

IN THE SUPREME COURT OF FLORIDA

Case No. SC00-317

Question of Great Public Importance
Certified by the First District Court of Appeal

MARK EVAN OLIVE,
Appellant, Cross-Appellee,

v.

ROGER R. MAAS, in His Official Capacity
As Executive Director of the Commission on the
Administration of Justice in Capital Cases,
Appellee, Cross-Appellant,

And

ROBERT F. MILLIGAN, in His Official Capacity
As Comptroller of the State of Florida,
Appellee.

**INITIAL BRIEF AND APPENDIX OF
APPELLANT, CROSS-APPELLEE,
MARK EVAN OLIVE**

HOLLAND & KNIGHT LLP: Stephen F. Hanlon and Susan L. Kelsey,
P.O. Drawer 810, Tallahassee, FL 32302; Ph. (850) 224-7000, Fax (850)
222-3533; and Robert J. Shapiro, P.O. Box 1288, Tampa, FL 33601; Ph.
(813) 227-8500, Fax (813) 229-0134, **Counsel for Appellant, Mark Evan
Olive**

|

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	10
STANDARD OF REVIEW	13
SUMMARY OF THE ARGUMENT	13
ARGUMENT	16
I. THE CAPPED FEE SCHEDULE AND LIMITATION ON COSTS IN THE CONTRACT ARE VOID BECAUSE THEY BAR ENFORCEMENT OF CAPITAL DEFENDANTS’ RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL	16
II. THE CONTRACT IS VOID TO THE EXTENT THAT IT REQUIRES POSTCONVICTION COUNSEL TO ENGAGE IN UNETHICAL CONDUCT AND JEOPARDIZE THE CLIENT’S RIGHTS TO EFFECTIVE AND ZEALOUS ASSISTANCE OF COUNSEL	30
CONCLUSION	39
CERTIFICATE OF FONT AND SERVICE	41
INDEX TO APPENDIX AND APPENDIX (attached)	

TABLE OF AUTHORITIES

CASES	PAGE
<i>Arbelaez v. Butterworth</i> , 638 So. 2d 326 (Fla. 1999)	23
<i>Armstrong v. State</i> , 642 So. 2d 730 (Fla. 1994), <i>cert. denied</i> , 514 U.S. 1085 (1995)	26
<i>Buntrock v. Buntrock</i> , 419 So. 2d 402 (Fla. 4 th DCA 1982)	37
<i>Burr v. State</i> , 576 So. 2d 278 (Fla. 1991)	32
<i>Butterworth v. Kenny</i> , 714 So. 2d 404 (Fla. 1998)	39
<i>Campbell v. Pioneer Savings Bank</i> , 565 So. 2d 417 (Fla. 4 th DCA 1982)	37
<i>Chiles v. Children A, B, C</i> , 589 So. 2d 260 (Fla. 1991)	29
<i>Copeland v. Dugger</i> , 505 So. 2d 425 (Fla. 1987), <i>vacated and remanded by</i> , 484 U.S. 807, <i>opinion on remand</i> , 565 So. 2d 1348 (1990)	35
<i>Department of Rev. v. Kuhnlein</i> , 646 So. 2d 717 (Fla. 1994), <i>cert. denied</i> , 115 S. Ct. 2608 (1995)	29
<i>Engle v. State</i> , 576 So. 2d 696 (Fla. 1991)	35
<i>Green v. State</i> , 620 So. 2d 188 (Fla. 1993)	28
<i>Hitchcock v. Dugger</i> , 481 U.S. 393 (1987)	7, 34
<i>Hoffman v. Haddock</i> , 695 So. 2d 682 (Fla. 1997)	4, 16, 20, 23, 26
<i>Houston v. Dutton</i> ,	

50 F.3d 381 (6 th Cir. 1995)	35
<i>Hyman v. Ocean Optique Distributors</i> , 734 So. 2d 546 (Fla. 3d DCA 1999)	28
<i>Jones v. State</i> , 740 So. 2d 520 (Fla. 1999)	19
<i>Johnson v. Mississippi</i> , 486 U.S. 578 (1988)	32
<i>Kight v. Dugger</i> , 574 So. 2d 1066 (Fla. 1990)	31, 37
<i>Makemson v. Martin County</i> , 491 So. 2d 1109, cert. denied, 479 U.S. 1043 (1987)	1, 3, 16, 20, 25
<i>Martinez v. Scanlon</i> , 582 So. 2d 1167 (Fla. 1991)	29
<i>McFarland v. Scott</i> , 512 U.S. 1256 (1994)	19
<i>Monroe County v. Garcia</i> , 695 So. 2d 823 (Fla. 3 rd DCA 1997)	21
<i>Operation Rescue v. Women's Health Center, Inc.</i> , 626 So. 2d 664 (Fla. 1993), aff'd in part, rev'd in part sub nom. <i>Madsen v. Women's Health Center, Inc.</i> , 512 U.S. 753 (1994)	13
<i>Orange County v. Corchado</i> , 679 So. 2d 297 (Fla. 5 th DCA 1996)	21
<i>Peede v. State</i> , 748 So. 2d 253 (Fla. 1999)	2, 19
<i>Remeta v. State</i> , 559 So. 2d 1132 (Fla. 1990)	1, 16, 20, 21
<i>Rose v. Palm Beach County</i> , 361 So. 2d 135 (Fla. 1978)	25
<i>Santa Rosa County v. Administration Committee</i> , 661 So. 2d 1190 (Fla. 1995)	29

