

IN THE SUPREME COURT OF FLORIDA

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

RELATOR,

v.

CASE NO. SC01-

1586

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

RESPONDENTS.

_____ /

EMERGENCY PETITION FOR WRIT OF QUO WARRANTO

COMES NOW Attorney General Robert A. Butterworth and files this Petition for Writ of Quo Warranto, pursuant to Art. V, sec. 3(b)(8), Fla. Const., seeking to prevent the Office of the Capital Collateral Regional Counsel and their assistants or registry counsel from representing any death row inmates 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, as such action is contrary to their legislative authority derived from Florida Statute 27.7001-27.711, and

requests withdrawal of all representation from all such cases
and would show:

I. Preliminary Statement

The proceeding which has occasioned the instant petition derives, by the efforts of assistant CCRC attorney Eric Pinkard of CCRC-Middle to be appointed to represent Freddie Lee Hall¹ on Hall's pro se motion for counsel to assist him in challenging his 1968 conviction for assault with intent to commit rape filed in the circuit court of Sumter County. Relator notes that CCR counsel has sought to engage in representing another death row inmate, Mr. Melton, in challenging not only his capital judgment and sentence but also a non-capital judgment and sentence via Rule 3.850 attack (See App. 6) 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. Relator submits that collateral counsel appointed pursuant to chapter 27 are not authorized by statute to conduct such representation and therefore seeks relief by the instant writ to stop this unpermitted practice.

¹ A death row inmate whom Mr. Pinkard is representing currently in this Court on a pending rehearing of a habeas corpus petition which challenged the effective assistance of appellate counsel at resentencing.

II. Statement of Facts

On March 15, 2001, Hall filed in the Circuit Court for the Fifth Judicial Circuit in and for Sumter County what he labeled a "Motion to Appoint Counsel to Argue Previously Filed Motion to Appoint Counsel for Purposes of Appeal" in Case No. 1546. (App.

1) In Case No. 1546, Hall had been convicted in 1968 following a jury trial of Assault With Intent to Commit Sexual Battery.

The State filed a Response in Opposition to Motion to Appoint Counsel to Argue Previously Filed Motion to Appoint Counsel for Purposes of Appeal on or about April 10, 2001. (App. 2)

Thereafter, Eric C. Pinkard of Capital Collateral Regional Counsel - Middle (CCRC) filed a Notice of Appearance on behalf of the defendant. (App. 3) The State filed State's Motion to Strike Notice of Appearance citing chapter 27 of the Florida Statutes, particularly F.S. 27.7001, and urging these provisions do not contemplate, authorize or permit the Capital Collateral Regional Counselors to represent defendants in non-capital cases. The State relied on State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) and additionally argued that CCRC was attempting to circumvent the recent Florida Supreme Court opinion denying Hall's Habeas Corpus review in Hall v. Moore, 26 Fla. L. Weekly S316 (May 10, 2001), wherein this Court denied

habeas corpus relief on the claim that Hall received ineffective assistance of appellate counsel. This Court ruled in pertinent part:

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. 1143, 1146 (Fla. 1989). Thus, the failure of appellate counsel to raise this issue does not render counsel's performance ineffective.

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 at 1143.

Id. at 317.

A hearing was conducted before the Honorable Hale A. Stancil, Circuit Judge on June 11, 2001. (App. 4) In response to Judge Stancil's question whether CCRC could represent Hall in this non-death case, Mr. Pinkard replied:

MR. PINKARD: Judge, I believe that, although it's a non-death case, it is the aggravating circumstances for which substantiated or for which a Court relied upon in giving Mr. Hall the death sentence.

And I think that if there is a problem monetarily as far as the taxpayers spending money for CCRC to represent Mr. Hall in this case, I'd be happy to take the appointment individual, separate and apart from CCRC, as I am a member of the Florida Bar and could be appointed for that purpose. That way I wouldn't submit a bill- . . .

* * *

MR. PINKARD: I can take the case pro bono. That would be fine with me.

The State continued to object that this was an improper circumventing of the legislature's intent. (App. 4, TR 5) Pinkard acknowledged the 1968 conviction was not a death penalty case but contended there was a nexus since the instant conviction was used as an aggravating circumstance. (App. 4, TR 6)

On June 25, 2001, Judge Stancil entered his order. (App. 5) The court felt it was not necessary to decide whether Kenney precluded CCRC from representing the defendant but since attorney Pinkard indicated a willingness to handle the matter on a pro bono basis in his individual capacity as a member of the Florida Bar, separate and apart from CCRC, the court concluded that Attorney Pinkard should be appointed to represent the

defendant in this case. (App. 5)

III. Reasons for Granting the Writ

This Court has held that quo warranto is the proper method to test the exercise of some right or privilege, the peculiar powers of which are derived from the state. Martinez v. State, 545 So. 2d 1338, 1339 (Fla. 1989); State ex rel. Smith v. Brummer, 426 So. 2d 532 (Fla. 1982) (quo warranto issued because public defender did not have authority to file class action on behalf of juveniles in federal court), cert. denied, 464 U.S. 823 (1983); State ex rel. Smith v. Jagger, 426 So. 2d 9 (Fla. 1982) (same); see also, State ex rel. Shevin v. Weinstein, 353 So. 2d 1251 (Fla. 3d DCA 1978) (holding circuit court did not have authority to appoint an acting state attorney to represent the State of Florida in an action pending before a federal court); State, Dept. of Health and Rehabilitative Services v. Schreiber, 561 So. 2d 1236 (Fla. 4th DCA 1990) (public defender had no authority to request circuit court to make inquiry into conditions at state hospital since defendant on whose behalf the public defender had made the motion had escaped and was at large).

