#90143

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

5TH DCA CASE NO.: 96-0914 1914
ORANGE L.T. CASE NO.: CR80-5117

ORANGE COUNTY, FLORIDA

Appellant,

v.

Freddie Lee Williams,

Appellee.
_____/

INITIAL BRIEF

George L. Dorsett
Assistant County Attorney
Florida Bar No. 375098
Orange County Attorney's Office
Orange County Administration Center
201 S. Rosalind Avenue
Orlando, Florida 32802
(407) 836-7320

Attorney for Appellant, Orange County

TABLE OF CONTENTS

PAGE

Table of Contents I

Table of Citations ii

Preliminary Statement 1

Statement of the Case and Facts 2

Summary of Argument 3

Argument 4

I. SECTION 27.702 AND 703, FLA. STAT. PROVIDE THAT THE FLORIDA OFFICE OF CAPITAL COLLATERAL REPRESENTATIVE ("CCR") IS RESPONSIBLE FOR REPRESENTING THE PETITIONER IN COLLATERAL MOTIONS FOR POST CONVICTION RELIEF. 5

II. SPALDINGV.DUGGER 6

III. *RIGHT* TO SUPPORT VERSUS *SOURCE* OF SUPPORT . , , , ... 7

IV. EQUITABLE ARGUMENTS - FUNDING BY THE LEGISLATURE 12

V. COUNTIES ARE NOT EVEN INDIRECTLY RESPONSIBLE FOR SUCH COSTS VIA THEIR RESPONSIBILITIES TO THE PUBLIC DEFENDER 14

VI, PUBLIC DEFENDERS (AND THEREFORE COUNTIES) ARE NOT RESPONSIBLE FOR DEFENDING INDIVIDUALS WHERE NO PROVISION FOR THAT IS MADE BY STATUTE 16

VII. *THE SONGER, MOXLEY* AND *ROSE* CASES ARE DEMONSTRATIVE OF THE UNDERLYING LAW 18

VIII. THE CAPITAL COLLATERAL REPRESENTATIVE IS RESPONSIBLE FOR COSTS ULTIMATELY, EVEN WHERE SOMEONE ELSE IS ACTUALLY REPRESENTING THE INMATE 24

Conclusion.. 26

Certificate of Service 27

TABLE OF CITATIONS

CASES **PAGE**

Brevard v. Moxley, 526 So. 2d 1023 (Fla. 5th DCA 1988) 4,19,20,21,23

Burrv. State, 518 So. 2d 903 (Fla. 1987) 8

Graham v. State, 372 So. 2d 1363 (Fla. 1979). 16

In the Interest of DB, 385 So. 2d 83 (Fla. 1980) 3,20,21,22,23

O f f i c e ,371 So. 2d 684 (Fla. 4th DCA 1979) 3,16

Pinellas County v. Sawyer, 620 So. 2d 757 (Fla, 1993) 4,17

Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978) 23

Songer v. Citrus County, 462 So. 2d 54 (Fla. 5th DCA 1984) 4,18,23

Spaldinev. Dugger, 526 So. 2d 71 (Fla. 1988) 6

State ex rel Jim Smith v. Jordanbv, 498 So. 2d 948 (Fla. 1986) 16

State v. William Melvin White, (CR 78-1840) 25

State v. Linroy Bottjson (CR 79-4512) 25

Yacussi v. Hershey, 549 So. 2d 782 (Fla. 4th DCA 1989) 3,16

FLORIDA STATUTES

Section27.51 ....3.14
Section 27.51(5)(b) 5,14,15,25
Section 27.702 3,4,5,20,24
Section27.703 3,4,5,20,24
Section27.704 18
Section43.28 21,22,23
Section914.11 ....3.8
Section925.035 3,8,10
Section925.036 3,10
Section939.07 3,8,11
Section939.037 ....3.13

PRELIMINARY STATEMENT

Citations to the Record are designated as R, with the page numbers following.

STATEMENT OF THE CASE AND FACTS

1. Mr. Williams tiled a Petition for continued Payment of Costs. (R3-10)

2. At the hearing on that motion on April 12, 1996 Orange County asserted that in the proceeding for which the attorney for Mr. Williams wishes to be granted costs, the attorney is acting in place of the Capital Collateral Representative, or at the very least, was acting as if he were the equivalent of an attorney appointed in place of the Capital Collateral Representative.

3. The County asserted that in a proceeding such as this, a collateral action for post conviction relief, that the County was not responsible for costs, and that the Capital Collateral Representative was responsible.

4. The court permitted the parties (Orange County and the Petitioner Williams,) to file Memoranda of Law in support of their positions, which they did. (R 13-37 and R 38-76).

5. The County's position in its Memorandum was primarily that absent a specific provision in the Constitution, the statutes or by way of a contract, neither the County nor anyone else is responsible for paying the litigation costs of another, and certainly not where a specific authority provision exists which requires another entity to provide such costs, here. (R 13-37)

6. The Petitioner's reply essentially claimed that if a volunteer counsel steps forward to relieve the Office of the Capital Collateral Representatives (CCR) of the duty to represent, via an attorney, the Petitioner, then the CCR is also relieved, automatically, of the other costs, because the petitioner is no longer "a CCR client." The County would then be responsible.

7. The Court granted the motion for continued costs on June 27, 1996, and the County filed an amended notice of appeal on July 3, 1996.

SUMMARY OF ARGUMENT

1. The underlying and profound requirement of the applicable Florida Statute is that the Office of the Capital Collateral Representative must pay for the Petitioner's Litigation Costs, and for that matter, his attorneys fees, in accordance with Section 27.702 and 703, Fla. Stat.

