

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-899

LOWER COURT CASE NO. 91-16659 CFANO

TROY MERCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

The issue presented in this appeal is a question of law: whether the circuit court correctly interpreted this Court's opinion in Suggs v. State, 152 So. 3d 471 (Fla. 2014). Circuit court rulings of law are reviewed de novo

REQUEST FOR ORAL ARGUMENT

Mr. Merck has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Merck, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE

On November 14, 1991, Mr. Merck was indicted with a single count of premeditated first-degree murder of James Newton (R. 17-8).

Mr. Merck's trial commenced on August 31, 1993, and he was found guilty on September 7, 1993 (R. 2010). The following week, Mr. Merck's jury recommended a sentence of death (R. 2054-5). Mr. Merck was sentenced to death on December 9, 1993 (R. 2129-35).

On direct appeal, this Court affirmed Mr. Merck's conviction but reversed his sentence of death and remanded for further sentencing proceedings. Merck v. State, 664 So. 2d 939 (Fla. 1995).

At Mr. Merck's re-sentencing, the jury recommended the death sentence and Mr. Merck was sentenced to death on September 12, 1997 (R2. 597; 762-74).

On direct appeal from the re-sentencing, this Court again reversed Mr. Merck's sentence of death and remanded for further sentencing proceedings. Merck v. State, 763 So. 2d 295 (Fla. 2000).

Mr. Merck's second re-sentencing proceeding commenced on March 17, 2004. On March 19, 2004, the jury recommended a sentence of death, by a vote of 9 - 3 (R3. 251). On August 6, 2004, Mr. Merck was sentenced to death (R3. 310-5).

On direct appeal from the second re-sentencing, this Court affirmed Mr. Merck's sentence of death. Merck v. State, 975 So. 2d 1054 (Fla. 2007).

Mr. Merck filed a Rule 3.851 motion on September 2, 2009 (PC-R. 1-169). A limited evidentiary hearing was granted (PC-R. 170-1).

An evidentiary hearing occurred on July 20 - 21, 2010. And, on August 27, 2010, the circuit court denied all relief (PC-R. 300-660).

Mr. Merck appealed to this Court. He simultaneously filed a petition for writ of habeas corpus. This Court denied all relief. Merck v. State, 124 So. 3d 785 (Fla. 2013).

Mr. Merck filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida on May 14, 2013. On June 3, 2013, Mr. Merck filed a motion for substitution of counsel and/or for appointment of conflict free counsel.

On February 12, 2014, the District Court granted Mr. Merck's motion for substitution of counsel finding that a conflict existed between Mr. Merck and his state court counsel; on April 8, 2014, undersigned was appointed to represent Mr. Merck as his federal court counsel pursuant to the Criminal Justice Act (CJA).

On October 28, 2014, Mr. Merck amended his petition for writ of habeas corpus.

On January 30, 2015, Mr. Merck requested that he be permitted to amend his amended petition for writ of habeas corpus based on information that he had recently discovered.

After briefing, the District Court entered an order authorizing CJA counsel to exhaust Mr. Merck's claim in state court.

Thereafter, Mr. Merck, through CJA counsel, filed a successive Rule 3.851 motion in the circuit court (PC-R2. 1-32).

The State filed a motion to strike (PC-R2. 33-8).

On July 9, 2015, the circuit court entered an order granting the State's motion to strike (PC-R2. 39-41; 42-3).

Mr. Merck appealed (PC-R2. 44-5).

After briefing, on January 8, 2016, this Court entered an order dismissing the appeal, which stated: "The Notice of Appeal is hereby dismissed without prejudice for Linda McDermott to seek substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)." See Merck v. State, Florida Supreme Court Case No. SC15-1439 (Jan. 8, 2016).

On January 19, 2016, Mr. Merck filed a motion for rehearing. The motion is currently pending before the Court, along with other motions and responses.

On January 25, 2016, Mr. Merck, through Ms. McDermott filed a Motion for Substitution of Counsel, in which Mr. Merck requested that Ms. McDermott be appointed to represent him as

Registry Counsel (PC-R3. 5-7). Mr. Merck asserted that he had no contact with anyone from the Capital Collateral Counsel for the Middle Region (CCC-MR), since April, 2014, and that due to the District Court's finding, a conflict existed (PC-R2. 5-7).

Simultaneously with his motion, Mr. Merck filed a successive Rule 3.851 motion, similar to the motion that had been struck (PC-R2. 8-32).

On January 29, 2016, the State filed a motion to strike (PC-R3. 33-6).

On February 3, 2016, Mr. Merck filed a response to the motion to strike (PC-R3. 37-9).

