IN THE SUPREME COURT OF THE UNITED STATES
DEATH PENALTY CASE
EXECUTION SCHEDULED: 12:01 A.M., CDT, OCTOBER 29, 2014

MARK A. CHRISTESON, Petitioner, Nos. 14-6873, 14A445
v.
DONALD ROPER, WARDEN, Respondent

PETITIONER’S SUPPLEMENTAL BRIEF REGARDING MR. CHRISTESON’S AUTHORIZATION OF COUNSEL MS. MERRIGAN AND MR. PERKOVICH TO MOVE FOR SUBSTITUTION OF COUNSEL

1. By An August 7, 2014 Letter, Mr. Christeson Retained Merrigan and Perkovich

Mr. Christeson first retained undersigned counsel Merrigan and Perkovich by a retention agreement letter dated August 7, 2014 (Retention Agreement), counter-signed by Mr. Christeson and returned through the prison mail on August 12, 2014, and carried out pursuant to Missouri Professional Conduct Rule 4-1.2(c), which provides: “A lawyer may limit the scope of representation if the client gives informed consent in a writing signed by the client to the essential terms of the representation and the lawyer’s limited role.” Missouri Rule 4-1.2(c).

The existence of this Retention Agreement was identified in supplemental briefing before the Eighth Circuit. Petitioner therein noted that the Retention Agreement is subject to attorney/client privilege and confidentiality. However, for the purposes of clarifying the present question of standing, Appellant submits that the August 7, 2014 letter specifies that undersigned counsel would represent Mr. Christeson in his appeal of the Order in question and only in that appeal, detailing this scope of appellate representation. By August 12, 2014, Mr. Christeson signed and returned to undersigned counsel the retention letter for this limited representation.
2. Mr. Christeson’s Representation Continued With The Renewed Substitution Motion Resulting In The Eighth Circuit Judgment Before This Court

Upon the Eighth Circuit’s dismissal on October 15, 2014 of the appeal from the district court’s July 10, 2014 order, Ms. Merrigan ultimately filed her Renewed Amended Entry of Appearance in the Western District of Missouri on October 21, 2014, wherein she stated:

Counsel noticed her appearance on Petitioner’s behalf on August 5, 2014, (Doc. 81), for the limited purpose of appealing from the July 10, 2014 order. Ms. Merrigan continues her pro bono representation concerning the subject and substance of that dispute, viz. the conflict of interest of the Court-appointed attorneys against Mr. Christeson and the requirement of this Court to ensure substitution by conflict-free counsel. This representation continues to be governed by Mo. Prof’l Conduct Rule 4-1.2(c). Additionally, Petitioner qualifies for such limited representation under Prof’l Conduct Rule 4-1.2(d)(2) because counsel is representing him in her institutional capacity with the Saint Louis University School of Law. Ms. Merrigan filed her Amended Entry of Appearance. (Doc. 95).

App. 341a. The language in this Renewed Amended Entry of Appearance was included as fn. 2 in the Renewed Motion By Pro Bono Counsel For Substitution Of 18 U.S.C. §3599 Appointed Counsel (App. 344a), which the district court denied and the court of appeals’ judgment before this Court affirmed.

3. Written Request and Agreement from Mark Christeson to Counsel for Their Representation

As set forth above, undersigned counsel have previously withheld the improper disclosure of client correspondence in recognition of attorney/client privilege and confidentiality concerns, as expressed in briefing in the lower courts. In response to Justice Alito’s ordered briefing, Ms. Merrigan reached Mr. Christeson by telephone and
received his consent to release to this Court relevant correspondence. A copy of Mr. Christeson’s Retention Agreement with Ms. Merrigan and Mr. Perkovich and other correspondence from him is appended hereto, pursuant to Rule 32.3 of this Court. The following are relevant excerpts.

On May 14, 2014, Mr. Christeson wrote, *inter alia*:

I know that I’ve already told you and Joe how thankful I am for your assistance, but I thank you both again. I honestly had started to lose hope. However, after speaking with the both of you that has actually changed. And I really hope the both of you get appointed to my case.

On May 15, 2014, Mr. Christeson signed and notarized a “Consent to Representation”, wherein he stated, *inter alia*:

I, Mark Christeson, understand that attorneys Joseph Perkovich and Jennifer Merrigan are filing a motion for appointment in the district court in my case, in order first to litigate the dismissal of my habeas petition as untimely. I consent to their representation. I also understand that they are not my lawyers, until the court appoints them.

