

IN THE SUPREME COURT OF FLORIDA

WILLIAM SWEET

Petitioner,

v.
CFA

CASE NUMBER: SC03-1818
LOWER TRIBUNAL NO: 91-2899

STATE OF FLORIDA

Respondent.

_____ /

STATE'S RESPONSE TO SWEET'S INITIAL PETITION

COMES NOW THE STATE OF FLORIDA, by and through undersigned counsel, and hereby responds to the pleading styled "Appeal from the Circuit Court in and For Duval County" and "Initial Petition" filed by attorney D. Todd Doss, in which he asks this Court to vacate the order appointing Mr. Frank Tassone, and appoint Mr. Doss to represent Mr. Sweet.

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

1. Mr. Sweet's successive postconviction proceedings are pending before the Honorable Frederick B. Tygart, Circuit Judge, Duval County, 4th Judicial Circuit, Jacksonville, Florida.¹

¹ Sweet filed his initial motion for postconviction relief on August 1, 1995 and filed an amended motion on June 30, 1997. After an evidentiary hearing on four of his twenty-eight claims,

2. In Part IV, Chapter 27, Florida Statutes, the Legislature provided for appointment of collateral legal counsel to represent persons convicted and sentenced to death.

3. To implement its purpose, the Florida Legislature created three regional offices of capital collateral counsel.² The offices were divided into the northern, middle, and southern regions. The northern regional office, located in Tallahassee, bore responsibility for cases in the First, Second, Third, Fourth, Eighth, and Fourteenth Judicial Circuits. *Section 27.701(1), Florida Statutes.*

4. Effective July 1, 2003, the Florida Legislature created a pilot program whereby the responsibilities of the Office of Capital Collateral Representative - North (CCRC-North) would be met using only attorneys from a registry of private attorneys maintained pursuant to s. 27.710. In accordance with the provisions of this pilot program, capital defendants, who would otherwise be represented by counsel employed by CCRC-North, would instead be represented by appointed private counsel drawn

the trial court denied Sweet's motion for post-conviction relief and this court affirmed in Sweet v. State, 810 So.2d 854 (Fla. 2002). Sweet's petition for writ of habeas corpus was denied by this Court in Sweet v. Moore, 822 So.2d 1269 (Fla. 2002).

² Originally, only one statewide Office of Capital Collateral Representative (CCR) was created.

from the registry. *Section 27.701(2), Florida Statutes.*³

5. On May 8th, 2003, Mr. Doss, then employed by CCRC-North, filed a successive motion for post-conviction relief on Mr. Sweet's behalf in the circuit court. The motion challenged Mr. Sweet's judgments of conviction and sentences on the basis of the United States Supreme Court's decision in Ring v. Arizona, 534 U.S. 584 (2002). *Appendix 1.*

6. On June 16, 2003, in anticipation of the demise of CCRC-North, Mr. Doss filed a motion for appointment as Mr. Sweet's registry counsel. Mr. Doss filed an amended motion on June 24, 2002. *Appendix 2.*

7. On July 2, 2003, the trial court appointed Mr. Frank Tassone to represent Mr. Sweet. In its order, the court noted that the motion pending before the court raised issues "essentially legal in nature" and the motion could be handled

³ In 1998, in order to alleviate CCRC's backload of unassigned cases, the Florida Legislature enacted sections 27.710 and 27.711, Florida Statutes which provides for a registry of private attorneys to represent death row defendants in postconviction proceedings, establishes the fee and costs schedule to compensate registry attorneys, and outlines guidelines which must be adhered to by these private attorneys. See Olive v. Maas, 811 So.2d 644 (Fla. 2002).

adequately by local counsel without unreasonable delays.
Appendix 3.

