

IN THE SUPREME COURT OF FLORIDA

**CASE NO. SC12-509
LOWER CASE NO. 2007-CF-2377**

JAMES L. DRISCOLL JR, et al,

Appellant,

v.

DAVID BYRON RUSS, et al,

Appellee

**INITIAL BRIEF OF DISCHARGED COUNSEL PURSUANT TO
FLORIDA RULE OF CRIMINAL PROCEDURE 3.851(i)(8)(B)**

**JAMES L. DRISCOLL JR.
FLORIDA BAR NO. 0078840**

**DAVID D. HENDRY
FLORIDA BAR NO. 0160016**

**CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544**

DISCHARGED COUNSEL
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REQUEST FOR ORAL ARGUMENT

Discharged counsel does not request oral argument.

PRELIMINARY STATEMENT REGARDING REFERENCES

The record from Mr. Russ' Motion to Dismiss CCRC/Also to Dismiss Pending Postconviction Proceedings Beyond the Initial Appeal (Motion) is contained in the record attached to the Circuit Court's order granting the Motion. All other references are explained in the brief or are self-explanatory.

STATEMENT OF THE CASE AND OF THE FACTS

The facts detailed herein are limited by discharged counsel's time to review this case and are without the benefit of detailed record review, investigation and consultation with Mr. Russ. The facts from the pendency of Mr. Russ' case in the circuit court are from this Court's opinion and the respective briefs of appellate counsel. These facts are presented here without the development of facts outside the record.

No jury ever determined Mr. Russ' guilt or innocence or the applicability of the death penalty because Mr. Russ pleaded guilty and waived his right to present mitigation and his right to a penalty phase jury. Before a trial could take place, Mr. Russ' trial counsel informed the trial court that Mr. Russ wanted to waive a penalty phase jury and the presentation of all mitigation. The trial court conducted a hearing pursuant to *Koon v. Dugger*, 619 So.2d 246 (Fla. 1993). The trial court appointed special counsel to present mitigation.

At the penalty phase, special counsel:

(1) present[ed] prison medical records from previous incarcerations, (2) develop[ed] four witnesses' testimony through cross-examination, and (3) argu[ed] against imposition of the death penalty and not[ed] a number of potentially mitigating factors. Special counsel called three witnesses during the penalty phase. Special counsel also presented Russ's records from the following facilities: (1) the Texas Department of Criminal Justice (1993-1996); (2) the University Medical Center, Lubbock, Texas (1996 1998); (3) the Texas Department of Criminal Justice (1998-2001); (4) the Correctional Managed Health Services, State of Texas (2001- 2005); and (5) the John E. Polk Correctional

Facility (May 2007-present). Additional documents were admitted into evidence, such as Russ's (1) G.E.D., (2) college transcripts showing a G.P.A. of 3.67, (3) letter of acceptance to Texas Tech, (4) scholarship donor forms, and (5) thank-you letters to the scholarship donors.

Russ v. State, 73 So.3d 178, 186 (Fla. 2011). (Footnote omitted). At the penalty phase hearing special counsel noted the existence of Mr. Russ':

(1) substance abuse addiction, (2) physical and verbal abuse that he experienced as a child, (3) relationship with his brother, (4) multiple attempts to cure his addiction, (5) acceptance of responsibility for the crimes, (6) courtroom behavior, (7) obtaining a GED, (8) employment as a roofer, (9) depression, (10) training as a counselor, (11) relationship with his fiancée's son and with his 80 year old aunt, (12) lack of violent criminal history, and (13) desire to spare people from the penalty phase proceedings.

Id. fn 3.

At the *Spencer* hearing, special counsel presented as mitigation that:

(1) Russ suffered from a long-term severe addiction to illegal drugs; (2) the crimes of conviction were the result of a long history of drug abuse and a direct result of said addiction; (3) Russ was severely physically abused as a child by his father; (4) Russ was verbally abused as a child by his father; (5) Russ had the capacity to form and maintain loving relationships with family members, before and after incarceration; (6) Russ was a devoted brother; (7) Russ was a devoted son to his mother; (8) Russ suffered from multiple medical problems, including: (a) a thyroid condition, (b) hepatitis C, (c) head trauma, (d) severe headaches, (e) vertigo, (f) vision problems, (g) dental problems, (h) heart attack, (i) allergies, (j) kidney stones, (k) chronic acid reflux, (l) asthma, and (m) degenerative disc; (9) Russ made numerous attempts to cure his drug addiction by going to multiple drug rehabilitation programs; (10) Russ was spending \$500-600 each week on cocaine prior to the crimes of conviction; (11) Russ suffered from undiagnosed mental illness due to his physical abuse and drug use; (12) Russ pleaded guilty to the crimes and accepted responsibility