2. The petitioner's need for funds, and questions of his *right* to them is less of an issue than the proper source of the funds. The County is mandated to help defendants and appellants, not petitioners for Collateral Relief. Section 914.11, 925.035, 925.036, 039.07, *Fla. Stat.*

3. Orange County has just as many arguments of an equitable nature as Petitioner and the CCR have. The County's funds were also cut. See Section 925.037, Fla. Stat. The County is in a much poorer planning position than the CCR for budgeting for such payments. The CCR, after all, was required to fund such cases from the beginning, and the County would have an unbudgeted expenditure if it had to support Williams. The CCR has already benefitted from the free ride it has had from William's attorney. Whey should it continue to receive one from the County?

4. Counties *are* not even *indirectly* responsible for such costs by way of their responsibilities to the Public defender, since the Public Defender is *also* not required to represent an indigent collateral action petitioner. See Section *27.5* 1, *Fla. Stat.*

5. There is no "penumbra" or general duty in the absence of a statute for a public defender (and therefore through them the County) to represent an indigent. *Yacussi v. Hershey 549* So. 2d 782 (Fla. *4th* DCA 1989) and *Office of the Public Defender v. Baker,* 371 So. 2d 684 (Fla. 4th DCA 1979) Counties are only required to assist indigents, *otherwise* than through their support via special Public Defenders, where *no other statute* (like Section *27.702* and 703) exists *and* there is a constitutional right to assistance. *See In the Interest of D.B., 385 So.* 2d 83 (Fla. 1980).

Common law provides no such mechanism. *Pinellas* County *v.* Sawyer, 620 So. 2d 757 (Fla. 1993). Cost provisions against the State (meaning also the County) must be strictly construed. ***Sawyer, supra.***

6. There are several cases which provide a good illustration of the requirements of the statute. Orange County believes they can all be interpreted, when all things are considered, to support the County's position. *Songer v.* ***Citrus*** County, 462 So. 2d 54 (Fla. 5th DCA 1984), ***Brevard*** v. *Moxley* 526 So. 2d 1023 (Fla. 5th DCA 1988). They demonstrate that where no statute, constitutional or contractual authority exists to bill counties, ***and*** where statutory authority exists to bill someone else, Counties should not be forced to pay.

7. The CCR is ultimately responsible for the petitioner's costs, even if another attorney is actually representing the inmate. The inmate is still "a CCR client" for cost purposes. See Sections 27.5 1(5) (6), 27.702 and 27.703, Fla. Stat.

Orange County cannot be required to pay such costs as a matter of both law and equity.

ARGUMENT

THE CAPITAL COLLATERAL REPRESENTATIVE IS RESPONSIBLE FOR COSTS

The particular proceeding for which the attorney seeks payment reimbursement is a collateral proceeding for post conviction relief. The individual for whom the relief is sought is no longer a defendant at that point, and is petitioning for special relief.

I. SECTION 27.702 AND 703, FLA. STAT. PROVIDE THAT THE FLORIDA OFFICE OF CAPITAL COLLATERAL REPRESENTATIVE ("CCR") IS RESPONSIBLE FOR REPRESENTING THE PETITIONER IN COLLATERAL MOTIONS FOR POST CONVICTION RELIEF.

A. Section 27.702 establishes the responsibility of the CCR in the proceeding. It states in pertinent part:

> 27.702 Duties of the capital collateral representative. -- The capital collateral representative shall represent, *without additional compensation, any* person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to his indigency or determined by a state court of competent jurisdiction to be indigent *for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed. . . Representation by the capital collateral representative shall commence upon termination of appellate proceeding. . .*

(Emphasis added.)

From this it is clear that the Capital Collateral Representative does not represent a defendant, but rather a convicted felon seeking collateral relief. The fact that the client is no longer a defendant is a key element.

B. Section 27.703 of the Florida Statutes also provides, in pertinent part:

> 27.703 Conflict of interest and substitute counsel. If at any time during the representation of two or more indigent persons, the capital collateral representative shall determine that the interests of those persons are so adverse or hostile that they cannot all be counseled by the capital collateral representative or his staff without conflict of interest, the sentencing court shall *upon applications therefor by the capital collateral* representative-appoint one or more 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 Capital Collateral Representative.*

(Emphasis added.)

Nothing in the motion for costs speaks to the issue of conflicts or adverse interests although that may presumably be the case. The County's information is only that the attorney for whom reimbursement is sought volunteered to represent the petitioner. Therefore, the attorney representing former Defendant must be considered to be standing in place of the Capital Collateral Representative, rather than as an appointed counsel. However, even if this attorney had been appointed, it is clear that he would be paid from dollars appropriated to the Office of the Capital Collateral Representative, not from Orange County.

