

IN THE FLORIDA SUPREME COURT

RONNIE FERRELL,

Petitioner,

v.

CASE NO. 03-1423

Lower Court Case No. 91-8142CFA

STATE OF FLORIDA,

Respondent.

**APPEAL FROM THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY
STATE OF FLORIDA**

INITIAL PETITION

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
497 Stonehouse Rd
Tallahassee, FL 32301
(850) 322-2172

On behalf of Mr. Ferrell

JURISDICTIONAL STATEMENT

In Trepal v. State, 754 So.2d 702, 707 (Fla. 2000), this Court established the parameters of interlocutory appeals in collateral proceedings noting that it accepted jurisdiction under Article V, Sec. 3 (b)(1), Fla. Const. This Court further held that:

... to obtain relief an appellant must establish that the order compelling discovery does not conform to the essential requirements of law and may cause irreparable injury for which appellate review would be inadequate.

Trepal, 754 So. 2d at 707. Mr. Ferrell alleges both in this petition for extraordinary relief, and requests that this Court accept jurisdiction over this matter under Article V, Sec. 3 (b)(1) of the Florida Constitution.

ISSUE PRESENTED

In light of the Office of the Capital Collateral Counsel for the Northern Region's (CCC-NR), elimination, effective July 1, 2003, Linda McDermott, Mr. Ferrell's designated attorney within CCC-NR, moved the circuit court for an order appointing her to continue to represent Mr. Ferrell, but as Registry counsel. Mr. Ferrell requested that Ms. McDermott continue to represent him and seek the appointment of counsel.

A hearing on the motion was held on June 26, 2003. At that hearing, the prosecuting attorney, George Bateh (against whom Ms. McDermott on behalf of

Mr. Ferrell has pled constitutional violations), opposed Ms. McDermott's continuation as counsel for Mr. Ferrell. Mr. Bateh asked that the court appoint local counsel. In response, Ms. McDermott argued that her continuation as Mr. Ferrell's counsel would be the most cost effective, cause the least amount of delay and certainly conform with the requirement of due process. Following the hearing, the court denied Ms. McDermott's request for appointment and appointed Frank Tassone to represent Mr. Ferrell.

Upon learning of Mr. Tassone's appointment, Ms. McDermott spoke to Mr. Tassone.. He advised of his conversations with personnel from the judge's office and the assistant state attorney, Mr. Bateh, prior to the June 26th hearing regarding representation of Mr. Ferrell. Neither Mr. Ferrell nor Ms. McDermott were give notice and an opportunity to be heard during these ex parte negotiations between the judge, the prosecutor, and the newly-appointed registry counsel. Because of the backdoor negotiations to remove Mr. Ferrell's longstanding counsel, neither Ms. McDermott nor Mr. Ferrell were given an opportunity to air the findings of the Eleventh Circuit in Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003) (finding Tassone's performance deficient and remanding for an evidentiary hearing on Mr. Hardwick's ineffective assistance claim). Nor were they given an opportunity to address the fact that Mr. Bateh would be representing the State at the federal

evidentiary hearing and would be attempting to defend Mr. Tassone's reputation by repudiating the Eleventh Circuit's finding that Mr. Tassone's performance had been unreasonable, a product of ignorance of capital law.¹ Nor were they given the opportunity to address the fact that undersigned counsel previously reviewed the files on the convictions of many witnesses in the case and recalls that Mr. Tassone and/or his law partner, Refik Eler, previously represented individuals who testified against Mr. Ferrell, and his co-defendants, Mr. Hartley and Mr. Johnson.²

At Mr. Ferrell's request, Ms. McDermott filed a Motion for Rehearing in the circuit court of the order appointing Mr. Tassone because Mr. Ferrell's right to continuity in his representation, effective assistance of counsel and due process were violated by the ex parte conversations that occurred and the conflict that had been created as a result of the relationship between Mr. Tassone and Mr. Bateh. The circuit court denied the rehearing motion.

Thus, the issue presented is whether the circuit court deprived Mr. Ferrell of

¹During the same time period that Mr. Tassone advised Ms. McDermott that he was having conversations with Mr. Bateh about undertaking Mr. Ferrell's representation, Mr. Tassone and Mr. Bateh were discussing and strategizing for the upcoming evidentiary hearing in Hardwick, according to Mr. Tassone's response to a bar grievance filed by Mr. Hardwick.

²Despite the fact that undersigned filed a Motion for Rehearing and informed Mr. Tassone that she would be filing an appeal, the files and records have been sent to Mr. Tassone..

his constitutional right to due process and his statutory right to effective representation by counsel unburdened with a conflict of interest.