<i>Spalding v. Dugger</i> , 526 So. 2d 71 (Fla. 1988)	1, 16
<i>Spaziano v. Seminole County</i> , 726 So. 2d 772 (Fla. 1999)	26
<i>Spaziano v. State</i> , 660 So. 2d 1363 (Fla. 1995), cert. denied, 516 U.S. 1053 (1996)	1, 16, 25
<i>State ex rel. Smith v. Brummer</i> , 426 So. 2d 532 (Fla. 1982), cert. denied, 464 U.S. 823 (1983)	31
<i>State v. Lewis</i> , 656 So. 2d 1248 (Fla. 1994)	6, 17, 20
<i>Ventura v. State</i> , 673 So. 2d 479 (Fla. 1996)	7, 19, 35
<i>Walton v. Dugger</i> , 634 So. 2d 1059 (Fla. 1993)	5, 19
<i>West v. Atkins</i> , 487 U.S. 42 (1988)	31
<i>White v. Board of County Comm'rs</i> , 537 So. 2d 1376 (Fla. 1989)	3, 16, 20, 21, 23
<i>Williams v. Dixon</i> , 961 F.2d 448 (4 th Cir.) , cert. denied, 506 U.S. 991 (1992)	35
<i>Wilson v. Wainwright</i> , 474 So. 2d 1162 (Fla. 1985)	2
<i>X Corp. v. Y Person</i> , 622 So. 2d 1098 (Fla. 2d DCA 1993)	30
RULES AND STATUTES	
Fla. Stat. Ch. 727	4
Fla. Stat. § 27.710(4)	4, 11, 25
Fla. Stat. § 27.711(1)(c)	8, 38

Fla. Stat. § 27.711(3)	25
Fla. Stat. § 27.711(4)	2, 7, 8, 17
Fla Stat. § 27.711(8)	9
R. Regulating Fla. Bar 4-1.7(b)	32
R. Regulating Fla. Bar 4-3.1	34
R. Regulating Fla. Bar 4-1.6	36

INTRODUCTION

[W]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute.

Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986),
cert. denied, 479 U.S. 1043 (1987).

A lawyer upon whose shoulders the State places “the dreadful responsibility of trying to save a man from electrocution”¹ must provide competent, loyal, and effective representation. The criminal defendant’s right to effective representation in postconviction proceedings derives from state statute.² This Court has established and consistently reaffirmed rules of law designed to ensure the requisite effective representation, through adequate resources and compensation, and through rules of ethics designed to ensure zealous and independent advocacy in the exercise of a full range of procedural and substantive options. This Court has said that it “will not lightly forgive a breach of this professional duty [zealous representation within the bounds of the

¹ Makemson, 491 So. 2d at 1111 (quoting the trial court). The Florida Legislature has subsequently authorized lethal injection as the primary method of carrying out a death sentence, with electrocution an available alternative method. § 922.105, Fla. Stat. (Supp. 2000) (ch. 2000-2, § 2, Laws of Fla.).

² Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990) (“[I]t is clear that this state has established a right to counsel in clemency proceedings for death penalty cases [§ 925.035(4), Fla. Stat. (1987)], and this statutory right necessarily carries with it the right to have effective assistance of counsel.”); see also Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988) (“We recognize that, under section 27.702, each defendant under a sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings.”); Spaziano v. State, 660 So. 2d 1363, 1369-70 (Fla. 1995) (right to counsel in state habeas corpus proceedings), cert. denied, 516 U.S. 1053 (1996). Here, § 27.710, Fla. Stat. (Supp. 1998), creates a statutory right to appointed counsel in postconviction capital collateral proceedings.

law] in any case; in a case involving the death penalty it is the very foundation of justice.” Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). See also Peede v. State, 748 So. 2d 253, 255 n.5 (Fla. 1999) (“[W]e remind counsel of the ethical obligation to provide coherent and competent representation, especially in death penalty cases.”). Nevertheless, through Appellees and the Justice Administrative Commission, the State of Florida has crafted a mandatory contract for appointed postconviction counsel that requires such counsel to accept at the inception of the appointment, and waive any objection to, severe substantive restrictions on counsel’s ability to provide effective representation in postconviction cases (the “Contract”). [A 1.]³ The offending restrictions fall into two general categories. First, the Contract requires postconviction counsel to accept specified maximum caps on the number of compensable hours that may be devoted to statutorily-defined “stages” of postconviction proceedings, and caps on the amount of attorneys’ fees and costs available. These caps on compensable hours and the amount of compensation are derived from statute, which makes them the “exclusive means of compensation.” [A 1 at 2 (from § 27.711(4), Fla. Stat. (Supp. 1998).] Second, the Contract requires postconviction counsel to comply with sweeping restrictions on counsel’s advocacy and exercise of independent professional judgment in the conduct of the litigation for which the appointment was made. [A 1 at 2-3.]