II. SPALDING V. DUGGER

Assuming, then that the attorney is standing in place of the CCR because he is not the equivalent of an appointed attorney, the case of *Spalding* v. *Dugger*, 526 So. 2d 71 (Fla. 1988) illustrates that the CCR is funded by the legislature, not the County, for attorneys fees, travel costs, witness expenses and other associated litigation expenses. The case quotes the Capital Collateral Representative as asserting in pertinent part as follows:

> Petitioner Spalding maintains that the unprecedented signing of nine death warrants, all operative during the same time period, makes it impossible for him to provide the death-sentenced prisoners with even a semblance of the postconviction due process to which they are entitled.
>
> Spalding bases his assertion on the fact that his office's budget has the completely depleted and, thus, he *lacks the necessary funds to meet travel costs, witness expenses, and other associated litigation costs until the new budget year commences on July I, 1988.* The agency's chief fiscal office stated under oath that the accounts from whom the collateral representative contracts for experts and part-time staff assistants, *including experts utilized to address mental health issues,* "have been completely exhausted". She determined that *CCR cannot expend funds for investigation, travel, experts, or other services directly related to the nine cases under active death*

> ***warrants,*** without violating Section 2 15.3 11, Florida Statutes (1987), and subjecting the capital collateral representative to the penalties provided in Section 775.082, 775,083, or 775.084, Florida Statutes (1987).
>
> Spalding asserts that, given these fiscal circumstances he is unable to assure the presence of counsel for scheduled evidentiary hearings in the various courts prior to July 1. He concedes that when additional funds are released on July 1, the problem "should dissipate".
>
> The collateral representative requests this Court to grant relief in one of the following alternatives: (1) enter stays of execution and order no further evidentiary hearings be held in the collateral relief proceedings for the death-sentenced prisoners Spalding represents until after July 1, 1988; (2) direct the respondent trial courts to enter stays of execution and not proceed on evidentiary hearings until after July 1, 1988; or (3) order the trial courts to enter stays of execution ***unless the appropriate boards*** of county commissioners ***agree to pay*** the costs and expenses of the office of the capital collateral representative. The state responds that this Court does not have jurisdiction to provide the requested relief until a postconviction claim is filed in the trial court and the trial court has had an opportunity to entertain the issue of whether a stay is necessary.

(Emphasis added.)

Clearly, the CCR did not believe that counties have a responsibility to pay such costs.

Neither the CCR or the court behaved as if they thought the County had any duty to pay for such costs and the opinion denying the relief sought by the CCR turned on other issues.

III. *RIGHT* TO SUPPORT VERSUS *SOURCE* OF SUPPORT

The citations of authority made by the attorney for Petitioner establish two basic requirements. First, indigent defendants have the right to have the necessary financial support to ***defend*** against the criminal charges. The second requirement is that counties are required to provide ***those*** funds for ***defendants.*** None of the statutes or case citations show that a county, as opposed to some other entity, must provide funds to assist an individual when he has completed his defense,

and has exhausted his appeals.

A. COUNTIES COVER TRIALS AND APPEALS FOR DEFENDANTS

All of the applicable Florida statutes, specifically 914.11, 925.035(6) and 939.07 all speak of *defendants* in criminal *cases* and focus on *trials* and *appeals. The* pertinent parts are as follows:

> 9 14.11 Indigent *defendants.* -- If a court decides, on the basis of an affidavit, that a *defendant* in a criminal case is indigent and unable to pay the cost of procuring the attendance of witnesses, such *defendant* may subpoena the witnesses, and the costs, including the cost of the defendant's copy of all depositions and transcripts which are certified by the defendant's attorney as serving a useful purpose *in the disposition of the case,* shall be paid by the county. When depositions are taken outside the circuit in which *the case ispending,* travel expenses shall be paid by the county in accordance with s. 112.061 and shall also be taxed as costs.
>
> (Emphasis added.)

This provision clearly speaks to the disposition of a criminal case, not an ancillary or collateral proceeding. The Petitioner is not a defendant, He has already been convicted. The case is not "pending." It has been decided. It was final upon review by the highest appellate court following Petitioner's direct appeal of judgment and sentence. *See Burr v. State, 5* 18 So. 2d 903 (Fla. 1987).

> 925.035 Appointment and compensation of an attorney in capital cases; *appeals from judgments* imposing the death penalty.-
>
> (1) If the court determines that the *defendant* in a capital case is insolvent and desires counsel, it shall appoint a *public defender* to represent the defendant. If the public defender appointed to represent *two* or more *defendants* found to be insolvent determines that neither he nor his staff can counsel all of the accused without conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender in his capacity as such or in his private practice, to represent those accused. The attorney shall be

allowed compensation, as provided for in s. 925.036 for representing a defendant.

(2) If the defendant is convicted and the death sentence is imposed, ***the appointed attorney shall prosecute an appeal*** to the Supreme Court. The attorney shall be compensated as provided for in s. 925.036. If the attorney first appointed is unable to prosecute the ***appeal,*** the court shall appoint ***another*** attorney and the attorney shall be compensated as provided for in s. 925.036.

(3) If there is a ***second trial*** of the same case, the appointed attorney shall be compensated as provided for in s. 925.036.

(4) If the death sentence is imposed and is ***affirmed on appeal to the Supreme Court,*** the appointed attorney shall be allowed compensation, not to exceed $1,000, for attorneys' fees and costs incurred in representing the defendant as to ***an application*** *for* ***executive clemency, such compensation to be paid out*** *of* ***general revenue from finds budgeted to the Department*** *of* ***Corrections.*** The public defender or an attorney appointed pursuant to this section may be appointed by the trial court that rendered the judgment imposing the death penalty, to represent an indigent defendant who has applied for executive clemency as relief from the execution of the judgment imposing the death penalty.

(5) When the appointed attorney in a capital case has completed the duties imposed ***by this section,*** he shall file a written report in the trial court stating the duties performed by him and ***apply*** *for* ***discharge.***

(6) All compensation and costs ***provided*** *for* ***in this section, except*** as provided in subsection (4), ***shall be paid*** by ***the county*** in which the trial is held unless the trial was moved to that county on the ground that a fair and impartial trial could not be held in another county, in which event the compensation and costs shall be paid by the original county from which the cause was removed.

(Emphasis added.)