in this matter; (13) Russ behaved appropriately in the courtroom; (14) Russ obtained his high school GED; (15) Russ had the trade skill of being a roofer; (16) Russ suffered from depression; (17) Russ had been taking prescription medicine while in custody which was very helpful for his mental health status; (18) Russ had been trained and educated in the field of drug abuse; (19) Russ attended Western Texas College from 1994 to 1997 and had a cumulative GPA of 3.67; (20) Russ was accepted to attend school at Texas Tech University in Lubbock, Texas, on July 17, 1997; (21) Russ was a member of the Center for the Study of Addiction which was run by Dr. Carl Anderson, Ph.D., at Texas Tech University; (21) Russ received a substance abuse studies scholarship for him to address his substance abuse addiction with Dr. Anderson on December 10, 1996; (22) Russ wrote a thank-you note and kind words to scholarship sponsors concerning his receipt of the scholarship in 1997 and 1998; (23) Russ was a father figure to the young son of his live-in girlfriend; (24) Russ took his girlfriend's son fishing and helped with his school work; (25) Russ carried an 80 year old woman from her car to the ocean so she could sit in a chair and fish; (26) Russ had a loving relationship with his girlfriend; (27) Russ did not want to put the victim's family members through the emotional process of the penalty phase proceedings; (28) Russ had been counseling children concerning criminal activity and the dangers of drug use while in custody at the county jail for roughly the previous twelve months the counseling was part of a program run by the Sheriff's Office; (29) Russ had no violent criminal history.

Id. at 186-87.

In the sentencing order the court found the aggravating circumstances that the capital felony was: (1) Committed while the defendant was engaged in the commission of a kidnapping (significant weight); (2) committed for pecuniary gain (moderate weight); (3) especially heinous, atrocious, or cruel (HAC) (great weight), and; (4) committed in a cold, calculated, and premeditated manner (CCP) (great weight).

Incorrectly listed as “statutory mitigators” in this Court’s opinion, *id.* at 187, the trial court found: (1) Russ had an abusive childhood (moderate weight), and (2) Russ suffered from severe, long-term addiction to drugs which he was unable to conquer despite numerous attempts at rehabilitation (some weight).” Neither one appears to be a statutory mitigating factor under Section 921.141(6), Florida Statutes. With regard to statutory mitigation, the trial court noted that no evidence of any of the listed circumstances were presented or argued. (Vol. IX R. 1648)

The trial court also found the following nonstatutory mitigating factors:

(1) the defendant was remorseful for the homicide (moderate weight), (2) the defendant suffered from multiple medical problems (very little weight), (3) the defendant had the capacity to form and maintain loving and caring relationships with both family and nonfamily members (little weight), (4) the defendant had pursued higher education and was skilled in the roofing trade (little weight), (5) the defendant had no violent criminal history (little weight), (6) the defendant behaved appropriately in the courtroom (little weight), and (7) the defendant wrote thank-you notes to his scholarship donors at Texas Tech University in 1997 (very little weight).

The trial court sentenced Mr. Russ to death for first-degree murder. *Id.* at 187. The trial court also sentenced Mr. Russ to life imprisonment for kidnapping with a weapon, robbery with a deadly weapon, and burglary of a dwelling with an assault or battery. *Id.* 187-88. The court sentenced Mr. Russ to 5 years for the grand theft motor vehicle. *Id.* All sentences were concurrent. *Id.* at 188.

On direct appeal of his death sentence, Mr. Russ’ appellate counsel raised two issues:

Point I: The trial court failed to follow the required procedure where a defendant waives the presentation of mitigation, and affirmatively ignored valid mitigation, rendering Russ's death sentence unconstitutional under the Eighth and Fourteenth Amendments and Article I, Sections 9, 16, and 17 of the Constitution of Florida.

Point II: The Appellant's death sentence was impermissibly imposed, rendering the death sentence unconstitutional.