On June 18, 2014, a fellow inmate typed for Mr. Christeson a letter to Ms. Merrigan expressing, *inter alia*:

My attorneys (Butts and Horwitz) and I, also spoke of attorneys Joe Perkovich and Jennifer Merrigan. Attorneys Horowitz [sic] and Butts expressed their opinions that it would not be in my best interest if attorneys Perkovich and Merrigan represented me due to the fact that they were out of State attorneys. Attorneys Horowitz and Butts are afraid I will gets “lost in the shuffle of out of State lawyers.” Attorneys Horowitz and Butts stated that attorneys Perkovich and Merrigan may not want to represent me pro-bono however, attorneys Perkovich and Merrigan have already agreed to do so. Attorneys Horowitz and Butts nonetheless expressed their opinion again that attorneys Perkovich and Merrigan did not have my best interest in mind and that I would be better off with attorneys from Missouri. I respectfully disagree. It was attorneys Horowitz and Butts that contacted attorneys Perkovich and Merrigan requesting their assistance with my case. I personally feel that attorneys Joe Perkovich and Jennifer Merrigan should be allowed to represent me. I truly believe that despite attorneys Horowitz and Butts’s opinion, that attorneys Perkovich and Merrigan do have my best interest in mind and
more so then Horowitz or Butts. In the short time that I have been in contact with attorneys Perkovich and Merrigan, they have gone out of their way to come and visit with me twice to discuss my case. They have been in constant contact with me by phone and through letters letting me know exactly what is going on and what they are doing on my behalf. In my opinion, it is attorneys Horowitz and Butts that do not have my best interest in mind. If they did they would have filed my Federal Habeas Corpus on time and I wouldn’t be having to fight to get the court to allow me to do it now out of time. I truly believe that attorneys Perkovich and Merrigan have shown more passion and concern regarding my case than any attorneys thus fare and therefore, I feel it would be in my best interest if they were allowed to represent me.

As the foregoing reflects, Mr. Christeson’s view about undersigned counsel representing him has been clear for months. Further, the assistance of inmate law clerks also reflects Mr. Christeson’s struggle to replace his conflicted appointed counsel.

4. **Contemporaneous Fellow Inmate Observations**

In addition to the correspondence with Mr. Christeson, undersigned counsel received declarations from three fellow inmates that observed Mr. Christeson’s position concerning representation by Mr. Perkovich and Ms. Merrigan.

Former cellmate Jonathan French stated:

> On April 4, 2014 I went to the Hole... When I got back to PC, Mark told me things were being done on his case by new lawyers who had come to meet him while I was gone. Mark was very glad about this because he almost never even heard from his old court-appointed lawyers, Phil and Eric, and felt that they had never done anything to help him.” App. 234a. French further stated: “Mark was even more positive than ever because he had the new lawyers digging into his case and showing him that they were doing so by talking to him often, sending documents they were filing, and also visiting him.

App. 235a.

Protective Custody law clerk William Harrison: “I only learned that Mark’s lawyers had filed his petition untimely several months later, when he came back to me for
help. Mark said that his lawyers had not done anything for him and that new lawyers were trying to help him.” App. 237a.

Prison Law Clerk, Ed Burgdorf stated:

Mark was under the belief that his appeals were ongoing. It wasn’t until about 4 months ago that Mark shared some of his letters with me and I realized the state of Mark’s case. Mark did not realize his appeals were over. Only when Mark received he motions requesting different counsel, did it finally dawn on me what was happening with his case.

App. 229a.

CONCLUSION

As can be seen from the foregoing, Mr. Christeson had repeatedly urged Ms. Merrigan and Mr. Perkovich to replace his appointed lawyers before undersigned counsel ultimately were able to appear in the lower courts on his behalf and, now, before this Court.

For these further reasons set forth in this ordered briefing, this Court should grant Mr. Christeson a stay of execution and a writ of certiorari.

Respectfully submitted,
/s/Jennifer A. Merrigan
*JENNIFER A. MERRIGAN, Mo 56733
JOHN R. MILLS
JOSEPH J. PERKOVICH
St. Louis University School of Law
St. Louis, MO 63101
816-695-2214
jenmerrigan@gmail.com
john@jrmillslaw.com
mail@jos.perkovich.name
*Counsel of Record

Counsel For Petitioner, Mark A. Christeson
October 28, 2014
CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following address on this the 28th day of October, 2014:

Stephen D. Hawke  
Office of the Missouri Attorney General  
P.O. Box 899  
Jefferson City, MO 65102  
Mike.Spillane@ago.mo.gov

/s/Jennifer A. Merrigan  
Jennifer A. Merrigan

Counsel for Petitioner
I got the info you sent today. And hopefully, I'll be able to get everything sent back in the next day, or so.

