IN THE FLORIDA SUPREME COURT

RONNIE FERRELL,

Petitioner,

v. **CASE NO. SC03-1423**
Lower Court Case No. 91-8142CFA

STATE OF FLORIDA,

Respondent.

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

REPLY TO STATE'S RESPONSE TO PETITION

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On behalf of Mr. Ferrell

ARGUMENT IN REPLY

What Respondent failed to address in its response was that Mr. Ferrell has been denied due process by the State of Florida in disrupting his capital postconviction proceedings by dismissing his longstanding counsel and appointing counsel who labors under a conflict of interest. In fact, Respondent never once acknowledges that Mr. Ferrell asserts that a due process violation has occurred. Likewise, Respondent never once acknowledges Mr. Ferrell's standing to object to the violation of due process that has occurred; what Mr. Ferrell desires to have happen in his case or that Mr. Ferrell authorizes this appeal. Rather, in avoiding the true issue of this appeal, Respondent personally attacks undersigned counsel and raises irrelevant, inaccurate and inappropriate information which were not even matters considered by the lower court in denying Ms. McDermott's motion for appointment and appointing Mr. Tassone to represent Mr. Ferrell in order to attempt to convince this Court that Mr. Ferrell's petition should be denied.

A. AUTHORITY TO REPRESENT MR. FERRELL IN THIS PETITION

The State argues that Ms. McDermott does not have the authority to file a petition on Mr. Ferrell's behalf (Response at 2). First, Mr. Ferrell specifically authorizes this interlocutory appeal and in fact requested that Ms. McDermott

pursue any available appellate remedies on his behalf.[1]

In addition, Ms. McDermott filed a motion for her appointment as Mr. Ferrell's registry counsel, again upon Mr. Ferrell's request. As to that motion, Ms. McDermott and Mr. Ferrell certainly were authorized to file such a motion. And, as such, they both had a right to obtain appellate review of the circuit court's order. Certainly as to Ms. McDermott that order was a final order.

Further, in Peede v. State, 748 So. 2d 253 (Fla. 1999), this Court held that ineffective representation at any level of the capital punishment process will not be tolerated. During his appeal to this Court from the denial of his Rule 3.850 motion, Mr. Peede filed a pro se reply brief written by a "ghost writer" and not Mr. Peede or his counsel of record, this Court accepted Mr. Peede's reply brief and found that "it was more helpful and comprehensive than the initial brief filed." Id. at 256, n.5. This Court also 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

[1]Assuming Mr. Ferrell had the skills and resources to bring this appeal pro se, undoubtedly the State would have moved to dismiss Mr. Ferrell's petition based on the fact that he is represented by counsel – Mr. Tassone. Implicitly, the State's position indicates that no matter how conflicted or ineffective Mr. Tassone may be, Mr. Ferrell has no option but to accept his services or retain private or pro bono counsel. Effectively, Ms. McDermott has agreed to represent Mr. Ferrell pro bono as to the issue regarding the appointment of counsel.

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). Obviously, conflicted counsel is not competent counsel. Both Mr. Ferrell and Ms. McDermott believe that Mr. Tassone labors under the burden of a conflict and thus cannot represent Mr. Ferrell.

Also, as Ms. McDermott pointed out in her Initial Petition, Ms. McDermott represented Mr. Ferrell for several years. She represented Mr. Ferrell at the time that the Office of the Capital Collateral Counsel for the Northern Region was closed and is familiar with the circumstances surrounding Mr. Tassone's appointment of Mr. Ferrell. She is in the best position to raise the due process and conflict/competence issues on Mr. Ferrell's behalf.

Moreover, Ms. McDermott is required and authorized to raise this issue under Fla. Stat. § 27.711(12). The statute specifically states:

> The court shall monitor the performance of counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Comptroller, Department of Legal Affairs, the executive director, **or any interested person may advise the court of any circumstance that could affect the quality of representation**, including, but not limited to, false or fraudulent

> billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Fla. Stat. § 27.711 (12)(emphasis added). Undersigned's knowledge of the circumstances which resulted in Mr. Tassone's appointment and the existing conflict compel her to raise this issue with Mr. Ferrell's authority to this Court. Also, contrary to the State's argument, Ms. McDermott raised the issues below to the circuit court in her motion for rehearing, (App. 6 to Initial Petition), thus, this Court is certainly authorized to review the findings of the court below.

