

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE

JUN 25 1968

CLERK SUPREME COURT
By *Tanya*
Deputy Clerk

Theodore Robert Bundy,)
)
Appellant,)
)
v.)
)
State of Florida,)
)
Respondent.)

Case No. 68960

INITIAL BRIEF OF APPELLANT AND APPLICATION
FOR A STAY OF EXECUTION

James E. Coleman, Jr.
Polly J. Nelson

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Respondent
Theodore R. Bundy

TABLE OF CONTENTS

PRELIMINARY STATEMENT.....1

STATEMENT OF FACTS.....1

ARGUMENT.....6

 I. The Circuit Court Improperly Denied Defendant's
 Application for a Stay7

 II. A Stay of Execution Is Appropriate In This Case17

 III. Denial Of A Stay Under The Facts Of This Case Would
 Constitute A Deprivation Of Defendant's Right To Due
 Process Of Law19

 A. The 3.850 motion is a State-created life
 and liberty interest......

 B. Failure to grant a stay of execution on the
 facts of this case would deny defendant due
 process of law......

CONCLUSION.....

TABLE OF AUTHORITIES

Arnett v. Kennedy, 416 U.S. 134, 167

Cleveland Board of Educ. v. Loudermill, 105 S. Ct. 1487 (1985)

Couse v. Canal Authority, 209 So. 2d 865 (Fla. 1968)

Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982)

Evans v. Bennett, 440 U.S. 1301 (1979)

Florida Senate v. Graham, 412 So. 2d 360 (Fla. 1982)

Granger v. Florida State Prison, 424 So. 2d 937, 938 (Fla. App.
1983)

Haitian Refugee Center v. Smith, 676 F.2d 1023, 1039 (5th Cir.
1982)

McCall v. State, 186 So. 667, 669 (Fla. 1939)

Monroe Educ. Ass'n v. Clerk, District Court of Appeal, Third
District, 299 So. 2d 1, 2-3 (Fla. 1974)

Montayne v. Haymes, 427 U.S. 236, 242 (1976)

Paul v. Davis, 424 U.S. 693, 710-11 (1976)

Rosenberg v. United States, 346 U.S. 273, 288 (1953)

Russell v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985)

Shaw v. Martin, 613 F.2d 487, 491-92 (4th Cir. 1980)

State v. Beach, 466 So. 2d 218 (Fla. 1985)

Sullivan v. State, 372 So. 2d 938, 941 (Fla.1979)

Valle v. State, 394 So.2d 1004 (Fla. 1981)

Fla. R. Crim. Pro. 3.850.

Tampa Tribune, May 23, 1986

Mann, The Scope of the All Writs Power, 10 Fla. State U.L. Rev.
197, 198 (1982)

PRELIMINARY STATEMENT

Defendant Theodore Robert Bundy, through his counsel, submits this brief in support of his appeal from the June 25, 1986, order of Circuit Judge Edward D. Cowart denying his Application for a Stay of Execution. Defendant's execution is scheduled for 7:00 a.m. on July 2, 1986. Defendant respectfully requests this Court to stay that execution.

STATEMENT OF FACTS

Defendant was convicted of murder and sentenced to death by the court below on July 31, 1979. This Court affirmed that conviction nearly five years later on June 21, 1984, and denied rehearing on September 24, 1984.

Prior to the clemency hearing date set by the Governor of Florida, defendant's appellate and clemency counsel, Robert Harper, withdrew from representation. In January 1986, Judge Charles E. Miner, Jr., of the Second Judicial Circuit, appointed Steven L. Seliger to represent defendant in executive clemency proceedings. On January 17, 1986, Judge Miner ordered the payment of fees to an investigator and a psychologist to assist counsel in those proceedings.

On January 15, 1986, defendant filed pro se a petition for a writ of certiorari in the United States Supreme Court. He served copies of his petition on both the Governor and Attorney General of Florida.

On February 5, 1986, without holding a lawful clemency hearing,1/ and with defendant's pro se petition pending in the

United States Supreme Court, the Governor signed a warrant ordering the defendant's execution by March 5. Affidavit of James E. Coleman, Jr., at ¶ 6 (hereinafter "Coleman Aff.").^{2/} On February 13, 1986, defendant applied pro se to the United States Supreme Court for a stay of his execution. Upon the suggestion of Associate United States Supreme Court Justice Louis F. Powell, Jr., that he obtain counsel to pursue his application for a stay of execution, defendant retained present counsel on February 19, 1986. Id. ¶ 7. On February 26, 1986, the United States Supreme Court granted a stay of execution pending disposition of defendant's petition. The Court gave counsel until March 28, 1986, to supplement defendant's pro se petition.

