IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1763
2 DCA CASE NO. 2D05-842
LOWER TRIBUNAL CASE NO. CF78-2090A1-XX

STATE OF FLORIDA,

Petitioner,

v.

DEAN KILGORE,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's discharge of counsel and resulting constructive dismissal of Respondent's Rule 3.850 motion. The following symbols will be used to designate references to the record in this appeal:

"RI. ____" – record on appeal to 2nd DCA Case No. 79-124

"R. ____" -- record on appeal to 2nd DCA Case No. 05-842

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PRELIMINARY STATEMENT REGARDING CERTIFIED QUESTION

The District Court of Appeal certified the following question for this Court's review:

> ARE COUNSEL APPOINTED TO PROVIDE COLLATERAL REPRESENTATION TO DEFENDANTS SENTENCED TO DEATH, PURSUANT TO SECTION 27.702, AUTHORIZED TO BRING PROCEEDINGS TO ATTACK THE VALIDITY OF A PRIOR FIRST DEGREE MURDER CONVICTION THAT WAS USED AS A PRIMARY AGGRAVATOR IN THE DEATH SENTENCING PHASE?

Kilgore v. State 933 So. 2d 1192, 1193 (Fla. 2d DCA 2006).

In its Initial Brief, the State submits that the certified question should be narrowed to:

> DID THE TRIAL COURT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN RULING THAT CCRC WAS NOT AUTHORIZED TO COLLATERALL CHALLENGE THE VALIDITY OF ANY OF THE DEFENDANT'S PRIOR VIOLENT FELONY CONVICTIONS, ALL OF WHICH WERE FINAL MORE THAN 25 YEARS AGO.

Mr. Kilgore submits that the question should state:

> WHERE SUPREME COURT CASE LAW AND APPLICABLE PROFESSIONAL STANDARDS REQUIRE POSTCONVICTION COUNSEL TO INVESTIGATE AND CHALLENGE AGGRAVATING FACTORS PRESENTED BY THE STATE, DID THE CIRCUIT COURT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW WHEN IT PREVENTED CAPITAL POSTCONVICTION COUNSEL FROM CHALLENGING A PRIOR VIOLENT FELONY CONVICTION WHICH WAS USED TO SUPPORT A SENTENCE OF DEATH?

STATEMENT OF THE CASE AND FACTS

Mr. Kilgore was indicted by the Grand Jury in Polk County, Florida on August 25, 1978 on three counts: (1) the premeditated murder of Thomas Wood in violation of Florida Statutes Sec. 782.04; (2) the forcible abduction of Barbara Ann Jackson against her will with the intent to facilitate the commission of murder and burglary while carrying, displaying, using, threatening or attempting to use a firearm in violation of Florida Statutes sect. 787.01; and, (3) entering the dwelling of Barbara Ann Jackson at 1236 Parkhurst Avenue, Lakeland, Polk County, Florida, with the intent to commit kidnapping while armed with a rifle, in violation of Florida Statutes Sec. 10.02. (RI. 36-37).

Assistant public defender Frederick R. Replogle and special public defender Dan P. Brawley represented Mr. Kilgore at trial (RI. 387). On December 18, 1978, the Circuit Court of the Tenth Judicial Circuit, Polk County, entered the judgment of convictions for first degree murder, kidnapping and trespass with a firearm and sentenced Mr. Kilgore to consecutive life sentences (twenty-five years mandatory) on counts one and two, with a consecutive five-year sentence on count three.

Mr. Kilgore filed an appeal with the Second District Court of Appeals, Case No. 79-124, sometime after the record was filed on May 14, 1979. Assistant public defender Paul C. Helm

represented Mr. Kilgore on the appeal. The 2nd DCA issued a per curiam opinion affirming Mr. Kilgore's convictions on February 13, 1980. The mandate issued on February 29, 1980. No further proceedings were undertaken in the instant case until August 15, 2002.

