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

CORRECTED REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The State of Florida respectfully renews its proposal that the certified question framed by the designated panel of the Second District Court[1] in Kilgore v. State, 933 So. 2d 1192 (Fla. 2nd DCA 2006) should be restated as follows:

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.

STATEMENT OF THE CASE AND FACTS

The State of Florida will rely on its Statement of the Case and Facts set forth at pages 2-10 of the State's Initial Brief.

At pages 4 – 5 of CCRC's "Statement of Facts," CCRC sets forth multiple unsupported allegations which are purportedly based on Kilgore's 1989 prison murder case. Kilgore's 1989 prison case is not before this Court and there is no record before this Court supporting any of CCRC's unsupported allegations. Pages 4 -5 of CCRC's "Statement of Facts" should be stricken as violating Rule 9.210, Fla.R.App.P.

[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).

SUMMARY OF THE ARGUMENT

The certified question, both as framed by the Second District in Kilgore v. State, 933 So. 2d 1192, 1193 (Fla. 2d DCA 2006), and as restated in the State's initial brief, should be answered in the negative because the trial court below did not depart from the essential requirements of the law in ruling that CCRC was not authorized to collaterally challenge the validity of Kilgore's prior violent felony convictions, all of which were final more than 25 years ago.

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)

In addition to the arguments previously set forth in the State's initial brief, the State submits the following reply to CCRC's answer brief.

Throughout their answer brief, CCRC seeks to obfuscate the dispositive issue in this case –- that is whether the trial court departed from the essential requirements of the law in

ruling that CCRC was not authorized under Florida law to represent Kilgore in his 1978 non-death penalty case.

CCRC is charged with representing death-sentenced inmates under § 27.702, Florida Statutes. Section 27.702(1) states, in pertinent part:

> (1) The capital collateral regional counsel shall represent each person convicted and sentenced to death in this state for the sole purpose of instituting and prosecuting collateral actions challenging the 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. [. . .][2] (e.s.)

[2] In Chapter 2000-3, Laws of Florida, Section 2, the Legislature added the following one-sentence amendment to 27.702(1): *"[T]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by statute."* This section was part of "DPRA" challenged as unconstitutional in Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). In Allen, this Court declared a majority of Chapter 2000-3 unconstitutional (as violating separation of powers), and this Court upheld only sections 11, 14, 15, 16, and a portion of section 3 of Chapter 2000-3, Laws of Florida. However, section 27.702, Fla. Stat. still reflects the one-sentence originally added by Chapter 2000-3, section 2, and this sentence is still quoted to date. See, Diaz v. State, 945 So. 2d 1136 (Fla. 2006) (citing section 27.702(1), and noting "[P]ursuant to the statute, CCRC attorneys "shall file only those postconviction or collateral actions authorized by statute."). This apparent confusion may be attributable, in part, to the continued inclusion of this sentence in section 27.702, the Legislature's continuous revision system and periodic readoption of the Florida Statutes pursuant to sections 11.2421 - 11.2424, Fla. Stat., and the addition of several [unrelated] amendments to section 27.702, since 2000.

CCRC's argument begins at page 9 of their answer brief. At pages 9 – 11 of their answer, CCRC recites the ABA guidelines applicable to *trial* counsel, claims an entitlement to "seek to litigate all issues, whether or not previously presented," and then unilaterally equates their own *statutory* collateral authority with the *constitutional* right of trial counsel discussed in Rompilla v. Beard, 545 U.S. 374 (2005).

In Melton v. State, 949 So. 2d 994, 1005-1006 (Fla. 2006), this Court recently noted that, in Rompilla, the Supreme Court addressed *trial counsel's* representation at the penalty phase. In other words, Rompilla involved the constitutional right of counsel at trial. Nothing in Rompilla addressed *collateral* counsel's *statutory* representation in post-conviction.

Furthermore, in Melton, this Court emphasized that a capital defendant *"may not relitigate"* his prior violent felony conviction as part of his capital post-conviction proceedings. Accordingly, here, as in Melton, CCRC may not relitigate Kilgore's prior violent felony convictions as "part and parcel" of Kilgore's capital case. CCRC's self-appointed attempt to use Kilgore's death penalty case as a vehicle to initiate an unauthorized collateral challenge to Kilgore's 1978 convictions is prohibited under Melton.

