

IN THE SUPREME COURT OF FLORIDA

STATE ex rel. ROBERT A. BUTTERWORTH,
Attorney General,
State of Florida,

RELATOR,

v.

CASE NO.

BILL JENNINGS, CCRC-Middle Region;
ERIC PINKARD, Assistant CCRC-Middle Region;
et al.

RESPONDENTS.

_____/

**CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE'S RESPONSE TO
EMERGENCY PETITION FOR WRIT OF QUO WARRANTO**

COMES NOW Respondent, Capital Collateral Regional Counsel-
Middle, Bill Jennings and his duly designated assistants and
files this response to the Relator's Emergency Petition for Writ
of Quo Warranto and seeks immediate denial of said petition or
in the alternative, oral argument on whether this Court should
grant the Realtor's petition. This response represents the
position of Capital Collateral Regional Counsel-Middle and
should not be considered to represent the position of the other
two Capital Collateral Regional Councils.

Preliminary Statement

1. Bill Jennings is the appointed Capital Collateral

Regional Counsel-Middle and will be referred to as Mr. Jennings throughout this response.

2. Eric C. Pinkard is a duly appointed Assistant Capital Collateral Regional Counsel-Middle employed by this office and will be referred to as Mr. Pinkard throughout this response. Mr. Pinkard currently is a member of the Florida Bar in good standing.

3. The Office of Capital Collateral Regional Counsel-Middle will be referred to as CCRC-M when this office is discussed separately from the other two regions.

4. Freddie Lee Hall is a client of CCRC-M and will be referred to as Mr. Hall throughout this response. Mr. Hall's case is currently assigned to Mr. Pinkard and the team he supervises. Mr. Pinkard, has represented Mr. Hall in both state and federal court during collateral litigation challenging the legality and constitutionality of Mr. Hall's death sentence.

5. The state presented as an aggravator at Mr. Hall's capital murder trial, his 1968 conviction for assault with attempt to rape. The jury found that this factor existed beyond a reasonable doubt and returned a death recommendation for Mr. Hall based in part on this 1968 conviction.

7. Mr. Hall's 1968 conviction was fraught with constitutional violations such as when court personnel called

Mr. Hall, who is an African American, a "nigger" in front of the jury that convicted Mr. Hall.

8. Mr. Hall sent a timely request for the appointment of counsel for an appeal from the 1968 conviction. The 1968 court either willfully ignored his request or negligently failed to act upon Mr. Hall's timely request for appellate counsel.

9. After having been appointed pro bono by the circuit court, Mr. Pinkard is currently pursuing an appeal for Mr. Hall's 1968 conviction. Even though Mr. Pinkard has appeared *pro bono* in this matter, this representation would fall squarely within Mr. Pinkard's duties as an Assistant CCRC-M.

REASONS FOR DENYING THE WRIT

10. First and foremost, Mr. Pinkard's representation of Mr. Hall on 1968 appeal is a proper and necessary part of collaterally representing Mr. Hall on the capital murder case. This is the function of CCRC-M, and it is the reason that the office was established by the legislature.

11. Section 27.7001, Florida Statutes states:

Legislative Intent. It is the intent of the Legislature to create part IV of this chapter, consisting of ss.27.7001-27.708, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to

challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice. It is the further intent of the Legislature that collateral representation shall not include representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation.

12. If the people of this State are to regard the death sentence of Mr. Hall "with the finality they are entitled to in the interests of justice," Mr. Hall must be allowed meaningful access to the courts to challenge his death sentence. This requires that Mr. Pinkard challenge the legality of Mr. Hall's death sentence which was based in part on an 1968 conviction that the state used as a prior violent felony aggravator.

13. Furthermore, the state is incorrect in asserting that the elimination of Mr. Hall's 1968 conviction would not have any impact on his death sentence due to the existence of another prior violent felony conviction. Mr. Hall's co-defendant, Mack Ruffin, received a life sentence for his participation in the murder of Karol Hurst. This court found that Mr. Hall was more culpable than Ruffin and, therefore, his death sentence was not disparate treatment. One of the basis for the finding that Hall

was more culpable than Ruffin was the 1968 conviction. The only other prior violent felony conviction for Mr. Hall is the contemporaneous murder of Deputy Colburn, for which Ruffin was also convicted. Therefore, the elimination of the 1968 conviction of Mr. Hall would be critical to his death case as it would remove the basis of distinction this court found between Hall and Ruffin. The death sentence of Mr. Hall would then be contrary to Florida law as disparate to treatment of an equally culpable co-defendant who received a life sentence. See Hall v. State, 614 So.2d at 479 (Fla. 1993).