The Legislature has made its intent unmistakably clear that Capital Collateral and registry counsel are limited to

challenging only the conviction and sentence of death of death row inmates. See F.S. 27.7001 (intent to provide for collateral representation "to challenge only Florida capital conviction and sentence" and "collateral representation shall not include representation during retrials, re-sentencing proceedings commenced under Chapter 940, or civil litigation"); F.S. 27.702(1) (directing that capital collateral counsel shall represent death sentenced defendants for the sole purpose of instituting and prosecuting actions challenging the judgment and sentence imposed in the state and federal courts and that counsel shall file only those post-conviction or collateral actions authorized by statute)(emphasis supplied); F.S. 27.706 (requiring regional counsel and all full-time assistants appointed shall serve on a full-time basis and may not engage in the private practice of law)(emphasis supplied); F.S. 27.711(1)(c) (prohibiting counsel appointed under s. 27.710 from representing a 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.)

In State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) this Court ruled on the Attorney General's petition for a

writ of quo warranto that CCRC's representation of capital defendants was limited by statute to traditional post-conviction relief actions that challenge only the validity of the conviction and sentence and was not statutorily authorized to initiate a federal civil rights lawsuit seeking declaratory and injunctive relief concerning whether the functioning of Florida's electric chair rendered it an unconstitutional method of execution. This Court noted that the legislature expressed its intent 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:

In creating CCRC and the right to representation for capital defendants in postconviction relief proceedings, the Florida legislature has made a choice, "based on difficult policy considerations and the allocation of scarce legal resources," to limit the representation of CCRC by (1) prohibiting that representation from extending to representation "during trials, resentencings, proceedings commenced under chapter 940, or *civil litigation*", § 27.7001 (emphasis added); and (2) providing that such representation shall be "for the *sole purpose of instituting and prosecuting collateral actions challenging the legality of the of the judgment and sentence imposed.*" § 27.702 (1) (emphasis added). In our view, 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.

The Court concluded:

[12] Accordingly, for the reasons expressed, we grant the State's petition and issue a writ of quo warranto directing that CCRC has no authority to represent capital defendants in the federal civil rights action at issue and has no authority to represent capital defendants in any civil action not directly challenging the legality of the judgments and sentences of such defendants.

Id. at 411.

In the instant case, relator submits that CCRC-assistant Pinkard's and CCRC Counsel Jennings' efforts to challenge that 1968 conviction departed from the mandate of Kenny, and the clearly-expressed legislative intent of chapter 27 of the Florida Statutes. The responsibilities of collateral counsel for death row inmates do not extend to asserting challenges to non-capital convictions.²

² Indeed the same argument leveled here that a challenge to the aggravating factor is a part of the challenge to the death case was made and rejected in Kenny. There the Court rejected the notion that a challenge to the electric chair was a challenge to the appropriateness of the sentence imposed. "The fact that the documents called the Judgement and Sentence specifically provided for the electrocution is relevant under Fla. Stat. Sec. 27.702 authorizing CCR (now CCRC) to file 'collateral actions challenging the legality of the judgment and sentence.'" ...CCRC-South's Response to Petition for Writ of Quo Warranto to Prevent Respondents From Acting As Plaintiffs' Counsel in Jones, ET. AL. v. McAndrews, ET. AL., footnote 7.

Attorney Pinkard argued below that there was a nexus to his capital representation since Hall's 1968 assault conviction was one of the convictions subsequently used as an aggravating factor by the trial judge who sentenced Hall to death in the resentencing proceeding.³ This Court had only recently rejected the defense assertion that appellate counsel in the capital proceeding had been ineffective for failing to argue the impropriety of its consideration since prior case law required the challenged conviction to have been set aside, not merely subject to attack. Hall v. Moore, 26 Fla. L. Weekly S316 (Fla. 2001). The Court pointedly added:

"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 1143."

Id. at 317.

