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IN THE DISTRICT COURT OF APPEAL, SECOND DISTRICT,
LAKELAND, FLORIDA

ALPHONSO GREEN,
Appellant,

v.

STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY,
Appellees

Case No.: 86-14233
Division: E

Appeal No.: 91-04055

HILLSBOROUGH COUNTY'S ANSWER BRIEF

APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

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PRELIMINARY STATEMENT

Throughout this brief, the Appellee, Board of County Commissioners, Hillsborough County, shall be referred to as "Hillsborough County". The record shall be referred to by the Symbol "R", followed by the page number (R. page). The Defendant, Alphonso Green, shall be referred to as "Mr. Green". Counsel for the Defendant, Robert Fraser, shall be referred to as "Mr. Fraser". Citations to the Initial Brief of Appellant shall be "IB" followed by the page number. (IB page).

STATEMENT OF THE CASE AND FACTS

For purposes of this brief, Hillsborough County adopts the Statement of the Case[1] and Facts contained in the Initial Brief of the Appellant.

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[1] Writ of Certiorari is the proper procedure to obtain review of an order in a suit in which the County is not a party. See Dade County v. Grossman, 354 So.2d 131 (Fla. 3d DCA 1978).

SUMMARY OF ARGUMENT

There is no Florida or Federal Constitutional right to assistance of counsel for discretionary review to the U.S. Supreme Court. In addition, Section 925.035, Florida Statutes (1991), does not authorize the appointment of counsel for discretionary review. Thus, the trial court properly denied Mr. Green's request that Mr. Fraser be appointed to file his application for discretionary review to the U.S. Supreme Court.

The order does not deny Mr. Green equal protection under the Florida or Federal Constitution simply because he is an indigent capital defendant who may have received discretionary representation from the Tenth Circuit Public Defender. Like Mr. Fraser, the Public Defender is motivated to represent capital defendants out of a professional obligation to provide effective assistance of counsel. Although the Public Defender routinely provides such representation, this practice does not confer a substantive right on a capital defendant, absent a constitutional right that requires assistance of counsel. Since the record reflects that Mr. Green received "meaningful appellate review" including a Petition for Certiorari to the United States Supreme Court, he was not denied due process under the Fourteenth Amendment.

For the foregoing reasons, the trial court correctly ruled that Hillsborough County is not statutorily or constitutionally obligated to compensate Mr. Fraser for filing Mr. Green's application for discretionary review by the U.S. Supreme Court.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN DENYING THE APPELLANT COURT-APPOINTED COUNSEL FOR DISCRETIONARY REVIEW TO THE UNITED STATES SUPREME COURT

A. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO DISCRETIONARY REVIEW TO THE UNITED STATES SUPREME COURT

In Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 2447, 41 L.Ed. 2d 341 (1974), the Supreme Court explicitly held that the rule requiring appointment of counsel for indigent defendants on their first appeal of right would not be extended to require counsel for discretionary state appeals and for application for review in the Supreme Court since such appointment is not required under the due process and equal protection clause of the Fourteenth Amendment. See Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963); Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 814, 9 L. Ed.2d 799 (1963).

Moffitt was charged and convicted in two criminal prosecutions. The North Carolina Court of Appeals upheld his conviction. During the trial and appeal he was represented by the public defender because of his indigency. Moffitt then sought discretionary review to the North Carolina Supreme Court with Court-appointed counsel but was informed that the state was not required to furnish counsel for that petition. After exhausting state remedies, he appealed the denial of counsel to the Court of Appeals for the Fourth Circuit. The Fourth Circuit reversed the District Court judgments and held that Moffitt was entitled to

counsel at state expense both on his petition for review to the North Carolina Supreme Court and his petition for certiorari to the U. S. Supreme Court. Ross v. Moffitt, 417 U.S. at 604, 94 S.Ct. at 2440-2441, 41 L.Ed2d at 347.

