IN THE SUPREME COURT OF FLORIDA

CASE NO. 79207

McARTHUR BREEDLOVE,

Petitioner/Appellant/Cross-Appellee,

v.

STATE OF FLORIDA; HARRY K. SINGLETARY, JR.,

Respondents/Appellees/Cross-Appellants.

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT COURT, IN AND FOR DADE COUNTY, STATE OF FLORIDA

SUMMARY ANSWER BRIEF TO CROSS-APPEAL

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

THOMAS H. DUNN
Assistant CCR
Florida Bar No. 871753

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

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This Honorable Court has before it the appeal of the circuit court's summary denial of Mr. Breedlove's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. 3.850, and Mr. Breedlove's petition for a writ of habeas corpus, which is presently pending before the Court. A death warrant is currently pending against Mr. Breedlove, and his execution is scheduled for January 22, 1992. The State has filed a cross-appeal on the circuit court's ruling to consider Mr. Breedlove's ineffective assistance of counsel claims on the merits thereby rejecting the State's argument that they are procedurally barred. Given the time constraints involved in this action, Mr. Breedlove's counsel cannot provide this Court with a proper brief professionally addressing this issue. This summary brief will address the State's argument on cross-appeal.

On the basis of the application for a stay of execution, it is respectfully requested that the Court enter a stay, and allow the normal briefing schedule to go forward so as to allow Petitioner/Appellant/Cross-Appellee the opportunity to properly brief and present his Rule 3.850 appeal, and to properly reply to the erroneous contentions presented in the State's response to the application for habeas corpus relief, and to allow the Court the opportunity to properly review and fully consider this case. The claims presented by Petitioner/Appellant/Cross-Appellee and the issues involved in this action are important and substantial. A stay of execution is proper.

In this summary answer brief, references to the transcripts and record of these proceedings will follow the pagination of the Record on Appeal. The trial proceedings will be referred to as "R. ___." The record on appeal from the summary denial of this post-conviction motion will be referred to as "PC-R. ___."

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DECIDING MR. BREEDLOVE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ON THE MERITS AND REJECTING A PROCEDURAL BAR DETERMINATION.

Mr. Breedlove's Rule 3.850 motion presented, inter alia, claims alleging that Mr. Breedlove was denied the effective assistance of counsel at his capital trial and penalty phase. Although the circuit court's summary denial of Rule 3.850 relief was erroneous, the lower court correctly reached the merits of Mr. Breedlove's ineffective assistance of counsel claims. The State has now cross-appealed the circuit court's decision to review the merits of the ineffective assistance of counsel claims.

Contrary to the State's arguments, these claims were properly presented -- despite the fact that this is Mr. Breedlove's second Rule 3.850 proceeding -- because the claims could not have been presented before. As explained in the Rule 3.850 motion, counsel who represented Mr. Breedlove during the first Rule 3.850 proceedings is employed by the same Public Defender's office which represented Mr. Breedlove at trial. Thus, as he has attested, see infra, former post-conviction counsel was legally and ethically precluded from investigating or presenting ineffective assistance of counsel claims regarding his own office. As he has also attested, former post-conviction counsel never discussed the conflict arising from this situation with Mr. Breedlove.

Under state statute, Mr. Breedlove was and is entitled to the effective assistance of counsel in post-conviction proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Under state statute, Mr. Breedlove also was and is entitled to conflict-free representation in post-conviction proceedings. Fla. Stat. secl. 27.703. Mr. Breedlove has not had the benefit of either of these guarantees, through no fault of his own. Neither Mr. Breedlove's nor the State's prior post-conviction counsel raised the conflict question in prior proceedings. No one informed Mr. Breedlove about the conflict. With the assistance of conflict-free counsel, Mr. Breedlove is now entitled to have his claims reviewed on their merits.

Mr. Breedlove is entitled to a full, fair, and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Rule 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Florida law, Holland, supra; Fla. R. Crim. P. 3.850, as well as the federal constitution guarantee Mr. Breedlove that opportunity. See Michael v. Louisiana, 350 U.S. 91, 93 (1955)(Due Process Clause guarantees defendant "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court."), quoting Parker v. Illinois, 333 U.S. 571, 574 (1948); Case v. Nebraska, 381 U.S. 336, 337 (1965)(Clark, J., concurring)(federal constitution guarantees defendant "adequate corrective [state-court] process for the hearing and determination of [his] claims of violation of federal

constitutional guarantees); see also id. at 340-47 and nn.5-6 (Brennan, J., concurring)(same). Florida extended the right to seek Rule 3.850 relief; it must "assure the indigent defendant an adequate opportunity to present his claims fairly." Ross v. Moffitt, 417 U.S. 600, 616 (1974). Having extended the right to seek redress under Rule 3.850, the State must provide a forum, and that forum's consideration of Mr. Breedlove's claim must comport with due process. Bounds v. Smith, 430 U.S. 817 (1977); Evitts v. Lucey, 469 U.S. 387 (1985). The right to an "adequate opportunity" to seek "adequate corrective process" is what Mr. Breedlove's motion invokes.