14. Florida law is clear that the constitutional validity of a prior violent felony conviction aggravator cannot be challenged in the murder case. In Hall v. Moore, 26 Fla. L. Weekly S316 (May 10, 2001), this court stated:

Hall argues as his third issue that appellate counsel was ineffective for failing to argue it was error to use Hall's 1968 conviction for assault with intent to commit rape as an aggravating circumstance because the conviction was obtained in a racist atmosphere and in violation of Hall's constitutional rights. This Court has noted that counsel cannot be ineffective for failing to raise a meritless issue on appeal. See Id. at 643. At the time of Hall's appeal, this Court had held that a defendant's allegations concerning the unconstitutionality of a prior conviction were not cognizable if that conviction had not been set aside. See Bundy v. State, 538 So.2d 445, 447 (Fla. 1989); Eutzy v. State, 541 So.2d 1143, 1146 (Fla. 1989). Thus, the

failure of appellate counsel to raise this issue does not render counsel's performance ineffective.

Id. (emphasis added)

Based upon the foregoing language from this court's opinion in Hall, the only available method of challenging the constitutionality of Mr. Hall's 1968 case is an action in the court which rendered the conviction. This rule, along with the allegations in the petition, places CCRC attorneys in an untenable "catch 22" position. Prior violent felony convictions cannot be challenged in the murder case, and the state claims that actions to set aside the prior violent felony conviction are outside the scope of representation for CCRC.

15. It is the position of CCRC-M, that it is not possible to effectively and ethically represent a capital defendant without the freedom to challenge a prior violent felony aggravator. A prior violent felony aggravator can be the deciding factor in imposition of the death sentence in a capital case. For CCRC attorneys to ignore constitutional issues relating to a prior violent felony conviction would be a breach of the ethical and professional mandate to provide competent representation to capital defendants. CCRC-M urges this court to strictly construe any language in the legislation creating CCRC which limits CCRC's abilities to fully represent capital defendants.

16. The use of an invalid aggravator to justify a death sentence has led to the United States Supreme Court to determine that a death sentence was unconstitutional. Johnson v. Mississippi, 486 U.S. 578, 590 (1988). In Johnson, the petitioner was convicted and sentenced to death for murder. Id. at 580. The petitioner's death sentence was predicated in part on petitioner's prior conviction for a felony in New York. Id. After petitioner's death sentence was affirmed by the Mississippi Supreme Court, a New York court vacated the New York felony conviction which Mississippi, in part, based the petitioner's death sentence. Id. at 580. The Mississippi Supreme Court denied petitioner post-conviction relief. Id. The United States Supreme Court reversed that court and found that the use of the New York conviction was cruel and unusual punishment in violation of the Eighth Amendment. Id.

17. Similar to the Florida Legislature's concerns of finality stated in Section 27.7001, Florida Statutes, was the concern of the Court in Johnson that: "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' 'in any capital case.'" Id. at 584.

(citations omitted). For the people of Florida to have the "finality that they are entitled to in the interest of justice," CCRC-M attorneys must be allowed to challenge the invalid conviction upon which Mr. Hall's death sentence is based.

18. The representation by Mr. Pinkard on Mr. Hall's 1968 aggravator case is not prohibited by Section 27.7001, Florida Statutes. Section 27.702(1) provides that CCRC's representation is "for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed." Section 27.7001 only prohibits CCRC from representing Mr. Hall only during "retrials, resentencings, proceedings commenced under chapter 940, or civil litigation." Mr. Pinkard's challenging the 1968 conviction falls squarely within instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed as provided for in Section 27.702(1).

19. The procedural history of Johnson shows conclusively that CCRC-M is properly challenging use of Mr. Hall's 1968 conviction as an aggravator for imposing the death sentence. In Johnson, the petitioner's attorneys went before a New York appellate court and challenged the petitioner's New York conviction, then sought relief from the petitioner's capital sentence and which was denied. Id. Only then could the

petitioner be heard by the U.S. Supreme Court, which reversed the petitioner's death sentence. CCRC-M is merely attempting to exhaust Mr. Hall's state remedies as in Johnson, and if unsuccessful proceed in federal court. To do so, CCRC-M must first use the procedures provided for in Florida Statutes and in the Florida Constitution. To do otherwise, Mr. Hall's death sentence would lack the finality and justice spoken of in Section 27.7001, Florida Statutes, and the special need for reliability in the determination that death is the appropriate punishment in any capital case that the United States Supreme Court found important in Johnson. Id. at 584.