Also, I'm sending the letters from Erica and Phil. As well as some other things that may hopefully help.

I know that I've already told you and Joe how thankful I am for your assistance, but I thank you both again. I honestly had started to lose hope.

However, after speaking with the both of you, that has actually changed.

And I really hope the both of you get appointed to my case.

The both of you really seem so caring and sincere, which is a change from all of the lawyers I've had throughout the past.

I really believe you and Joe were meant to represent me, because I had written to you about the Innocent Project Act, but you had already stopped working there.

So, I truly feel you and Joe are in the picture for a reason.

Anyway, I drew you a couple of things.
I hope you don't mind, it's just that you seemed to like my tattoos. So I wanted to show you what I could do with limited supplies. Anyways, if there is anything I can do to assist you and Joe, please let me know.

Respectfully,

Mark
Consent to Representation

I, Mark Christeson, understand that attorneys Joseph Perkovich and Jennifer Merrigan are filing a motion for appointment in the district court in my case, in order first to litigate the dismissal of my habeas petition as untimely. I consent to their representation. I also understand that they are not my lawyers, until the court appoints them.

SIGNED: Mark Christeson

DATE: 5-15-14

STATE OF ____________ )
COUNTY OF __________ ) ss.

Subscribed and sworn to before me by Mark Christeson, who personally appeared before me and is known to me to be the person described herein and who declared that the aforementioned information is true and correct to the best of his knowledge and that he executed the foregoing authorization, and acknowledged that he executed the same as his free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 15th day of ____________, 2014.

My Commission Expires:

SANDY CONWAY
My Commission Expires
February 2, 2018
Washington County
Commission #14574152

Notary Public
Conversation with Attorneys Phil Horowitz and Eric Butts held on 6/18/14:

On the above date I spoke with my current attorneys Phil Horowitz and Eric Butts. During this conversation said attorneys spoke to me concerning several things. One such thing was that they were filing a motion in the court on my behalf requesting that I be given a mental evaluation by some doctor in Illinois. I was never sent a copy of this motion and at no time did I ever give any consent for them to file a motion or even agree to participate in a mental evaluation of any kind.

I feel as their client, I should be made aware of what they are wanting to do and be allowed to review any motions prior to them filing them in the court. These attorneys are consistently leaving me out of the loop.

My attorneys and I, also spoke of attorneys Joe Perkovich and Jennifer Merrigan. Attorneys Horowitz and Butts expressed their opinions that it would not be in my best interest if attorneys Perkovich and Merrigan represented me due to the fact that they were out of State attorneys. Attorneys Horowitz and Butts are afraid I will get "lost in the shuffle of out of State lawyers."

Attorneys Horowitz and Butts stated that attorneys Perkovich and Merrigan may not want to represent me pro-bono however, attorneys Perkovich and Merrigan have already agreed to do so.

Attorneys Horowitz and Butts nonetheless expressed their opinions again that attorneys Perkovich and Merrigan did not have my best interest in mind and that I would be better off with attorneys from Missouri. I respectfully disagree. It was attorneys Horowitz and Butts that contacted attorneys Perkovich and Merrigan requesting

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their assistance with my case. I personally feel that attorneys Joe Perkovich and Jennifer Merrigan should be allowed to represent me. I truly believe that despite attorneys Horowitz and Butts's opinion, that attorneys Perkovich and Merrigan do have my best interest in mind and more so then Horowitz or Butts.

In the short time that I have been in contact with attorneys Perkovich and Merrigan, they have gone out of their way to come and visit with me twice to discuss my case. They have been in constant contact with me by phone and through letters letting me know exactly what is going on and what they are doing on my behalf. In my opinion, it is attorneys Horowitz and Butts that do not have my best interest in mind. If they did they would have filed my Federal Habeas Corpus on time and I wouldn't be having to fight to get the court to allow me to do it now out of time.

I truly believe that attorneys Perkovich and Merrigan have shown more passion and concern regarding my case than any attorneys thus far and therefore, I feel it would be in my best interest if they were allowed to represent me.

