FILED
SID J. WHITE
MAY 8 1997
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,403

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BARRY HOFFMAN,

Petitioner,

v.

THE HONORABLE L. PAGE HADDOCK
Circuit Judge, Fourth Judicial Circuit
In and for Duval County,

Respondent.

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# CITY OF JACKSONVILLE AND DUVAL COUNTY'S RESPONSE TO THE PETITION FOR EXTRAORDINARY RELIEF, PROHIBITION AND MANDAMUS

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FRED D. FRANKLIN, JR.
GENERAL COUNSEL
CITY OF JACKSONVILLE

By: HOWARD M. MALTZ
ASSISTANT GENERAL-COUNSEL
City of Jacksonville
Florida Bar No. 593109.
600 City Hall, 220 East Bay Street
Jacksonville, FL 32202
904/630-1300

The City of Jacksonville and Duval County, by and through the undersigned Assistant General Counsel, responds to Petitioner Barry Hoffman's Petition for Extraordinary Relief, Prohibition, and Mandamus and states the following:

## I. BACKGROUND

Petitioner seeks this extraordinary relief from his post-conviction proceedings before Judge L. Page Haddock of the Circuit Court, Fourth Judicial Circuit of Florida, Duval County. Petitioner is represented by the Office of Capital Collateral Representative (hereinafter referred to as "CCR"). In February 1997, Judge Haddock set an evidentiary hearing on Petitioner's Motion for Post-Conviction Relief. Said hearing was set to be heard from April 29 through May 2, 1997. CCR filed two motions to reset that hearing, both of which were denied.

Thereafter, on April 24, 1997, CCR moved for an Order directing Duval County and/or the City of Jacksonville[1] to pay CCR's costs for conducting the evidentiary hearing or, in the alternative, to continue the hearing until the next fiscal year. CCR claims this is necessary since it has exhausted its entire budget for fiscal year 1996-1997, although more than two months remain (Attachment A). The undersigned Assistant General Counsel filed an objection to assessing these costs against the County (Attachment B). The Circuit Court denied the

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[1]The City of Jacksonville and Duval County is a consolidated governmental entity and is hereafter referred to as "the County."

Petitioner's Motion to Assess Costs, or Alternatively for a Continuance (Attachment E to Petition). The following day the instant Petition was filed with this Court.

The Petitioner seeks a Writ of Prohibition, prohibiting the trial court from conducting an evidentiary hearing without directing Duval County to pay CCR's costs, or in the alternative a Writ of Mandamus to continue the hearing until the beginning of the next fiscal year.

## II. REASONS FOR DENYING THE PETITION

Duval County strongly opposes any order directing it to pay the costs sought by CCR which it claims to be associated with the evidentiary hearing.[2]

Common law provided no mechanism whereby one party could be charged with the costs of the other. Cost provisions are a creature of statute. ***Board of County Commissioners, Pinellas County*** v. ***Sawyer,*** 620 So. 2d 757 (Fla. 1993); and ***Wolf v. County of Volusia,*** No. 88,146 (Fla. April 17, 1997). A county can only be compelled to pay those costs mandated by statute. ***County of Dade v. Sansom,*** 226 So. 2d 278 (Fla. 3d DCA 1969). There are no statutory provisions which mandate that a county pay the costs at issue here; however, the applicable statutes make it clear that these costs are CCR's obligation.

The Florida legislature has plainly stated that the costs that CCR seeks to

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[2]The City of Jacksonville takes no position regarding the postponement of the evidentiary hearing.

have the County pay are CCR's obligation, and are to be paid from CCR's budget.

Florida Statutes, section 27.705(3) (1995) provides:

> "All payments of the salary of the capital collateral representative and employees of his or her office **and payments for other necessary expenses of office from state funds appropriated therefor** shall be considered as being for a valid public purpose. Travel expenses for official business within and outside the state shall be paid in accordance with the provisions of s.112.061...."[3] (emphasis added)

It is obvious from the language of section 27.705(3) that CCR is responsible for the costs it seeks to have imposed on Duval County. The legislature is assumed to have expressed its intent through the words found in a statute. ***Zuckerman v. Alter, 615*** So. 2d 661, 663 (Fla. 1993). Where the words of a statute are clear and -unambiguous, judicial interpretation is not appropriate to displace the expressed intent of the legislature. ***Citizens of the State of Florida v. Public Service Commission,*** 435 So. 2d 784, 786 (Fla. 1983). There is no ambiguity in section 27.705(3) and the legislature has made its intent clear that these costs are to be borne by CCR from its annual appropriations.

The case of ***Spa/ding*** v. ***Dugger,*** 526 So. 2d ***71*** (Fla. 1988) further illustrates that CCR is funded by the legislature, not the county, for attorney fees, travel costs, witness expenses and other associated litigation expenses. The case

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[3] Florida Statutes, § 112.061 sets out the rates and methods of compensation for travel by public officials.