Appellant Mark Evan Olive, perhaps the State’s most experienced habeas corpus lawyer [R II – 200, Ex. A; A 2], challenged these contractual provisions after being appointed to represent a person sentenced to death, and then being told to sign the Contract. Olive maintained below that the Contract provisions are contrary to law and, accordingly, void and unenforceable. [R II – 200; R II – 299.] Olive has

³ The Contract is in the Record at R II – 200, Ex. 5 to Ex. A, Olive’s Affid. The Contract will be referenced herein at A 1.

the full force of law and public policy behind him, and is entitled to a judgment declaring the Contract void and unenforceable.

This Court has previously held that the State cannot impose absolute caps on the amounts of fees or costs that an attorney may recover for services rendered in a capital case. Makemson, 491 So. 2d at 1110 (“We ... find the fee maximums unconstitutional when applied to cases involving extraordinary circumstances and unusual representation.”); White v. Board of County Comm’rs, 537 So. 2d 1376, 1380 (Fla. 1989) (“We find that virtually every capital case fits within this standard [extraordinary circumstances and unusual representation] and justifies the court’s exercise of its inherent power to award attorney’s fees in excess of the current statutory fee cap.”). An absolute cap on compensable hours or the amount of compensation allowed cannot co-exist with the indisputable right to effective assistance of counsel, including the right of that counsel to receive “adequate funding.” See Hoffman v. Haddock, 695 So. 2d 682, 685 (Fla. 1997) (Wells, J., concurring).

Despite (or perhaps in part because of) this Court’s clear pronouncements in Makemson and White, the Florida Legislature enacted section 27.710, Florida Statutes (Supp. 1998), creating the requirement for the Contract. The Contract incorporates the requirements of Chapter 27, Part IV, Florida Statutes (entitled “Capital Collateral Representation,” and referenced herein as the “Registry Act”). The Contract is mandatory, and expressly binds the attorney to comply with its terms and conditions in the course of litigating the case for which the attorney is appointed:

Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Comptroller. ... By signing such contract, the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.

§ 27.710(4), Fla. Stat. (Supp. 1998).

By signing the Contract, postconviction counsel agrees at the beginning of a representation not to subsequently request fees or costs that exceed specified statutory maximums as to both number of compensable hours that may be worked on a given “stage” of the litigation, and the amount of compensation available for discrete tasks that the statute defines:

The parties agree that services performed under this Contract shall be paid in accordance with Section 27.711(4), Florida Statutes, set forth as the Fee and Payment Schedule in Exhibit A attached hereto and made a part hereof, and that said fee and payment schedule is the exclusive means of compensation hereunder.

[A 1 at 2, ¶ 3.A.) (emphasis added).]

The Contract strictly limits the number of compensable hours an attorney may work in preparing critical pleadings. [A 1 at 2, 5-6.] Compensation is available only after the major pleadings in the case have been filed or a particular “stage” of litigation is completed (with the added condition under the Death Penalty Reform Act of 2000, Ch. 2000-3, Laws of Florida (the “DPRA”), that the attorney must agree not to amend or supplement pleadings in order to obtain compensation). Further, if the case is delayed due to state action, such as the withholding of public records or an interlocutory appeal,⁴ no interim fees are available and enormous economic pressure comes to bear on appointed counsel to bring the litigation to a potentially hasty end.

The effect of these requirements is to circumvent Makemson and White by handing the State a waiver defense to any subsequent attempt by postconviction counsel to obtain compensation that exceeds the statutory hours, fees, or cost maximums. The central point of Olive’s

⁴ Delay due to state action is a real, and not merely theoretical, problem. See, e.g., Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993) (withholding of public records); Trepal v. State, No. SC94505 (2000 WL 263684) (Fla. Mar. 9, 2000) (Fla. 2000) (interlocutory appeal); State v. Lewis, 656 So. 2d 1248 (Fla. 1994) (same).

challenge to the statutory caps is not that the caps themselves are necessarily unconstitutional on their face or as applied in this or any other particular case, but rather that the State cannot validly extract an advance waiver of postconviction counsel's right to request excess compensation, particularly when at the time of making the waiver counsel may have no way to know whether or not it may be necessary or appropriate to request compensation in excess of the caps. Additionally, the State may not disqualify an attorney for appointment based on the attorney's belief that the case cannot be effectively handled within the scheduled limits. Olive's Affidavit filed with the trial court demonstrated that, based on his substantial experience, he knows the risk to be substantial and not merely theoretical. [A 2 at 12-14.] The same conclusion follows from the report prepared in 1998 by Robert Spangenberg of The Spangenberg Group, entitled "Amended Time and Expense Analysis of Post-Conviction Capital Cases in Florida" ("Spangenberg 1998"). [R II – 200, Ex. 7 to Ex. A.]