Again, it is clear from the language of this statute that the payment concerns trial in the original court and appeals of the result, for which the Public Defender or special conflict counsel

shall be appointed, There is even a specific provision for an attorney to be paid *from funds of the department of corrections* when a special "conflict" public defender files for executive clemency. The statute even limits payment by the counties to those costs defined *in that statute only,* It even shows that by specific provision in some cases the county does *not* pay costs and when it does, only while the individual is a defendant *at trial* and *on appeal.*

The provision immediately following Section 925.035, provides:

> 925.036 Appointed counsel; compensation. --
>
> (1) An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of the representation, be compensated at an hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit; however, such compensation shall not exceed the maximum fee limits established by this section. *In addition, such attorney shall be reimbursed for expenses reasonably incurred,* including the costs of transcripts authorized by the court. If the attorney is representing a defendant charged with more than one offense in the same case, the attorney shall be compensated at the rate provided for the most serious offense for which he represented the defendant. This section does not allow stacking of the fee limits established by this section.
>
> (2) The compensation for representation shall not exceed the following:
>
> (a) For misdemeanors and juveniles represented at the *trial level: $1,000.*
>
> (b) For noncapital, nonlife felonies represented at the *trial level: $2,500.*
>
> (c) For life felonies represented at the *trial level: $3,500.*
>
> (d) For capital cases represented at the *trial level: $3,500.*
>
> (e) For representation *on appeal: $2,000.*

(Emphasis added.)

Note that there are no provisions for attorneys fees or for reimbursement of costs for any action ***other than a trial or an appeal.***

Section 939.07, Fla. Stat. states:

> 939.07 Pay of defendant's witnesses. --
>
> In all criminal ***cases prosecuted in the name of the state*** in the circuit courts or county courts in this state where the ***defendant*** is indigent or discharged, the county shall pay the legal expenses and costs, as is prescribed for the payment of costs incurred by the county in the prosecution of such cases, including the cost of the defendant's copy of all depositions and transcripts which are certified by the defendant's attorney ***as*** serving a useful purpose ***in the disposition of the case;*** provided, that ***before any witness is subpoenaed on behalf of a defendant in the circuit or county court an application shall be made to thejudge,*** in writing, on behalf of the defendant, setting forth the substance of the facts sought to be proved by the witness or witnesses, making affidavit that the defendant is insolvent, and if upon such showing the judge is satisfied that the witness or witnesses are necessary for the proper defense of the defendant, he shall order that subpoena issue, and that the costs as herein provided shall be paid by the county, and not otherwise.

(Emphasis added.)

Again, the proceeding for which the instant payments are requested is ***not prosecuted in the name of the state.*** The petitioner is no longer a defendant, none of the costs are necessary for the disposition of the case, because it had already been disposed of, and there is no defense of a defendant going on at all. This is a collateral matter entirely.

There are many cases concerning indigency and the right to financial support, some of which are cited by the attorney for the Petitioner, others not. All cited by him do support the right to financial support. ***None*** address collateral actions for post conviction relief. Orange County does not disagree with the principle that indigent defendants have a right to financial support for their

defense. Orange County does not even quarrel with the principle that the defendant has *by statute,* a right to financial support for motions for litigation expenses for the specific type of post conviction relief former defendant has requested. Orange County simply takes the position that *no statute, rule or case requires Orange County or any county to cover such costs, and that the only provisions for such collateral actions indicate that the CCR, not the County, shouldpay.*

The critical issue is therefore not the indigency of Petitioner. He has been found indigent. His right to financial assistance is not the issue either. The only issue is the *source* of the funds, not the right to receive them. One cannot just substitute "volunteer legal counsel" for "public defender" and pretend that the same statutes apply. The public defender is supported by the counties in accordance with the Florida Statutes, and any private attorney appointed in place of the Public Defender is paid by the County, The CCR is not supported by the County. The County is *not* responsible for the costs in a collateral proceeding. There are no cases which require the County to be responsible in such a case.

IV. EQUITABLE ARGUMENTS - FUNDING BY THE LEGISLATURE

The Petitioner has made numerous statements relating to the lack of funds available from the legislature for the Capital Collateral Representative and the cancellation of funding for the organization formerly known as the voluntary Lawyers Resource Center, (VLPCDO). The U.S. Congress (in VLPCDO's case) and the Florida Legislature have indeed either cut funding or have not increased it, and the CCR and VLPCDO have indeed suffered. This set of facts has been placed before the Court as, it seems, an equitable argument that since the CCR cannot cover costs of this proceeding, the County must be corralled and forced to do so.

A. THE COUNTY'S FUNDS WERE CUT ALSO.

The County can raise a similar argument though. The Legislature, by its own statute, is ***required*** to reimburse counties for the attorney's fees and costs they are supposed to pay. See §925.037, Fla. Stat. The legislature has refused to do this for years. It seems that both the CCR and the County could bring the same argument, except that at least the CCR has received *some* portions of the money required by statutes to be paid to it, where the County has received none or virtually none.

B. THE COUNTY IS A POORER PLANNING POSITION.

The County is in no better position than the legislature/CCR to plan and budget for such expenditures, and indeed has *less* information with which to plan. Orange County's budget for attorney's fees and costs for indigents is established on the assumption that it can rely on the statute to require the CCR to pay for collateral actions such as this, even just as Orange County knows that whatever happens, it will probably not receive reimbursements for its outlays by the legislature, required though they are. The CCR can ***observe*** all of the Death Penalty Cases in the "pipeline" and plan to ask for a budget sufficient to pay for them. Orange County cannot. The CCR has a statutory provision for funding for Death Penalty related collateral actions. Orange County does not. Indeed if Orange County paid such ***voluntarily,*** its Comptroller might consider that as a deliberate misappropriation of funds and bring sanctions against the County Government, since there is no provision for the County to pay, and there is one for the CCR to pay.