Counsel originally undertook to represent defendant only to seek a stay of his execution pending review of his petition in the United States Supreme Court and to supplement that pro se petition. Coleman Aff. ¶ 7. In the course of that limited representation, counsel discovered that defendant had not sought review by the United States Supreme Court of his conviction for murder in Lake City, Florida. Id. ¶ 9. Counsel advised defendant that a review of the Florida Supreme Court's decision in that case should be made as soon as possible, and, if warranted, a petition for a writ of certiorari filed. Id. Counsel thereafter undertook to expand their representation of defendant to begin preparation of the petition in the Lake City case after they filed the supplemental certiorari petition in this case. Id.

On May 1, 1986, counsel informed the United States

Supreme Court that they had advised defendant expeditiously to seek review of his Florida conviction arising out of Lake City, that counsel would represent defendant for that purpose, and that a petition for a writ of certiorari in that matter would be filed forthwith. Id. ¶ 10. On May 2, counsel informed Arthur Wiedinger, the Governor's counsel, of the status of defendant's petition in the present matter and that defendant would file a petition in the Lake City matter by May 16, 1986. Id. ¶ 13. Counsel also informed Mr. Wiedinger that, upon filing the Lake City petition, counsel immediately would turn to the voluminous record in the present matter in order to identify, evaluate, prepare, and present as expeditiously as possible any collateral challenge to Mr. Bundy's conviction and sentence. Id. Counsel undertook to keep the Governor, through his counsel, informed of the progress of their effort to pursue a collateral challenge. Id.

On May 5, 1986, the Supreme Court denied certiorari in this case, and the stay lapsed. On that date, NBC coincidentally broadcasted the second half of a two-part television program attributing to defendant, in addition to the murders involved in the two cases in Florida, numerous murders for which he has never been convicted or charged.

On May 13, 1986, two days before defendant was prepared to file his petition in the Lake City case, NBC filed a motion in the Circuit Court of the Second Judicial District seeking release of certain unidentified police audio tapes for use in a future television broadcast about defendant. Counsel for defendant was

notified about NBC's motion the day before hearing on it was scheduled. Defendant, supported by the state, sought to postpone a ruling on NBC's motion in order to review the motion and oppose it if necessary. Coleman Aff. ¶ 16. The court refused to postpone the hearing and ordered the tapes released to the public. Id. Defendant immediately sought a stay of that order in the this Court. On May 14, 1986, this Court stayed the order and set the matter for hearing. NBC subsequently withdrew its motion and the matter was dismissed as moot. As a result of this diversion, defendant was not able to file his Lake City petition until May 20. Defendant's counsel informed the Governor's counsel of the delay and the reason for it. Coleman Aff. ¶ 16.

On May 19, 1986, the day before filing the certiorari petition in the Lake City case, defendant's counsel informed the Governor's counsel that they intended immediately to turn their attention to the collateral issues in the present matter. Id. The Governor's counsel agreed that reviewing the 10,000 page record for that purpose would be a time-consuming task. Id.

On May 22, 1986, the day after the petition in the Lake City case was filed, the Governor unexpectedly signed the death warrant that is the subject of this appeal and application. Id. ¶ 17.

Although he provided no formal explanation for issuing the death warrant, the Governor reportedly explained to the press the reason for the warrant as follows:

"There may well be another stay, but the way the process works, there will be no effort made to secure judicial relief until a warrant is signed."

Tampa Tribune, May 23, 1986. Coleman Aff. ¶ 18.

As the Court is well aware, the record of the proceedings in this case exceeds 10,000 pages. At least 112 witnesses testified at the trial or in pre-trial hearings. The defendant was represented by at least 14 different attorneys at various stages of the proceedings. The issues raised by the proceedings included complex evidentiary questions of the admissability of post-hypnotic testimony and forensic odontology; and fundamental fair trial issues concerning defendant's right to counsel of his choice, defendant's competency to stand trial and to act as his own co-counsel, and his right to a trial free from prejudicial interference by the press.

On June 9, 1986, defendant filed motions in the Circuit Court (1) for admission of his out-of-state counsel pro hac vice in this matter, (2) for a determination that he was indigent, and (3) for payment of fees and expenses of experts to assist in the preparation of a Rule 3.850 motion. On June 13, 1986, the court granted the motions for counsel to proceed pro hac vice and to establish defendant's indigency, but denied the motion for payment of fees and expenses of experts on the ground that it failed adequately to demonstrate the need for such assistance. Amended Order Granting Defendant's Motion for Determination of Indigency and Motions of Foreign Attorneys to Appear Pro Hac Vice and Denying the Motion for Payment of Reasonable Fees and Expenses of Experts (June 17, 1986).

