

IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,411

DANIEL EUGENE REMETA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR MARION COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of an order denying Mr. Remeta's CCRC-South counsel's motion to withdraw due to a conflict of interest.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant appeal to this Court;

All other citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Oral argument is presently scheduled for March 4, 1998.

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INTRODUCTION

Daniel Remeta is represented by Todd Scher, the Chief Assistant for the Office of the Capital Collateral Regional Counsel for the Southern Region (CCRC-South). On behalf of Mr. Remeta, Mr. Scher filed a motion to intervene in a federal challenge to Florida's use of the electric chair. At a recent meeting of the Commission on the Administration of Justice in Capital Cases, members of the Commission roundly criticized that suit, criticized CCRC-South for representing individuals like Daniel Remeta who have previously litigated a Rule 3.850 motion, and indicated that because of CCRC-South's actions, opposition to CCRC-South's budget would be mounted. These comments included the following:

"[T]here has been a lot of undercurrent of late as to the parameters of what is a proper and appropriate representation that the office of the three CCRs provide . . ."

"[It is] generally felt that once around is enough . . ."

"[F]rankly, I would recommend to this Commission that your representation be limited to one full round of capital relief and no other . . ."

"We haven't assigned what your ethical obligations are."

"[W]e're oversight of you, so we have to look -- you know, when you talk to your children, you've got to kind of find out what's going on . . ."

(Comments of Former Justice Parker Lee McDonald, Attachment A at 40).

"[A]s of this morning while we were going through the Governor's budget recommendations, obviously one of those was the Office of the Capital Collateral Representatives and we sort of flagged that for future, future discussion, because we're very concerned about that."

"[W]hile I was a great supporter of this concept last year, I am becoming less of a supporter of this concept now, and that is because I believe that if, as attorneys we looked at something, we could see that this looks like, like a dilatory tactic or a surplusage or whatever by doing this, and I think all of us who are attorneys up here could look at that and suggest that that's what's happening, and I can recognize pretty well, when I see something that's just being filed for less than I would think would be a good faith effort . . . I think that's something we have got to explore in great detail before this budgetary process is over."

"I feel for the record -- I mean, I can't envision, as a lawyer, in any manner, shape, or form, calling all of these people [listed on the witness list for federal electric chair trial] in good faith, as witnesses."

"I just -- it's a waste of time what you did here [in pursuing the federal electric chair suit]."

"[T]his is a major concern to I think almost every person in the state that wants to see this process moved ahead, and I'm getting tired of hearing the excuses . . ."

(Comments of Senator Ron Silver, Attachment A at 43-44; 71).

"[F]or all this time on a civil matter in a case dealing with the fairness or should we have the death penalty, and the Florida Supreme Court has already made a decision on it, now we're going to the United States District Court, Northern District, and maybe we will go to the Southern District and maybe we will go to another . . . is unacceptable."

"I can't in any good conscience support your budget the next time out."

"I'm just not seeing money well spent, and if I had to make a budget decision right now, I would not be supportive of something like this."

"I figured if you even attempted to do this it would take six months, and we're here to try and move this process along."

"Forget about the costs, it goes beyond money. It's the resources tied to it, but also a lot of lives involved, and as much as you're trying to protect your client, we have the interests of the victims and everyone associated to it and the system included, and I don't think there's any fairness in this process to the point that I'd probably not support anything you want to do if this is how you are going to carry forth . . ."

(Comments of Representative Sally Heyman, Attachment A at 6567).

These comments highlight Mr. Remeta's dire situation. The Commission views itself as a CCRC oversight committee, somewhat akin to senior partners in a law firm with supervisory power ("[w]e're oversight of you, so we have to look -- you know, when you talk to your children, you've got to kind of find out what's going on"). By virtue of Rule 4-1.7 of the Rules of Professional Conduct,¹ Mr. Remeta's counsel counsel -- the Capital Collateral Regional Counsel-South -- is burdened by a conflict which requires that Mr. Remeta be provided conflict-free counsel. For the reasons set forth in this brief, Mr. Remeta's counsel must withdraw from his representation at this time.

STATEMENT OF THE CASE AND THE FACTS

Mr. Remeta was indicted by a grand jury for one count of first-degree murder on July 1, 1985 (R. 2259). Mr. Remeta was tried by a jury and on June 2, 1986, was

¹The members of the Commission could not represent Mr. Remeta because as they indicated, their loyalty is to "the victims" not to Mr. Remeta. If the Commission members are akin to senior partners of a law firm, the entire office is tainted by their conflict. If they are just third parties with control of the pursestrings, they are clearly trying to influence the independent judgment of undersigned counsel.

convicted of premeditated murder in the first degree (R. 2535).² The penalty phase was conducted on June 3, 1986 and Mr. Remeta was sentenced to death on the same day (R. 2239, 2554). Mr. Remeta's conviction and sentence were affirmed on direct appeal. Remeta v. State, 522 So. 2d 825 (Fla. 1988). On October 3, 1988, certiorari was denied by the United States Supreme Court. Remeta v. Florida, 109 S. Ct. 182 (1988).

On February 19, 1990, Mr. Remeta timely filed his Rule 3.850 motion.³ That motion was denied following a limited evidentiary hearing, and this Court affirmed on appeal, as well as denied a state habeas petition. Remeta v. Dugger, 622 So. 2d 452 (Fla. 1993).

Mr. Remeta then filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254, which was summarily denied on June 15, 1994. Remeta v. Singletary, No. 93-148-Civ-Oc-16 (M.D. Fla. 1994). An appeal to the United States Court of Appeals for the Eleventh Circuit was subsequently denied. Remeta v. Singletary, 85 F. 3d 513 (11th Cir.), reh'q. denied, 96 F. 3d 1459 (11th Cir. 1996).

