

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC01-1587**

**STATE OF FLORIDA ex rel.  
ROBERT A. BUTTERWORTH, etc.,**

Relator,

v.

**BILL JENNINGS, etc., et al.,**

Respondents.

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**RESPONDENT DUPREE'S MOTION TO DISMISS**

**COMES NOW THE RESPONDENT, NEAL A. DUPREE, CCRC-SOUTHERN REGION**, and herein moves to dismiss Respondent Dupree and/or the Office of the Capital Collateral Regional Counsel-South [CCRC-South], from the Emergency Petition for Writ of Quo Warranto filed against him and other named parties. In support thereof, Respondent Dupree would state:

1. On July 24, 2001, Relator filed an Emergency Petition for Writ of Quo Warranto [Petition], naming several parties as Respondents. One of the parties is Neal A. Dupree, who is the appointed agency head of the CCRC-South Office.
2. In his petition, Relator seeks to prevent Respondent Dupree (as well as the other named parties), from representing clients "in actions to challenge the validity of any judgment and sentence other than the capital judgment and sentence of death that has been imposed for which they are representing the death row inmate" (Petition at 1).
3. As to Respondent Dupree, Relator's specific "complaint" is set forth as follows:

Additionally, Relator would submit that Mr. Neal Dupree of CCRC-S has filed a seventy-nine page motion to vacate in a non-capital post-conviction case for Michael Thomas Rivera in December, 2000 in Broward County Circuit Court Case No. 86-2598.

(Petition at 2). This brief mention of Respondent Dupree and the complaints about his alleged unauthorized practice is set forth in the "Preliminary Statement" of the Relator's pleading. No additional specific complaints about Respondent Dupree or the Michael Rivera case are made in the Relator's pleading except for the brief passage set forth in the "Preliminary Statement."<sup>1</sup> And aside from the general reference to a December, 2000, pleading, no other documents from the Michael Rivera case are referred to by Relator or attached to his pleading.

4. For the reasons set forth below, Respondent Dupree submits that the petition should be dismissed as to him and the CCRC-South Office. In order to fully understand his position as to the propriety of dismissal, and because Relator did not accurately set forth in his petition the Michael Rivera litigation, a chronology of the Mr. Rivera's litigation will be first discussed.

**A. CHRONOLOGY OF LITIGATION ON BEHALF OF MICHAEL RIVERA.**

5. Mr. Rivera's conviction for first-degree murder and resulting sentence of death were affirmed by this Court in 1990. Rivera v. State, 561 So. 2d 536 (Fla. 1990). Thereafter, the former

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<sup>1</sup>With the exception of the brief mention of the Rivera case and a case being litigated out of the CCRC-North Office, the petition essentially is directed to alleged unauthorized litigation arising out of the CCRC-Middle office. This motion does not address the merits of the Relator's legal position as to the statutory authority argument; rather, this motion only seeks dismissal of Respondent DuPree and CCRC-South for the express reasons set forth later in this motion. Should it be necessary, Respondent DuPree and CCRC-South will, in their response to the petition itself, address the legal arguments raised by Relator.

Office of the Capital Collateral Representative<sup>2</sup> [CCR] began representing Mr. Rivera in litigating a Rule 3.850 motion.

6. In November, 1986, Mr. Rivera had been convicted by a jury of kidnapping, attempted first-degree murder, aggravated child abuse, and aggravated battery upon Ms. Goetz. During the State's case-in-chief at Mr. Rivera's capital trial, it was permitted, over objection, to introduce Williams-rule<sup>3</sup> evidence in the form of a sexual assault purportedly committed by Mr. Rivera on Jennifer Goetz. Rivera, 561 So. 2d at 538-39. The Goetz convictions were also used as aggravating circumstances in support of the death sentence.

7. As noted above, Mr. Rivera was convicted in the Goetz case in November, 1986. Mr. Rivera subsequently appealed the Goetz conviction, and the Fourth District reversed the convictions for child abuse and aggravated battery, and remanded for resentencing. Rivera v. State, 547 So. 2d 140 (Fla. 4th DCA 1989). On August 5, 1993, Mr. Rivera was resentenced in the Goetz case, and he appealed. The Fourth District reversed and remanded for proper crediting of Mr. Rivera's "time served." Rivera v. State, 638 So. 2d 148 (Fla. 4th DCA 1994). On July 8, 1994, the trial court entered the sentencing order as mandated by the Fourth District.