In addition to eliciting from postconviction counsel an advance waiver of any objection to the statutory fee and cost maximums regardless of future circumstances, the Contract imposes significant restraints on counsel's advocacy and independence. [A 1 at 2-3.] It merits emphasis here that this Contract is not between attorney and client, but between attorney and the opposing party, which seeks to carry out a sentence of death upon the client. By reference to section 27.711(11), Florida Statutes (Supp. 1998), the Contract prohibits postconviction counsel from representing, or assigning another attorney to represent, the capital defendant in any civil litigation other than habeas corpus proceedings, or any civil or criminal litigation in any other state even if this representation is done pro bono and is necessary for the purpose of pursuing habeas corpus relief. [A 1 at 2.] At the same time, postconviction counsel is prohibited from filing pleadings in advance of factual development as authorized by Ventura v. State, 673 So. 2d 479 (Fla. 1996), and arguing for the expansion, modification, or reversal of existing law.⁵ [A 1 at 3 ¶ 4.] In initial postconviction proceedings, this has the effect of prohibiting preparation and filing of claims based on developing law; claims based on a successful challenge to a prior conviction that was

⁵ Imagine what death penalty jurisprudence would look like now if this had been the standard for the past 25 years. E.g., Hitchcock v. Dugger, 481 U.S. 393 (1987). Imagine how many clients of postconviction lawyers would now be dead without having had the benefit of developments in death penalty jurisprudence.

introduced against the client in support of a death sentence; claims based on the client's juvenile record; claims based on mental health records, particularly if they are maintained in another state; and claims based on information obtainable through a lawsuit brought under the federal Freedom of Information Act. Despite these restrictions (or perhaps because of them), the statute provides that no act (and presumably no omission) of postconviction counsel pursuant to the statute or the Contract may later form the basis of a claim of ineffective assistance of counsel. § 27.711(10), Fla. Stat. (Supp. 1998).

During the representation, in order to obtain compensation, postconviction counsel must make available to the public, under the public records law, "all documents, papers, letters or other materials" relating to the representation. [A 1 at 3 ¶6.] The Contract makes the State's Justice Administrative Commission – not the court – the final arbiter of what is and what is not subject to public access. [Id.]

Finally, the Contract prohibits counsel from "filing ... repetitive pleadings" [A 1 at 2-3]; while the statute prohibits postconviction counsel from engaging in or being compensated for any "repetitive or successive collateral challenges to a conviction and sentence of death," even if such litigation is based on newly discovered evidence of innocence, ineligibility for the death penalty, a newly discovered constitutional violation, incompetence for execution, or a fundamental change in law made retroactive on habeas corpus review. § 27.711(1)(c), Fla. Stat. (Supp. 1998). In all cases, the Contract and

statute prohibit the attorney from representing the client at a retrial or resentencing or a clemency proceeding. Under the statutory fee schedule incorporated in the contract, no funds or other resources are available for the attorney to do anything on behalf of a client facing execution, including meet with the client. § 27.711(4), Fla. Stat. (Supp. 1998). Nevertheless, the attorney must agree to represent the client until the sentence is carried out unless released by the trial court. § 27.711(8), Fla. Stat. (Supp. 1998).

Each of these provisions places postconviction counsel in the untenable and unethical position of conducting the representation under severely handicapping restrictions. Appointed postconviction counsel are subject to restrictions not placed on private counsel acting pro bono publico, attorneys employed by the Capital Collateral Regional Counsels, or attorneys retained to represent a person sentenced to death. The outcome of postconviction litigation conducted by such an attorney is unreliable. This is not a lawyer; this is the illusion of a lawyer – an illusion that presents a clear and present danger to the client under a sentence of death.

Because the Contract forces postconviction counsel to waive the protections of Makemson and White, which were designed to ensure effective representation; and further to waive ethical rules that were also designed to ensure effective representation, the Contract is void and unenforceable.

The stakes here are as high as they get.

