IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1674

LOWER COURT CASE NO. 1983-CF-001682-A-O

ROBERT IRA PEEDE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

The issue presented in this appeal presents a question of law and fact. Thus, a *de novo* standard applies. *Bruno v. State*, 807 So. 2d 55, 61-2 (Fla. 2001).

REQUEST FOR ORAL ARGUMENT

Mr. Peede has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Peede, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF THE CASE AND FACTS[1]

Mr. Peede was indicted on May 25, 1983, with one count of first-degree murder in the death of his wife, Darla Peede (R. 1008). Mr. Peede pled not guilty to the charge.

A capital jury found Mr. Peede guilty on February 17, 1984 (R. 1235). The jury recommended death by a vote of eleven to one (R. 1247). On August 27, 1984, the trial court imposed a sentence of death on the count of first-degree murder (R. 1251-2). On direct appeal, this Court affirmed Mr. Peede's conviction and sentence, but overturned the aggravating circumstance that the murder was committed in a cold, calculated and premeditated manner without any pretense or moral justification. This Court found that there was no heightened premeditation proven which would substantiate the aggravating circumstance. *Peede v. State,* 474 So. 2d 808 (Fla. 1985).

In response to a death warrant signed on May 6, 1988, Mr. Peede filed his initial Rule 3.850 motion on June 6, 1988 (PC-R1.

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[1]The following abbreviations will be utilized to cite to the record in this cause, with appropriate volume and page number(s) following the abbreviation:

"R. __" - record on direct appeal to this Court;
"PC-R. __" - record on appeal from the summary denial of postconviction relief;
"PC-R2. __" - record on appeal from the denial of relief after an evidentiary hearing;
"PC-R3. __" - record on appeal from the summary denial of relief of successive motion for postconviction relief;
"PC-R4. __" - record on appeal from the summary denial of relief of successive motion for postconviction relief.

4). Mr. Peede filed an amended 3.850 motion of February 21, 1995 (PC-R1. 448-612).

On June 21, 1996, the state court issued an order summarily denying Mr. Peede's 3.850 claims (PC-R1. 632). Mr. Peede appealed the summary denial to this Court (PC-R1. 1690).

This remanded Mr. Peede's case to the circuit court for an evidentiary hearing. *Peede v. State*, 748 So. 2d 253 (Fla. 1999).

On November 10 and 12, 2003, and January 12 through 14, 2004, an evidentiary hearing was held. After the hearing, the circuit court denied all relief (PC-R2. 1774-86).

Mr. Peede appealed that order to this Court and simultaneously filed a petition for writ of habeas corpus. This Court denied relief. *Peede v. State*, 955 So. 2d 480 (Fla. 2007).

On May 5, 2008, Mr. Peede filed his petition for writ of habeas corpus in the federal district court.

On November 16, 2010, Mr. Peede filed a successive Rule 3.851 in the circuit court concerning *Porter v. McCollum*, 558 U.S. 30 (2009) (PC-R3. 17-45). On May 2, 2011, the circuit court denied relief (PC-R3. 87-92).

Mr. Peede appealed that order to this Court. This Court denied relief. *Peede v. State*, 94 So. 3d 500 (Fla. 2012).

On February 27, 2015, the federal district court vacated Mr. Peede's sentence of death and granted a resentencing based on ineffective assistance of trial counsel. The State appealed to

the Eleventh Circuit Court of Appeals.

While the State's appeal was pending in the Eleventh Circuit, Mr. Peede filed a second successive Rule 3.851 in the circuit court (PC-R4. 64-102). Thereafter, Mr. Peede amended his motion in order to comply with the page limitation (PC-R4. 111-136).

On April 3, 2017, Mr. Peede's counsel was notified that Governor Rick Scott had entered an Executive Order 17-91 (PC-R4. 161-3). The Order removed the State Attorney for the Ninth Circuit, Aramis D. Ayala from prosecuting Mr. Peede any further, based upon her March 16, 2017, declaration that she would no longer seek the death penalty "in all pending and future capital felonies..." (*Id.*). Governor Scott assigned Mr. Peede's case to the State Attorney for the Fifth Circuit, Brad King (*Id.*).

