

*In The Supreme Court of Florida*

DONALD JAMES SMITH,

*Appellee,*

v.

CASE NO. SC18-822

STATE OF FLORIDA,

*Appellant.*

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MOTION TO CLARIFY OPPOSING COUNSEL'S NOTICE OF APPEARANCE

On November 19, 2018, opposing counsel, Rocco J. Carbone III, filed a notice of appearance in this Court in this capital case. The notice of appearance, however, did not comply with the rules of court governing notice of appearances in capital cases.

The rule of criminal procedure governing the minimum standards for attorneys in capital cases, rule 3.112(i), requires a notice of appearance to be filed by capital counsel. The rule provides:

Notice of Appearance. An attorney who is retained or appointed in place of the Public Defender or Criminal Conflict and Civil Regional Counsel to represent a defendant in a capital case shall immediately file a notice of appearance ***certifying that he or she meets the qualifications of this rule***. If the office of the Public Defender or Criminal Conflict and Civil Regional Counsel is appointed to represent the defendant, the Public Defender or Criminal Conflict and Civil Regional Counsel shall certify that the individuals or assistants assigned as lead and co-counsel meet the requirements of this rule. A notice of appearance filed under this rule shall be served on the defendant.

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This Court's rule requires that counsel in capital cases enter a notice of appearance with a certificate that he or she is qualified.

The rule of criminal procedure governing the minimum standards for appellate counsel in capital cases, rule 3.112(h), requires that counsel in any capital appeal:

- (1) are members of the bar admitted to practice in the jurisdiction or admitted to practice *pro hac vice*; and
- (2) are experienced and active trial or appellate practitioners with at least five years of experience in the field of criminal law; and
- (3) have prior experience in the appeal of at least one case where a sentence of death was imposed, as well as prior experience as lead counsel in the appeal of no fewer than three felony convictions in federal or state court, at least one of which was an appeal of a murder conviction; or alternatively, have prior experience as lead counsel in the appeal of no fewer than six felony convictions in federal or state court, at least two of which were appeals of a murder conviction; and
- (4) are familiar with the practice and procedure of the appellate courts of the jurisdiction; and
- (5) have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases; and
- (6) have attended within the last two years a continuing legal education program of at least twelve hours' duration devoted specifically to the defense of capital cases.

The rule requires either four prior criminal appeals including one capital appeal and one murder appeal OR six prior criminal appeals with 2 of the 6 appeals being murder appeals. And the rule requires specific CLE courses.

A proper notice of appearance should contain a list of cases, including the

name of the case, the case number, and the type of conviction involved. Without that detailed information being included in the notice of appearance, it is very difficult to determine if counsel is, in fact, death qualified. And a proper notice of appearance should also include a list of CLEs attended in capital defense courses within the last two years.

Opposing counsel's notice of appearance did comply with rule 3.112(i). It did not contain a certification that he meets the requirements to be a death-qualified appellate attorney under rule 3.112(h). While Mr. Carbone may well be a death-qualified appellate attorney, it is impossible to determine if he is a death-qualified appellate attorney from his current notice of appearance. This Court should order opposing counsel to file an amended notice of appearance with a list of his prior appeals and a list of his recent CLE courses.<sup>1</sup>

This Court in the future should monitor notices of appearances in capital cases to ensure that the appellate attorneys appearing in this Court are death-qualified and to enforce the this Court's rule regarding proper notice of appearances.

Accordingly, this Court should order Mr. Carbone to file an amended notice of appearance as required by rule 3.112(i) which details his qualifications as

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<sup>1</sup> If Mr. Carbone is not death qualified he could associate with a death-qualified attorney and still handle this appeal. This Court allowing such associations would held ensure that there is a path forward for younger attorneys to becoming death-qualified attorneys and to ensure there are sufficient number of capital attorneys.

required by rule 3.112(h).

Respectfully submitted,

ASHLEY MOODY  
ATTORNEY GENERAL OF FLORIDA

/s/ Charmaine Millsaps

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COUNSEL FOR THE STATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION TO CLARIFY OPPOSING COUNSEL'S NOTICE OF APPEARANCE has been furnished by e-portal to Rocco J. Carbone III, 135 Jenkins Street, 105B #110, St. Augustine, FL 32086; Phone: (904) 599-3238; email: Rocco@carboneappeals.com this 14th day of February, 2019.

/s/ Charmaine Millsaps

Charmaine M. Millsaps  
Attorney for the State of Florida