FACTS UPON WHICH PETITIONER RELIES

Mr. Ferrell was convicted and sentenced to death for the murder of Gino Mayhew. Mr. Ferrell's co-defendants, Kenneth Hartley and Sylvester Johnson were also convicted; Mr. Hartley was sentenced to death and Mr. Johnson was sentenced to life in prison. The prosecution of Mr. Ferrell, Mr. Hartley and Mr. Johnson was primarily based upon testimony of jailhouse informants, and other convicted felons. Sidney Jones, the State's eyewitness to the alleged abduction and police informant, had over seventy (70) convictions in Duval County. Juan Brown, an individual who said that he saw Mr. Ferrell in Mr. Mayhew's vehicle on the evening of the crimes, also had a lengthy history of convictions in Duval County. Likewise, Robert Williams, a jailhouse informant, had several convictions in Duval County. The testifying jailhouse informants against Mr. Hartley included Anthony Parkin, Ronald Bronner and Eric Brooks. These witnesses had many convictions in Duval County. Additionally, several non-testifying jailhouse informants were utilized in the prosecution of Mr. Ferrell, Mr. Hartley and Mr. Johnson; these witnesses also had numerous conviction in Duval County.

The Circuit Court for the Fourth Judicial Circuit, in and for Duval County,

Florida, entered the judgment of conviction and sentence of death at issue in this case. On direct appeal, this Court affirmed the conviction and sentence. Ferrell v. State, 686 So. 2d 1324 (Fla. 1996), cert. denied, 520 U.S. 1173 (1997).

Mr. Ferrell's case was handled by CCC-NR from the date his direct appeal was final until the elimination of CCC-NR on July 1, 2003. Ms. McDermott was Mr. Ferrell's designated counsel from June, 2002, until June 30, 2003.³ Prior to becoming Mr. Ferrell's designated counsel, Ms. McDermott represented Mr. Ferrell along with other CCC-NR attorneys. Appendix Tab 1.

A Rule 3.850 motion had been filed by CCC-NR.⁴ Thereafter, public records were pursued in anticipation of amending the motion. At the time of CCC-NR's closure, Mr. Ferrell's litigation team had been actively investigating and preparing an amendment to his Rule 3.850 motion. Undersigned counsel reviewed the files on the convictions of the above named witnesses and recalls that Mr.

³During the time that CCC-NR represented Mr. Ferrell, the case had been contentious. It was clear from the record that undersigned counsel and others from CCC-NR who had appeared in court on Mr. Ferrell's behalf believed that Mr. Bateh was guilty of prosecutorial misconduct.

In 2002, the State filed a bar complaint against the attorney who was CCC-NR's designated attorney for Mr. Ferrell prior to Ms. McDermott, regarding his contact with a jailhouse informant used by the State against Mr. Ferrell. The complaint was dismissed by the Florida Bar.

⁴The boilerplate language of the Rule 3.850 did include allegations of constitutional violations resulting from prosecutorial misconduct.

Tassone and/or his law partner, Refik Eler, previously represented individuals who testified against Mr. Ferrell, Mr. Hartley and Mr. Johnson.

At the time CCC-NR was closed many of the claims for the amended Rule 3.850 motion had been investigated and were being prepared for filing. The claims challenging Mr. Ferrell's convictions and sentences include extensive Giglio and Brady violations, prosecutorial misconduct and ineffective assistance of counsel claims. Specifically, CCC-NR had already substantiated that undisclosed benefits had been provided to many of the witnesses by Assistant State Attorney George Bateh; Mr. Bateh knowingly presented false testimony during Mr. Ferrell's trial; Mr. Bateh presented inconsistent theories in the trials of Mr. Ferrell, Mr. Hartley and Mr. Johnson; Mr. Bateh's arguments were improper.⁵ See State v. Brooks, 762 So. 2d 879 (Fla. 2000).⁶ Certainly, these claims if true could lead to sanctions from the Florida Bar against Mr. Bateh. Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).⁷

⁵These examples are illustrative of Mr. Ferrell's claims, but they are certainly not a comprehensive list of the prosecutorial misconduct that occurred at his trial.

⁶Mr. Bateh's repeated, condemned, conduct was ultimately referred to the Florida Bar.

⁷Mr. Bateh clearly had a personal interest in thwarting undersigned counsel's efforts to establish prosecutorial misconduct which deprived Mr. Ferrell of his constitutional rights and warrant Rule 3.850 relief.