While serving his sentences on the instant case, Mr. Kilgore was indicted for the murder of Emerson Jackson, a fellow inmate at Polk Correctional Institution. Mr. Kilgore plead nolo contendare and was sentenced to death. On direct appeal, this Court permitted Mr. Kilgore to withdraw his plea. Kilgore v. State, 933 So. 2d 1192. Mr. Kilgore was subsequently tried and convicted by jury. At the penalty phase, the State offered the 1978 murder conviction, which is the subject of the instant appeal, to establish the aggravating factors of "prior violent felony" and "under sentence of imprisonment." In addition to the documentary evidence establishing Mr. Kilgore's prior violent felony conviction, the State also presented Barbara Ann Jackson and Capt. Joe Keil to testify regarding the events and circumstances of the 1978 case. On April 27, 1994, the Honorable Dennis P. Maloney sentenced Mr. Kilgore to death. On direct appeal, this Court affirmed Mr. Kilgore's convictions and sentences. Kilgore v. State, 688 So. 2d 895 (Fla. 1996), cert. denied, 139 L.Ed. 58 (1997).

Capital Collateral Regional Counsel-South ("CCRC-South")

was appointed as counsel for Mr. Kilgore in his death penalty case, Polk County Case No. CF89-0686A1-XX.[1] That case is pending in Hillsborough County before the Honorable J. Rogers Padgett. Pursuant to Fla. R. Crim. P. 3.852, CCRC-South filed several demands for additional public records, including records regarding his 1978 case, from the Office of the State Attorney. The State objected to production of several items and claimed exemptions. After conducting an in camera inspection, on August 20, 2001, Judge Padgett disclosed certain "state attorney notes" of interviews with Barbara Jackson and Jeffrey Barnes, both of whom were deposed and testified at Mr. Kilgore's 1978 trial. These notes had never been previously made available to counsel for Mr. Kilgore. Counsel determined that, when compared with other existing statements and testimony by these witnesses, the notes arguably revealed impeachment material pursuant to Brady v. Maryland, 373 U.S. 83 (1963) (In her 52-page 1978 deposition, Ms. Jackson admitted that she had a romantic relationship with Mr. Kilgore and she stated that she thought he had been drinking on the night of the 1978 offense. (RI. 463, 513)).

Trial counsel in 1978, 1990, and 1994 did not have the benefit of this potential impeachment material because it had been withheld under a claim of privilege or exemption, and had

[1] Capital Collateral Regional Counsel-Middle withdrew due to a conflict.

no reason to know that the notes existed until they were disclosed by the trial court. After the disclosure, postconviction counsel moved for access to all of the withheld "attorney notes" of State Attorney interviews with named police officers and other witnesses from the 1978 proceedings including Lt. Gene E. Nipper, Joseph Keil, B.B. "Billy" Bush, Gerald Barlow, John W. Smith, Sgt. Grier, Karen Sullen, Pam Jackson, Leon Williams, Anthony Jackson, Jeffery Barnes, H.R. Morgan, C.S. Smith, Barbara Ann Hall and Gloria Lumar, Jasper Woods, Sonja Edwards, Frances Hadley and John Gene Williams.

On August 15, 2002, CCRC-South filed a motion to vacate the 1978 judgments of convictions and sentences pursuant to Fla. R. Crim. P. 3.850 and requested an evidentiary hearing. The motion to vacate alleged, inter alia, that Mr. Kilgore's 1978 convictions are materially unreliable because no adversarial testing occurred due to the cumulative effects of ineffective assistance of counsel and the withholding of exculpatory evidence. (R. Supp. V. 1). On October 17, 2002, the State responded to Mr. Kilgore's motion below by filing a motion to discharge CCRC-South from representing Mr. Kilgore in any challenge to the 1978 conviction. (R. 40-47). Mr. Kilgore responded on October 24, 2002, with a detailed argument against procedural bar of his claims as well as argument against the dismissal of CCRC-South from Mr. Kilgore's case. (R. 48-128).

The circuit court took no further action on the case until Mr. Kilgore filed a motion on October 21, 2004 requesting a status conference on the discharge motion, the State's claim of procedural bar, Mr. Kilgore's response, and argument on the necessity for an evidentiary hearing on the disputed matters of fact and law contained in Mr. Kilgore's Rule 3.850 motion. (R. 129-131).

