affirmed the override, the death-sentenced individual ultimately received sentencing relief and when the individual was again sentenced to death and this Court considered the case on direct appeal, it found the override to be improper and ordered a life sentence.[10] Given these figures, there have then been 114 individuals (123-1-4-4) who have received a death sentence, notwithstanding a jury recommendation of life, but only 28 (33-1-4) or 24.6% of the total number were still subject to a death sentence following completion of the direct appeal process. Certainly a reversal rate on direct appeal of over 75% suggests if nothing else that trial judges simply don't understand when it is legally permissible to override a jury recommendation of life. But even these figures do not give a complete picture of the judicial resolution of Florida capital cases in which juries recommend life since they do not reflect what happens in post conviction to the cases in which the death sentence has been affirmed by this Court and, equally important, they do not reflect cases in which jury recommendations of life are followed by the trial court. Regarding these considerations, of the 28 individuals who received jury recommendations of life but who were still subject

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[9]The cases are those of Ernest Dobbert, Joseph Spaziano, Raleigh Porter, and Gregory Engle.

[10]The cases are those of Elwood Barclay, Howard Douglas, James McCrae, and Robert Buford.

to a death sentence following their direct appeal, four subsequently had their death sentences set aside and lesser sentences imposed following successful appeals on other issues,[11] one received life when he was granted executive clemency by the Governor and cabinet,[12] one died while in custody,[13] two had their cases remanded for resentencing following successful appeals on other issues and their cases have not yet made their way back through the direct appeal process,[14] and two have been executed.[15] This means then that factoring in those individuals who have completed post conviction proceedings, there are only 20 individuals who either have been executed or who are still subject to a death sentence and for whom their jury override was affirmed by this Court on direct appeal. This is only 17.5% of the total number of individuals who received death sentences, notwithstanding jury recommendations of life, and whose case has been considered by the Florida Supreme Court. But even this figure of 20 does not reflect the number of jury override death sentenced individuals who may be executed because it can be expected that some will receive relief in collateral post-conviction proceedings with the result that they ultimately may

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11 These four individuals are Daniel Gardner, Anthony Sawyer, Ernie Miller, and Charlie Burr.

[12]The one individual is Darrel Hoy.

[13]The one individual is Robert Echols.

[14]The two individuals are Rufus Stevens and Ed Thomas.

[15]The two individuals are Ernest Dobbert, and Buford White.

receive a sentence less than death. In fact, two individuals whose cases are presently in post-conviction have received relief from the courts considering their cases[16] and if these decisions are not set aside, they will receive resentencing proceedings which could result in a sentence less than death. Given that the ratio of those override individuals whose sentence was affirmed on direct appeal but who ultimately received life following completion of collateral post conviction proceedings to those who have been executed is 11 to 2 or 5-1/2 to 1,[17] if that same trend continues, of the 18 individuals who are still subject to a death sentence following direct appeal, i.e., 20 minus the two who have been executed, only three will ultimately receive a death sentence, making a total of only five out of 114 or only 4.3% of the total number of jury override cases that have been considered on direct appeal by this Court.[18] Finally, since these figures do not reflect the number of cases in which the trial court has followed the jury recommendation of life they do not truly reflect the percentage of cases in which an execution is likely

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[16]The two individuals are Robert Parker and William Eutzy.

[17]I have not included Robert Echols who died while in custody.

[18]Even if the number in this group of those who ultimately may be executed is somewhat underestimated, the percentage of those who may ultimately receive a death sentence, notwithstanding a jury recommendation of life, remains very small. In this context also note the effect on this percentage if amicus has underestimated the number of individuals who received a jury life recommendation and whose life recommendation was followed by the trial court, see text, infra and n.19.

if the jury recommends life. It is difficult to obtain accurate figures on those cases in which the jury recommends life and the trial court imposes a life sentence,[19] but it certainly would be a fair assumption that this number should substantially exceed the number of cases in which the judge overrides a jury recommendation of life.[20] If one assumes that this figure is only double the number of cases in which there has been an override of a life recommendation, then it can be estimated that in approximately only 1% of the total number of cases in which there has been a jury recommendation of life, will there be an execution. Clearly this suggests that if Mr. Francis were to fall in the category of those who received a jury recommendation of life who were executed, his execution would be freakish and unusual.