In Ms. McDermott's request for appointment on or about June 10, 2003, she informed the circuit court:

Undersigned previously and currently represents Mr. Ferrell in his postconviction appeals as his designated counsel. As such counsel is familiar with the facts, circumstances and challenges to Mr. Ferrell's convictions and sentences and has met with Mr. Ferrell several times to discuss his postconviction appeals. The continuity that would follow from appointing counsel familiar with Mr. Ferrell's case would serve Mr. Ferrell's best interests and due process. To appoint counsel unfamiliar with Mr. Ferrell's case would disadvantage Mr. Ferrell at this crucial time in his postconviction appeals due to the fact that at a minimum unfamiliar counsel would have to request extensive delays to learn Mr. Ferrell's case and prepare for the proceedings in Mr. Ferrell's case. Such a delay in and of itself denies Mr. Ferrell's interest of advancing his claims and challenges to his convictions and sentences. The appointment of Ms. McDermott would be consistent with due process.

7. Likewise, preserving the continuity of counsel would also promote the interests of the State in minimizing the increased cost and time that appointing unfamiliar counsel would surely cause. The State of Florida desires to minimize the costs of the appellate process. There is no better way to fulfill such intentions since Ms. McDermott is already familiar with Mr. Ferrell's case and has already dedicated several hours which an unfamiliar attorney would have to duplicate in order to effectively litigate the case.

8. Additionally, the Governor and Legislature has stated that desire to minimize delays in capital litigation and obtain finality in capital cases at a more expeditious rate than currently exists. The appointment of Ms. McDermott would result in minimal delay in the transition of Mr. Ferrell's case from CCC-NR to Ms. McDermott. Should this case be transferred to unfamiliar counsel, the delay would be substantial for competent counsel to gain the requisite knowledge and understanding of Mr. Ferrell's case.

Appendix Tab 2 (footnotes omitted).⁸ The State did not file a written response to Ms. McDermott's motion.

On June 26, 2003, a brief hearing was held in Judge Arnold's chambers.⁹ Ms. McDermott appeared on behalf of Mr. Ferrell and Mr. Bateh appeared on behalf of the State along with Assistant Attorney General Curtis French. Without stating a formal objection to Ms. McDermott's motion for her appointment so that she could continue as Mr. Ferrell's counsel, Mr. Bateh instead asked that the judge appoint local counsel from Jacksonville.

Undersigned counsel informed the judge that she had invested numerous hours of work on Mr. Ferrell's case and that it was more cost effective to appoint her rather than an attorney unfamiliar with Mr. Ferrell's case. In addition, undersigned counsel informed the court that appointing an unfamiliar attorney would certainly require lengthy delays due to the complexities of Mr. Ferrell's case.

⁸Ms. McDermott has considerable capital experience. Ms. McDermott was designated counsel for thirteen (13) clients at the time of CCC-NR's defunding. In addition, she had been counsel for both Juan Melendez and Rudolph Holton, two death sentenced individuals who were set free after their convictions were overturned in January of 2002 and 2003, respectively. Ms. McDermott also represented Barry Hoffman before this Court when this Court ordered a new trial. Hoffman v. State, 800 So. 2d 174 (Fla. 2001).

⁹Undersigned later learned that Judge Arnold was in the midst of a capital trial at the time of the hearing.

On the other hand, Mr. Bateh argued that the case was not complex and local counsel who would be more readily available to attend hearings was needed.¹⁰

As to the court's concern that counsel would have difficulty in attending hearings, undersigned assured the court that she would have no problems in attending scheduled hearings. Indeed, undersigned informed the court that the fact that she was not local would not cause any problems and she had already been appointed to two (2) capital postconviction cases in Jacksonville. Appendix Tabs 3 and 4.

Subsequently, the lower court denied Ms. McDermott's motion and appointed Frank Tassone to represent Mr. Ferrell. Appendix Tab 5. After learning of this appointment, Ms. McDermott called Mr. Tassone on July 7, 2003. Mr. Tassone advised her that Mr. Bateh and he had a conversation about the

¹⁰Mr. Bateh informed the court that Mr. Ferrell's case was not complicated and therefore new counsel could be up to speed quickly. Certainly, Mr. Ferrell's counsel, rather than the prosecutor, Mr. Bateh, would be in a better position to more reliably inform the Court of what collateral representation of Mr. Ferrell involved. But more importantly, Mr. Bateh had a conflict of interest as to the matter of Mr. Ferrell's representation in light of Mr. Ferrell's claims of prosecutorial misconduct. Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001).

