IN THE SUPREME COURT OF FLORIDA

RONNIE FERRELL,

Petitioner,

v. CASE NO. SC03-1423

STATE OF FLORIDA,

Respondent.
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STATE'S RESPONSE TO "INITIAL PETITION"

COMES NOW THE STATE OF FLORIDA, by and through undersigned counsel, and hereby files its response to the pleading alternatively styled "APPEAL FROM THE CIRCUIT COURT IN AND FOR DUVAL COUNTY STATE OF FLORIDA" and "INITIAL PETITION," filed by attorney Linda McDermott, in which she asks this Court to "vacate the order appointing [attorney Frank] Tassone and appoint Ms. McDermott to represent [Ronnie Ferrell]." Petition at 27.

PRELIMINARY STATEMENT

Ronnie Ferrell's state postconviction proceedings are pending in circuit court in Duval County. Following the termination of Capital Collateral Counsel, Northern Region in June of this year, Linda McDermott, who had been representing Ferrell as an assistant CCC-North, asked the circuit court to appoint her to represent Ferrell. The circuit court denied her

motion and instead appointed local registry counsel Frank Tasssone to represent Ferrell. On or about August 15, 2003, Ms. McDermott filed a "Petition" asking this Court to vacate the circuit court's order appointing Tassone and to appoint Ms. McDermott to represent Ronnie Ferrell. By order dated September 2, 2003, this Court ordered the State to file a response to the Petition. On September 9, 2003, the State filed a "Motion to Dismiss Unauthorized Petition and Deny all Requested Relief." By order dated October 16, 2003, this Court deferred ruling on the motion to dismiss and ordered the State to file a response.

ARGUMENT

1. Initially, the State would renew its argument that Ms. McDermott's pleading is unauthorized. Although Rule 9.142(b) of the Rules of Appellate Procedure authorizes the filing of an original petition to review nonfinal orders in capital postconviction proceedings, it does not authorize an attorney whose motion for appointment as counsel has been denied to appeal that denial. Under the rule: "Either **party** to the death penalty postconviction proceedings may seek review under this rule." Fla.R.App.P. 9.142(b)(3)(B) (emphasis supplied). Ms. McDermott is not a party and does not represent a party. Hence,

nothing in the rule authorizes her to file any petition on Ferrell's behalf or on her own behalf.[1]

2. Furthermore, while Rule 9.142(b)(4)(E) authorizes a petitioner to set forth "the facts on which the petitioner relies," the rule *requires* citation to the "appropriate pages of the supporting appendix." The supporting appendix *shall* contain "the portions *of the record* necessary for a determination of the issues presented." Rule 9.142(b)(5). Nothing in the rule contemplates or allows the petitioner to rely on non-record facts, yet Ms. McDermott's petition is replete with "facts" unaccompanied by any citation to any portion of her supporting appendix or, for that matter, to any portion of any record of the proceedings below. In fact, it is obvious that many of her alleged "facts" (Petition at pp 2-13) reference matters outside the record in this case or any other.[2] Because Ms. McDermott's

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[1] Ms. McDermott cites Section 27.711(12), Fla. Stat. as authority for bringing this Petition. See Reply to State's Motion to Dismiss at 5. This Statute, however, clearly refers to the *circuit* court, not this Court, and provides no basis for her to file a Rule 9.142(b) initial petition in this Court as an "interested person."

[2] For example, Ms. McDermott asserts as "fact" that "Mr. Ferrell's litigation team had been actively investigating" this case and had "substantiated" various examples of prosecutorial misconduct at trial. Petition at 7. Ferrell's "litigation team" may or may not have been actively investigating this case, but Ms. McDermott can find no support for this assertion in the record below; nor, more particularly, can Ms. McDermott establish from the record that she herself has done much of

"Initial Petition" and the arguments therein are thoroughly infected by non-record factual allegations, the State will, by separate motion, move to strike the petition. Whether or not this Court grants that motion, however, such unsupported allegations do not and cannot support the grant of any relief by this Court.

