IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DEAN KILGORE,

Respondent.
______________________________/

CASE NO. SC06-1763
2 DCA No. 2D05-842
L.T. No. CF78-2090A1-XX

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

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PRELIMINARY STATEMENT REGARDING CERTIFIED QUESTION

In Kilgore v. State, 933 So. 2d 1192, 1193 (Fla. 2d DCA 2006), the Second District Court of Appeal[1] 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?

Unlike the questions of great public importance certified by the Second District in State v. Steele, 872 So. 2d 364, 365 (Fla. 2d DCA 2004) ["Does a trial court depart from the essential requirements of law, in a death penalty case..."], the certified question framed by the Second District in this case omitted an essential prerequisite: this is a certiorari proceeding. Thus, the State respectfully submits that the certified question in this case instead should state:

CERTIFIED QUESTION AS RESTATED

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

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[1] The Second District's panel was comprised of three members of the Fifth District Court of Appeal. See, Kilgore, 933 So. 2d at 1192, 1197, Opinion by Sharp, W.J., Associate Judge; Sawaya, T.D., Associate Judge (concurs); Griffin, J.R., Associate Judge (dissents with opinion).

STATEMENT OF THE CASE AND FACTS

Kilgore's 1978 Violent Felony Convictions

On August 25, 1978, Dean Kilgore was indicted by the Grand Jury in Polk County for (1) the premeditated murder of Thomas Wood in violation of Section 782.04, Florida Statutes; (2) the forcible confinement, abduction or imprisonment of Barbara Ann Jackson against her will with the intent to facilitate the commission of murder and burglary, or to inflict bodily harm upon or terrorize Barbara Ann Jackson, while carrying, displaying, using, threatening or attempting to use a firearm, in violation of Section 787.01, Florida Statutes; and entering the dwelling of Barbara Ann Jackson, with the intent to commit kidnapping while armed with a dangerous weapon, a rifle, in violation of Section 810.02, Florida Statutes. (V1/R32-34).

Following his jury trial, Kilgore was found guilty as charged on counts one and two, and on count three, Kilgore was found guilty of trespass with a firearm. (V1/R36-39). On December 18, 1978, Kilgore was sentenced to consecutive life sentences (25 years mandatory) on counts one and two and a consecutive five-year sentence on count three. (V1/R36-39; See also, Supp.V1/R154).

Kilgore's direct appeal, Kilgore v. State, 2d DCA Case No. 79-124, was affirmed, *per curiam*, on February 13, 1980. Kilgore

v. State, 380 So. 2d 589 (Fla. 2d DCA 1980). The mandate issued on February 29, 1980. Kilgore did not seek post-conviction relief in state court. Kilgore v. State, 933 So. 2d 1192, 1194 (Fla. 2d DCA 2006); See also, Supp. V1/155.

Kilgore's 1989 Prison Murder

In 1989, Dean Kilgore was incarcerated at the Polk Correctional Institution, serving his consecutive sentence of life imprisonment for first-degree murder, consecutive life sentence for kidnapping, and consecutive five-year sentence for armed trespass, when Kilgore armed himself with a homemade shank and he stabbed another inmate, his homosexual lover, Emerson Robert Jackson. Jackson died as a result of the stab wounds. Kilgore was indicted for first-degree murder and possession of contraband by an inmate. Kilgore originally pled *nolo contendere* to both charges. However, Kilgore was permitted to withdraw the plea, and he was subsequently tried by a jury. Kilgore v. State, 933 So. 2d 1192, 1194 (Fla. 2d DCA 2006). In 1994, Kilgore was convicted on both counts and the jury recommended the death penalty by a vote of 9 to 3. Kilgore v. State, 688 So. 2d 895, 897 (Fla. 1996) . In imposing the death penalty, the trial court found the following two aggravating circumstances:

(1) Kilgore was under sentence of imprisonment at the time he committed the murder; and

(2) Kilgore was previously convicted of a felony involving the use or threat of violence to the person (*first-degree murder, kidnapping, trespass with a firearm, three counts of assault with intent to commit murder in the second degree, two counts of aggravated assault, and resisting arrest with force*)[2]. See, Kilgore, 688 So. 2d at 897 (e.s.). This Court affirmed Kilgore's first degree murder conviction and death sentence on direct appeal. Kilgore v. State, 688 So. 2d 895, 897 (Fla. 1996), cert. denied, Kilgore v. Florida, 522 U.S. 834 (1997). CCRC-South currently represents Kilgore in his death penalty case, CF89-0686A1-XX.[3]

CCRC's 2002 Rule 3.850 motion on Kilgore's 1978 Convictions

On August 16, 2002, CCRC-South filed a Rule 3.850 "Motion to Vacate Judgment of Conviction and Sentence with Special

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[2] Three of Kilgore's nine prior violent felony convictions were imposed in 1978. Kilgore's six additional prior violent felony convictions were imposed in 1971. See, Kilgore v. State, SC Case No. 83,684 (V1/123-127; Penalty Phase transcript at V10/142-1415; See also, http://www.dc.state.fl.us

[3] Kilgore's trial counsel in his 1989 prison murder case is now a Circuit Judge in Polk County. Therefore, Kilgore's Polk County death penalty case is now pending before Hillsborough County Circuit Judge Padgett. Several days of evidentiary hearings have been held on Kilgore's postconviction motion to vacate his 1989 prison-murder death penalty case, and another evidentiary hearing is pending on Kilgore's most recent claim of alleged mental retardation. [See, https://www2.myfloridacounty.com/ccis]

Request to Leave to Amend" in Circuit Court Case CF78-2090A1-XX. (Supp.V1/152-164). CCRC's motion sought to challenge the validity of the three prior violent felony convictions imposed in 1978 (first-degree murder/life sentence; kidnapping/consecutive life sentence; and trespass with a firearm/consecutive five year sentence). (Supp.V1/152-164).

