IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,731

TERRY MELVIN SIMS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR SEMINOLE COUNTY, FLORIDA

SUPPLEMENTAL BRIEF OF APPELLANT

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ARGUMENT

RULE 3.852(h)(2) DID NOT APPLY TO TERRY SIMS'S CASE AND APPELLEE'S RADICAL AND NEWLY HATCHED REINTERPRETATION OF RULE 3.852(h) IS UNREASONABLE, UNWORKABLE, AND WOULD VIOLATE DUE PROCESS

At oral argument in this case, Appellee sprung on the Court and counsel a novel recasting of Florida Rule of Criminal Procedure 3.852(h). The state argued that the separate classes of cases defined by rule 3.852(h) were interchangeable such that rule 3.852(h)(2) would apply to cases in which the defendant had previously been denied post-conviction relief under rule 3.850, although rule 3.852(h)(3) appeared to preclude that possibility.

A. Rule 3.852(h)(2) Was Not Available Mr. Sims

Section 119.19(8)(d), the statutory correlate of rule 3.852(h)(2) specifically provides that requests may be made under that subdivision only under certain conditions:

> If, [1] on the date this statute becomes effective, a defendant is represented by [2] appointed capital collateral regional counsel or private counsel, and [3] he or she has initiated the records request process . . . .

Mr. Sims's counsel on October 1, 1998, the effective date of the rule, was Steven

Malone. Mr. Malone is and was at that time an assistant public defender. He is neither a capital collateral regional counsel nor a private attorney. Mr. Malone read this language as precluding him from taking advantage of section 119.19(8)(d) and rule 3.852(h)(2).

Rule 3.852 and section 119.19, Florida Statute (Supp. 1998), contain very specific language regarding who may request public records on behalf of a capital post-conviction defendant. The Legislature contemplated requests being made only by "a capital collateral regional counsel or private counsel [who] is appointed to represent a defendant . . . or other counsel who is a member of The Florida Bar and is authorized by such counsel representing a defendant." § 119.19(8)(a), Fla. Stat. (Supp. 1998). The Legislature was adamant that all requests made on behalf of a person sentenced to death conform to the strict provisions of section 119.19. § 119.19(12), Fla. Stat. (Supp. 1998)("The capital collateral regional counsel or private counsel shall not solicit another person to make a request for public records on behalf of the regional counsel or private counsel. The *trial court shall impose appropriate sanctions* against any regional counsel or private counsel found in violation of this subdivision."); § 27.708(3) (Supp. 1998)("Except as provided in § 119.19, the capital collateral regional counsel or contract private counsel shall not make any public records request on behalf of his or her client.").

Apart from these foreboding admonitions, Mr. Malone was aware that a specific portion of the Criminal Appeals Reform Act, codified in section 924.051(9), Florida Statutes (Supp. 1998), prohibited him and his office from using "funds, resources, or employees . . . directly or indirectly, in appellate or collateral proceedings unless the use is constitutionally or statutorily mandated." Requests under rule 3.852(h)(2) and section 119.19(8)(e) by an assistant public defender were not constitutionally or statutorily mandated; they were statutorily prohibited. In federal court, the state invoked section 924.051(9) to remove Mr. Malone from Mr. Sims's case. The federal court denied the state's motion, however, and Mr. Malone was bound by the federal court to continue representing Mr. Sims there.

Prior to the death warrant being signed, and after certiorari was denied on the federal habeas corpus action (June 1999), Mr. Malone was in the process of arranging to have the Office of the Capital Collateral Regional Counsel for the Middle Region ("CCRC") take over the case. That office had no knowledge of Mr. Sims's case until then. When the Governor suddenly signed Mr. Sims's death warrant, and this Court remanded the *Provenzano* case for further hearing, CCRC Middle determined that it could not handle both warrant cases at once. Relying upon section 27.704(2), Florida Statutes (Supp. 1998), CCRC Middle contracted with the public defender's office for representation for Mr. Sims. § 27.704(2), Fla. Stat. (Supp. 1998)("Each capital

collateral regional counsel may * * * [c]ontract with . . . public defenders for the purpose of providing . . . representation for individuals who are sentenced to death in this state."). Only then, did Mr. Malone become "other counsel who is a member of The Florida Bar and is authorized by [a capital collateral regional counsel or private counsel]" to make public records requests on behalf of Mr. Sims.