3. Essentially, Ms. McDermott's claim is that the circuit court, the prosecutor, and Frank Tassone all conspired to deprive Mr. Ferrell of effective representation by removing his "longstanding" counsel who has "spent hundreds of hours working on his case," and replacing him with an attorney whose "legal skills [are] wanting." Petition at 20-21, 23. As noted above, there is no record support for the existence of any such "conspiracy." Nor does the record support the claim that Ms.

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anything in this case. Moreover, regardless of what prosecutorial misconduct Ms. McDermott thinks Ferrell's "litigation team" may have "substantiated," nothing has been proved as yet (and the State disputes that any prosecutorial misconduct occurred).

For another example, Ms. McDermott reports as "fact" her interpretation of the contents of a telephone conversation between her and Frank Tassone some nine days after the circuit court denied her request for appointment and appointed Tassone. Petition at 11. This conversation (assuming it took place) obviously occurred outside the record.

For yet another example, Ms. McDermott discusses the transport of files from CCC-NR to various newly appointed registry counsel in various cases. Petition at pp 11-13. None of this discussion is supported by citation to any record, and the State is unaware of any record testimony or evidence that would support these "facts."

McDermott has worked "hundreds of hours" on Ferrell's case, or that her "legal skills" are one whit superior to Mr. Tassone's.

4. It is a matter of public record that Tassone has been a member of the bar of Florida since 1973 (see Respondent's Appendix 1, Florida Bar Attorney Profile for Frank Tassone, Jr.), and has been representing capital defendants at least since 1982. See, e.g., Davis v. Singletary, 119 F.3d 1471, 1473-74 (11th Cir. 1997) (noting that Allen Lee Davis had been represented at his 1982 capital trial by "[e]xperienced criminal defense attorney Frank Tassone"). Ms. McDermott, on the other hand, has been a member of the Florida Bar only since 1997 (Respondent's Appendix 2, Florida Bar Attorney Profile for Linda McDermott; the record does not disclose that she has any criminal or capital trial experience.

5. Moreover, while Ms. McDermott contends that she has worked "hundreds of hours" on this case and that appointment of new counsel would cause "extensive delays," Petition at 8, it must be noted that this Court issued its mandate on direct appeal in 1997 (the same year Ms. McDermott was admitted to the Florida Bar) and, although Ferrell has been represented by CCR or CCC-NR since 1998, he has yet to file a meaningful motion for postconviction relief, having thus far filed only a "shell" 3.850 motion whose only substantive claim was that, because CCR

had injudiciously spent the millions of dollars provided to it by the Legislature, it was too broke to provide adequate legal assistance to Mr. Ferrell. See Respondent's Appendix 3 (Ferrell's shell motion to vacate). Just what Ms. McDermott has accomplished in the "hundreds of hours" she has worked on this case is not immediately apparent. Nor is it apparent from the record that the appointment of new counsel could cause any significant new delays over and above what CCR, CCC-NR, and Ms. McDermott have already achieved.

In fact, it appears to the contrary that appointing Ms. McDermott would generate at least some additional delay. She has failed to acknowledge to this Court that she has sought continuances in other cases on the ground that she has moved to the Fort Lauderdale area, is pregnant, and will be unable to travel for several months. See Respondent's Appendix 4.

Ultimately, Ms. McDermott simply has not established and cannot establish her claim that appointment of counsel other than herself will cause additional delay.

6. It also bears noting that, in contrast to Frank Tassone, who has practiced in the Jacksonville area for more than twenty years, Ms. McDermott has, in the few short years she has been admitted to the bar, practiced variously in Tampa, Tallahassee, and now Fort Lauderdale. And, although she now claims to be in

private practice with former CCR attorney Martin McClain, it is not at all apparent that the two actually have a law "office" as such, or any kind of real "practice," either. The registry statute reposes the duty to appoint registry counsel with the trial court. Section 27.711(2), Fla. Stat. 2002. The trial court in this case cannot be faulted for choosing to appoint established local counsel rather than an attorney from a distant locale with no established practice or office or residence.

