

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1587

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

Petitioner,

v.

BILL JENNINGS, etc., et al.,

Respondents.

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

COME NOW THE RESPONDENTS, NEAL DUPREE, CCRC-SOUTHERN REGION AND MICHAEL P. REITER and BRET B. STRAND, CCC-NORTHERN REGION, and herein jointly submit this Response to the Emergency Petition for Writ of Quo Warranto.

A. PRELIMINARY STATEMENT.

On July 24, 2001, Relator filed an Emergency Petition for Quo Warranto [Petition], seeking to prevent Respondents 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).

On July 26, 2001, this Court issued a Request for Response from the Respondents to be served on or before August 15, 2001.

On August 8, 2001, Respondent Dupree of CCRC Southern Region, and

Respondents Reiter and Strand of CCC-Northern Region, respectively filed a Motion to Dismiss as well as a Motion to Toll Time for Filing Responses Pending Ruling on Motion to Dismiss. On August 29, 2001, this Court granted the motion by Respondents Reiter, Strand, and Dupree to toll time pending a ruling on their motion to dismiss. Relator has not served any response to Respondents' motion to dismiss. See Fla. R. App. P. 9.300 (a) ("A party may serve 1 response to a motion within 10 days of service of the motion").

On January 2, 2002, this Court issued a Request for Response, indicating that the motions to dismiss would be carried with the case and directing the Offices of the Capital Collateral Regional Counsel for the Northern and Southern Regions to file substantive responses to the Petition of Quo Warranto on or before January 22, 2002.¹

Respondents herein file their response and submit that the Petition is due to be denied for the following reasons.

B. RELATOR'S PETITION MUST BE DENIED.

Relator is seeking quo warranto relief against the three CCRC regional offices, and various attorneys employed by those offices, as well as registry counsel² because "collateral counsel appointed pursuant to chapter 27 are not authorized by statute to conduct such representation" (Petition at 2). The

¹On August 15, 2001, the Capital Collateral Regional Counsel-Middle filed its Response to Emergency Petition for Writ of Quo Warranto.

²However, no registry attorney has been named as a party by the Relator.

"representation" about which Relator complains is the representation of death-sentenced inmates in attacks on underlying Florida convictions, which convictions have been used in some fashion in the inmate's capital prosecution.

Relying essentially on this Court's decision in State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), as well as various sections of Chapter 27, Florida Statutes, Relator argues that the representation by Respondents Jennings and Pinkard (and by implication, Respondents Reiter, Strand, and Dupree), "departed from the mandate of Kenny, and the clearly-expressed legislative intent of chapter 27 of the Florida Statutes" (Petition at 8).³ Relator's arguments are meritless.

(1) Respondents are Proceeding with Legal Authority of the Lower Courts.

In its petition, Relator challenges the authority of Respondents Dupree, Reiter, and Strand, to represent defendants Michael Rivera and Antonio Melton in challenges to underlying Florida convictions used by Relator in the capital trials of both Mr. Rivera and Mr. Melton. The chronology of the Melton and Rivera cases is fully set forth in the Motions to Dismiss filed by CCRC-South and CCC-North, respectively. (See Respondent Dupree's Motion to Dismiss at 2-6; Respondents Reiter and Strand's Motion to Dismiss at 2-5).

Although Relator complains that Respondents are acting outside the scope

³Relator does not acknowledge that the complained-of representation of both Mr. Melton and Mr. Rivera was initiated several years *prior* to the Court's decision in Kenny.

of their statutory authority, Relator's petition does not mention that Respondents are in fact acting within their authority as determined by the lower courts in both Melton and Rivera. As noted in the motion to dismiss filed by Respondents Reiter and Strand, the lower court in the Melton litigation permitted Respondent Strand to litigate Mr. Melton's underlying conviction (Respondents Reiter and Strand's Motion to Dismiss at 4-5). The lower court judge in the Rivera case also rejected an attempt by the State to discharge CCR/CCRC-South from representing Mr. Rivera in a challenge to an underlying conviction (Respondent Dupree's Motion to Dismiss at 4-5).