Rejecting Moffitt's equal protection charge, the Supreme Court reasoned:

> At the trial stage any person hauled into court who is too poor to hire an attorney cannot be assured a fair trial unless counsel is provided. By contrast, in the appeal process, the defendant needs an attorney not as a shield to protect him but as a sword to upset the prior determination of guilt. The fact that an appeal has been provided does not mean that a state acts unfairly by refusing to provide counsel at every stage of the way.

Ross, 417 U.S. at 611, 94 S.Ct. at 2445, 41 L.Ed.2d at 351.

The court stated that equal protection dictates that the indigent defendant have access to a "meaningful appeal". It further stated that at the discretionary stage the respondent would at least have a transcript or other record of the trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in most cases, an opinion by the appeals court deposing of the case. Ross, 417 U.S. at 614, 94 S.Ct. at 2445, 41 L.Ed.2d at 353.

Finally, the Court concluded that under these circumstances, an indigent defendant, supplemented with pro se material, is far less handicapped than the indigent defendant denied counsel on his initial appeal as of right. Id. The court recognized that although a particular service might benefit an indigent defendant does not mean that the service is constitutionally required. When

the defendant is given an adequate opportunity to fairly present his claims in the appellate process. Ross, 417 U.S. at 616, 94 S.Ct. at 2444-2447, 41 L.Ed.2d at 354.

In another case, Wainright v. Torna, 455 U.S. 586, 587-588, 102 S.Ct. 1300, 1301, 71 L.Ed.2d 475, 477-478 (1982), because the respondent had no constitutional right to counsel for discretionary review to the Florida Supreme Court and did not contend otherwise, the court held he could not be deprived of effective assistance of counsel by his retained counsel's failure to file a timely application. The court found that the respondent was deprived by his counsel and not the state because the Florida Supreme Court dismissed the untimely application. Wainright, 455 U.S. at 588, 102 S.Ct. at 1301, n.4, 71 L.Ed.2d at 478.

The Florida Legislature has chosen not to extend Douglas, supra, to provide for appointment of counsel for a defendant who seeks either discretionary review in the Florida Supreme Court or the U.S. Supreme Court. §925.035, Fla. Stat.(1991); Art. V. §3, Florida Constitution. Furthermore, like the respondent in Wainright v. Torna, Mr. Green never contended he was entitled to counsel for discretionary review to the U.S. Supreme Court. (R 24-25; 37-45); Art. I, §2, Florida Constitution. And, applying Ross, Mr. Green received meaningful appellate review and was not denied any rights secured by the Federal or State Constitution.

Mr. Fraser relies on Haag v. State, 591 So.2d 614 (Fla. 1992). However, unlike the instant case, Haag implicated a basic guarantee of Florida law, the right to relief through writ of habeas corpus.

Art. I, §13, Florida Constitution. Id. (IB 4) Under fundamental principles of fairness, the Haag Court was compelled to invoke the "mailbox rule" to allow inmates equal access to court and to avoid a level of arbitrariness that could violate equal protection. Id. at 617-618.

Therefore, contrary to Mr. Fraser's contention, the fact that Mr. Green is a capital defendant and the Tenth Circuit Public Defender has adopted a policy of filing applications for certiorari to the U.S. Supreme Court does not create a substantive right to assistance of counsel to be compensated by Hillsborough County. (R 42-43)(IB 4,5). Moreover, under the Wainright rationale, the order below does not violate Mr. Green's equal protection rights since he was without a federal or state constitutional right to assistance of counsel.

For the foregoing reasons, the trial court's order should be affirmed.

B. THERE IS NO FLORIDA STATUTORY RIGHT TO DISCRETIONARY REVIEW TO THE UNITED STATES SUPREME COURT

Section 925.035, Florida Statutes (1991), governs appointment and compensation of counsel for indigent capital defendants in appellate proceeding. Section 925.035 does not authorize the circuit court to appoint a public defender or appointed counsel to represent an indigent capital defendant on discretionary review to the U.S. Supreme Court. Neither does Section 925.035 impose a duty on appointed counsel to represent an indigent capital defendant on

discretionary review to the U.S. Supreme Court. §925.035(5).