On February 11, 2016, the circuit court directed CCC-MR "to respond to the contention that the office may no longer represent Defendant due to conflict." (PC-R3. 41).

On February 18, 2016, CCC-MR filed a response to the circuit court's order asserting a conflict (PC-R3. 43-80).

On April 18, 2016, the circuit court granted the State's motion to strike Mr. Merck's successive Rule 3.851 and struck Mr. Merck's motion for substitution of counsel holding that CCC-MR had not filed a motion to withdraw (PC-R3. 81-4).

Mr. Merck timely filed a notice of appeal (PC-R3. 87-8).

STATEMENT OF THE FACTS

In his initial postconviction proceedings Mr. Merck was represented by the Capital Collateral Counsel for the Middle Region (CCC-MR).

At the evidentiary hearing, Mr. Merck requested that he be permitted to address the court (PC-R. 996). At that time, Mr. Merck informed the court that his appointed counsel was not adequately representing him; that postconviction counsel had not investigated all of the issues in his case, included claims in his Rule 3.851 motion and presented evidence at the evidentiary hearing. See PC-R. 995-1012.

During the course of the inquiry with Mr. Merck, CCC-MR through Attorney Richard Kiley stated that this was CCC-MR's case (PC-R. 1009) ("[t]his is our hearing. Although it is his life, it is my case, and strategically I make and my attorneys make the strategic decision." In addition, the following exchange took place:

THE COURT: ... I have no legal authority in the middle of these proceedings to appoint new counsel to him or to allow him to amend his pleadings.

MR. AKE: No. I agree with that.

(PC-R. 1006).

In response, Mr. Merck correctly stated:

... that for the purposes of the state court appeals I do have a right to effective representation. And if they are not offering me effective representation, since you have jurisdiction over the case right now, I

believe you do have the right to dismiss counsel and appoint new counsel if there is a conflict with this one.

(PC-R. 1010).

After the circuit court denied the motion, Mr. Merck filed a pro se motion for rehearing (PC-R 662-79). The circuit court struck the motion (PC-R. 680-1).

In his appellate proceedings before this Court, CCC-MR did not raise the issue of conflict or any of the issues Mr. Merck raised before the circuit court.

After instituting his federal habeas corpus proceedings, Mr. Merck complained to the District Court that CCC-MR had not adequately represented him in his state court proceedings and that he was entitled to a substitution of counsel. On February 11, 2014, the District Court ruled:

Because a conflict exists between CCRC-M counsel and Petitioner, continued representation by CCRC-M is precluded. Accordingly, the "interests of justice" require the appointment of conflict free counsel to represent Petitioner, who can conduct an investigation of those claims and develop an evidentiary record. CCRC-M is relieved from further responsibility in representing Petitioner.

See PC-R3. 77 (emphasis added).

While preparing to amend his petition for writ of habeas corpus, Mr. Merck's federal investigator located and interviewed witnesses. One of the witnesses who was located and interviewed was Neil Thomas, a critical trial witness for the prosecution.

On January 28, 2015, Thomas spoke with Mr. Merck's

investigator by telephone. Thomas relayed information about the evening of the crime that had not previously been revealed and was inconsistent with his trial testimony. See PC-R3. 12-3.

Following the conversation, Mr. Merck moved to amend his pending amended petition for writ of habeas corpus. After hearing from the parties, on May 15, 2015, the federal district court authorized CJA Counsel to represent Mr. Merck in his successive state court postconviction proceedings and stayed the federal proceedings.

On June 16, 2015, Mr. Merck, through his CJA Counsel, filed a successive Rule 3.851 motion in the circuit court (PC-R2. 1-32).

That same day, the State filed a motion to strike, arguing that the Rule 3.851 motion was unauthorized because Ms. McDermott was not appointed as Registry Counsel to represent Mr. Merck (PC-R2. 34-5).

The circuit court struck Mr. Merck's successive Rule 3.851 motion and Mr. Merck appealed.

After briefing, on January 8, 2016, this Court entered an order dismissing the appeal, which stated: "The Notice of Appeal is hereby dismissed without prejudice for Linda McDermott to seek substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)." See Merck v. State, Florida Supreme Court Case No. SC15-1439 (Jan. 8, 2016).

On January 25, 2016, Mr. Merck, through Ms. McDermott filed a Motion for Substitution of Counsel, in the circuit court, in which Mr. Merck requested that Ms. McDermott be appointed to represent him as Registry Counsel (PC-R3. 5-7). Mr. Merck asserted that he had no contact with anyone from the Capital Collateral Counsel for the Middle Region (CCC-MR), since April, 2014, and that due to the District Court's finding, a conflict existed (PC-R2. 5-7).

Simultaneously with his motion, Mr. Merck filed a successive Rule 3.851 motion, similar to the motion that had been struck (PC-R2. 8-32).