7. Moreover, regardless of Ms. McDermott's overall qualifications, viewed independently, or vis-a-vis Frank Tassone, she is not eligible for appointment as registry counsel in this case. Section 27.710 (3), Fla. Stat. (2002) states:

> An attorney who applies for registration and court appointment as counsel in postconviction capital proceedings must certify that he or she is counsel of record in not more than four such proceedings . . . .

Further, Section 27.711 (9), Fla. Stat. (2002) explicitly warns potential registry counsel that: "An attorney may not represent more than five capital defendants at any one time."

Ms. McDermott's own submission to this Court (Petitioner's Appendix 2) shows that her Motion for Appointment of Counsel is deficient because, although she asserted in the motion that "she meets the qualifications of Fla. Stat. Sections 27.710 and 27.711, and is eligible to represent Mr. Ferrell," she failed to include a certification that she "is counsel of record in not

more than four [capital postconviction] proceedings" as required by Section 27.710 (3). In fact, Ms. McDermott cannot make such a certification because (as she subsequently has acknowledged in another case, see Respondent's Appendix 5, at fn. 6), she has been appointed as registry counsel to represent nine different capital postconviction defendants (not including Mr. Ferrell) - a fact she has disclosed neither to the trial court nor (in this case) to this Court.[3] Thus, Ms. McDermott cannot in any event lawfully represent Mr. Ferrell as registry counsel.

8. Ms. McDermott argues in her reply to the State's motion to dismiss and deny all relief that the State has no standing to make the foregoing argument. Reply to State's Motion to Dismiss at 7. She has it backwards. Because she is not eligible under the statute for appointment as registry counsel, she has no standing to complain about the trial court's refusal to appoint her as such. Furthermore, this Court ordered the State to respond to Ms. McDermott's demand that she be appointed to

[3] Ms. McDermott states (Petition at 10) that she informed the trial court in her motion for rehearing that she has been appointed to represent two other capital postconviction defendants in Duval County. In addition, she attached to the "Petition" copies of the orders of appointments in those two cases (Petitioner's Appendices 3 and 4). Notably, however, she failed to acknowledge to the trial court or in her petition to this Court that she is appointed registry counsel representing seven additional (i.e., nine total) capital postconviction defendants. Respondent's Appendix 5 (fn. 6).

represent Mr. Ferrell and the State has every right - in fact, it has the duty - to inform this Court in its response that such appointment would be unlawful.

9. Finally, to the extent that Ms. McDermott has any right file a petition as an "interested person" under Fla.R.App.P 9.142(b) merely to "advise the court of any circumstances that could affect the quality of [Ferrell's] representation," Reply at 5 (citing Fla. Stat. Section 27.711 (12)), and to seek the removal of the allegedly incompetent Mr. Tassone regardless of whether or not she benefits from that removal, the State would challenge her description of Frank Tassone.

Ms. McDermott's criticism of Tassone rests primarily on the panel decision in Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003), which she interprets as finding Tassone's performance in the Hardwick case deficient and remanding for an evidentiary hearing on the issue of prejudice. Moreover, she argues that, because prosecutor George Bateh will "be working [at such evidentiary hearing] to save . . . Mr. Tassone's tattered reputation," Tassone somehow has a conflict of interest which will prevent him from effectively representing Mr. Ferrell. Petition at 20.

The State disagrees that Tassone's performance has been found constitutionally deficient. The Hardwick panel opinion,

to be sure, contains language critical of Mr. Tassone, but the issue of deficient attorney performance, like the issue of prejudice, remains open and unresolved. See 320 F.3d at 1191 (because state evidentiary hearing was inadequate, case remanded for federal evidentiary hearing on issue of "ineffective assistance of trial counsel at the sentencing phase").