Finally, due to this Court's constitutional responsibility "to ensure the death penalty is administered in a fair, consistent, and reliable manner . . .", the issue on appeal has been appropriately brought to this Court's attention. Arbelaez v. Butterworth, 738 So. 2d 326 (Fla. 1999).

B. BASIS FOR THE PETITION

The State also complains that Ms. McDermott has relied on "non-record facts" in asserting the issues contained in the initial petition (Response at 3).[2]

Apparently, the State misunderstands the purpose of this appeal. This Court

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[2]The State has also filed a motion to strike over approximately seventy (70) days after the Initial Petition was filed. While the State's motion should be dismissed as untimely, undersigned will respond to the motion by separate pleading.

has been requested to review the lower court's findings in dismissing Ms. McDermott as Mr. Ferrell's postconviction counsel and appointing Mr. Tassone and to determine whether or not such action complied with due process and the statutory requirement that Mr. Ferrell receive the effective assistance of counsel. Thus, at issue is what facts, representations and arguments were made to the lower court upon which it based its decision.

Ms. McDermott informed the court at the hearing regarding her motion for appointment that she had spent considerable time and energy on Mr. Ferrell's case.[3] Further, Ms. McDermott timely informed the circuit court of her concerns regarding Mr. Tassone's appointment to represent Mr. Ferrell in her motion for

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[3]Undersigned finds it very troubling that the State has suggested that she lied to the lower court and now this court about her specific efforts and time spent on Mr. Ferrell's case. Response at 3, fn. 2. As opposing counsel, the State is well aware that Ms. McDermott's involvement in Mr. Ferrell's case dates back to before August, 1999, when a public records hearing was held at which time Ms. McDermott represented Mr. Ferrell. The State was also present for this hearing. Since, that time, Ms. McDermott has regularly appeared on Mr. Ferrell's behalf at hearings, along with other CCC-NR attorneys, and filed numerous motions in her representation of Mr. Ferrell. The State's suggestion that undersigned cannot support her involvement and effort in Mr. Ferrell's case is ridiculous and disingenuous as the State was present, either in person or telephonically for many of the hearings and was served with all copies of motions and pleadings that were filed in Mr. Ferrell's case.

Furthermore, the State was well aware of the issues Mr. Ferrell was pursuing and that Mr. Ferrell's counsel was confident that it could prove numerous instances of prosecutorial misconduct. Some of those instances are clear from the face of the record.

rehearing which was filed on or about July 9, 2003, and again reiterated her efforts on Mr. Ferrell's behalf. See App. 6 to Initial Brief. Within her motion for rehearing undersigned factually detailed the basis for Mr. Ferrell's claims. The State did not dispute the facts or request an evidentiary hearing. Those facts, which form the basis of Mr. Ferrell's claims must be taken as true and, despite the State's contention, are contained in the record below, which is the record upon which the circuit court relied when it denied Mr. Ferrell's motion for rehearing and appointed Mr. Tassone.

Many of the facts upon which Mr. Ferrell relies may not have been contained in the transcript of the hearing on undersigned's motion for appointment of counsel, but that was because undersigned and Mr. Ferrell were unaware that negotiations about Mr. Ferrell's case had been undertaken by the State, Mr. Tassone and the circuit court or its staff until after the circuit court denied Ms. McDermott's motion for appointment. However, those allegations certainly are contained in the record and were before the circuit court when it made its decision to appoint Mr. Tassone and to deny Mr. Ferrrell's motion to appoint Ms. McDermott as registry counsel. As soon as Ms. McDermott learned of the the circumstances under which Mr. Tassone was appointed to represent Mr. Ferrell and her knowledge of Mr. Tassone's relationship with Assistant State Attorney

George Bateh, she informed Mr. Ferrell and the circuit court, upon Mr. Ferrell's request to do so. Had the State wanted to dispute those allegations, the time to do it was while the matter was pending in the circuit court.[4]

Indeed, it is the State and not undersigned who has injected non-record allegations and facts into the appellate record when they were not before the circuit court and were not considered by the circuit court in dismissing Ms. McDermott as Mr. Ferrell's postconviction attorney. For instance, the State relies on undersigned and Mr. Tassone's Florida Bar Attorney profiles. While undersigned is uncertain of the relevance of the bar profiles, those profiles, were not before the circuit court when it made the decision to appoint Mr. Tassone as registry counsel for Mr. Ferrell. Likewise, to undersigned's knowledge her pregnancy[5], the fact that she has

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[4]Undersigned is certainly not opposed to this Court's remanding for an evidentiary hearing to fully develop what occurred prior to the lower court's appointment of Frank Tassone as Mr. Ferrell's registry counsel.