On September 22, 2011, this Court issued its opinion affirming Mr. Russ' conviction and death sentence. On Point I, this Court found that the trial court did not abuse its discretion. *Id.* at 191. On Point II, this Court affirmed the trial court's finding of the CCP and the HAC aggravating factors and found that the death sentence was proportional. *Id.* at 196, 197, 199. Although not raised, this Court considered the sufficiency of the evidence and found that Mr. Russ' plea of guilty knowing, intelligent and voluntary. *Id.* at 200.

After this Court issued the opinion in Mr. Russ' case, Mr. Russ' appellate counsel did not seek rehearing. No Petition for Writ of Certiorari was filed in the United States Supreme Court. This Court issued the Mandate on October 14, 2011. On the same date, this Court appointed the Office of the Capital Collateral Regional Counsel-Middle Region (CCRC-M). The Court ordered that CCRC-M shall "within thirty days from this date of this order, file a notice of appearance in the trial court or a motion to withdraw based on a conflict of interest or some other legal ground." CCRC-M filed a "Conditional Notice of Appearance" on November 14, 2011.

In a motion dated November 1, 2011, Mr. Russ moved to dismiss counsel and waive all postconviction proceedings. On December 1, 2011, the trial court held a status conference and informed CCRC-M of Mr. Russ' motion. The trial court ordered CCRC-M to meet with Mr. Russ and then inform the court of Mr. Russ' intentions regarding the motion. On December 20, 2011, CCRC-M traveled to Florida State Prison to see Mr. Russ and other clients. Mr. Russ refused to meet with CCRC-M. On December 21, 2012, counsel filed a "Report of CCRC-M's Attempt to Meet with the Defendant David B. Russ and Discern His Intentions Concerning His Pro-se Motion to Dismiss CCRC-M and All Postconviction Litigation."

The trial court set Mr. Russ' motion for a hearing on January 19, 2012. At the close of the hearing the court indicated that it was going to grant Mr. Russ' motion and order would be forthcoming. The clerk received the trial court's order on February 10, 2012. On February 17, 2012, discharged counsel filed a Notice of Seeking Review in the Supreme Court of Florida as Required Under Florida Rule of Criminal Procedure 3.851(i)(8)(B).

SUMMARY OF ARGUMENT

The process of Mr. Russ' waiver was unnecessarily hasty. The process failed to inform Mr. Russ of all of the different stages of collateral review available

to Mr. Russ at no cost. Moreover, because of the timing of Mr. Russ' waivers, there will be no full investigation and development of any issues that might exist in Mr. Russ' case. Mr. Russ could not knowingly waive the possible issues in his case without discharged counsel investigating and developing such issues and apprising Mr. Russ of these issues. The constitutional protections that Florida's postconviction process offers was rendered a nullity by the discharge of counsel before counsel could fully review Mr. Russ' case. Discharged counsel does not join in these proceedings because Florida's death penalty scheme violates the United States Constitution and, without the postconviction process, Mr. Russ could be executed.

STANDARD OF REVIEW

The standard of review is abuse of discretion. *See Trease v. State*, 41 So.3d 119, 124-125 (Fla. 2010).

I. WHILE DISCHARGED COUNSEL COULD NOT ARGUE AGAINST THE COURT GRANTING MR. RUSS' MOTION, COUNSEL DOES NOT JOIN, CONTRIBUTE OR ADVOCATE FOR A WAIVER OF MR. RUSS' RIGHT TO SEEK POSTCONVICTION RELIEF.

Collateral counsel has no power to decide who lives or dies and whether such death sentence is constitutional. Counsel opposes the death of Mr. Russ at the

hands of the State, first because he is a human being and the State's killing of him is wrong. Second, through the ongoing work of discharged counsel, it has become apparent that Florida's death penalty is unconstitutional and does not function in reality as asserted in theory.

Postconviction litigation has been removed from basic questions of innocence and right or wrong. Such areas are not litigated in themselves but must be wrapped in the cloak of very technical claims which the law considers. Fundamental issues that strike at the heart of justice and fairness remain hidden in these technical claims. If justice and fairness are remedied it is only because by coincidence they are linked with what the law happens to consider a viable claim.

Without postconviction claims, the possible underlying injustice and unfairness of Mr. Russ' case will not be remedied. This is intolerable in a society that likes to think of itself as a fair and just one. Because the death of Mr. Russ at the hands of the State is wrong, discharged counsel does not join, contribute or advocate for Mr. Russ' waiver of the only manner in which the underlying wrongfulness of his death sentence may be remedied.