If Hall seeks to now challenge his 1968 non-capital conviction as invalid, he must do so without the counsel

³ Challenges to the appropriateness of an aggravating factor, such as prior violent felony, are properly the subject matter for challenge and review by the trial court and the direct appeals process respectively, rather than on collateral review. Claims not raised and preserved at trial and on direct appeal are not cognizable in post conviction review. Because any attack as to the appropriateness of an aggravating factor must be raised in the direct appeal process, attacking the correctness of an underlying aggravator, after the direct appeal, is beyond the scope of CCRC authority.

provided by the legislature in chapter 27 which is limited to representation for challenges to the imposed capital judgment and sentence.⁴

Mr. Pinkard's assertion below that the problem should be deemed moot with his appointment as counsel in a pro bono capacity is unacceptable. He is not legally authorized to overturn the legislature's considered judgment on the limitation of services provided by the collateral counsel assigned pursuant to chapter 27. The legislature has ordained that "all full-time assistants appointed by [capital collateral regional counsel] shall serve on a full-time basis and may not engage in the private practice of law". F.S. 27.706. Attorney Pinkard may not have a client base or law practice independent of the responsibilities assigned to him by the Capital Collateral Regional Counsel. Quite apart from the practical difficulties of monitoring whether Pinkard is or will be using CCRC staffing, equipment, office space, etc. in his "pro bono" assistance,⁵ the problem remains that whatever time and effort he puts into his

⁴ Moreover, we add parenthetically that even a successful challenge to the 1968 conviction would not yield a determination that aggravating factor F.S. 921.141(5)(b) is inapplicable since Hall had other and additional prior violent felony convictions which remain unaffected.

⁵ It appears that in filing a Notice of Appeal for Hall to review the 1968 judgment and sentence, Mr. Pinkard has used CCR letterhead and postage meter.

representation in challenging this non-capital conviction, other death row inmates represented by the Capital Collateral Regional Counsel-Middle's Office are not being served while he engages in this extra unauthorized effort. As recognized in Kenny, the Florida legislature has made a choice "based on difficult policy considerations and the allocation of scarce legal resources" to limit the representation of CCRC to challenge the capital defendant's conviction and sentence only through traditional postconviction relief proceedings. 714 So. 2d at 408. Mr. Pinkard should not be allowed to use the ploy that any "pro bono" service adequately responds to the legislature's limitations.⁶

Furthermore, the statutory obligation of CCRC to represent

⁶ Permitting the private or pro bono practice of Mr. Pinkard is fraught with delays and other issues which cannot be tolerated. Not only will Mr. Pinkard be making decisions as to his time that will impact other CCRC clients but he could potentially delay the processing of the capital Rule 3.851 by having to choose which case he will work on at the same time. There is nothing, no facts or legal issues in the 1968 case that have anything to do with the death penalty case, save the existence of the conviction itself and there is certainly nothing about the death penalty case that has any relation to the validity of the 1968 conviction except that, that conviction existed to be used as an aggravating factor. This having been said, Mr. Pinkard will necessarily be required to take on another case where there is no justification. If the instant assignment is authorized, why shouldn't every death row inmate with a prior violent felony have their priors challenged by CCRC? The answer is clear because there are limited resources and the legislature has elected what areas of defense the state will fund.

Mr. Hall on his capital judgment and sentence may become compromised by Mr. Pinkard's extraneous effort to act pro bono on Hall's non-capital conviction. Not only is he taking time away from representing Mr. Hall validly in proceedings pursuant to the statutory mandate (e.g. federal habeas corpus review), but also in the event Mr. Pinkard should leave the employment of CCRC to pursue other opportunities, it is not clear whether that would result in the saddling of additional responsibilities on that agency to continue his pro bono efforts for Hall in the non-capital arena to the detriment of other capital litigants desirous of legitimate representation in their cases, as the legislature has seen fit to establish. Mr. Hall is a client of CCRC, not specifically Mr. Pinkard. As part of Mr. Pinkard's employment with CCRC he has been assigned to handle Mr. Hall's case. Should Mr. Pinkard leave CCRC's employ he will not be responsible for representing Mr. Hall rather CCRC will be obligated to reassign the Hall case to another CCRC attorney to handle all capital litigation. By allowing Mr. Pinkard to circumvent the scope of his employment and expand representation to non-capital matters, Mr. Pinkard is placing CCRC in an unacceptable posture. First, clients who might otherwise be represented by Mr. Pinkard will be assigned to other attorneys while Mr. Pinkard sets his own agenda as to who and when he elects

to represent; second, should Mr. Pinkard leave CCRC's employ, he has complicated the representation of Mr. Hall by CCRC; third, Mr. Pinkard's action potentially threatens the ability of the CCRCs to secure adequate funding and staffing. Certainly permitting an attorney to set out the rules **he elects to follow** does not say much for the agency's ability to operate properly under the statutes or allocate resources in an appropriate manner to ensure finite resources are fairly and equitably dispersed.⁷

Alternatively, should this Honorable Court decide that jurisdiction more appropriately rests with another court, relator requests that the cause be transferred to that court. See Art. V, sec. 2(a) Fla. Const. and Fla. R. App. P. 9.040(b). If an improper remedy has been sought, the cause should be treated as if a proper remedy had been sought. Art. V, sec. 2(a), Fla. Const.; Fla .R. App. P. 9.040(c).

⁷ A similar issue is pending in Olive v. Maas, FSC Case No. SC00-317.

Respectfully submitted,

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COUNSEL FOR RELATOR

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, 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 - Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this _____ day of July, 2001.

COUNSEL FOR RELATOR
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).

COUNSEL FOR RELATOR