Florida provides a mechanism pursuant to which Mr. Breedlove may seek to vindicate his rights, see Fla. R. Crim. P. 3.850. The Legislature has provided counsel, see Fla. Stat. §27.701, et. seq. (1985), and thus promised Mr. Breedlove the effective assistance of an advocate in that process. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).

The State in its Response to Mr. Breedlove's Second Motion for Post-Conviction Relief urged the circuit court to deny Mr. Breedlove's motion on the basis of a procedural bar, as being untimely and a successive motion. As Mr. Breedlove noted in the introduction to his Motion and his Summary Brief to this Court, this case is in "a unique procedural posture." His former appellate attorney and post-conviction attorney explains:

> My name is Elliot H. Scherker and I am employed as an Assistant Public Defender in the Appellate Division of the Office of the Public Defender of the Eleventh Judicial

Circuit of Florida. I have been so employed since October of 1975.

I was assigned primary responsibility for the appellate representation of Mr. McArthur Breedlove after his conviction for first-degree murder and the imposition of a death sentence in 1979. I represented him on direct appeal to the Supreme Court of Florida, and before the Supreme Court of the United States on a petition for a writ of certiorari. Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982).

On November 30, 1982, I filed a motion for post-conviction relief on Mr. Breedlove's behalf in Dade County Circuit Court. The motion raised two claims: (1) denial of the right to be present at a critical stage of the proceedings, and (2) a claim under Brady v. Maryland, 373 U.S. 83 (1963), alleging that the detectives who coerced Mr. Breedlove into making inculpatory statements would probably have been impeached with undisclosed evidence of their own racketeering and drug-related activities. The first claim was abandoned during the course of the litigation in circuit court.

The motion was summarily denied on January 4, 1991. I represented Mr. Breedlove on appeal from the order denying the motion. The Supreme Court of Florida affirmed the trial court's order. Breedlove v. State, 580 So. 2d 605 (Fla. 1991).

I was employed as an assistant public defender throughout my representation of Mr. Breedlove in appellate and post-conviction proceedings. The Dade County Public Defender has also represented Mr. Breedlove in all pretrial, trial, and sentencing proceeding, with representation provided by Assistant Public Defenders Eugene F. Zenobi, Jay L. Levine, and David Finger.

I did not investigate or raise any claims of ineffectiveness of counsel, either at trial or on appeal, in the course of my representation of Mr. Breedlove. I believed that I would have been ethically and legally precluded from pursuing any such claims

> because to have done so would have engendered a conflict of interest.
>
> I never discussed this matter with Mr. Breedlove. I proceeded with my representation in his case to extent allowable under Florida law.
>
> Prior to oral argument on the post-conviction appeal in the Supreme Court of Florida, I was contacted by a staff attorney from the Florida Volunteer Lawyers Resource Center who suggested that I should withdraw as Mr. Breedlove's counsel in order that any viable claims of ineffective assistance of counsel could be investigated and presented to the courts. After the affirmance of the trial court's order denying relief, I was contacted by Assistant Attorney General Ralph Barreira, counsel for the state before the Supreme Court of Florida, who expressed to me a similar view on behalf of the state.

(PC-R. 54-56).

Mr. Scherker's affidavit was before the circuit court, as was undersigned counsel's argument that under Florida law Mr. Scherker could not challenge the ineffectiveness of his own law office (relying on Adams v. State, 380 So. 2d 421, 422 (Fla. 1980)). On the basis of the information before it, the circuit court rejected the State's argument for a procedural bar and decided the claims on the merits. The circuit court's ruling was proper under the circumstances and should not be disturbed.

The State concedes that from 1982 until the creation of CCR in 1985, Mr. Breedlove had "a valid excuse" for not raising claims of ineffectiveness of counsel: the conflict of interest issue that prevented Mr. Scherker from raising a claim of ineffectiveness against his own law office. See Adams v. State, 380 So. 2d at 422. The State argues that this genuine conflict

"did not prevent the Public Defenders Office from withdrawing after the creation of CCR in 1985, so that CCR could amend the initial motion with these claims, claims which the Public Defender's representative knew were the standard crux of 3.850 litigation." (State's Brief at 40). The State's argument relies on more than the creation of CCR. Their argument also depends on a second prong: that "the reason the Public Defenders Office did not withdraw is because it wanted these claims to form the basis of a second petition down the road, with new counsel who could always rely on the Public Defenders Office's alleged conflict." (State's Brief at 41). Mr. Breedlove will address each prong of the State's argument separately.