Defendant's application for a stay of execution in the

Circuit Court was supported by the affidavits of counsel. In one affidavit, counsel described the facts and legal issues that they thus far had identified as appropriate to raise in collateral proceedings. Nelson Aff., Ex. 1. The other affidavit identified those issues requiring the assistance of experts to develop adequately, and set forth the steps necessary to complete that task. Coleman Aff. ¶¶ 19-25.

The Circuit Court heard oral arguments on defendant's application for a stay on June 25, 1986. At the hearing, the State conceded and the court found that it had jurisdiction to grant a stay of defendant's execution if defendant's application "contained enough facts to show, on its face, that he might be entitled to relief under 3.850." Russell v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). The court found that two of the category of claims identified in defendant's application--those dealing with defendant's competency and those dealing with ineffective assistance of counsel--were colorable claims under 3.850, but held that both previously had been raised by defendant and decided by the court. Consequently, the court denied defendant's application for a stay. The court's decision was wrong.

ARGUMENT

Under the facts of this case, a stay of execution is necessary to allow defendant, through counsel, adequately to develop and present non-frivolous issues in collateral proceedings. Without a stay, defendant will be executed before any court can consider his serious claims for post conviction

relief. Moreover, defendant would be deprived of his rights under the constitutions of Florida and the United States to equal protection of the laws and to freedom from deprivation of life and liberty without due process of law.

I. The Circuit Court Improperly Denied Defendant's Application for a Stay

Defendant filed his application for a stay of execution prior to filing his 3.850 motion or any other motion for post conviction relief. He took that unusual approach because under the circumstances of this extraordinary case his counsel believed no other approach responsibly could be taken. The fact that the application for a stay of execution precedes the formal motion for post conviction relief, however, does not, on the record in this case, diminish in any respect whatsoever the court's authority and obligation to stay defendant's execution. Neither the State nor the trial court disputed this.

Florida courts have the constitutional power to issue "all writs necessary or proper to the complete exercise of their jurisdiction." Fla. Const. art. V, sec. 3(b). In Florida Senate v. Graham, 412 So. 2d 360 (Fla. 1982), this Court held that the all writs power of Florida state courts extends to cases within the ultimate, as distinguished from the already acquired, jurisdiction of the court. In that case, the Court held that courts had jurisdiction to decide an apportionment question "although there was no matter pending before the court to which the writ petitioned for would be ancillary."^{3/} It is beyond

dispute -- indeed the State concedes -- that the Circuit Court ultimately would have jurisdiction to hear a proper 3.850 motion, and, therefore, had jurisdiction to enter a stay in the circumstance of this case to maintain the status quo and "avoid mootness." Florida Senate v. Graham, 412 So. 2d at 361. The only issue, therefore, is whether defendant made a sufficient showing that a stay was necessary to preserve the Circuit Court's jurisdiction.

In State v. Beach, 466 So. 2d 218 (Fla. 1985), this Court denied the State's motion to prohibit Circuit Judge Beach from staying Robert Waterhouse's execution pending the filing of a 3.850 motion. The Circuit Court properly granted the stay on the ground that "[i]f the Court couldn't issue a stay to preserve its jurisdiction over a motion for post-conviction relief under Rule 3.850, basically the State would be allowed to moot out that motion by executing the client." Transcript of Hearing at 4 (statement of Beach, J.).

Faced with a similar situation soon after the Beach decision, this Court, in Russell v. Schaeffer, 467 So. 2d 698 (Fla. 1985), affirmed the Beach decision and provided guidance to the lower courts on when it was appropriate to issue a stay pending the actual filing of a 3.850 motion. In Russell, the Court granted the State's petition for a writ prohibiting Circuit Judge Schaeffer from issuing a stay of defendant John Michael's execution where no 3.850 motion was pending. The Court distinguished its decision in Beach saying, "Waterhouse's application for stay contained enough facts to show, on its face,

that he might be entitled to relief under rule 3.850
Michael, on the other hand, has not filed a 3.850 motion, and his application for stay is devoid of any facts which would allow a court to consider that document as a colorable motion under rule 3.850." Russell v. Schaeffer, 467 So. 2d at 699 (emphasis added).

