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FILED
SID J. WHITE
MAR 20 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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.: CRSO-5117

#90143

ORANGE COUNTY, FLORIDA

Appellant,

V.

FREDDIE LEE WILLIAMS,

Appellee.
_____/

REPLY BRIEF

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PRELIMINARY STATEMENT

Citations to the Record are designated as R, with the page numbers following. Citations to the County's Initial Brief and Appellee Williams' Answer Brief are designated as IB and AB, respectively, with the page numbers, and where possible, paragraph numbers following.

SUMMARY OF ARGUMENT - REPLY

Preliminary

The County has never asked the volunteer attorney to pay anything, or for that matter, do anything. That argument is a distraction. The same can be said for the CCR.

1. The appearance of a private death penalty rule 3.850 volunteer counsel does not make the Petitioner a County client.

2. The Petitioner would not have been a County client absent a volunteer counsel and is not one now.

3. The CCR is the entity with the preexisting burden. They should pay the costs if anyone should.

4. ***Behr*** and ***Thompson*** illustrate the County's point, not Appellees. They show that the entity with the preexisting burden should pay.

5. The issue is the source, not the right to funds. This Court should not mix the two.

ARGUMENT

Preliminary Observations

This Court is being asked by Appellee to focus on whether the attorney for Mr. Williams should have to pay to cover the costs of litigation. (AB 1 and 2, paragraph 4 and 5) Orange County has never affirmatively suggested that the volunteer attorney is obligated or should pay. That issue is an attempt to distract the Court. The County only wants this Court to find that there is no requirement for the County to pay.

The court is also being asked to focus on the Office of the Capital Collateral Representative (CCR) (A B 4 and 5, paragraph 1 through 3, A B 6 through 9) and whether CCR is responsible for such costs. Again, Orange County is not interested so much in getting the CCR to pay for these costs, as to simply point out that the burden is not the County's, where no specific provision is made for the County to have the burden, and particularly where specific provisions do exist in the statute for some other entity to assume that burden.

I. THE APPEARANCE OF A PRIVATE DEATH PENALTY 3.850 VOLUNTEER COUNSEL DOES NOT MAKE THE PETITIONER A COUNTY CLIENT.

The thrust of the Appellee's argument with which Orange County most completely disagrees is his implicit contention that if a lawyer volunteers to handle a Rule 3.850/Collateral motion for a presumably indigent defendant, that action automatically converts the petitioner from a CCR client to a County client. only way that Petitioner/Appellee's argument can be read, ultimately, because if the CCR is only responsible for payment if the Petitioner "is a CCR Client," then the County is only responsible if the Petitioner is a "County client." But how does a petitioner get to be a County client? Petitioner/Appellee would seem to be saying: that he is a County client because his

lawyer volunteered to represent him without compensation. That argument simply makes no sense at all. It just does not follow.

II. THE PETITIONER WOULD NOT HAVE BEEN A COUNTY CLIENT IF NO VOLUNTEER COUNSEL APPEARED, AND IS NOT ONE NOW.

Where the County already has the duty under the statute to cover an indigent's costs, the appearance of a private or volunteer, counsel will not lift the burden of cost from the County, so why should it lift such a statutory burden from the CCR? Orange County is quite aware that an indigent can move a county to pay for an indigents costs (as opposed to attorney's fees), where a m-appointed, paid (perhaps by a relative) or volunteer attorney is already representing a criminal defendant, at trial or on direct appeal, and sometimes, where appropriate, be granted such payments. (As will be seen, it is quite amazing that Appellee should bring those instances to the Court's attention because the logic works entirely against him.) The obvious theory in those instances is that had the attorney not volunteered, or been paid by relatives or friends, the defendant would have been a County client completely, and would have had to pay, either via the public defender's office, or via specially appointed outside counsel acting in place of the public defender. Orange County has taken great pains to explain why this is so in its initial brief. (IB 5-6, 8-12, 14 and 15). It will not reiterate that explanation here except to say that the counties generally are responsible for indigents at trial and appellate level by way of provisions in the Florida Statutes. The only thing happening in those instances where as private attorney is involved, is, in theory, that the local county indigency system is getting a partial benefit by not having to cover the legal fees of the attorney, and is, in theory, just being asked to pay costs it would have had to pay anyway. It therefore should pay those costs, if otherwise appropriate, and count itself lucky that the volunteer lawyer or the defendant's friends have

carried the legal fee burden, and only left the costs for the County to pay.

