No. 24-7387

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY FLOYD WAINWRIGHT,
Petitioner,

v.

RON DESANTIS, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals

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BRIEF OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, BRONX DEFENDERS, FLORIDA JUSTICE INSTITUTE AND CONSERVATIVES CONCERNED AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici Curiae are organizations that have an interest in the development of constitutional law that ensures the ethical representation of indigent people accused of and sentenced for criminal conduct, and especially condemned people, sentenced to death. Amici believe that courts' acceptance of filings by convicted litigant's chosen, willing, and ready counsel is vital to afford due process.

The **Florida Association of Criminal Defense Lawyers** ("the Association") is a nonprofit membership organization of over 1,300 practicing criminal defense attorneys with twenty-nine chapters throughout Florida. The Association promotes education and scholarship in criminal defense law to promote excellence and integrity among criminal defense lawyers.

The **Bronx Defenders** ("BxD") is a nonprofit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Each year, BxD defends over 25,000 low-income Bronx residents in criminal, civil, family, and immigration cases and reaches hundreds more through outreach programs and community legal education. Through BxD's criminal defense work, BxD has seen firsthand how critical it is for

[1] Pursuant to Rules 37.2(a) and 37.6, Amici certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, *amici* members, or *amici* counsel made a monetary contribution to its preparation or submission.

the accused not only to be represented by competent counsel capable of providing zealous representation but also that the accused's choice of counsel be respected.

The **Florida Justice Institute** ("FJI") is an award-winning nonprofit, public interest law firm that uses impact litigation and advocacy to improve the lives of Florida's disenfranchised residents and underinvested communities while preserving human rights in the justice system, empowering vulnerable populations experiencing homelessness and poverty, and providing dignity for people with disabilities. FJI has filed and prevailed in numerous civil rights lawsuits challenging unconstitutional prison conditions, including for those on Florida's death row. FJI supports the rights of Florida prisoners to make decisions about aspects of their lives, including critical and appropriate stages of court proceedings.

Conservatives Concerned is a network of political and social conservatives who question the alignment of capital punishment with conservative principles and values. Our programs include educating conservatives about the failed death penalty system and mobilizing them to bring about its end.

SUMMARY OF ARGUMENT

Refusing to recognize filings by chosen counsel strips condemned, death-row litigants of their choice over litigation objectives and denies access to courts and due process. The decision to seek postconviction relief belongs to clients, who should not be denied the ability to pursue nonfrivolous claims when a qualified, prepared attorney stands ready to file. Mr. Wainwright lost his ability to file a nonfrivolous

state habeas petition because the Florida Supreme Court rejected his authority to decide whether to file a habeas petition and his choice of attorney to prepare and file it. Clients, and not counsel, get to set litigation objectives. Refusing to recognize filings by qualified, prepared counsel who stands ready and willing to file deprives death-row inmates of authority to decide whether to seek relief, and ultimately, of the opportunity to be heard, denying due process.

STATEMENT OF FACTS

The Florida Supreme Court refused to recognize Mr. Wainwright's state habeas petition unless lead appointed counsel, who wanted nothing to do with the petition, adopted or filed the pleadings himself within one day. Lead counsel had little time or desire to deal with his client. After Governor Ron DeSantis signed Mr. Wainwright's death warrant, scheduling the execution a month later, the Florida Supreme Court issued a scheduling order requiring all appeals and petitions to be filed within eleven days. But Baya Harrison, Mr. Wainwright's appointed lead counsel, informed his client of the death warrant by sending an incorrectly addressed letter which took ten days to arrive. Without consulting his client, Mr. Harrison waived an evidentiary hearing, declined to file public records requests, and filed a single claim postconviction motion. In fact, Mr. Harrison had not spoken personally with his client once during his decade-long representation and had waived Mr. Wainwright's right to appear.

As a death row inmate, Mr. Wainwright could not initiate phone calls or proceed *pro se*. Unable to communicate with Mr. Harrison, Mr. Wainwright consulted with Terri Backhus, pro bono counsel who had previously represented him in a federal habeas action. Mr. Wainwright consented to a motion for substitution of counsel and a postconviction motion putting forth multiple claims. A Florida trial court declined to instate Ms. Backhus, instead relegating her to second chair. After Mr. Wainwright's postconviction motion, filed by his appointed lead counsel, was denied, Mr. Wainwright specifically requested that Ms. Backhus file a state habeas petition.[2] Ms. Backhus offered to send a copy to the appointed lead counsel and requested he sign the petition. Mr. Harrison indicated he wanted nothing to do with it. Ms. Backhus filed a state habeas petition, a notice of appearance, and motion for stay of execution with the Florida Supreme Court.

Without notice, the Florida Supreme Court entered an order on May 27, 2025, recognizing Mr. Harrison as lead counsel and directing him to file a notice adopting the petition and stay motion, where failure to do so would result in the striking of said filings. The Court's May 27, 2025, Order provided in full:

"On May 20, 2025, Terri Backhus filed a petition for writ of habeas corpus and motion for stay of execution on behalf of Anthony Floyd Wainwright. Since Baya Harrison is lead postconviction counsel for Wainwright, it is ordered that Mr.