Based on her experience on behalf of Mr. Hoffman, Mr. Melendez, and Mr. Holton, and her other clients, Ms. McDermott is knowledgeable on what is involved in building a case for 3.850 relief.

representation of Mr. Ferrell prior to the June 26, 2003, hearing.¹¹ Likewise, Mr. Tassone recalled a conversation predating the hearing with Judge Arnold's judicial assistant about being appointed to a capital postconviction case, but could not be certain that the case which was discussed was Mr. Ferrell's. Mr. Tassone was aware of the hearing on Ms. McDermott's motion for appointment, but could not attend due to his schedule.¹²

At Mr. Ferrell's request, Ms. McDermott filed a Motion for Rehearing. Appendix Tab 6. The court denied the motion on July 17, 2003. Appendix Tab 7.

Following his appointment, Mr. Tassone arranged for Mr. Ferrell's files and records to be removed from the CCC-NR office to Jacksonville. Mr. Ferrell's case, along with eight (8) other cases had been assigned to three local Jacksonville

¹¹At the time of the hearing, Mr. Bateh had already been recruiting Mr. Tassone to undertake Mr. Ferrell's representation. Certainly, Mr. Bateh never revealed that to Ms. McDermott at the time of the hearing. Yet, somehow after the hearing the attorney that Mr. Bateh had been recruiting received the appointment.

¹²Mr. Tassone did not speak to Ms. McDermott or Mr. Ferrell prior to his appointment as counsel or to discuss the complexities which Mr. Ferrell's case presents.

During the July 7th conversation, Ms. McDermott informed Mr. Tassone that she recalled that he had represented an adverse witness to Mr. Ferrell in the past and believed that a conflict existed.

attorneys.¹³ These three attorneys, Frank Tassone, Dale Westling and Jefferson Morrow, arranged to have all of the files and records transported on the same day by John Bradley, a former Duval County homicide detective. Mr. Bradley worked for Duval County law enforcement for 18 years until his retirement in 1993.

Appendix Tab 8. Mr. Bradley who worked for the Duval County Sheriff at the time of Mr. Ferrell's prosecution, received the confidential files and records in Mr. Ferrell's case and transport the files and records back to Jacksonville. Mr. Bradley was accompanied by another individual who indicated to those at the old CCC-NR office the day the files were picked up that he was an employee of the Duval County Sheriff's Office. Those individuals had exclusive access to Mr. Ferrell's confidential files and records. Those files are now in a storage facility in Jacksonville subject to Mr. Bradley's control.

At the time of Mr. Ferrell's investigation and prosecution, Detective Bradley was employed by the Duval County Sheriff's Office and did in fact participate in

¹³Many of the cases which were assigned to the Jacksonville attorneys were cases in which former CCC-NR counsel, familiar with the cases, had made motions for appointment. The appointments were rejected. Counsel later learned that there was a agreement to appoint local Jacksonville attorneys in order to provide them with work as part of a patronage system.

the investigation involving the homicide of Gino Mayhew.¹⁴ It is clear that Mr. Bradley still has unfettered access to Mr. Ferrell's confidential files and records.

NATURE OF THE RELIEF SOUGHT

Mr. Ferrell, through Ms. McDermott, asserts that his right to due process of law have been violated. Mr. Ferrell is entitled to an effective, conflict-free attorney. The appointment of Mr. Tassone rather than Ms. McDermott does not conform to the essential requirements of law and will cause irreparable injury for which appellate review would be inadequate in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitutions for each of the reasons set forth below. Accordingly, Mr. Ferrell seeks to have the order appointing Mr. Tassone vacated and requests that Ms. McDermott be appointed to represent him.

ARGUMENT IN SUPPORT OF PETITION

¹⁴Mr. Bradley was also responsible for receiving, transporting and maintaining the files for eight other former clients of CCC-NR. Mr. Bradley was in fact a lead homicide detective for an 18 year period. He had investigated the cases against many of these nine former CCC-NR clients. When picking up the files, Mr. Bradley commented to the former CCC-NR employee acting as custodian, that one particular client whose files he held in his hands was where he needed to be, on death row. A clearer conflict of interest is hard to imagine. Providing Mr. Bradley unfettered access to confidential files and records of clients who he and his co-workers had actively prosecuted, was serious breach of Mr. Ferrell's right to confidentiality.