[5]If, as the State suggests, undersigned's pregnancy was a factor in the circuit court's decision to appoint Mr. Tassone, then undersigned believes that would constitute a violation of state and federal law raising a whole set of other issues for Mr. Ferrell as well as personally for Ms. McDermott which would, at a minimum, require reversal of the lower court's order.

As to the State's characterization that Ms. McDermott has requested "continuances" in other cases due to her pregnancy, it is false. This argument was not presented below and Ms. McDermott has never been given fair notice and reasonable opportunity to be heard regarding this false accusation. Even though this was not a matter that was before the circuit court when it appointed Mr. Tassone as Mr. Ferrrell's registry counsel and is thus not properly before this

Court now, Ms. McDermott feels that it is incumbent up her to put on the record the actual circumstances in Mr. Geralds' case.

Ms. McDermott has represented Mr. Geralds since May, 1999. An evidentiary hearing was scheduled for May, 2003, for three hours. Before the hearing, undersigned contacted the court and requested additional time for the hearing because of the number of witnesses and items of evidence. The court could not extend the hearing around that date, so the court provided the parties with dates for a two-day evidentiary hearing. One of the dates offered was July 29 and 30, 2003, and the parties agreed to this date.

On July, 28, after undersigned traveled to Panama City to complete preparation for the evidentiary hearing, the State requested an emergency hearing, at which time the State requested a continuance. The court noted that the defense was ready to proceed, but granted the State's motion for continuance. Following the continuance, the court provided potential dates for rescheduling the hearing. The dates included September 23 and 24, 2003, and October 29 and 30, 2003. The parties agreed upon the September dates.

On September 23, 2003, Mr. Geralds' evidentiary hearing commenced and undersigned presented witnesses and evidence. During the hearing, the State requested access to the trial attorney file. Undersigned provided them with the original file, and also reminded the court and counsel that the file had been reviewed prior to the State even responding to Mr. Geralds' Rule 3.850 motion by Assistant Attorney General Barbara Yates in early 2002. Ms. Yates, in fact, reviewed the file at Ms. McDermott's former office, created what appeared to be an index of the file and requested copies of particular documents and was provided the requested copies on that same day.

The relevance of the trial attorney file was that based upon an argument that neither of the State's representatives had ever reviewed the file prior to the hearing, the State achieved another continuance. However, Ms. McDermott adamantly opposed a continuance and argued, among other arguments, that: 1) the State had previously had access to the trial attorney file and it made no difference that it was Ms. Yates, rather than any other State representative and 2) the State was now able to view the defense's entire case for relief and was attempting to try to "fix" all of the instances of Brady and Giglio violations in addition to the problems with ineffective assistance of counsel. Such behavior, which can only be characterized as "sandbagging" would never be tolerated if defense counsel dared to engage in it.

commenced a private practice of law with Mr. McClain as her law partner[6] and Ms.

Thus, to suggest that Ms. McDermott sought a continuance in the Geralds case due to her pregnancy, is outrageous. Ms. McDermott pleaded with the Court to force the State to conclude the evidentiary hearing in September and was prepared to conclude the hearing.

Moreover, as is obvious, Mr. Geralds case and Mr. Ferrell's case are in completely different procedural postures. So, to suggest that Ms. McDermott's pregnancy and the fact that she does not want to travel to Panama City for five weeks prior to her due date to participate in an evidentiary hearing and intends to attempt to take off eight weeks following the delivery of her child effect her ability to represent Mr. Ferrell, whose case is in the pre-3.850 stage is ridiculous.

