

IN THE SUPREME COURT OF FLORIDA

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

JAMES L. DRISCOLL JR., et al,

Appellants,

v.

DAVID BYRON RUSS, et al,

Appellees

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

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DISCHARGED COUNSEL

REPLY

As required by the briefing schedule, the Appellants served their initial brief on April 9, 2012. The briefing schedule gave the Appellees, the State of Florida and Mr. Russ personally, 20 days to serve answer briefs. The State served an Answer Brief on April 16, 2012. Mr. Russ appears to have not filed an Answer Brief. According to Florida Rule of Criminal Procedure 3.851(1)(8)(B), Mr. Russ was not required to file a brief as the Rule states: “Both the prisoner and the state *may* serve responsive briefs.” *Id.* (Emphasis added).

The time for Mr. Russ to file an Answer Brief, set by this Court, appears to have lapsed on April 29, 2012. Should Mr. Russ decide that some sort of submission to this Court is appropriate, Discharged Counsel respectfully requests that this Court consider such a submission because Discharged Counsel cannot advocate for Mr. Russ and the State is incapable of protecting Mr. Russ’ interests.

REPLY TO THE SUMMARY OF THE ARGUMENTS AND ARGUMENT

Discharged Counsel made no claim in their Initial Brief that the circuit court failed to follow the procedures set forth in Florida Rule of Criminal Procedure 3.851. Discharged Counsel had to file a brief as required by the Rule and by Order of this Court. While Discharged Counsel thinks it is a bad decision for Mr. Russ to waive counsel and all collateral proceedings, and are fundamentally opposed to his execution, there was absolutely nothing counsel could do to prevent Mr. Russ’

waivers or to stop his future execution. Nevertheless, a brief was due and counsel, now listed in this Court's case style as the Appellants, had to file a brief.

From Discharged Counsel's review of some of the other waiver cases which this Court has considered or which are pending, usually discharged counsel raises the issue of competency to waive. If there is a question of competency, counsel may move for a competency determination even if the client is opposed to raising issues. Even if the experts find the defendant competent to waive, counsel can still challenge competency in the circuit court and raise the issue on appeal.

Unfortunately, Discharged Counsel could not raise an incompetency claim in the circuit court or in this Court because Discharged Counsel had absolutely no knowledge or opinion on whether Mr. Russ was competent to waive postconviction because prior to being discharged counsel had no opportunity to meet with Mr. Russ. Moreover, having seen many cases in which competency to stand trial, proceed in postconviction, or to be executed has been at issue, there was no possibility that a court-appointed psychologist would find Mr. Russ to be incompetent, so trying to argue to the circuit court that it should force Mr. Russ to submit to a competency evaluation would have been adverse to Mr. Russ' desires and futile.

The State argues at page 6 that, "Collateral counsel represented that he had met with Russ that day and Russ was 'very strong in his belief.' (WHR23)."

Answer at 6. This statement of “fact” has the potential to be misleading because of a lack of context. What Discharged Counsel actually said was “I had the opportunity to meet him today and he is very strong in his belief and we respect that, but if something changed, I think that we would continue, I guess, to seek the records and so forth.” (WHR 23). The remaining portion of this exchange showed that Discharged Counsel never “met” with Mr. Russ in the sense that there was any sort of meaningful consultation with counsel.

When Discharged Counsel informed the circuit court that he had the opportunity to meet Mr. Russ it was in the sense of: My name is Jim Driscoll and this is David Hendry from CCRC; nice to meet you Mr. Russ. There was nothing that approached the level of an attorney-client meeting that should take place in a death case. While the decision to meet with counsel was Mr. Russ’ decision, the fact that Discharged Counsel introduced themselves to Mr. Russ and spoke with Mr. Russ while waiting for the judge to take the bench should not be taken as counsel having the consultation with Mr. Russ necessary for counsel’s silence on competency to function as proof of competency or that the waiver was constitutionally valid. As made clear in the Initial Brief, Discharged Counsel opposes the execution of any individual by the State. Although, because of the tension between the Rules of Criminal Procedure and the Rules of Professional Responsibility, Discharged Counsel is powerless to prevent Mr. Russ’ waiver and

execution, this does not mean that Discharged Counsel condone it.

Discharged Counsel raised a number of concerns in the Initial Brief. The State rather than confront the troublesome aspects of the procedure followed in every waiver case argues:

To the extent that collateral counsel has now raised issues which were not raised in the lower court, those issues (1) were waived; (2) are not properly before this court in a Rule 3.851(i)/9.14(c) proceeding; and (3) have no merit. This Court's adoption of Rule 3.851(i) and case law both before and after that adoption establish the procedure to be followed. The lower court followed this procedure, explicitly citing to Rule 3.851(1), *Durocher*, and *Trease*.(WHR9, 20)."

Answer at 11. This is incorrect.

Discharged Counsel was Mr. Russ' counsel in theory until the circuit court accepted Mr. Russ' waiver. Discharged Counsel had no standing to raise any issue at Mr. Russ' waiver hearing. When Discharged Counsel filed the notice of seeking review in this Court, as mandated by the Rule, counsel became the Appellants and, for what it was worth, had standing to raise issues. Counsel raised issues in the initial brief concerning whether the procedures the circuit court was required to follow were necessary or prudent for this type of case. Such issues are properly before this Court because counsel filed these issues in the Brief that Rule 3.851 mandated that Discharged Counsel file.

Even if the issues contained in the Initial Brief cannot alter the result of the circuit court's decision, these issues have merit. The circuit court followed the

required procedure in this case. The required procedure in this case, based on the timing of the waiver, failed to square Mr. Russ' right to waive postconviction proceedings with the needed review necessary to confer legitimacy upon a death sentence and Florida's death penalty scheme.

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 Reply has been furnished by U.S. Mail to all counsel of record on this 7th day of May, 2012.

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CERTIFICATE OF COMPLIANCE

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

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