8. Mr. Tassone accepted representation on July 22, 2003 and was issued a contract by the Department of Financial Services on August 11, 2003 to compensate Mr. Tassone for his work on behalf of Mr. Sweet. *Appendix 4.*

9. On July 11, 2003, Mr. Sweet and Mr. Doss filed a motion for rehearing contesting the appointment of Mr. Tassone. *Appendix 5.*

10. Mr. Doss alleged that Mr. Tassone's appointment deprived Sweet of his statutory and constitutional right to effective assistance of counsel. Mr. Doss claimed that his removal from the case violates Sweet's right to effective assistance of counsel. Further, Mr. Doss alleged that Mr. Tassone has a conflict of interest because an assistant state attorney, not assigned to this case, will be "representing the State and defending Mr. Tassone against Mr. Hardwick's claims of ineffectiveness." (Appendix 5, Motion for Rehearing at page 3).⁴ Mr. Doss raised no claim in the trial court regarding an actual conflict of interest caused by a former homicide investigator

⁴ Hardwick v. Crosby, 320 F.3d 1127 (11th Cir. 2003).

who was allegedly employed by Mr. Tassone to transport Mr. Sweet's confidential records and files.

11. On September 11, 2003, Judge Tygart denied Mr. Doss' motion for rehearing which it deemed a motion for reconsideration. The court observed that it interpreted Mr. Doss' motion to allege that Mr. Tassone was incompetent and has a conflict of interest. The trial court found Mr. Doss' allegations to be without any legal or factual merit. The court found that Mr. Tassone "has a reputation in the legal community as a competent and forceful advocate." *Appendix 6.*

12. The same day, the court directed the State to file a response to Sweet's successive motion for postconviction relief.

13. On October 10, 2003, Mr. Doss filed a petition asking this Court to vacate the circuit court's order appointing Mr. Tassone and to appoint Mr. Doss to represent Mr. Sweet.

14. On October 22, 2003, Mr. Doss filed a motion to stay proceedings in the trial court until this Court ruled on his initial petition. *Appendix 7.*

15. On November 1, 2003, this Court directed the State to respond to Mr. Doss' initial petition.

16. On or about November 5, 2003, Mr. Tassone filed a motion to amend Sweet's successive motion to vacate judgements of

conviction and sentences. On November 6, 2003, the court granted the motion to amend, preserving all of the State's procedural and substantive defenses. The Court directed the amended motion be filed within five days and granted the State an additional twenty days to respond to the amended motion. *Appendix 8.*

17. On November 6, 2003, Judge Tygart denied Mr. Doss' motion to stay the proceedings pending the outcome of the instant petition. *Appendix 9.*

18. None of the "facts" stated by Mr. Doss in his petition are relevant to the issue before the court. (Pet. 4-7). While Mr. Doss alleges that Mr. Sweet presented "unrebutted evidence" of trial counsel's "deficient" performance at trial at the evidentiary hearing held on Sweet's amended motion for post-conviction relief (Pet. 6), this Court affirmed the denial of Sweet's motion. Sweet v. State, 810 So.2d 854 (Fla. 2002). The recitation of these "facts" is irrelevant to Mr. Doss' appeal of the circuit court's order appointing Mr. Tassone to represent Mr. Sweet.

19. While the State generally accepts the procedural history of this case as outlined by Mr. Doss on pages 7-14 of his initial petition the State has no knowledge of Mr. Doss' allegations concerning an agreement to appoint local

Jacksonville attorneys to capital cases "in order to provide them work as part of a patronage program," or any conflict of interest involving Detective Bradley who was allegedly assigned the responsibility to receive, transport, and maintain files for former CCRC-North clients. (Pet. 15-16). There is nothing in the record supporting these claims.

ARGUMENT

20. This Court may dismiss this initial petition on jurisdictional grounds. Rule 9.142(b), Florida Rules of Appellate Procedure, authorizes the filing of an original petition to review non-final orders in capital postconviction proceedings. The rule does not appear to authorize an attorney whose motion for appointment of counsel has been denied to "appeal" that order. Rule 9.142(b)(3)(B), allows either "party" to the capital postconviction proceedings to seek review under the rule. While Mr. Doss represented Mr. Sweet for some period of time prior to the demise of CCRC-North, Mr. Doss is now a *de jure* stranger to these proceedings. Mr. Doss is neither a party nor counsel of record for a party.