[2] Mr. Wainwright alleged that the Florida Supreme Court should reconsider its prior adversarial rulings in Mr. Wainwright's case because the pervasive, systemic failures that occurred at every stage of his proceedings hindered his ability to obtain meaningful review of his constitutional claims, rendering his death sentence manifestly unjust.

Harrison file a notice adopting the habeas petition and motion for stay of execution. Failure to file such an adoption by May 28, 2025, will result in the striking of said filings. [¶] All further filings on behalf of Wainwright in this case shall contain the signature of both counsel."

Mr. Harrison, without consulting Mr. Wainwright, refused to adopt both filings. The state court struck the pleadings as unauthorized because they were filed by petitioner's second chair counsel rather than the lead counsel whom petitioner had tried to replace.

Mr. Wainwright lost his opportunity to file his state habeas petition less than two weeks before his scheduled execution because the Florida Supreme Court refused to recognize his chosen attorney.

ARGUMENT

I. THE DECISION WHETHER TO FILE A NON-FRIVOLOUS STATE HABEAS PETITION IS ENTRUSTED TO THE CLIENT, NOT THE CLIENT'S LAWYER.

Several weeks before Anthony Wainwright's scheduled date of execution, one of his attorneys, Terri Backhus, acting with Mr. Wainwright's authorization, sought to initiate a new proceeding by filing a state habeas petition on Mr. Wainwright's behalf in the Florida Supreme Court. No one has asserted that the petition was frivolous or otherwise deficient. The Florida Supreme Court refused to consider the filing, however, unless Mr. Wainwright's court-appointed counsel, Baya Harrison, authorized the habeas petition to be filed. Mr. Harrison did not approve the habeas

petition, nor did he file a habeas petition of his own, with the result that the Florida Supreme Court struck the filing, and Mr. Wainwright was entirely denied access to habeas proceedings in the state supreme court before his scheduled execution.

There is no question that Ms. Backhus was qualified to prepare and file the habeas petition in this case. Ms. Backhus, a member of the Florida bar, had previously represented Mr. Wainwright in federal post-conviction proceedings and subsequently represented him in the state circuit court along with court-appointed lead counsel. There is also no question that Mr. Wainwright authorized Ms. Backhus to initiate a habeas proceeding in the Florida Supreme Court on his behalf. The state supreme court did not explain its order providing that the petition had to be authorized, not by the petitioner, but by a different lawyer in the matter. That court took its lead from the state circuit court, which had authorized Ms. Backhus to serve as co-counsel subject to a similar limitation, namely, that she could not file any pleading or make any argument without Mr. Harrison's express approval.

The Florida Supreme Court's ruling is contrary to conventional professional and constitutional understandings. Rule 1.2(a) of the ABA Model Rules of Professional Conduct sets forth the applicable principle: "[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." Rule 4-1.2(a) of the Rules Regulating the Florida Bar ("Florida Rules") is to the same effect. This principle derives from agency law. *See* Restatement (Third) of the Law Governing

Lawyers § 21, cmt. d (2000) ("A client may give instructions to a lawyer during the representation about matters within the lawyer's reasonable power to perform, just as any other principal may instruct an agent.").

The principle that the client, not the lawyer, determines the lawful objectives of the representation underlies various decisions on the constitutional right to effective assistance of counsel. For example, although a lawyer need not accede to a criminal litigant's request regarding what arguments to make on appeal, because that is a strategic decision entrusted to the lawyer, *see Jones v. Barnes*, 463 U.S. 745 (1983), a lawyer must comply with the litigant's instructions to file a notice of appeal because the decision to initiate an appeal is an objective of the representation, not a strategic decision. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Under this principle, it is the convicted litigant, not the lawyer, who decides whether to seek post-conviction relief. The lawyer must file a nonfrivolous habeas petition if directed by the client to do so but may not file such a petition if the client instructs the lawyer not to do so. *Sanchez-Velasco v. Sec'y of the Dep't of Corr.*, 287 F.3d 1015, 1027 (11th Cir. 2022) ("no attorney should ever file a habeas petition in the name of an inmate he has not even bothered to speak with, much less obtain permission from") (citing Florida Rule 4-1.2(a)); *Ford v. Tate*, 835 S.E.2d 198, 238 (Ga. 2019) (Blackwell, J., concurring) ("When a habeas petitioner represented by counsel indicates that he wishes to withdraw his petition and discontinue the

proceedings, his lawyer certainly may take some time to fully advise the petitioner about his legal options . . .. But once the lawyer has discharged these responsibilities, the lawyer ultimately must honor the decision of a competent client. And at that point, the ethical obligation of the lawyer is to help the client achieve the lawful objective of the representation — here, the discontinuation of habeas proceedings — not to press on with the pursuit of relief that the client no longer wants.") (citing Ga. R. Prof. Conduct 1.2 (a)).