It may be suggested that the above empirical data, rather than proving that it would be freakish and arbitrary to execute Mr. Francis, establishes that he should be executed because, given the overwhelming success rate of those who received a jury recommendation of life in obtaining a sentence less than death,

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[19]Florida Department of Correction figures indicate that as of 6/30/90, there were 2,604 individuals who were serving a life sentence for homicide. Florida Department of Corrections Annual Report, 1989-1990, P. 40-41, Appendix E, infra. To determine the number in which a judge imposed a life sentence following jury recommendation of life, one would first have to know what percentage of this number is serving a mandatory minimum sentence of 25 years for murder and of this group what percentage went to trial and received a jury recommendation of life.

[20]This is self-evident since presumptively a judge should follow a jury penalty recommendation in a capital case.

if Mr. Francis was unable to do so, it shows that he is deserving of execution. This argument is faulty for at least three reasons. First, Mr. Francis' override was affirmed at a time, 1985, when (as the Court has candidly admitted) it was not applying its Tedder jury override standard in a manner consistent with Tedder's admonition that a "judge must concur with the jury life recommendation unless 'the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ," Cochran, supra, 547 So.2d 928, 933 (Fla. 1989), quoting Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Second, as the following discussion of the circumstances surrounding the post-conviction litigation of Mr. Francis' effective assistance of counsel claim indicates, there are significant questions concerning the fairness of his post conviction proceedings. Finally, and perhaps most importantly, there can be little question that the empirical data set forth above suggests that the execution of Mr. Francis would be freakish, unusual and arbitrary. Even if then a contrary explanation of this data is hypothetically plausible, when an individual is facing execution one should not speculate but must err on the side of life and not death. At a minimum, this data suggests that the Court stay Mr. Francis' execution to reconsider the override question.

Circumstances Surrounding the Presentation of Mr. Francis' Ineffective Assistance of Counsel at Penalty Phase and Other Claims

As previously noted, amicus fully concurs with petitioner's claim that this Court should revisit its previous rejection of petitioner's claim of ineffective assistance of counsel at penalty phase. The anomaly that resulted when this Court granted relief, based on the same analysis and very similar evidence, in Stevens, supra, barely a year after it rejected that analysis in Mr. Francis' case, does not comport with any notion of the rational and even handed application of society's most awesome penalty, and clearly warrants revisiting of the issue by this Court and the granting of relief to Mr. Francis.

As was the case with its jury override presentation, amicus does not intend, however, to reargue the grounds for relief presented by petitioner. Rather, amicus presents herein additional reasons why this Court should permit Mr. Francis a full and fair opportunity to show that his right to effective assistance of counsel at his penalty phase and other constitutional rights were violated during the trial and direct appeal of the charges against him. Specifically, the circumstances under which Mr. Francis' prior Rule 3.850 motion and habeas petition were prepared and litigated -- the facts that Mr. Francis' case was one of multiple cases litigated under warrant, and that the Capital Collateral Representative was underfunded and understaffed at the time -- deprived Mr. Francis of his statutory right to the effective assistance of post-

conviction counsel and of the opportunity for one full and fair hearing of his post-conviction claims.

It is now widely recognized that holding the first round of post-conviction proceedings under the threat of execution, posed by a pending death warrant, is both inherently unfair to the person facing the death penalty and unnecessarily expends judicial resources by forcing the courts to review cases, under overwhelming time pressure primarily for the purpose of determining whether a stay of execution is warranted. For example, the Powell Committee, appointed by Chief Justice Rehnquist and chaired by former Associate Justice Powell, commented:

> 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.

Report on Habeas Corpus in Capital Cases, 45 Cr. L. Rptr. 3239, 3240 (Sept. 27, 1989) (herafter Powell Committee Report). Also, the Powell Committee found that the "current chaos in capital litigation (in part resulting from this problem) ... diminishes public confidence in the criminal justice system." Id. at 3241.

In seeking to address the above described problems and other difficulties in the collateral review process, the Powell Committee concluded that any recommendations should aim toward accomplishing the following goal:

> 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. at 3240. Accordingly, the Committee proposed, inter alia, that an automatic stay of execution be entered during a death sentenced individual's first round of post conviction proceedings:

> Importantly, the [proposed] statute provides for an automatic stay of execution, which is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time. This automatic stay ensures that claims need not be evaluated under the time pressure of a scheduled execution. It should substantially eliminate the rushed litigation over stay motions that is troubling both for litigants and the judiciary.