The creation of CCR did not defeat Mr. Breedlove's conflict of interest issue; in fact, it strengthened his position. CCR was created by the Legislature, Chapter 85-323, Laws of Florida, to provide representation to indigent persons convicted and sentenced to death in post-conviction proceedings, see Fla. Stat. §27.701, et. seq. (1985), and thus promised Mr. Breedlove the effective assistance of an advocate in that process. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Moreover, the statute specifically provides for conflict-free counsel and substitute counsel. Fla. Stat. §27.703 (1985).

The State argues in its Response filed in circuit court that CCR had an affirmative duty to "come and take over representation of" Mr. Breedlove upon its creation. The statutue, however, put no such affirmative duty upon CCR. The statute dictates that CCR

"shall represent . . . any person convicted and sentenced to death in this state who is without counsel." Fla. Stat. §27.702 (1985)(emphasis added). Mr. Breedlove had counsel and the statute put no further duty upon CCR to "evaluate" the representation that Mr. Breedlove was receiving at the time. In fact, the statute further dictates that CCR's representation of indigent death sentenced inmates did not begin until "receipt of files from the Public Defender." Surely, CCR had no statutory duty to interfere with another counsel's representation. Ethically, CCR was prohibited from doing so. Indeed, the statute itself indicates that CCR had the right to inquire of all death sentenced persons except those "who are represented by other counsel. Fla. Stat. §27.708 (1985).

The State next argues that Mr. Scherker had a duty to withdraw upon the creation of CCR. Under the Code of Professional Responsibility and the Rules of Professional Conduct, Mr. Scherker had a conflict of interest which prevented him from effectively representing Mr. Breedlove. See DR 5-101, Code of Professional Responsibility and Rule 4-1.7, Rules of Professional Conduct. Although Mr. Scherker always had a duty to inform Mr. Breedlove of the conflict, once CCR was created and provided a statutory mechanism for providing effective and conflict-free counsel to Mr. Breedlove, Mr. Scherker had an ethical duty to withdraw unless he reasonably believed that continued representation would not adversely affect Mr. Breedlove and Mr. Breedlove consented after full disclosure. DR 5-101,

Code of Professional Conduct and Rule 4-1.7b, Rules of Professional Conduct. Mr. Scherker admitted that he "never discussed this matter with Mr. Breedlove. I proceeded with my representation in his case to the extent allowable under Florida law." Mr. Scherker's continued representation of Mr. Breedlove was indeed unethical.

The State attempts to characterize Mr. Scherker's unethical conduct as "a strategic error, an error which had nothing to do with conflict of interest. It is certainly unfortunate for the defendant that he loses opportunity to litigate his ineffective claims." (State's Brief at 41). The State ignores the clear ethical duty that Mr. Scherker had to withdraw and his failure to fully inform Mr. Breedlove of the conflict and to obtain his consent before continuing with his representation. Having failed to do so, this cannot be viewed simply as a case in which post-conviction counsel withheld a claim.

Moreover, if, as the State argues, these claims of ineffectiveness were "claims which the Public Defenders' representative knew were the standard crux of 3.850 litigation," surely the State and the circuit court know this also. Both the State and the circuit court had an ethical duty to raise this conflict issue.[1] The trial judge should not have appointed Mr. Scherker to represent Mr. Breedlove. Adams v. State, 380 So. 2d 421, 422 (Fla. 1980).

---

[1]None of the prior participants in the post-conviction process informed CCR that a conflict existed.

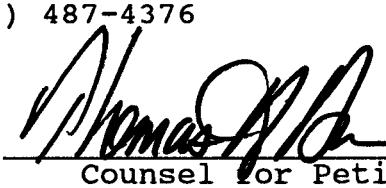
Finally, the State alleges that Mr. Scherker did not withdraw because of a strategy decision. There is absolutely nothing before this Court to support that allegation. At a minimum, an evidentiary hearing must be conducted to resolve that issue.

Mr. Breedlove's ineffective assistance of counsel claims are before the Court on their merits. The merits of the claims require a stay of execution, an evidentiary hearing, and Rule 3.850 relief.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

THOMAS H. DUNN
Assistant CCR
Florida Bar No. 871753

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

By: 
Counsel for Petitioner

Copies furnished to:

Ralph Barriera
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Dade County Regional Service Center
401 N.W. Second Avenue, Suite 921N
Miami, Florida 33128