II. MR. RUSS HAS THE RIGHT TO PURSUE COLLATERAL RELIEF IN THE STATE AND FEDERAL COURTS AS DETAILED HERE.

From early in the history of the common law the writ of habeas corpus has been available to individuals to test the legality of confinement. Predating American independence, the British Parliament codified the common law writ with the passage of the Habeas Corpus Act of 1679. 31 Car. 2, c. 2, 27. After declaring independence, the newly formed United States ratified Article I Section 9 which provides in relevant part: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The writ was expanded to those held in State custody in 1867. The right to seek habeas review is addressed in 28 U.S.C. § 2254.

Article I, Section 13 of the Florida Constitution states: “Habeas corpus.— The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.” In a Florida capital case, part of this right is enabled through Florida Rule of Criminal Procedure 3.851. This Court has original jurisdiction over petitions for writ of habeas corpus filed in the Court. Article V, Section 3, Florida Constitution.

28 U.S.C. § 2244(d)(1) limits the time for seeking federal habeas review under § 2254 and states:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

For purposes of (d)(1)(A), the judgment becomes final after a Petition for Writ of Certiorari is denied by the United States Supreme Court or the time for seeking a Petition elapses. *See* USSC Rule 13.3. 28 U.S.C. § 2244(2) provides that: “The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Florida Rule of Criminal Procedure 3.851(a) provides in relevant part that: “This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal.” Rule 3.851(b) provides for the appointment of postconviction counsel following this Court issuing the mandate. The time for filing a motion under Rule 3.851 is one year from judgment becoming final. Florida Rule of Criminal

Procedure (d)(1). Final is defined as:

- (A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or
- (B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

There are exceptions to the time limitation of this rule under circumstances such as newly discovered evidence or a retroactive change in the law. Once a motion is filed, Rule 3.851 sets the time for an evidentiary hearing.

Florida Rule of Criminal Procedure 3.852 requires agencies involved in the death sentenced individual's case to send public records to the repository and claim exemptions. This Rule provides for time limits for the agencies to produce records. It also allows for the death sentenced party to seek additional and supplemental records with procedures and time limits for doing so.

Separate and apart from Rule 3.851, Florida Rule of Criminal Procedure 3.853 provides a mechanism for the condemned to seek DNA testing. Following the denial of a Rule 3.853 motion there is a right to appeal to this Court. If DNA testing exonerates it would be newly discovered evidence and would be the basis for a successive Rule 3.851 motion. Additionally, newly discovered evidence allows passage through the "gateway" to allow otherwise procedurally barred claims to be heard in federal court. *See Schlup v. Delo*, 513 U.S. 298 (1995). With the initial brief following the circuit court's denial of a Rule 3.851, the condemned

may file an original petition for writ of habeas corpus in this Court.¹ If the Court affirms the denial of the Rule 3.851 motion, the case becomes final upon issuance of the mandate and the tolling of 28 U.S.C. § 2244(2) stops. A Petition for Writ of Certiorari can be filed in the United States Supreme Court but this does not toll the time for filing a federal habeas petition. From this Court's mandate, a death sentenced individual then has the remaining time to file a Petition for Writ of Habeas Corpus under 28 U.S.C. §2254.

Federal law allows for the appointment of counsel to represent the indigent death-sentenced individual during the federal habeas process. Appointed counsel, whether from the CCRCs or the registry, will usually file the petition and seek *nunc pro tunc* appointment. With *informa pauperis* status there is no cost to file a federal habeas petition, to appeal to the United States Circuit Court of Appeal for the Eleventh Circuit and to file a Petition for Writ of Certiorari in the United States Supreme Court.

Without state and federal postconviction, any violation of the United States Constitution in Mr. Russ' case will be unremedied. The possibility of an individual being executed in violation of the Constitution is disturbing. It is even more so if the possibility of repeat violations is considered. A constitutional

¹ While this may not have ever happened, it seems technically possible that a State Petition for Writ of Habeas Corpus can be filed without out seeking postconviction relief under Rule 3.851.

violation that is remedied through the postconviction process prevents these errors from occurring in

other cases because the courts' decisions educate the future participants in a criminal trial of the error. To the extent that the constitutional error was the result of deliberate misconduct, a postconviction remedy provides a penalty that will hopefully discourage recidivism.

The legal processes listed here would all be available to Mr. Russ if he did not waive counsel and these procedures.