Pretermitting any dispute over just what the panel opinion says, however, and even assuming that the State will ultimately fail to convince the Eleventh Circuit that Tassone was not ineffective in the Hardwick case, there is no merit to Ms. McDermott's argument that Tassone's appointment must be vacated. In effect, Ms. McDermott is arguing: (a) a criminal defense attorney whose effectiveness is challenged on postconviction is precluded from representing any other criminal defendants until the issue of his effectiveness is resolved, and (b) an experienced criminal defense attorney found ineffective in one case tried seventeen years ago is presumptively incapable of representing any other criminal defendant, ever.

It must be noted that accusations of attorney ineffectiveness are, for better or for worse, routinely raised in postconviction proceedings, both capital and noncapital. Ms. McDermott cites no authority (and the State is aware of none) for the proposition that a criminal defense attorney whose

effectiveness is being litigated in one case may not represent any other criminal defendants until the ineffectiveness issue in the one case is resolved - and this is so whether or not any of the other criminal defendants are being prosecuted by the same prosecutor who had prosecuted the defendant who now claims that his trial counsel was ineffective.[4]

Nor is there anything unique about the circumstances of this case. The "conflict" Ms. McDermott perceives is based on her assumption that Tassone will fear that if he accuses prosecutor Bateh of prosecutorial misconduct or otherwise annoys Mr. Bateh in his pursuit of relief for Ferrell, Bateh will decline to defend Tassone in the Hardwick case even if the ultimate result of such inaction should be that Mr. Bateh will have to retry Hardwick's sentencing phase. This is a nonsensical assumption on Ms. McDermott's part; the State will attempt to defend the attacks on Hardwick's and Ferrell's convictions and sentences regardless of any action Tassone might take in the Ferrell case, and there is no reason for Mr. Tassone to think otherwise.

Nor has Ms. McDermott cited any authority (and, likewise, the State is aware of none) for the proposition that an attorney

[4] One wonders what the reaction of the defense bar would be if the State routinely moved to disqualify defense attorneys on the ground that their effectiveness was being challenged in another case.

found ineffective in one case is thereafter presumptively ineffective in all cases, no matter how many years have elapsed since the trial of the case in which he is found ineffective. At this juncture, of course, Tassone has never been found to have rendered ineffective assistance.[5] But even if he is ultimately found to have rendered ineffective assistance in a case he tried more than 17 years ago, Tassone is nevertheless today an experienced and competent defense attorney who has represented numerous capital defendants, many successfully. He is a member in good standing of the Florida Bar, and has been determined to be qualified to be on the statewide registry of attorneys as set out in Section 27.710, Fla. Stat. 2002. The trial judge, who has first-hand knowledge of Tassone and his legal ability from Tassone's years of practice in the Fourth Circuit, appointed him to represent Mr. Ferrell in his postconviction proceedings. There has been no demonstration that the trial court failed to comply with the statutory mandate to "give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of

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[5] In Davis v. Singletary, supra, the Eleventh Circuit expressly rejected a claim that Tassone's performance at the penalty phase of a death-penalty case was constitutionally deficient.

representing a person sentenced to death," Section 27.710(3)(b)(2), Fla. Stat. 2002, and no demonstration of any abuse of discretion or denial of Mr. Ferrell's due process rights.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the "Initial Petition" filed by attorney Linda McDermott seeking to overturn the lower court's decision not to appoint her as registry counsel in Ronnie Ferrell's postconviction proceedings should denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Linda McDermott, McClain and McDermott, P.A., 141 N.E. 30th Street, Wilton Manor, Florida 33334, this 22nd day of October, 2003.

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CURTIS M. FRENCH
Senior Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that this response to Linda McDermott's "Initial Petition" has been reproduced in 12 point Courier New, a font that is not proportionally spaced.

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CURTIS M. FRENCH
Senior Assistant Attorney General