

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-899

LOWER COURT CASE NO. 91-16659 CFANO

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TROY MERCK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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REPLY BRIEF OF APPELLANT

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**ARGUMENT IN REPLY**

**ARGUMENT I**

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

In response to Mr. Merck's Initial Brief, the State asserts two arguments: First, that this Court does not have jurisdiction to entertain Mr. Merck's appeal due to the fact that undersigned was not authorized to file the pleadings in the circuit court (Answer Brief at 6, 8) (hereinafter "AB at \_\_\_\_"). And, second, that the circuit court did not abuse its discretion in striking the motion for substitution of counsel and successive Rule 3.851 motion because they were filed by undersigned, who is not authorized to file pleadings on behalf of Mr. Merck (AB at 6, 8-9).

Because both arguments rest on the premise that undersigned was unauthorized to file the motion for substitution of counsel, Mr. Merck submits that the appeal rests entirely on the resolution of that issue.

On January 8, 2016, this Court entered an Order dismissing the previous notice of appeal "without prejudice for Linda McDermott to seek substitution of counsel in the circuit court". Merck v. State, SC15-1439 (Fla. Jan. 8, 2016). The plain language of this Court's January 8, 2016, Order, indicated that undersigned could seek substitution of counsel, i.e., this Court

specifically identified Linda McDermott as the person who could seek substitution, rather than referring to Mr. Merck, or CCC-MR as the party "to seek substitution of counsel in the circuit court". The circuit court ignored the plain language of this Court's Order in striking the motion for substitution and successive Rule 3.851 motion.

Further, in addition to the authorities Mr. Merck cited in his Initial Brief, see Initial Brief at 14-16, this Court recently addressed a situation in which *pro bono* counsel filed a pleading on behalf of a capital collateral defendant who was represented by the Capital Collateral Counsel for the Southern Region (CCC-SR). See Bates v. Jones, SC16-1199. In Bates, the factual scenario differed only in that CCC-SR had no conflict with Mr. Bates, but rather, his federal court counsel, which was not CCC-SR, procured *pro bono* counsel (Holland & Knight), to litigate a claim pursuant to Hurst v. Florida, 136 S.Ct 616 (2016), on Mr. Bates' behalf.

In Bates, the State moved to strike the petition for writ of habeas corpus that was filed by *pro bono* counsel. On July 18, 2016, this Court entered an order striking Mr. Bates' petition stating: "The petition is therefore stricken, without prejudice to counsel at Holland & Knight refiling the petition. Counsel at Holland & Knight may refile the petition as co-counsel with the lead counsel at Capital Collateral Regional Counsel - South, or

alternatively, **counsel at Holland & Knight may obtain an order of substitution of counsel in the circuit court** pursuant to Suggs v. State, 152 So.2d 471 (Fla. 2014).” Bates, SC16-1199 (July, 18, 2016) (Emphasis added).

Once again, as in this Court’s January 8, 2016, Order, in Mr. Merck’s case, this Court made clear that Holland & Knight, as *pro bono* counsel, could obtain an order of substitution of counsel in the circuit court so that it could re-file the petition as counsel for Mr. Bates. This Court did not require that CCC-SR withdraw or institute the proceedings on substitution.

Likewise, the State’s reference to Florida Statute § 27.702(2), (AB at 8-9), makes equally clear that a party is authorized to move for substitution of counsel, even though a capital collateral defendant is represented by a CCC office. Florida Statute § 27.702(2) states: “The capital collateral regional counsel shall represent persons convicted and sentenced to death within the region in collateral postconviction proceedings, unless a court appoints or permits other counsel to appear as counsel of record.” According to the statute, the court may permit other counsel to appear as counsel of record, and does not require CCC to initiate the substitution.

Indeed, as in Bates, CCC-SR had no basis for withdrawal, but this Court recognized that substitution of counsel may still be appropriate.

Obviously, unlike Bates, and what the State fails to mention, is that in Mr. Merck's case, CCC-MR responded to the circuit court's order and declared that "a conflict of interest inhibits [CCC-MR's] continued representation of Mr. Merck." (PC-R3. 43). The circuit court erroneously ignored CCC-MR's statement in striking the motion for substitution of counsel and successive Rule 3.851. Under the circumstances here, even if a motion to withdraw was a prerequisite to the substitution of counsel, the circuit court should have construed CCC-MR's response as a motion to withdraw based upon a conflict.

#### **CONCLUSION**

Mr. Merck requests that this Court enter an order appointing Linda McDermott as his counsel of record, or remand his case to the circuit court for further proceedings on his motion for substitution of counsel and reinstate his successive Rule 3.851.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic mail to Stephen Ake, Assistant Attorney General, on this 24<sup>th</sup> day of August, 2016.

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

This is to certify that the Reply 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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