

IN THE SUPREME COURT OF FLORIDA

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

RELATOR,

v.

CASE NO. SC01-1587

BILL JENNINGS, CCRC - Middle Region;
ERIC PINKARD, Assistant CCRC - Middle
Region; MICHAEL P. REITER, CCRC -
Northern Region; BRET B. STRAND,
Assistant CCRC - Northern Region;
NEAL A. DUPREE, CCRC - Southern Region;
et al.

RESPONDENTS.

REPLY TO RESPONDENTS' RESPONSE TO EMERGENCY
PETITION FOR WRIT OF QUO WARRANTO

Pursuant to this Court's order of January 2, 2002, Relator submits this Reply:

(1) Respondents first contend that with respect to the Melton and Rivera cases, the petition should be denied on the basis of laches and/or procedural default due to Relator's long-standing acquiescence to Respondents' conduct.

Relator would submit, of course, that if, as we contend, CCRC attorneys are not authorized by statute to engage in the representation of capital defendants who challenge their non-

capital convictions, that is a jurisdictional matter that can be challenged and corrected at anytime.

Secondly, one of the purposes in citing the Melton and Rivera cases was to demonstrate that the conduct by Mr. Jennings and Mr. Pinkard in the instant case was not an isolated incident but rather is becoming more commonplace. Irrespective of whether the state complained or acquiesced previously, the important point is that the state is now asserting the contention that the legislature has not authorized the capital collateral regional counsels' representation of defendants' non-capital convictions, especially after this Court's 1998 pronouncement in State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998).

(2) Respondents next argue that Chapter 27 does not preclude collateral counsel from challenging a non-capital conviction of a capital defendant. First, they assert that F.S. 27.7001 pertaining to legislative intent "merely suggests a legislative policy preference" (Response, P. 6). This contention was specifically rejected in Kenny, supra:

"CCRC argues that the legislative intent expressed in Section 27.7001 to restrict CCRC from representing capital defendants in civil litigation has no legal effect. It argues that the intent language merely suggests a legislative policy preference and should not be construed to impose

restrictions on CCRC's representation.....
We reject these arguments." Id at 407.

Relator submits the legislative intent paragraph of 27.001 announcing the purpose 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 demonstrates that counsel is not thereby commissioned to challenge non-capital convictions of such defendants.

Additionally, F.S. 27.702(1) mandates that capital collateral regional counsel shall represent each person convicted and sentenced to death for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed and shall file only those post-conviction or collateral actions authorized by statute. Furthermore, F.S. 27.706 requires that collateral regional counsel and all full-time assistants shall serve on a full-time basis and may not engage in the private practice of law. Finally, F.S. 27.711(11) specifically notes that attorneys appointed under 27.710 (the comparable Registry counsel provision) may not represent the capital defendant during "a proceeding challenging a conviction or sentence other than the

conviction and sentence of death for which the appointment was made."

Reading these provisions in pari materia requires the conclusion that pursuant to Chapter 27 neither capital collateral regional counsel nor their assistants may engage in representation of capital clients to challenge a merely non-capital judgment and sentence, whether on a part-time basis or not, they may only file post-conviction motions to challenge the judgment and sentence imposing a sentence of death.

Respondents argue that they may challenge a prior non-capital conviction which the state used as either Williams-rule evidence or as aggravation in the capital prosecution as part of the challenge to the legality of the judgment and sentence of their clients. While it may be true that post-conviction capital counsel can assert as a challenge to the capital sentence imposed that a prior violent felony conviction used as an aggravator has been set aside - see Johnson v. Mississippi, 486 US 578 (1988); Preston v. State, 564 So. 2d 120 (Fla. 1990); Rivera v. Dugger, 629 So. 2d 105 (Fla. 1994) - it does not follow as the logic of Respondents would have it that collateral counsel has an unlimited right to challenge a non-capital conviction that has not yet been overturned. See Eutzy v.

State, 541 So. 2d 1143 (Fla. 1989); Remeta v. State, 710 So. 2d 543 (Fla. 1998).¹

Relator notes that in the instant case, collateral counsel for Hall apparently seeks to initiate a challenge to a thirty year old conviction after this Court's denial of habeas corpus relief in Hall v. Moore, 792 So. 2d 447 (Fla. 2001), two years after this Court also affirmed the trial court's denial of a motion for post-conviction relief. Hall v. State, 742 So. 2d 225 (Fla. 1999).