Governor Scott based his decision on his a falsity: "**WHEREAS, following the decision of the Florida Supreme Court in *Hurst v. State of Florida* and subsequent cases retroactively applying the holdings of *Hurst*, Robert Ira Peede's case has been remanded for a new capital sentencing proceeding in the trial court**". *See* Executive Order 17-91 (Apr. 3, 2017)(emphasis added) (PC-R4. 161-3).

The following day, Mr. Peede's counsel received a notice of appearance from Brad King, State Attorney for the Fifth Circuit. The notice attached the Governor's Executive Order (PC-R4. 159-

63).

On April 17, 2017, Mr. Peede filed a motion to disqualify the Office of the State Attorney for the Fifth Judicial Circuit and to preclude Governor Rick Scott from interfering in Mr. Peede's case (PC-R4. 166-73). The circuit court denied Mr. Peede's motion (PC-R4. 189-90), but permitted Mr. Peede to amend his Rule 3.851 motion (PC-R4. 191-2).

Mr. Peede filed his second amended Rule 3.851 motion on June 20, 2017 (PC-R4. 200-24). On August 14, 2017, the circuit court denied the motion (PC-R4. 253-60). Mr. Peede timely appealed (PC-R4. 288-9).

On November 8, 2017, the Eleventh Circuit Court of Appeals reversed the district court's order vacating Mr. Peede's death sentence. *See* __ Fed. Appx. __ (11th Cir.), 2017 WL 51712137. Mr. Peede's petition for writ of habeas corpus to the Eleventh Circuit Court of Appeals is due to be filed on or before April 10, 2018.

SUMMARY OF THE ARGUMENT

In *Weems v. United States*, 217 U.S. 349, 378 (1910), the United States Supreme Court recognized that the constitutional prohibition against cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." A century later, in *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011), the United States Suprem Court reiterated that: "Prosecutors have a special 'duty to seek justice, not merely to convict.'" (citations omitted). Indeed, the prosecutor's discretion to provide individualized justice is firmly entrenched in American law. Thus, the intersection of rational and humane treatment of criminal defendants facing the death sentence intersects with the prosecutor's discretion to determine the appropriate course of action to comply with the eighth amendment and the evolving standards of decency.

In using his executive power to remove Mr. Peede's prosecutor and replace her with Brad King, Governor Scott interfered in Mr. Peede's case based on a wholly false pretense. This interference violates Mr. Peede's right to due process, equal protection and also injected arbitariness into Mr. Peede's capital proceedings which violates the eighth amendment.

ARGUMENT

THE CIRCUIT COURT ERRED IN DENYING MR. PEEDE'S CLAIM THAT THE ACTIONS OF THE GOVERNOR IN REMOVING PROSECUTOR ARAMIS AYALA AND REPLACING HER WITH PROSECUTOR BRAD KING VIOLATES MR. PEEDE'S RIGHT TO DUE PROCESS, EQUAL PROTECTION AND THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. STATE ATTORNEY BRAD KING AND HIS OFFICE MUST BE DISQUALIFIED AND MR. PEEDE'S DEATH SENTENCE MUST BE VACATED.

A. Executive Order 17-91

Governor Scott entered Executive Order 17-91 on April 3, 2017. The Order removed State Attorney for the Ninth Circuit, Aramis D. Ayala from prosecuting Mr. Peede any further, based upon her March 16, 2017, declaration that she would no longer seek the death penalty "in all pending and future capital felonies...".

Governor Scott assigned Mr. Peede's case to the State Attorney for the Fifth Circuit, Brad King (PC-R4. 161-3).

Governor Scott based his decision on his erroneous belief that: "WHEREAS, following the decision of the Florida Supreme Court in *Hurst v. State of Florida* and subsequent cases retroactively applying the holdings of *Hurst*, Robert Ira Peede's case has been remanded for a new capital sentencing proceeding in the trial court". *See* Executive Order 17-91 (Apr. 3, 2017) (PC-R4. 161-3).

Governor Scott drew his authority to hand-select Mr. Peede's party-opponent from Florida Statute § 27.14.

1. Florida Statute § 27.14.

Florida Statute § 27.14 was promulgated in 1905 to permit the governor to move state attorneys among judicial circuits for disqualification or for any "good and sufficient reason." Fla. Stat. § 27.14 (2016). However, the modern Florida Constitution gives voters control over who will prosecute criminal cases in their communities. Art. V, § 17, Fla. Const.