²The trial transcript shows the date of the proceedings as May 19, 1986, but unaccountably the verdict is dated June 2, 1986 (R. 2019, 2535).

³At the time, Mr. Remeta was represented by the former Office of the Capital Collateral Representative (CCR). The undersigned counsel Todd Scher was designated to represent Mr. Remeta in January of 1995 following the resignation of Judith Dougherty, who had represented Mr. Remeta until that time. In 1997, CCR was abolished and three (3) regional offices called Capital Collateral Regional Counsel (CCRC) were created. Although Mr. Remeta's case technically fell within the territorial jurisdiction of the CCRC-Middle region, it was decided that Mr. Scher would continue to represent Mr. Remeta given the stage of litigation his case was in at the time, namely, certiorari had been denied by the United States Supreme Court.

On January 3, 1997, Mr. Remeta filed a Petition for a Writ of Certiorari in the United States Supreme Court, which was denied on March 24, 1997. Remeta v. Singletary, 117 S. Ct. 1320, reh'g. denied, 117 S. Ct. 1727 (1997).

On December 9, 1997, Governor Lawton Chiles signed a death warrant on Mr. Remeta. He is scheduled to be electrocuted by the State of Florida at 7:00 a.m. on March 31, 1998.

On January 26, 1998, Mr. Remeta filed a motion to intervene as a plaintiff in the pending §1983 action in the United States District Court for the Northern District regarding the constitutionality of Florida's electric chair (Appendix 1. See Jones v. McAndrew, Case No. 4:97cv103-RH. The suit had been initiated by four (4) clients of CCRC-South -- Leo Jones, Milford Byrd, Roy Swafford, and Raleigh Porter -- and was set for trial commencing on February 23, 1998. On February 9, 1998, Mr. Remeta's counsel received the State of Florida's written opposition Mr. Remeta's intervention, arguing, inter alia, that Mr. Remeta's counsel was acting ultra vires in pursuing federal civil rights litigation.⁴

Due to the State's assertion that Mr. Remeta's counsel was acting ultra vires, CCRC-South filed a Writ of Prohibition in this Court asking that the State be prohibited from making such arguments. See Kenny v. Butterworth, Case No. _____

⁴In its pleading, the State referred to several quoted remarks from CCRC-South Peter Kenny during the February meeting of the Commission on the Administration of Justice in Capital Cases, and attached the transcript of that proceeding. Until that time, CCRC-South did not have a copy of these proceedings.

.⁵ The day after the petition was filed, the State filed a quo *warranto* petition in this Court, naming the undersigned as a Respondent, asserting that the undersigned was acting outside the scope of his statutory authority in representing Mr. Remeta in the federal litigation. See State ex. rel. Butterworth v. Kenny, et. al., Case No. 92,343.”

In the meantime, a hearing on Mr. Remeta’s motion to intervene was held before United States District Judge Robert Hinkle on February 13, 1998. At the hearing, the State again asserted that Mr. Remeta’s counsel was acting *ultra vires* in his attempt to intervene in the trial. Judge Hinkle orally granted Mr. Remeta’s motion to intervene over the State’s objection. The plaintiffs, including intervenor Remeta, also filed a motion to continue the trial due to CCRC-South’s financial situation, specifically noting that the office had sought relief in this Court (Appendix 3). See Arbelaez, et. al. v. Butterworth, Case No. 92,288. The motion for continuance was denied at the February 13 hearing.

After the February 13th hearing, undersigned counsel received this Court’s request for a response to the quo *warranto* petition. Mr. Remeta’s counsel, along with the CCRC-South counsel for the named plaintiffs in the federal suit, thereupon sought to withdraw from their representation due to the conflict of interest created by the State’s quo *warranto* petition as well as the actions of the Commission for the Administration of Justice in Capital Cases (Appendix 4). On February 20, 1998, Judge Hinkle issued an order changing his mind about the intervention, instead

‘This case is set for oral argument on March 4, 1998.

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denying Mr. Remeta's intervention motion because he had sought to withdraw from the case due to the conflict of interest (Appendix 5). He also issued an order granting summary judgment against the plaintiffs and denying the motion to withdraw without prejudice, noting that there remained critical stages of the proceeding left for the names plaintiffs and the putative intervenor Remeta (Appendix 6).

While the federal litigation was ongoing, Mr. Remeta was also actively seeking public records in his Marion County case, and Mr. Remeta sought the assistance of the trial court on several occasions to compel various state agencies to disclose public records pursuant to Chapter 19.⁷ On February 18, 1998, Mr. Remeta's counsel filed a motion to withdraw due to a conflict of interest (PC-R. 1)." Later that same day, the motion was argued at a hearing before Judge Angel. See PC-R. 14-104. Mr. Remeta's counsel outlined the procedural history of the federal litigation, the State's quo warranto petition, and the recent comments of the Commission which created the conflict of interest for Mr. Remeta's counsel:

Additional information that I've contained in my motion is really the crux of the matter here -- is that this CCRC South as well as the other two CCRC offices are overseen by what's called "The Committee" -- or "The Commission for the Administration of Justice in Capital Cases," and on February 5th was the most recent meeting of the -- what's commonly called "Oversight Committee."

'These matters are not part of this appeal, and thus none of the pleadings related to the ongoing public records issues are included in this record.

'Attached to the motion was a transcript of the February 5, 1998, meeting of the Commission on the Administration of Justice in Capital Cases. This transcript was inexplicably not included in the record and is attached to this brief.

And numerous statements during this meeting have created, in essence, a conflict between me, Mr. Remeta, and my future involvement in this case.

As I stated in the motion, because of the oversight by this legislative body, which is a body of the State of Florida, they have been interrogating Mr. Kenny from CCR South as to litigation strategies involved in the federal lawsuit.