Next, at page 12 of their answer brief, CCRC cites to a commentary in the ABA guidelines and claims that they extend these "*obligations*" to post-conviction counsel. The ABA guidelines are not now, and never have been, mandatory *obligations* to constitutional trial counsel; and, therefore, they certainly are not mandatory *obligations* to statutory post-conviction counsel in collateral proceedings. Moreover, in 1984, the United States Supreme Court decided Strickland v. Washington, 466 U.S. 668, 688-689 (1984) and emphasized that the ABA guidelines for trial counsel are "guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland, 466 U.S. at 689 (e.s.). Further, as the U. S. Supreme Court underscored,

> Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to

> the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Id. at 689.

At pages 13 – 14 of their answer brief, CCRC cites to Johnson v. Mississippi, 486 U.S. 578 (1988). In Phillips v. State, 894 So. 2d 28, 36 (Fla. 2004), this Court explained that to state a valid claim under Johnson, a defendant must show that the conviction on which the prior violent felony aggravator is based *has been reversed*. On post-conviction appeal, this Court noted that Phillips failed to demonstrate and the record did not indicate that either of Phillips' two convictions had been set aside, vacated, or reversed. So, Johnson simply did not apply. Phillips, 894 So.2d at 36 (citing Henderson v. Singletary, 617 So. 2d 313, 316 (Fla. 1993)). In other words, a capital defendant, whose prior convictions have been affirmed, lacks any basis for a Johnson claim. Here, as in Phillips and Henderson, Johnson simply does not apply. See also, Melton, *supra* (Explaining that to the extent that Melton claimed that his prior violent felony conviction was invalid or that his trial counsel was ineffective for failing to chase down leads that would have acquitted him on this charge, it was clear that this conviction was final and properly invoked as an aggravator in his capital case.)

On August 28, 1978, Dean Kilgore was indicted by a Polk County grand jury for first-degree murder, kidnapping, and burglary. Following his jury trial, Kilgore was found guilty of first-degree murder, kidnapping, and a lesser included offense, trespassing with a firearm. The trial judge sentenced Kilgore to consecutive terms of life imprisonment for the murder and kidnapping offenses, and another consecutive term of five years imprisonment for the armed trespass. Kilgore appealed his conviction to the Second District Court, 2d DCA Case No. 79-124. Kilgore's direct appeal was affirmed, *per curiam*, on February 13, 1980. Kilgore v. State, 380 So. 2d 589 (Fla. 2d DCA 1980). Thereafter, Kilgore did not seek post-conviction relief in state court.[3]

In this case, as in Melton and Phillips, it is clear that Kilgore's prior violent felony convictions were final and were properly invoked as an aggravator in the defendant's subsequent death penalty proceedings.

At pages 14 – 15 of their answer brief, CCRC asserts that they are distinguishable from State ex. rel. Butterworth v.

[3] However, although Kilgore did not seek post-conviction relief from his 1978 convictions in state court, Kilgore apparently filed a *pro se* habeas corpus petition in federal court, pursuant to 28 U.S.C. § 2254, renewing his direct appeal claims. Kilgore v. Wainwright, United States District Court, Middle District, Case No. 81-865-CIV-T-GC. Kilgore's *pro se* federal habeas corpus petition was dismissed for lack of merit in 1981. Kilgore v. Wainwright, USDC-Middle, Case No. 81-865-CIV-T-GC.