Amendments to the Florida Constitution adopted in 1972 and 1986 in turn expressly required for the first time that "the state attorney shall be the prosecuting officer of all trial courts" in his or her judicial circuit and made clear that any exception to this must be "provided in this constitution." *Id.* (emphasis added).

2. The Assignment of Brad King

Governor Scott picked State Attorney Brad King to prosecute Mr. Peede's case. Mr. King's selection was not just based on the proximity of the Judicial Circuits. First, Mr. King testified before the Florida Legislature in January 2016 against legislation that would require unanimous juries in death penalty cases because he believed that unanimous juries made it too difficult to obtain death sentences. Anna M. Phillips, *How the nation's lowest bar for the death penalty has shaped death row*, Tampa Bay Times (Jan. 31, 2016), http://www.tampabay.com/projects/2016/florida-executions/jury-vot

es/; see also Dara Kam, *State will interview 11 Supreme Court applicants*, Jacksonville.com (Nov. 14, 2016), http://jacksonville.com/metro/2016-1114/panel-will-interview-11-state-supreme-court-applicants ("Brad King has been an outspoken proponent of a new law [later found unconstitutional by this Court] dealing with the death penalty.").

Second, Mr. King recently applied for the vacancy of Justice James E.C. Perry on the Florida Supreme Court. Jim Rosica, *Brad King files for Supreme Court opening*, Florida Politics (Nov. 11, 2016), http://floridapolitics/archives/227060/brad-king-supreme-court. Though Mr. King was unsuccessful in his bid, at the latest, he will be eligible to apply for two of the three seats that become vacant in January, 2019. Mary Ellen Klas, *With four justices retiring, control of state Supreme Court could become election issue for next Governor* (Dec. 21, 2013), http://miamiherald.com/news/state/article1958714.html.

3. Mr. Peede's Case

Contrary to Governor Scott's order, Mr. Peede has yet to obtain *Hurst* relief. Indeed, his motion to vacate was being litigated at the time that the governor executed his order. And, while Mr. Peede and his counsel have no information that Ms. Ayala would move to vacate his death sentence and have him sentenced to life, exercising her exclusive discretion for a seventy-three year old, mentally ill Mr. Peede to be sentenced to

life at this juncture would be nothing if not rational and humane. Particularly in light of the fact that the district court judge who reviewed this Court's decision in relation to the ineffective assistance of counsel at the penalty phase claim believed that substantial, compelling mitigation existed that was not known to the jury that made the recommendation for death due to trial counsel's deficient performance. Moreover, Mr. Peede's jury was not only deprived of mitigating evidence and evidence to counter the prior violent felony aggravator, but was also deprived of the benefit of constitutional and accurate jury instructions.

B. Argument

1. Stripping Ms. Ayala of the Prosecution of Mr. Peede Violates the Florida and U.S. Constitution

Ms. Ayala is the elected State Attorney for the Ninth Circuit. As such, she is charged to prosecute all cases, including Mr. Peede's. The Florida Constitution requires that "except as provided in this constitution," the elected State Attorney for each judicial circuit "**shall be the prosecuting officer in all trial courts in that circuit.**" Art. V, § 17, Fla. Const. (emphasis added). In fulfilling that role, the State Attorney acts as a quasi-judicial officer charged with seeing that "every defendant receive[s] a fair trial," *Frazier v. State*, 294 So. 2d 691, 692 (Fla. Dist. Ct. App. 1974), and is imbued

with "absolute" discretion "in deciding whether and how to prosecute." *State v. Cain*, 381 So. 2d 1361, 1367 (Fla. 1980). *See also Woodard v. Wainwright*, 556 F.2d 781, 786 (5th Cir. 1977) (describing the "traditionally broad" discretion of Florida prosecutors). Article V, Section 17 thus gives local communities control over who exercises that discretion, increasing accountability to the voters and promoting the independent judgment the prosecutor's role requires. See, e.g., National District Attorneys Association, *National Prosecution Standards* (3d ed. 2009), at 3.