Id. at 3241.[21]

In October, 1990, Chief Justice Shaw of this Court established the Special Supreme Court Committee on Postconviction Relief Procedures in Capital Cases, chaired by Justice Overton, because of the inability of the Capital Collateral Representative (CCR) to provide effective representation to all death sentenced inmates in collateral proceedings, and because of the resulting delays in the consideration of such cases. In its Report filed on May 31, 1991, the Committee explicitly and commendably

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[21]These recommendations of the Powell Committee were approved by the Judicial Conference of the United States, and similar recommendations have been adopted by the American Bar Association Task Force on Death Penalty Habeas Corpus.

recognized that "each death row inmate should have competent counsel to represent him or her in postconviction relief proceedings." Report of the Special Supreme Court Committee on Postconviction Relief Proceedings in Capital Cases, May 31, 1991, at 1 (hereafter Overton Committee Report). The Committee further recognized that the pace of warrant signings has overwhelmed CCR's ability to meet its obligation of representing all death row inmates. Id. at 2. Accordingly, the Committee recommended that 1) pro bono counsel be recruited to remedy CCR's inability to competently represent all death row inmates in a timely manner, given their lack of adequate funds and staff, and 2) that with the adoption of procedures designed to insure that postconviction cases are filed and litigated in a reasonable and timely fashion, "the governor should hold in abeyance the signing of a death warrant to allow the first postconviction relief motion to proceed in a timely and orderly manner." Id. at 3-4.

The Overton Committee thus explicitly recognized that inmates are entitled to competent counsel in postconviction relief proceedings, and implicitly recognized that the pace of warrant signings and lack of adequate funds and staff for CCR has rendered CCR unable to provide competent representation. Of course, such findings implicitly assume that postconviction proceedings play an important role in ensuring that the process which results in a death sentence is free from legal error, and that such proceedings should be conducted in an appropriate manner, given the gravity of the issues presented. The

circumstances at the time that Mr. Francis' first Rule 3.850 motion and habeas petition were filed and litigated demonstrate, however, in a clear and convincing fashion, that CCR was unable to provide Mr. Francis the competent postconviction counsel to which he was entitled, both by law, § 27.702, Fla. Stat. (1987); see Spalding v. Dugger, 526 So.2d 71 (Fla. 1988), and by the need for fair and reliable procedures in post-conviction proceedings, as recognized by both the Powell and Overton Committees. This conclusion of course strongly militates in favor of petitioner's request that this Court revisit its earlier ineffective assistance of counsel at penalty phase ruling.

The circumstances under which CCR was forced to litigate Mr. Francis' case in the fall of 1987 were at least as onerous as those that led to the creation of the Overton Committee. The first warrant for the execution of Bobby Francis was signed by former Governor Bob Martinez on September 15, 1987, setting his execution for the week of November 13 to November 20. Rule 3.851, Fla. R. Crim. Pro. then required that any state post-conviction pleadings had to be filed by October 15, 1987, that is within 30 days. At the time the warrant for Mr. Francis' execution was signed, there was already one pending warrant, and two others were signed the same day. In early October, two more warrants were signed, so that at the time the pleadings in Bobby Francis' case were filed there were six outstanding warrants. (Affidavit of Larry Spalding, attached as Appendix B). These warrants were part of a stated policy of Governor Martinez of

signing warrants to "keep the pressure on" defense attorneys in post-conviction proceedings, primarily CCR. The multiple warrants placed intolerable pressure on CCR as it tried to obtain stays of execution simultaneously for all of its clients. Added to this pressure was the fact that CCR was already critically underfunded and understaffed to meet the burden of multiple warrants.

In the fall of 1987, the time of the Francis death warrant, CCR had 31 active cases for which it had sole responsibility, 65 other active cases in which it had substantial responsibility, and 21 additional cases in which it was required to file post-conviction pleadings within the next twelve months pursuant to the two year statute of limitations of Rule 3.850. (Affidavit of Larry Spalding). In five cases, Rule 3.850 required that pleadings be filed during the pendency of Mr. Francis' warrant. Two studies prepared by The Spangenberg Group, a private research organization retained by the American Bar Association to report counsel needs in post conviction death penalty litigation, reported that CCR would have had to be doubled in staff size and to receive 2-3 times its actual appropriations in order to meet minimum counsel requirements. (PCR. 371-82. Reference to PCR is to the record of Mr. Francis' first rule 3.850 proceeding).