Thus, as to Respondents Dupree, Reiter, and Strand, the lower courts have addressed this matter and did so years ago.⁴ Respondents re-assert their arguments, fully set forth in their respective motions to dismiss, that Relator's petition should be denied on the basis of laches and/or procedural default. Due to Relator's long acquiescence to the now-complained-of conduct, Relator is barred from seeking the relief it requests. See, e.g. State ex rel. Bankers Life & Casualty Co. v. Village of No. Palm Beach, 138 So. 2d 378 (Fla. 2d DCA 1962). The instant action is, essentially, an attempt to appeal the decisions of the lower court in Melton and Rivera, an appeal which, no matter how generously one reads the applicable rules, is clearly out of time. The Relator's actions should not be countenanced. Cf. Porter v. State, 788 So. 2d 917, 921 n.5 (Fla. 2001) (cautioning

⁴In the Rivera case, the court's ruling was made in 1996, over five years ago.

collateral counsel that "such lateness [in filing a notice of appeal] may result in sanctions imposed against counsel").

(2) Chapter 27 Does Not Preclude the Complained-of Representation by the Respondents.

Relator relies on §27.7001, Fla. Stat. (2001), as well as §27.702 (1), Fla. Stat. (2001), and argues that they set forth a "clearly-expressed legislative intent" that "[t]he responsibilities of collateral counsel for death row inmates do not extend to asserting challenges to non-capital convictions" (Petition at 8-9).⁵

§27.7001 sets forth the legislative intent underlying the creation of the provision of collateral representation to death-sentenced inmates:

It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.2001-27.708 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

⁵Relator argues that challenges to "the appropriateness" of a prior conviction used as an aggravating factor are only cognizable by the trial court and in the direct appeal process "rather than on collateral review" (Petition at 12). Relator's argument overlooks the fundamental difference between a challenge to the use of (or "appropriateness") of a particular conviction as an aggravator at the penalty phase versus the constitutionality *vel non* of the prior conviction. The former is, of course, a matter to be addressed on direct appeal: *i.e.* whether the trial court erred in using a particular prior conviction as an aggravating circumstance and/or in assigning the aggravator particular weight. See Chaky v. State, 651 So. 2d 1169 (Fla. 1995). The latter is cognizable in the postconviction process if a prior conviction is vacated. See Preston v. State, 564 So. 2d 120 (Fla. 1990) (due to vacation by CCR attorneys of prior conviction, defendant obtains postconviction relief in death case); Rivera v. Dugger, 629 So. 2d 105 (Fla. 1994) (same).

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.

§27.7001 (footnote omitted).

§27.702 (1), Fla. Stat. (2001), describing the duties of the capital collateral regional counsel, provides in pertinent part:

The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the validity of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court. The capital collateral regional counsel and the attorneys appointed pursuant to s.27.710 shall file only those postconviction or collateral actions authorized by statute.

Nothing in these two provisions supports Relator's argument. Turning first to §27.7001, this is a section setting forth legislative intent. Under established principles of statutory construction, a section of a bill entitled "Legislative Intent" does not generally create enforceable rights, but rather merely suggests a legislative policy preference. See Pennhurst State Sch. and Hosp. v Halderman, 451 U.S. 1 (1981). "Legislative history cannot be used to change the plain and clear language of a statute." Fl. Dept. of Rev. v. Fl. Mun. Power Agency, et. al., 789 So. 2d 320, 324 (Fla. 2001).

Nothing in §27.7001 sets forth clear legislative intent that the capital collateral regional counsel are prohibited from asserting a challenge to an underlying

conviction used by the State in the capital proceeding. In fact, the opposite is true. By its express terms, §27.7001 excepts only "representation during retrials, resentencings, proceedings commenced under chapter 940, or civil litigation." See State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 407 (Fla. 1998) ("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"). "[C]ourts cannot judicially alter the wording of statutes where the Legislature clearly had not done so." Fl. Dept. of Rev., supra at 324. See also Baker v. State, 636 So. 2d 1342, 1343-44 (Fla. 1994) ("Where the legislature has used particular words to define a term, the courts do not have the authority to redefine it").

Nothing else in §27.7001 provides any express prohibition on the CCRC's ability to undertake the complained-of representation. Relator points to the sentence stating that the CCRCs may "challenge only Florida capital conviction and sentence" (Petition at 6), inferring from this that Respondents' duties "do not extend to asserting challenges to non-capital convictions" (Petition at 8-9). This sentence does not provide any express prohibition except to limit the CCRCs representation to a "Florida capital conviction and sentence." Here, there is no argument by Relator that any of the Respondents are challenging anything other than Florida convictions. The language relied upon by the Relator hardly provides the "clear legislative intent," State v. Allen, 790 So. 2d 1122, 1126 (Fla. 2d DCA 2001), to support its argument.