STATEMENT OF THE CASE AND FACTS

The undisputed record evidence shows that Olive is a 22-year lawyer and 14-year member of The Florida Bar who specializes in capital trial and capital postconviction representation and has very substantial experience in this area. [A 2 at 1-3.] After the Florida Legislature adopted the Registry Act, part IV of chapter 27, in 1998, Olive applied for inclusion on the statewide registry of private attorneys available for court appointment to represent indigent death row inmates in capital postconviction proceedings. [A 2 at 4; R II – 200 at Ex. C.] See generally §§ 27.710-.711, Fla. Stat. (Supp. 1998).⁶ Olive’s application was approved and he was placed on the registry list. [A 2 at 4; R II-200 at Ex. C.] On September 1, 1998, Fourth Judicial Circuit Judge Donald R. Moran appointed Olive to represent death row inmate Anthony Mungin. [R II-200 Ex. C.] Olive entered an attorney-client relationship with Mungin. [A 2 at 4-5.] He reviewed materials in Mungin’s case. [*Id.*] He corresponded with Mungin. [*Id.*] He had his associate meet with Mungin. [*Id.*] Olive attested below that Mungin wanted Olive to represent him, and that Olive wanted to represent Mungin. [*Id.*] He evaluated the case sufficiently to develop explicit theories about how to handle it and some specific actions that would be required, as well as the approximate number of hours of attorney time that would be required to handle the case. [A 2 at 5-10.] Shortly thereafter, Appellee Rober R. Maas as Executive Director of the State Justice Administrative Commission submitted the Contract to Olive, instructing him to sign and return it.⁷ [A 1.]

The Contract is mandatory under the Registry Act. See § 27.710(4), Fla. Stat. (Supp. 1998). The Contract requires each participating lawyer to certify “that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.” [A 1 at 2; see § 27.710(4), Fla. Stat. (Supp.

⁶ The 1999 Florida Legislature adopted certain changes to the Registry Act, effective July 1, 1999. 99-221, Laws of Fla. These changes, which will be noted when appropriate herein, further evidence the need for a declaratory judgment on Olive’s claims.

⁷ Although section 27.710(4), Florida Statutes (Supp. 1998), requires postconviction counsel to enter a contract with the Comptroller of Florida, the contracting party on behalf of the State is the Justice Administrative Commission, with the Comptroller serving as contract manager. [A 1 at 1.]

1998). The Contract incorporates the waivers of objection to the statutory hours, fees, and costs schedule, stating again, as does the statute, that these are the “exclusive means of compensation” for postconviction counsel. [A 1 at 2.] The Contract further sets forth restrictions on the scope of the representation, as discussed in the Introduction above. [A 1 at 2-3.]

After being appointed and entering into an attorney-client relationship with Mungin, Olive refused to allow the relationship to be restricted as set forth in the Contract. He therefore challenged the terms and conditions of the Contract as unlawful and therefore void, first by filing a Petition to invoke this Court’s all writs jurisdiction,⁸ then by filing a complaint for declaratory judgment and injunctive relief in Leon County Circuit Court. [R I – 1 (Complaint); R II-200 (Amended Complaint).] Olive’s lawsuit produced a final order in the form of a Declaratory Judgment that “the fee and cost limits set forth in Section 27.711, Florida Statutes, are not facially unconstitutional, and the statute does not, on its face, preclude capital defendants from receiving effective assistance of counsel in post-conviction proceedings.” [A 3 at 2; R III - 557.] The order further declared that “the limitations set forth in Sections 27.711(9) and 27.711(10), Florida Statutes, do not, on their face, infringe upon the Florida Supreme Court’s exclusive jurisdiction to regulate the conduct of lawyers.” [A 3 at 2; R III - 557.] The trial court did not address Olive’s claim that both the statute and the terms and conditions of the Contract were void and unenforceable⁹ because they required him to waive his right to exceed the prescribed maximum number of hours, fees, or costs, and because they required him to agree to violate his duties of loyalty and confidentiality to his client.

Olive timely appealed to the First District Court of Appeal [R III – 559], which granted his Suggestion of Certification for Immediate Resolution by this Court as a case of great public importance. This Court accepted jurisdiction by Order dated February 23, 2000.

⁸ Olive’s Petition was filed with this Court on October 15, 1999, assigned Case No. 94,088. The Petition was denied by Order dated February 11, 1999, with Justice Anstead noting he would have ordered a response.

⁹ The trial court denied Olive’s Motion for Summary Judgment and granted Appellees’ ore tenus Motions for Summary Judgment. [R III-554.]

As a result of Olive's court challenges to the terms and conditions of the Contract, the trial judge who had appointed him to represent Mungin revoked his appointment. [R II – 200 Ex. G.] Olive remains listed on the statewide registry for postconviction counsel, but has not been appointed to any case since then. [R III – 537, Second Affid. Of Maas.]

STANDARD OF REVIEW

The standard of review is de novo because the issues are purely legal and the material facts undisputed. Operation Rescue v. Women's Health Center, Inc., 626 So. 2d 664 (Fla. 1993), aff'd in part, rev'd in part sub nom. Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994).