III. WHATEVER PURPOSE FLORIDA RULE OF CRIMINAL PROCEDURE 3.851(i) SERVES IT IS NOT FRUSTRATED BY ALLOWING A FULL INVESTIGATION BY POSTCONVICTION COUNSEL BECAUSE THE SIGNATURE AND TIME REQUIREMENT OF RULE 3.851 ALLOWS THE ULTIMATE DECISION OF WHETHER TO SEEK POSTCONVICTION RELIEF TO BE MADE BY THE DEATH SENTENCED INDIVIDUAL AFTER POSTCONVICTION COUNSEL'S REVIEW AND INVESTIGATION WHICH ALSO ALLOWS FOR A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER.

On January 19, 2011, after Mr. Russ filed his *pro se* motion and discharged counsel filed their "Report of CCRC-M's Attempt to Meet with the Defendant David B. Russ and Discern His Intentions Concerning His Pro-Se Motion to Dismiss CCRC-M and All Postconviction Litigation," the trial court held a hearing on Mr. Russ' motion. Rule 3.851 does not set a time for a time for setting a hearing after a motion to discharge postconviction is filed.

Although discharged counsel does not take issue with the court setting a hearing on the motion, there was no reason under Rule 3.851 for the trial court to hold the hearing when it did. The Rule itself applies generally to two distinct situations: In the first, an individual may seek to discharge postconviction counsel before a motion for postconviction relief has been investigated or filed. This is precisely the situation under which Mr. Russ filed his *pro se* motion to discharge counsel and dismiss postconviction proceedings. Other than the time limits imposed on all postconviction litigants, there was nothing unique to Mr. Russ that made it necessary for the trial court to discharge counsel before any investigation and review of Mr. Russ' case could take place.

In the second situation, the individual seeking to discharge postconviction counsel has already filed a motion. While the work of the postconviction attorney is ongoing, and often new facts and issues emerge after the filing of an initial postconviction motion, with the filing of a postconviction there is a great deal of investigation and legal review inherent in the development and production of a motion. Mr. Russ' waiver of postconviction proceedings, and his discharge of counsel, was without the benefit of any review of his case and any explanation of the issues in his case because his Motion was set before discharged counsel could provide any meaningful review of Mr. Russ' case.

Florida Rule of Criminal Procedure 3.851(i)(1) states that this "subdivision

applies only when a prisoner seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel.” Mr. Russ sought to dismiss both. Mr. Russ’ motion also specifically asked “to waive or dismiss any and all postconviction appeals beyond today.” It is clear that Mr. Russ was indicating that he did not want to file any postconviction motion through counsel or *pro se*. Under one construction of 3.851(i)(1), however, there is ambiguity; Mr. Russ did not have any postconviction proceedings pending at the time of his motion and would not have anything pending until and unless he actually filed a motion for postconviction relief. While certainly this Court’s appointment of CCRC-M can be seen as the initiation of “postconviction proceedings,” and the record process of Rule 3.852 is a “proceeding” of sorts, the fact remains that there was no proceedings set for Mr. Russ to actually dismiss. Mr. Russ’ posture was quite distinct from the individual who has filed a Rule 3.851 motion and is about to go to a Case Management Conference or an evidentiary hearing. Such an individual clearly has a motion and those court dates pending.

The point of this matter is that there is no rational reason for requiring a formal hearing when an individual seeks to waive postconviction proceedings and postconviction counsel before the filing of a timely motion under Florida Rule of Criminal Procedure 3.851. If the individual anticipates waiving postconviction proceedings, that individual’s desire is not thwarted by counsel reviewing the case

with or without the cooperation of the putative client. If the client does not want to provide information, the client does not have to do so. If the client does not want to even speak to counsel, that also entirely would be in the client's discretion. Even without cooperation there would be at least some legal review of the case and the death sentenced individual could be informed of possible issues before waiving postconviction.

When the date for filing a motion approaches, the client would be able to exercise complete control of whether a motion is filed because, barring incompetency, the putative client is reasonably the only person whom can sign the verification. *See* Rule 3.851(e)(1); (“The motion shall be under oath . . .”). While the Rule does not specify whose oath, it is generally assumed that this means the client's oath. The Federal Rules of Habeas Corpus, from which the Florida postconviction rules seemed to be derived, allow the federal habeas petitioner's attorney to sign as an authorized party *for* the petitioner. *See* Rules Governing § 2254 Cases, Rule 2; 28 U.S.C. §2242(c)(5). Ultimately, if a motion is filed without the putative client's signature there would without question be a postconviction proceeding pending and the individual can move to dismiss both under Rule 3.851(i).