On October 17, 2002, the State filed a Motion to Discharge the Office of the Capital Collateral Representative, asserting that under Chapter 27, Florida Statutes, CCRC could not lawfully undertake the representation of a capital defendant to challenge the judgment and sentence in a non-capital case, citing State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) and Olive v. Maas, 811 So. 2d 644 (Fla. 2002). (V1/40-47). On October 24, 2002, CCRC filed a written response, opposing both the State's motion to discharge CCRC and the procedural bars. (V1/48-128).

On November 18, 2004, the trial court held a status hearing on the motion to discharge CCRC. (V1/132-139). On January 10, 2005, the trial court entered a written order entitled "Order Dismissing Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend." (V1/141-143). However, the trial court's order addressed only the statutory prohibition and CCRC's lack of authority to represent Kilgore in

a non-capital case. (V1/141-143). This order granted the State's motion to discharge CCRC (V1/40-45) as postconviction counsel for Kilgore in his 1978 *non-capital case*. (V1/143).

The trial court's written order states, in pertinent part:

> In case CF78-2090A1-XX, the Defendant was tried and found guilty of Count One, First-Degree Murder, Count Two, Kidnaping, and Count Three, Trespassing with a Firearm. The Defendant was sentenced to life in State Prison with twenty-five year mandatory for Counts One and Two, and fifteen years for Count Three. The Defendant appealed the guilty verdict. The Second District Court of Appeal affirmed the judgment and sentence on February 13, 1980.
>
> In Case CF89-0686A1-XX, the Defendant was tried and found guilty of first-degree murder. The 1978 conviction was used as an aggravating circumstance during the penalty phase. The Defendant was sentenced to death. The verdict and sentence were affirmed by the Florida Supreme Court. See Kilgore v. State, 688 So. 2d 895 (Fla. 1996). Subsequently, C.C.R.C. was appointed to represent the Defendant for collateral relief proceedings in case CF89-0686A1-XX.
>
> On August 16, 2004 [sic, 2002], the Defendant, through C.C.R.C. counsel, filed a *Motion to Vacate Judgment of Conviction and Sentence with Special Request to Leave to Amend* in case CF78-2090A1-XX (non-capital case). The Defendant alleges he is entitled to relief based on newly discovered evidence.
>
> The State responded to the Defendant's motion by alleging that under section 27.711(11), Florida Statutes, the Office of the Capital Collateral representative cannot lawfully undertake the representation of a capital defendant by challenging a judgment and sentence of a non-capital sentence. Thus, the State requests that this Court enter an order removing the capital collateral representative from representing the Defendant on the non-capital case.

Section 27.711(11), Florida Statutes, reads as follows:

> An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing 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, (e.a.) or any civil litigation other than habeas corpus proceedings.

The Supreme Court has held that this limitation on the activities of counsel appointed to represent capital defendants is valid. State ex rel. Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998); Olive v. Mass, 811 So.2d 644 (Fla. 2002). Accordingly, this Court finds that the capital collateral regional counsel appointed to represent Mr. Kilgore in the capital case, CF89-0686A1-XX, is precluded from representing him in the non-capital case, CF78-2090A1-XX. Therefore, it is ADJUDGED:

> That the State's motion to discharge the office of the capital collateral representative is GRANTED.

(V1/142-143)

On February 24, 2005, CCRC filed a notice of appeal of the "final order dismissing Defendant's motion to vacate judgments of conviction and sentence pursuant to Fla. R. Crim. P. 3.850 and granting the State's motion to discharge collateral counsel." (V1/144-145). However, because the Circuit Court's order only dismissed CCRC from representing Kilgore in his 1978 non-death penalty case, the Second District elected to convert

the summary postconviction appeal to a proceeding in certiorari. Kilgore v. State, 933 So. 2d 1192, 1193 (Fla. 2d DCA 2006).

Second District's Opinion on Certiorari

In Kilgore v. State, 933 So. 2d 1192 (Fla. 2d DCA 2006), two members of the Second District Court's designated panel, the Honorable Judges Sharpe and Sawaya, granted certiorari and 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, 933 So. 2d at 1193

The majority opinion in Kilgore also concluded, *inter alia*, "that the statutes providing representation to death sentenced inmates should be interpreted to encompass the right to effective assistance of counsel in collateral proceedings," . . . [and] "even if the statute was intended to prevent CCRC from representing the inmate in such collateral proceedings, such a limitation would not be permitted because it would deny the inmate effective assistance of counsel." Kilgore, 933 So. 2d at 1197, citing Remeta v. State, 559 So. 2d 1132 (Fla. 1990). In response to the majority opinion, Judge Griffin authored a dissenting opinion, which stated, in pertinent part:

The majority acknowledges that “the State is not constitutionally required to provide counsel in collateral proceedings seeking to attack the validity of a criminal conviction, and if counsel is provided pursuant to chapter 27, the Legislature may limit and qualify the representation provided at state expense.” The majority also agrees that the legislature has “clearly chosen to exclude from such state funded representation civil litigation, which includes collateral attacks on other criminal convictions, because of its concerns about exhausting the public treasury.”

Indeed, section 27.711(11), Florida Statutes, quoted in the majority opinion is clear:

> An attorney appointed under s. 27.710 [Registry of attorneys applying to represent persons in post-conviction capital collateral proceedings; certification of minimum requirements; appointment by trial counsel] to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing 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 added). Because, however, the legislature did not reinforce this apparently categorical prohibition by specifying that no representation is authorized for "a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made" even if such a conviction was used as a primary aggravator, the statute is unclear and requires construction. But “no” means “no.” Counsel may not represent the defendant in those identified proceedings. The failure to say “not even if . . .” does not make the statute any less categorical. The statute is clear and the legislative intent is obvious.