Jennings, Case No. SC 01-1587, because CCRC-South initiated their collateral attack on Kilgore's 1978 priors "as part and parcel" of their duties as an Assistant CCRC South, not on a *pro bono* basis. CCRC's unilateral "part and parcel" justification does not constitute any grant of power to exceed their statutory authorization.[4] In an analogous scenario recently presented in Mann v. State, 937 So. 2d 722, 728 (Fla. 3rd DCA 2006), the Public Defender made a similar claim, arguing that it may exercise its professional discretion and independence and represent defendants without appointment in non-capital collateral proceedings. The Third District held that the Public Defender's Office was not free to exercise discretion without being granted the authority to act on behalf of the defendant, and the Court emphasized that "the Public Defender's Office may not represent a defendant not under sentence of death in a collateral proceeding unless appointed to do so." Mann, 937 So. 2d at 729, citing § 27.51(4), Florida Statutes (2005) (prohibiting the public defender and assistant public defenders from engaging in the private practice of criminal law). In this

[4] Also, at footnote 2, pages 15-16 of CCRC's answer brief, CCRC alleges that records were improperly withheld from counsel in Kilgore's 1989 prison murder case. The State strongly disputes Kilgore's unsupported allegations and reiterates that CCRC's blatant attempts to raise unauthorized, untimely, and procedurally barred challenges to his 1978 convictions, under the guise of a "necessary part and parcel" to his 1989 prison murder case, should be squarely rejected.

case, CCRC, like the Public Defenders in Mann, may not unilaterally appoint themselves to represent defendants in their non-capital collateral proceedings. Moreover, under § 27.702, et. seq., CCRC is not even eligible for appointment in non-capital proceedings.

At pages 16 – 18 of their answer brief, CCRC also claims that CCRC is *required* to attack a capital defendant's non-capital prior violent felony convictions [including those multiple prior violent felony convictions that have been final for more than 25 years] and that nothing in the statutes, §§ 27.7001, 27.702(1), 27.706, and 27.711(1)(c), or State ex rel Butterworth v. Kenny, 714 So. 2d 404, 407-08 (Fla. 1998), or Olive v. Maas, 811 So. 2d 644 (Fla. 2002) *restricts* CCRC from initiating collateral challenges to long-final non-capital convictions. Contrary to their self-serving claim of entitlement, CCRC does not have *carte blanche* authority to appoint themselves in non-death penalty cases. See e.g., Mann, *supra*. Moreover, CCRC's authority is indeed restricted by Florida law under Chapter 27, as this Court held in Kenny and reiterated in Olive.

At footnote 3, pages 18 – 19 of CCRC's answer brief, CCRC also declares that "ethical" post-conviction counsel "must" attack a prior conviction from years before. In both Kenny and

Olive, this Court rejected collateral counsel's claim of an alleged inability to fulfill their professed ethical obligations. See, Olive v. Maas, 811 So. 2d 644 (Fla. 2002) (stating, "[W]ith 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)).

Furthermore, as this Court painstakingly explained in Kenny, 714 So. 2d at 407-08[5]

> [B]oth the United States Supreme Court and this Court have held that defendants have no constitutional right to representation in postconviction relief proceedings. Under the Sixth and Fourteenth Amendments to the United States Constitution, an indigent defendant is entitled to counsel at the state's expense at the trial stage of a criminal proceeding, *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), and for the initial appeal from a judgment and sentence of the trial court, *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963). That right, however, does not extend to postconviction relief proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct.

[5] Moreover, in Pennsylvania v. Finley, 481 U.S. 551 (1987), the United States Supreme Court held that "even though the State need not grant a prisoner access to counsel on postconviction review, once it has done so, the Due Process Clause of the Fourteenth Amendment" does not require that the State provide the full services of counsel once it chooses to provide counsel. Finley, 481 U.S. at 557. Thus, any arguable claim that due process is violated if CCRC is not permitted to exceed their statutory authorization is without merit.

1990 (1987)(constitution does not require states to provide counsel in postconviction proceedings). As noted by the United States Supreme Court in *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), there is a distinction between the need for counsel in preconviction proceedings and the need for counsel in postconviction proceedings. That distinction is based on the fact that during the initial proceedings, the State is presenting witnesses and arguing to a jury in an attempt to strip from the defendant the presumption of innocence; whereas, once the conviction and sentence become final, the presumption of innocence is no longer present and the defendant, in seeking postconviction relief, acts to "upset the prior determination of guilt." 417 U.S. at 611.