C. THE CCR WAS REQUIRED TO FUND THIS COLLATERAL PROCEEDING FROM THE INCEPTION.

The Original Motion under Rule 3.850 was not filed by Petitioner until December 29, 1986,

well after the creation of the CCR, effective June 24, 1985 and an amended Motion was filed on May 3 1, 1989. The pertinent parts of the Statutes were as applicable then as now, There is, therefore, not even the excuse that the amounts were incurred or the commitment made to have them incurred before the CCR-related legislation took effect.

D. THE CCR HAS HAD A FREE RIDE

Another equitable argument that has perhaps been overlooked is that up until now, the CCR has had a "Free Ride", in that they have paid no attorney's fees at all. For Petitioner or the CCR to bring equitable arguments when CCR has the statutory duty lacks any connection to equity or fairness.

V. COUNTIES ARE NOT EVEN *INDIRECTLY* RESPONSIBLE FOR SUCH COSTS VIA THEIR RESPONSIBILITIES TO THE PUBLIC DEFENDER.

In contrast, Section 27.5 1 Fla. Stat, Shows the following with respect to the Public Defender, and states

> **27.51 Duties of public defender. --**
>
> (1) The public defender shall represent, without additional compensation, any person who is determined by the court to be indigent as provided in s. 27.52 and who is:
>
> *(a) Under arrest for, or is charged, with a felony.*
>
> • ⊠□
>
> (4) The public defender for a judicial circuit enumerated in this subsection shall, . . . handle all felony appeals. , .
>
> (5)(a) When direct appellate proceedings prosecuted by a public defender on behalf of an accused and challenging a judgment of conviction and sentence of *death* terminate in an ***affirmance*** of such conviction and sentence, , . . the public defender shall notify the accused of his rights pursuant to Rule 3.850, Florida Rules of

> Criminal Procedure, including any time limits pertinent hereto, *and shall advise such person that representation in any collateral proceedings is the responsibility of the capital collateral representative.* The public defender shall then forward all original files on the matter to the capital collateral representative, retaining such copies for his files as may be desired. However, the trial court shall retain the power to appoint the public defender or other attorney not employed by the capital collateral representative to represent such person in proceedings for relief by executive clemency pursuant to s. 925.035.
>
> (b) It is the intent of the Legislature that any public defender representing *an inmate* in *any* collateral proceedings in any court on *June* 24, *1985,* shall continue representation of that inmate in all post-conviction proceedings unless relieved of responsibility from further representation by the court.
>
> (6) A sum shall be appropriated to the public defender of each judicial circuit enumerated in subsection (4) for the employment of assistant public defenders and clerical employees and the payment of expenses incurred in cases on appeal.

The language in Section 27.51, Fla. Stat., shows that: (1) The Public Defender represents indigents under arrest for, or charged with a felony, which is not the situation here, since the Petitioner is not *charged* with a felony any longer, but has been *convicted* of it, and is not under *arrest* for it, because he has been convicted and is incarcerated waiting the death penalty. (2) Normally the Public Defender handles all felony appeals for indigents. This action is *not* an appeal. (3) Under today's statute, the Public Defender is clearly required by the statute to *terminate* representation after the appeals are exhausted and have any collateral action done by the Capital Collateral Representative.

The Legislature specifically requires that the Public Defender continue representation, if that office was doing so for a defendant in a collateral proceeding already, *as of June 24, 1985.* That language implies that Public Defenders are not supposed to handle *new* collateral actions. As stated

earlier, Orange County interprets this language also, from June 24, 1985 forward to mean that the Public Defender or anyone else who continues on with representation is there standing *in place of the Capital Collateral Representative, not as a public defender.*

VI. PUBLIC DEFENDERS (AND THEREFORE COUNTIES) ARE NOT RESPONSIBLE FOR DEFENDING INDIVIDUALS WHERE NO PROVISION FOR THAT IS MADE BY STATUTE.

There are several cases which support the position that a public defender would not otherwise handle matters not shown specifically in the statute. This is an important factor, because it is usually through the Public Defender's statutory responsibility that counties are required to cover costs of defending indigents through special appointed Public Defenders. There is no provision, for example, for the Public Defender to represent indigent parents in a child dependency proceeding. The court in *Yacussi* v. *Hershey*, 549 So. 2d 782 (Fla. 4th DCA 1989) pointed that out in granting the Public Defender's petition for a writ of prohibition disallowing the use of the Public Defender for that purpose. The Public Defender also is not required to represent a *juvenile* in such a proceeding, for which there was also no provision; *Office of the Public Defender v. Baker,* 37 1 So. 2d 684 (Fla. 4th DCA 1979). Counties, it should be noted, *are directly* responsible for representing indigent parents in dependencies, anyway, but only because of specific case law providing that such indigents have a *constitutional* right to counsel. Nothing in the law shows that Petitioner has any similar right, and indeed there is case law that indicates the opposite. *Graham v. State, 372 So.* 2d 1363 (Fla. 1979).