<u>Kilgore</u>, 933 So. 2d at 1198 (Griffin, J., dissenting)

The State timely filed a motion for rehearing, which was denied on August 3, 2006. On August 28, 2006, the State filed its Notice to Invoke Discretionary Jurisdiction. On September 11, 2006, the Second District withdrew its mandate and stayed proceedings pending disposition of the instant case by this Court. On September 25, 2006, this Court accepted jurisdiction. State v. Kilgore, 2006 Fla. LEXIS 2255 (Fla. 2006).

SUMMARY OF THE ARGUMENT

CCRC-South was appointed under Fla. Stat. §§ 27.702 (1) and 27.711 (11) to represent Dean Kilgore in collaterally attacking his murder conviction and death sentence for the 1989 prison murder of Emerson Jackson. In 2002, CCRC initiated an unauthorized Rule 3.850 motion to challenge the validity of three of Kilgore's prior violent felony convictions. Kilgore's 1978 convictions partially supported one of the aggravating factors in his 1989 prison murder case.[4]

The State respectfully submits that under Chapter 27, Florida Statutes, CCRC is only authorized to represent a capital defendant in the capital defendant's death penalty case. The trial court cited to § 27.711(11), Fla. Stat., State ex rel. Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998) and Olive v. Mass, 811 So.2d 644 (Fla. 2002), in finding that CCRC was precluded from representing Kilgore in his "non-capital case, CF78-2090A1-XX." In relying on the Florida Statutes and this Court's published caselaw, the trial court did not depart from the essential requirements of the law in discharging CCRC from representing Kilgore in a non-death penalty case which was final more than 25 years ago.

[4] In addition to Kilgore's 1978 convictions, Kilgore also had an additional six prior violent felony convictions from 1971.

ARGUMENT

ISSUE

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

(Question as restated)

Standard of Review

The controlling standard of review applicable to certiorari proceedings in Florida is whether the trial court's order constituted a departure from the essential requirements of the law. State v. Steele, 921 So. 2d 538 (Fla. 2005). In Steele, this Court emphasized that the appellate courts should exercise their discretion to grant the extraordinary writ of certiorari only when (1) there has been a violation of a clearly established principle of law which (2) resulted in a miscarriage of justice. Steele, 921 So. 2d at 538.

Analysis

Although the Second District converted this proceeding to one in certiorari, it's opinion below inexplicably did not address the applicable certiorari standard of review. The State submits that this omission is especially significant in this case because the trial court's order, which dismissed CCRC from representing Kilgore in a non-death penalty case, specifically

relied on both statutory authority, § 27.711(11), Fla. Stat., and precedent from this Court, State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) and Olive v. Maas, 811 So. 2d 644 (Fla. 2002). (V1/142-143). Accordingly, the trial court's order, predicated on both statutory authority and this Court's published precedent, cannot meet the certiorari criteria of a departure from the essential requirements of law.

Florida Statute Chapter 27 provides the authority for CCRC to provide legal representation to death-sentenced individuals on collateral attack of their capital cases. In this case, the trial court's order granted the State's motion to discharge CCRC (V1/40-45) as Kilgore's self-appointed postconviction counsel in Kilgore's 1978 non-capital case. (V1/141-143). The trial court's order did not address, and certainly did not preclude, Kilgore from ever proceeding on his own in asserting a collateral challenge, albeit untimely and procedurally barred, to his 1978 non-death penalty case.[5] Kilgore was simply in the

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[5] The State certainly did not concede any procedural defenses below and the State continues to assert that Kilgore's collateral challenges to his non-death penalty convictions are procedurally barred for the failure to comply with the two year time limitation requirement of Rule 3.850(b), Fla. R. Crim. P. See generally, Beaty v. State, 701 So. 2d 856 (Fla. 1997) approving Beaty v. State, 684 So. 2d 206 (Fla. 2d DCA 1996).

However, the State recognizes that the question of whether Kilgore is procedurally barred from challenging his 1978 non-capital case was not addressed by the lower courts. The State merely emphasizes that it does not agree in any effort that

same position as other prison inmates who are serving lengthy prison terms and who belatedly assert untimely, procedurally barred, postconviction challenges in non-death penalty cases.

The State respectfully submits that the Legislature has made its intent clear that CCRC and registry counsel are limited to challenging only the conviction and sentence of death of death row inmates. See, §27.7001, Fla. Stat. (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"); §27.702(1), Fla. Stat. (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 <u>only</u> those post-conviction or collateral actions authorized by statute)(emphasis supplied); §27.706, Fla. Stat. (requiring regional counsel and all full-time assistants appointed shall serve on a full-time basis and may <u>not</u> engage in the private practice of law)(emphasis supplied); §27.711(1)(c), Fla. Stat. (<u>prohibiting</u> counsel

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Kilgore may be attempting to avoid the consequences of Rule 3.850(b) - and to render nugatory the time bar jurisprudence of this state - by the tactic of bootstrapping the untimely filing of his non-death penalty cases with his death penalty case.

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.) (e.s.)

In granting the State's motion to discharge CCRC, the trial court's written order states, in pertinent part:

> Section 27.711(11), Florida Statutes, reads as follows:
>
> > An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing 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, (e.a.) or any civil litigation other than habeas corpus proceedings.
>
> The Supreme Court has held that this limitation on the activities of counsel appointed to represent capital defendants is valid. State ex rel. Butterworth v. Kenny, 714 So.2d 404 (Fla. 1998); Olive v. Mass, 811 So.2d 644 (Fla. 2002). Accordingly, this Court finds that the capital collateral regional counsel appointed to represent Mr. Kilgore in the capital case, CF89-0686A1-XX, is precluded from representing him in the non-capital case, CF78-2090A1-XX.
>
> (V1/142-143).

In State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), this Court issued a writ of *quo warranto* directing that

CCRC has no authority to represent capital defendants in federal civil rights actions 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. This Court rejected CCRC's argument that the legislative intent expressed in section 27.7001 to restrict CCRC from representing capital defendants in civil actions had no legal effect, and similarly rejected the argument that it would constitute an arbitrary application of the law - and would prevent it from filing claims that other inmates not represented by CCRC attorneys could pursue. Id. at 407. As this Court explained in Kenny:

> In creating CCRC and the right to representation for capital defendants in post-conviction 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, re-sentencing, 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 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 post-conviction relief proceedings in criminal and quasi-criminal proceedings.