And there have been numerous comments, one of which I did quote in here, saying that if this lawsuit continues that no recommendations for future funding by this commission will be made to the legislature.

And, of course, this commission was set up, specifically, to 'oversee the running of the CCRC offices,' so, therefore, their point of view in the matter will be very significant.

And, in essence, this committee which oversees us is also -- has the pursestrings for our office, and it's clearly a conflict because this agency is basically saying, 'If you continue with this you're not going to get any more money.'

So I'm now in a position where I have to A) attempt to defend Mr. Remeta in the federal suit as well as in any proceeding in this court, and B) I represent twenty-four -- twenty-five other clients, and I have an indication now, from this committed that they're not going to receive any more money in the future because of my actions in representing Mr. Remeta.

And I think under the Rules of Professional Conduct it's a clear ethical violation for me to continue in this fashion; particularly, given CCRC's current financial situation, which is a matter that's currently pending, again, in the Florida Supreme Court in a separate written petition that was filed, I believe, on February 3rd.

* * *

I have adverse interests now, conflicting interests, and because of the situation I've -- to protect Mr. Remeta's

right, he has the right to conflict-free counsel as do all the other clients that I represent and that are represented by my office, so, therefore, I felt I had no choice but to seek to withdraw at this time based on this clear conflict.

(PC-R. 20-25).

The State responded that no response "is deserved to such a late-filed motion" and that "it's not a conflict, it's based on matters that've been known or should've been known to Mr. Scher since February 5th of this year" (PC-R. 25).⁹

Judge Angel initially believed that the crux of Mr. Remeta's complaint was that counsel received a paycheck from the State (PC-R. 26). However, Mr. Remeta's counsel clarified that "I don't want the record or The Court to think that just because I'm paid by the State that that's -- that's the basis of my complaint at this time" (PC-R. 27). Counsel continued:

I don't think that public defenders or judges are -- first of all, there's no other state agency, to my knowledge, that first of all contains -- that of a law firm, essentially, as CCRC South is; and Number 2, that is overseen by a specially-created agency also containing many lawyers to the point where they are hauled before this body, interrogated as to litigation strategies, and then threatened to have their budget and their funding taken away if they continue in a certain course of action.

I don't think that happens to public defenders. There is no sort of oversight committee for them, in terms of the type of committee that's been created here, and certainly, where a public defender or any -- any defense attorney summoned or ordered to appear before a

⁹The motion was filed on February 18, 1998. Mr. Remeta's counsel did not receive a transcript of the Commission hearing until February 9, 1998, when it was attached to the State's objection to Mr. Remeta's motion to intervene in the federal court lawsuit (Appendix 2).

committee and questioned extensively, as in this case, by other attorneys, which is entirely inappropriate, about litigation strategies, that would create a conflict.

(Id.).

Mr. Remeta's counsel then analogized the situation to "Your Honor being summoned or ordered by some body that oversees the judiciary and . . . told you to rule a certain way in a certain case where you wouldn't" (PC-R. 27-28). In response, Judge Angel stated:

THE COURT: I'd go set me a lawyer to defend me.

(PC-R. 28) (emphasis added). Judge Angel went on to state that "I appreciate everything you're saying. Without some statutory or other authority to support it, I'll have to find that that would be a legally insufficient conflict" (Id.).

On February 20, 1998, Judge Angel entered a written order denying the motion to withdraw (PC-R. 6). This appeal ensued.

SUMMARY OF ARGUMENT

Mr. Remeta's CCRC-South counsel is burdened by a conflict of interest under the Rules of Professional Conduct. The conflict requires that Mr. Remeta's CCRC-South counsel be permitted to withdraw and that conflict-free non-CCRC counsel be appointed to represent Mr. Remeta. The Commission on the Administration of Justice in Capital Cases is a state-created body with a self-appointed obligation to "oversee" the CCRC-South office. However, the actions of the Commission and actions of the State of Florida have created a conflict. Members of the Commission have openly stated that no further funding will be appropriated to CCRC-South due to its continued representation of various plaintiffs, including Mr. Remeta, in federal litigation involving the constitutionality of Florida's electric chair. Members of the Commission have openly reproached CCRC for litigating successor postconviction litigation. Members of the Commission have openly stated that their interests lie with the victims and in expediting the legal process along. Members of the Commission have asked questions that breached Mr. Remeta's attorney-client privilege, requiring disclosure of tactics and strategies in front of the party-opponent who then used the disclosed information in court. Agents of the Attorney General of Florida have expressed that CCRC should no longer continue to exist. These same Commission members hold the pursestrings of CCRC-South, which represents Mr. Remeta. Mr. Remeta's counsel has been placed in a situation of clearly divided loyalties under the ethical canons, and his motion to withdraw should have been granted. The lower court did not have discretion to go behind the assertions of a conflict, as this Court

stated in Guzman v. State. Relief is warranted, and Mr. **Remeta** should be appointed conflict-free non-CCRC counsel to pursue available state and federal remedies.

ARGUMENT

THE ACTIONS OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN CAPITAL CASES AND THE STATE OF FLORIDA HAVE CREATED A CONFLICT OF INTEREST FOR MR. REMETA'S CCRC-SOUTH COUNSEL, IN VIOLATION OF MR. REMETA'S RIGHT TO CONFLICT-FREE COUNSEL AND THE ETHICAL DUTIES OWED TO MR. REMETA AND OTHER CCRC-SOUTH CLIENTS BY MR. REMETA'S COUNSEL.

