

FILED

SID J. WHITE

MAY 8 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
By
Chief Deputy Clerk.

BARRY HOFFMAN,

Petitioner,

v.

CASE NO. 90,403

L. PAGE HADDOCK,

Respondent.

RESPONSE TO PETITION FOR EXTRAORDINARY
RELIEF, PROHIBITION, AND MANDAMUS

The State of Florida, by and through undersigned counsel, responds to Hoffman's petition for extraordinary relief, prohibition, and mandamus and states the following:

The Office of the Capital Collateral Representative (CCR) has represented Hoffman for the last decade. In October 1987 CCR filed a first motion for postconviction relief on Hoffman's behalf. The circuit court summarily denied that motion. On appeal this Court reversed and directed that a hearing be held, that Hoffman be given public **records** access to the state attorney's files, and that he be permitted to amend his postconviction motion. Hoffman v. State, **571 so.** 2d 449 (Fla. 1990). In June 1991 CCR filed Hoffman's amended postconviction motion which the trial court summarily

denied. This Court again reversed and "emphasize[d] that the trial court must honor and cannot deviate from the instructions" that the Court set out. Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992) (emphasis in original). This Court then directed the circuit court to hold a public records hearing and allow yet another amendment to the postconviction motion, after which "a proper hearing shall be held in full compliance with the mandate of this Court." Id.

After remand to the circuit court, public records disclosure, and hearings thereon, proceeded during the next three years. On November 1, 1996 the circuit court found that records disclosure **was** complete **and** directed CCR to file yet another amended motion for Hoffman. The second amended motion for postconviction relief was filed in January 1997. Thereafter, on February 21, 1997 the circuit court, with counsel present, scheduled a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), for April 11, 1997, to be followed by an evidentiary hearing from April 29 through May 2, 1997.

At the Huff hearing, collateral counsel moved to reset the evidentiary hearing because his second-chair assistant and his investigator were working on another case. (Attachment A to petition). The circuit court denied the motion. The following week, counsel filed another motion to reset the evidentiary

hearing, again arguing that his assistant counsel and investigator, being otherwise occupied, could not prepare for Hoffman's evidentiary hearing. (Attachment B to petition). In its response (appendix A) the state objected to resetting the hearing. The circuit court denied the motion. (Attachment C to petition).

Nine days later (April 24, 1997) collateral counsel changed tactics and moved for an order directing **Duval** County and/or the City of Jacksonville to pay CCR's costs for conducting Hoffman's evidentiary hearing. (Attachment D to petition). In that motion counsel alleged that CCR had spent its entire appropriation for fiscal year 1996-1997 even though more than two months still remained in its fiscal year. (Attachment D to petition at 8). The circuit court denied the motion. (Attachment E to petition). Collateral counsel filed the instant petition on the following day, and this Court stayed further proceedings in the circuit court.

In this petition collateral counsel alleges that CCR has spent its entire budget and that, therefore, no funds are available to continue Hoffman's representation. According to counsel, he became aware of this shortfall only upon receiving a memorandum from Michael Minerva on April 23, 1997, informing him that CCR's total appropriation had been encumbered or spent. (Petition at 5-6). Counsel, however, has not seen fit to attach a copy of that

memorandum or, indeed, any documents that demonstrate the claimed lack of funds, to his petition. In contrast to counsel's contention, however, the Auditor General's Office has found that CCR still has unspent and unencumbered funds. (Appendix B).

Even if the petition were accompanied by documentation supporting counsel's basic claim (i.e., CCR is out of money), the petition does not demonstrate why this state of affairs came to **pass** regarding Hoffman.¹ CCR has known, at least since this Court's 1992 opinion, that an evidentiary hearing would be held on at least some of Hoffman's claims. Less than twenty-four hours after receiving Minerva's memorandum, collateral counsel produced a list of expenses he claimed would be needed to conduct Hoffman's evidentiary hearing. (Petition at 6). Because CCR has known for years that the just-cancelled hearing would be held at some time, **and** in light of the short time counsel needed to arrive at the cost of such hearing, an irresponsible lack of planning appears to have occurred.

Governmental entities are required to live within their incomes and to conduct their affairs systematically and with

¹ According to Michael Minerva's testimony in a federal hearing in October 1996, CCR's budget and number of personnel for fiscal year 1996-1997 are the greatest in its history. (Appendix C).

dispatch. Calculating the cost of Hoffman's evidentiary hearing could have been done, and the necessary sums set aside, at the beginning of the fiscal year. Then, if, as in fact happened, the circuit court scheduled Hoffman's evidentiary hearing, the funds for such hearing would have been available. CCR has the statutory duty to represent Hoffman. The state would not presume to tell another agency how its legislatively appropriated budget should be allocated, but, when an agency has the duty to effectuate and implement a statutory directive, it would seem only prudent to set aside moneys to meet that duty.