Id. at 408.

Subsequently, in Olive v. Maas, 811 So. 2d 644 (Fla. 2002), this Court reaffirmed its determination in Kenny -- that postconviction capital counsel acting pursuant to chapter 27 were not free to ignore the Legislature's determination that such counsel were not permitted unfettered discretion to litigate whatever they choose irrespective of legislative constraints. In Olive v. Maas, attorney Olive filed an action for declaratory relief seeking a determination of his legal rights and professional duties under F.S. 27.710 ("the Registry Act") and F.S. 27.711 which provides the terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings. In one of his counts, Olive asserted that various limitations imposed by section 27.711 and in the contract would compel him to violate the Rules of Professional Conduct. Rejecting Olive's claim that legislative restrictions would prohibit him from acting as a zealous advocate, this Court emphasized:

> With respect to the provision directed to the scope of representation, Olive again maintains that compliance therewith would trigger a violation of his ethical obligations as an advocate. We have previously addressed and rejected a similar argument in State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998). In that case, we reviewed the attorney general's petition to prevent CCRC attorneys representing death row inmates from filing civil actions in federal court on behalf of their respective clients. In that case we ultimately concluded:

> 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, re-sentencing, 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 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.

Kenny, 714 So. 2d 15 408. Because the Legislature created this registry of attorneys to alleviate CCRC's workload, it is clear that registry attorneys stand in a position similar to CCRC lawyers. It is further clear that the Legislature obviously sought to impose the same restrictions on the scope of representation by both types of capital collateral attorneys. Given our conclusions in Kenny (i.e. upholding the same restrictions on representation by CCRC), and taking into account that those same restrictions were imposed on registry attorneys by the Legislature, we find no compelling reason to reach a different result in this case. Thus, we uphold these restrictions on the scope of representation based on the reasoning in Kenny. (emphasis supplied)

811 So. 2d at 654-655.

Under Kenny and Olive, pursuant to chapter 27, the authority of CCRC and registry counsel to represent death-

sentenced individuals in postconviction or collateral challenges is limited to challenging the judgment and sentence of death that has been imposed. They may not, despite whatever good intentions they ostensibly may have, undertake representation of death row inmates in a retrial, a resentencing proceeding, civil litigation other than habeas proceedings; nor may they initiate a postconviction challenge to an unrelated non-death penalty judgment and sentence even if imposed on a death row inmate. To allow otherwise would permit CCRC or registry counsel to subvert the carefully-crafted legislative effort "based on difficult policy considerations and the allocation of scarce legal resources" and degrade the mission of providing competent counsel for challenging capital judgments and sentences by wasting time, effort and resources in pursuit of unauthorized challenges to other convictions which have become final and perhaps even barred by time limits imposed by law. In other words, CCRC should not be permitted to exhaust the state treasury by initiation of unauthorized challenges to cases beyond the mandate provided by the Legislature.

In the instant case, the State respectfully insists that the Legislature has determined that the intent of F.S. 27.7001 was to provide collateral representation "to challenge any Florida capital conviction and sentence;" that the capital

collateral regional counsel shall represent death sentenced individuals for the sole purpose of prosecuting collateral actions and shall file only those actions authorized by statute, F.S. 27.702; that CCRC counsel must serve on a full-time basis and may not engage in the private practice of law, F.S. 27.706; and since CCRC and registry counsel are both limited in the scope of their representation in identical fashion, F.S. 27.711, Olive v. Maas, CCRC may not initiate postconviction litigation to challenge Kilgore's non-capital convictions.

To the extent that Kilgore asserted below that his non-death penalty postconviction proceedings are "part and parcel" of his capital postconviction proceedings, the State respectfully submits that it is more accurate to characterize Kilgore's time-barred, non-capital proceedings as an attempt to create confusion by inserting facts or arguments that have no relevance whatsoever to any legitimate challenge to Kilgore's 1978 non-capital convictions. For example, in his postconviction motion, Kilgore's wholesale assertion of an alleged violation of Brady v. Maryland, 373 U.S. 83 (1963) in his 1989 death penalty case had no relevance to his 1978 non-capital cases. Whatever alleged errors purportedly may have occurred in Kilgore's 1989 murder prosecution have no bearing on his 1978 non-capital convictions, and vice versa. Commingling

unrelated trials and postconviction motions amid the hope that courts will accept it all is akin to impermissibly attempting to cross reference and adopt separate records. See, Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995) ("However, the intertwining of separate records evident here is not something to be encouraged").

The interest of reaching timely and just resolution is not advanced by allowing CCRC to act beyond its statutory mandate. Here, a composite of unrelated, irrelevant allegations may simply overwhelm by confusion and, ultimately, Kilgore's claims still must be addressed by separate appellate tribunals. Review of Kilgore's capital postconviction final orders must be made by this Court, whereas Kilgore's untimely, procedurally barred, challenges to his non-capital convictions must be made by the Second District Court of Appeal, which initially affirmed those judgments and sentences.

In support of his argument below, Kilgore relied primarily on the single-paragraph order issued by this Court in State ex rel. Butterworth v. Jennings, 819 So. 2d 140 (Fla. 2002). (V1/58; and CCRC's attachments: State's Petition at 59-74; CCRC's Responses at 77-112, and Oral Argument Transcript, State ex rel. Butterworth v. Jennings, V1/115-128). In its majority opinion below, the Second District noted that because there was

no opinion in Jennings, it had no precedential value. Kilgore, 933 So. 2d at 1196, n. 11.