Respondents repeat the argument advanced earlier that the state had not objected for a lengthy period of time on the Rivera and Melton matters but of course Kenny was not decided until 1998. Respondents add that the legislature could have acted to prohibit the complained of representation citing Delgado v. State, 776 So. 2d 233, 242 (Fla. 2000)(Wells, C.J. dissenting). Relator answers that after Kenny, the legislature obviously thought that the limitations on CCRC's representation

¹ If Respondents are correct that they can initiate a challenge to a prior conviction not yet set aside it would seem that would include going to Utah to challenge a kidnapping conviction for a defendant like Bundy v. State, 538 So. 2d 445 (Fla. 1989) or to Nebraska or Kansas to set aside convictions for defendants like Eutzy or Remeta. Relator submits they may not do so, nor remain in Florida to initiate a challenge to a non-capital conviction.

was well-understood and additionally codified it in F.S. 27.711(11).

(3) Respondents next argue that reliance on Kenny is misplaced. In Kenny the court quoted from F.S. 27.7001 and 27.702 and stated:

"As noted by the above two sections of Chapter 27, in providing collateral representation to defendants sentenced to death, the legislature has clearly expressed its intent that such representation is for the sole purpose of "challenging the legality of the judgment and sentence imposed" and that such representation is not to include "civil litigation"." Id at 407

Respondents argue that the actions of Hall's counsel in the instant case - Mr. Jennings and Mr. Pinkard - are fully consistent with the court's decision in Kenny. Relator disagrees. In their challenged actions collateral counsel are not filing a motion for post-conviction relief pursuant to Rule 3.850 or 3.851 to challenge the judgment and sentence of death imposed for the murder of Karol Hurst in 1978; rather they seek review to challenge the conviction of Hall on an assault charge committed a decade earlier. Clearly it was not the intent of the legislature with scarce finite resources available to set up a scheme whereby counsel appointed for the purpose of representing defendants to challenge the judgment and sentence of death that has been imposed to allow expansion of that

purpose to include making challenges as well to any and all non-capital judgments and sentences that have been imposed, including those three decades earlier.

Respondents contend that the instant situation is similar to the litigation engaged in by CCRC concerning the constitutionality of the electric chair, the lethal injection statute and cases involving insanity to be executed citing such cases as Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997); Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999); Sims v. State, 754 So. 2d 657 (Fla. 2000); Provenzano v. State, 761 So. 2d 1097 (Fla. 2000); Provenzano v. State, 760 So. 2d 137 (Fla. 2000), but these cases all involved instituting and prosecuting the "traditional collateral actions challenging the legality of the judgment and sentence" of death imposed, either by post-conviction motion, habeas corpus, or invocation of this Court's all writs jurisdiction. In the instant case, on the other hand, CCRC seeks to challenge an extraneous non-capital judgment. It does not "directly" challenge the legality of the judgment and sentence of death that Kenny requires. 714 So. 2d at 411.

Moreover, CCRC's effort to initiate such a challenge occurred after this Court rebuffed his effort on a habeas corpus petition challenging the effective assistance of appellate counsel in Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001):

[4] Hall argues as his third issue that appellate counsel was ineffective for failing to argue that 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 deemed 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.

[5] We also deny Hall's request to postpone ruling on this claim until a decision is made with regard to a possible review of Hall's prior conviction. We have rejected this suggested procedure. See *Eutzy*, 541 So. 2d 15 1143.

(Emphasis supplied)

Respondents cite State ex rel. Butterworth v. Minerva, 682 So. 2d 1101 (Fla. 1996), an unpublished opinion which simply denied a writ of quo warranto. Ultimately, the Eleventh Circuit Court of Appeals concluded in Hill v. Butterworth, 147 F.3d 1333 (11th Cir. 1998) that the case should be remanded to the district court with instructions to dissolve the injunction and dismiss the complaint for want of a justiciable case or controversy pursuant to Calderon v. Ashmus, 523 US 740 (1998).