SUMMARY OF THE ARGUMENT

By statute, the State of Florida gives death-sentenced inmates the right to appointed postconviction counsel. By law, such counsel must provide competent and effective representation. In the context of capital cases, including postconviction proceedings, this Court has defined effective representation as including the availability of compensation not limited by predetermined maximums, but left to the exercise of the trial court's sound discretion and inherent authority. In addition, this Court has the exclusive authority to regulate the Florida Bar and the practice of its members, and has established a system of ethical rules designed to ensure that attorneys provide zealous representation free from restraints on their independent professional judgment. In spite of these irrefutable principles of well-settled law, the State of Florida has for the first time instituted a requirement that appointed postconviction counsel enter into a contract with the State, pursuant to which counsel agrees to waive the protections of existing law with respect to compensation and advocacy in the very case for which the appointment is made.

Olive is experienced and well-known as a capital trial and habeas corpus attorney, and remains among the attorneys listed on the

State's registry as qualified and available to do this kind of work. He was appointed in a case and told to sign the Contract. Before doing so, however, he requested a declaratory judgment of his rights and obligations under the Contract. The State responded by orchestrating the revocation of his appointment, and other counsel was appointed in his stead, thus illustrating perfectly why this case is nonetheless ripe for determination: it is likely to recur but will evade review because the State can always stay one step ahead of any attorney who seeks a declaratory judgment before signing the Contract. Olive is entitled to the judgment he seeks.

This Court's decisions in Makemson, White, and Remeta have made the governing law clear with respect to fee caps in capital cases, including postconviction cases. These cases are so unusually complex and time-consuming, and the stakes so high, that the defendant's right to effective assistance of counsel is unlawfully impaired by an absolute and inflexible maximum that infringes on the trial court's inherent authority to exceed the stated limits on hours, fees, or costs in appropriate cases. This Court should not countenance the State's blatant attempt to circumvent these cases by binding postconviction counsel contractually to an advance waiver of the right to seek compensation for work that exceeds the specified maximums. The Court should instead declare the advance waiver provisions of the Contract void and unenforceable.

The second set of issues before the Court is equally compelling, and the law equally clear. A lawyer may not violate the duties of loyalty and confidentiality to the client by agreeing in advance

to contractual terms that limit the lawyer's exercise of zealous advocacy and independent professional judgment. No lawyer may enter into a third party agreement that leaves the lawyer hog-tied and gagged in representing a client, let alone do so at the behest of an opposing party that seeks the death of his or her client! The provisions of the Contract and the Registry Act that limit what a postconviction lawyer can do, and compel disclosure of information relating to the representation, are contrary to law and unenforceable.

ARGUMENT

II. THE CAPPED FEE SCHEDULE AND LIMITATION ON COSTS IN THE CONTRACT ARE VOID BECAUSE THEY BAR ENFORCEMENT OF CAPITAL DEFENDANTS' RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The State's attempt to force an advance contractual waiver from postconviction counsel is contrary to law and renders those terms of the Contract void. This Court established the invalidity of fee and cost caps for capital cases in White v. Board Of County Comm'rs, 537 So. 2d 1376 (Fla. 1989), Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), and Remeta v. State, 559 So. 2d 1132 (Fla. 1990). These cases reinforce the trial court's inherent power to ensure effective representation in capital cases, a right to which capital defendants remain entitled in postconviction proceedings. Remeta, 559 So. 2d at 1135; Spalding, 526 So. 2d at 72; see also

Hoffman v. Haddock, 695 So. 2d 682, 685 (Fla. 1997) (“The legitimate purpose of post-conviction Proceedings requires adequate funding.”) (Wells, J., concurring); Spaziano v. State, 660 So. 2d 1363, 1369-70 (Fla. 1995) (right to counsel in state habeas corpus proceedings). Under these authorities, the challenged Contract terms are void and unenforceable.

A. The Registry Act and Contract.

The Registry Act and Contract contain a schedule that authorizes compensation at specified points during postconviction proceedings, for work not exceeding specified numbers of attorney hours per phase, covering the life of the case from state court proceedings through the Florida Supreme Court to the United States Supreme Court. Section 27.711(4) of the Registry Act sets forth the following schedule of allowable hours worked payable at \$100 per hour, in stages, on a predetermined schedule. An attorney signing the Contract agrees that these provisions will furnish the “exclusive means” of compensation:

- a. a maximum of 25 hours upon accepting appointment and filing a notice of appearance;
- b. a maximum of 200 hours, with compensation available only after timely filing in the trial court the capital defendant’s “complete” original motion for postconviction relief;

c. a maximum of 100 hours, with compensation available only after the trial court issues a final order granting or denying the capital defendant's motion for postconviction relief;

d. a maximum of 40 hours, with compensation available only after timely filing in the Supreme Court the capital defendant's brief or briefs that address the trial court's **final** order granting or denying the capital defendant's motion for postconviction relief and the state petition for writ of habeas corpus;¹⁰

e. a maximum of 200 hours, with compensation available only after the appeal of the trial court's denial of the capital defendant's motion for postconviction relief and the capital defendant's state petition for writ of habeas corpus become final in the Supreme Court;¹¹