Although the State recognizes that the Second District's majority opinion concluded that Jennings had no "precedential value," the State nevertheless respectfully directs this Court's attention to the underlying issues presented in Jennings which have resurfaced in the instant case. In Jennings, the State filed a petition for writ of *quo warranto* against the three regional CCRC offices. The petition against CCRC-Middle dealt with the efforts to represent Freddie Lee Hall who claimed that he was not given an appeal from his 1968 assault conviction, and with the other CCRC offices that they were representing capital defendants in non-capital postconviction actions (Melton and Rivera). CCRC-North (Melton) argued that the State waived any complaint about CCRC's representation by failing to appeal the trial court's order permitting them to do so, that the statute permitted them to do so, and that such efforts are extremely rare since in most cases the two year limitation of Rule 3.850 would bar relief. CCRC-South (Rivera) noted that the State sought to discharge CCRC in Rivera in 1996, that the litigation in Rivera and Melton had proceeded in the lower courts and that prejudice would result if the writ were granted; they too argued the statute authorized their actions. CCRC-Middle (Hall) argued

that under the unique circumstances of his case, CCRC was most knowledgeable about Hall's case, that the statute authorized CCRC to do it, but that nothing would prevent the public defender's office from asserting a belated appeal on Hall's behalf.

The State respectfully submits that Kenny and Olive announced a clear indication that both registry counsel and CCRC are not authorized by chapter 27 of the Florida Statutes to initiate a challenge to a capital defendant's non-capital judgment and sentence. This Court's subsequent 1/2 page order in Jennings (V1/58) meant only that (a) petition for writ of *quo warranto* was granted to the extent that CCRC attorneys are prohibited from acting pro bono for defendants to challenge non-capital convictions, and (b) the petition was dismissed without prejudice in all other respects. Certainly, if this Court had deemed the State's claim to be meritless, the order could easily have said dismissed "with prejudice." The State respectfully submits that, in Jennings, this Court was responding to the concerns stated by CCRC North and South, *i.e.* that litigation had already proceeded in Melton and Rivera and that it would cause undue prejudice by the granting of the writ years after postconviction litigation had proceeded. At the same time, the

State was not precluded from timely pursuing and litigating these issues below.

The instant case also is different from that presented in Jennings by CCRC-Middle in the Hall case. There, with CCRC's attorney prohibited from representing Hall *pro bono*, the case was returned to the trial court in the same posture as it had been prior to the trial court's order permitting *pro bono* representation. As reflected by the Jennings' oral argument transcript, attached to CCRC's response (V1/123; 125), CCRC's counsel answered this Court's question that a motion for belated appeal had not yet been filed, suggested that CCRC counsel perhaps was attempting to obtain others to pursue it if need be, and indicated that public defender's office could handle Hall's belated appeal (O.A., pp. 9-10; V1/123 and 125). Certainly, this Court could have concluded -- without further articulation -- that available resources remained for Hall.

In any event, this Court's summary disposition order in Jennings cannot be read as a general approval of any *carte blanche* effort by CCRC to initiate non-capital postconviction litigation (especially in a case like the present one where the motion would be time-barred by more than twenty years for the failure to comply with the two year limitation) since that would seem to operate as a *de facto, sub silentio* overruling of Olive

v. Maas, which had been decided less than three months earlier. Additionally, this Court might have concluded that Hall's situation presented a unique factual pattern unlikely to reoccur. In this case, CCRC was essentially "self-appointed." Without statutory authorization, CCRC unilaterally initiated a procedurally-barred postconviction motion[6] in a non-death penalty case, despite the fact that during the preceding 25 years, Kilgore could have filed a postconviction motion in his non-death penalty case and sought the appointment of postconviction counsel, if warranted.

The Second District's majority decision below placed great reliance on its assumption that Kilgore's 1978 first degree murder conviction was *a major aggravator* favoring the death penalty, Kilgore, 933 So. 2d at 1194, and to bolster its erroneous conclusion *that the only method*[7] *"of attacking the*

[6] The Second District's majority opinion concluded that the prosecutor's 1978 notes of victim and eyewitness interviews were "previously not made available to counsel for Kilgore." Kilgore, 933 So. 2d at 1194. Yet, as the State pointed out on rehearing below, there is no way to know on this record what Kilgore's 1978 counsel knew or what information Kilgore's 1978 counsel had from the kidnapping victim and eyewitness.

[7] As asserted on rehearing below, the Second District's "only-method-of-attack" conclusion was unsupported by the existing record and, more importantly, demonstrably untrue. As CCRC well knows, CCRC is currently in the midst of attacking Kilgore's death penalty case on the basis of other post-conviction methods, including claims based on alleged ineffective assistance of trial counsel in his 1989 prison murder case and the defendant's alleged mental retardation.

sentence of death is to attack the primary aggravator, a prior first degree murder conviction." Kilgore, 933 So. 2d at 1196 (e.s.). Florida law specifically limits the aggravating factors in a death penalty case. See, §921.141(5), Fla. Stat. As this Court well knows, but as the majority below apparently misunderstood, *one* of the enumerated aggravating factors is the "prior violent felony" aggravator, which is established during the penalty phase by **a** prior violent felony conviction.[8] Thus, when the State offers evidence to establish the prior violent felony aggravator, this Court consistently has held:

> "[I]t is involving the use or threat of violence to the person rather than the bare admission of the conviction." Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989). Further, this Court explained that "*[t]estimony concerning the events which resulted in the 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.* Id.

Dufour v. State, 905 So. 2d 42, 63 (Fla. 2005) (e.s.).