THE TRIAL COURT VIOLATED DUE PROCESS OF LAW BY ENTERTAINING THE PROSECUTING'S REQUEST AS TO WHO SHOULD OR SHOULD NOT BE MR. FERRELL'S COUNSEL, BY TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN MR. FERRELL AND MS. MCDERMOTT, AND BY APPOINTING THE PROSECUTING ATTORNEY'S HANDPICKED CHOICE TO BE MR. FERRELL'S COUNSEL. AS A RESULT, AN ACTUAL CONFLICT OF INTEREST EXISTS BETWEEN MR. TASSONE AND MR. FERRELL.

A. Introduction.

In Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999), this Court acknowledged it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent, and reliable manner...". Id. In a special concurrence, two Justices discussed the right to counsel in capital postconviction in terms of State Due Process. Counsel was characterized as an "essential requirement" in capital postconviction proceedings. Id. at 329.

As noted in Arbelaez, all capital litigation is particularly unique, complex and difficult. The basic requirement of due process in an adversarial system is that an accused be zealously represented at "every level"; in a death penalty case such representation is the "very foundation of justice". Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). The special degree of reliability in capital cases, which can only be provided by competent, effective and conflict-free representation in

postconviction proceedings, is necessary to ensure that capital punishment is not imposed in an arbitrary and capricious manner and that no one who is innocent or who has been unconstitutionally convicted or sentenced to death is executed.

Arbelaez v. Butterworth, 738 So. 2d 331 at n. 12.

Furthermore, this Court stated in Peede v. State, 748 So. 2d 253 (Fla. 1999), that ineffective representation at any level of the capital punishment process will not be tolerated. The Court felt "constrained to comment on the representation afforded Peede in these proceedings [appeal from summary denial of motion for postconviction relief]", which included criticism of the length, lack of thoroughness, and conclusory nature of the initial brief, and reminded counsel of "the ethical obligation to provide coherent and competent representation, **especially in death penalty cases**, and we urge the trial court, upon remand, to **be certain that Peede receives effective representation**". Id. at 256, n. 5 (emphasis added).

In Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988), this Court recognized that "under section 27.702, each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings." In addition, this Court has found that an attorney who lacks the necessary resources and/or capital trial experience

will be deemed not competent to continue representation of death sentenced client. See Spaziano v. State, 660 So. 2d 1363, 1369-1370 (Fla. 1995). Thus, this Court has explicitly acknowledged the need for effective representation in capital postconviction proceedings. Id.

In fact, this Court adopted minimum standards for certain attorneys litigating capital cases. In Re: Amendment to Florida Rules of Criminal Procedure -- Rule 3.112 -- Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610 (Fla. 1999). The opinion adopting new rules acknowledged the complexities, convoluted doctrines of procedural default, and uniqueness of capital law.¹⁵ This Court stated that under our system of justice, "the quality of lawyering is critical" in capital cases and acknowledged the Court's "inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues inherent in death penalty cases". Id. at 613-614. Indeed, federal and state due process requires that Mr. Ferrell be effectively represented by conflict-free counsel throughout his postconviction proceedings. In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), the United States Supreme Court most recently

¹⁵Mr. Bateh's comment that an unfamiliar attorney could get up to speed quickly in Mr. Ferrell's case because the case was not complicated is absurd in light of this Court's acknowledgment that all capital litigation is complex.

addressed the general due process guarantees afforded a capital postconviction defendant in the context of Ohio's clemency scheme. 523 U.S. 272 (1998). A majority of the Court found that the Ohio clemency scheme did not violate due process, however, the court divided on the issue of the extent of due process rights which attach in capital postconviction proceedings. Id. In delivering the plurality opinion for the Court, Justice O'Connor, along with three (3) other justices held that: "[a] prisoner under a sentence of death remains a living person and consequently has an interest in his life." Id. at 288 (J. O'Connor concurring in part and concurring in judgment).

In finding that due process may attach to postconviction proceedings, Justice O'Connor referenced her concurring opinion in Ford v. Wainwright, 477 U.S. 399 (1986). At issue in Ford was Florida's statute requiring that a capital postconviction defendant be competent to be executed. Justice O'Connor, relying on precedent, found that "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources -- the Due Process Clause and the laws of the States." 477 U.S. 399, 428,(J. O'Connor concurring in part, dissenting in part)(quoting Hewitt v. Helms, 459 U.S. 460, 466 (1983)). Justice O'Connor made clear: "[R]egardless of the procedures the State deems adequate for determining the preconditions to adverse official action, federal law defines the kind of process

a State must afford prior to depriving an individual of a protected liberty or property interest." Ford, 377 U.S. at 428-429. In analyzing Mr. Ford's liberty interest at the time of his execution, Justice O'Connor noted that the Florida Statute governing postconviction procedures provided for mandatory action by the State. Id. at 428 ("The relevant provision of the Florida Statute, however, provides that the Governor "*shall*" have the prisoner committed . . .")(emphasis in original).