8. On June 21, 1996, while Mr. Rivera's capital Rule 3.850 motion was on appeal to this Court, a Rule 3.850 motion was filed by CCR on behalf of Mr. Rivera, challenging the validity of the Goetz conviction (Attachment 1). On September 6, 1996, the State, through the Office of the State

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<sup>2</sup>As the Court is aware, the agency formerly known as CCR was abolished by the legislature in 1997 and three (3) regional offices, known as Capital Collateral Regional Counsel, were created.

<sup>3</sup>Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959).

Attorney in and for the Seventeenth Judicial Circuit, filed a Motion to Discharge the Office of the Capital Collateral Representative, arguing that although the motion was timely filed, CCR should be discharged from representing Mr. Rivera:

8. On June 25, 1996, the Office of the Capital Collateral Representative filed this Motion to Vacate Judgment of Conviction and Sentence With Special Request for Leave to Amend.

9. The State maintains that the Office of the Capital Collateral Representative has no authority to represent Defendant on this case.

10. The Capital Collateral Representative is empowered, through Chapter 27, to represent "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." §27.7001, Fla. Stat. 91995), as amended by Fla. Session Law 96-248 (emphasis added). The duties of the Capital Collateral Representative are set forth in F.S. §27.702 which directs CCR to represent each person convicted and sentenced to death by "instituting and prosecuting collateral actions challenging the legality of the judgment and sentence." §27.702 (1), Fla. Stat. (1995) (emphasis added). Thus, the Office of the Capital Collateral Representative is authorized to represent death row inmates on capital cases only. This is not a capital case. Michael Rivera is under a sentence of death in another Broward county case: Case No. 86-11716CF. CCR has already challenged that death sentence by litigating an unsuccessful motion for post-conviction relief in May 1995. However, CCR does not now have the authority to challenge all of Mr. Rivera's convictions on other non-capital cases.

11. So that there be no misunderstanding, the Florida Legislature clearly stated its intent that collateral representation by CCR "shall not include representation during retrials, re-sentencings, proceedings commenced under Chapter 940, or civil litigation." §27.7001 Fla. Stat. (1995), as amended by Fla. Session Law 96-248. Thus, if CCR is precluded from representing a death-row convict on the retrial, re-sentencing or in clemency proceedings on the capital case itself, then CCR is certainly precluded from representation of a death row convict on another, separate, non-capital case. Furthermore, newly created F.S. § 924.066 states: "A person in a non-capital case

who is seeking collateral relief under this chapter has no right to a court-appointed lawyer." §924.066 Fla. Stat. (1996), as created by Fla. Session Law 96-248. Thus, Michael Rivera has no right to any court-appointed counsel on this case at this time let alone representation by the Capital Collateral Representative.

12. The State is not asking this Court to Strike the Motion to Vacate itself but would suggest that Defendant be permitted to adopt it pro se, if he wishes to do so. Thus, Defendant would not be prejudiced by CCR's discharge, rather he would receive the benefit of their timely filed seventy-three page motion.

(Attachment 2) (emphasis in original).

9. CCR, on behalf of Mr. Rivera, filed a written response to the State's motion, detailing the legal bases which warranted a denial of the motion (Attachment 3). Following a hearing,<sup>4</sup> the circuit court **denied the State's motion** on December 23, 1996:

**THIS CAUSE** came on to be heard on the State's Motion to Discharge the Office of the Capital Collateral Representative. Having considered the motion, Defendant's response, and the arguments of counsel, the Court hereby orders that the motion is **DENIED**.

(Attachment 4). **No appeal was ever taken by the State from the court's denial of the motion to discharge.**

10. Thus, with full legal authority to represent Mr. Rivera on his non-capital case, CCR and then CCRC-South continued to litigate that case, along with the capital case, which was remanded for an evidentiary hearing by this Court in 1998. Rivera v. State, 717 So. 2d 477 (Fla. 1998). For example, as noted by Relator, Mr. Rivera, through CCRC-South counsel, filed an amended Rule 3.850

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<sup>4</sup>There is no transcript of the hearing at this time, as the State never appealed the order denying its motion to discharge CCR.

motion in the Goetz case in December, 2000. The State raised no complaint about Mr. Rivera's representation as a result of the December, 2000, filing, nor has the State raised any complaint when other pleadings have been filed by CCRC-South on behalf of Mr. Rivera in the Goetz case (Attachment 5). Other than the motion to discharge filed by the State nearly five years ago, the State has in fact taken no action with respect to the Goetz case since the filing of the initial Rule 3.850 motion in 1996.<sup>5</sup>