¹⁰ There is no provision for compensation for an interlocutory appeal as in Trepal v. State, Case No. SC94505 (2000 WL 263684) (Fla. Mar. 9, 2000), and State v. Lewis, 656 So. 2d 1248 (Fla. 1994). Further, postconviction counsel could not be compensated for work performed prior to the interlocutory appeal until resolution of that proceeding and completion of that interrupted phase of the litigation as per the statute.

¹¹ Effective July 1, 1999, the maximum is 400 hours. § 27.711, Fla. Stat. (1999). The 1999 Legislature also added a provision that the attorney is entitled to be compensated for up to a maximum of 100 hours, after the trial court issues an order, pursuant to a remand from the Supreme Court, which directs the trial court to hold further proceedings on the capital defendant's motion for postconviction relief. Id.

f. a maximum of 25 hours at the conclusion of proceedings in state court, with compensation available only after filing a petition for writ of certiorari in the United States Supreme Court; and

g. a maximum of 50 hours, for representation of the capital defendant in any certiorari proceedings before the United States Supreme Court.

The Registry Act also limits fees that may be paid to investigators and expert witnesses. See § 27.711(5), Fla. Stat. (Supp. 1998). The statute allows \$40 per hour, up to a maximum of \$15,000, for investigative services. The statute allows a maximum of \$5,000 cumulatively for expert witness compensation, transcripts, and other miscellaneous expenses. See id.¹² The fee and expense schedule is the “exclusive means” of compensating appointed postconviction counsel for work in state court, except that counsel must, “when appropriate,” seek further compensation from the federal government in federal habeas litigation. See § 27.711(3), Fla. Stat. (Supp. 1998); Contract ¶ 3 [A 1 at 2].

These provisions prohibit postconviction counsel from requesting compensation from the trial court in excess of the limits on number of hours worked, fees, and costs that are established in the Registry Act. Further, the provisions

¹² Effective July 1, 1999, an attorney was entitled to a maximum of \$15,000 for miscellaneous expenses, except that, if the trial court finds extraordinary circumstances exist, the attorney is entitled to payment in excess of \$15,000. § 27.711(6), Fla. Stat. (1999).

prohibit the trial court from providing compensation at any time other than those specified. No attorney can validly agree in advance to contractual terms that in effect limit the number of hours the attorney may work on a particular phase of postconviction proceedings. See McFarland v. Scott, 512 U.S. 1256 (1994) (Blackmun, J., dissenting) (“The prospect that hours spent in trial preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney’s zealous representation of his client.”). This is particularly true where the contract is with the opposing party, and where that opposing party has an established track record of delaying litigation or making it more difficult. Ventura, 673 So. 2d at 480 (agencies withheld records and objected to disclosure); Walton, 634 So. 2d at 1061-62 (same); Jones v. State, 740 So. 2d 520 (Fla. 1999) (12-year delay in competency hearing); Peede, 748 So. 2d at 255-56 & n.4; Lewis, 656 So. 2d at 1250. Inflexible imposition of these statutory maximum caps is an unconstitutional curtailment of the court’s inherent power to ensure adequate representation in capital cases and an invalid and unenforceable waiver of this Court’s White and Makemson protections of the death-sentenced individual’s statutory right to effective assistance of counsel.

B. The Inflexible Statutory and Contractual Maximums Infringe on the Trial Court’s Inherent Authority to Ensure Effective Representation.

In Makemson, this Court recognized a clear link between adequate compensation and quality of representation, concluding that “it is within the inherent power of Florida’s trial courts to allow, in extraordinary and unusual cases, departure from the statute’s fee guidelines. . . .” 491 So. 2d at 1114. This Court subsequently held that because all capital cases were extraordinary and unusual, they justified an award of attorney’s fees in excess of the statutory fee cap. White, 537 So. 2d at 1378. See also Haddock, 695 So. 2d at 685 (effective post-conviction representation requires adequate funding of counsel) (Wells, J., concurring).

Relying on both Makemson and White, this Court approved the trial court’s inherent authority to exceed statutory fee caps to compensate attorneys appointed in capital clemency proceedings when necessary to ensure adequate representation. Remeta v. State, 559 So. 2d 1132 (Fla. 1990). The Court recognized in Remeta that this principle is not limited to clemency proceedings:

[T]he appointment of counsel in any setting would be meaningless without some assurance that counsel give effective representation Trial courts must have the authority to fairly compensate court-appointed counsel. It is the only way to ensure effective representation and give effect to the right to counsel in these death penalty clemency proceedings.