The circuit court conducted a hearing on November 18, 2004. (R. 132-139) and entered an order dismissing CCRC from the instant case on January 10, 2005 (R. 141-143). The lower court's order did not address the State's procedural bar arguments or otherwise make any findings as to the merits of Mr. Kilgore's claims below. On February 24, 2005, Mr. Kilgore appealed the circuit court's order dismissing CCRC-South to the Second District Court of Appeal. The Second District converted the appeal to a petition for certiorari and certified the following question to this Court for review:

> ARE COUNSEL APPOINTED TO PROVIDE COLLATERAL REPRESENTATION TO DEFENDANTS SENTENCED TO DEATH, PURSUANT TO SECTION 27.702, AUTHORIZED TO BRING PROCEEDINGS TO ATTACK THE VALIDITY OF A PRIOR FIRST DEGREE MURDER CONVICTION THAT WAS USED AS A PRIMARY AGGRAVATOR IN THE DEATH SENTENCING PHASE?

Kilgore v. State, 933 So. 2d 1192, 1193 (Fla. 2d DCA 2006).

On August 28, 2006, the State filed its Notice to Invoke Discretionary Jurisdiction. On September 11, 2006, the District

Court of Appeal withdrew its mandate and stayed proceedings pending disposition of the case by this Court. On September 25, 2006, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Mr. Kilgore's convictions in the instant 1978 case were used to establish the “prior violent felony” and “under sentence of imprisonment” aggravating factors in Mr. Kilgore's 1989 death case, Polk Co. Case No. CF89-0686A1-XX. CCRC-South has undertaken the attack on Mr. Kilgore's 1978 priors as part and parcel of his duties as postconviction counsel. Applicable professional standards and United States Supreme Court case law require postconviction counsel in a capital case to undertake an exhaustive investigation into the client’s background and to seek to litigate all issues, including challenging any aggravating factors presented by the State. The consideration of a vacated conviction to support an aggravating factor violates the Eighth Amendment. By preventing postconviction counsel from challenging the prior conviction, which was used as aggravation in Mr. Kilgore’s death penalty case, the trial court departed from the essential requirements of the law as established by the United State’s Supreme Court and applicable professional standards.

STANDARD OF REVIEW

This case is before this Court on review of the district court's ruling on a certiorari proceeding certifying a question of great public importance. The issue before this Court is whether the district court appropriately found that the circuit court's order dismissing CCRC-South as counsel for Mr. Kilgore constitutes a departure from the essential requirements of law. When determining whether the trial court's ruling constitutes a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice. Combs v. State, 436 So. 2d 93 (Fla. 1983).

The State argues that the trial court's dismissal of CCRC-South as counsel for Mr. Kilgore was appropriate because the trial court relied on both statutory authority and case law. As argued below, neither Fla. Stat. Sec. 27.711(11), State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), nor Olive v. Maas, 811 So. 2d 644 (Fla. 2002), restrict CCRC-South from challenging aggravating circumstances, including prior violent felonies, used to support their clients' death sentences. The essential requirements of the law at issue are the obligations

of postconviction counsel to vigorously advocate for their clients in accordance with Fla. Stat. Sec. 27, applicable professional norms, and United States Supreme Court case law.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW WHEN IT PREVENTED CAPITAL POSTCONVICTION COUNSEL FROM CHALLENGING MR. KILGORE'S PRIOR VIOLENT FELONY CONVICTION WHICH WAS USED TO SUPPORT MR. KILGORE'S SENTENCE OF DEATH

The Florida Legislature created the Capital Collateral Regional Counsel Offices to "represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the legality 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." Fla. Stat. Sec. 27.701(1). CCRCs' are limited to filing "only those postconviction or collateral actions authorized by statute" and "shall not include representation during retrial, resentencing proceedings commenced under Chapter 940, or civil litigation." Fla. Stat. Sec. 27.702(1).

Under applicable professional standards, postconviction

counsel in capital cases is required to undertake an exhaustive investigation into the client's background and to seek to litigate all issues, whether or not previously presented. The United States Supreme Court has determined that the applicable professional standards are set forth in the American Bar Association Standards of Criminal Justice:

> Counsel's conduct . . . fell short of the standards for capital defense work articulated by the American Bar Association (ABA) --standards to which we have long referred as guides to determining what is reasonable" Strickland [v. Washington, 466 U.S. 668 (1984)]; Williams v. Taylor, [529 U.S. 420 (2000)]. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence **and evidence to rebut any aggravating evidence that may be introduced by the prosecutor**. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.41(c)) p. 93 (1989) (emphasis added).

Wiggins v. Smith, 123 S. Ct 2257, 2536-2537 (2003).