If there is no constitutional right, Ross, Supra, or statutory right to assistance of counsel for discretionary review, the court can not assess attorney fees against the county. See Peters v. Cox, 341 F.2d 575 (10th Cir. 1965). For example, in Songer v. Citrus County, Florida, 462 So.2d 54 (Fla. 5th DCA 1984), the District Court affirmed the circuit court's decision that a defense attorney who filed a motion to vacate the death penalty and appealed the denial of that motion was not entitled to an assessment of attorney fees and costs against citrus county. The Court held that nothing in the governing statutes authorized the imposition of attorney fees on a county for the representation of a criminal defendant in a post-conviction collateral proceeding. Id.

Nevertheless, in Brevard County Board of County Commissioners v. Moxley, 526 So.2d 1023, 1024 (Fla. 5th DCA 1988) the District Court limited Songer and affirmed the trial court's appointment of counsel to represent the defendant in his 3.850 proceeding. The Court held, "to apply Songer would cause §27.53, §925.035 and §925.036 to be unconstitutional as applied and, under the facts of the instant case, would violate the defendant's equal protection rights under the Florida and Federal Constitution." Id.

Even the U.S. Supreme Court in Ross recognized that although there is no absolute right to counsel in collateral relief proceedings, the circumstances of a particular case may require appointment of counsel. See also Graham v. State, 372 So.2d 1363

(Fla. 1979); Floyd v. Parole and Probation Commission, 509 So.2d 919, 920 (Fla. 1987)(Indigent defendants are not entitled to counsel in all parole revocation proceedings. If counsel is furnished in all proceedings, the decision should be made by the legislature.)

In Troedel v. State, 479 So.2d 736, 737 (Fla. 1985), the Supreme Court rejected an indigent capital defendant's argument that Chapter 85-332, Laws of Florida Creating the Office of Capital Collateral Representative, conferred a right to collateral representation that will be denied without a stay of execution to allow more time to prepare collateral challenges to the judgments and sentences. The court held that chapter 85-332 provided a state policy of providing legal assistance for collateral representation but did not add anything to the substantive law or constitutional rights of indigent capital defendants. Id.

In the instant case, Mr. Doug Conner, Assistant Public Defender, Tenth Judicial Circuit, testified that his office routinely files a petition for certiorari to the U.S. Supreme Court when the Florida Supreme Court affirms a judgment and Sentence of death. He also testified that funds for discretionary review representation are provided by the State. (R 40-41) §§925.035, 27.50, Fla. Stat. Mr. Fraser, therefore, asserts that the trial court's order violates Mr. Green's rights under the Equal Protection Clause. (R 43)

There is no authority which mandates the Public Defender to provide discretionary review representation to indigent capital

defendants. (R 43-44) Apparently, the Public Defender's routine filing of such applications is a state policy motivated by the Public Defender's ethical duty to provide effective assistance of counsel at every stage of the appellate process. (R 40-41; 43-44) Sixth Amendment, U. S. Constitution; See also §§27.702, 27.704, Florida Statutes (1991).

Applying Troedel, Hillsborough County contends that the Public Defender's policy of conferring a benefit did not confer a statutory or constitutional right on Mr. Green. Moreover, unlike the capital defendant in Brevard County v. Moxley, who the trial court determined had a constitutional right to counsel, apart from his equal protection claim, Mr. Green never contended that he had a constitutional right to assistance of counsel.

Appointed counsel in conflict cases are not employees of the Public Defender's Office but are officers of the court who are compensated by the county when a constitutional or statutory right requires assistance of counsel. §§925.035, 27.50, Fla. Stat.; See also In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1136 (Fla. 1990).

