IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-984

JAMES EUGENE HUNTER,

Appellant,

v.

STATE OF FLORIDA, ET. AL.,

Appellee,

REPLY BRIEF OF THE APPELLANT
(STATE OF FLORIDA)

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PRELIMINARY STATEMENT - RELATED CASES (APPELLEE'S)

Appellee is correct is asserting that the issues presented are substantially similar to the issues contained in the companion cases of Gaskin v. State, No. SC01-982 and Wuornos v. State, No. SC01-983. Appellee is incorrect, and is clearly refuted by the record, in so much as it states that it "cannot determine why these cases were selected, to the apparent exclusion of all others, for an interlocutory appeal as to the cost issue, not do the defendants off such an explanation." The record reads as argued by CCRC counsel:

> I checked on that. There has been one case, that was State versus Fotopolous. Fotopolous, that was on that. That case was an extraordinary situation and one which is distinguishable from this matter. Besides that case, we have not been billed for a record on appeal, the preparation of the record on appeal...nor has the Southern Region for at least the past three years, which is as far back as we are able to look.

(PCR 5).

REPLY TO APPELLEE'S STATEMENT OF THE CASE AND FACTS

Appellant relies on the original Statement of the Case and Facts contained in the initial brief.

APPELLEE IS INCORRECT IN ASSERTING THAT THERE IS NO EXISTING STATUTORY FRAMEWORK WHICH COMPELS THE COUNTIES TO PAY CERTAIN COSTS AND PROVIDES FOR THE REIMBURSEMENT OF COSTS TO THE COUNTIES

Recently, this Court held that the Office of the Capital Collateral Regional Counsel is not responsible for the payment of all necessary costs and expenses which are incurred in capital collateral litigation. See Miami-Dade County v. Jones, No. SC00-1427(Fla. August 23, 2001), distinguishing, Orange County v. Williams, 702 So.2d 1245 (Fla. 1997), and, Hoffman v. Haddock, 695 So.2d 682 (Fla. 1997).

In coming to this conclusion, the court relied on sections 43.28 and 916.115 of the Florida Statutes. Essential to this Appellant's argument is section 43.28 which "makes counties responsible for costs that inhere in the operation of the courts." Jones, Slip Op. at 7. See Initial Brief for Appellant at 8-9, 18, Hunter v. State (No. SC01-984). Costs that "inhere in the operation of the courts" are those costs "which, by their very nature, are non-partisan and essential to the fundamental fairness and operation of the proceedings versus expenditures in the course of partisan advocacy."[1] Jones, Slip. Op. at 7.

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[1] It should be noted that the appellee in Orange County v. CCRC Middle Region (No. SC01-337)(undecided case) posited this same argument to this Court on the same issues as in Jones: "The resolution of this issue turns on the distinction between two types of costs: those that inhere in the operation of the courts and those which are incurred by an advocate in the course of advocacy. The test

In Jones, the issue was whether the county or CCRC was responsible for payment of expert witness fees appointed by the court. This Court found that section 916.115 of the Florida Statutes dictated the outcome of the case. That section reads, in pertinent part:

> Expert witnesses appointed by the court to evaluate the mental condition of a defendant in a criminal case shall be allowed reasonable fees for services rendered as evaluators of competence or sanity and as witnesses, which shall be paid by the county in which the indictment was found or the information or affidavit was filed....The fees shall be taxed as costs in the case.

Section 916.115(2), Fla. Stat. (2000)(emphasis added), cited in Jones, Slip Op. at 4.

Relevant to this analysis is the language of section 916.115(2), cited by Jones, that such fees "shall be taxed as costs in the case." This is the exact language contained in section 27.0061, Fla. Stat. (2001), cited by the Appellant in its initial brief.[2] There is no distinction between the language of section 916.115(2) and

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created by the distinction is whether the expenditure is partisan in nature or not." Answer Brief of Appellee at 14, Orange County v. CCRC Middle Region (No. SC01-337)(Served May 1, 2001).

[2] Section 27.0061 reads: Upon the demand of the state attorney, or the presiding judge in any criminal case, or the defendant within the time allowed for taking an appeal and for the purpose of taking an appeal in a criminal case, the court reporter shall furnish with reasonable diligence a transcript of the testimony and proceedings; and the costs for same shall be taxed as costs in the case.

section 27.0061 which would require a different result under the Hoffman trilogy.

Continuing, this Court analyzed section 43.28, finding "support for the conclusion that the County is responsible for the costs at issue in this case." Jones, Slip Op. at 7. The costs at issue were "non-partisan and essential to the fundamental fairness and operation of the proceedings." Id.

