IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 00-1427

MIAMI-DADE COUNTY, Appellant, v. THE OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL and VICTOR TONY JONES, Appellees.	))))))))))))	LOWER TRIBUNAL NO. 90-50143

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF TYPE SIZE AND STYLE

Undersigned counsel certifies that the type size and style used in this brief is 14 point Times New Roman.

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ARGUMENT

CCRC concedes it is required to pay "most costs associated with post-conviction proceedings." Answer Br. at 8; *id.* at 6. It must, considering this Court's trilogy of *Hoffman v. Haddock*, 695 So. 2d 682 (Fla. 1997), *Porter v. State*, 700 So. 2d 647 (Fla. 1997), and *Orange County v. Williams*, 702 So. 2d 1245 (Fla. 1997). But, argues CCRC, its responsibility is "not without logical limitation." *Id*. at 7. CCRC then asserts that the fees of the expert appointed to evaluate its claim of incompetence are beyond the limits of logic and therefore beyond the holdings in the *Hoffman* trilogy. It then compares these fees with other "ludicrous" expenses such as "legal fees occasioned by opposing counsel" and those expenses occasioned when its clients are in Miami-Dade County for hearings, such as "housing[,] security, transportation, food, etc." *Id*. at 11. As such, CCRC concludes "this is a situation justifying a departure from the plain and literal meaning of the statute [chapter 27]." *Id*. at 11-12.

But CCRC misconstrues the type of expense at issue here. Unlike incarceration, the competency of CCRC's clients and their ability to assist counsel go to the very heart of CCRC's statutory mandate to represent capital convicts and is therefore completely consistent with Chapter 27. This is the benchmark for ascertaining CCRC's financial obligation, and not the tangential analysis CCRC

employs.

In *Porter* this Court reaffirmed that

> chapter 27 expressly directs that CCRC is to provide for the collateral representation of any person convicted and sentenced to death in this state and is to be responsible *for the payment of all necessary costs and expenses.*

700 So. 2d at 848 (quoting *Hoffman*, 695 So. 2d at 684) (emphasis added by *Porter* Court).

Carter v. State, 700 So. 2d at 873 (Fla. 1997), in turn, explained that meaningful representation of counsel requires the competence and assistance of the client. *Carter*, 706 So. 2d at 875 ("Unless a death-row inmate is able to assist counsel . . . the right to collateral counsel . . . would be practically meaningless."). Indeed, CCRC made this very argument in its motion here. While it is true that competency is an issue with which the court, and indeed all parties, are properly concerned, at bottom of this concern is the effective assistance of counsel. This expense is thus fundamentally different from the examples of expenses CCRC proposed, i.e., the cost of detaining its clients and its opponents' legal fees. It should not be forgotten that the competency evaluation was at the request of CCRC. The very purpose of the competency evaluation procedures announced in *Carter* is to "ensur[e] the consideration of all viable collateral claims a deathrow

inmate may have." *Carter*, 706 So 2d 876. Clearly the motion was filed, and quite properly so, because CCRC's counsel determined it was in the interest of his client to do so.[1] As such, it is a matter that properly falls within the budget of CCRC. *E.g.*, *Porter*, *supra*. By contrast, CCRC has cited no legal authority either here or below for the proposition that counties bear such responsibility. As this Court explained, "[t]here are no statutory provisions that impose an obligation on the counties to pay the costs of collateral litigation." *Orange County*, 702 So. 2d at 1247.

The result would be the same even if the issue of competency was raised initially by the trial court. For once again, the underlying interest is the same—the effective and meaningful representation of the capital convict, a responsibility exclusively vested in CCRC. If the court on its own takes steps to ensure that meaningful representation is achieved, CCRC properly bears the expense because providing meaningful representation is CCRC's responsibility. An analogous situation existed in *Orange County*, where the issue was who was responsible for paying the costs of *pro bono* counsel in the collateral proceedings. This Court observed that "CCRC clearly would have been statutorily responsible for

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[1] Such interests are in addition to the practical benefit a capital convict receives in the event of a finding of incompetence, that of a stayed execution.

representing Williams had *pro bono* counsel not volunteered his services." 702 So. 2d at 1248. CCRC was thus financially obligated for the costs of another who was fulfilling CCRC's responsibility, and this Court so held.

The district courts have considered another analogous situation, and have all reached the same conclusion, that when one party acts to effectuate the statutory responsibility vested in another party, the party bearing the responsibility bears the associated expense. In *Dept. of Health & Rehab. Servs. v. Kahn*, 639 So. 2d 689 (Fla. 5th DCA 1994), a guardian ad litem had been appointed on behalf of the child in dependency proceedings. The guardian ultimately sought termination of parental rights. In connection with the termination proceedings, the mother was ordered to undergo a psychological evaluation. HRS was held responsible for the expert's fees, even though it did not initiate the proceedings or retain the expert, because of HRS's "primary duty, created by statute, to provide protective services to children in need of protection." *Kahn*, 639 So. 2d at 690 (citing §415.509(1)(a)(4), Fla. Stat.). The court explained: "While here HRS did not instigate the permanent termination proceedings, HRS is responsible for providing protective services to children and such services were being provided in connection with which the expert fee was incurred." *Id*. at 691; *accord*, *In the Interest of A.H.*, 459 So. 2d 417 (Fla. 1st DCA 1984); *In the Interest of R.W.*, 409

So. 2d 1069 (Fla. 2nd DCA 1981), *rev. den.* 418 So. 2d 1279 (Fla. 1982); *Metropolitan Dade County v. Dept. of Health & Rehab. Servs*., 683 So. 2d 188 (Fla. 3rd DCA 1996); *In the Interest of C.T.*, 503 So. 2d 972 (Fla. 4th DCA 1987); *In the Interest of M.P.*, 453 So. 2d 83 (Fla. 5th DCA 1984), *rev. den.*, 472 So. 2d 735 (Fla. 1985).