Due to the actions of the Commission on the Administration of Justice in Capital Cases [hereinafter Commission], as well as the State of Florida, Mr. Remeta's CCRC-South counsel has a conflict of interest which can only be remedied by his immediate withdrawal from Mr. Remeta's case. As demonstrated in this Brief, the Commission, which holds the pursestrings for CCRC-South (and the other CCRC offices) has stated that it will recommend no further funding for CCRC-South due to the actions of Mr. Remeta's CCRC-South counsel in pursuing federal litigation about Florida's electric chair." The Commission also expressed its desire to recommend that CCRC-South be prohibited from litigating successive Rule 3.850 motions and stated publicly that it has the interests of the victims to contend with when assessing CCRC-South's funding and ability to litigate. Moreover, the State of Florida's agents have used the words of CCRC-South Peter Kenny against Mr. Remeta in pending legal proceedings, creating further conflict, and has suggested that the current postconviction scheme be abolished and replaced by a system of privately-appointed counsel.

¹⁰Mr. Remeta's judgment and sentence signed by Judge Carven Angel provided "DANIEL EUGENE REMETA be sentenced to death by electrocution" (R. 2554).

Under the Rules of Professional Responsibility, Mr. Remeta's counsel now has been put in a position of divided loyalties -- either continue with his representation of Mr. Remeta in both federal civil litigation and successive state court litigation in the face of the express statements of the Commission, or cease in his representation of Mr. Remeta in order to attempt to salvage the funding for his other CCRC-South clients. The Commission is the body that holds the pursestrings, and is the body that decides the extent to which CCRC-South will be funded in the future, if at all. This untenable situation, created by a State body acting under State authority, mandates withdrawal at this time. Mr. Remeta should be provided with conflict-free counsel to pursue his available federal and state court remedies.

A. THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN CAPITAL CASES.

This past legislative session, the Florida legislature created the Commission on the Administration of Justice in Capital Cases. The Commission's legislatively-defined purpose is to "review the administration of justice in capital collateral cases, receive relevant public input, review the operation of the capital collateral regional counsel, and advise and make recommendations to the Governor, Legislature, and Supreme Court." § 27.709 (2), Florida Statutes (1997).¹¹ The Commission also

¹¹The Commission is comprised of two members appointed by the Governor, two members appointed by the President of the Senate from the membership of the Senate, and two members appointed by the Speaker of the House of Representatives from the House membership. § 27.709 (1)(a). The members of the current Commission are Former Justice Parker Lee McDonald, Judge Charles Miner of the First District Court of Appeals, Senator Locke Burt, Senator Ron Silver, Representative Victor Crist and Representative Sally Heyman. The executive director of the Commission is Roger Maas, who was formerly the Capital Collateral Representative appointed by Governor Chiles

“shall receive complaints regarding the practice of any office of regional counsel and shall refer any complaint to The Florida Bar, the State Supreme Court, or the Commission on Ethics, as appropriate.” Id.¹²

Since its creation, the Commission has met several times to discuss the operation of the three CCRC offices, including the Southern Region office which represents Daniel Remeta. At the most recent convocation of the Commission, on February 5, 1998, numerous statements were made by Commission members, statements which, when brought to the undersigned’s attention, led to the filing of the motion to withdraw at issue.

As noted above, the Commission is staffed by former Justice Parker Lee McDonald, Judge Charles Miner of the First District Court of Appeals, Senators Locke Burt and Ron Silver, and Representatives Victor Crist and Sally Heyman. During the February 5 meeting, the issue of CCRC-South’s litigation of the Jones v. McAndrew

after the resignation of Michael Minerva.

¹²CCRC-South does not contend that it cannot be subject to “oversight” by some committee. However, the manner which the Legislature has set up the Commission has created a significant conflict. The Commission is staffed by members openly hostile to CCRC-South’s efforts to represent its clients. In contrast, for example, the State of California recently enacted legislation setting up a similar CCRC-type of postconviction representation. The legislation includes the creation of a Board of Directors. According to the law, “no attorney who is employed as a judge, prosecutor, or in a law enforcement capacity shall be eligible to serve on the board” (Attachment B at p. 16). While the California legislation does require annual reports to the California Senate on the status of appointed counsel and on the operations of the office, the “oversight” function is not performed by the legislature, but by the board. This should be contrasted to Florida, where the Commission meets monthly and interrogates CCRC-South counsel about litigation strategies, etc., and elicits privileged information which the party-opponents turn around and use against CCRC-South clients in litigation. This is what occurred to Mr. Remeta as a result of the February convocation of the Commission.

federal lawsuit was the key topic on which the members questioned CCRC-South Peter Kenny extensively. CCRC's representation of its clients in successive Rule 3.850 motions was also a topic of conversation. After noting that "there has been a lot of undercurrent of late as to the parameters of what is a proper and appropriate representation that the office of the three CCRs provide[,]" (Attachment A at 39), former Justice Parker Lee McDonald publicly stated that it was "generally felt that once around is enough" and that he "would recommend to this Commission that your representation be limited to one full round of capital relief and no other" (Attachment A at 39, 40). When it was brought to Justice McDonald's attention that CCRC attorneys were bound to carry out their duties consistent with the Rules of Professional Responsibility, Justice McDonald stated:

Well, that's the question. We haven't assigned what your ethical obligations are.

(Attachment A at 40) (emphasis added). Justice McDonald then indicated that perhaps the ethical rules should be different for state-funded counsel, such as CCRC attorneys (Attachment A at 40-41).¹³

Senator Ron Silver also expressed "concern" about CCRC's litigation methods,

¹³Contrary to Justice McDonald's personal views, CCRC attorneys are governed by the Rules of Professional Conduct just as every other attorney licensed to practice in the State of Florida. There are no different ethical obligations that attach to CCRC attorneys, nor to other state-funded attorneys. Justice McDonald's statement that the Commission has not yet "assigned" the ethical obligations of CCRC counsel is troubling and further demonstrates counsel's conflict -- counsel has a Damocles sword hanging over his head and risks bringing it down on himself and his clients should the Commission decide that representation in successor litigation is not consistent with state-paid counsel's yet-to-be determined ethical obligations.

stating that "as of this morning while we were going through the Governor's budget recommendations, obviously one of those was the Office of the Capital Collateral Representatives and we sort of flagged that for future, future discussion, because we're very concerned about that" (Attachment A at 43). Senator Silver acknowledged that "State Attorneys have unlimited funds to go forward" yet stated that he was "becoming less of a supporter of this [CCRC] concept now, and that is because I believe that if, as attorneys we looked at something, we could see that this looks like, like a dilatory tactic or a surplusage or whatever by doing this [postconviction litigation], and I think all of us who are attorneys up here could look at that and suggest that that's what's happening" (Attachment A at 43-44). Senator Silver added that "this is a major concern to I think every person in the state that wants to see this process moved ahead, and I'm getting tired of hearing the excuses. . ." (Attachment A at 71).