Not only was CCR underfunded, understaffed, and facing multiple death warrants at the time of the post conviction proceedings in Mr. Francis' case, it was also required to litigate multiple <u>evidentiary hearings</u> under warrant. Litigation

of even a single evidentiary hearing under warrant places crushing burdens on defense counsel and often makes it impossible for counsel even to locate and bring to court all of the witnesses who could offer relevant and useful testimony. Moreover, it is clearly unnecessary and unfair. The fact that an evidentiary hearing is held constitutes a recognition by the court that the movant's allegations are sufficiently weighty to require the formal taking of evidence in order for them to be resolved. Where that is the case, as the Powell and Overton Committees have recognized, it is surely inconsistent with the reasoned, orderly and judicious consideration of such claims to require the movant to litigate them under threat of impending execution.

In the fall of 1987 then, CCR was required to litigate numerous evidentiary hearings under warrant. Thus, the available time to prepare for the hearings and present evidence was telescoped from what would ordinarily be the case, so that CCR did not have an adequate opportunity to prepare for <u>any</u> of these hearings. The multiple, independent but mutually reinforcing circumstances of lack of funds and staff, numerous filing deadlines, multiple warrants and multiple evidentiary hearings under warrant combined to render CCR incapable of providing adequate representation to Mr. Francis, as graphically recounted by his post conviction counsel, Mark Olive and Jane Rocamora:

> 3. When I was hired by CCR, my prior legal experience had primarily consisted of immigration and employment law with a heavy emphasis in complex civil litigation.

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5. Because of the pace of warrant cases and other filing deadlines, I had only a very short time to learn Florida criminal law and procedure, Florida post-conviction law and procedure, and the law of federal habeas corpus. I was almost immediately assigned to working on cases, under the supervision of the litigation director.

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8. Until late August or early September, 1987, I had been averaging between 12 and 15 hours of work per day seven days a week. I was trying to learn the law and do assignments at the same time. By the end of August or early September, I started having to work almost 20 hours a day. By late September, I was working, at times, up to 36 hours without a break, after which I would have time for only six or seven hours of sleep before returning to work. I was exhausted.

9. I was assigned to work on Bobby Francis' case after a warrant was signed for his execution during this period of time. At that time, I was just finishing work on one case and starting on another. Additionally, I had some responsibilities in a third case. All of these cases had filing deadlines. With the Francis case, I was working for the first time on a case under warrant as well as non-warrant cases.

10. The records on appeal in Bobby Francis' case alone were more extensive than those in any of my previous cases at CCR. He had gone through three trials. In all, I believe that there were over 7,000 pages of just direct appeal records, as well as hundreds of pages of investigatory and other records. Additionally, while I was working on the Francis case, another death warrant was signed, and that case was assigned to me.

11. I was responsible for reading the records on direct appeal, reviewing documents collected in the investigation of the case, preparing an outline of the record and a list of issues. I did not have time to read all of the records on appeal, nor all of the investigation documents.

12. Shortly after the death warrant on Bobby Francis was signed, CCR's supervisor of investigators was forced to leave. As a

result, although I was inexperienced in investigating capital post-conviction cases under these circumstances, part of the responsibility for supervising the investigation fell to me. Lack of time, lack of supervision, my own inexperience and lack of familiarity with mental health issues, and the disruption caused by the departure of the supervisor of investigators prevented us from investigating more of Bobby Francis' life history than his incredibly difficult, impoverished and abused childhood.

13. I had almost no access to supervision on this case, simply because the number of pending death warrants and related court appearances left us with literally no time. I was unable to provide my supervisor with an outline of the record or a list of possible issues because I had no time to write them. The lack of an outline or list of issues severely hampered my supervisor's ability to represent Mr. Francis, as he was moving from one warrant case to another and had no time to independently review the records.