**B. RESPONDENT DUPREE AND CCRC-SOUTH SHOULD BE DISMISSED FROM THE INSTANT QUO WARRANTO PROCEEDING.**

**(i) Mr. Dupree and CCRC-South are proceeding with full legal authority of the court.**

11. With the complete chronology of the Rivera situation now clarified, it is quite apparent that Relator has no justiciable actual controversy against Respondent Dupree and CCRC-South, and Mr. Dupree should be dismissed from the instant action. That Relator would set forth a materially inaccurate factual summary of the Rivera litigation, and, most importantly, fail to tell this Court that a motion to discharge CCR filed by the State **nearly five years ago** and **denied nearly five years ago**, raises a number of troubling questions, not to mention belying the "emergency" nature of the relief sought by the Relator.

12. The bottom line is that CCRC-South has been counsel for Mr. Rivera on the Goetz case since 1996 with the full legal authority of the lower court. There is no actual controversy as to

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<sup>5</sup>In fact, following the filing of the amended motion in December, 2000, the lower court entered an order requiring the State to respond to the motion within thirty (30) days (Attachment 6). To date, the State has failed to comply with this order.

Respondent Dupree and CCRC-South. It remains to be seen how Mr. Dupree and CCRC-South can be engaging in "unpermitted practice" when a court has in fact permitted the office to proceed as Mr. Rivera's counsel. Because Mr. Dupree and CCRC-South have been representing Mr. Rivera with the full authority of an order of a court of competent jurisdiction, Mr. Dupree should be dismissed from the Relator's action.

**(ii) Laches and/or Procedural Default Bar any Action against Mr. Dupree and CCRC-South.**

13. As noted above, the State's motion to discharge Mr. Rivera's collateral counsel was filed **nearly five years ago** and **denied nearly five years ago**. NO appeal was perfected by the State, or was attempted to be perfected by the State. NO attempt was made by the State to seek any type of mandamus, prohibition, or other extraordinary relief. Now, **nearly five years later**, Relator, for the first time, has asserted a complaint about Mr. Rivera's collateral counsel.

14. Respondent Dupree submits that the Relator's complaints as to him and the CCRC-South office are barred by laches and/or procedural default.

15. The doctrine of laches is a defense which "requires proof of (1) lack of diligence by a party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." McCray v. State, 699 So. 2d 1366, 1368 (Fla. 1997) (quoting Costello v. United States, 365 U.S. 265, 282 (1961)). If the delay in asserting a claim is "unreasonable" then laches can properly serve to bar the claim. Id. This is particularly true where a defendant set forth "no reason" for the "inordinate" delay in raising his claim for the first time. Id.

16. In McCray, the Court addressed a situation where a criminal defendant filed a petition

for habeas corpus alleging ineffective assistance of appellate counsel some fifteen (15) years after his direct appeal. Concluding that the claim "could and should have been raised many years ago" and thus was "unwarranted," "unnecessarily clog[ged] the court dockets" and was "an abuse of the judicial process," the Court fashioned a remedy whereby any petition claiming appellate ineffectiveness raised more than five (5) years from the direct appeal would be presumptively prejudicial to the State and thus barred by the doctrine of laches. McCray, 699 So. 2d at 1368.

17. Respondent Dupree submits that the Relator's present complaint about CCRC-South's representation of Mr. Rivera is barred by the doctrine of laches. The Relator's inordinate delay in raising this matter (nearly five years) is presumptively prejudicial to Mr. Rivera. Nowhere in Relator's pleading does he attempt, much less establish, any reason for the inordinate delay in complaining about Mr. Rivera's representation on the Goetz case. The simple fact is that the State is attempting, five (5) years after the fact, to remove from Mr. Rivera's case "the most qualified and best prepared advocates." Scott v. State, 717 So. 2d 908, 911 (Fla. 1998).

18. This inordinate and unjustifiable delay is presumptively prejudicial under the reasoning of McCray. Even if not presumptively prejudicial, however, the delay is nonetheless prejudicial to Mr. Rivera and his collateral counsel, who have, in good faith, relied on the court's 1996 ruling permitting the now-complained of representation. Mr. Rivera should not have to lose the unusual benefit of the continuity of counsel he has had in his case. Such continuity is rare in postconviction cases. See Arbelaez v. Butterworth, 738 So. 2d 326, 329 (Fla. 1999) (Anstead, J., specially concurring) (noting Florida's "hodge-podge" system of collateral legal representation that has been plagued with "uncertainty and unevenness of representation").