> [A]mong the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences.

Id., quoting 1 ABA Standards for Criminal Justice 4-4.1. (emphasis in original).

As the Sixth Circuit has held:

> Although the instant case was tried before the 1989 ABA edition of the standards was

> published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as "prevailing professional norms" as "guided" by "American Bar Association standards and the like."

Hamblin v. Mitchell, 354 F. 3d 482 (6th Cir. 2003), 2003 U.S.App. LEXIS 26291.

The 2003 version of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases speaks specifically to counsel's "obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty," specifically requiring that:

> Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside. Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.

In Rompilla v. Beard, 545 U.S. 374 (2005), the Supreme Court found that trial counsel was deficient because he "failed to make reasonable efforts to review the prior conviction file, despite knowing that the prosecution intended to introduce Rompilla's prior conviction not merely by entering a notice of

conviction into evidence but by quoting damaging testimony of the rape victim in that case." Id., at 389. Moreover, "A reasonable defense lawyer would have attached a high importance to obtaining the record of the prior trial, in order to anticipate and find ways of deflecting the prosecutor's aggravation argument." Id., at 395 (O'Connor, J., concurring).

The ABA Guidelines specifically extend these obligations to post-conviction counsel: "Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines including the obligations to continue an aggressive investigation of all aspects of the case." Guideline 10.15.1 E.4. Commentary to Guideline 10.15.1 emphasizes the duty of post-conviction counsel:

> . . . [C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7 (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies or prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

* * *

> As with every other stage of capital proceedings, collateral counsel has a duty . . . to raise and preserve all arguably meritorious issues. These include not only challenges to the conviction and sentence, but also issues which may arise subsequently. Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications. Counsel should be aware that any change in the availability of post-conviction relief may itself provide an issue for further litigation. This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

The State's contends that CCRC-South's challenge to Mr. Kilgore's 1978 murder conviction is "unauthorized" and " beyond the mandate provided by the legislature." (I.B. p. 18). The State ignores the fact that the 1978 conviction formed the basis of Mr. Kilgore's "prior violent felony" and "under sentence of imprisonment" aggravators. As such, postconviction counsel is not only authorized to launch a good-faith challenge to the 1978 conviction, CCRC-South is required to do so.

The requirement that counsel in death penalty cases investigate and challenge prior cases is well founded. In Johnson v. Mississippi, 486 U.S. 578, 590, the petitioner's death sentence was predicated, in part, on a previous conviction which was vacated after the trial and direct appeal. Id. at 580.

During the sentencing phase of Johnson's trial, the previous conviction was argued to the jury and used to support Mississippi's prior violent felony aggravating factor. The Supreme Court held that the consideration of a subsequently vacated conviction to support an aggravating factor violates the Eighth Amendment. See, also, Armstrong v. State, 862 So. 2d 705 (Fla. 2003)(death sentence reversed where prior felony conviction that jury considered as an aggravating circumstance was vacated after petitioner was sentenced to death).

The State contends that this Court's May 7, 2002 order in State ex rel. Butterworth v. Bill Jennings, et. al., Case No. SC01-1587, prohibits the CCRCs from collaterally attacking prior violent felonies that are used as aggravating factors in the capital cases of their clients. (See R. 58). The language of Jennings fails to support this contention.

In Jennings, the State sought "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."

CCRC-Middle countered that although a lawyer from their office had been appointed pro bono by the circuit court to attack the CCRC capital client's non-capital prior violent felony, that unusual circumstance was essentially irrelevant to the issues at hand because "this representation would fall squarely within [counsel's] duties as an Assistant CCRC." (R. 77-88). This Court did not affirmatively state that attacks on prior violent felonies used as aggravation in a capital trial cannot be undertaken by CCRC counsel pursuant to the Florida Statutes. Rather, this Court interpreted Fla. Stat. Sec. 27 as prohibiting attorneys employed in the CCRC Offices from "representing capital inmates on other criminal cases on a pro bono basis." This Court did not require the CCRCs to withdraw from representation in cases attacking non-capital prior violent felonies used in aggravation, and dismissed the State's Quo Warranto petition in all respects with the exception of an explicit prohibition of pro bono work by CCRC (R. 58). CCRC-South has undertaken the attack on Mr. Kilgore's 1978 priors as part and parcel of his duties as an Assistant CCRC South, not on a pro bono basis.[2]