21. Additionally, this Court may deny Mr. Doss' initial petition on procedural grounds. Rule 9.142(b)(4)(E), Florida Rules of Appellate Procedure, requires a petitioner to set forth "the facts on which the petitioner relies with references to the

appropriate pages of the supporting appendix." Likewise, Rule 9.142(b)(5), Florida Rules of Appellate Procedure, requires the supporting appendix to contain portions of the record necessary for a determination of the issues presented. Nothing in the rule contemplates or allows Mr. Doss to rely on non-record facts. Yet, the petition is replete with facts unaccompanied by any citations to the appropriate page number of the appendix or supported by the accompanying appendix. The petition is inadequate to allow this Court to do any meaningful review of the issue Mr. Doss presents to this Court and should be denied or dismissed.

22. Finally, Mr. Doss' claim fails on the merits. Section 27.711(2), Florida Statutes, grants to the trial court the responsibility to appoint registry counsel. This court should overturn its decision only upon a finding of an abuse of discretion.⁵ Mr. Doss has failed to demonstrate the trial judge

⁵ As this seems to be a matter of first impression, the Court has not adopted a standard of review for appointment of one registry counsel over another. This court has reviewed appointment of counsel in capital cases under an abuse of discretion standard. See e.g. Trease v. State, 768 So.2d 1050 (Fla. 2000) (finding no abuse of discretion in trial judge's failure to appoint co-counsel in a capital case when the defendant was represented by one of the best capital defense attorneys in the circuit and because he failed to show the case was so complex that co-counsel was necessary).

abused his discretion in appointing Mr. Tassone to represent Mr. Sweet.

23. There is nothing in the record to establish that Mr. Tassone is not qualified to handle a successive postconviction motion involving purely legal matters or that the failure of this Court to remove Mr. Tassone and appoint Mr. Doss will deprive Mr. Sweet of any "right" he may have to counsel in these successive postconviction proceedings. Indeed, Mr. Tassone has been a member of the bar since 1973, some 18 years longer than Mr. Doss, and has been representing capital defendants since at least 1982.⁶ See e.g. Davis v. Singletary, 119 F.3d 1471, 1473-1474 (11th Cir. 1997) (noting that Davis had been represented by "[e]xperienced criminal defense attorney Frank Tassone").
Appendix 10.

24. In support of his claim, Mr. Doss points to the case of Hardwick v. Crosby, 320 F.3d 1127(2003). Mr. Doss alleges that the Hardwick decision demonstrates that Mr. Tassone cannot be an effective advocate for Mr. Sweet. In Hardwick, a three judge panel of the 11th Circuit Court of Appeals criticized Mr. Tassone's performance at the penalty phase of Hardwick's capital trial. The Court found, however, that Mr. Hardwick did not

⁶ Dates of admission to the bar drawn from the official website of the Florida bar at www.flabar.org.

receive ineffective assistance of counsel at the guilt phase of trial.

25. Mr. Hardwick was tried and convicted in March 1986. The evidentiary hearing on Hardwick's motion was held in 1990. Hardwick at 1154. It seems inconceivable that Mr. Doss would urge this Court to find that Mr. Tassone is incompetent to represent Mr. Sweet now because one panel of the 11th Circuit Court of Appeals was critical of his performance in a case tried over 17 years ago. Mr. Doss cannot, and did not, cite to any case tried more recently in which Mr. Tassone was found to be ineffective in his representation of a capital defendant. Likewise, Mr. Doss can point to no law that supports the notion that an experienced criminal defense attorney found ineffective in one case is presumptively incompetent to represent a capital defendant over 17 years later.