In July, 2003, when Mr. Ferrell's case was removed from Ms. McDermott and assigned to Mr. Tassone, Ms. McDermott was finalizing Mr. Ferrell's Rule 3.850 motion and engaging in pre-filing motions and discovery. Most likely, had Ms. McDermott been appointed to represent Mr. Ferrell, his Rule 3.850 motion would have been filed within the past few weeks, or in the very near future. Thus, Ms. McDermott's pregnancy and her desire not to travel in the five weeks preceding her delivery date would not have effected Mr. Ferrell's case in any way. Thus, Ms. McDermott's pregnancy has no apparent relevancy to her qualifications or competence to represent Mr. Ferrell or the fact that his due process rights have been violated by Mr. Tassone's appointment.

[6]Undersigned is unclear as to why the State has questioned whether her private practice of law, formed with Mr. McClain, is a "real practice", what it means to have a "real practice" by the State's standards or how her practice which did not exist at the time she moved to be appointed to Mr. Ferrell's case has any relevance to the issues at hand. Response at 7. Certainly, these contentions have not precluded her appointment in the four cases in which Ms. McDermott has been issued contracts by the Department of Financial Services, nor in the case in which this Court has recognized her as *pro bono* counsel, nor in those case in which she has been appointed by federal courts to represent capital habeas petitioners. Undersigned disagrees with the State's characterization that she has no "established practice".

McDermott's relocation of her residence and law practice to Ft. Lauderdale[7], which the State relies upon in its response to argue that she is somehow not competent or should not be appointed to represent Mr. Ferrell were not a matters that the lower court considered when determining who to appoint to represent Mr. Ferrell.

The State's argument that Ms. McDermott has intentionally delayed Mr. Ferrell's case is false and not supported by the record. The State never argued to the lower court that Ms. McDermott had delayed Mr. Ferrell's case because she did not. A review of the record demonstrates that Mr. Ferrell's case has been

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[7]The State also cites the fact that Ms. McDermott has resided in Tampa, Tallahassee and now Ft. Lauderdale throughout her membership in the Florida Bar. Again, undersigned is unclear as to how this fact bears upon the issues presented and again disagrees with the characterization that she has no established residence. Surely, all citizens of the United States have the constitutional right to move their residence. It is unclear how Ms. McDermott's exercise of such a fundamental right has anything to do with whether the circuit court erred in appointing Mr. Tassone as Mr. Ferrell's registry counsel given that the Eleventh Circuit has issued an opinion earlier this year finding that Mr. Tassone's knowledge of capital law is wanting.

Nevertheless, undersigned would note, that when she relocated to Tampa in 1998, it was because if she wished to continue her employment with a successor CCR agency, she had to move, due to the fact that when CCR was abolished and three offices created, she was assigned to the Tampa office. Subsequently, the Tallahassee office offered her a job which she accepted and she moved back to Tallahassee. And this year, the legislature closed the Tallahassee office, thereby terminating her employment.

actively litigated based upon legitimate issues throughout the past years.[8] Any delays that occurred cannot be attributed to Ms. McDermott. In fact, the parties stipulated to many of the continuances for filing Mr. Ferrell's amended Rule 3.850 motion as issues arose.

Likewise, at the time the lower court appointed Mr. Tassone rather than Ms. McDermott to represent Mr. Ferrell, the statutory limitation was not at issue and therefore not presented to the circuit court or considered in making its ruling. The registry statute has no relevance to the issues presented.[9]

C. DUE PROCESS & THE EXISTING CONFLICT

The State in its haste to personally attack undersigned counsel completely fails to address Mr. Ferrell's claim that Mr. Tassone's appointment at the ex parte request of George Bateh denied him due process. Neither Ms. McDermott nor Mr. Ferrell were given fair notice and reasonable opportunity to be heard regarding George Bateh's efforts to get the circuit court to appoint Mr. Tassone. Rose v. State, 601 So. 2d 1181, 1182 (Fla. 1992); Huff v. State, 622 So. 2d 982, 983

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[8]Ms. McDermott had no control of the pace of Mr. Ferrell's case at the time when a senior judge presided over Mr. Ferrell's case. The State never complained or requested the senior judge to enter orders more quickly, despite the time that passed between the filing of motions and orders.

[9]Undersigned Motion for Appointment was not "deficient". Response at 7. Everything stated in her motion for appointment was accurate and still is.

