IN THE DISTRICT COURT OF APPEAL
FIFTH CIRCUIT

ORANGE COUNTY, FLORIDA,

Appellant.

V.

FREDDIE LEE WILLIAMS,

Appellee,

90143

CIR. CT. CASE NO. CR80-5117
DCA CASE NO. 96-1914

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellee accepts the Appellant's Statement of Case and Facts but, for completeness, adds the following portions of Defendant/Appellee's Motion for Costs and the Court's ruling:

MOTION FOR CONTINUED PAYMENT OF COSTS

1. The Defendant is currently incarcerated in the Florida State Prison, having been convicted of first degree murder and sentenced to death.

2. This Court, on March 7, 1996, granted an evidentiary hearing as to claims II, III and IV, of Defendant's Amended Motion for Post Conviction Relief. These claims raised issues of ineffectiveness of trial counsel under the requirements of Strickland v. Washington, 466 U.S. 668, 105 S.Ct. 668, 80 L.Ed.2d 674 (1986), relating to preparation for and handling of the penalty phase of the proceedings.

3. Mr. Williams has been represented by the undersigned legal counsel pro bono since 1986. Mr. Williams was previously adjudged indigent for purposes of obtaining trial counsel, and his financial situation has not changed since that time, as he has been incarcerated since his conviction in 1981. As a result of Mr. Williams' indigency, his counsel will not be able to effectively and completely prepare and present his claims for post conviction relief unless this Court authorizes the release of funds for the retention of experts, investigative assistance, and other reasonable necessary litigation expenses.

4. At the time that the undersigned commenced representation of Mr. Williams, the undersigned was a senior partner in a law firm with four partners and two associates, along with summer clerks and extensive support staff, In September of 1992, the undersigned opened his own law offices, and is currently engaged in a very busy litigation practice along with one associate. Both lawyers are very involved in the day to day court-intensive aspects of a criminal defense practice. The undersigned therefore does not have the same time and financial resources that he possessed when he first took the case.

5. The undersigned's decrease in time and resources is compounded by the fact that at the time the undersigned commenced representation of Mr. Williams the Voluntary [sic] Lawyers Resource Center (V.L.R.C.), which was comprised of

six staff attorneys, along with paralegals and other support staff, was in existence to assist solo practitioners and small firms that were representing defendants on death row. The undersigned was assisted in his representation of Mr. Williams by the V.L.R.C. However, the V.L.R.C was zero funded by Congress in 1995, and its doors were closed March 3 1, 1996. . . ,

* * *

6. In Claim II of the Defendant's 3.850 Motion, it is asserted that the Defendant's trial counsel was ineffective at the advisory sentencing phase and sentencing phase of his trial. Included in this claim is the assertion that the Defendant's trial counsel failed to adequately prepare for the final summation to the jury. Also under this claim, Defendant asserts ineffectiveness of trial counsel in failing to argue the existence of any statutory mitigating circumstances during the advisory sentencing phase, including that the offense was committed while the Defendant was under the influence of extreme mental duress (F.S. 921.141(6)(e)), and that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law were substantially impaired (F.S. 921.141(6)(f)). The undersigned anticipates the necessity of obtaining expert legal testimony to address the issue of the required "standard of care" under Strickland at the evidentiary hearing on this matter.

7. Under Claim II, Defendant asserts that his trial counsel was ineffective in failing to request that a psychiatrist or psychologist be appointed to aid the defense in providing testimony in support of several statutory mitigating factors, and numerous non-statutory mitigating factors, including the Defendant's very low I.Q. (only 81), that the Defendant would very likely be a productive and cooperative inmate, mental health problems, alcohol abuse, a prior history of having a head injury, and any neurological or organic brain damage due to the prior history of head injury. Further, Defendant asserts that his trial counsel was ineffective in failing to investigate or present any evidence concerning the Defendant's past medical history in support of both statutory and non-statutory mitigating factors, including: failing to investigate evidence of: prior gunshot injuries to the Defendant's head, leg and chest; failure to conduct neurological inquiry and testing to the effect of prior trauma to Defendant's head and his mental health status, competency and sanity; failure to conduct any background investigation or present evidence concerning past treatments of the Defendant by any

mental health experts; and failure to investigate or present any evidence concerning the Defendant's past history of trauma to the head causing severe headaches, intermittent disability, or loss of orientation, black-outs, dizziness and fainting spells.