The affidavit of Polly J. Nelson submitted in support of defendant's application in this case provided more than sufficient basis for the Circuit Court to determine that defendant could assert claims in a 3.850 motion that were not frivolous. The trial court denied relief, however, on the ground that although the ineffective assistance of counsel claims and the competency claims identified in Exhibit 1 to the Nelson Affidavit were colorable claims under 3.850, all such claims had been raised by Mr. Bundy and decided by the Court in Mr. Bundy's motion for a new trial. The trial court's decision was clearly wrong. The transcript of the entire proceeding in the trial court on the issue of ineffective assistance of counsel raised in the motion for a new trial is contained in Exhibit 1 to this brief. It is clear from that transcript that the Court did not consider any of the specific claims of ineffective assistance of counsel identified in the Nelson Affidavit. Indeed, the only issue raised in those proceedings was whether the Court should hold an evidentiary hearing to permit Mr. Bundy to identify the specific basis for his general claim that his counsel was ineffective. The court refused to hold such a hearing. Moreover, it is clear that the Court's finding that defendant's

counsel was effective extended only to claims of ineffectiveness that would have been apparent based solely on the record. None of the claims identified in the Nelson Affidavit fall into that category.

Defendant's motion for a new trial was prompted by the improper insistence of the court that the issue of effective assistance of counsel be raised immediately. The inappropriateness of raising the issue at that time was made clear by the fact that trial counsel were still active in the case when the motion for new trial was drafted, and by the fact that Defendant's competency counsel was himself appointed for purposes of raising the new trial motion. Even though Defendant was, as he stated in court, "forced" to file the motion by the court, he was not allowed sufficient time in which to prepare the motion. The inevitable result of the lack of time and objective perspective and investigation was a "bare-bones" list of cursory complaints about the trial, including general assertions as to the ineffectiveness of trial counsel. This Court affirmed the court's consequent denial of defendant's motion for an evidentiary hearing on his generalized ineffectiveness claims, stating that "[s]ince Bundy failed to prove the existence of any act or omission of counsel that was below the standard of reasonably competent counsel, the court properly denied the motion." 455 So. 2d 330, 349.

Thus, both this Court and the trial court recognized

that Defendant's motion for a new trial did not raise cognizable claims of ineffectiveness of counsel.

The question of the effectiveness of counsel, as presented here, also was not exhausted by defendant's brief on appeal. First, as discussed above and recognized by this Court's opinion, only the issue of the lack of evidentiary hearing on defendant's claim of ineffectiveness of counsel was ripe for appellate review. Thus, the Court decided only that issue on appeal. Second, the instances of ineffectiveness raised here are distinctly different from those that appellate counsel prematurely attempted to raise. Third, the instances of alleged ineffectiveness raised on appeal were not properly presented in a manner capable of review, but were merely listed. The brief on appeal summarily notes that counsel was inexperienced, insufficiently prepared to meet the bitemark evidence, failed to notice a motion, did not timely challenge the grand jury, did not adequately confer with Defendant, was not prepared for trial and presented the bitemark evidence too late, and was not timely in having semen tests conducted. Appellant's Brief on Appeal at 120-21.

On the other hand, the Nelson Affidavit clearly and specifically identifies instances in which defendant's various counsel were ineffective:

1. Failure to Investigate. Affidavit of counsel indicates that trial counsel failed to investigate, among other things, (1) the condition of defendant's teeth at the time of the

arrest, Nelson Aff. Ex. 1 at 21-22, and (2) evidence of mitigating factors, despite ample reason to suspect that mental mitigating factors were present and despite their firm belief that defendant was incompetent. Id. at 22. Although some aspects of the failure of counsel to obtain the potentially exculpatory bite-mark evidence were raised in the motion for new trial and on appeal, the broad question of counsel's failure to attempt to rebut the State's evidence on this issue remain unexhausted. The counsel's failure to raise mitigating factors has never been raised before.

2. Failure to Prepare. Affidavit of counsel states that trial counsel failed in their obligation to adequately prepare for trial, and that the court's own rulings denying needed continuances contributed to the prejudice of counsel's lack of preparation. Id. at 20. The same is true of Defendant's counsel appointed for purposes of the motion for a new trial. The latter issue has never been raised; the former issue remains relevant as part of the totality of the circumstances that constituted ineffective assistance of counsel, even if not sufficient to state a claim standing alone.

3. Failure to Present Adequate Mitigation. Despite the court's urging, trial counsel presented no evidence at the sentencing phase regarding defendant's mental status, although they believed him incompetent. Id. at 22. This issue has not been raised in prior proceedings.

4. Failure to Conduct an Adequate Ferretta Hearing. Defendant was allowed to proceed pro se during the critical

months after his indictment during which the State was preparing its cases against him in two complex and highly publicized capital prosecutions. During that period, defendant gave public statements in the form of motions to the court and conducted over 90 depositions, including alleged eyewitnesses. This issue has not been raised previously.

