IN THE FLORIDA SUPREME COURT

WILLIAM SWEET,

Petitioner,

v. **CASE NO.**
Lower Court Case No. 91-2899CFA

STATE OF FLORIDA,

Respondent.

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

REPLY BRIEF

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On behalf of Mr. Sweet

ARGUMENT IN REPLY TO STATE'S ANSWER BRIEF

Respondent completely misses the issue in their brief. The issue is that the trial court abused its discretion and arbitrarily violated Mr. Sweet's right to due process. By arbitrarily dismissing Mr. Sweet's existing counsel and appointing one who labors under an apparent conflict of interest, with at best questionable competence, the trial court has completely disrupted Mr. Sweet's capital postconviction proceedings.

Apparently, the sole reason Mr. Doss was removed from Mr. Sweet's case was that the pending Motion to Vacate Judgments of Convictions and Sentences With Special Request for Leave to Amend "may be adequately handled by local counsel without any unreasonable delays." (*See* Order Appointing Counsel, P.B.[1]-Tab 2) . Lacking is a finding that there would have been **any** delay had Mr. Doss remained on the case. The need for "local counsel" has no basis in constitutional or statutory law and is misleading. As is apparent from the bar profile appended to the State's Answer Brief, Mr. Doss resides and practices in Lake City, Florida, less

[1]Petitioner's Brief.

than one hour from the Duval County Courthouse.

Interestingly, after being appointed, Mr. Tassone requested to amend the pending motion to vacate. This request was not even made for more than four months after Mr. Tassone was appointed; whereas, had the trial court appointed Mr. Doss, the State could have responded and the matter ruled upon. In *Gorby v. State*, SC03-1152, presently pending before this Court, a *Ring* claim similar to Mr. Sweet's took 66 days from the time of filing to a denial of Motion for Rehearing. (*See* P.B. at 8). A drastic difference than the four months to file a motion to amend filed by Mr. Tassone.

Within the Order Appointing Counsel, *See* P.B.- Tab 2, there is no finding that Mr. Doss labors under an actual or apparent conflict, as does Mr. Tassone. There is no finding that Mr. Doss' competence to handle capital cases has been questioned by the United States Eleventh Circuit Court of Appeals[2], as Mr. Tassone's has been. There is no finding that Mr. Doss' competence was questioned in Mr. Sweet's case. There is no finding that Mr. Sweet desires Mr. Doss to be removed as counsel. Quite the contrary as demonstrated by the Declaration of William Sweet appended to the Motion for Rehearing filed in the trial court, P.B.- Tab 3, that clearly states his desire that he wants Mr. Doss to continue

[2]*Hardwick v. Crosby*, 320 F.3d 1127 (2003).

to represent him in his postconviction proceedings. Instead, Mr. Sweet unequivocally states that he does not want Mr. Tassone as his counsel. P.B.- Tab 3. Mr. Sweet also clearly states his desire that he believes that it is in his best interest that Mr. Doss represent him and it is not in his best interest that Mr. Tassone represent him. As is evidenced by the foregoing, the statement by Respondent that Mr. Doss has failed to demonstrate any abuse of discretion is clearly erroneous. S.R.[3] at 12. Additionally, the statement that there has been no showing that the trial court failed 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 representing a person sentenced to death." (citations omitted) S.R. at 12, is also clearly erroneous.

Respondent argued that Mr. Doss does not have authority to file a petition on behalf of Mr. Sweet. S.R. at 6-7. This argument fails in two respects. One is that Mr. Sweet specifically authorized Mr. Doss, and continues to do so, to represent him in his postconviction proceedings. P.B.- Tab 3. The Declaration of William Sweet appended to the Motion for Rehearing could not be more clear or

[3]State's Response.

unequivocal on that matter.[4] He authorized Mr. Doss to file the motion to be appointed as registry counsel, authorized the Motion for Rehearing, and now he has authorized Mr. Doss to pursue all available appellate remedies on his behalf.

Mr. Doss is also authorized to raise this issue under § 27.711(2), Fla. Stat. . 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.

§ 27.711(12), Fla. Stat. (emphasis added). Undersigned's knowledge of the circumstances which resulted in Mr. Tassone's appointment, the existing conflict, and the express request of Mr. Sweet authorized the petition. The issues surrounding Mr. Tassone's appointment were raised in the Motion for Rehearing,

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

(P.B. - Tab 3), thus, this Court is certainly within its authority to review the findings of the trial court.

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 appropriately been brought to this Court's attention. *Arbelaez v. Butterworth*, 738 So.2d 326 (Fla. 1999).