This Court also adopted a strict definition of "collateral counsel" who could take advantage of rule 3.852. Collateral counsel are defined, consistent with the legislative language quoted above, as "a capital collateral regional counsel from one of the three regions in Florida; a private attorney who has been appointed to represent a capital defendant for postconviction litigation; or a private attorney who has been hired by the capital defendant or who has agreed to work pro bono for a capital defendant for postconviction litigation." Fla.R.Crim.Pro. 3.852(b)(4). Mr. Malone relied upon that definition as excluding him because he was neither an employee of a Capital Collateral Regional Counsel ("CCRC") nor a private attorney.

Rule 3.852(h)(2) was not available to Mr. Sims because the state had not provided him with collateral counsel, and he had no means by which to hire a private attorney.

B. Rule 3.852(h)(2) Was Not Available to Any Capital Postconviction Defendant Whose rule 3.850 or rule 3.851 Motion had been Denied Before October 1, 1998

Mr. Sims, like all other similarly situated capital post-conviction defendants in Florida reasonably relied upon the plain meaning of rule 3.852(h)(3). Mr. Sims and his counsel, and counsel from each of the Capital Collateral Regional Counsels reasonably believed that Emergency Rule 3.852(h)(3), and section 119.19(8)(e) meant what they said. If a defendant had applied for relief under rule 3.850 or 3.851, and relief was denied prior to October 1, 1998, they were prohibited from making ***any*** additional requests for public records until a death warrant was signed.

Until the state made its novel argument to this Court on October 19, 1999, everyone else, including other Assistant Attorneys General, *see* Attachment A, believed that rule 3.852(h) divides all capital cases in which this Court's mandated issued prior to October 1, 1998 into three discrete and mutually exclusive categories. Rule 3.851(h)(1) applies to cases in which no public records requests had been made. Rule 3.852(h)(2) applies exclusively to cases in which an initial rule 3.850 motion is pending or has not been filed, and collateral counsel "has initiated the public records request process." § 119.19(8)(d), Fla. Stat. (Supp. 1998). Rule 3.852(h)(3) exclusively applies to people whose rule 3.850 or rule 3.851 motions had been denied.

This reasonable, common-sense, interpretation of the rule is consistent with the canon of construction which holds that where a rule is intended to apply to different classes of cases, the provision most closely related to a party's case governs that case. *See Edmond v. United States*, 520 U.S. 651, 657 (1997)(where specific provision conflicts with general one the specific governs). Mr. Sims and many other similarly situated persons relied upon this plain reading of the rule. Having induced Mr. Sims's forbearance through the statute and the rule, the state cannot now, consistent with the Due Process Clause of the United States Constitution, withdraw his rights to request and obtain public records. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

Undersigned counsel has conferred with the litigation directors and chief assistant CCRCs from each regional office and is authorized to represent that **no one** has ever read rule 3.852(h)(2) to apply to cases in which post-conviction relief had been denied. *See* Attachments A, B, & C.[1]

Were this Court to interpret rule 3.852(h) in the radical manner proposed by the state, it would have an adverse impact on every capital post-conviction defendant whose rule 3.850 or rule 3.851 motion had been denied prior to October 1, 1998. The

[1]Attachment C, letter from the Chief Assistant CCRC for the Northern Region, is being prepared. It will be filed under separate cover and served on opposing counsel as soon as it is ready.

state's radical reinterpretation of the rule would completely undermine the reasonable expectations of numerous capital post-conviction defendants. *See* Attachments.

CONCLUSION

For the foregoing reasons, Mr. Sims respectfully submits that the state's surprise reinterpretation of rule 3.852(h) should be rejected, the lower court's decision denying Mr. Sims's motion to compel should be reversed, a stay of execution should issue, and this case should be remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Brief is being sent via facsimile transmission, copy to follow by United States mail, first class postage prepaid, Kenneth S. Nunnelley, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Blvd., Daytona Beach, Florida 32118-3958, this 18st day of October, 1999.

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ATTACHMENT A

ATTACHMENT B

ATTACHMENT C