5. Interference of Defendant as Co-Counsel. Affidavit of counsel indicates that defendant's formalized status as co-counsel interfered with the ability of his appointed counsel to provide effective assistance. One example cited is defendant's successful attempt to prevent his appointed counsel from offering evidence or argument that would have demonstrated defendant's incompetency to stand trial. Nelson Aff. at 19-20. Believing that they were obliged to defer to defendant as the "lead counsel" on the case, and influenced by defendant's threats to examine witnesses himself, trial counsel also complied with defendant's nonsensical demands as to the manner in which they were to cross-examine crucial witnesses. Counsel complied with these requests against their professional judgment and conducted cross-examinations of State witnesses that elicited gruesome and prejudicial details of the crime scene that the State had not brought out. Id. at 21. This issue has not been raised previously.

6. Failure to Protect Defendant's Interests. Affidavit of counsel states that after negotiating a plea bargain with the State trial counsel believed to be in defendant's best

interest, trial counsel allowed the intended plea proceedings to take place knowing that Defendant would engage in bizzare behavior that would forever foreclose the favorable terms of the plea and would result in the publication of information that would prevent defendant from ever having an opportunity for fair trial. Id. at 21. Not only has this issue not been raised previously, but it is based almost soley on facts outside the record of which the court below could not possibly be aware.

7. Ineffective Assistance of Competency Counsel.

Affidavit of counsel states that competency counsel, Brian T. Hayes, failed in his obligation to investigate and determine whether defendant was incompetent and instead merely acquiesed in defendant's desire to be found competent. Id. at 20. This issue has not been previously raised, and, in fact, could not possibly have been raised in the motion for a new trial which Hayes was appointed to prepare.

8. The Cumulative Effect. Defendant is entitled to further develop all issues related to the effectiveness of counsel, including the denial of choice of counse, in order to present his present claim that the cumulative effect of the conduct of counsel and decisions of the court affecting counsel denied defendant his rights under the sixth amendment.

In addition to the above claims cognizable under rule 3.850, defendant's counsel have identified a claim of ineffective assistance of appellate counsel cognizable by this Court in an original habeas corpus action. This claim, too, requires further factual development before it can be adequately presented and

resolved. Independently of the claims available under 3.850, defendant would be entitled to a stay of execution from this Court to pursue his claim of ineffective assistance of appellate counsel.

Appellate counsel failed to meet minimum standards of professional competence in this matter and his failure gravely affected the outcome of defendant's appeal.

First, appellate counsel failed to argue in his initial brief and oral argument to this Court that the sentence of death was inappropriate. Id. at 22. Counsel's omission was so egregious that this Court was prompted to raise the issue sua sponte and require further briefing by counsel on the issue. Any subsequent submission, however, could not overcome the impression that counsel found no merit in the claim.

Second, appellate counsel failed to raise the inadequacy of the competency hearing held below and the failure of the court to determine defendant's competency at other points in the trial despite the obvious existence of threshold facts as to defendant's inability to rationally assist counsel in his defense.

Third, appellate counsel failed to raise numerous issues that "cry out from the record" and had been preserved at trial including (1) the exclusion from the penalty phase of the testimony concerning the community's view of the death penalty, the cruelty of the electrocution technique used to execute death penalties, and the inefficacy of the death penalty for purposes of deterrence, (2) the denial of defendant's motion for the entry

of testimony of a fellow prisoner as to defendant's value as a prison law clerk, (4) the court's persistent denials of continuances, even during the penalty phase that commenced only a few days after conclusion of the trial with the result that very little was presented in the way of mitigation, and (5) the protestations by both the State and defense counsel at various points in the trial that one of the juror's was sleeping.

Fourth, appellate counsel failed to raise important issues that were available if preserved at trial, including (1) the court's erroneous instruction that a majority vote was required for a recommendation of either life or death, with the result (evident immediately from news reports) that the jury took extraordinary efforts to break a six-six deadlock, (2) the State's failure to properly preserve exculpatory evidence, such as the semen stain that was allowed to deteriorate for several months before it was finally tested by the State and the excised skin of the victim containing a bite mark which was placed in water by the police pathologist rather than in preserving solution and (3) the trial court's unsealing before trial of depositions taken under protection of seal.

Fifth, appellate counsel inadequately developed several of the issues he raised on appeal, including (1) pretrial publicity, particularly the trial court's denial of a second motion for a change of venue despite a knowledgeable and prejudiced venire and jury, and the clear inappropriateness of the presence of the press at bench conferences and certain sensitive pretrial hearings, and (2) the admissibility of the particular bite mark

evidence presented at trial in photographic form.