It is clear that section 43.28 does not expressly mandate that the counties pay for costs and fees for the appointment of counsel.[3] This court, however, construed the language contained in section 43.28 as requiring the counties to pay for the attorney fees and costs relating to the representation of indigent criminal defendants. Brevard County Bd. Of County Comm'rs v. Moxley, 526 So.2d 1023 (Fla. 5th DCA 1988); In re D.B. and D.S., 385 So.2d 83 (Fla. 1980).

The Third District Court of Appeal in Colonel v. State, 723 So.2d 853 (Fla. 3rd DCA 1998), held that indigent petitioners were entitled to a free transcript of an evidentiary hearing in collateral proceedings. Although not a capital case, the court looked to the explicit language in two statutes, one of which was section 27.0061,

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Section 27.0061, Fla. Stat. (2201)(emphasis added).

[3] The counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the state, personnel necessary to operate the circuit and county courts. Section 43.28, Fla. Stat. (2000).

Fla. Stat. (1997).[4]

Appellee posits the argument that it is the current law and practice of CCRC to pay all costs of capital collateral litigation. This is incorrect. Statutory law compels the counties to pay for transcribing the record. Section 27.0061, Fla. Stat. (2001). Statutory law compels the counties to pay the costs of indigent defendants. Section 43.28, Fla. Stat. (2001). In all three actions before this Court involving this issue, Appellee can only submit one case in the entire history of CCRC in which the costs of the Record on Appeal (ROA) were paid by CCRC. Further, it should be noted that payment on the Fotopoulis cost, which was the one example given, involved the necessity of obtaining the ROA in expeditious manner as was cited by counsel in his argument to the trial court:

> As to, again, as to the Fotopolous case, that case was an extraordinary situation. We have been - he was represented by private counsel. The private counsel withdrew and with only a short period of time to prepare the appeal. I believe it was either 30 or 90 days. I didn't know which time it was. In any event, it was a very short

[4] Appellee attempts to dismiss this argument on procedural grounds arguing that these issues were not presented below. Appellee's argument is both distinguishable, to the effect that the cases cited are civil cases, and incorrect because appellant is appealing a motion which requested that the costs either be paid by the county or waived. Thus the Appellee and lower court has had sufficient notice as to the issues presented. Appellee's reliance on Shere v. State, 756 So.2d 215 (Fla. 1999), is not helpful since no reported decision of that style is located at that cite.

> period of time. We were given the case. We were assigned it. We attempted to get an extension on the filing of the brief. The Supreme Court denied that. Given the brevity of time in order to brief that appeal and the deadline that we had, it was the office's determination to go ahead and pay and not try and delay in trying to save that money for that situation.

(PCR 6-7).

APPELLEE IS INCORRECT BY ASSERTING THAT THIS COURT DID NOT MISREAD THE PROVISIONS OF SECTION 27.705(3) IN DECIDING WILLIAMS, PORTER AND HOFFMAN

As stated supra, this Court in Jones has receded from the general proposition that CCRC is responsible for the payment of all costs of capital collateral litigation announced in the Hoffman trilogy. The Appellee in the instant action simply dismissed this issue as being without merit. It is this Court's interpretation of Williams, Porter and Hoffman that is critical to the instant appeal.

In Jones, this Court offered a new analysis in determining whether CCRC or the counties were responsible for certain costs: "[S]ection 43.28 requires that counties absorb expenditures which, by their very nature, are non-partisan and essential to the fundamental fairness and operation of the proceedings versus expenditures incurred in the course of partisan advocacy." Jones, Slip Op. at 7. With this new analysis, this Court revisited the Williams and Hoffman decisions in distinguishing

those cases from the facts of Jones.[5]

> It is true that in Williams and Hoffman we declined to extend section 43.28, thereby declining to make the counties responsible for certain postconviction costs. However, those cases involved partisan advocacy costs and not those necessary and inherent to be implemented in a fundamentally fair system. For example, Hoffman dealt with, among other things, the costs associated with the transportation and lodging for the litigation team and costs related to defense witnesses. Similarly, Williams involved the costs incurred by an attorney providing pro bono representation to a death-sentenced prisoner. This is also a partisan advocacy cost for which CCRC would have been financially responsible had pro bono counsel not volunteered his services.

Id. at 8 (internal citations omitted).

In Colonel v. State,[6] the District Court held that indigent defendants have a constitutional right to transcripts of collateral proceedings. This was necessary because a "State may not discriminate against convicted defendants because of their poverty." Id. at 854, citing, Griffin v. Illinois, 351 U.S. 12 (1956). It is this

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[5] Interestingly, this Court in Jones does not mention the Porter decision although it was briefed and argued by the Appellant. Under the present County's analysis, there is no reason to disregard Porter because all three cases stand for the proposition that CCRC is responsible for all costs of capital collateral litigation. Porter, unlike Williams and Hoffman, however, involved what may be deemed as non-partisan costs - the cost of the court reporter's transcription. This may be a subtle abandonment of the reasoning behind Porter.