Here, as in Dufour, it was appropriate in the penalty phase of Kilgore's capital trial to introduce testimony concerning the details of any prior felony conviction. Moreover, as the State emphasized on rehearing below, the Second District's "primary

[8] The "prior violent felony" aggravator under §921.141(5) (b), Fla. Stat., states, "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." (e.s.)

aggravator" assumption was demonstrably erroneous. The trial court's sentencing order in Kilgore's death penalty case (App. 2, Order dated April 27, 1994, Circuit Court Case No. CF89-0686A1-XX, filed in Florida Supreme Court Case No. 83,684) found that Kilgore's 1978 convictions and sentences supplied the basis for the first aggravator under 921.141(5)(a), *i.e.*, that "the capital felony was committed by a person under sentence of imprisonment." (App. 2, Sentencing Order, at page 1). The first aggravating factor -- the "under sentence of imprisonment" aggravator -- was established because Kilgore was serving consecutive prison sentences on his 1978 convictions when he committed the 1989 murder. Thereafter, in finding the second aggravating factor -- the prior violent felony aggravator -- the trial court's order in Kilgore's 1989 prison murder case states:

> **(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.** Kilgore has previously been convicted of three counts of assault with intent to commit murder in the second degree, two counts of aggravated assault, one count of resisting arrest with force, and the above-mentioned first degree murder, kidnapping and trespass with a firearm. (see state's exhibit numbers 29, 30, 31, 32, 33, 34, and 35).

(App. 2, at pages 1-2) (e.s.).

As evidenced by the foregoing excerpt from the trial court's sentencing order in Kilgore's death penalty case, the single "prior violent felony aggravator" was established by

Kilgore's multiple prior violent felony convictions. Contrary to the erroneous assumption by the Second District's majority opinion, Kilgore's 1978 murder conviction was not an independent "primary aggravator." Furthermore, the Second District's "primary aggravator" assumption is contrary to this Court's decision on direct appeal which rejected Kilgore's claim of undue reliance on his prior violent felony convictions. See, Kilgore v. State, 688 So. 2d 895, 900 (Fla. 1996) (rejecting Kilgore's claim that the trial judge allegedly gave too much weight to his prior convictions and finding that the trial court's sentencing order adequately evaluated both the aggravation and mitigation).

In this case, the single "prior violent felony" aggravator was established by Kilgore's multiple prior violent felony convictions, all of which were final more than 25 years ago. As a practical matter, all of Kilgore's multiple prior violent felony convictions must have been previously set aside in order for Kilgore to successfully challenge the application of this *single* aggravating factor. Additionally, even if all nine of Kilgore's prior violent felony convictions were set aside, Kilgore would still have the additional aggravating factor of "under sentence of imprisonment."

In Johnson v. Mississippi, 486 U.S. 578 (1988), the defendant's death sentence was predicated, in part, on a prior New York conviction which was vacated after Johnson's trial and direct appeal in Mississippi. 486 U.S. at 580. The United States Supreme Court held that the consideration of a subsequently vacated conviction to support an aggravating factor violated the Eighth Amendment. Id. at 590. This Court has provided for similar relief under Johnson v. Mississippi for such errors when a prior conviction previously has been set aside. See, Rivera v. State, 629 So. 2d 105 (Fla. 1993). However, this Court has denied postconviction relief where the defendant argued there was a Johnson v. Mississippi violation in a prior conviction, used as an aggravator, which had not yet been set aside. See, Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001). Moreover, even where a prior violent felony conviction has been vacated, in order to succeed on a Johnson v. Mississippi claim, it still must be established that the error was not harmless. See, Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993); Moon v. Head, 285 F.3d 1301, 1316 (11th Cir. 2002) (holding that because the aggravating circumstances in Moon's case were overwhelming, the admission of eight convictions subsequently vacated did not result in actual prejudice). In this case, even if Kilgore's 1978 murder

conviction (the prior violent felony conviction which the Second District erroneously construed as the "primary aggravator") arguably was set aside, Kilgore still has eight other prior convictions remaining under the *single* "prior violent felony" aggravating factor and Kilgore still has the second, additional aggravating factor of "under sentence of imprisonment." Although CCRC may rely on the fact of prior vacated convictions in challenging the defendant's capital sentence; it may not initiate such challenges on unrelated non-death penalty judgments. Consequently, Johnson is not a license to override the Legislature's legitimate restriction on the services to be afforded by postconviction counsel.

Several policy reasons also support the trial court's order below. Should the courts allow CCRC or registry counsel to initiate postconviction challenges in unrelated non-capital cases such as Mr. Kilgore's, in contravention of the Legislature's stated intent, such counsel will expend the already scarce state-provided resources to the detriment of other capital defendants for whom they have been properly assigned and whose capital judgments and sentences are not being handled. The Legislature has specifically designated CCRC to be financially responsible for all necessary costs and expenses of capital postconviction proceedings. See, Gaskin v. State, 798

So. 2d 721, 723 (Fla. 2001), citing § 27.705(3), Fla. Stat. (2000). However, depletion of their allotted funds has been cited by CCRC as a basis to stay, and, therefore delay, post-conviction death penalty proceedings. See, Hoffman v. Haddock, 695 So. 2d 682, 684 (Fla. 1997). This Court had often shared the Legislature's frustration regarding unnecessary delay in capital cases. See, Allen v. Butterworth, 756 So. 2d 52, 65 (Fla. 2000), citing Peede v. State, 748 So. 2d 253, 255-56 n.4 (Fla. 1999). However, permitting unrestrained CCRC's to divert scarce fiscal resources toward unauthorized challenges to procedurally barred non-capital convictions will not only add further delay, but it will unquestionably impact CCRC's ability to provide the necessary attention and devotion to CCRC's other capital defendants who are statutorily entitled to full consideration of their claims.[9]

[9]To the extent that CCRC claims an arguable self-appointed "right" to initiate non-capital collateral actions that have not been set aside, it would not take too much time and effort for CCRC to exhaust its allotted budget by traveling to other states, or countries, to examine other capital defendants' backgrounds and prior non-capital convictions. For example, CCRC might conclude that it is essential to go to Utah to examine the kidnapping conviction of someone like Ted Bundy (see Bundy v. State, 538 So. 2d 445 (Fla. 1989)) or Nebraska or Kansas for inmates such as Eutzy (Eutzy v. State, 541 So. 2d 1143 (Fla. 1989)) and Remeta (Remeta v. State, 710 So. 2d 543 (Fla. 1998)), or to Cuba for someone like Mendoza (Mendoza v. State, 817 So. 2d 848 (Fla. 2002)). See also, Report of Investigation, Neal Dupree, Capital Collateral Regional Counsel South Office, Case Number IV-20050400001, by Department of