II. A Stay of Execution Is Appropriate In This Case

Defendant is in a precarious position. He is currently scheduled to be executed at 7:00 a.m. on July 2, 1986. Although he is represented by counsel, his counsel have not had an adequate opportunity to review the extensive record in his case, identify and research all the potentially meritorious legal issues present, or conduct an appropriate factual investigation, all of which are necessary to prepare and file a competent and complete motion for post conviction relief. Despite those limitations, counsel for defendant have identified and begun to research and investigate numerous legal claims that ultimately may entitle defendant to post conviction relief. However, unless defendant's execution is stayed he forever will be deprived of the opportunity for the full and fair hearing on his claims, a right that lies at the heart of our judicial system. Under these circumstances there is no justifiable course but to stay defendant's execution.

In considering an application for a stay of execution three factors are relevant: (1) the probability of irreparable injury if no stay is granted; (2) the remedial quality of any such injury; and (3) the likelihood of ultimate success on the merits. See, e.g., Sullivan v. State, 372 So. 2d 938, 941 (Fla. 1979) (England, C.J., dissenting). For obvious reasons, an application for stay in a capital case should be more liberally granted than one in a civil case. See McCall v. State, 186 So.

667, 669 (Fla. 1939); see also Shaw v. Martin, 613 F.2d 487, 491-92 (4th Cir. 1980) (requirement that underlying claims have substance is significantly less stringent in a capital case). Defendant fully meets the requirements of this test.

First, if this stay is denied, defendant undoubtedly will suffer irreparable injury either through his execution or through loss of the opportunity to have the courts in Florida consider fairly his claims for relief. Second, these injuries clearly are irremediable. Mr. Bundy's execution obviously could not be reversed. Moreover, if the Florida courts do not hear Mr. Bundy's claims, subsequent attempts to litigate them will be viewed with disfavor and subject to summary dismissal. See Fla. R. Crim. Pro. 3.850. Thus, the only real issue is whether defendant's application for a stay satisfies the third prong of the test: does defendant's application contain the "facial showing of substance [sufficient] to justify a stay?" Shaw v. Martin, 613 F.2d at 491 (citing Rosenberg v. United States, 346 U.S. 273, 288 (1953)). As we have demonstrated above, Mr. Bundy also meets this final prong of the test.^{4/}

The affidavit of Polly J. Nelson presents apparent claims in Mr. Bundy's case that have not been fairly litigated on the merits. As the affidavit demonstrates, those claims are not frivolous; and as we demonstrate above, they have not been fully considered or decided by the Circuit Court. In the circumstances, there is a compelling need for this Court to stay defendant's execution to permit him to pursue claims that may entitle him to relief under 3.850.

III. Denial Of A Stay Under The Facts Of This Case Would
Constitute A Deprivation Of Defendant's Right To Due
Process Of Law

Defendant sought a stay of execution so that counsel would have an adequate opportunity properly to prepare a complete 3.850 motion. Since first undertaking to represent Mr. Bundy in February--originally for a very limited purpose--counsel consistently have acted to litigate Mr. Bundy's claims in an orderly and expeditious manner. Whenever it has become apparent that Mr. Bundy has an open avenue for legal redress, counsel advised him to pursue it without delay. See, e.g., Coleman Aff. ¶ 9,11. Counsel also undertook to keep the Governor informed of precisely what steps were being taken on behalf of Mr. Bundy so that he would know that there would be no delay in bringing potential claims to court. Id. ¶ 13, 14, 16.

Despite these efforts by his counsel, Mr. Bundy finds himself faced with an imminent execution and insufficient time adequately to prepare for post conviction proceedings. The trial court, faced with admittedly colorable claims under 3.850, also lacked the time to give those important issues even the attention it routinely would give to proceedings in the most mundane matter. Indeed, the State admitted at the hearing before Judge Cowart that it was not fully familiar with the record in this case. The cause of this situation is the Governor's precipitous action in signing a death warrant when he knew that Mr. Bundy, although diligently preparing for post conviction proceedings,

was far from prepared to begin them.

On May 2, 1986, counsel for Mr. Bundy informed the Governor's counsel of their intention to file a certiorari petition on Mr. Bundy's behalf in the Lake City case and then to turn to a diligent evaluation and preparation of post conviction proceedings in this case. Coleman Aff. ¶¶13, 14. At that time, counsel also undertook to keep the Governor informed of their progress and of any developments in Mr. Bundy's case. Id. ¶ 13. Counsel scrupulously complied with that undertaking. Coleman Aff. ¶¶ 13-16.