26. Mr. Doss also claims that Mr. Tassone has an actual conflict of interest with Mr. Sweet and as such his appointment is "ill advised." (Pet. 23). Mr. Doss bases this claim on two principal allegations. The first is that Mr. Tassone has a conflict of interest because the original prosecutor in this case, Mr. George Bateh, is representing the state in the federal district court proceedings in Hardwick. Mr. Doss claims that Mr. Bateh has entered an appearance in federal district court to

represent the State in proceedings ordered by the 11th Circuit. (Pet. 25).⁷ Mr. Doss alleges that Mr. Bateh, on behalf of the State, will be "in essence... representing Mr. Tassone." (Pet. 27).

27. Mr. Doss cites to no case law in support of his claim that Mr. Bateh's appearance in the Hardwick case creates an actual conflict of interest in Sweet's case. Mr. Bateh is not counsel for the State in the instant proceedings. The State is represented by co-counsel, Assistant State Attorney Mark Borello and the undersigned. It is also simply not accurate to state that Mr. Bateh is "representing" Mr. Tassone at the evidentiary hearing ordered by the 11th Circuit in Hardwick. What is true is that Mr. Bateh will represent the State of Florida in a proceeding in which a federal district judge will take evidence on the statutory and nonstatutory mitigating evidence that Mr. Tassone could have presented at the state sentencing proceeding and "determine whether Hardwick is entitled to habeas relief on his claim of ineffective assistance of counsel at his sentencing proceeding." Hardwick v. Crosby, 320 F.3d at 1192-1193.

⁷ There is nothing in this record to substantiate this claim, however for the purpose of the State's response, the State will accept this assertion as true.

28. To demonstrate an actual conflict of interest a defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance." A lawyer suffers from an actual conflict of interest when he or she "actively represent[s] conflicting interests." Owen v. Crosby, 854 So.2d 182, 193-194 (Fla. 2003). To prevail, a defendant must point to specific evidence in the record that suggests his or her interests were compromised. A possible, speculative or merely hypothetical conflict is insufficient to establish an actual conflict of interest. Id. at 194; Hunter v. State, 817 So.2d 786, 791-92 (Fla. 2002).

29. In alleging an actual conflict of interest, Mr. Doss implies Mr. Tassone has an actual conflict because he will act to curry favor with the State so that Mr. Bateh will effectively "restore [Mr. Tassone's] tattered reputation." (Pet. 27). Likewise, Mr. Doss implies the State wants to keep Mr. Tassone on this case because the State will benefit when Mr. Tassone "gives up on defending Mr. Sweet." (Pet. at page 27.n. 19). Not only is this an unwarranted attack on the professional ethics of the counsel involved in this case, there is not a single shred of record evidence to substantiate such conjecture. At most, this is a mere speculative conflict,

insufficient to support a claim of actual conflict of interest.
Owen at 194.

30. Finally, without any record support, Mr. Doss alleges that "Mr. Tassone employed a former detective (John Bradley) from the Jacksonville Sheriff's Office to receive and transport Mr. Sweet's confidential files, an individual who has previously [been] involved in the investigation and prosecution of homicides for the very agency that arrested Mr. Sweet." (Pet. 30-31).⁸ While the State has no knowledge of the circumstances surrounding the transport of Mr. Sweet's records, Mr. Doss has failed to cite to any authority that, even if true, Mr. Tassone's use of Mr. Bradley to transport Mr. Sweet's files creates an actual conflict of interest between Mr. Tassone and Mr. Sweet.

31. In this case, the trial judge found that Mr. Tassone enjoys a reputation in the legal community for competent and forceful advocate on behalf of his clients. Mr. Doss has failed to demonstrate the trial court failed to comply with its statutory mandate to "give priority to attorneys whose

⁸ Mr. Doss also claims that "due to inaccessibility of the records, Mr. Sweet does not know if Mr. Bradley participated in investigating his case". (Pet. 16). Mr. Doss does not indicate which "records" are inaccessible. In his initial Rule 3.850 motion, Sweet alleged that he was denied access to public records. He did not appeal the trial judge's denial of this claim.