Similarly, the Florida statute governing appointment of capital collateral counsel is mandatory. Fla, Stat. § 27.701 ("It is the intent of the Legislature . . . to provide for the for the collateral representation of any person convicted and sentenced to death in this state . . ."). The State of Florida has created a right by which Mr. Ferrell is appointed capital collateral counsel. Therefore, as in Ford, due process is required. Because Mr. Tassone and Mr. Ferrell's interests conflict and because Ms. McDermott is in the best position to represent Mr. Ferrell, Mr. Ferrell's right to due process has been violated.

B. Due Process and Effective Representation.

Ms. McDermott was Mr. Ferrell's designated counsel at the time of the defunding of CCC-NR. This defunding was touted as a pilot project, the purpose of which to find the most cost efficient method of providing effective representation. It was not suppose to be a method of depriving capital defendants

of knowledgeable and qualified counsel in whom they had confidence. Certainly if the purpose was to close the office with a track record of winning post-conviction relief and to provide capital defendants with less qualified counsel, the provisions would be unconstitutional as a violation of due process. Having extended a statutory right, the State of Florida cannot denigrate that right without regard to due process.¹⁶

In this instance, the prosecuting attorney of behalf of the State of Florida, Mr. Bateh, seized upon the new statutory provisions as a vehicle for removing counsel who would zealously challenge his conduct at Mr. Ferrell's trial as prosecutorial misconduct which may be subject to sanctions by the Florida Bar. See Florida Bar v. Cox. But, Mr. Bateh not content to just seek Ms. McDermott's removal from the case went further. He actively recruited Mr. Ferrell's replacement counsel, Mr. Tassone. In Mr. Tassone, Mr. Bateh found counsel who faced his own bar problems over the recent Eleventh Circuit opinion questioning his

¹⁶Certainly, the State of Florida, a party opponent to Mr. Ferrell, cannot remove Ms. McDermott from a capital defendant's case whom she has been representing because she has won post-conviction relief for other capital defendants. Those capital defendants who have already been provided Ms. McDermott as their counsel can only have her removed by state action that comports with due process.

competence in capital cases.¹⁷ Hardwick v. Crosby. In Mr. Tassone, Mr. Bateh also found a lawyer who was to be Mr. Bateh's principle witness at the federal evidentiary hearing order by the Eleventh Circuit in Mr. Hardwick's case. Together, Mr. Bateh and Mr. Tassone would be working to save Mr. Hardwick's death sentence and Mr. Tassone's tattered reputation. In this endeavor, Mr. Bateh and Mr. Tassone are clearly allies trying to assist each other.

The orchestrated appointment of Mr. Tassone deprived Mr. Ferrell of his statutory and constitutional right to effective assistance of counsel. See Fla. Stat. 27.7001 (2002); U.S. Const., Amends. 5 & 14. The Florida legislature intended that the elimination of CCC-NR would be more cost effective and expedite capital postconviction cases. Removing the attorney who is most familiar with Mr. Ferrell's case and has already spent hundreds of hours working on his case serves neither of these purposes. The removal of Ms. McDermott and appointment of an attorney unfamiliar with Mr. Ferrell's case violated not just Mr. Ferrell's right to effective assistance of counsel, but his due process right to the continuation of the representation. Ms. McDermott has consulted with Mr. Ferrell on numerous

¹⁷The bar grievance filed by John Hardwick has been dismissed on statute of limitations grounds.

occasions and is quite familiar with his case.¹⁸ Mr. Ferrell requested that Ms. McDermott remain on his case. Ms. McDermott has sought to remain on his case. That attorney-client relationship cannot consistent with due process be terminated by the party-opponent, the State of Florida.¹⁹

This Court has stated that the requirement of due process in an adversarial system is that an accused be zealously represented at “every level” and that in a death penalty case, such representation is the “very foundation of justice.” Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Yet here, the party-opponent has used the new statute to remove Mr. Ferrell’s longstanding counsel, and replace her with someone with whom he has his own relationship. Indeed, Mr. Bateh’s conduct has created an actual conflict between Mr. Ferrell and Mr. Tassone and he has interfered with Mr. Ferrell’s right to have the effective assistance of counsel in

¹⁸Surely, if the Florida legislature’s actions caused Mr. Ferrell to be deprived of effective assistance of counsel and due process, this Court should not tolerate such an action and should ensure that Mr. Ferrell receive the process to which he is due. In this case, such process includes appointing Ms. McDermott to represent Mr. Ferrell.