The Second District's majority opinion recognized that the "[l]egislature has clearly chosen to exclude from such state funded representation civil litigation, which includes collateral attacks on other criminal convictions, because of its concerns about exhausting the public treasury." Kilgore, 933 So. 2d at 1194. Notwithstanding this explicit recognition, the Second District's majority then amazingly concluded that, "*based on our research, the rarity of this issue would not translate into a significant concern for the public treasury.*" Thus, the Second District's announced factual finding second-guesses a Legislative function and it is admittedly unsupported by the existing record on appeal. More troubling, the Second District's statement appears to suggest that appellate courts are free to conduct their own independent factual research and dispute legislative enactments based on their own independent investigation. However, Article II, section 3 of the Florida Constitution prohibits the members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000). In this case, the

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Financial Services, Division of Accounting and Auditing, Office of Fiscal Integrity (concluding that CCRC-South improperly spent more than $100,000 for lobbyists, in apparent violation of state law, and CCRC-South also sent two CCRC staff attorneys to Cuba, via Mexico, in the Mendoza case, in apparent violation of both state and federal laws.

underlying "public treasury" concern undeniably involves an exercise of the public-policy-making function of the Legislature. Article II, section 3, not only "divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches." Bush v. Schiavo, 885 So. 2d 321, 329 (Fla. 2004) (e.s.)

Furthermore, the Second District majority's perceived "*rarity*" of death penalty defendants with prior violent felony convictions is erroneous as a matter of fact and law.[10] As noted on rehearing, if the Second District majority's independent research was strictly "legal research," then a recent review of this Court's death penalty caselaw confirms that capital defendants with a "prior violent felony" aggravating circumstance are not a "*rarity*" in this state. In fact, this Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in rejecting capital defendant's sentencing claims under Ring v. Arizona, 536 U.S. 584 (2002).

[10] Presumably, any independent factual investigation may have included a review of both the Florida Department of Corrections online website, http://www.dc.state.fl.us/ and also the online website for Florida's Commission on Capital Cases, http://www.floridacapitalcases.state.fl.us/. Both online websites include various links which specifically identify all of the death row inmates in Florida, including their prior violent felony convictions in Florida.

See e.g., Morris v. State, 931 So. 2d 821 (Fla. 2006); Philmore v. State, 2006 Fla. LEXIS 1254 (Fla. 2006).[11]

In this case, the Second District's majority opinion concluded that CCRC may be self-appointed to initiate

[11] See also, Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Caballero v. State, 851 So. 2d 655, 663-64 (Fla. 2003); England v. State, 2006 Fla. LEXIS 942 (Fla. 2006); Patton v. State, 878 So. 2d 368, 377 (Fla. 2004); Reynolds v. State, 934 So. 2d 1128 (Fla. 2006); Jones v. State, 855 So. 2d 611, 619 (Fla. 2003); Doorbal v. State, 837 So. 2d 940, 963 (Fla. 2003); Morris v. State, 931 So. 2d 821 (Fla. 2006); Smith v. State, 866 So. 2d 51, 68 (Fla. 2004); Davis v. State, 875 So. 2d 359, 374 (Fla. 2003); Johnston v. State, 863 So. 2d 271, 286 (Fla. 2003); Lamarca v. State, 931 So. 2d 838 (Fla. 2006); Perez v. State, 919 So. 2d 347 (Fla. 2005); Miller v. State, 926 So. 2d 1243 (Fla. 2006); Johnson v. State, 933 So. 2d 1153 (Fla. 2006); Zakrzewski v. State, 866 So. 2d 688, 697 (Fla. 2003); Smith v. State, 931 So. 2d 790 (Fla. 2006); Monlyn v. State, 894 So. 2d 832, 839 (Fla. 2004); Seibert v. State, 923 So. 2d 460, 474 (Fla. 2006); Grim v. State, 841 So. 2d 455, 465 (Fla. 2003); Walls v. State, 926 So. 2d 1156 (Fla. 2006); Suggs v. State, 923 So. 2d 419, 442 (Fla. 2005); Parker v. State, 908 So. 2d 1058 (Fla. 2005); Lugo v. State, 845 So. 2d 74, 119 n.79 (Fla. 2003); Kimbrough v. State, 886 So. 2d 965, 984 (Fla. 2004); Ferrell v. State, 918 So. 2d 163, 180 (Fla. 2005); Henry v. State, 862 So. 2d 679, 687 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003); Conde v. State, 860 So. 2d 930, 959 (Fla. 2003); Belcher v. State, 851 So. 2d 678, 685 (Fla. 2003); Blackwelder v. State, 851 So. 2d 650, 654 (Fla. 2003); Marshall v. Crosby, 911 So. 2d 1129, 1135, n.6 (Fla. 2005); Schoenwetter v. State, 931 So. 2d 857 (Fla. 2006); Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); Owen v. Crosby, 854 So. 2d 182, 193 (Fla. 2003); Buzia v. State, 926 So. 2d 1203 (Fla. 2006); King v. Moore, 831 So. 2d 143 (Fla. 2002); Cummings-El v. State, 863 So. 2d 246, 255 (Fla. 2003); Cole v. State, 841 So. 2d 409, 431 (Fla. 2003); Fotopoulos v. State, 838 So. 2d 1122, 1136-37 (Fla. 2002); Sochor v. State, 883 So. 2d 766, 790 (Fla. 2004).

procedurally-barred[12] challenges to multiple prior non-capital convictions, all of which were final more than 25 years ago. However, Kilgore, like every other non-capital defendant in Florida, previously had the opportunity for jury trial[s], direct appeal[s], and timely post-conviction proceedings in both state and federal court. Once a conviction is final, the State acquires an interest in the finality of the convictions. Indeed, this Court has repeatedly recognized the importance of finality and emphasized:

> It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefitting neither the person convicted nor society as a whole.