The Florida Constitution provides for two exceptions to the State Attorney's role as sole prosecutor in a judicial circuit, but neither is relevant here. The first exception gives the statewide prosecutor concurrent jurisdiction to prosecute crimes involving two or more circuits, Art. IV, § 4(b), Fla. Const. Mr. Peede's case involves only the Ninth Judicial Circuit. The second exception permits municipal prosecutors to prosecute violations of municipal ordinances, Art. V, § 17, Fla. Const., but no municipal ordinances are in play here. Those are the only exceptions that the Constitution contemplates, and in fact, the "except as provided in this constitution" language was added specifically in 1986 to account for the newly created office of the statewide prosecutor. *Compare* Art. V, § 17, Fla. Const. (1972), *with* Art. V, § 17, Fla. Const. (1986). *See* Fla. House J.

Res. 386 (1985) (proposing ballot language to amend Article V, Section 17 and Article IV, Section 14 to create the statewide prosecutor role); *see also* R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 Fla. S. U. L. Rev. 634 (1985) (describing the multijurisdictional functions of the statewide prosecutor that were ultimately adopted in 1986).

Florida's Constitution is therefore "clear, unambiguous, and addresses the matter in issue," with respect to who can prosecute crimes, and so "it must be enforced as written." *Lawnwood Med. Ctr. v. Seeger*, 990 So. 2d 503, 511 (Fla. 2008). Here, that means that Ms. Ayala is to prosecute cases in her judicial circuit.

Governor Scott nevertheless appears to claim constitutionally-granted power to replace Ms. Ayala on cases as he sees fit, i.e. that he has determined require the death penalty. No such power exists, and an unlimited right to replace elected State Attorneys would offend both the constitutional grant of prosecuting authority to independent prosecutors and Florida's separation of powers.

As a preliminary matter, Governor Scott has relied first on authority purportedly granted by § 27.14, which provides for replacement of state attorneys with other state attorneys. That authority, however, must cede to Florida's Constitution, which provides that state attorneys "shall" prosecute local cases. *See,*

e.g., *City of Daytona Beach v. Harvey*, 48 So. 2d 924, 925 (Fla. 1950)("The voice of the people expressed in the constitution is the supreme law of the land and it rises above that of the legislature, the courts or the executive.").

In addition, Governor Scott's usurpation of Ms. Ayala's prosecutorial role violates the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). Governor Scott, by his unprecedented actions has injected an arbitrary circumstance in the capital punishment process. Indeed, as the U.S. Supreme Court recognized in *Kennedy v. Louisiana*: "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution. *See Harmelin v. Michigan*, 501 U.S. 957, 999, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (KENNEDY, J., concurring in part and concurring in judgment); see also Part IV–B, infra. It is the last of these, retribution, that most often can contradict the law's own ends. This is of particular concern when the Court interprets the meaning of the Eighth Amendment in capital cases. When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to

decency and restraint." 554 U.S. 407, 420 (2008). Were Ms. Ayala to exercise decency and restraint toward Mr. Peede, Governor Scott instead seeks only retribution.

2. Even if Florida Statute § 27.14 (2016), Were at Issue, Governor Scott Failed to Adequately Justify its Use in Mr. Peede's Case

Florida Statute § 27.14 (2016), cannot be used to circumvent the Florida and U.S. Constitutions. However, even if it were appropriate for Governor Scott to attempt to reassign Mr. Peede's capital litigation, he failed to satisfy the statutory requirements of § 27.14 because his stated reason for dismissing Ms. Ayala did not constitute a "good and sufficient reason" to remove Ms. Ayala from Mr. Peede's prosecution. § 27.14 only allows the Governor to replace a state attorney for two reasons: disqualification, or "other good and sufficient reason." § 27.14, Fla. Stat. (2016). Since there is no suggestion that Ms. Ayala is disqualified, Governor Scott can only rely on § 27.14 if there is a good and sufficient reason to replace Ms. Ayala.