Left unanswered because of the timing of the waiver of postconviction proceedings and the discharge of counsel in the instant case is the issue of what

would happen if Mr. Russ changes his mind before the expiration of the postconviction time limitations.² There have been cases in which the postconviction petitioner sought to reinstate the postconviction process and have counsel reappointed. *See Trease v. State*, 41 So.3d 119,120-121(Fla. 2010)(where amongst other events, the postconviction court reinstated postconviction proceedings and appointed counsel).

When a Rule 3.851 motion is filed before the court decides a motion to waive postconviction, the Rule 3.851 motion is denied with prejudice if the court grants the waiver motion. *Res judicata*, in addition to any time bar, prevents the consideration of at least the original postconviction motion because it was denied with prejudice. Mr. Russ is not time barred from filing a Rule 3.851 motion and he has not had a prior motion dismissed with prejudice. This would lead to a conclusion, albeit an uncertain one, that Mr. Russ legally could either request counsel be appointed at a later date or file his own postconviction action in state or federal court before the applicable time periods lapse.

If Mr. Russ filed his own motion, the courts would inevitably appoint counsel because, as Justice Anstead once stated in concurrence, “Obviously, a capital defendant imprisoned on death row has little or no ability or means to

² Discharged counsel is not suggesting that there are any indications that Mr. Russ would do so.

evaluate the fairness of these complex and sensitive legal proceedings or to evaluate trial counsel's competence and conduct." *Arbelaez v. Butterworth*, 738 So.2d 326, 332 (Fla. 1999). Counsel would then have to obtain the records that are available and draft a motion in a truncated time period.³

The highly unlikely scenario that Mr. Russ would change his mind highlights the potential pitfalls of allowing a waiver of postconviction before the case has been fully investigated and before the applicable time limit is set to expire. Because Mr. Russ did not have a motion that was on the path for consideration at the time he waived counsel and postconviction, should Mr. Russ change his mind and want to pursue postconviction, counsel would of course be ready and willing to provide whatever representation possible. This would, however, be on a truncated basis that was caused by the timing of Mr. Russ' waiver and certainly would not provide Mr. Russ with the representation he would receive if counsel worked through the normal time limits for filing a motion.

Mr. Russ' discharge of counsel and of all postconviction proceedings occurred in a hasty manner that was not, or should not be, required under the law. Mr. Russ waived his right to postconviction before he could be apprised of the

³ It is unclear whether the agencies that were required to submit public records under Rule 3.852 will fulfill this obligation and whether CCRC-M will receive them.

possible claims that he was waiving because discharged counsel had not had the time or even all of the records to completely investigate and develop all of the possible claims Mr. Russ was giving up.

There was no reason that the hearing in Mr. Russ' case needed to occur when it did, even if the process allowed it.

CONCLUSION

While the trial court did not err in conducting the motion hearing and granting Mr. Russ' motion, the procedure occasioned by the Rule was premature and contrary to the credibility of Florida's death penalty scheme. Proper review by postconviction counsel would have allowed Mr. Russ to make an informed decision and would have brought to light any constitutional infirmity in the State's seeking a death sentence for Mr. Russ. While discharged counsel certainly respects Mr. Russ' decision, he should rest assured that if he in fact does change his mind and wishes to seek postconviction, counsel will provide as much representation as the courts will allow.

CONCLUSION

Discharged counsel respectfully submits this brief for this Court to consider the process involved when an individual waives fundamental rights affecting the

fairness of Florida's death penalty system.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by U.S. Mail to all counsel of record on this 9th day of April, 2012.

JAMES L. DRISCOLL JR.
Florida Bar No. 0078840
Assistant CCRC

David Dixon Hendry
Florida Bar No. 0160016
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Discharged Counsel

Copies furnished to:

Barbara C. Davis, Assistant Attorney General, Office of the Attorney General, 444
Seabreeze Blvd., 5th Flr., Daytona Beach, FL 32118

Office of the State Attorney, 101 Bush Blvd., Sanford, FL 32773,
David Byron Russ, DC#35896, Florida State Prison, 7819 NW 228th St., Raiford,
FL 32026-1000

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

JAMES L. DRISCOLL JR.
Florida Bar No. 0078840
Assistant CCRC

David Dixon Hendry
Florida Bar No. 0160016
Assistant CCRC

CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE
3801 Corporex Park Dr., Ste. 210
Tampa, Florida 33619
813-740-3544
Attorney For Appellant