That the expert might be labeled "court appointed" is of no legal significance to the question of who bears financial responsibility. Criminal courts routinely "appoint" experts, even in situations where the expert is expected to testify on behalf of the defendant or is to consult with defense counsel exclusively. For that matter, when indigent defendants receive the services of any professionals in the criminal system they are said to be "appointed," without regard to the underlying funding source. *See e.g.*, §27.52(1)(d), Fla. Stat. (when accused is indigent "the court shall *appoint* the public defender or a conflict attorney to provide representation") (emphasis added); §27.703, Fla. Stat. (private counsel to be "appointed" to represent deathrow inmate when CCRCs have conflicts); *Arbelaez v. State*, 25 Fla. L. W. S586 (Fla. 2000) (CCRC argued that expert should have been "appointed" in original criminal proceedings for purposes of arguing mitigation at trial). Nor does it matter, as CCRC notes (Answer Br. at 6, 7), that the expert was chosen from a list of doctors approved by the court. *See Burch v.*

State, 522 So. 810, 812 (Fla. 1988) (rejecting challenge that trial court erroneously appointed expert other than one requested by defendant; "In holding that a defendant whose mental condition was seriously in issue was entitled to the assistance of a competent psychiatrist, the [United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985),] was careful to note that its holding did not mean 'that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own.'").

Along these lines, CCRC's point is unclear when it argues "a court-appointed expert is cloaked with 'neutrality,' whereas an expert paid for by a litigant is always subject to attack for bias because he or she is being 'paid' by the party." Answer Br. at 9-10 (citing *Allstate Insurance Co. v. Boecher*, 733 So. 2d 993, 997 (Fla. 1999); *Parkin v. State*, 238 So. 2d 817 (Fla. 1970); *Gold, Vann, & White, et. al*, *v. DeBerry*, 639 So. 2d 47, 56 (Fla. 4th DCA 1994); *Langston v. King*, 410 So. 2d 179, 180 (Fla. 4th DCA 1982)). In the instant situation, where the court "appoints" the expert, with the input of the parties—as was the case here and remains under the new Rule 3.851(d)(5)—presumably no bias will be imputed based on who is paying the bill.[2] Here the arbiter of the proceedings is not a jury,

[2] History and practice demonstrate that an expert's conclusions may be favorable to the defendant even when the expert is appointed by the court. *Chapman v. State*, 391 So. 2d 744, 746 (Fla. 5th DCA 1980), a case cited by CCRC

but the very court that made the appointment. Thus the court obviously fully appreciates the circumstances of the appointment. But CCRC does not explain how this is relevant in establishing why the County is responsible for the expense.

Similarly unclear is CCRC's argument that when experts are "paid by defense counsel, in capital cases, they are particularly vulnerable to attack." Answer Br. at 10 (citing *Campbell v. State*, 679 So. 2d 720, 724 (Fla. 1996); *Henry v. State*, 574 So. 2d 66, 71 (Fla. 1991)). Initially, this statement is not exactly correct. *Campbell* and *Henry* spoke not to *payment* by any particular party, but rather the frequency of, or a proclivity for, testifying on behalf of criminal defendants. Such characteristics may be present notwithstanding which governmental unit's budget ends up absorbing the expense. And therefore such tendencies may be brought out by either side to show bias or prejudice. In any event, CCRC never explains how any of this justifies questioning the legislature's policy prerogative that these costs are to be borne by CCRC.

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for the proposition that court appointed experts are neutral, illustrates how this can be the case. There, a total of four "disinterested, qualified experts" were appointed to determine the defendant's mental condition, for both competency and insanity issues. While all four concluded the defendant was competent, when it came to the issue of insanity, two testified for the defendant and the other two for the state. *Id.* at 745, 746. Moreover, there is nothing to prohibit CCRC from unilaterally retaining whatever experts or consultants it deems appropriate.

Finally, in support of its position that it is not responsible for these fees, CCRC states: "A party can hardly be required to pay for the fees of an expert which the party has not chosen or contracted with." Answer Br. at 8 n.l. CCRC fails to appreciate the irony of this statement in light of its argument that the County is responsible. For the County did not contract with or select this expert (indeed, CCRC selected Dr. Latterner); nor, more fundamentally, is the County a party in these proceedings. It has no greater interest in the outcome of the competency inquiry, or the Rule 3.850 matter as a whole, than any other citizen. As this Court has noted, time after time, the legislature did not include the counties, or involve county funds, in these proceedings. Such responsibility rests with CCRC, which is statutorily charged with representing death-row inmates and ensuring their competency when required.

CONCLUSION

CCRC presents to this Court no statute, case law, or legal theory to show why the County is responsible for this expense. Nor did the lower court rely on any such legal authority. As such, under *Milligan v. Palm Beach County Bd. of County Comm'rs*, 704 So. 2d 1050 (Fla. 1998), there can be no County liability. On the other hand, this Court has repeatedly held that CCRC, and not the counties, are responsible for the costs associated with the collateral challenges of deathrow

inmates. This is exactly the type of cost at issue today. Accordingly, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this _____ day of February, 2001, to: Sandra S. Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131 and Angelica Zayas, Office of the State Attorney, 1350 N.W. 12th Avenue, Miami, Florida 33136, and Todd G. Scher, CCRC-South, Litigation Director, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301.

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