This distinction holds true even where the defendant has been sentenced to death. Although the United States Supreme Court has stated that death is different and although no person has been executed in this state in recent years who has not had counsel at the time of execution, that Court has determined that there is no right to counsel for postconviction relief proceedings even where a defendant has been sentenced to death. *See Murray v. Giarratano*, 492 U.S. 1, 106 L. Ed. 2d 1, 109 S. Ct. 2765 (1989) (holding that *Finley* applies to inmates under sentence of death as well as to other inmates). *See also Jones v. Crosby*, 137 F.3d 1279, 1998 U.S. App. LEXIS 5728, 1998 WL 130163 (11th Cir. 1998). As the Supreme Court stated in *Murray*, "the additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case . . . are sufficient to assure the reliability of the process by which the death penalty is imposed." 492 U.S. at 10. *See also Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996) (no constitutional right to postconviction relief counsel in this circuit; ineffective assistance of postconviction relief counsel not cognizable claim); *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996)(based on *Murray*, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief), *cert. denied*, No. 97-7000 (U.S. Feb. 23, 1998). All that is required in postconviction relief proceedings, whether capital or non-capital, is that the defendant have

meaningful access to the judicial process. *Bounds v. Smith*, 430 U.S. 817, 52 L. Ed. 2d 72, 97 S. Ct. 1491 (1977)(furnishing access to adequate law libraries or adequate assistance from persons trained in the law may fulfill a State's obligation to provide prisoners' right of access to courts), *disapproved in part by Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)(*Bounds* disapproved to extent it can be read to require state to enable prisoner to discover grievances and litigate effectively once in court; state need only provide inmates with tools needed to attack sentences directly or collaterally).

Like most other states, Florida, to ensure the credibility and constitutionality of its death penalty process, has provided postconviction representation only in cases where the defendant has been sentenced to death. This statutory right to representation acts to ensure meaningful access to the courts in a complex area of the law and to ensure that our death penalty process is constitutional. As Justice O'Connor noted in her concurring opinion in *Murray*,

> [*Bounds*] allows the States considerable discretion in assuring that those imprisoned in their jails obtain meaningful access to the judicial process. Beyond the requirements of *Bounds*, the matter is one of legislative choice based on difficult policy considerations and the allocation of scare legal resources. Our decision today rightly leaves these issues to resolution by Congress and the state legislatures.

492 U.S. at 13 (O'Connor, J., concurring) (emphasis added).

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 scare legal resources," to limit the representation of CCRC by (1) prohibiting that representation from extending to representation "during trials, resentencings, proceedings commenced under chapter 940, or civil litigation," § 27.7001

(emphasis added); and (2) providing that such representation shall be "for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the 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. (e.s.)

At page 19 of CCRC's answer brief, CCRC asserts that the kidnapping victim in the 1978 case testified "arguably inconsistently" in Kilgore's capital penalty phase. CCRC's unsupported allegation merely diverts this Court's attention from the true issue on certiorari and serves only to create confusion by impermissibly commingling unproven allegations from separate records which are not even before this Court. See also, Johnson v. State, 660 So. 2d 648, 653 (Fla. 1995) ("However, the intertwining of separate records evident here is not something to be encouraged").

At page 20 - 21 of CCRC's answer brief, CCRC asserts that "[a]s the State would have it, CCRC-South must choose which clients it will zealously defend. . ." Contrary to CCRC's claim that they would be forced to make an "unconscionable" choice, the State merely expects CCRC to zealously represent all of their clients by abiding by their statutory authorization. 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.

Lastly, at page 22 of their answer brief, CCRC asserts a *pro forma* "equal protection" claim, citing Strickland, *supra*, Williams v. Taylor, 529 U.S. 420 (2000), Wiggins v. Smith, 539 U.S. 510 (2003), and Hamblin v. Mitchell, 354 F. 3d 482 (6th Cir. 2003). All of these cases involved *trial counsel*'s performance -- they have nothing to do with the authorized scope of post-conviction counsel's statutory representation. Moreover, CCRC's perfunctory equal protection complaint is meritless. See, State ex rel Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998) (rejecting CCRC's argument that this limitation on its authority constitutes an arbitrary application of law or a violation of capital defendants' equal protection rights, and concluding that the statutory limitation is a reasonable allocation of resources).

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular mail to Paul Kalil, Assistant CCRC, Office of the Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this 25th day of May, 2007.

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).

Respectfully submitted,

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