Representative Sally Heyman also spoke on this issue, stating that she was "really disillusioned by this whole thing" (Attachment A at 67). She noted that the issue was not just about cost, but that the Commission also had the interests of the victims to be concerned about when assessing CCRC-South's financial situation:

Forget about the costs, it goes beyond money. It's the resources tied to it, but also a lot of lives involved, and as much as you're trying to protect your client, we have the interests of the victims and everyone associated to it and the system included. and I don't think there's any fairness in this process to the point that I'd probably not support anything you want to do if this is how you are going to carry forth . . .

(Attachment A at 67) (emphasis added).¹⁴

CCRC-South Peter Kenny was then questioned by the Commission about the federal lawsuit, first by Justice McDonald who asked how much lawyer time was being spent on the Jones v. McAndrew case (Attachment A at 55-56).¹⁵ Justice McDonald then questioned “whether or not that’s the type of work you ought to be doing . . . We know we’ve got that problem” (Attachment A at 56). Justice McDonald further pressed Mr. Kenny into revealing how much lawyer time had been spent on the Jones litigation and how many lawyers and investigators were assigned to the case (Attachment A at 57).

¹⁴This comment reflects a recognition on one level that undersigned counsel should be “trying to protect [his] client” but on another level that the undersigned is answerable to a Commission whose loyalty rests not with the client but with the victim. A clearer conflict is harder to imagine.

¹⁵The Commission’s questioning of Peter Kenny clearly called for disclosure of what would normally be considered attorney-client privileged information. The fact that the Commission asked for such information (“what are your strategies”) certainly could be interpreted as indicating that the Commission sees itself in a role akin to senior partners who are within the privilege. However, the fact that this was done publicly with party opponents present would reflect a fundamental misunderstanding of the attorney-client privilege.

Perhaps Peter Kenny should have refused to answer such questions on the grounds of privilege. However, it is clear from the transcript that Mr. Kenny would have incurred the wrath of the Commission had he done so. Legislators, who will be deciding whether to confirm Mr. Kenny’s appointment, are part of the Commission. Mr. Kenny, under the circumstances, was burdened with a conflict. See Rule 4-1.7(b), Rules of Professional Responsibility. The bottom line is that Mr. Remeta’s attorney-client privilege was breached, a fact which the State did not hesitate to then use against Mr. Remeta. In its opposition to Mr. Remeta’s motion to intervene in the federal suit, the Attorney General used Mr. Kenny’s words at the Commission hearing against Mr. Remeta, arguing that Mr. Kenny’s statements established that the motion to intervene should be denied. Again, a clearer conflict, orchestrated by the State and the Commission, can hardly be imagined.

Senator Silver questioned Mr. Kenny about the witness list that had been filed in the Jones v. McAndrew suit, telling Mr. Kenny “I can’t envision, as a lawyer, in any manner, shape for form, calling all of these people in good faith, as witnesses” (Attachment A at 58-59). He then went to far as to say “I mean, I don’t know why you would call anyone . . . [and] why you’d even consider calling them” (Attachment A at 59). After Mr. Kenny explained that the testimony of various legislators was relevant to the constitutional issue presented in the federal suit, Senator Silver stated “it’s a waste of time what you did here” (Attachment A at 60).¹⁶

Representative Heyman then was heard on this issue, stating that “as much as I want to support the rights to the max to assure that someone who is innocent and has been adjudicated perhaps unfairly or with error is not going to be executed,” the fact that CCRC-South sought to litigate the constitutionality of the electric chair in federal court and named various Florida congresspersons in its witness list “is unacceptable” (Attachment A at 65). Representative Heyman flatly stated that “I can’t in good conscience support your budget the next time out” (Attachment A at 66). She reiterated her concern that challenging convictions and death sentences in this manner was a waste “because this [electrocution] is how their sentence is going to be carried out if you cannot find a way to show that they’re innocent” (Attachment A at 66). She concluded that “I’m just not seeing money spent well, and if I had to make a budget decision right now, I would not be supportive of something like this”

“Again, this discussion of strategies and tactics was done in the presence of Mr. Remeta’s party-opponents.

(Attachment A at 66), adding that “if you even attempted to do this it would take six months, and we’re here to try and move this process along” (Attachment A at 67).

Additional matters were then addressed at the Commission meeting. For example, Mr. Kenny pointed out that this Court had, in a number of opinions, assigned costs to CCRC that had previously been borne by the counties, such as volunteer counsel costs and costs of transcripts (Attachment A at 72). See Porter v. State, 700 So. 2d 647 (Fla. 1997) ; Orange County v. Williams, 702 So. 2d 1245 (Fla. 1997). Mr. Kenny noted that CCRC-South had received a bill for \$122,000 in expenses from a Chicago law firm representing Harold Harvey (Attachment A at 73). Regarding this bill, the following discussion ensued:

JUSTICE McDONALD: I hope that’s the type of bill you wouldn’t pay unless the court forced you to pay it, frankly.