Moreover, the complained-of litigation does challenge the validity of a "Florida capital conviction and sentence." As set forth above and in the Respondents' motions to dismiss, the challenges brought by the Respondents in the Melton and Rivera cases directly address the validity of the capital case either due to the use of the underlying conviction as Williams rule evidence in the guilt phase, or the use of the conviction as an aggravating circumstance in the penalty phase, or both (as in the Rivera case). Contrary to the "sky-is-falling" tenor of the Relator's pleading, the Respondents are not simply filing challenges to any prior convictions that their clients may have in the past, but rather only those convictions which may impact on a "Florida capital conviction and sentence," those which the State chose to use against the defendant during the capital prosecution, and those which, based on the investigation and independent judgment of collateral counsel, there is deemed to be a viable and available constitutional challenge. "The state is constitutionally obligated to respect the professional independence of the public defenders whom it engages." State ex rel. Smith v. Brummer, 426 So. 2d 532, 533 (Fla. 1982).⁶

Likewise, nothing in §27.702 (1) alters the inescapable conclusion that the Respondents are not acting outside of their statutory mandate. Relator refers to the

⁶That Relator can only find three cases to complain about which involve underlying challenges to prior convictions belies the "sky-is-falling" tenor of its petition. As the Attorney General wrote in its brief to this Court in Olive v. Maas, Case No. SC00-317, "[i]t is possible, even likely, that most postconviction proceedings will involve no Johnson challenge" (Answer Brief of Appellees/Initial Brief of Cross-Appellants, Olive v. Maas, No. SC00317, at 16).

sentence stating that the CCRCs' representation shall be for "the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person" (Petition at 6). This statutory provision is perhaps even broader than the language contained in §27.7001 on which Relator relies, and thus cannot provide any stronger support for its argument. In filing challenges under Rule 3.850 (*i.e.*, "instituting and prosecuting collateral actions"), to convictions which the State used as either Williams-rule evidence or as aggravation in the capital prosecution, Respondents are clearly "challenging the legality of the judgment and sentence" of their respective clients.

"Although the definition [contained in the statute] is broad, it is clear." Lee v. City of Jacksonville, 793 So. 2d 62 (Fla. 1st DCA 2001). If the legislature intended to preclude CCRC representation in underlying convictions, it could have explicitly stated so in the legislation. That the legislation does explicitly prohibit representation in retrials, resentencings, clemency proceedings, and civil litigation, clearly establishes that the legislature did *not* intend to expressly prohibit the type of representation that Relator complains of in the instant action.

The best evidence which belies the Relator's position is that in the Rivera and Melton cases, the defendants have been represented by CCR/CCRC counsel in challenges to underlying convictions for over half a decade. "[L]ong acquiescence in a particular [statutory] construction [is] entitled to great weight." Johnson v. State, 91 So. 2d 185, 187 (Fla. 1957). The Rule 3.850 motion in Rivera was filed in 1996; the motion in Melton in 1995. Not until July of 2001 does the State decide to

complain. If the Respondents' actions in these cases is so "unpermitted" (Petition at 2), and "unacceptable" (Petition at 10), certainly the Relator could have complained about it earlier,⁷ and certainly the Florida Legislature could have, had it chosen to, acted to prohibit the now-complained-of representation. That the legislature has not acted is further evidence that the Relator's interpretation of the relevant provisions of Chapter 27 is erroneous. See, e.g. White v. Johnson, 59 So. 2d 532, 533 (Fla. 1952) ("there have been numerous sessions of the legislature, including the one existing on that date, and at no one of such sessions had the legislature seen fit to change in any material manner the language in the body of the statute. This fact may be taken as an indication that the legislature approved or accepted the construction placed upon Section 222.11 . . ."); Johnson v. State, 91 SO. 2d 185, 187 (Fla. 1957) ("failure by the legislature to amend a statute . . . amounted to legislative acceptance or approval of the construction rendered in the earlier case"); Delgado v. State, 776 So. 2d 233, 242 (Fla. 2000) (Wells, C.J., dissenting) ("Since those dates, there have been yearly legislative sessions. The Legislature has not evidenced any doubt that these long-standing statutory interpretations are in accord with legislative intent. The fact that the Legislature has not acted in so many sessions according to this Court's precedent indicates that the

⁷That Relator has sat on his hands for over half a decade with respect to the alleged improper representation in the Melton and Rivera cases cannot be reconciled with his assertion that this matter is an "emergency" action.