On January 29, 2016, the State filed a motion to strike (PC-R3. 33-6). The State argued that Ms. McDermott could not file the successive Rule 3.851 motion because she was not counsel of record, seemingly ignoring the simultaneously filed motion for substitution of counsel and this Court's January 8, 2016, Order. See PC-R3. 34.

On February 11, 2016, the circuit court directed CCC-MR "to respond to the contention that the office may no longer represent Defendant due to conflict." (PC-R3. 41). Specifically, the circuit court stated: "If CCRC believes that its representation is hindered by an actual conflict of interest, as described under §27.703, Fla. Stat., its response should allege details sufficient to allow this Court to determine the existence of such

a conflict." (PC-R3. 41).

On February 18, 2016, CCC-MR filed a response to the circuit court's order asserting a conflict (PC-R3. 43-80). CCC-MR also stated that "justice requires that Ms. McDermott also be appointed to represent Mr. Merck for any state related matters." (PC-R3. 44).

On April 18, 2016, the circuit court granted the State's motion to strike Mr. Merck's successive Rule 3.851 and struck Mr. Merck's motion for substitution of counsel holding that CCC-MR had not filed a motion to withdraw (PC-R3. 81-4).

SUMMARY OF THE ARGUMENT

1. In Suggs v. State, 152 So. 3d 471, 472 (Fla. 2014), this Court stated:

Because Mr. Suggs' death sentence has not been carried out and the record is devoid of any evidence showing that the circuit court entered an order terminating Attorney Moldof's status as Mr. Suggs' counsel of record, we find that Attorney Moldof is presently Mr. Suggs' counsel of record in state courts. See Fla. R. Jud. Admin. 2.505(f)(1)-(3) (outlining modes by which an attorney's appearance for a party terminates); see also *Van Poyck v. State*, No. 73,662 (Fla. May 10, 2013) (Order Remanding Case for Determination of Counsel of Record).

Attorney Moldof shall maintain his status as Mr. Suggs' counsel of record unless Attorney Moldof has previously obtained a court order releasing him from representation, or until such a court order issues. Accordingly, we dismiss without prejudice for the circuit court to consider appointment of new counsel under the registry statute should existing counsel obtain permission to withdraw from representation. At such time, Mr. Suggs may then file with the circuit court a subsequent motion for appointment of registry counsel.

The circuit court interpreted this Court's opinion in Suggs to mean that court appointed collateral counsel must file a motion to withdraw in order for counsel to be substituted. See PC-R3. 82 ("As noted above, CCRC has not withdrawn from its representation of Defendant in this matter. Thus, Defendant's Motion for Substitution of Counsel is inappropriate."). This was so even though CCC-MR was directed to respond to the motion for substitution of counsel and specifically asserted a conflict. See PC-R3. 43 ("[CCC-MR] firmly believe[s] that a conflict of interest inhibits [] continued representation of Mr. Merck in

front of this Court.").

The circuit court erroneously interpreted Suggs, to require that CCC-MR **must** file a motion to withdraw, rather than Mr. Merck filing a motion for substitution of counsel. However, even if such an interpretation were correct, error still occurred in light of the circumstances in Mr. Merck's case. CCC-MR has had no contact with Mr. Merck for more than two years. In addition, CCC-MR has made clear that a conflict exists and that "its representation [of Mr. Merck] is hindered by an actual conflict of interest." (PC-R3. 44). Therefore, this Court should reverse and remand for further proceedings on Mr. Merck's motion for substitution of counsel and his successive Rule 3.851 motion.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN STRIKING MR. MERCK'S MOTION FOR SUBSTITUTION OF COUNSEL AND SUCCESSIVE RULE 3.851 MOTION.

The issue before this Court is simply: was CCC-MR required to file a motion to withdraw as counsel for Mr. Merck in order for a substitution of counsel to occur, pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014). Four legal sources conclusively resolve the issue and make it clear that the circuit court erroneously struck Mr. Merck's motions.

First, this Court's order specifically stated: "The Notice of Appeal is hereby dismissed without prejudice for Linda McDermott to seek substitution of counsel in the circuit court pursuant to Suggs v. State, 152 So. 3d 471 (Fla. 2014)." See Merck v. State, Florida Supreme Court Case No. SC15-1439 (Jan. 8, 2016). Thus, this Court unambiguously identified Ms. McDermott's actions, i.e., a motion seeking substitution of counsel, as an appropriate vehicle to be considered by the circuit court in determining whether to terminate CCC-MR's representation and appoint substitute counsel. Indeed, this Court's order interpreted Suggs in such a way that made clear a motion for substitution of counsel could properly initiate proceedings related to the representation of Mr. Merck.