They also cite Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000) where the Court pursuant to its mandamus authority concluded that the Death Penalty Reform Act constituted an unconstitutional encroachment on the Court's exclusive power to adopt rules for the practice and procedure in all courts. Respondents also cite the views of Roger Maas in the pending case of Olive v. Maas, No. SC00-317. Whatever Mr. Maas' views on compensation for registry counsel may be under a variety of circumstances does not alter Relator's view that the statute does not authorize collateral counsel to represent capital defendants to challenge a non-capital conviction.

(4) Respondents' final contention is that if the Relator's interpretation were adopted, it would violate equal protection and due process "by prohibiting CCRC lawyers from challenging the validity of a 'Florida capital conviction and sentence' while at the same time permitting either private or registry counsel to do so". They assert "Any attempt to prohibit the CCRCs from challenging their clients' underlying convictions, while no such prohibition exists as to registry counsel or private counsel, violates equal protection." (Response, P. 18)

Quite the contrary is true. Florida Statute 27.711(11) provides:

"An attorney appointed under s 27.710 [the registry counsel provision] to represent a

capital defendant may not represent the capital defendant during a retrial, a re-sentencing proceeding, a proceeding commenced under chapter 940, a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings". (Emphasis supplied)

Relator maintains that both registry counsel and Capital Collateral Regional Counsel are not authorized by statute to represent capital defendants to challenge a non-capital judgment and sentence and they do not have carte blanche authority to decide to ignore limits imposed by the legislature simply because they believe it might be helpful tangentially to combat the death penalty, as by the filing of a federal civil rights action under Section 1983 for a declaratory judgment or injunctive relief regarding the functioning of Florida's electric chair. See State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998).

As to Respondents' assertion of an arbitrary application of law or a violation of capital defendants' equal protection rights the identical argument was rejected in Kenny, supra, at 410:

We reject CCRC's argument that this limitation on its authority constitutes an arbitrary application of law or a violation of capital defendants' equal protection rights. To the contrary, we conclude that

the limitation is a reasonable allocation of resources. As the United States Supreme Court noted in *Murray*, a state might quite sensibly decide to concentrate the resources it devotes to providing attorneys for capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated on collateral attack.

492 U.S. at 11, 109 S.Ct. at 2771. Certainly, if the legislature can determine whether to provide capital defendants with postconviction counsel, it can place reasonable restrictions on such representation without those restrictions being labeled arbitrary. We find CCRC's equal protection argument to be equally untenable; the fact that a capital defendant with private counsel could pursue actions without limitation is no different from the fact that noncapital defendants who are afforded no statutory right to postconviction counsel would likewise hire private counsel to pursue such claims. See § 27.51, Fla. Stat. (1997)(providing no authority for public defenders to represent non-capital defendants with postconviction representation). We have previously upheld similar restrictions on the representation of indigents by public defenders. See, e.g., *State ex rel. Smith v. Brummer*, 443 So. 2d 957 (Fla. 1984)(public defender is not authorized by statute or rule to accept appointment by federal judge to represent indigent defendants in federal habeas corpus proceedings).

Based on the foregoing arguments and authorities, Relator respectfully requests this Court to find that the Capital Collateral Regional Counsel Offices may not under the statute undertake representation of a capital defendant to challenge the judgment and sentence of a non-capital conviction and should grant the requested relief in the Petition for Writ of Quo Warranto.

CONCLUSION

In conclusion, Relator requests that the Court reject the arguments presented in Respondents' motions and grant the relief requested by the state.

Respectfully submitted,

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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 BILL JENNINGS, CCRC and ERIC PINKARD, Assistant CCRC, Office of the Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619; MICHAEL P. REITER, CCC, JOHN P. ABATECOLA, Chief Assistant CCC and BRET B. STRAND, Assistant CCC, Office of the Capital Collateral Regional Counsel - Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301; NEAL A. DUPREE, CCRC and TODD G. SCHER, Litigation Director, Office of the Capital Collateral Regional Counsel - Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this _____ day of January, 2002.

COUNSEL FOR RELATOR

CERTIFICATE OF FONT COMPLIANCE

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

COUNSEL FOR RELATOR