[6] 723 So.2d 853 (Fla. 3rd DCA 1998).

principle that is necessary in implementing a fundamentally fair system, the same system required by the outcome in Jones.

In misreading the provisions of section 27.705(3), Fla. Stat. (2001), this Court has created a Procrustean bed of obligations which the counties are continuing to exploit. See Answer Brief of Appellee (Volusia County) at 5, Gaskin v. State (No. SC01-982); Answer Brief of Appellee (Volusia County) at 6, Wuornos v. State (No. SC01-983); Answer Brief of Appellee (Volusia County) at 5, Hunter v. State (No. SC 01-984); see also Answer Brief of Appellee (State of Florida) at 4, Gaskin v. State (No. SC01-982); Answer Brief of Appellee (State of Florida) at 3, Wuornos v. State (No. 01-983).

Further, as this Court recalls from oral argument in Jones, the Appellant County argued that based on the Hoffman trilogy CCRC would be responsible for all costs, including such costs that have traditionally been borne by the county.[7]

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[7] The exchange on this point is interesting:

> The Court: How about if collateral counsel would approach the court and say [“]We need to have an interpreter for these proceedings[“]. It would be at the request of CCRC. Who would be responsible for the interpreter?
> Counsel: If the CCRC was making the request, and if the request was for the benefit of the death-row inmate, CCRC would bear that responsibility.

Miami-Dade County v. Jones, (No. SC 00-1427)(oral argument May 3, 2001).

Under this theory, the counties would be able to charge CCRC a fee for such services as interpreters, bailiffs, the clerk and use of the courtroom. Such financial abandonment by the County would be unprecedented and extraordinary but allowable under this Court's interpretation of section 27.705(3).

Such fees would seriously hinder CCRC's representation of its clients in two ways. First, by requiring CCRC to pay for costs that have traditionally been borne by the county or waived, expenditures are diverted from partisan costs, such as those relating to defense experts, travel and expenses of the litigation team.

Second, there is no notice given through the wording of section 27.705(3) as to which costs CCRC would next be responsible for paying. For example, Porter involved the cost of transcribing the record. Williams involved the costs of volunteer counsel. No case has addressed the actual cost of the clerk preparing the Record On Appeal (ROA) which can be a substantial amount. No case has addressed the cost of interpreters, bailiffs, clerk's hourly time and use of the courtroom. In light of this, under this Court's reasoning in Hoffman, CCRC would be responsible for paying such costs when the County found it appropriate to bill the agency. The lag time between paying the bill and receiving funding from the Legislature would cripple CCRC's ability to effectively represent its clients. This is especially troublesome in light of this Court's repeated assertions that the

Legislature has a duty to better fund all three CCRCs. See Allen v. Butterworth, 756 So.2d 52 (Fla. 2000)("It is important to emphasize one point. A reliable system of justice depends on adequate funding at all levels.").

Therefore, in determining which costs should be borne by which party, the desired analysis is the one announced recently in Jones. Under Jones, it is clear that the costs associated with the transcription of the record and the preparation of the ROA are non-partisan and inhere in the operation of the courts.

The Appellee is Incorrect In Asserting That The Counties Cannot Be Compelled to pay for the Record for the Indigent Defendant in Collateral Cases and Cannot Be Reimbursed by the State

The Appellee, again, has offered no new argument as to why the County cannot be compelled to pay for the record or, in the alternative, why the costs of preparing the record cannot be waived other than its reliance on Hoffman, Porter and Williams. Its reliance on Long v. Pittman, 699 So.2d 1351 (Fla. 1997), is misplaced because Long is no more than a denial of a petition of mandamus relying on Porter and Hoffman. It offers no original analysis. Without Hoffman and Porter, Long has no precedential value.

In its order, the trial court stated that "there are no statutory provisions that impose an obligation on the counties to pay the cost of collateral litigation and they

cannot be compelled to pay such costs." (PCR 57). Again, as stated above, the Third District Court of Appeal in Colonel v. State, 723 So.2d 853 (Fla. 3rd DCA 1998), held that indigent petitioners were entitled to a free transcript of an evidentiary hearing in collateral proceedings. The only distinguishing factor is the Hoffman line of cases misconstruing the intent of Chapter 27.[8]

REMAINING ARGUMENTS

Appellant relies on argument presented in the original brief regarding these issues.

CONCLUSION

The costs associated with the transcription of the record by the official court reporter and the preparation of the Record on Appeal by the Clerk of the Circuit Court are non-partisan costs as defined in Jones. As such, these costs should be governed by the aforementioned statutes in the Appellant's initial brief.

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[8] See, supra, note 4.

RELIEF SOUGHT

Appellant requests that this Court reverse the order of the trial court and enter a judgement in favor of CCRC. Alternatively, CCRC requests that this Court reverse the trial court's order and remand this case back for a hearing to determine which costs are to be paid by the respective parties.