Here, the Florida Supreme Court took the decision whether to file a nonfrivolous habeas petition away from the client. Mr. Wainwright had communicated his desire to submit the habeas petition prepared by Ms. Backhus. But the Florida court gave unilateral authority to a lawyer who had no time or desire to prepare a habeas petition himself and who opposed allowing Ms. Backhus to file the one that Mr. Wainwright authorized her to prepare.

The Florida court had no legitimate reason to give Mr. Harrison a veto over Mr. Wainwright's decision, in consultation with Ms. Backhus, to initiate the habeas process in the state supreme court. Nothing suggests that Ms. Backhus was unqualified or ineligible to serve as counsel, that she delayed or abused the judicial process in any way, or that the petition she filed was in any way deficient. Nor did Mr. Harrison have a legitimate reason to exercise his veto. The Florida court's ruling deprived Mr. Wainwright of authority to decide to initiate a habeas proceeding.

II. THE CHOICE OF COUNSEL TO INITIATE A STATE HABEAS PROCEEDING IS LIKEWISE FOR THE CLIENT, NOT THE CLIENT'S LAWYER.

The Florida Supreme Court's ruling also denied Mr. Wainwright the authority to choose which lawyer would file the habeas petition and conduct the representation in the state supreme court, if a petition were to be filed. Although Ms. Backhus was then representing him with Mr. Harrison in a different state court proceeding, and she had agreed to represent him without compensation in the Florida Supreme Court, she was not allowed to do so without Mr. Harrison's assent, which was withheld.

The Florida rules of procedure provide for a court to appoint lead postconviction counsel in capital cases but do not expressly give lead counsel exclusive authority over representation in all state court proceedings. Fla. R. Crim. P. 3.851(b)(4) provides: "In every capital postconviction case, one lawyer shall be designated as lead counsel for the defendant. The lead counsel shall be the defendant's primary lawyer in all state court litigation." Pursuant to this provision or under its supervisory power, the Florida Supreme Court authorized Mr. Harrison as lead counsel to determine whether to file a habeas petition on the client's behalf, even though Mr. Wainwright authorized Ms. Backhus, another qualified member of the Florida bar, to do so.

At the trial stage, criminal litigants who have the ability to secure counsel have a right to be heard through that chosen counsel; this right to "counsel of

choice" is a fundamental aspect of the Sixth Amendment right to counsel. *See, e.g.*, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). A party's ability to be heard through the qualified attorney who the party has authorized, rather than through an attorney dictated by the court or the state, is no less important to the fairness of post-conviction proceedings. That is especially true here, because predictably, in closing the courthouse door to Mr. Wainwright's chosen attorney, the Florida Supreme Court denied Mr. Wainwright access to the state supreme court's habeas process altogether.

III. THIS COURT SHOULD CLARIFY THAT, IN THE POST-CONVICTION CONTEXT, A COURT'S AUTHORITY OVER CASE MANAGEMENT DOES NOT INCLUDE DELEGATING UNILATERAL AUTHORITY TO "LEAD POSTCONVICTION COUNSEL" TO DECIDE WHETHER TO FILE A HABEAS PETITION.

It is uncertain, and perhaps unknowable, how often courts employ the practice adopted by the Florida courts to restrict a party's procedural rights in post-conviction death-penalty proceedings. It does not appear that all courts assign lead counsel authority over all judicial filings in postconviction capital proceedings. *See Sigmon v. Stirling*, Civil Action No.: 8:13-cv-01399-RBH 2018 U.S. Dist. LEXIS 168699, at *64 (D.S.C. Sept. 30, 2018) ("There is no rule [in South Carolina] setting forth how duties should be divided between lead counsel and second chair counsel in a capital case."). This judicial practice is unlikely to be acknowledged in reported decisions, much less to be challenged by parties and addressed in reported decisions.

One can anticipate that other courts might occasionally – albeit mistakenly – adopt the same practice in post-conviction proceedings because courts legitimately employ it in certain civil proceedings pursuant to procedural rules or their inherent authority over case management. For example, a court in a class action may authorize a single lawyer to decide whether to make motions on behalf of the class. *See, e.g.*, *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 763-64 (9th Cir. 1977) (pursuant to Fed. R. Civ. P. 43, to avoid unnecessary cost and delay, the court ordered that only lead counsel could file pretrial motions unless other counsel secured court authorization). The practice is permissible in a class action for multiple reasons that have no relevance in criminal or post-conviction proceedings: The decision whether to file a motion in a class action (as distinguished from a habeas petition) is ordinarily a strategic one entrusted to counsel; in a class action, even decisions ordinarily entrusted to the client are made by class counsel; and the class's "choice of counsel" (or interim class counsel) is itself entrusted to the court to decide.

This is an appropriate case in which to determine whether a party in a post-conviction proceeding is denied constitutional due process when, as an apparent exercise of statutory or inherent case management authority, a court removes decision-making authority from the client and gives it to one of the client's lawyers. The implementation of this practice mattered here, because the result was to deny a death-row inmate, who faces imminent execution, an opportunity to employ an

available legal procedure to challenge the constitutionality of his conviction or sentence, and to authorize the qualified lawyer he preferred to represent him in that process. The implementation of this procedural device could not have been more impactful or less justified.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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