MR. KENNY: Well, the -- the Supreme Court said we had to and they’ve asked the circuit court to order us to pay it, so whether he will do that or not, I don’t know, but that’s one of the things that we’re facing for which we clearly don’t have the finances.

JUSTICE McDONALD: All the Supreme Court says is this is not a county expense, that if it’s anybody’s, it’s yours.

MR. KENNY: Right.

JUSTICE McDONALD: If it’s anybody’s.

(Attachment A at 73-74) (emphasis added).¹⁷ As to the additional expense

¹⁷Of course, this Court in Orange County unequivocally held that “CCR is responsible for the litigation expenses incurred by volunteer postconviction counsel.” Orange County, 702 So. 2d at 1248. This Court also wrote that “[i]n recognition of our

associated with transcription costs, Justice McDonald commented “one good thing about transcripts, when you got to pay for them out of your own pocket, you’re a little bit more careful about how many transcripts you order, too” (Attachment A at 74).¹⁸

Deputy General Counsel for Attorney General **Butterworth**, Marty Moore, also appeared at the Commission hearing and began his comments by saying “[s]ince this is a status report on the state of post-conviction capital collateral proceedings in Florida, I thought I’d echo what you probably already know, and the state is sorry, sorry, sorry” (Attachment A at 76-77).¹⁹ Moore noted that the Attorney General’s

determination that litigation expenses incurred by volunteer postconviction counsel are the responsibility of CCR, we request the legislature to consider these costs, past and future, in the appropriations for CCR’s budget.” *Id.* at 1248 n.8. However, when this issue was raised before the Commission, the response was simply that CCRC-South should not pay the bill in the Harvey litigation unless ordered to by a court. e , when the issue of transcription costs arose before the Commission, CCRC-South pointed out that this Court had again urged CCR and the Commission “to immediately assess the impact of these costs on CCR’s budgets in each of the CCR offices and at an early time do what is necessary to make the legislature aware of the need to appropriate the funds to cover these costs.” *Porter*, 700 So. 2d at 648-49. The Commission’s response to this was to suggest that CCRC should not order all the transcripts in its capital cases now that it had to pay for them. And rather than considering these additional expenses in CCRC’s budget, the Commission clearly has indicated that CCRC will not get any funding based on its litigation in cases such as Mr. **Remeta’s** involvement in the federal suit.

¹⁸Of course, this Court, when reviewing a capital postconviction appeal, must have the entire record before it, including all transcripts of all hearings. Additionally, the record in state court eventually becomes the record in federal habeas proceedings, should the case proceed to federal court. CCRC-South does not have the luxury of picking and choosing which transcripts to have transcribed and made part of the appellate record. This simple issue epitomizes the irreconcilable conflict that CCRC-South is facing with the Commission members.

¹⁹Of course, the Attorney General’s Office is the party-opponent to CCRC-South in all proceedings in state and federal court. The Commission, as senior law partners or overseers or as parents, or whatever capacity it views itself, entertains the comments of a party-opponent with more gravity than was shown the CCRC-South. A party-

Office, "out of utter frustration" with CCR, "suggested sunseting the former office of CCR and privatizing that part of the work in the 3.850 arena" (Attachment A at 77) Moore told the Commission "[f]rom our standpoint, in the Attorney General's Office and the State Attorneys, it does not look like any work has been done" by CCRC in filing Rule 3.850 motions (Attachment A at 80). Moore also stated that the filing of Rule 3.850 motions "is not happening, . . . and we in the Attorney General's Office have no hope that it will happen in the foreseeable future. Therefore, we are coming to this Commission and we are suggesting that you consider privatizing this function" (Attachment A at 80).²⁰

B. CONFLICT OF INTEREST.

The actions of the Commission have created an insidious conflict of interest for Mr. Remeta's CCRC-South counsel. Mr. Remeta's attorney is bound by the Rules of

opponent's comments should be viewed with suspicion. Here, they were not, even though a cursory investigation would show that misrepresentations were made about CCRC-South's activities in order to gain a strategic advantage and to further denigrate CCRC-South in the eyes of Commission members.

²⁰Deputy Counsel Moore neglected to inform the Commission that this Court had stayed the filing of motions under Rule 3.851 and also stayed the provisions of Rule 3.852, and that that was the reason why no new motions had been filed of late. Moore also misrepresented the history of what he called "shell 3.850s." Moore also neglected to inform the Commission that since July, 1997, CCRC-South attorneys have conducted seven (7) evidentiary hearings, six oral arguments before this Court (soon to be seven, as Mr. Remeta's case is set to be argued on March 4, 1998), filed six (6) initial briefs (including this Brief) in this Court, filed two Rule 3.850 motions, and attended numerous status hearings and other motion hearings relating to ongoing Rule 3.852 litigation. The undersigned also has filed several briefs in the Eleventh Circuit Court of Appeals, conducted an oral argument in the Eleventh Circuit just last week, and has two (2) federal habeas corpus petitions due for filing in April. Moore's statement that CCRC is not actively litigating cases is false, yet his statements are received and accepted without question by the Commission.

Professional Conduct. So too are the attorneys that are members of the legislative Commission.²¹ This conflict can only be resolved by allowing Mr. Remeta's CCRC-South counsel to withdraw and to order the appointment of conflict-free counsel to allow Mr. Remeta to pursue available state and federal court remedies at this time.