8. Under Claim II, Defendant asserts that his trial counsel failed to investigate and present evidence concerning the Defendant's prior disadvantaged family background and upbringing, and never investigated the Defendant's school records or problems, as they related to his low I.Q. Also, there was a complete failure on the part of trial counsel to present any evidence of the Defendant's alcoholism and abuse of alcohol, an additional recognized non-statutory mitigating factor. Defendant also claims that his trial counsel was ineffective for failing to contact the victim's family, specifically her sisters, to present their testimony that they did not desire the death penalty for the Defendant.

9. To investigate and substantiate Mr. Williams' post conviction claims, principally those based on Mr. Williams' mental health problems, low I.Q. and alcohol abuse, investigative aid, expert witnesses and other services are required. Specifically, counsel anticipates that it will be necessary at a minimum to retain the services of a psychiatrist and a psychologist as well as an investigator to document Mr. Williams' life story. Funds will be required to obtain the services of these experts and for other reasonable and necessary litigation expenses.

10. To show that his right to effective assistance of counsel was violated, the Defendant must show that he was prejudiced by trial counsel's failure to develop mental health and other mitigating evidence. Strickland v. Washington, 466 U.S. 688 (1984). This requires a showing that, but for counsel's ineffectiveness, there is a reasonable likelihood that the outcome would have been different. Id at 684. To make this showing, Mr. Williams must present to the court what a competent investigation by trial counsel would have revealed; that is, what competent investigators would have uncovered as to his life history and what competent mental health professionals would have testified to if retained and given an opportunity to review that life history.

11. To develop the facts material to this claim adequately -- and thus to be afforded a full, fair and adequate hearing -- Mr. Williams must be provided reasonable and sufficient funds for investigative assistance and expert witnesses.

Funds are necessary for an investigator who can document Mr. Williams life history and to obtain an evaluation of Mr. Williams by a psychiatrist who can testify as to the significance of that life history on Mr. Williams' culpability. A psychologist who can perform psychological testing and provide expert testimony as to the results of his testing is also required.

* * *

15. The need for an evidentiary hearing in this matter is apparent. As demonstrated herein, to develop the facts material to his claims, the Defendant will have to present numerous witnesses and experts to testify to the significance of his mental condition regarding his culpability and to testify with respect to the standard for effective representation of defendants charged with capital crimes in the State of Florida. The necessity of such a hearing is undisputed, and the hearing will undoubtedly be lengthy and will involve complex issues. Therefore the Defendant needs funds to develop the facts and obtain testimony to support his claims.

(R. at pp. 3-9, Motion for Costs).

ORDER GRANTING MOTION FOR CONTINUED PAYMENT OF COSTS

This matter came before the Court in the Defendant's Motion for Payment of Costs filed April 11, 1996. After considering the motion, the arguments of counsel and the record of this case, the Court makes the following findings:

1. The Capital Collateral Representative is not obligated to absorb the costs of this collateral relief action because the Defendant is represented by volunteer private counsel. § 27.702(1), Fla. Stat. (1995); Spaziano v. State, 660 So. 2d 1363, 1370 (Fla, 1995)("[Spaziano] may be represented at the evidentiary hearing by CCR or by competent volunteer counsel . . . at no expense to the State, . . . ").

2. The Defendant's decision to employ volunteer counsel does not necessarily relieve the County of any obligation it may have to pay for costs. Compare Johnson v. Snyder, 417 So. 2d 783 (Fla. 3d DCA 1982); Sanintil v. Snyder, 417 So. 2d 784 (Fla. 3d DCA 1982); Behr v. Gardner, 442 So. 2d 980 (Fla. 1st DCA 1983).

3. The Court finds that the costs proposed by the Defendant to date are necessary to afford the Defendant due

> process at an evidentiary hearing and to permit this Court to address this complex postconviction claim, Orange County is therefore responsible for paying for these costs. See § 43.28, Fla. Stat. (1995); Brevard County Bd. of County Comm'rs v. Moxley, 526 So. 2d 1023 (Fla. 5th DCA 1988).

(R. at pp. 78, 79).