The Supreme Court of Florida also stated, in *State ex rel Jim Smith v. Jordanby, 498 So.* 2d 948 (Fla. 1986) that statutory authority permits representation by a public defender (and thereby indirectly a County) only in circumstances entailing *prosecution by the state threatening an indigent's liberty interest.* (That case involved a civil rights action by the public defender). *In*

Board of County Commissioners, Pinellas County v. *Tom F. Sawyer,* 620 So. 2d 757 (Fla. 1993) the Supreme Court of Florida in reversing the finding that an acquitted defendant could recover investigative costs, held that

> [1] *Common law provided no mechanism whereby one party could be charged with the costs of the other. Cost provisions are a creature of statute and must be carefully construed This Court has held for over a century that costprovisions against the State must be expressly authorized:*
>
> *It may be premised that at common law neither party could be charged with the costs of the other, and it was only by statute that such a charge came to be allowed but even after that in England and in this country the sovereign or the State was not chargeable with costs, either in civil or criminal cases, unless there was express provision of law to authorize it.*
>
> *Buckman v. Alenxander, 24* Fla. 46, 49, 3 Do. 8 17 8 18 (1888).
>
> Contrary to the district court's finding of ambiguity, we find that section 939.06, Florida Statutes (1989), is unequivocal:
>
> • • •
>
> 5939.06, Fla. Stat, (1989). Given its plain meaning, the relevant portion of this statute simply says: No acquitted criminal defendant shall be liable for any court costs or court fees, any costs or fees of a ministerial government office, or any charges for subsistence, and that if such a defendant has paid any of these taxable costs he or she shall be reimbursed by the county. *On its face, the statute does not authorize an acquitted defendant to be reimbursed for any additional disbursements. We hold that investigative costs are not taxable costs under the plain language of the statute.*
>
> Sawyer's mutuality claim is misplaced. Sections 939.01 and 939.06, Florida Statutes (1989), do not provide for mutuality of repayment. . . . *Further, we observe that the Legislature has expressly authorized repayment under various circumstances and could easily have done so here if such were the legislative intent.*

(Emphasis added, Footnotes deleted).

The critical consideration in this (Williams) case is that (1) there is no statute directly providing that counties will pay costs in collateral actions, (2) there is no statute indirectly providing that counties will pay under any section which would require a public defender to represent the petitioner in a collateral motion, today, (3) the statutes which do exist, Section 27.702, 27.703 and 27.704 all point directly at the Capital Collateral Representative as the proper party and (4) there is no organic, per *se constitutional* right to counsel in such a case which would require direct responsibility by the County. Orange County therefore concludes that the attorney currently representing Petitioner is only a provisional substitute for the Capital Collateral Representative.

VII. THE *SONGER* ***MOXLEY*** AND *ROSE* CASES ARE DEMONSTRATIVE OF THE UNDERLYING LAW.

There are many cases concerning indigency and the right to financial support. Orange County has even found cases which address the right to counsel in such post conviction, post appeal petitions, which indicate that there is no right. However, a careful examination of the two major cases in this District is extremely informative;

A. SONGER. The Court in ***Songer*** v. *Citrus County, 462* So. 2d 54, (Fla. 5th DCA 1984) held, in a case where a defense attorney who filed a motion to vacate the imposition of the death penalty, and appealed the denial of that motion, then appealed from a Circuit Court order declining to assess attorneys fees. The District Court affirmed the order declining to assess attorneys fees saying:

> Contrary to appellant's assertion, there is nothing in sections 27.53, 925.035 or 925.036, Florida Statutes (1983) which authorizes the imposition of attorney's fees on a county for the representation of a criminal defendant in post-conviction collateral proceedings. Therefore the trial court was correct when it declined to assess attorney's fees and expenses against Citrus County for the work done by appellant's attorney in filing a motion to vacate the imposition of

> the death penalty and in appealing the denial of that motion. The order denying assessment of fees against Citrus County is therefore AFFIRMED.

It is clear that the court in Songer regarded the action filed by the defense attorney contesting the imposition of the death sentence as a "collateral" action despite the characterization of it by the reporter as an appeal. The Court, (in 1984 there was not yet a CCR) followed the generally applicable rule that no one is held responsible for the legal costs of another, unless there is specific authority, usually statutory, for that, a constitutional provision, or a contractual provision. The court ruled that the statutes to which the defendant would normally resort did not provide for payment for collateral actions. No issue was raised *as* to the *constitutional* right to effective representation of counsel for the collateral action, apparently because the petitioner had clearly received *the benefit* of an attorney. The only issue was the source of the funds, which the Court said could not be the county.

The Fifth District Court of Appeals had an opportunity to revisit this issue in *Brevard County Board of County Commissioners v. Moxley*, 526 So. 2d 1023 (Fla. 5th DCA 1988), after the creation of the Capital Collateral Representative's Office. That case (capital murder) involved an action for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, and presumably was considered a collateral, rather than an appellate, proceeding. There were numerous differences, but some interesting similarities also, to the instant case and the Songer case.

B. *MOXLEY.* The *Moxley* case involved a Motion for attorneys fees, similar to *Songer,* but dissimilar to this case, since in this case the petitioner is requesting permission to incur the cost, and cost only, not fees, and have the County pay them later.

The County in the *Moxley* case was not given an opportunity to appear and object to the

original appointment of that *particular* attorney. If it had been so noticed, it could have objected pointing to the statutory requirements of Section 27.702 and 703, and argue that that particular attorney should not be appointed, (and thereby presumably paid by the County,) but the CCR instead should be (and thereby presumably paid by the State.) But worse yet, when the County did get notice ***ex post***, or in the "after" situation where the appointed attorney was requesting payment and had already done the work with every expectation of being paid, the County still did not contest the *appointment* of the private attorney instead of the CCR.