¹⁹This is not a situation where the duly appointed CCC-NR within the attorney-client relationship determined that the designated counsel needed to be replaced . This a situation where the party-opponent is choosing who will and will not be representing Mr. Ferrell.

his postconviction litigation.²⁰

Mr. Bateh cannot choose his adversary, particular when his adversary has prosecutorial misconduct claims against Mr. Bateh to pursue. Considering the allegations of the Brady and Giglio violations and prosecutorial misconduct that occurred at trial which Ms. McDermott intended to pursue, it is clear that Mr. Bateh wants to chose the attorney who will represent Mr. Ferrell.²¹ To allow Mr. Bateh to chose his adversary taints the judicial system which is designed to work only when a criminal defendant is represented by a zealous advocate who is not burdened with a conflict and has no *quid pro quo* relationship with the prosecutor. Mr. Tassone and Mr. Bateh have a relationship that precludes Mr. Tassone from representing Mr. Ferrell and advancing his claim of prosecutorial misconduct against Mr. Bateh.

²⁰This is not the first instance that the State has sought to deprive Mr. Ferrell of collateral counsel who will vigorously pursue his prosecutorial misconduct claim. Mr. Ferrell's prior designated counsel was Bret Strand. The State filed a meritless bar grievance against Mr. Strand in order to try to force his removal from the case. This too is evidence of Mr. Bateh's desperation to deprive Mr. Ferrell of effective representation on his prosecutorial misconduct claim.

²¹Ms. McDermott has already represented three (3) capital postconviction defendants who have received new trials, two (2) of which have been exonerated and one (1) who is awaiting his new trial. In those cases, Ms. McDermott served as the clients' designated counsel and won new trials based on Brady violations. Since there is no legitimate reason to remove Ms. McDermott from Mr. Ferrell's case, it seems that such a result is purely based on Mr. Bateh's desire to protect himself against Mr. Ferrell's claims of prosecutorial misconduct.

Mr. Tassone was the defense attorney who represented John Hardwick. Hardwick v. Crosby, 320 F.3d 1127 (2003)(finding Tassone’s performance deficient and remanding for an evidentiary hearing on Mr. Hardwick’s ineffective assistance claim). Mr. Bateh has entered an appearance in federal district court to represent the State in proceedings ordered by the Eleventh Circuit. In those proceedings, Mr. Bateh will be representing the State and defending Mr. Tassone against Mr. Hardwick’s claims of ineffectiveness. Moreover, when ordering the evidentiary hearing, the Eleventh Circuit specifically found Mr. Tassone’s legal skills wanting. 320 F. 3d at 1181; see also at 1156 (“Tassone’s testimony further reveals that his misunderstanding of mitigating factors critical to the penalty phase.”); Hardwick at 1168, n. 154 (“Tassone’s awareness of Hardwick’s drunk and drugged state and his failure to present this mitigating evidence during the sentencing phase demonstrates his misunderstanding of mitigation law.”); Id. at 1173 (“Regarding nonstatutory mitigating factors, Tassone failed to recognize Hardwick’s dysfunctional family life and the mental and physical abuse that he endured during his childhood and teen years.”). The Court also found Mr. Tassone did not understand guilt phase concepts. Id. at 1149, n. 109. Rather, Mr. Tassone believed Mr. Hardwick was guilty and advised him to plead guilty. Id. at 1161.

The Eleventh Circuit also found: “Tassone appears to have given up on

defending Hardwick and seemingly expended no effort, either in presentation of mitigating evidence or in understanding mitigation law, to prevent Hardwick's receiving the death penalty." 320 F.3d at 1189. Finally, the Court commented that the record directly contradicted Mr. Tassone's testimony about his representation of Mr. Hardwick. Id. at 1131, n1; see also 1175-6 ("The reasons given by Tassone and the state for not calling family members . . . are not substantiated by the record.").

Following the Eleventh Circuit opinion, Mr. Hardwick filed a bar grievance against Mr. Tassone. In his June 18, 2003, response, Mr. Tassone contested the allegation of incompetent representation. Mr. Tassone noted that an evidentiary hearing will soon be held at which he hoped the errors in the Eleventh Circuit analysis would be revealed. He stated that he has conferred with Mr. Bateh, the original prosecutor in Mr. Hardwick's case regarding the status of the proceedings. Appendix Tab 9. In fact, Mr. Bateh has filed his notice of appearance in federal district court in Mr. Hardwick's pending case and indicated that he will participate in the evidentiary hearing when it occurs on the issue of Mr. Tassone's ineffectiveness. In essence, Mr. Bateh is representing Mr. Tassone. Clearly, Mr. Tassone wants to use the evidentiary hearing in Mr. Hardwick's case to restore his tattered reputation and is relying upon Mr. Bateh to assist him in that regard.