SUMMARY OF ARGUMENT

Pro bono counsel in capital post-conviction proceedings who is not affiliated with the Office of the Capital Collateral Representative, or appointed by the Court because of a conflict of interest, is classified under section ***43.28, Florida Statutes*** (1995), as "personnel necessary" for operation of the courts. The trial judge properly applied this statute in finding that the County should pay the litigation costs to be incurred by counsel for Mr. Williams, an indigent death-sentenced person whose constitutional claims were found sufficient to require an evidentiary hearing.

The County's assertion that CCR should pay those expenses is refuted by the legislative history of CCR, and the present and past versions of Chapter 27, Part IV (CCR statute), and the Supreme Court's Commentary to the post-conviction rules, all showing that a dual system of representation has existed since the inception of CCR. No authority exists for imposing on CCR the litigation costs of a person who CCR does not represent.

ISSUE (RESTATED)

WHETHER THE TRIAL JUDGE CORRECTLY RULED THAT ORANGE COUNTY RATHER THAN THE CAPITAL COLLATERAL REPRESENTATIVE (CCR) WAS RESPONSIBLE FOR COSTS TO BE INCURRED BY A LAWYER REPRESENTING A DEATH-SENTENCED PERSON PRO BONO IN AN EVIDENTIARY HEARING UNDER FLA. R. CRIM. P. 3.850 WHEN CCR WAS NOT COUNSEL AND THE *PRO BONO* COUNSEL WAS NEITHER ACTING AS A SPECIAL ASSISTANT CCR NOR COURT-APPOINTED UNDER *FLA. STAT. $27.703 (1995)* DUE TO A CONFLICT OF INTEREST.

ARGUMENT

Freddie Lee Williams is sentenced to death. His motion for relief under Fla. R. Crim. P. 3.850 requires an evidentiary hearing on constitutional issues to determine if the sentence is lawful. Although Mr. Williams might have been represented by the Office of the Capital Collateral Representative (CCR), in fact he is represented by counsel acting ***pro bono.***

The Appellant (County) claims that CCR is nevertheless responsible for the costs incurred by Williams' counsel because were it not for such ***pro bono*** counsel, Mr. Williams would be represented by CCR. Of course, the County's argument is built on a hypothetical case and not reality.

The legislative staff analysis attached to Mr. Williams' response in the trial court demonstrates legislative intent in 1985 was to limit CCR's responsibility to representing indigent death-sentenced persons who were without counsel (R. 73). That intent was expressed in section 27.702(1), ***Florida Statutes*** (1995), which said CCR would represent those sentenced to death "who [were] without counsel and . . . unable to secure counsel due to indigency . . . ".

From this statute the County somehow asserts that CCR became the funding source for all indigents sentenced to death even if they are not represented by CCR. A plain reading of the statute does not support that construction. CCR represents only its own clients. By statute, those are clients who are (1) without counsel, and (2) are unable to secure counsel due to indigency or determined by a court of competent jurisdiction to be indigent. Whether indigent or not, persons who have counsel are not represented by CCR.[1]

Nevertheless, the County argues somewhat obliquely that since an indigent person who did not have counsel would be represented by CCR, others who are indigent but not represented by CCR are entitled to have their costs paid as if they were clients of CCR. Interestingly, the County supplies no authority for this interpretation of the statute.

The County's position assumes that the Legislature intended to and did fund CCR to the extent that the expenses of all indigent clients, not just CCR's, would be paid out of CCR's appropriations.

Legislative history is to the contrary. As the staff summary said:

> CCR was created as an agency that would be funded to represent those persons who did not have legal representation in post-conviction proceedings because of their indigency .

(R. 73). The funding was obviously based on the number of clients to be represented by CCR. The CCR clients did not include those death-sentenced individuals who had volunteer counsel. Orange County now says that the Legislature meant to include under the CCR funding

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'As amended by Chapter 96-290, § 2, LAWS OF FLORIDA, effective May 30, 1996, Section 27.702(1) no longer requires indigency as a qualification for CCR representation.

umbrella all death-sentenced persons, even those with volunteer counsel. That is not what the bill analysis claims, and it is not what the statute says.