19. The Goetz conviction and the capital conviction are unquestionably intertwined, and recent events in Broward County in the aftermath of Frank Lee Smith's posthumous exoneration only further establish the need for competent counsel who are familiar with Mr. Rivera's case to remain on his case. See DeVise, *Conduct of Broward Detective in Another Case is Questioned*, THE MIAMI HERALD, June 25, 2001 (Attachment 7); Norman, *Captain of Deceit: It's Clear that BSO's Richard Scheff Lied Under Oath. So Why Isn't he Charged with Perjury?*, THE NEW TIMES, July 26, 2001 (Attachment 8). It is clear that Mr. Rivera would be substantially prejudiced by CCRC-South's sudden removal from the Goetz case, and the Relator's belated (by five (5) years) attempt to remove counsel is barred by laches.

20. In addition to laches, the Relator's position as to Respondent Dupree and CCRC-South is barred by the doctrine of procedural default. Procedural default applies to the State as well as to defendants. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). In Mr. Rivera's case, the lower court denied the State's motion to discharge in December, 1996. In reality, the Relator's instant action is an attempt to seek appellate review of an order issued nearly five (5) years ago. No matter how generously one reads the applicable rules of procedure, the State's present attempt to have CCRC-South removed from Mr. Rivera's case is procedurally defaulted.

21. As the Court recently noted, "there is a history of the Supreme Court of Florida accepting jurisdiction" in interlocutory appeals in capital cases, be they initiated by a defendant or the State. Trepal v. State, 754 So. 2d 702, 706 (Fla. 2000). Certainly, the State of Florida is aware of both its ability to seek interlocutory review and what procedures to follow. See, e.g. State v. Kokal, 562 So. 2d 324 (Fla. 1990); State v. Lewis, 656 So. 2d 1248 (Fla. 1994). In fact, the appeal in

Lewis was taken by the same judicial circuit as Mr. Rivera's, and was prosecuted several years before the December, 1996, order of the lower court denying the State's motion to discharge CCR from representing Mr. Rivera. Obviously the State was aware that it could appeal, and it was aware of the procedures necessary to perfect that appeal. Clearly it made a decision not to do so in 1996, and Relator's attempt to circumvent the applicable time provisions for filing appeals should not be countenanced. If the State of Florida is permitted to belatedly seek review of clearly time-barred issues that it made the decision not to appeal in the first instance, surely then a defendant must be allowed to follow the same procedures. Yet time and again, the Court has ruled that defendants are procedurally barred from raising issues in an untimely fashion, even when the cause for the untimeliness is borne from ineffective assistance of collateral counsel,<sup>6</sup> and not a strategic decision not to file a timely appeal, as is clearly the case with respect to the State's actions in Mr. Rivera's situation.<sup>7</sup> The State of Florida should not be permitted to reap the benefit of sitting on its hands for five (5) years.

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<sup>6</sup>See, e.g. Lambrix v. State, 698 So. 2d 247 (Fla. 1996).

<sup>7</sup>Certainly, the actions of the Relator in this case should be compared to a situation addressed by the Court in Jones v. State, 701 So. 2d 76 (Fla. 1997), where a procedural default was assessed against Mr. Jones. In that case, a State witness testified for the first time that he had relied on a document to formulate his expert opinion. Mr. Jones' counsel requested a copy of the document from the witness, but proceeded with the cross-examination without yet having the document. The next morning, the document was produced by the witness, who remained in the courtroom to watch the proceedings. "Later that morning," id. at 78, Mr. Jones' counsel filed an objection to the witness's testimony because the information contained in the just-disclosed document was in fact novel scientific evidence in violation of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). On appeal, the State argued, and this Court agreed, that Mr. Jones' objection was "waived" because it was not made contemporaneously with the witness' testimony. Jones, 701 So. 2d at 78. If Mr. Jones' counsel "inaction" (as it were) was sufficient to warrant a waiver and thus a procedural default, it cannot seriously be questioned that the State's wholesale abandonment of its attempt to discharge Mr. Rivera's collateral counsel until now is likewise waived and defaulted.

WHEREFORE, Respondent Neal A. Dupree and/or the CCRC-South office move that they be dismissed from the above-captioned action.

I HEREBY CERTIFY that the foregoing has been sent to opposing counsel via first class mail this 7th day of August, 2001.

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