On May 19, 1986, counsel informed the Governor's counsel that they would file the Lake City certiorari petition on May 20, 1986, and then turn to evaluating the prospects for post conviction relief in this case. Coleman Aff. ¶ 16. The governor's counsel explicitly acknowledged that reviewing the record in this case for purposes of determining what if any post conviction issues should be raised would be a formidable task. Id. Three days later counsel was informed that the Governor had signed a death warrant. Coleman Aff. ¶ 17.

The Governor defended his decision to sign the death warrant on the ground that absent a warrant no action would be taken to pursue Mr. Bundy's claims. Coleman Aff. ¶ 18. This explanation flies in the face of the facts. Not only had counsel undertaken expeditiously to review Mr. Bundy's case and institute post conviction proceedings, the terms of the recently enacted statute of limitations provision in Fla. R. Crim. Pro. 3.850 requires Mr. Bundy to file for post conviction relief by the end

of this year. In the circumstances, the warrant can be viewed only as an apparent attempt to force Mr. Bundy to file for post conviction relief before he had had adequate time to prepare and to force the courts to consider Mr. Bundy's claims under the constraints imposed by an impending execution. The actions of the Governor and their consequence constitute a deliberate and serious infringement on defendant's right to due process of law.

Unless Mr. Bundy's execution is stayed, the State of Florida will take Mr. Bundy's life and deny him the right effectively to utilize the statutory means of collateral attack --a 3.850 motion. Defendant does not contend that in the abstract he has a state or federal constitutional right to state collateral attack. However, once the State creates a means of collateral attack, it must allow prisoners to pursue the right in a fair manner.^{5/} The Governor may not arbitrarily terminate effective access to the statutory mechanism for collateral attack by signing a death warrant. Before the he is executed, procedural due process demands that defendant be permitted to pursue meaningfully his state-created right to attack his conviction and sentence in collateral proceedings. In the circumstances, that can be accomplished only if defendant's execution is stayed.

A. The 3.850 motion is a State-created life and liberty interest.

State law may create life or liberty interests that are entitled to federal constitutional protections. See Paul v. Davis, 424 U.S. 693, 710-11 (1976); see also Granger v. Florida

State Prison, 424 So. 2d 937, 938 (Fla. App. 1983) (due process attaches to state created liberty interests). A state creates a constitutionally protected interest when it establishes "a right or justifiable expectation rooted in state law." Montayne v. Haymes, 427 U.S. 236, 242 (1976). The 3.850 motion creates such an interest.

The 3.850 motion is intended to permit all persons convicted of crimes in Florida the right meaningfully to challenge their conviction and sentence. This right may not be arbitrarily terminated solely because the Governor sets an execution date. It goes without saying that the Florida legislature did not create a system of collateral attack available only to non-capital defendants. Nor can the 3.850 motion be extended in practice only to those fortunate enough not to have attracted the Governor's antipathy. A defendant sentenced to die has the right to exhaust his state post conviction remedies before his life is taken by the State. Any other procedure would deny defendants on Florida's Death Row the right to life and liberty without due process of law.

If defendant's collateral attack ultimately is unsuccessful after his claims have been sufficiently litigated, "the law must be allowed to run its course." Evans v. Bennett, 440 U.S. 1301, 1303 (1979). In each case, therefore, the issue is at what point are the issues sufficiently litigated so that the defendant has exhausted his "entitlement to 'all the protections which . . . surround him under our system.'" Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980) (quoting Evans v.

Bennett, 440 U.S. 1301 (1979)). Post conviction relief procedures are "so long and so well established that they must be counted among the most basic 'protections' with which our system has 'surrounded' all persons convicted of a crime." Id. The point of this is clear: defendant cannot, consistently with due process, be executed until he has had a meaningful opportunity to avail himself of this important right afforded by the Florida criminal justice system.

The Florida legislature recognizes the integral nature of the 3.850 motion to the State's system of justice -- particularly in capital cases. Florida Statute 27.51(5) requires that after direct appellate proceedings have concluded, "the public defender shall notify the accused of his rights pursuant to Rule 3.850, .

collateral proceeding is the responsibility of the capital collateral representative." (Emphasis added.) The creation of the capital collateral representative and the mandatory duty of the public defender to inform the defendant of his "rights pursuant to Rule 3.850" show that the legislature has conferred a life and liberty interest upon defendant to pursue state post-conviction remedies.

The State may argue that because defendant has no right to collateral attack, he must accept whatever procedure is provided by the State. It is well settled, however, "that the 'bitter with the sweet' approach misconceives the constitutional guarantee." Cleveland Board of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985). While the legislature may elect not to confer

a life and liberty interest, "it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate safeguards." Id. (quoting Arnett v. Kennedy, 416 U.S. 134, 167) (Powell, J., concurring in part and concurring in result in part).