Legislature approved or accepted the construction placed upon the statute").⁸

(3) Relator's Reliance on Kenny is Misplaced.

In addition to the statutory language, Relator relies on this Court's decision in Kenny to support its position that Respondents are acting beyond the scope of their mandate. Reliance on Kenny, however, is misplaced.

At issue in Kenny was a *quo warranto* action challenging the CCRC's representation of death-sentenced inmates in a federal civil action, brought pursuant to 42 U.S.C §1983, seeking declaratory and injunctive relief as to the constitutionality of Florida's electric chair. In that proceeding, Relator argued that because §27.7001 prohibited the CCRCs from instituting "civil litigation," the CCRCs were acting outside their explicit statutory mandate. The Court agreed, holding that "[a] federal civil rights action filed under section 1983 for a declaratory judgment or for injunctive relief is a civil action that does not test the legality of the conviction and sentence." Kenny, 714 So. 2d at 410. The Court's holding in Kenny, however, was limited to its facts, as the Court itself unambiguously

⁸Respondents would also note that no argument was made by Relator with respect to the litigation conducted by CCRC-South on behalf of Daniel Remeta. CCRC-South litigated postconviction litigation on behalf of Mr. Remeta with respect to Kansas convictions used both as Williams-rule evidence and as evidence of aggravating circumstances. This litigation occurred in 1997 and 1998. See Remeta v. State, 710 So. 2d 543 (Fla. 1998). At no time did Relator complain that CCRC-South was acting outside of its statutory authority in representing Mr. Remeta. Relator cannot pick and choose which cases it is going to challenge CCRC-South's statutory authority; by doing so now, it is plainly apparent that Relator is simply trying to remove "the most qualified and best prepared advocates" from Mr. Rivera's and Mr. Melton's cases. Scott v. State, 717 So. 2d 908, 911 (Fla. 1998).

expressed: "We conclude that the legislature, in expressing its intent to prohibit CCRC from engaging in civil action 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 sentence imposed." *Id.* That is, the CCRCs were prohibited only from "represent[ing] capital defendants in any civil action not directly challenging the legality of the judgments and sentences of such defendants." *Id.* at 411.

The situation addressed in Kenny could not be more different than the now-complained-of representation by the CCRCs.⁹ The litigation in Hall, Rivera, and Melton is not "civil" litigation but rather consists of legal challenges brought pursuant to Rule 3.850 which do "test the legality of the conviction and sentence" of the defendants. Kenny, 714 So. 2d at 410; Miami-Dade County v. Jones, 793 So. 2d 902 (Fla. 2001) (eschewing "civil" vs. "criminal" distinction regarding Rule 3.850 proceedings).¹⁰ As the Court wrote in Kenny, "the statute empowers CCRC with the authority to challenge the validity of a capital defendant's conviction and sentence only through traditional postconviction relief proceedings in criminal and quasi-criminal proceedings." *Id.* at 408. Nothing in the express holding of Kenny

⁹Respondents would note that Judge Stancil, who presided over the Hall litigation below, also concluded that "the facts in Kenny are distinguishable" from the instant situation (Relator's Appendix 5 at p.2).

¹⁰In fact, in the Hall litigation below, the State Attorney conceded that "clearly there's a linkage between this 1968 case and the capital postconviction murder case" (Relator's Appendix 4 at p.17).

indicates that Respondents are acting outside of their statutory mandate; in fact, Respondents maintain that their actions are fully consistent with the Court's decision in Kenny.

The situation presented by Relator is more akin to the litigation conducted by CCR/CCRC with respect to the state court litigation regarding the constitutionality of Florida's electric chair, Florida's lethal injection statute, and cases involving insanity to be executed. For years, CCR and/or the CCRC offices have litigated these issues with no complaint by Relator that such litigation exceeds the statutory authority now at issue. See Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997) (electric chair litigation); Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999) (electric chair litigation); Bryan v. Moore, 744 So. 2d 452 (Fla. 1999), *cert. dismissed as improvidently granted*, 428 U.S. 1133 (2000) (electric chair litigation); Sims v. State, 754 So. 2d 657 (Fla. 2000) (lethal injection litigation); Provenzano v. State, 761 So. 2d 1097 (Fla. 2000) (lethal injection litigation); Provenzano v. State, 760 So. 2d 137 (Fla. 2000) (insanity to be executed litigation).