Instead of citing the statute that which apply, Sections 27.702 and 703, the County cited the *Songer* case, which only, as the Fifth District pointed out, said what did *not* apply. The Court by-passed *Songer*. It said

> We agree with the trial judge that our prior case of *Songer v. Citrus County, Florida*, 462 So. 2d 54 (Fla. 5th DCA 1984) is not pertinent to the instant issue. *Songer* was a narrowly limited opinion which upheld a trial court's determination that nothing in section 27.53, 925.035 or 925.036, Florida Statutes (1983) authorized the imposition of attorney fees on a county for the representation of a criminal defendant in post-conviction collateral proceedings.

• ♋

Neither the County nor the Petitioner in *Moxley* considered Section 43.28, *Fla. Stat; the* Fifth District went on to say:

> Apparently, section 48.23, Florida Statutes (1983) was never raised or considered in that case, as it should have been. Section 43.28, Florida Statutes (1987), which is applicable to the instant case, provides:
>
> 43.28 Court facilities. - The counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the state, personnel necessary to operate the circuit and county courts.

The Fifth District went on to cite *In the Interest of D.B.*, 385 So. 2d 83 (Fla. 1980) which

established, (in a child dependency case where there were no statutes assigning the duty of representing indigent parents to anyone) that section 43.28, Fla. Stat., in a situation where the parents were constitutionally entitled to representation anyway, would require the County to pay. It stated:

> The applicability of the foregoing statute was discussed by the Florida Supreme Court in *In* Interest *of D.B.,* 385 So. 2d 83 (Fla. 1980). Therein, it was held that the United States Supreme Court, in establishing a constitutional right to counsel in certain cases, has placed the obligation to provide that counsel on the government rather than the individual members of the legal profession. The court specifically held:
>
> > In our opinion, when 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,***
>
> The court also stated:
>
> > When appointment of counsel is desirable but not constitutionally required, the judge ***should use all available legal aid services and when these services are unavailable,*** he should request private counsel to provide the necessary services. ***Under these circumstances, no compensation is available, and the services are part of the lawyer 's historical professional responsibility to represent the poor.***

(Emphasis supplied.)

The Court in ***the In the Interest of*** D.B. case had ***no*** "other statutory provisions" and therefore the first prong, which applies Section 43.28 "absent other statutory provisions," was met. That is not the case here in the Williams proceeding. The Fifth District went on to say:

> In the instant case we are not concerned with ***the appointment*** of counsel which was merely desirable. The trial court determined that it was constitutionally required, and that ***determination was not challenged by Brevard County at notice hearing before the trial***

> *court.* Indeed, Brevard's certiorari petition before this court specifically *does not take issue with* the trial *court's appointment* of Attorney Green. The petitioner, in its reply brief, has attempted to belatedly challenge the constitutional necessity of Green's appointment. We find this to be improper. See *Lynch v. Tennyson*, 443 So. 2d 1017, 1019 (Fla. 5th DCA 1983).

(Emphasis added.)

This fact situation does not apply in the instant case. The County, of course, was not given a chance to object to the voluntary undertaking by the attorney in this *Williams* case. Had it been given the chance, it would have objected to the extent that the court would allow such an undertaking to shift the cost burden from the CCR to the County. For the record, Orange County does object under that set of implied assumptions, and continues its objections. The Fifth District went on to say:

> Brevard County basically argues that Attorney green cannot be considered as "personnel necessary to operate the Circuit Court" under section 43.28 in regard to Brunskill's 3.850 motion because he is not a person "necessary to conduct the daily business or operations of the Courts, i.e., bailiff, clerks and court reporters." Brevard contends Green is an independent contractor and not an employee of the county or part of its personnel. Brevard concedes that its position, if accepted, leaves the courts "in the unenviable position of having to appoint counsel, but without any means to assure just compensation." It is obvious that Brevard's argument is directly refuted by the language in *In Interest of D. B.*

Whether that holding is valid as to whether an attorney is "court personnel" or not, (and Orange county, frankly, does not concede that the Fifth District Court of Appeals is right about this,) that is a moot issue. This is because even if the County agreed that an attorney is, generally, "Court Personnel", it still believes that the CCR would have to pay him. The Court in *Moxley* went on to discuss the issue of the underlying right to Counsel for a petitioner for collateral relief. The issue of who pays was not further addressed, as the Court had already held that the County should pay.

The Fifth District Court of Appeals apparently determined to do its own research in order to find applicable provisions of the Florida Statutes and on its own found the provision in Section 43.20 and a case, *In the Interest of D.B.*, which were not considered by either side in the lower court proceeding. Unfortunately it did not in the research notice the provisions of Section 27.702 and 703, nor, apparently, was it told of the existence of such by Brevard County.

Obviously the County disagrees with and could distinguish *Moxley* factually from the instant case, from *Songer*, and, for that matter, from *In the Interest of D.B.*, since the facts of this *Williams* case are sufficiently different from the above cases. However, the County would prefer to take the *Moxley* substantive legal holdings head on, instead. The Fifth District, to be diplomatic, was right only as far as the case law, the statutes with which it was apprised and its own research took it. Orange County believes that had Brevard County disputed the appointment of a private attorney, rather than the CCR (or an attorney appointed through its motion) and pointed out the requirements of Section 27.702 and 703, the case would simply have been decided the other way,

C. *ROSE*. One case which the Petitioner made available actually works to his disadvantage, *Rose v. Palm Beach County*, 361 So. 2d 135 (Fla. 1978). That case was apparently presented for the proposition that the Courts have inherent power to do all things reasonably necessary for the administration of Justice within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions. *Rose* also held, however, that the doctrine of inherent power should be involved only in situations of clear necessity, and only after established methods have failed, or an emergency has arisen. In this *Williams* case there are valid existing laws, i.e., Sections 27.702 and 703, Fla. Stat. There is no clear necessity here, which would justify violating the statute and requiring Orange County to cover the costs. There is no showing that established

methods have failed. There is no showing of an emergency.