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." *Section 27.710(3)(b)(2), Florida Statutes*. He has also failed to demonstrate any abuse of discretion or the denial of any of Mr. Sweet's rights to due process.

32. In any event, Mr. Doss is not eligible for appointment as registry counsel in this case. *Section 27.710(2), Florida Statutes*, provides that to be eligible for placement on the registry, private counsel must certify they have at least 3 years' experience in the practice of criminal law and must have participated in at least five felony jury trials, five felony appeals, five capital postconviction evidentiary hearings, or any combination of at least five of such proceedings. *Section 27.710(2), Florida Statutes (2003)*.⁹

33. Additionally, an attorney who applies for registration and court appointment as counsel in a particular case must certify he or she is counsel of record in not more than four postconviction capital collateral proceedings. *Section*

⁹Private counsel must also have attended a continuing legal education program of at least 10 hours' duration devoted specifically to the defense of capital cases within the last year (if available). *Section 27.710(1), Florida Statutes (2003)*.

27.710(3), *Florida Statutes* (2003). This certification, purportedly, ensures that registry counsel are not counsel of record in more than five capital post conviction cases. Section 27.711(9), *Florida Statutes* (2003) prohibits registry counsel from representing more than five capital defendants at any one time.

34. Section 27.711, *Florida Statutes* (2003), also provides the mechanism by which appointed registry counsel may be compensated for work performed on behalf of capital defendants. In addition to statutory attorney's fees, Section 27.711 (6) provides for reimbursement of certain litigation costs. The legislature has made clear, however, that both the appointment and compensation of registry counsel must be made as prescribed in Part IV, Chapter 27. The Department of Financial Services issues contracts to qualified registry counsel pursuant to that chapter.

35. Section 27.711(3), *Florida Statutes* prescribes that "[t]he fee and payment schedule in this section is the exclusive (emphasis mine) means of compensating a court-appointed attorney who represents a capital defendant." Additionally, Section 27.7002(4), *Florida Statutes* (2003), provides that "no attorney may be appointed, at state expense, to represent any defendant

in collateral legal proceedings except as expressly authorized in this chapter."

36. According to State records, Mr. Doss is counsel of record in at least eight (8) registry cases.¹⁰ Mr. Doss has been issued contracts in five of his eight cases, all of which were signed in July 2003. While he may have been eligible for appointment when he originally filed his motions for appointment in this case, Mr. Doss is no longer qualified to be appointed as registry counsel.¹¹ *Appendix 11.*

37. Mr. Doss was recently removed from a ninth registry case (Heath v. State) in Escambia County for exceeding the statutory case limitations. *Appendix 12.*

37. On the other hand, state records show Mr. Tassone has been appointed as registry counsel in five cases, including Mr.

¹⁰ Gorby v. State (Bay County); Melton v. State(Escambia County); Orme v. State(Bay County); Morrison v. State (Duval County); Fennie v. State (Hernando County); State v. Barwick (Bay County); State v. Hill (Escambia County); State v. Stephens (Duval County). Information drawn from the records of the Commission on Capital Cases website at www.floridacapitalcases.state.fl.us

¹¹ In his motion for appointment, Mr. Doss did not certify that he was counsel of record in four or fewer capital cases as required by Section 27.710(3), Florida Statutes (2003). However, it appears that at the time he sought initial appointment, he did not exceed the cap.

Sweet's and is therefore eligible to represent Mr. Sweet.
*Appendix 13.*¹²

CONCLUSION

BASED ON THE FOREGOING, the Initial Petition filed by attorney D. Todd Doss to overturn the trial court's decision to appoint Frank Tassone as registry counsel in Sweet's successive motion for postconviction relief should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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¹² Information drawn from the records of the Commission on Capital Cases website at www.floridacapitalcases.state.fl.us

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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 D. Todd Doss P.O. Box 3006, Lake City, Florida 32056-3306 this 14th day of November 2003.

MEREDITH CHARBULA
Assistant Attorney General