Collateral counsel also complains that the eighteen-day period between the Huff hearing and the scheduled evidentiary hearing was insufficient to prepare for the latter hearing because 'counsel would not know which claims the court would grant a hearing on until after the Huff hearing." (Petition at 4) .² This complaint, however, is disingenuous. The second amended motion raised twelve issues and asked for an evidentiary hearing on all issues. Although hope may spring eternal, collateral counsel has sufficient experience in postconviction proceedings to realize that an

² Collateral counsel admitted in the amended motion to reset evidentiary hearing that he does not prepare early for a hearing. (Attachment B to petition at para. 7).

evidentiary hearing, most likely, would not be held on any procedurally barred issues and that, most likely, he would not need to prepare for an evidentiary hearing on the procedurally barred issues. As set out in the circuit court's order (appendix D), the following issues are procedurally barred: I (denial of counsel, could have been raised on direct appeal; III (waiver of rights), raised on direct appeal; VI (prosecutorial argument), raised on direct appeal; VII (cold, calculated, and premeditated aggravator and instruction unconstitutional), could have been raised on direct appeal; VIII (stipulations as to mitigators), could have been raised on direct appeal; IX (dilution of the jury's sense of responsibility), could have been raised on direct appeal; XI (burden shift), could have been raised on direct appeal; and XII (application of the heinous, atrocious, or cruel aggravator), raised on direct appeal. The court summarily denied claim X (public records) as moot. Thus, the only issues that counsel need be concerned with are II (Brady³), IV (ineffectiveness), and V (same). Brady and ineffectiveness are the issues this Court mentioned in remanding for an evidentiary hearing. 571 So. 2d at 450.

³ Brady Maryland, 373 U.S. 03 (1963).

Moreover, from the documents filed in the circuit court, it is obvious that considerable preparation has been done in this case, preparation that, presumably, collateral counsel will use or could have used at an evidentiary hearing. Regarding the Brady claim, the second amended postconviction motion states: "The appendix submitted previously reveals much of the undisclosed information which was exculpatory and/or impeachment evidence." (Appendix E).⁴ Presumably, collateral counsel would rely on that previously set out information at an evidentiary hearing.

Additionally, the previously submitted appendix contains Dr. Fox's report and the affidavits of Hoffman's mother, former **sister-in-law**, and several family friends. Fox's report and the **just-mentioned** affidavits are quoted extensively in the second amended postconviction **motion**.⁵ In the list of estimated costs for the evidentiary hearing the expenses for Dr. Fox and the out-of-state lay witnesses is more than \$10,000, well over half of the estimated \$17,000 needed for the evidentiary hearing. (Attachment D to

⁴ The appendix referred to here is attached to both the original 1987 motion and the 1991 amended motion.

⁵ It is interesting to note that, even after more than three years of public records disclosure, the second amended motion filed in January 1997 is identical to the 1991 amended motion with the addition of four short paragraphs of facts.

petition at 10-11). In spite of this expense and CCR's alleged lack of funds, collateral counsel approached neither the state nor the circuit court about the possibility of stipulating to using Dr. Fox's report and the out-of-state witnesses' affidavits in lieu of their personal appearance or of having those persons testify telephonically.

Numerous courses of action were open to collateral counsel. Instead of pursuing them, however, collateral counsel has, at the eleventh hour, simply asked this Court to take the drastic step of staying the circuit court proceedings on the eve of an evidentiary hearing, scheduled in a case in which the postconviction motion has been pending for almost a decade. This course of action is unacceptable to all concerned, and the stay should be vacated and CCR directed to perform its statutory duties without delay.

CONCLUSION

Therefore, the State of Florida asks this Court to deny the requested relief, to lift its stay of the circuit court proceedings, **and** to direct that court and the parties to proceed with Hoffman's evidentiary hearing.

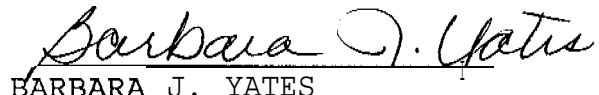
Respectfully submitted,

HARRY SHORSTEIN
STATE ATTORNEY

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



LAURA L. STARRETT
Assistant State Attorney
Florida Bar No. 308137



BARBARA J. YATES
Assistant Attorney General
Florida Bar No. 293237

OFFICE OF THE STATE ATTORNEY
330 East Bay Street
600 **Duval** County Courthouse
Jacksonville, FL 32202
(904) 630-7100

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Stephen Kissinger, Office of the **Capital Collateral** Representative, Post Office **Drawer** 5498, **Tallahassee**, FL 32314-5498; the Honorable L. Page **Haddock**, **Circuit Court Judge**, Fourth Judicial Circuit, 210 **Duval** County Courthouse, **330 East Bay** Street, Jacksonville, Florida 32202; and Howard **Maltz**, Office of the General Counsel, 220 East **Bay** Street, 13th Floor, Jacksonville, **Florida 32202**, this 8th day of **May**, 1997.



BARBARA J. YATES

Assistant Attorney General