[2] Mr. Kilgore's goal below was to preserve arguments and evidence that needed to be heard and exhausted in the trial court. On the date Mr. Kilgore filed his successor motion, August 15, 2002, nearly a year had passed since the State had produced records upon the order of the court in Tampa in his death case that had been withheld from counsel in Mr. Kilgore's

As Jennings suggests, the limitations enumerated in Fla. Stat. Secs. 27.7001, 27.702(1), 27.706 and 27.711(1)(c), as relied upon by the State (I.B. at pp. 12-15), are not applicable to undersigned CCRC counsel's representation of Mr. Kilgore on his 1978 prior violent felony. As CCRC-Middle argued in Jennings: "[i]f 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, re-sentencings, 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." (R. 85)

The State also argues that State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) prevents CCRC from fulfilling its duties to Mr. Kilgore. Kenny imposed a limitation on CCRC

1978 proceedings. The State arguably withheld material and exculpatory evidence from defense counsel thereby depriving Mr. Kilgore of his rights under the Fifth, Sixth, and Eighth Amendments in violation of Brady v. Maryland, 373 U.S. 83 (1963), Napue v. Illinois, 360 U.S. 264 (1959), and Giglio v. United States, 405 U.S. 150 (1979). The prosecutor is required to reveal to defense counsel any and all information that is helpful to the defense, including impeachment evidence, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, 473 U.S. 667 (1985). It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F. 2d 1533 (11th Cir. 1984).

litigating civil rights or class actions in Federal Courts challenging the legality of Florida's use of the electric chair. However, the limitation on civil rights actions did not extended to collateral attacks on aggravating offenses. As this Court found 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. As the ABA Guidelines demonstrate, supra, challenging prior violent felonies that were used to support aggravating factors is such a "traditional" postconviction proceeding; in fact, it is expected of collateral counsel. Contrary to the lower court's order discharging CCRC-South, and the State's argument here, nothing in the holding of Kenny indicates that CCRC is acting outside of its statutory mandate in attacking an aggravator in Mr. Kilgore's case.

The State also mistakenly relies on Olive v. Maas, 811 So. 2d 644 (Fla. 2002), in support of the contention that capital collateral counsel may not represent capital defendants seeking to challenge the judgment and sentence of a non-capital conviction. This Court's holding in Olive concerned whether private registry counsel appointed pursuant to Florida Statute to represent capital postconviction clients are limited to the contractual fee caps. This Court held that they are not

because:

> [B]y accepting an appointment, a registry attorney is not forever foreclosed from seeking compensation should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of his or her time, energy and talent and violate the principles outlined in Makemson and its progeny.

Olive at 654, citing Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986).

As in Kenny, the statutory restrictions on the scope of representation that are outlined in the Olive opinion do not restrict either CCRC lawyers or registry lawyers from attacking prior violent felonies used as aggravation in death cases. To the contrary, the lifting of the fee cap requirement by this Court in Olive actually provides a specific avenue for registry counsel to obtain compensation "in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases." Id. Under Kenny, registry counsel may seek compensation for legal work in postconviction that is not anticipated by the statutory fee cap and contract. That must include collateral attack of prior violent felonies pursuant to the ABA Guidelines and federal case law.[3]

[3] Mr. Kilgore submits that Fla. R. Crim. P. 3.850 contemplates that newly discovered evidence, retroactive new fundamental rights, and attorney negligence can all trump any time limitations of Fla. R. Crim. P. 3.850(b) and require that

The State further argues that Mr. Kilgore's 1978 murder conviction is "unrelated" (I.B. 19) to the capital case, that the cases have no bearing on one-another (I.B. 20), that CCRC-South's representation is therefore "beyond the mandate provided by the Legislature" (I.B. 19), and that CCRC-South is "attempt[ing] to create confusion" by fulfilling his obligations as postconviction counsel. These claims defy logic.