By contrast, section 27.704(2), Florida Statutes, authorizes the Capital Collateral Representative to appoint part-time assistant capital collateral representatives "who shall serve without compensation at the discretion of the capital collateral representative." Had Mr. Williams' counsel been functioning as a part-time assistant under section 27.704(2), the County's argument might have some statutory foundation. The issue of whether the County or CCR is liable for costs incurred by a statutory assistant would present a closer question than the one here, which is CCR's liability for litigation costs associated with volunteer counsel not functioning as an appointed part-time assistant under Chapter 27.

The existence of section 27.704(2) virtually negates the County's argument. By authorizing CCR to recruit its own "volunteers" as special assistant CCR attorneys, the Legislature was distinguishing those lawyers donating services under the auspices of CCR, for whom CCR might have financial responsibility, from other volunteer lawyers acting independently from CCR. CCR could exercise some fiscal control over expenses incurred by its part-time assistants representing CCR clients, whereas it properly should have no such responsibility for, or control over, other volunteer counsel, such as counsel for appellee who is not representing a CCR client.

The continued dichotomy between CCR and volunteer lawyers was recognized by the Florida Supreme Court as recently as 1993 when adopting new Rule of Criminal Procedure 3.85 1. The comments by the Court said:

> To assure [proper] representation, the [Supreme Court Committee on Postconviction Relief in Capital Cases] noted that it was essential that there be adequate funding of the Capital Collateral Representative and sought temnorarv assistance Bar in providing pro bono representation for some.

(Emphasis added). As did the Legislature, the Court thus envisioned a dual system of representation in which CCR would be counsel for some, but not all, indigent death-sentenced persons. The County's attempt to make CCR responsible for litigation expenses of *pro bono* counsel is inconsistent with that dual system.

As stated *supra*, note 1, in the last session of the Legislature, Chapter 27, Part IV, *Florida Statutes,* was amended by deleting the indigency requirement. CCR is not, however, the sole source of collateral counsel. Newly-created subsection 27.702(2), *Florida Statutes,* provides that CCR "shall represent each person convicted and sentenced to death . . . unless a court appoints or permits other counsel to appear as counsel of record" (emphasis added). Chapter 96-290, § 2, LAWS OF FLORIDA. Counsel for Mr. Williams obviously fits within that latter category.

The County also invokes section *27.703, Florida Statutes,* which provides that if during the representation of two or more indigent persons, CCR determines that their interests are so adverse or hostile that they cannot all be counseled by CCR without conflict of interest,

> the sentencing court shall upon application therefore by the Capital Collateral Representative appoint one or members of the Florida Bar to represent one or more of such persons. Appointed counsel shall be paid from dollars appropriated to the Office of the Canital Collateral Representative.

(Emphasis added).

This statute has no bearing on the issue before this Court. Mr. Williams' counsel was not appointed by a court on account of conflict of interest experienced by CCR. The County's argument that had counsel been a conflict attorney appointed pursuant to section 27.703, CCR would be liable for his fee and by implication, the costs associated with the representation, is not authority to hold CCR responsible for litigation costs of an attorney who is not so appointed.

Moreover, newly amended section ***27.703, Florida Statutes,*** relieved CCR of responsibility for the fees of counsel appointed to replace CCR due to a conflict of interest. Chapter 96-290, § 3, LAWS OF FLORIDA. Whereas section 27.703 formerly mandated payment of conflict counsel from funds "appropriated to the Office of the Capital Collateral Representative, " the payments are now to come from funds "appropriated to the Justice Administrative Commission. "

In light of those amendments, it is now even more unlikely for CCR to be liable for costs or fees associated with counsel representing a non-CCR client.

On the other hand, statutory and decisional authority supports the trial judge's ruling that the county is liable for such costs.

Despite the County's distaste for it, section ***43.28, Florida Statutes,*** governs this case. It provides that:

> The counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the state, personnel necessary to operate the circuit and county courts.

In In Interest of D.B., 385 So. 2d 83 (Fla. 1980), the Florida Supreme Court defined "personnel necessary to operate the circuit and county courts" this way:

> [W]hen appointment of counsel is constitutionally required to represent an indigent, the case cannot proceed without such an appointment; consequently, such counsel is "personnel necessary" to operate the court. In such an instance, the trial court may require the county to pay appropriate attorney's fees for such representation absent any other statutory provision,

Id. at 93.

As demonstrated above, no statutory provision authorizes payment of the costs incurred by *pro bono* counsel for an indigent death-sentenced person who is not a CCR client in post-conviction except section 43.28. The County is therefore authorized and required to bear those expenses.