Second, in Suggs, this Court held:

Because Mr. Suggs' death sentence has not been carried out and the record is devoid of any evidence showing that the circuit court entered an order terminating Attorney Moldof's status as Mr. Suggs' counsel of record, we find that Attorney Moldof is presently Mr. Suggs' counsel of record in state courts. See Fla. R. Jud. Admin. 2.505(f)(1)-(3) (outlining modes by which an attorney's appearance for a party terminates); see also *Van Poyck v. State*, No. 73,662 (Fla. May 10, 2013) (Order Remanding Case for Determination of Counsel of Record).

Attorney Moldof shall maintain his status as Mr. Suggs' counsel of record unless Attorney Moldof has previously obtained a court order releasing him from representation, or until such a court order issues. Accordingly, we dismiss without prejudice for the circuit court to consider appointment of new counsel under the registry statute should existing counsel obtain permission to withdraw from representation. At such time, Mr. Suggs may then file with the circuit court a subsequent motion for appointment of registry counsel.

152 So. 3d at 472. The plain language makes clear that counsel remains on the case unless she obtains a court order releasing her **"or until such a court order issues"**. *Id.* (emphasis added). The emboldened clause means that a motion for substitution of counsel appropriately initiates a proceeding which may result in an order releasing prior counsel from further representation.

Third, in Suggs, this Court referenced Florida Rule of Judicial Administration 2.505(f)(1)-(3). See 152 So. 3d at 472. A review of Fla. R. Jud. Admin. 2.505(f)(1)-(3) reveals that one of the proper methods for "Termination of Appearance of Attorney" is "Substitution of Attorney", which requires that an attorney file a motion requesting substitution which is approved by the client. See Fla. R. Jud. Admin. 2.505(e)(2). Such a procedure

makes no mention of current counsel having to withdraw in order for substitution of counsel and termination of counsel to occur, yet it was explicitly referenced in Suggs as a proper way for Registry Counsel to be appointed.

Fourth, in Groover v. State, Florida Supreme Court Case No. SC04-86, this Court considered a petition related to an order refusing to recognize pro bono counsel in Mr. Groover's state court proceedings. Ultimately, this Court denied the petition without prejudice for pro bono counsel to file a motion for substitution of counsel. See Groover, Florida Supreme Court Case SC04-86, Order of May 21, 2004). There, this Court did not require Registry Counsel to withdraw, but only required pro bono counsel to file a motion for substitution in order to institute proceedings as to who could represent Mr. Groover.

Finally, it makes no sense to allow for substitution of counsel only upon a motion to withdraw by current counsel. Under the circuit court's interpretation of Suggs, current counsel could die, become incapacitated, disbarred, or merely be incompetent or malicious, and the failure of counsel to file the motion to withdraw would preclude any substitution. Certainly, that is why substitution of counsel may be permitted on motions other than current counsel's motion to withdraw. See Fla. R. Jud. Admin. 2.505(f)(1)-(3).

Thus, it is clear that Mr. Merck's motion for substitution

of counsel and successive Rule 3.851 motion were properly filed and the circuit court erred in striking them because CCC-MR had not filed a motion to withdraw.

However, even if Suggs required that CCC-MR filed a motion to withdraw, the circumstances of Mr. Merck's case also require reversal. Here, the circuit court requested that CCC-MR "respond to the contention that the office may no longer represent Defendant due to conflict." (PC-R3. 41). In its response, CCC-MR made abundantly clear that "a conflict of interest inhibits [CCC-MR's] continued representation of Mr. Merck." PC-R3. 43. CCC-MR cited to specific issues, pursuant to Fla. Stat. 27.703, that had surfaced during Mr. Merck's state court evidentiary hearing and how Mr. Merck's complaints had caused CCC-MR and Mr. Merck's interests to become adverse in Mr. Merck's federal proceedings. See PC-R3. 43-80. CCC-MR also stated that Ms. McDermott was in the best position to represent Mr. Merck. Therefore, CCC-MR's response was essentially a motion to withdraw and should have been construed as such. The circuit court's order refusing to terminate CCC-MR's representation in light of its response was error.¹

¹If CCC-MR is required to file a motion to withdraw and its response was not sufficient to convey its position and information related to the conflict, Mr. Merck requests that this Court direct CCC-MR to file a motion to withdraw.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, **TROY MERCK**, urges this Court to reverse the circuit court's order and remand to allow him proceedings on his motion for substitution and to litigate his successive Rule. 3.851 motion in a proceeding that comports with due process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Stephen Ake, Assistant Attorney General, on this 18th day of July, 2016.

/s/.Linda McDermott
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CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

/s/. Linda McDermott
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