Furthermore, Section 925.035 does not authorize the appointment of counsel for discretionary review because the Legislature intended to limit the financial burden on counties for indigent capital appeals. Neither does Sub-section 925.035(6), a catch-all provision, provide compensation for discretionary

review.[2] Therefore, the Legislature should decide if counties should provide counsel to indigent capital defendants for discretionary review.

Accordingly, Judge Menendez properly followed the dictates of Section 925.035, Ross, supra, and Wainright, supra, in denying Mr. Green's motion to appoint counsel for discretionary review to the U.S. Supreme Court. As a matter of law, Mr. Fraser's appointment and Mr. Green's right to assistance of counsel terminated when the Florida Supreme Court affirmed his judgment and sentence of death. Green v. Florida, __ U.S. __, 112 S.Ct. 1191 (1992).

For the foregoing reasons, this court should affirm the order below.

II. HILLSBOROUGH COUNTY DOES NOT HAVE A STATUTORY OR CONSTITUTIONAL DUTY TO COMPENSATE MR. FRASER FOR PREPARING MR. GREEN'S PETITION FOR CERTIORARI TO THE U.S. SUPREME COURT

Mr. Fraser seeks compensation under Makemson v. Martin County, 464 So.2d 1281, 491 So.2d 1109, 1110 (Fla. 1986) (Section 925.036 is unconstitutional when it is applied to limit the court's inherent power to ensure adequate representation of counsel and thereby exceed the statutory fee limit in a capital case). (IB 7) Unlike Makemson's appointment, Mr. Frasers's representation was not authorized because Judge Menendez was not statutorily or constitutionally authorized to appoint him. Id. Therefore Makemson and Section 935.036, Florida Statutes are not applicable.

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[2] Capital Collateral Representation and executive clemency are funded by the State.

But see, Remeta v. State, 559 So.2d 1132, 1135, Note 4, (Fla. 1990) (Makemson was extended to executive clemency proceedings since Florida provides a statutory right to counsel. §925.035(4), Fla. Stat. J. McDonald, dissent: "the court did not conclude that there is a constitutional right to counsel in clemency proceedings".)

The common law did not ensure the poor a right to counsel. See County of Dade v. Sansom, 266 So.2d 279 (Fla. 3d DCA 1990). It was the professional obligation of the American and English lawyer to accept an appointment to represent an indigent defendant without compensation. See also In the Interest of D.B. and D.S., 385 So.2d 83, 91-93 (Fla. 1980).

As an officer of the court and as an ethical duty to Mr. Green, Mr. Fraser, filed the application with full knowledge that Judge Menendez denied his appointment because Mr. Green did not have a constitutional or statutory right to assistance of counsel. Accordingly, under principles of appellate review, the instant appeal is moot.[3] (R 24-25; 27) See Department of Highway Safety v. Heredia, 520 So.2d 61 (Fla. 3d DCA 1988).

In conclusion, since the record clearly reflects that Hillsborough County met its statutory obligation to provide Mr. Green effective assistance of counsel the trial court's order should be affirmed. (R 27)

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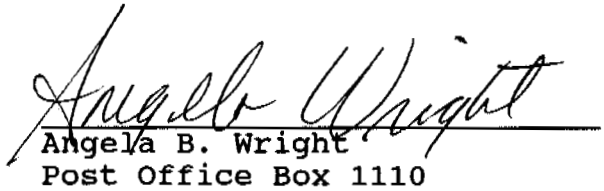
[3] See §27.702, Fla. Stat. (1991), "Representation by the capital collateral representatives shall commence upon termination of direct appellate proceedings in state or federal courts ..."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail this 25th day of August to ROBERT FRASER, ESQUIRE, P. O. Box 3470, Brandon, Florida 33509 and BOB LANDRY, ESQUIRE, THE OFFICE OF THE ATTORNEY GENERAL, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607.



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