The County attempts to distinguish D.B. by asserting that the obligation to provide counsel was based on a constitutional, as opposed to a statutory right, and that counsel is not constitutionally required for post-conviction proceedings.

That argument is refuted by this Court's decision, relied on by the trial judge, in Brevard County Comm'rs v. Moxley, 526 So. 1023 (Fla. 5th DCA 1988), holding that Florida's Constitution may require appointment of counsel even if the United States Constitution does not. The Court said:

> We recognize that a prisoner has no absolute constitutional right to appointed counsel in a collateral attack on his conviction. *Pennsylvania v. Finley,* U.S. , 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). *Finley,* however, deals with the right to counsel imposed upon the states by the sixth amendment. On the other hand, the Florida cases of *Williams v. State,* 472 So. 2d 738 (Fla. 1985) and *Graham v. State, 372* So.2d 1363 (Fla. 1979) are the progeny of *State* v. *Weeks,* 166 So.2d 892 (Fla. 1964), which is predicated upon a provisional right to counsel generated by the fifth amendment and by the Florida Constitution.
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> * * *

> It is important to note that in Weeks the due process requirements were considered pursuant not only to the fifth amendment of the United States Constitution, but on the basis of section 12, Declaration of Rights, Florida Constitution (1885). This due process provision has been retained in Article I, section 9, of the current Florida Constitution as revised in 1968.

Id. at 1026.

The flexible due process standards governing right to counsel in post-conviction include a meritorious claim, complexity of the issues, and the adversarial nature of the proceedings. *Id.*

The motion for costs, quoted extensively *supra,* satisfies the due process standards mandating the assistance of counsel for Mr. Williams. Counsel is therefore constitutionally required, just as decreed in D.B, and Moxley .

Furthermore, the right to effective assistance of counsel in capital post-conviction proceedings is guaranteed by section 27.7001 *et. seq., Florida Statutes,* as construed by the Florida Supreme Court in Spaziano v. State, 660 So. 2d 1363 (Fla. 1995), and Spalding v. Dugger, *526 So.* 2d 71 (Fla. 1988).

The obligation for counties to pay counsel under section 43.28 as "personnel necessary" to operate the courts may be based on a statutory right to counsel as well as a constitutional right. State Dept. of Revenue v. Salch, 673 So. 2d 904 (Fla. 2d DCA 1996); Brevard Board of County Comm'rs v. Harris, 657 So. 1233 (Fla. 5th DCA 1995); In Re B.C., 610 So. 2d 627 (Fla. 1st DCA 1992); In Re Skinner, 541 So. 2d 781 (Fla. 4th DCA 1989).

In analogous trial proceedings, the counties are required to pay costs of indigent defendants who have retained counsel even though they are eligible for appointment of the

public defender. Behr v. Gardner, 442 So. 2d 980, 982 (Fla. 1st DCA 1983)(on rehearing)("An indigent defendant receiving the services of a private attorney retained by a third party may obtain reasonable costs of discovery from the county pursuant to Fla. R. Crim. P. 3.220(k)"); Thompson v. State, 525 So. 2d 1011 (Fla. 3d DCA 1988)(indigent defendant not required to accept services of public defender in order to obtain reasonable discovery costs from the county).

The same principle applies here. Mr. Williams should not have to forego the services of *pro* bono counsel, who has represented him since 1986, and become a CCR client in order to have necessary litigation costs paid by the government,

Under these facts, Mr. Williams' ***pro bono*** counsel is uniquely "personnel necessary" to operation of the court within the meaning of section 43.28 and the trial judge correctly required the county to pay the costs. See ***also*** Orange County v. Corchado, 21 Fla. L. Weekly D1802 (Fla. 5th DCA Aug. 9, 1996)(rejecting county's argument that even though court was authorized to appoint second attorney in a capital case, county could not be required to pay the attorney's fees).

Finally, none of the cases cited in the County's brief are authority for reversing the judge's order, It should therefore be affirmed.

CONCLUSION

The trial judge followed applicable precedent in ordering the County to pay costs of ***pro bono*** counsel who is not a special assistant CCR or appointed due to a CCR conflict. No authority supports the County's attempt to impose liability for those costs on CCR.

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 30, 1996.

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