Both aggravating factors found by the trial court in the death case arose out of Mr. Kilgore's conviction in the 1978 case. Furthermore, a victim/witness in 1978 case testified, arguably inconsistently, in Mr. Kilgore's capital penalty phase. As the State rightly points out, this Court has emphasized that "testimony concerning the events which resulted in the [prior violent felony] conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence." Rhodes v. State, 547 So. 2d 1201 (Fla. 1989). The impact of the witness testimony regarding the 1978 murder on the death penalty case cannot be discounted. Similarly, the State finds fault with the district court's finding that circumstances such as Mr. Kilgore's case are a "rarity" (I.B.). As the State rightly points out, this Court

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competent, diligent and ethical postconviction counsel **must** attack a prior conviction from years before based on any

has repeatedly relied on prior violent felonies in affirming death sentences. While the "prior violent felony" aggravator is not uncommon, the circumstances giving rise to challenging this aggravator in postconviction are. One can only hope that the many cases cited by the State do not involve withheld Brady material which would call into question the validity of those convictions.

Contrary to the State's contention that CCRC-South is "self-appointed" and "claims an arguable self-appointed right" to initiate non-capital collateral actions," CCRC is acting fully within its statutory mandate, and consistent with the duties imposed on postconviction counsel by the United States Supreme Court and applicable guidelines. The State points out that defendants do not have a constitutional right to effective assistance of counsel in postconviction proceedings, even in death penalty cases.[4] The cases cited by the State support the contention that defendants may not claim ineffective assistance of counsel as a basis for relief. However, this does not relieve postconviction counsel of his duties and responsibilities to client, the court and the profession to

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applicable grounds of Fla. R. Crim. P. 3.850(a).

[4] To the extent that the State's Initial Brief argues the merits of Mr. Kilgore's claims raised in the 1978 Rule 3.850 Motion, the merits of the motion are not at issue here and have yet to be decided by the circuit court. The merits of Mr.

zealously advocate on his clients' behalf.[5]

The State suggests that, by representing clients like Mr. Kilgore consistent with prevailing professional norms, CCRC-South will divert scarce fiscal resources and attention from its other clients. The State's concern that CCRC-South "might conclude" that it is necessary to travel to other states or countries to investigate clients' backgrounds or prior cases is perplexing. Like the State Attorneys and Attorney General's Offices, CCRC-South regularly does travel to other states and countries to investigate such matters. This, again, is required under the applicable professional norms.[6] As the State would have it, CCRC-South must choose which clients it will zealously defend, and which it will not because some cases are more expensive and less convenient than others. Such a policy would not only be inconsistent with professional norms, it would be unconscionable.

Kilgore's claim have no bearing on whether he is entitled to representation in bringing them.

[5] To the extent that the State expects Mr. Kilgore to investigate and raise these claims himself, counsel submits that Mr. Kilgore's case is currently being litigated to determine whether he is mentally retarded.

[6] More troubling is the State's reliance on the recent Department of Financial Services Report of Investigation, Case No. IV-20050400001, alleging that CCRC-South improperly spent funds on lobbyists "in apparent violation of State law" and sent employees to Cuba investigate a case "in apparent violation of state and federal laws." (I.B. 31-32, FN 9). This is clearly no more than an ad hominem attack based on unfounded allegations that have no bearing on the issues before this Court.

Equal protection requires that all capital postconviction clients have equal access to the courts. As noted supra, Strickland, Williams, Wiggins, and Hamblin all point to the existence of attorney performance standards that require counsel in death penalty cases to routinely investigate the bases for statutory aggravation including prior crimes. Any policy or statute that attempts to disarm counsel from undertaking the investigation and collateral attacks required under this case law must fall. The Florida Supreme Court's order in Jennings was entered months after Olive and it utterly fails to interpret the Florida Statutes in such a way as to deny the Capital Collateral Regional Counsel the opportunity to attack prior violent felonies as the lower court's order in the instant case does.

CONCLUSION

WHEREFORE, the certified question should be answered in the affirmative and this Court should hold that the district court was correct in finding that the trial court did depart from the essential requirements of the law by dismissing CCRC-South from representing Mr. Kilgore in a collateral attack on his 1978 convictions which were used to support the finding of aggravating circumstances in his subsequent death penalty case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first-class postage prepaid, to Katherine Blanco, Office of the Attorney General, Concourse Center 4, 3507 Frontage Road, Suite 200, Tampa, Florida 33607, this 14th day of November, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is prepared in 12-point Courier New font, in compliance with the requirements of Fla. R. App. P. 9.210(a)(2).

PAUL KALIL
Assistant CCRC-South