14. I drafted the state habeas corpus petition myself, without the benefit of supervision or even a complete review of the record. As a result, it is likely that I missed important issues in the case. I was not sufficiently experienced, I had no time because of my caseload, and I was numb from exhaustion by the time the state habeas and 3.850 pleadings had to be prepared. Under these circumstances, it was impossible for us to perform effectively as counsel for Mr. Francis.

15. The litigation director, who was to conduct the evidentiary hearing for Mr. Francis, arrived in Miami for the hearing the night before it started, directly after finishing another evidentiary hearing, also under warrant. He had no time to prepare for the hearing or review any of the record in the case. These circumstances, coupled with my inexperience, the lack of time I had to review the voluminous records and documents, and the manner in which the case had been prepared, resulted in his being entirely unable to conduct a competent evidentiary hearing.

Affidavit of Jane Rocamora (attached hereto as Appendix C, submitted and made part of the record in the court below).

> 6. ... I was physically unable to give the requisite attention to Bobby Francis' case. I assigned much of the preliminary work and drafting of pleadings to Jane Rocamora, a recently hired attorney with little capital litigation experience. Ms. Rocamora herself had so many other commitments that she was unable even to read the entire voluminous record in Mr. Francis' case prior to the pleadings being filed.
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> 7. Shortly after the warrant for the execution of Bobby Francis was signed, CCR's supervisor of investigators was forced to leave. The disruption caused by her departure, together with the fact that we had multiple death warrants and other filing deadlines, prevented us from conducting an adequate investigation of Mr. Francis' case, particularly in areas related to his background and his mental health. In particular, the investigation of his background covered only his childhood.
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> 8. Lack of funds and time prevented us from having Bobby examined by more than a single mental health expert, Dr. James Merikangas. Based on a neurological and psychiatric examination, Dr. Merikangas found that Bobby Francis suffers from organic brain damage, but we were unable to confirm Dr. Merikangas' findings through neuropsychological or physical tests that Dr. Merikangas recommended, such as a CAT scan.
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> 9. I have reviewed a recent report by Dr. Joyce Carbonell, who has conducted a neuropsychological examination of Bobby Francis. Her testing confirms that Mr. Francis does indeed suffer from organic brain damage, and has done so since before the time of the offense in question. I believe that Dr. Carbonell's findings would have provided extremely important support for Dr. Merikangas' testimony. Owing to the circumstances in which we were forced to litigate Mr. Francis' case, however, the support provided by such test results simply was not available to us.
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> 10. As the date set for Bobby Francis' execution approached, the burden of the

multiple proceedings under warrant on our office and on me became crushing. In one week, I had three oral arguments on applications for stays of execution in the Florida Supreme Court, as well as an oral argument in the trial court in Mr. Francis' case on his Rule 3.850 motion and application for stay of execution. I repeatedly informed Judge Knight that under the circumstances I could not perform effectively in representing Mr. Francis without a stay of execution and an opportunity to prepare properly for a hearing. Judge Knight refused to grant a stay of execution, instead scheduling an evidentiary hearing to be held under warrant.

11. Evidentiary hearings were also scheduled, under warrant, in the cases of Anthony Bertolotti and Harry Phillips. I assigned the Phillips hearing to other attorneys in the office, but I conducted the Bertolotti hearing myself. Because the Bertolotti hearing was held before the hearing in Mr. Francis' case, the Francis hearing was postponed for two days. I requested a further one day continuance to give myself a day between the hearings, but this request was denied. As a result, after the Bertolotti hearing was completed in Orlando, I flew to Miami that evening, and Mr. Francis' hearing began the next day.

12. Because the Bertolotti hearing came first, I focused on it. As a result, not only was I exhausted at the conclusion of the Bertolotti hearing, but I had virtually no time to prepare for the Francis hearing. I had time to read only parts of the Francis record myself and Ms. Rocamora was unable to read the entire record or provide me with an outline of any of it. As a result, my knowledge of the facts of the case was extremely limited. Moreover, I had no opportunity to talk to Mr. Francis before the hearing began, and as a result of a misunderstanding Mr. Francis was not even transported to the hearing until its second day. Nor was I able to talk at length to any of the witnesses prior to their testimony.