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 post-conviction due process to which they are entitled ."
>
> Spalding bases his assertion on the fact that **his office's budget has been 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 1, 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 215.311, 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 conceded 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 post-conviction 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)

***Id.*** at 72

In ***Spa/ding,*** CCR articulated its belief that there is no mandate that counties pay such costs. Neither CCR, nor the Court, posited that the county had any duty to pay such costs.

Furthermore, CCR acknowledges in its Petition in the instant case, that it is their obligation to pay those costs they seek to have taxed upon Duval County. CCR admits that the costs for travel and accommodations for its attorneys, investigators, and witnesses are to be paid from its state budget. (Petition, p. 15 n. 4).

It is helpful as well, to look at Florida Statutes, section 27.703 (1996) in determining the legislative intent in this area, which provides:

> "If at any time during the representation of two or more persons, the capital collateral representative shall determine that the interests of those persons are so adverse or hostile that they cannot be counseled by the capital collateral representative or his or her staff without conflict of interest, the sentencing court shall upon application 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 funds appropriated**

> **to the Justice Administrative Commission."[4]** (emphasis added).

This provision further illustrates the intention of the legislature that the State is to pay the fees and costs associated with post-conviction capital representation, and not the counties, regardless of whether CCR or conflict counsel provides the representation.

While there are statutory provisions in Florida that mandate counties be taxed for certain expenses incurred by State agencies, nowhere in the CCR Act[5] does such a provision exist. These provisions which allow for taxing costs against the counties, deal primarily with costs associated with trials and direct appeals. There are no similar statutory cost provisions which apply to post-conviction capital matters. The legislature easily could have provided for imposing the cost obligation on the counties in this area if such were the legislative intent; however, the legislature has made it clear that counties should not be encumbered with these costs.

An example of a statute which does provide for taxing costs against a county is Florida Statutes, section 939.06. This statute provides for counties to reimburse "taxable costs" to an acquitted criminal defendant following trial. In ***Board of County Commissioners, Pinellas County v. Sawyer,*** 620 So. 2d 757 (Fla.

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[4]Section 27.703 was amended in 1996 to change the state funding source for conflict counsel from CCR to the Justice Administrative Commission, thus providing more available funding for CCR.

[5]Florida Statutes, sections 27.701-27.708

1993), this Court held that "investigative costs" were not taxable costs under this statute and refused to assess them against the county. This Court further explained that "cost provisions are a creature of statute and must be **carefully construed."** (emphasis added) *Id.* at 758. Likewise, recently in ***Wolf v. County of Volusia,*** No. 88,146 (Fla. April 17, 1997), this Court found expert witness fees, court reporter and transcription expenses, video-taped deposition expenses, private process serving fees, and copying expenses were not "taxable costs" and thus were not the obligation of the county to pay. It was explained that "[t]his Court has held for over a century that cost provisions against the State (and counties) must be **expressly authorized"** (emphasis added). *Id.*

This Court has historically carefully scrutinized cost provisions and absent clear statutory authorization has refused to impose costs upon governmental entities. In ***Sawyer*** and ***Wolf,*** this Court held that the counties were not obligated to pay certain costs even pursuant to a statute that did have some provisions for cost liability; therefore, under section 27.705, where there are no provisions for any imposition of costs against a county, the County is in no way obligated to pay the costs sought by CCR. Likewise, nowhere in the CCR Act are costs expressly, or implicitly, taxed against counties. Carefully construing the relevant statutory provisions, makes it evident that there is no legal basis for assessing the costs sought by CCR against Duval County.

Furthermore, ordering Duval County to pay the expenses sought by CCR would effectively increase the appropriations to CCR and change the legislative

intent that CCR pay these expenditures from its own budget. To do so would violate Florida's separation of powers doctrine.

Article II, section 3 of the Florida Constitution provides:

> "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

The Judiciary's broad grant of jurisdiction is subject to the separation of powers doctrine. ***Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles,*** 680 So. 2d 400, 407 (Fla. 1996). The power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes. ***Chiles v. Children A, B, C, D, E, and F, etc.,*** 589 So. 2d 260, 265 (Fla. 1991). Only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. ***Id. at*** 267. This legislative responsibility is totally abandoned when the power to reduce, nullify, or change these priorities is given over to another branch of government. ***Id. at 265.*** It is well settled that another branch of government does not have the power to restructure an appropriation. ***Id.*** The power of the judiciary is law-interpreting, not law-making. ***Ervin*** v. ***Collins,*** 85 So. 2d 852,855 (Fla. 1956).

The legislature has appropriated CCR a sum of money for its 1996-1997 fiscal year budget. Likewise, the legislature has stated in section 27.705 that the expenses CCR seeks to have the County pay, are to come from CCR's annual appropriations and not from the County. For the courts to find otherwise would

amount to legislating and violate the doctrine of separation of powers.

