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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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES. ii

ARGUMENT IN REPLY 1

CONCLUSION. 5

CERTIFICATE OF SERVICE. 6

CERTIFICATION OF TYPE SIZE AND STYLE. 6

TABLE OF AUTHORITIES

Page

Ayala v. Scott,
224 So. 3d 755 (Fla. 2017) 2, 3

Huggins v. State,
889 So. 2d 743 (Fla. 2004) 5

Evitts v. Lucey,
469 U.S. 387 (1985). 1, 2

Ohio Adult Parole Authority v. Woodard,
523 U.S. 272 (1998). 1

Pennsylvania v. Finley,
481 U.S. 551 (1987). 1

ARGUMENT IN REPLY

The State argues that Mr. Peede's argument is improperly brought in Rule 3.851 proceedings. *See* Answer Brief at 2-3. However, the State misunderstands Mr. Peede's argument and posture before this Court, i.e, because Mr. Peede is a capital postconviction defendant, actions by the governor, be they within his executive authority, are curtailed by the Florida and United States Constitutions. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998)(plurality opinion)(holding that due process applies even in the context of executive discretion, like clemency). Here, Governor's Scott's arbitrary action violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Further, the State's reliance on *Pennsylvania v. Finley*, 481 U.S. 551 (1987), is misplaced. While the United States Supreme Court held in *Finley* that there was no federal constitutional right to postconviction relief, the Court has consistently held that where a state extends a right, the right may only be extinguished in a manner that comports with due process. *See Evitts v. Lucey*, 469 U.S. 387 (1985). In *Evitts*, the United States Supreme Court noted that the States were not required to provide a right to a direct appeal of a criminal conviction. However, where the right was nonetheless extended, due process protection attached:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may chose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause.

Evitts, 469 U.S. at 400-01. Here, because the State of Florida has extended a right for Mr. Peede to challenge his conviction and sentence he is entitled to due process before that right can be taken away. *See* Fla. Stat. §27.7001 ("It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.7001-27.711, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner ..."). Thus, the State's argument, like Governor Scott's actions, fails to acknowledge the constitutional protections to which Mr. Peede is entitled. Those constitutional protections and the cases affirming them provide the authority for Mr. Peede's claims.

Moreover, *Ayala v. Scott*, 224 So. 3d 755 (Fla. 2017), does not settle the issue presented here: Whether Governor Scott's actions in removing the elected State Attorney based on a false pretense and appointing Brad King violate Mr. Peede's rights under the fifth, eighth and fourteenth amendments. *See* Answer Brief at 4-5. The facts and issues present in Mr. Peede's appeal

were neither presented nor determined in *Ayala*. *Id*. at 757 ("Ayala argues that the Governor exceeded his authority under section 27.14 by reassigning death penalty eligible cases in the Ninth Circuit to King over her objection because article V, section 17, of the Florida Constitution makes Ayala 'the prosecuting officer of all trial courts in [the Ninth] [C]ircuit.'").

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.

Most importantly, but relegated to footnote in the State's Answer Brief[1], in Mr. Peede's case, the basis for Governor

[1]The State simply argues that despite the false pretense for reassigning Mr. Peede's case that the error "has nothing to do with the reasons for reassignment" and maintains that the reassignment was a valid exercise of the Governor's authority". Answer Brief at 7, n.5. But of course, the "error" had everything to do with the "reason[] for reassignment" because that is exactly what it was: the reason for reassignment. But, it is

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 and the State’s argument that the issue was settled in *Ayala* is erroneous.

Further, in response to this Court’s decision in *Ayala*, State Attorney Ayala has followed this Court’s ruling. *See* Florida Governor Wants Death Penalty on the Table in Alleged Murder-For-Hire, Mayra Cuevas and Emanuella Grinberg, CNN (Jan. 24, 2018), http://www.kesq.com/news/national-world/florida-governor-wants-death-penalty-on-the-table-in-alleged-murderforhire/690813332. (“Ayala said she would follow the court's ruling. To that end, she created a panel of prosecutors in her office to review each case eligible for the death penalty. She vowed not to interfere with the panel's decisions and said she expected it to

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indisputably false and therefore, Governor Scott cannot establish a good or sufficient reason for his interference in Mr. Peede’s case.

result in some death penalty cases.). Thus, at a minimum, Governor Scott should not have extended his executive order for another year.

Finally, as to the denial of Mr. Peede's motion to disqualify Brad King and the Office of the State Attorney for the Fifth Judicial Circuit, the State argues that Mr. Peede has not established that Brad King is biased. *See* Answer at 6-7. The State ignores this Court's decision in *Huggins v. State*, 889 So. 2d 743, 768, n.13 (Fla. 2004), where this Court held that "on a case-by-case basis, specific or actual prejudice will not be required where the appearance of impropriety is strong." In Mr. Peede's case, Governor Scott and Mr. King's recent comments and positions concerning the death penalty establish actual prejudice, or, at a minimum, the circumstances establish a strong appearance of impropriety. *See* Initial Brief at 14-16.

CONCLUSION

Based on his arguments included in his Initial and Reply Briefs, Mr. Peede respectfully requests that this Court grant him relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by electronic mail to Scott A. Browne, Senior Assistant Attorney General, on this 23rd day of April, 2018.

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CERTIFICATION OF TYPE SIZE AND STYLE

This is to certify that the Initial Brief of Appellant has been reproduced in a 12 point Courier type, a font that is not proportionately spaced.

/s/. Linda McDermott
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