VIII. THE CAPITAL COLLATERAL REPRESENTATIVE IS RESPONSIBLE FOR COSTS ULTIMATELY, EVEN WHERE SOMEONE ELSE IS ACTUALLY REPRESENTING THE INMATE.

The County understands the CCR's position to be that if any attorney ***other*** than the CCR represents an inmate sentenced to death in such a collateral action, that person is "not a CCR client". They mean that if a lawyer steps up and volunteers to represent the inmate on a *pro* bono basis, or if the inmate's family should hire a lawyer for a fee, or if, perhaps, a public defender carries on with an old case under the prior statute, then that representation relieves the CCR of ***any responsibility*** for representation, or for costs, or for anything else. This position defies logic, For example, the very language of the statute requiring the public defender (or a private attorney appointed by the court) to continue representing, Section 27.51(5)(b), Fla. Stat., allows that office to ***cease*** representing the petitioner if the Court allows it. What if that happened? The natural assumption that the current attorney would be more effective in continuing to represent the petitioner because he had been doing so previously would not make sense if he was unable to effectively do so, due to health or financial reasons. There would then be no prejudice to the inmate if he asked to withdraw and transfer the case to the CCR. Could the CCR than say they were not responsible? The same thing holds true if a volunteer lawyer asked to withdraw, or died, or if a petitioner's family ran out of money and could no longer pay the petitioner's attorney. Clearly ***the*** CCR is ***responsible.*** It is just very fortunate if for historical reasons or because a lawyer volunteers that some of the burden of ***representing*** such clients is taken by other persons. That does not mean that the litigation costs just somehow are the responsibility of the County.

The Petitioner is mistaken in his interpretation of the County's arguments.

1. *The State v. Linroy Bottison* (CR *79-45* 12) and *State v. William Melvin White* (CR 78-1840 CR) (R 39) cases relied upon as authority are not such. They are merely other Circuit Court cases, and do not mandate a like holding here.

2. The argument by CCR, included in the record by reference, (R 39) is precisely taken on by the County herein. The CCR uses reasoning which just does not make equitable sense. The volunteering by a lawyer to handle the representation in CCR's place does not shift the cost burden to the County.

3. The *Spalding* case *is* relevant, dispite the Petitioner/Appellee's assertions (R 40) because it clearly shows that CCR is responsible for costs under this statute.

4. Even the citation of Section *939.15, Fla. Stat.,* given by the Petitioner, supports the County (R 43) becuase the 3.850 motion is not a criminal Tase pending in these courts. e argument that Collateral actions are not *excluded* is not pertinent where the law as specified in *Sawyer* says such collateral actions should be *included affirmatively*. The same should be said of rules that "come after 3 .O 10."

5. The Petitioner/Appellee wants to use the Rose case against the county by saying that the existence of Williams on "death row" is *per* se sufficient necessity. First, the necessity or emergency must be found by the court. Nothing exists to show such a finding was made. But further, the "emergency or necessity" does not, in Rose, or any other case, relate to simply the status of the inmate. The necessity emergency should be shown on the motions, both the motion under Rule 3.850 and in the motion for costs. There was no such showing, The implication is that the fact that the motion is a 3.850 motion is enough.

6. But, even if the nature of the motion would be considered enoughper se, it can hardly

be said to be enough to overcome the underlying requirement in the Statute that CCR must provide the cost support.

7. Appellee cited (R 43) Section 57.081 as a "sweetener," meaning that the County, theoretically, could ask the state for reimbursement. All Appellant is doing is saying that it is permissible to violate Section 27.702 and 703, or take a chance on doing so, and the County might have the right to get a reimbursement.

8. A Habeas Corpus action is not a 3.850 motion, which is a statutory motion. At the very least, if the Judge below was going to rely on that Section, and essentially agree that the County should be reimbursed, it should have required the Department of Corrections to appear. This was not done. Nothing in the ruling below fixed the responsibility for reimbursing the County on the "state general fund" or any other fund.

9. The Petitioner/Appellee tries to remind the Court (R 47) that Section 43.28 would apply in the absence of a specific statute. There is no "absence" of a statute. Section 27.702 and *703, Fla. Stat.* exist. But even if they did not, no finding of necessity or emergency was made.

10. The Appellee tries to show that the CCR is only responsible where the Petitioner is on "death row" and is "not represented." (R 39, R 45) The theory is that representation by anyone relieves them from both attorney's fees and costs. They say this is implied, The Statute specifies the opposite. Ultimately, this is the core issue to be decided by this Court.

CONCLUSION

For the foregoing reasons, Orange County respectfully requests that the Court find that Orange County is not responsible, as a matter of law, for payment of the litigation costs for Petitioner in his collateral Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Chandler Muller, Esquire 1150 Louisiana Avenue, Suite 2, Winter Park, Florida 32789, by U.S. Mail on this 3rd day of September, 1996.

George L. Dorsett
Assistant County Attorney
Florida Bar No. 375098
ORANGE COUNTY ATTORNEY'S OFFICE
Orange County Administration Center
201 S. Rosalind Avenue
Orlando, Florida 32802
(407) 836-7320

gld:cases\Williams\memlaw2.wpd
(09/03/96)