The Rules of Professional Conduct clearly establish that the Legislature's actions have created a conflict of interest for Mr. Remeta's CCRC-South counsel. Rule 4-1.7 (a) states that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client." Furthermore, Rule 4-1.7 (b) provides that "[a] lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person."²²

²¹Justice McDonald and Judge Miner are attorneys licensed in Florida. According to the Florida Bar Journal, Senator Silver and Representative Heyman are also attorneys in Florida. It is ironic that while the legislature has empowered the Commission members to advise the Florida Bar of any ethical breaches of CCRC attorneys, there is no "oversight" for the attorneys that are Commission members. Their actions in threatening to cease CCRC-South's funding if certain litigation methods are followed or are not followed would appear to be violative of the spirit and intent of the ethical canons. Certainly, Representative Heyman's unequivocal comments that she would not support future funding for CCRC because of her personal attitude about the manner in which CCRC litigates its cases, not to mention her stated concern about the rights of the victims, are in conflict with her legislative mandate to oversee the "administration of justice in capital cases." The preamble to the Rules of Professional Conduct state that "[a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." The comments at the February Commission meeting cannot be squared with these concepts.

²²The comment to this rule is enlightening as to the conflict present in this case. "Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other

CCRC-South is overseen by the Commission for the Administration of Justice in Capital Cases, a state body which has established that its interests are directly adverse to those of the clients it is allegedly overseeing. The Commission holds the purse strings for CCRC-South's budget, a budget which is used to represent CCRC-South clients like Mr. Remeta. As noted above, the Commission has indicated that it has the victims' interests to be concerned about, and a member of the Commission has explicitly threatened not to vote for any further budgetary requests for CCRC-South due to the federal litigation regarding the electric chair. The Commission has also stated that it does not like the fact that CCRC-South engages in successor postconviction litigation²³ and is solely interested in seeing this process "moved ahead." These interests are accompanied by stated threats that CCRC-South will receive no future funding.

"The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages." State ex re. Smith v. Brummer, 426 So. 2d 532, 533 (Fla. 1983). However, this principle has been ignored and openly flouted by the Commission on the Administration of Justice in Capital Cases. Mr. Remeta's CCRC-South counsel has now been placed in a position of adverse loyalties. On the

responsibilities or interest. The conflict in effect forecloses alternatives that would otherwise be available to the client.'

²³CCRC-South and the former CCR have obtained stays of execution based on claims alleged in successive Rule 3.850 motions in a number of cases, such as Paul Scott (1995), Joe Spaziano (1996), Rickey Roberts (1996), Leo Jones (1992), Raleigh Porter (1995) (stay entered by Eleventh Circuit Court of Appeals), McArthur Breedlove (1992), Allen Davis (1993), Roy Clark (1988), Ian Lightbourne (1989), and Freddie Hall (1989).

one hand, he owes Mr. Remeta his undivided attention to investigate and pursue all available legal remedies, which include successor postconviction litigation (litigation which the Commission has openly expressed its reproach) and federal litigation on the electric chair (litigation which the Commission has also condemned and based on which no future funding will be allocated to CCRC-South). On the other hand, Mr. Remeta's counsel represents some twenty-four (24) other clients in postconviction litigation who now will not receive future funding (or future funding has been severely threatened) due to Mr. Remeta's successor litigation and federal litigation on the electric chair.

The conflict is clear. "If an attorney's own personal interests or the interests of someone else to whom the attorney owes a duty (usually another client) conflict with the interests of a client, [h]e will be restrained in [his] ability to represent that client zealously." Freund v. Butterworth, 117 F. 3d 1543, 1574 (11th Cir. 1997). The Florida ethical canons emphasize "an attorney's duty to 'exercise independent professional judgment on behalf of a client.'" Id.

The First District Court of Appeals recently addressed a somewhat analogous situation in Handley v. Dennis, 642 So. 2d 115 (Fla. 1994). At issue was a public defender's obligation to a client who is an indigent mental patient that the State was seeking to have involuntarily committed. A public guardian of the patient sought injunctive relief to enjoin the Public Defender from attempting to have her client (the patient) moved to a less restrictive facility outside the jurisdiction of the guardian. The lower court refused to grant an injunction, and the First DCA affirmed, relying

essentially on the lower court's order. The lower court had written that the public defender "has a duty under the law to represent indigent mental patients in hearings to determine the need for continued involuntary commitment. . . In such cases, the duty of the Public Defender is a legal and professional duty that is owed to the patient as a client. The Public Defender serves as an independent advocate for the patient not as a neutral party charged with the responsibility of determining the best interests of the patient or the needs of society." *Id.* at 116-17 (emphasis added) (citations omitted).

This situation is also analogous to that addressed by the Supreme Court in Wood v. Georgia, 450 U.S. 261 (1981), where the issue was a third-party who had hired the lawyer to represent a defendant. Although the underlying facts of Wood are dissimilar from the instant case, the fundamental ethical principles are the same and clearly apply here. The Court wrote that "if petitioner's counsel was serving the employer's interest . . . this conflict in goals may well have [affected the strategy decisions in the case]." *Id.* at 268. A risk inherent in such situations is that "the party paying the fees may have had a long-range interest in establishing a legal precedent and could do so only if the interests of the defendants themselves were sacrificed." *Id.* at 270. Here, the party controlling the pursestrings has publicly stated its hostility toward the litigation carried out by CCRC-South attorneys and has openly stated its interest in the victims and in moving these cases along faster. Moreover, the party opponent has openly advocated for the abolishment of CCRC-South. Obviously the continuing litigation ongoing in Mr. Remeta's case is inconsistent with the

Commission's stated objectives, as the Commission will no longer vote for future CCRC-South funding (including, obviously, costs which this Court has recently held in Porter and Orange County were to be borne by CCRC).