(1993). When the appointment was made, Ms. McDermott and Mr. Ferrell objected to the due process violation and further advised the circuit court of Mr. Tassone's conflict of interest. The State in its response before this Court also fails to address Mr. Ferrell's claims that Mr. Tassone has an actual conflict with Mr. Ferrell.

In its response, the State suggests that Ms. McDermott cannot be appointed to represent Mr. Ferrell in his postconviction proceedings as Registry counsel because she has received more than five (5) appointments to represent capital defendants in their postconviction appeals.[10] While it is doubtful that the State has standing to make this argument, the State's reliance upon this point ignores that the first issue is whether Mr. Tassone was properly appointed as registry counsel and whether Mr. Ferrell's right to due process has been violated.

Further, the position set forth by the State as to the meaning and application of §27.711(9), Fla. Stat., is contrary to the standard construction as revealed by customary practice, and would render the provision unconstitutional.[11] If the

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[10]While counsel may have received more than five (5) court-appointments, the Department of Financial Services has only executed four (4) contracts.

[11]As is explained below, the only valid construction of the provision is that it was intended to benefit the capital defendant being provided registry counsel. That being so, only the capital defendant would have standing to object.

position being advanced in the Response was the recognized construction of §27.711(9), and if the State has standing to object, the provision would be unconstitutional in violation of due process. The State has chosen to apply a different standard to how it employees capital specialists to represent the State while precluding such specialists from being appointed to represent an indigent capital litigant. Assistant Attorney Generals are routinely assigned to many more than five capital cases because it is believed that capital specialists do a better job.[12] The State cannot use the five case limit as a sword stripping a capital defendant of knowledgeable and qualified counsel, because such a construction would create an unlevel playing field that provides the State with a distinct advantage. Such an unlevel playing field offends the constitutional guarantee of to fundamental fairness.

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[12]Certainly, the State has recognized the benefit of having capital specialists represent the State in collateral proceedings. Reviewing the case load of various assistants attorney general, it is apparent that the State sees benefit from employing capital specialists to handle capital collateral proceedings on behalf of the State. For example, Kenneth Nunnelley is listed as counsel of record in this Court in 16 active capital cases; Sandra Jaggard is listed as counsel of record in this Court in 14 active capital cases; Charmaine Millsaps is listed as counsel of record in this Court in 11 active capital cases; Curtis French is listed as counsel of record in this Court in 10 active capital cases; Carol Dittmar is listed as counsel of record in this Court in 9 active capital cases; Kim Hopkins is listed as counsel of record in this Court in 8 active capital cases. This tally does not include additional cases pending in federal court or in the circuit court. Undoubtedly, these assistants attorney general represent the State in numerous additional cases, pending either in circuit court or in federal court.

Dillbeck v. State, 643 So.2d 1027, 1030 (Fla. 1994)("No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensbury's rules, while the other fights ungloved."). The State cannot be permitted to chose both its own counsel and counsel for the defense, using criteria for the defense counsel that it rejects for its own counsel.

The five case limitation extends a right to the capital defendant, not to the State. Thus, the State has no standing to assert the five case limitation when it is not asserted by the capital defendant. Clearly, the five case provision was adopted to benefit the capital defendant. It was designed to make sure that the appointed lawyer has the time necessary to undertake a capital case. Since it is a provision extending a legal protection to the capital defendant, it is for the capital defendant to either exercise that right or waive it. This is not a unusual concept. The constitutional right to counsel is a right that the criminal defendant alone can either exercise or waive. Faretta v. California, 422 U.S. 806 (1975).

To give the State, a right to enforce this provision against the wishes of the capital defendant provides the State with the ability chose, or at least veto, its adversary. A capital defendant is not given the opportunity to veto the State's representative in a criminal case. Recently, this Court addressed the limitation imposed upon a criminal defendant's right to disqualify a prosecuting attorney. In

Scott v. State, 717 So.2d 908, 910-11 (Fla. 1998), this Court indicated that a criminal defendant could not disqualify the assigned state attorney merely because he would also be a witness on a Brady claim. "To hold otherwise on this issue would bar many trial prosecutors - - who may be the most qualified and best prepared advocates for the State - - from representing the State in a Brady claim in a subsequent postconviction evidentiary hearing." Just as this Court precluded the defendant in Scott from removing "the most qualified and best prepared advocate for the State," the State must be precluded from depriving a capital defendant of "the most qualified and best prepared advocate" for the defense.