The situation presented by Relator is also akin to that which Relator complained about in State ex rel. Butterworth v. Minerva, No. SC88,612, and in Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). In Minerva, Relator sought *quo warranto* relief against CCR attorneys, alleging that their representation of defendant Clarence Hill in federal litigation seeking declaratory and injunctive relief with respect to whether Florida was eligible to "opt into" the accelerated provisions contained in the Antiterrorism and Effective Death Penalty Act [AEDPA]. See 28

U.S.C. §2261-66 (1996). Citing the same statutory provisions it cites in the instant case, Relator argued that "CCR's cavalier abuse of its statutory authority" required *quo warranto* relief. This Court denied the petition without comment. State ex rel. Butterworth v. Minerva, 682 So. 2d 1101 (Fla. 1996). If the litigation that Relator complained about in Minerva did not exceed the CCR's statutorily-mandated scope of representation, it is clear that the litigation complained of in the instant case is similarly within the scope of the Respondent's statutory mandate. As in Minerva, the Relator's petition herein should be denied.

The instant situation is also analogous to that raised by the State in the Allen v. Butterworth litigation. There, the CCRC offices challenged the validity of the Death Penalty Reform Act [DPRA] on a number of constitutional grounds. Relying on Kenny and the same statutes it now asserts, the State argued that the CCRC offices lacked statutory authority to challenge the DPRA because the challenge did not "expressly challenge" the legality of the conviction and sentence. This Court rejected this argument. Allen, 756 SO. 2d at 54-55.

The Relator contends that "[i]f Hall seeks to now challenge his 1968 non-capital conviction as invalid, he must do so without the counsel provided by the legislature in chapter 27 which is limited to representation for challenges to the imposed capital judgment and sentence" (Petition at 10). Relator belittles Mr. Pinkard's good-faith attempt to assist his client by alternatively arguing that he could represent Mr. Hall *pro bono* if necessary, calling it "unacceptable" (Petition at

10), and a "ploy" (Petition at 11). The Relator's position must be considered in light of the relief that is sought by Relator, which is to enjoin not only the named CCRC respondents, but also registry counsel (although no registry lawyer is named as a Respondent) (Petition at 1). Curiously, in the pending litigation in Olive v. Maas, Case No. SC00-317, different positions were advanced by the parties opposing Mr. Olive's arguments. For example, the brief filed on behalf of Mr. Roger Maas, states: "If Mr. Olive should ever be appointed to represent a death-sentenced inmate whose case has a Johnson v. Mississippi issue, and Mr. Olive certifies that any challenge to the Johnson conviction will be at absolutely no cost to the state, the appointing trial court can consider all the circumstances and allow him to proceed *pro bono*" (Answer Brief and Initial Brief on Cross-Appeal of Appellee Roger R. Maas, Olive v. Maas, No. SC00317 at 18). Yet the Relator chastises Mr. Pinkard for alternatively suggesting that he could represent Mr. Hall on a *pro bono* basis, the very remedy suggested by Mr. Maas in the pending litigation in Olive v. Maas. As for the argument advanced by Mr. Maas with respect to the cost of such a challenge were it to be advanced by a registry lawyer, even the Attorney General's Office, in its brief in that case, argued that it was "an open question whether a so-called Johnson challenge would in all cases be noncompensable because a court may well have inherent authority to compensate counsel for such an undertaking in `extraordinary or unusual circumstances'" (Answer Brief of Appellees/Initial Brief of Cross-Appellants, Olive v. Maas, No. SC00317 at 18). If courts have "inherent authority" to compensate counsel

appointed under the registry for litigation of underlying convictions giving rise to a Johnson challenge, then no different rule can apply to CCRC counsel.

(4) Relator's interpretation of §§27.7001 and 27.702 (1), if adopted, would violate equal protection and due process.