While it is evident that Duval County is not legally obligated to pay the costs sought, CCR has nevertheless failed to make any showing that it is fiscally bankrupt. While CCR alleges it has used all of its appropriations for this fiscal year, there is absolutely no proof to substantiate this claim. CCR has failed to attach any affidavits of its alleged financial woes, or any auditor reports to its original motion or to this Petition. Likewise, CCR has not indicated any attempts it has made to secure supplemental funding from other available sources.' The failure to do so is no doubt due to the fact that an audit conducted by the State Auditor General, and completed within the last ten (10) days reveals that CCR is not out of money, but actually has funds remaining in its budget (Attachment C). This fact that CCR is not broke renders its Petition baseless.

CCR's 1996-1997 budget exceeds $4,500,000.00(Attachment D). This is an increase from previous years. The legislature has determined this amount to be reasonable and appropriate. If CCR has exhausted its appropriations for this year, or is about to do so, this is due to its own mismanagement.

One needs to look no further than the instant case to see CCR's mismanagement of taxpayers' money. In CCR's original motion asking the Circuit Court to order the Duval County to pay its expenses (Attachment A), it is apparent that the costs sought are entirely unreasonable and excessive. For example, CCR

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[6]Florida Statutes, section 43.16(5)(a) provides for assistance to CCR through the Justice Administrative Commission.

seeks costs to rent to two vehicles, while there is no reason they could not use their personal vehicles and have the State reimburse it for mileage. CCR also desires to send four (4) employees to Jacksonville for a week, to conduct a hearing that can be easily conducted by one or two lawyers. Furthermore, CCR wants a separate hotel room for each employee at $90.00 a night. There is no reason why the CCR employees could not share rooms at a less expensive Jacksonville hotel. Lastly, CCR seeks thousands of dollars for expert witness fees and travel for five lay witnesses, though CCR has never approached the Circuit Court or the prosecution about substituting their testimony with reports or affidavits. It should also be noted that the costs that CCR seeks to incur and have taxed to Duval County exceed- those determined to be reasonable for capital post-conviction conflict counsel by Judge Schneffer, pursuant to the Administrative Order of this Court (Attachment E). This illustrates the ludicrous, unreasonable and unnecessary costs that no governmental entity should be forced to pay.

## III. CONCLUSION

In conclusion, counties have functions relative to the health, convenience, and welfare of the public in the county, ***Duval County v. Bancroft,*** 117 So. 799 (Fla. 1928) and Florida Statutes, section 125.01 (1996). It is not the function of the counties to supplement the budget of any State agency which mismanages or misappropriates its own funding. It is essential to the orderly operation of this State that counties not be burdened with extra encumbrances for which they are

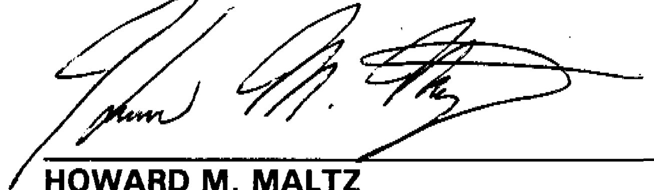
not legally obligated to provide.

Petitioner cites no authority whatsoever in support of imposing these costs on Duval County. Duval County is not legally obligated to pay the costs that CCR seeks. The Florida legislature has made its intent very clear that these costs are to be borne by CCR from its annual appropriations. The Trial Court did not err in refusing to order the Duval County to pay the costs sought by CCR.

Therefore, Duval County asks this Court to deny the requested relief sought by Petitioner.

Respectfully submitted,

**FRED D. FRANKLIN, JR.**
**GENERAL COUNSEL**



**HOWARD M. MALTZ**
**ASSISTANT 'GENERAL COUNSEL**
Florida Bar No. 593109
Office of General Counsel
600 City Hall, 220 E. Bay Street
Jacksonville, FL 32202
904/630-1300
Attorney for Respondent,
City of Jacksonville and Duval County

## CERTIFICATE OF SERVICE

I **CERTIFY** that a copy hereof has been furnished by delivery to Stephen M. Kissinger, Esquire, Officer of Capital Collateral Representative, P. 0. Drawer 5498, Tallahassee, FL 32314-5498, Barbara J. Yates, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, Ms. Laura L. Starrett, Esquire, Assistant State Attorney, 330 East Bay Street, 600 Duval County Courthouse, Jacksonville, FL 32202, and The Honorable L. Page Haddock, Circuit Court Judge, Duval County Courthouse, 330 East Bay Street, Jacksonville, FL 3202, this 8th day of May 1997.

**HOWARD M. MALTZ**
**ASSISTANT GENERAL COUNSEL**
Florida Bar No. 593109
Office of General Counsel
600 City Hall, 220 E. Bay Street
Jacksonville, FL 32202
904/630- 1300
Attorney for Respondent,
City of Jacksonville and Duval County

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