Mark Christeson #1031687
August 7, 2014

VIA PRIORITY MAIL
Mark A. Christeson
#1031687
Potosi Correctional Center
11593 State Hwy O
Mineral Point, MO 63660-9597

Re: Retention Agreement

Dear Mark:

This letter is titled the “Retention Agreement” and you hereby have been provided two copies of it. By the terms of this Retention Agreement, Jennifer Merrigan and Joseph Perkovich (“Appellate Counsel”) agree to represent you on a pro bono basis (free of charge to you) in the Matter further described below. Appellate Counsel agree to represent you in the Matter on the terms also described below.

This letter says that we are going to represent you in the appeal from Judge Whipple’s denial of the motion to substitute counsel. The law requires that we make it clear exactly what we will be representing you for and that we will be representing you only in that appeal.

1. **Scope of representation: the Matter.** The Matter is the representation of you by Appellate Counsel. The scope of the representation shall be limited to the appeal of a specific order or orders by the United States District Court for the Western District of Missouri (Hon. Dean Whipple) in the action styled Christeson v. Roper, No. 4:04-cv-08004. The order Appellate Counsel will appeal is either the Court’s July 10, 2014 order (Doc. 78, a copy of which is enclosed herewith), or an order that will result from the Motion for Substitution of Counsel that Appellate Counsel filed on August 5, 2014 (Doc. 80, a copy of which is enclosed herewith). Appellate Counsel will promptly confirm in writing the order that will be the subject of the appeal when it is clear how the Western District of Missouri will handle the issue of the conflict of interest between you and your current court-appointed attorneys, Mr. Eric Butts and Mr. Philip Horwitz, and the need for the substitution of new counsel to represent you.
2. *Changes in scope of representation.* The scope of Appellate Counsel’s representation may be changed only by written agreement signed by you and both Appellate Counsel.

3. *Making information available.* You agree to provide us with any information or documents Appellate Counsel deem useful or necessary for the representation during the Matter. You agree to assist in obtaining information and documents from other sources that Appellate Counsel deem useful or necessary for the representation during the Matter.

4. *Keeping you informed.* Appellate Counsel shall promptly comply with your reasonable requests for information regarding the status of the Matter. Generally, Appellate Counsel shall consult you and abide by your decisions with respect to the objectives of the representation, subject to Appellate Counsel’s professional judgment and ethical and legal obligations.

5. *Keeping Appellate Counsel informed.* You understand that it is your responsibility to cooperate with us (Appellate Counsel) in order to be effectively and efficiently represented during the course of the Matter.

6. *Withdrawal of representation in the Matter.* Pursuant to the applicable rules of professional conduct and responsibility, we (Appellate Counsel) may withdraw from representation of you in the Matter after taking reasonable available steps to avoid prejudice to your rights, including first giving you notice of intention to withdraw. We (Appellate Counsel) may withdraw if in our judgment:

   a. You do not cooperate with us or, by your conduct, you make it unreasonably difficult for us to carry out the representation effectively or efficiently; or

   b. You insist that we engage in conduct that is contrary to our judgment and advice or is contrary to law or our duties as your counsel in relation to your confinement by the Missouri Department of Corrections or the rules and regulations that apply to you as an inmate of the Missouri Department of Corrections; or

   c. Continued representation of you would result in a violation of the rules of ethics and professional responsibility applicable in any jurisdiction of Appellate Counsel’s practices; or

   d. There is other good cause under applicable law or ethical rules to justify withdrawal.
8. **Discharge of Appellate Counsel.** You shall have the right to end the representation by us (Appellate Counsel) in the Matter at any time without cause. If you want to exercise this right to end the representation, you must notify us in a written letter addressed to either or both Appellate Counsel.

This Retention Agreement was sent to you along with an identical copy of the Retention Agreement. Please sign one copy of the Retention Agreement and return it to Joseph Perkovich in the enclosed self-addressed stamped envelope. Please keep the other copy of the Retention Agreement for your records.

Generally, you may contact Jennifer Merrigan by telephone at (816) 695-2214 or Joseph Perkovich at (212) 400-1660 or (718) 852-1300.

Very truly yours,

APPELLATE COUNSEL

[Signature]
Joseph J. Perkovich
New York Bar Reg. No. 4481776

/s/ Jennifer A. Merrigan
Jennifer A. Merrigan
Missouri Bar 56733
PO Box 63928
Philadelphia Pa 19147.
jenmerrigan@gmail.com
816.695.2214 (tel)

Mark Christeson hereby agrees Appellate Counsel, Joseph Perkovich and Jennifer Merrigan, will represent him under the terms stated in the Retention Agreement (above).

[Signature]
Mark A. Christeson

Date: 8-12-14

Encls.