Adopting Relator's interpretation of §§27.7001 and 27.702 would result in a violation of equal protection and due process. The legislature of the State of Florida has opted to provide postconviction counsel to indigent death row prisoners. Attempts to limit the role of that counsel are subject to equal protection and due process analysis. See Allen v. Butterworth, 756 So. 2d 52, 54 (Fla. 2000). See also Ohio Adult Parole Authority v. Woodard, 118 S.Ct. 1244 (1998) (O'Connor, Souter, Ginsburg, Breyer, & Stevens, JJ., concurring) (where State exercises its discretion to provide measure to criminal defendants, decisions and procedure must comport with due process); Evitts v. Lucey, 469 U.S. 387, 400-401 (1985) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution- - and, in particular, in accord with the Due Process Clause"); Morrissey v. Brewer, 408 U.S. 471, 480-490 (1972) (if state exercises discretion to grant conditional liberty to convicted prisoners, any decision to revoke liberty of parolee or probationer must afford due process); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (although State may choose whether it will institute any given public welfare program, it must operate whatever program it does establish subject to the protections of due process); Pate v. Holman, 341 F.2d 764, 770 (5th Cir. 1965)

(due process violated when state denies indigent prisoner any of the necessary incidents of appeal, including representation by counsel).

Here, Relator's position, if adopted, would result in an infringement on the due process and equal protection rights of CCRC and its clients 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. This Court's deference to legislative decisions should be limited by the constitutional guarantees of due process and equal protection analysis. See, e.g., Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam); Shova v. Eller, 606 So. 2d 400, 409 (2d DCA 1992); Seminole County Bd. Of County Comm'rs. v. Long, 422 So. 2d 938, 941-42 (5th DCA 1982). Accord Art. I, sec. 21, Fla. Const. The question then is not what the statute states, but rather whether what it states is an unconstitutional infringement on the due process and equal protection rights of CCRC clients. The Due Process clause contains a substantive component that protects individuals government action that is arbitrary, Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665 (1986), conscience-shocking, Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209-10 (1952), oppressive in a constitutional sense, DeShaney v. Winnebago County Dep't. of Social Servs., 489 U.S. 189, 196, 109 S.Ct. 998, 1003 (1989), or interference with fundamental rights, United States v. Salerno, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101 (1987).

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. See, e.g. Allen v. Butterworth, 756 So. 2d 52, 54 (Fla. 2000) (statute which provided harsher standards for successive motions for postconviction relief only in capital cases violates equal protection). Relator has conceded in the Olive v. Maas litigation that registry lawyers "stand in the shoes" of CCR counsel, and that it is "an open question whether a so-called Johnson challenge would in all cases be noncompensable because a court may well have inherent authority to compensate counsel for such an undertaking in `extraordinary or unusual circumstances.'" Thus, to the extent that Relator has suggested that registry counsel or private counsel are permitted to be compensated for filing a challenge to a death sentenced inmate's underlying conviction, this position is not only contrary to the instant request for *quo warranto* relief against registry counsel but also, as applied only to CCRC counsel, violates equal protection. A law which applies to defendants who are indigent but not to those who are not is a blatant violation of equal protection. Griffin v. Illinois, 351 U.S. 12 (1955); Evitts v. Lucey, 469 U.S. 387 (1984).

C. CONCLUSION.

In conclusion, Respondents reassert their defenses as set forth in their motions to dismiss, and urge the Court to dismiss this action. Alternatively, as set forth above, Relator's argument is meritless and should be rejected.

I HEREBY CERTIFY that the foregoing has been sent to Robert Landry,
Asst. Attorney General, Department of Legal Affairs
Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, FL 33607; Bill
Jennings, CCRC-Middle, 3801 Corporex Park Drive, Suite 201, Tampa, FL 33619
via first class mail this 22nd day of January, 2002.

NEAL A. DUPREE
Capital Collateral Regional Counsel
Southern Region
Florida Bar. No. 311545
101 NE Third Avenue, Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

TODD G. SCHER
Litigation Director
Florida Bar. No. 0899641

By: _____
TODD G. SCHER

MICHAEL P. REITER
Capital Collateral Counsel
Northern Region
Florida Bar No. 0320234
1533 South Monroe Street
Tallahassee, FL 32301

BRET B. STRAND
Assistant CCC-Northern Region
Florida Bar No. 0780431

JOHN P. ABATECOLA
Chief Assistant CCC-Northern Region
Florida Bar No. 0112887

By: _____
John P. Abatecola