III. THE CCR IS THE ONE WITH THE PREEXISTING BURDEN

That, however, is not what is happening here. The CCR is the one being relieved of the attorneys fees via a volunteer attorney. The CCR is the entity with the preexisting statutory burden. But instead of being forced to pay the remainder of the expenses, as the County normally is, the CCR has, without any reason which conceivably makes sense, supposedly been allowed to shift the burden to the County.

The Appellant refers to the legislative staff analysis (A B 7) in support of the propositions that the CCR is only required to represent those sentenced to death "who [were] without counsel and . . . unable to secure counsel due to indigency . . .", (A B 7, citing Section 27.702(1) Fla. Stat. And Appellees own citation of the staff analysis, R 73)

If that logic holds to remove even the cost responsibility (note the Section says "represent") then the same logic could be applied much more widely to counties, relieving them of any responsibilities for paying for costs for criminal defendants, at initial trial level, who move to be considered "indigent for costs." The irony is that Appellee is citing the cases, *Behr v. Gardner, 442* So. 2d 980 (Fla. 1st DCA 1983) and *Thomson v. State,* 525 So. 2d 1011 (Fla. 3d DCA 1988), which show the County's exact point, which is that the County cannot escape from responsibility under the circumstances where private counsel steps forward and relieves it from the previously assigned burden of funding representatives. So why should the same logic not be applied to the CCR?

IV. *BEHR* AND *THOMPSON* ILLUSTRATE THE COUNTY'S POINT, NOT APPELLEE'S

Again, it cannot be emphasized enough that both *Behr* and *Thompson* involved cases in which the indigent would have otherwise been qualified for representation by either the public defender or

by specially appointed outside counsel, for which the costs would be, otherwise, by statute, payable by the County. In this collateral case, however, as the County has repeatedly stated in its initial Brief:

1. There is only the statutory authority provided by Section 43.28, Florida Statutes, to support any obligation by the County in collateral cases and that authority is only used when no other statutory provision is present. (IB 21)

2. There is a statutory provision that the CCR provide the support. (See the County's analysis in IB 5,6)

3. The underlying case law provides that the requirement to fund another's cost must be strictly and narrowly construed, and that absent express provision of law to authorize it, particularly against the state, charges are not allowed. *Pinellas* County v. *Sawyer*, 620 So. 2d 757 (Fla. 1993).

4. There is no other provision which affirmatively places the cost burden on the County which would bring the provisions of Section 43.28 into play.

In essence, Section 43.28, Fla. Stat., is a provision which comes into effect only if there are no other specific provisions, and even then only under special circumstances.

V. THE ISSUE HERE IS THE SOURCE, NOT THE RIGHT TO FUNDS.

The Appellee cites the Florida Supreme Court's comments when adopting the new rule 3.850, in 1993, *In the Interest* of *DB* 385 So. 2d 83 (Fla. 1980) and *Brevard Board of County Commissioners* v. *Moxley*, 526 So. 2d 1023 (Fla. 5th DCA 1988). Curiously, the emphasis is all on the right to counsel, not the issue of which funding source is to be accessed. The Court never wished in any way to enter into the classic argument about a litigant's right to adequate representation. Appellee wants to muddy the waters by mixing the two issues together. The Circuit Judge certainly has the discretion to determine the need for representation, and, assuming that, the need for cost support. If

the issue of the revenue source is joined at the hip with the right to adequate representation then the whole argument Appellees' makes, implying that the need having been established, the County should have paid proves too much. It would mean, obviously, that in all cases the County would have to pay. But the Supreme Court of Florida has ruled that cost provisions should not be construed that way. *Sawyer, supra.* An indigent litigant may need representation and deserve it, but not necessarily at County expense, as opposed to some other source.

CONCLUSION

Orange County would respectfully request that this Court reverse the Circuit Court's fmdings because, very simply, the volunteering to represent the Petitioner by a private counsel does not make Appellee a County client by any rule of law anywhere.

CERTIFICATE OF SERVICE

1 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 2 1 st day of October, 1996.

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