The State asserts that Petitioner has not established that any "right" to counsel he has in his postconviction proceedings has been violated. S.R. at 8. The State is completely ignoring the fact that once an attorney-client relationship has been established, absent some kind of conflict, that relationship cannot be arbitrarily abrogated by the State or the trial court. *See* P.B. at 28-30 *citing Davis v. State*, 403 S.E. 2d 800 (Ga. 1991), *Amadeo v. State*, 384 S.E. 181 (Ga. 1989), *Harris v. People*, 19 Cal.3d 786, 140 Cal. Rptr. 318, 567 P.2d 750 (1977), *Hercules v. Harmon*, 864 S.W. 2d 752, 754 (Tex. Crim. App. 1993). Due process rights attached when the State created a system that dictates that death-sentenced inmates be appointed counsel.

The Florida statute governing appointment of capital collateral counsel is mandatory § 27.701 Fla. Stat.("It is the intent of the Legislature . . . to provide 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. Sweet is appointed capital collateral counsel. Therefore, as in *Ford*, due process is required. *See Ford v. Wainwright*, 477 U.S. 399, 428-429, (1986).

The Sate of Florida attempts to deflect the real issue as to whether Mr. Sweet's due process rights were violated by focusing on Mr. Doss' eligibility to represent Mr. Sweet as registry counsel. Eligibility was not an issue when the Order Appointing Counsel was signed on July 2, 2003, as Mr. Doss had not entered into any contracts with the Department of Financial Services at that time. Therefore, the trial court could not and did not consider eligibility in making its arbitrary decision to remove Mr. Doss as counsel and appoint Mr. Tassone.

Further, the position set forth in the response filed by the Office of the Attorney General as to the meaning and application of § 27.711(9), Fla. Stat. (2002), is contrary to the standard construction as revealed by customary practice, and would render the provision unconstitutional. According to the State, the language that "[a]n attorney may not represent more than five capital defendants at any one time" means simply that a criminal defense attorney is prohibited from being involved as the registry counsel of record in more than five capital cases regardless of where the cases are pending. And apparently the State believes that

they have standing to object.[5] The State has tallied the cases that Mr. Doss is "counsel of record" and found that he is counsel of record in nine capital cases and therefore his appointment to represent Mr. Sweet violates § 27.711(9), Fla. Stat. (2002).[6] Of course, if the position being advanced in the Response was the recognized construction of § 27.711(9), Fla. Stat. (2002), and if the State has standing to object, the provision would be unconstitutional in violation of due process. A perusal of this Court's online docket establishes that many Assistant Attorneys General are counsel of record in the Florida Supreme Court alone in more than five capital cases.[7] Undoubtedly, these Assistant Attorneys General represent the State in additional cases, pending either in circuit court or in federal court. Obviously, the State of Florida has determined that it is beneficial to the

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[5]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.

[6]The State makes no effort to explain why the regional capital collateral offices are not precluded from assigning more than five cases to attorneys working in those offices.

[7] For example, Kenneth Nunnelley is listed as counsel of record in this Court in 18 active cases; Sandra Jaggard is listed as counsel of record in this Court in 16 active cases; Charmaine Millsaps is listed as counsel of record in this Court in 16 active cases; Curtis French is listed as counsel of record in this Court in 11 active cases; Carol Dittmar is listed as counsel of record in this Court in 7 active cases. This tally does not include additional cases pending in federal court or in the circuit court.

State to have as its counsel in capital cases those individuals, who specialize in capital cases and handle many more than five capital cases at one time. For the State to use the five case limit as a sword stripping a capital defendant of knowledgeable and qualified counsel, creates an unlevel playing field that provides the State with a distinct advantage. Such an unlevel playing field offends the constitutional guarantee of fundamental fairness. *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 choose both its own counsel and counsel for the defense, using criteria for the defense counsel that it rejects for its own counsel.

Presumably, 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 an 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 choose, or at least veto, its adversary. A capital defendant is not given the opportunity to veto the State's representative in a criminal case. 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."

The position advocated by the State violates due process. 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. Clearly, Mr. Sweet has been deprived of due process by the actions of the State of Florida and the trial court by the removal of Mr. Doss as his counsel, contrary to his wishes.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to State's Answer Brief has been furnished by hand to the Clerk of Court and by United States Mail, first class postage prepaid to all counsel of record on November 24, 2003.

CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that this Reply Brief has been reproduced in a 14 point Times New Roman type, a font that is not proportionally spaced.

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