In Mr. Peede's case, the basis for Governor Scott's removal of Ms. Ayala was simply false – Mr. Peede had not obtained *Hurst* relief and Ms. Ayala was not conceding it. *See* Executive Order 17-91 (Apr. 3, 2017) ("WHEREAS, following the decision of the Florida Supreme Court in *Hurst v. State of Florida* and subsequent cases retroactively applying the holdings of *Hurst*, Robert Ira Peede's case has been remanded for a new capital sentencing

proceeding in the trial court"). Surely, a patently false reason cannot establish a "good and sufficient reason". Thus, Fla. Stat. § 27.14 simply does not provide the Governor with the authority to reassign the prosecution of Mr. Peede's case to Mr. King.

3. Brad King and the State Attorney's Office for the Fifth Circuit Should Have Been Disqualified from Mr. Peede's Prosecution

In *McWatters v. State*, this Court reiterated: "This Court has stated that 'disqualification is proper only if specific prejudice can be demonstrated. Actual prejudice is 'something more than mere appearance of impropriety'. Disqualification of a state attorney is appropriate 'only to prevent the accused from suffering prejudice that he otherwise would not bear.'" 36 So. 3d 613, 636 (2010)(citations omitted). In *McWatters*, the Assistant State Attorney listened to phone calls between McWatters and his counsel. In reviewing the circuit court's denial of the motion, this Court held that McWatters was warned that the conversations were being recorded and therefore waived his right to confidentiality.

This Court has also carved out an exception to the actual prejudice standard: "**on a case-by-case basis, specific or actual prejudice will not be required where the appearance of impropriety is strong**." *Huggins v. State*, 889 So. 2d 743, 768, n.13 (Fla. 2004)(emphasis added).

In Mr. Peede's case, the Governor has selected Mr. King to

prosecute Mr. Peede and he has specifically identified his reasons: "My experience with Brad King has been very positive and I know he will take this very seriously and he'll do it like I'm doing it. He will think about the victims and think about their families.". *See Scott reassigns 21 murder cases from Ayala's office*, NEWS 6, (Apr. 4, 2017), clickorlando.com/news/politics/lawmakers-call-for-aramis-ayala-to-be-removed . Furthermore, Mr. King testified before the Florida Legislature in January 2016 against legislation that would require unanimous juries in death penalty cases because he believed that unanimous juries made it too difficult to obtain death sentences. Anna M. Phillips, *How the nation's lowest bar for the death penalty has shaped death row*, Tampa Bay Times (Jan. 31, 2016), http://www.tampabay.com/projects/2016/florida-executions/jury-votes/; see also Dara Kam, *State will interview 11 Supreme Court applicants*, Jacksonville.com (Nov. 14, 2016), http://jacksonville.com/metro/2016-1114/panel-will-interview-11-state-supreme-court-applicants ("Brad King has been an outspoken proponent of a new law [later found unconstitutional by this Court] dealing with the death penalty."). And, Mr. King recently applied for the vacancy of Justice James E.C. Perry on the Florida Supreme Court. Jim Rosica, *Brad King files for Supreme Court opening*, Florida Politics (Nov. 11, 216),

http://floridapolitics/archives/227060/brad-king-supreme-court. Though Mr. King was unsuccessful in his bid, at the latest, he will be eligible to apply for at least two seats that become vacant in January, 2019. Mary Ellen Klas, With four justices retiring, control of state Supreme Court could become election issue for next Governor (Dec. 21, 2013), http://miamiherald.com/news/state/article1958714.html. Clearly, Mr. King would want to curry favor with Governor Scott and/or any other pro-death penalty future governor in order to strengthen his position for an appointment to the Florida Supreme Court - the court that has exclusive jurisdiction of issues relating to the death penalty.

While Mr. Peede submits that Governor Scott and Mr. King's recent comments and positions concerning the death penalty establish actual prejudice, there can be no doubt that, at a minimum, the circumstances establish a strong appearance of impropriety.

CONCLUSION

Governor Scott's interference in Mr. Peede's case exceeded the scope of his authority and injected arbitrariness into Mr. Peede's capital sentencing proceedings. Further, Brad King and his office must be disqualified from any future proceedings in Mr. Peede's case.

Thus, based upon the foregoing argument, reasoning, citation to legal authority and the record, appellant, **ROBERT IRA PEEDE**, urges this Court to reverse the lower court's order and remand for a life sentence to be imposed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by electronic mail to Scott Browne, Senior Assistant Attorney General, on this 1st day of April, 2018.

/s/.Linda McDermott
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/s/. Linda McDermott
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