Hughes v. State, 901 So. 2d 837, 840 (Fla. 2005), quoting Witt v. State, 387 So. 2d 922, 925 (Fla. 1980); Remeta v. State, 710 So. 2d 543, 548 (Fla. 1998) (emphasizing that "[w]e have previously determined that a defendant is not entitled to relief simply because the defendant is seeking collateral review of a

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[12] Furthermore, Kilgore made no showing as to why the purportedly "recent" discovery of any alleged "newly discovered" information was not available through due diligence either at the time of trial or within the time limits set forth in rule 3.850. See, Remeta v. State, 710 So. 2d 543, 546 (Fla. 1998).

conviction used to establish the aggravating circumstance of prior violent felony. Roberts v. State, 678 So. 2d 1232 (Fla. 1996); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989). To hold otherwise would undermine the concept of finality by providing defendants with the opportunity to forever contest judgments and sentences by filing for collateral relief, no matter how nonmeritorious, on other convictions."); See also, Mayle v. Felix, 545 U.S. 644, 125 S.Ct. 2562, 2573 (2005) (noting that Congress enacted AEDPA to advance the finality of criminal convictions, citing Rhines v. Weber, 544 U.S. 269 (2005) "To that end, it adopted a tight time line, a one-year limitation period ordinarily running from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."); See also, Grayson v. King, 2006 U.S. App. LEXIS 21215, 36-37 (11th Cir., August 18, 2006) (affirming the dismissal of a 42 U.S.C. §1983 action, and stating, "[t]he government has a strong interest in the finality of duly adjudicated criminal judgments. See, e.g., Calderon v. Thompson, 523 U.S. 538, 555, 118 S.Ct. 1489, 1500, 140 L.Ed.2d 728 (1998); Sawyer v. Whitley, 505 U.S. 333, 338, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992); Murray v. Carrier, 477 U.S. 478, 487, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). Here, [the defendant] has enjoyed extensive judicial process

over the years; indeed, it has been over twenty years since his conviction, and he now seeks to forestall his death sentence by seeking further process with minimal probable value. Compelling interests -- e.g., guarding against a flood of requests, protecting the finality of convictions, and ensuring closure for victims and survivors -- support the State's position. . .”).

The Second District’s majority opinion below also relied, in part, on the fact that the ABA guidelines have been cited in the U. S. Supreme Court cases of Williams v. Taylor, 529 U.S. 362 (2000), Wiggins v. Smith, 539 U.S. 510 (2003), and Rompilla v. Beard, 545 U.S. 374 (2005). However, each of these cases addressed *only* the *constitutional* right to effective assistance of *trial counsel*, not statutory post-conviction counsel, to whom there is no constitutional right. See, Coleman v. Thompson, 501 U.S. 722, 752 (1991) (“There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.”).

The Second District’s majority opinion concluded that the statutes providing post-conviction representation to death sentenced inmates “*should be interpreted to encompass the right to effective assistance of counsel in collateral proceedings*.” Most significantly, this suggested interpretation has been

consistently rejected by this Court, by the Eleventh Circuit Court of Appeals, and by the United States Supreme Court. See e.g., Zack v. State, 911 So. 2d 1190, 1203 (Fla. 2005) (stating that "[u]nder Florida and federal law, a defendant has no constitutional right to effective collateral counsel. This Court has stated that "claims of ineffective assistance of postconviction counsel do not present a valid basis for relief"); Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996); Kokal v. State, 901 So. 2d 766, 777 (Fla. 2005); See also, Florida Department of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006) (Cantero, J. concurring) (noting the right to postconviction counsel in death penalty cases is purely statutory); King v. State, 808 So. 2d 1237, 1245 (Fla. 2002) (upholding trial court's denial of relief on the ineffective assistance of post-conviction counsel claim because it did not state a valid basis for relief). In Pennsylvania v. Finley, 481 U.S. 551, 95 L.Ed.2d 539, 107 S.Ct. 1990 (1987), the Supreme Court refused to extend a due process requirement for effective collateral counsel to situations where a state, like Florida, has opted to afford collateral counsel to indigent inmates. See also, Arthur v. Allen, 2006 U.S. App. LEXIS 15162, n.13 (11th Cir. 2006) (citing Coleman v. Thompson, 501 U.S. 722, 752 (1991) ("[A] petitioner cannot claim constitutionally ineffective

assistance of counsel" "in state post-conviction proceedings" because "[t]here is no constitutional right to an attorney" in such proceedings); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 281 (1998) (recognizing that the Supreme Court had "generally rejected attempts to expand" distinctions accorded capital inmates including a constitutional right to counsel in post-conviction proceedings)); See also, Wainwright v. Torna, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance).

Based on the foregoing arguments and authorities, as this Court held in Butterworth v. Kenny and reiterated in Olive v. Maas, in light of the Legislature's decision to allocate scarce, limited resources to provide that the Office of the CCRC is only for the representation of capital defendants to challenge the judgment and sentence of death - and not to challenge other, non-capital judgments and sentences, this Court should hold that the trial court did not depart from the essential requirements of the law in granting the State's motion to discharge CCRC from representing Dean Kilgore in his non-death penalty case, Case No. 78-2090.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the certified question, as restated, should be answered in the negative and this Court should hold that the trial court did not depart from the essential requirements of the law in discharging CCRC from representing Kilgore in a non-death penalty case which was final more than 25 years ago.

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 the Honorable Dennis P. Maloney, Polk County Courthouse, 255 N. Broadway Avenue, Bartow, Florida 33830; William M. Hennis, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301; and to Paul Wallace, Assistant State Attorney, P.O. Box 9000-Drawer SA, Bartow, Florida 33831-9000, this 20th day of October, 2006.

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).

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