Given his relationship with Mr. Bateh, the circumstances establish that Mr. Tassone possesses a conflict of interest that precludes him from representing Mr. Ferrell. Mr. Tassone is seeking Mr. Bateh's assistance to restore his reputation. He is hardly the person who should be challenging Mr. Bateh's prosecutorial conduct during Mr. Ferrell's capital proceeding.

In fact, Mr. Bateh's efforts to recruit Mr. Tassone to be forced upon Mr. Ferrell as registry counsel is circumstantial evidence of Mr. Bateh's prosecutorial misconduct.²² Mr. Bateh is attempting to deprive Mr. Ferrell of an effective advocate who is not burdened with conflicting personal loyalty to Mr. Bateh. Mr. Tassone was appointed to represent Mr. Ferrell after being recruited by Mr. Bateh.²³ Due to the relationship between Mr. Bateh and Mr. Tassone, such representation at this time creates a conflict of interest.

Additionally, the events that transpired in appointing Mr. Tassone demonstrate a violation of Mr. Ferrell's right to due process of law. The backdoor

²²Mr. Bateh is certainly not unaware of this Court's recent decision in Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001), wherein a prosecutor was suspended from the practice of law because of prosecutorial misconduct.

²³Mr. Bateh's involvement in Hardwick will benefit Mr. Tassone and Mr. Tassone's involvement in Mr. Ferrell's case will benefit Mr. Bateh, particularly if Mr. Tassone "gives up on defending" Mr. Ferrell. Again, Mr. Ferrell's case involves several instance of prosecutorial misconduct, including Brady and Giglio violations.

negotiations clearly deprived Mr. Ferrell and Ms. McDermott of notice and opportunity to be heard. Mr. Ferrell was never consulted or provided with information that Mr. Bateh was arranging counsel for Mr. Ferrell. Due to the circumstances in his case, Mr. Ferrell does not want a local Jacksonville attorney representing him and he did not want Mr. Bateh to arrange for his representation, particularly one who represented or whose partner represented one of the snitch witnesses in the case.

The events surrounding the transfer of Mr. Ferrell's files and records also creates an actual conflict between Mr. Ferrell and Mr. Tassone. Mr. Tassone employed a former detective from the Jacksonville Sheriff's Office to receive and transport Mr. Ferrell's confidential files; an individual who was previously involved in the investigation and prosecution of Mr. Ferrell. The integrity of the records that had been collected and maintained in order to establish misconduct by the State and the Sheriff's Department has been breached. Such an egregious failure to protect and preserve the confidence of a client cannot be ignored. A conflict-free, effective attorney must be appointed to represent Mr. Ferrell.

Clearly, Mr. Ferrell has been deprived of due process by the actions of the prosecuting attorney, by the removal of Ms. McDermott as his counsel contrary to his wishes, and by the appointment of Mr. Tassone as his counsel.

WHEREFORE, for the foregoing reasons, Mr. Ferrell respectfully requests that this Court vacate the order appointing Mr. Tassone and appoint Ms. McDermott to represent him.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Extraordinary Relief has been furnished by United States Mail, first class postage prepaid to all counsel of record on August 15, 2003.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Petition has been reproduced in a 14 point Times New Roman type, a font that is not proportionally spaced.

LINDA McDERMOTT
Florida Bar No. 0102857
McClain & McDermott, PA.
497 Stonehouse Rd.
Tallahassee, FL 32301
(850) 322-2172

On behalf of Mr. Ferrell

copies furnished to:

The Honorable Charles W. Arnold
Circuit Court Judge
Duval County Courthouse, Room 201

330 East Bay Street
Jacksonville, Florida 32202

George Bateh
Assistant State Attorney
Office of the State Attorney
600 Duval County Courthouse
330 East Bay Street
Jacksonville, Florida 32202

Stephen Siegel
Assistant State Attorney
Office of the State Attorney
10 West Adams Street, Suite 200
Jacksonville, FL 32202

Curtis French
Assistant Attorney General
Office of the Attorney General
The Capitol, PL01
Tallahassee, Florida 32399

Frank Tassone
1833 Atlantic Blvd.
Jacksonville, FL 32207