20. Moreover, the State's reliance on State ex rel Butterworth v. Kenny, 714 So. 2d 404 410 (Fla. 1998), is misplaced, because as this court concluded "the legislature in expressing its intent to prohibit CCRC from engaging in civil litigation on behalf of capital defendants, meant only to prohibit CCRC from engaging in civil litigation other than for the purpose of instituting and prosecuting the traditional collateral actions challenging the legality of the judgment and sentenced imposed." Clearly, Mr. Pinkard, by representing Mr. Hall on the 1968 aggravator case, is not engaged in civil litigation and is pursuing a traditional collateral action by challenging Mr. Hall's 1968 conviction.

21. The petition filed by the state also challenges Mr. Pinkard's pro-bono representation of Mr. Hall in the 1968 case. The state argues that Mr. Pinkard is "circumventing" the statute and engaging in the private practice of law. However, a review of the transcript of the hearing at the motion to appoint counsel reveals that the state's assertions are blatantly incorrect:

MR. PINKARD: All I am asking is that an attorney be appointed. (Tr.P.12)

MR. PINKARD: And Judge, if I can't be appointed, then merely appoint the Public Defender in this circuit to do Mr. Hall's appeal, which has never been done, is another alternative. I was just thinking, in the interest of economy, rather than spending taxpayers money appointing the Public Defender, that you could appoint me to do it. (Tr.P.14)

MR. PINKARD: Okay, Judge. All I'm asking for is counsel to be appointed. You don't necessarily have to appoint me.

THE COURT: And you're asking me to - if you can't be appointed, that I appoint other counsel on Mr. Hall's request.

MR. PINKARD: Correct your Honor. (Tr.P.19).

The above record demonstrates that Mr. Pinkard presented the lower court with options other than appointing him to represent Mr. Hall. Contrary to the assertions of the state, Mr. Pinkard was not attempting to "circumvent" any rule or statute, but merely moved the court to appoint Mr. Hall counsel, not necessarily Mr. Pinkard, for purposes of filing a belated appeal

on the 1968 conviction. 22. This representation is not the private practice of law because Mr. Pinkard is not being paid for the representation and is doing so on his own time. Pro bono work is encouraged by the profession and should not be viewed, as argued by the state, as detrimental to other clients. Lawyers in private and public law firms are encouraged to perform pro-bono services apart from their duties to their firms and other clients. Since Mr. Pinkard is using his vacation time to work on Mr. Hall's 1968 case, no other capital case that Mr. Pinkard is handling for CCRC-M has been compromised. Contrary to the assertions of the state, no other attorneys have been assigned Mr. Pinkard's case load to allow him time to pursue Mr. Hall's belated appeal. Lastly, should Mr. Pinkard leave CCRC-M for another position, he is still obligated to pursue Mr. Hall's belated appeal because he is personally counsel of record.

23. Lastly, the assertion by the state that allowing CCRC-M attorneys to challenge aggravators would lead to similar challenges in every case, is incorrect. Mr. Hall's case is unusual in that he filed a timely request to have an attorney appointed in his 1968 case. This is not typical of prior violent felony aggravators in other cases. In the vast majority of cases, by the time CCRC-M is appointed to the case the time limits associated with challenging the aggravator would have

passed. It is only because of the unique posture of Mr. Hall's 1968 case that a challenge may be possible. Therefore, the state is incorrect in asserting that allowing CCRC-M to represent Mr. Hall in the 1968 would require similar challenges for all other clients who have prior violent felony aggravators.

24. Accordingly, for the above reasons, this court should deny the Relator's petition or in the alternative, set this matter for oral argument.

WHEREFORE, the Respondent asks this Court to consider the above argument and deny this petition or alternatively set this matter for oral argument.

Respectfully submitted,

BILL JENNINGS
CCRC-MIDDLE REGION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to ROBERT A. BUTTERWORTH, Attorney General, and ROBERT J. LANDRY, Assistant Attorney General, Office of the Attorney General, 2002 North Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607; MICHAEL P. REITER, CCRC and BRET B. STRAND, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Northern Region, Post Office Drawer 5498, Tallahassee, Florida, 32314-5498; and NEAL A. DUPREE, CCRC, Office of the Capital Collateral Regional Counsel - Souther Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 15th day of August, 2001.

Eric C. Pinkard
Florida Bar No. 651443
Assistant CCRC

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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Eric C. Pinkard
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