It is clear that Mr. Remeta's CCRC-South counsel owes an independent duty to Mr. Remeta. However, the Commission, which is a legislatively-created "oversight" board for CCRC-South, sees itself as protectors of the victims and as arbiters of litigation strategies in CCRC-South cases, including that of Mr. Remeta. As an expression of its reproach, the Commission has stated it will not vote future funding for CCRC-South, funding which affects not only Mr. Remeta but also counsel's other death-sentenced clients. The Commission has placed Mr. Remeta's counsel in a no-win situation, and certainly has placed his clients in an untenable position. Mr. Remeta must ethically act as an independent advocate for Mr. Remeta, however the Commission has essentially stated that if Mr. Remeta's counsel does so, no more money will be appropriated to CCRC-South.²⁴ The conflict of interest could not be clearer, for if Mr. Remeta were represented by private non-CCRC counsel, that counsel would not be in a situation of such divided loyalties.²⁵

Although denying Mr. Remeta's motion, the lower court in essence understood

²⁴In fact, the situation is worse because it is apparent from the transcript that the Commission has already decided that CCRC-South will get no funding based on what has already occurred.

²⁵Moreover, there can be no doubt that if Mr. Remeta was represented by a law firm, for example, and that firm's managing partner told the lawyer that if he or she filed certain pleadings in Mr. Remeta's case the firm would no longer fund the case, that lawyer would have a conflict requiring withdrawal from the case. There is no difference here, where the Commission is essentially the "managing partner" of CCRC-South.

the seriousness of the problem. After Mr. Remeta's counsel explained the basis for the conflict, Judge Angel stated:

THE COURT: If this constitutes a conflict, the whole government would virtually collapse. We will not have a government because there's not a public defender who's not -- doesn't have the same conflict.

We would never have a criminal case in the state of Florida that could withstand any type of attack. Every public defender would be subject to -- we wouldn't even be able to -- we wouldn't even be able to get a judge -- to to Mars (sic) -- every judge is paid by the same treasury, and I've never seen a judge that would shirk his responsibility, enter orders contrary to the interest of the State just because he got a paycheck paid by the state comptroller.

(PC-R. 25-26).

In response, Mr. Remeta's counsel pointed out:

MR. SCHER: If I could just -- I -- I don't want the record or the Court to think that just because I'm paid by the State that that's -- that's the basis of my complaint at this time.

I don't think public defenders or judges are -- first of all, there's no other state agency, to my knowledge, that, first of all, contains -- that of a law firm, essentially, as CCRC South is; and Number 2, that is overseen by a specially-created agency also containing many lawyers to the point where they are hauled before this body, interrogated as to litigation strategies, and then threatened to have their budget and funding taken away if they continue in a certain course of action.

I don't think that happens to public defenders. There is no sort of oversight committee for them, in terms of the type or committee that's been created here, and, certainly, where a public defender or any -- any defense attorney summoned or ordered to **appear** before a committee and questioned extensively, as in this case, by other attorneys, which is entirely inappropriate, about

litigation strategies, that would create a conflict.

(PC-R. 27).

Mr. Remeta's counsel then analogized the situation involving the judge, and the following discussion ensued:

[MR. SCHER] It's sort of akin to Your Honor being summoned or ordered by some body that oversees the judiciary and was said -- you know, basically told you to rule a certain way in a certain case where you wouldn't.

THE COURT: I'd go ahead and get me a lawyer to defend me.

MR. SCHER: Well, exactly. And that's the situation. You know, Mr. Remeta has this lawyer who has conflicting interests, and so I would simply say, it's not just that we receive our funding from the State of Florida, I understand we all receive our funding from the State of Florida -- we're sitting in this room.

But there's a much larger, more insidious problem, basically, that's been created here.

THE COURT: I appreciate everything you're saying. Without some statutory or other authority to support it, I'll have to find that that would be a legally insufficient conflict. I'll deny the motion for that reason.

(PC-R. 27-28).

Judge Angel did not have discretion to go behind the assertions of Mr. Remeta's counsel that a conflict of interest existed that warranted withdrawal from the case. A trial court is not permitted to reweigh the facts considered by the public defender in determining if a conflict exists. Guzman v. State, 644 So. 2d 996, 998-99 (Fla. 1994); Hope v. State, 654 So. 2d 639 (Fla. 4th DCA 1995).

Mr. Remeta is entitled to effective and conflict-free representation by his


CCRC-South employed counsel. That representation is being held hostage by the members of the Commission who have invaded the attorney-client privilege, who have revealed privileged information to a party opponent, and who hold the pursestrings for CCRC-South. The Commission and the State have seemingly entered into an alliance with the same objective: the abolition of this agency. te which wants to abolish the agency. The motion to withdraw should be granted, and Mr. Remeta should be appointed conflict-free private counsel in order to pursue available remedies at this time.

CONCLUSION

In this brief, the undersigned has attempted to inform this Court of the unbearable situation that he and other CCRC attorneys face each and every day in attempting to represent clients who are sentenced to death due to the actions of the Commission, alone and in concert with the Attorney General of Florida. However, words are insufficient to convey how difficult it is to attempt to represent a death-sentenced client, particulary under a warrant situation like Daniel Remeta, with the ceaseless pressures being brought to bear from the State and the Commission The undersigned owes Mr. Remeta the absolute best representation he is capable of providing within the limits of the ethical canons. Yet his actions are “overseen” by a Commission, in concert with the Florida Attorney General’s Office and State Attorneys, whose stated purposes are the abolition of this agency and the speedy execution of his client. For a commission staffed by judges, lawyers, and legislators whose stated purpose is to get rid of CCRC or not adequately fund CCRC, to oversee

“the administration of justice in capital cases” really begs the question of what is the definition of “justice” in this situation. Mr. Remeta’s CCRC-South counsel is not a “child.” Mr. Remeta’s counsel is an attorney licenced in this State and is bound by the rules of professional responsibility to exercise independent judgment. Part of the exercise of independent judgment is to refrain from being influenced by others as to the scope, type, and nature of the representation he owes to his client. However, the Commission believes that it has the right to “assign” the ethical obligations that CCRC-South attorneys should be governed by. This is not the case. This Court’s intervention at this point is required.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF and appendix has been furnished by Federal Express, to all counsel of record on February 24, 1998.


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