As to the issue of whether Mr. Ferrell has been denied due process by depriving him of his longtime counsel, Mr. Tassone's qualifications or the fact that he has been practicing law for many years, make no difference. Ms. McDermott was Mr. Ferrell's state appointed attorney who had represented him for a considerable amount of time. Ms. McDermott knows Mr. Ferrell's case because she has reviewed voluminous records, transcripts and files. She has consulted with experts, filed pleadings and researched and drafted claims for his amended Rule 3.850 motion and kept Mr. Ferrell apprized of matters concerning his case. Indeed, an attorney-client relationship was formed over the past several years.

The defunding of CCC-NR which was touted as a pilot project, the purpose

of which to find the most cost efficient method of providing effective representation, was not meant to be a method of depriving capital defendants of knowledgeable and qualified counsel in whom they had confidence. Undoubtedly, Mr. Ferrell is in a better legal position with an attorney with whom he trusts and who is qualified generally in the litigation of capital postconviction challenges and very familiar with his case. Yet, without any basis, the State has deprived Mr. Ferrell of his longtime attorney. Mr. Ferrell has been denied due process by the State's actions.

The State argues that Mr. Tassone does not have a conflict with Mr. Ferrell based on the current litigation in Mr. Hardwick's case. However, the events surrounding Mr. Tassone's appointment to Mr. Ferrell's case suggest otherwise. Mr. Tassone was approached by Mr. Bateh to represent Mr. Ferrell, when Mr. Bateh was aware that Mr. Ferrell had requested Ms. McDermott's continued representation. At the same time, Mr. Bateh and Mr. Tassone were consulting about Mr. Hardwick's case. Certainly, Mr. Bateh needs Mr. Hardwick's cooperation to attempt to defeat Mr. Hardwick's claims of ineffective assistance of counsel. Likewise, Mr. Tassone needs Mr. Bateh's assistance in light of the Eleventh Circuit's opinion about Mr. Tassone's efforts for Mr. Hardwick.

At the hearing on Ms. McDermott's motion for appointment was heared, she

was not advised of George Bateh's ex parte efforts to recruit Frank Tassone as counsel for Mr. Ferrell. No fair notice and reasonable opportunity to be heard was afforded. Rose v. State, 601 So. 2d 1181, 1182 (Fla. 1992); Huff v. State, 622 So. 2d 982, 983 (1993). The proceedings violated due process. Following the sham hearing on Ms. McDermott's motion for appointment in which all of those in attendance, except for Ms. McDermott, were aware that Mr. Tassone had already been "signed up" to represent Mr. Ferrell, Mr. Tassone was appointed. Certainly, the State cannot deny that an agreement was made without the input of Mr. Ferrell or his current attorney. Even without knowing the extent of Mr. Tassone and Mr. Bateh's relationship, a conflict emerged between Mr. Tassone and Mr. Bateh based upon the appointment of counsel.

Furthermore, the State refuses to address the fact that Mr. Tassone has a conflict based upon his previous representation of a witness against Mr. Ferrell.[13]

The first issue before this Court is whether due process was violated when the circuit court appointed Mr. Tassone as registry counsel for Mr. Ferrell as a result of ex parte recruitment efforts by the prosecuting attorney, George Bateh. It

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[13]As undersigned informed the lower court and this Court, in reviewing the hundreds of files of prior convictions of the four key witnesses against Mr. Ferrell, undersigned recalls that either Mr. Tassone or his law partner represented at least one of the witnesses in the past. As such, Mr. Tassone cannot now represent Mr. Ferrell.

is clear from the response that the State simply cannot defend what occurred here.

WHEREFORE, for the foregoing reasons, Mr. Ferrell respectfully requests that this Court vacate the order appointing Mr. Tassone and remand for reconsideration of the motion to appoint Ms. McDermott as registry counsel before a judge who has not engaged in ex parte communication with the State.

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 Curtis French, Senior Assistant Attorney General, Office of the Attorney General, The Capitol, PL01, Tallahassee, Florida 32399, on October 29, 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.

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On behalf of Mr. Ferrell