13. In addition to the insuperable burdens which the timing of the hearing placed on our ability to prepare for it, neither defense expert witness Dr. Merikangas nor State expert witness Dr. Charles Mutter

testified in person. Rather, both testified by telephone. I believe that my inability to prepare and the fact that Dr. Merikangas testified by telephone seriously detracted from both the impact and credibility of his testimony. Moreover, although the State had notified me that it intended to call an expert witness, I had no ability to prepare for the cross examination of Dr. Mutter. Nor was Dr. Merikangas or any other mental health expert available to offer rebuttal testimony.

14. I have reviewed the report of Dr. Carbonell and the affidavit of Dr. Robert T. M. Phillips, both of whom have concluded that it was impossible for Dr. Mutter to make any valid findings concerning whether Mr. Francis suffers from fetal alcohol syndrome or brain damage, and concerning the effects of any such brain damage on his behavior, on the basis of a review of records without having personally examined Mr. Francis. There is no doubt in my mind, based on my own familiarity with mental health issues and the affidavit of Dr. Phillips, that the same standard of care and methodology was applicable in 1987. Had I had the time to prepare and access to a mental health expert for rebuttal purposes, I would certainly have cross examined Dr. Mutter on this issue and offered rebuttal testimony concerning the standard of care.

15. I believe that the circumstances set forth above, and particularly those set forth in paragraphs 9, 13 and 14 significantly contributed to Judge Knight's making oral findings crediting the testimony of Dr. Mutter and rejecting the testimony of Dr. Merikangas. In addition, the report of Dr. Carbonell indicates that Dr. Merikangas' finding that Bobby Francis suffers from brain damage was correct.

16. As I repeatedly informed Judge Knight prior to and during the hearing, the circumstances under which Mr. Francis' case was litigated rendered it impossible for me to provide him with effective assistance of counsel, and I in fact did not provide him with effective assistance.

Affidavit of Mark Olive. (Attached hereto as Appendix D).

Submitted and made part of the record in the court below.

The circumstances set forth by Mr. Olive and Ms. Rocamora made it impossible for them to provide Bobby Francis with the effective assistance of counsel to which he was entitled. Ms. Rocamora, who was inexperienced and without supervision, was forced to prepare and file Mr. Francis' first state habeas petition without time to make an adequate review of the record. Mr. Olive was forced to conduct an evidentiary hearing under warrant immediately after another such hearing, with no time to prepare and inadequate investigation. Post-conviction counsel repeatedly informed the trial court of these circumstances and requested that the court stay Mr. Francis' execution to enable counsel to provide him with competent representation and a full and fair hearing. (PCR. 4-7, 50, 61, 327-28, 351, 372, 384). This request was rejected each time it was made. Mr. Francis' execution was only stayed by this Court on appeal of the denial of his Rule 3.850 motion (after the Court had already denied his state habeas petition, which like the Rule 3.850 motion was filed under warrant).

These circumstances, as compellingly set forth by post-conviction counsel, are fundamentally inconsistent with the nearly universal recognition, joined by the Overton and Powell Committees, that death sentenced inmates should not be forced to litigate under warrant in the first round of post-conviction review. Moreover, in the context of Mr. Francis' case, the circumstances set forth above suggest that the decisions reached by this and other courts rejecting Mr. Francis' claims may have

been unreliable. The pleadings were prepared under the pressure of multiple filing deadlines and multiple death warrants, without adequate time for counsel even to read the entire record, much less carefully identify, investigate and plead all meritorious claims. The hearing was compressed into the equivalent of a single day of testimony, squeezed in between another hearing under warrant and the execution date, with no opportunity for reflection or preparation, and with key witnesses forced to testify by telephone.

Such a proceeding, in a case where a man's life is at stake, hardly comports with basic notions of due process and certainly is the antithesis of what has been recommended by Overton and Powell Committees. This suggests at a minimum that this Court stay Mr. Francis' execution and afford him the "one complete and fair course of collateral review ... free of the time pressure of impending execution" that he has never received.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court, at a minimum, stay petitoner's execution so as to permit the orderly and fair consideration of the claims presented in petitioner's pleadings currently pending in this Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand/delivery/facsimile transmission/United States Mail, first class, postage prepaid, to Ralph Barreira, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 921N, Miami, Florida 33128, and to Billy Nolas and Julie Naylor, P.O. Box 4905, Ocala, FL 32678-4905, by facsimile transmission this 14 day of June, 1991.

Attorney