- B. Failure to grant a stay of execution on the facts of this case would deny defendant due process of law.

Given that defendant has a protected life or liberty interest in collateral proceedings, the remaining issue concerns the amount of process due before the interest may be terminated. Due process requires, at the very least, the right to a meaningful opportunity to present one's case. See Cleveland Board of Educ. v. Loudermill, 105 S. Ct. 1487, 1495-96 (1985). The United States Supreme Court denied defendant's petition for certiorari in this case on May 5, 1986. Defendant was able to retain current counsel, at the urging of the Supreme Court, on February 19, 1986, and then only for a very limited purpose. Counsel agreed to begin representation of Mr. Bundy in collateral proceedings only on after filing a certiorari petition in the Lake City case on May 20. The warrant was signed on May 22. The record of defendant's trial alone is over 10,000 pages. The amount of time available to defense counsel as a result of the warrant being signed was wholly inadequate for a proper presentation of defendant's legitimate legal claims.

Defendant does not argue that a complete panoply of procedures attaches to his state conferred life or liberty

procedures attaches to his state conferred life or liberty interest. Rather, he claims the limited right to a meaningful presentation of his claims. As the affidavits of counsel attest, the alleged constitutional defects of defendant's trial are not frivolous. A stay is appropriate in this case in order for defense counsel properly to prepare a 3.850 motion.6/

CONCLUSION

For the reasons set forth above, the order of the trial court should be reversed, defendant's execution stayed, and this case remanded to the Circuit Court to permit defendant to file a 3.850 motion within 60 days of this Court's decision.

Respectfully submitted,



James E. Coleman, Jr.
Polly J. Nelson

Wilmer, Cutler & Pickering
1666 K St., N.W.
Washington, D.C. 20006
(202) 872-6000

Counsel for Appellant

June 26, 1986

1/ Mr. Bundy was not represented at the Clemency hearing. Arthur R. Wiedinger, Jr., the Governor's counsel was quoted in the Tallahassee Democrat on December 17, 1985, as stating that "[t]he hearing will go on with or without Bundy's attorney present *** [t]he case has been going on too long *** [t]here won't be a further formal argument before the governor and cabinet."

2/ Citations to the Coleman Affidavit and to the affidavit of Polly J. Nelson ("Nelson Aff.") refer to the affidavits of counsel filed in the Circuit Court in support of defendant's Application for a Stay of Execution.

3/ Mann, The Scope of the All Writs Power, 10 Fla.State U.L. Rev. 197, 198 (1982). See also Monroe Educ. Ass'n v. Clerk, District Court of Appeal, Third District, 299 So. 2d 1, 2-3 (Fla. 1974) (court has jurisdiction to issue writ irrespective of whether there is any ancillary matter currently pending in the court) (citing Couse v. Canal Authority, 209 So. 2d 865 (Fla. 1968)).

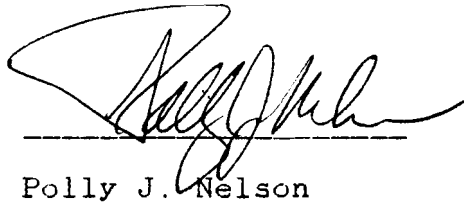
4/ In a capital case, "the inquiry into substance properly stops with identification of the nature of the issue, and with consideration as to whether it has been already fairly litigated on the merits." Shaw v. Martin, 613 F.2d at 492.

5/ See, e.g., Cleveland Board of Educ. v. Loudermill, 105 S. Ct. 1487, 1491-92 (1985) (Ohio civil service statute creates a "property" interest in continued public employment); Haitian Refugee Center v. Smith, 676 F.2d 1023, 1039 (5th Cir. 1982) ("the government violates the fundamental fairness which is the essence of due process when it creates a right to petition [for asylum] and then makes the exercise of that right utterly impossible.").

6/ Failure to grant the requested stay is analogous to the situation where a trial court denies a continuance necessary for counsel to adequately prepare a defense. Such a denial has long been recognized as a violation of the 14th Amendment's due process clause. Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982); Valle v. State, 394 So.2d 1004 (Fla. 1981).

CERTIFICATE OF SERVICE

I, Polly J. Nelson, an attorney-at-law, certify that on the 26th of June, 1986, a true and correct copy of Initial Brief of Appellant and Application for Stay of Execution was delivered by hand to Robert Cummings, Assistant State Attorney, Office of the State Attorney, Second Judicial Circuit, Suite 500, Lewis State Bank Building, Tallahassee, Florida 32301, and to Gregory C. Costas, Assistant Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301.



Polly J. Nelson