Remeta, 559 So. 2d at 1135 (emphasis added).

Without such authority, the trial courts of this state are powerless to effectuate this Court’s guarantee of effective representation and the “rule announced in Makemson would collapse because many attorneys would be unable to work on a pro bono basis.” Orange County v. Corchado, 679 So. 2d 297, 301 (Fla. 5th DCA 1996). See also Monroe County v. Garcia, 695 So. 2d 823, 825 (Fla. 3d DCA 1997) (“any other conclusion would render [Section 925.036(2)(c)] unconstitutional”). See White, 537 So. 2d at 1378. See Senate Staff Analysis and Economic Impact Statement, Bill CS/SB 1328, p. 15 (March 3, 1998) (“[i]n light of the fact the [Registry Act] does not specifically authorize a judge to allocate money over the statutory fee maximums for cases involving unusual or extraordinary circumstances, a court may find that the defendant’s right to assistance of counsel is being interfered with.”)¹³

¹³ The April 16, 1999 Senate Staff Analysis and Economic Impact Statement, prepared for CS/CS/SB 2054 (the 1999 legislation that amended the Registry Act) concludes that the fee caps established by the Registry

C. Because the Statutory and Contractual Maximums are Demonstrably Insufficient to Ensure Effective Postconviction Representation, The Court Should Enter A Declaratory Judgment Invalidating the Advance Waiver.

Olive's request for a declaratory judgment was ripe for determination regardless of whether or not he would exceed the fee and cost caps in representing Mungin. To demonstrate the very real and substantial risk associated with the requirement of an advance waiver of any right to exceed the caps, Olive provided the trial court his very educated estimates of the time and expense that would be required to represent Mungin. He also provided the trial court the detailed 1998 Spangenberg report supporting the same conclusions. [R II-200, Ex. 7 to Ex. A.] This evidence was not introduced for the purpose of creating or supporting an as-applied challenge to the Registry Act, as the State mistakenly attempted to recast Olive's case below, but rather for the purpose of demonstrating the very real risk that could result from the requested advance waiver, and hence the necessity of a declaratory judgment before postconviction counsel agrees to waive any right to exceed the caps.

The holdings of Makemson, White, and Remeta apply with equal force to the statutory caps contained in the Registry Act and Contract. These cases confirm the principle that the courts of this state have the inherent authority to exceed the statutory guidelines to compensate postconviction counsel. Capital postconviction proceedings are integral to ensuring the reliability of Florida's death penalty. Arbelaez v. Butterworth, 638 So. 2d 326, 326-327 (Fla. 1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is

Act do not prevent a court from ordering payment above the maximum authorized. [R II-299, Ex.L, p. 7.] However, the plain language of CS/CS/SB 2054 belies this conclusion. CS/CS/SB 2054 specifically authorizes a court to compensate an attorney in excess of the cap on miscellaneous expenses if extraordinary circumstances exist. It does not authorize the court to exceed the fee and expense caps in any other category. Application of the established theory of statutory interpretation, expressio unius est exclusio alterius, leads to the conclusion that a court is without authority to exceed the caps for compensation in any other category except miscellaneous expenses. This conclusion, which conflicts with the holdings of Makemson and White, emphasizes the necessity for a declaratory judgment on this issue.

administered in a fair, consistent and reliable manner, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process.”). Unless courts have the authority to compensate capital postconviction counsel in excess of the statutory guidelines, the courts cannot ensure effective representation. Unless attorneys have the power to seek necessary fees and costs at appropriate stages of the litigation, trial courts will have no meaningful way of exercising their inherent authority. “The relationship between an attorney’s compensation and the quality of his or her representation cannot be ignored.” White, 537 So. 2d at 1380. See also Haddock, 695 So. 2d at 685 (Wells, J., concurring).

This inherent authority is especially important where, as here, the total number of hours allowed pursuant to statute are far from reasonable. White, 537 So. 2d 1376, 1379 (Fla. 1989). Olive, who has acted as lead counsel in over 75 capital postconviction challenges and assisted in hundreds of others, has never participated in a case that could be competently handled from state trial court to the United States Supreme Court in so few hours. [A 2 at 11.] Indeed, national expert Robert Spangenberg concluded in his 1998 Analysis of Postconviction Capital Cases in Florida that attorneys providing effective capital postconviction representation would most likely need to work 3,300 hours over the life of the case. [R II-200, Ex. 7 to Ex. A.]

Olive evaluated the record on appeal for Anthony Mungin, and based on his extensive experience, Olive concluded that a minimum of 2,500 hours would be necessary to effectively represent Mungin for the life of the case. [A 2 at 10-11.] This number of hours substantially exceeds the fee caps set forth in the Registry Act. Olive also determined also that the maximum of \$5,000 available for expert services is insufficient to retain the forensic and mental health experts to investigate and support claims. [A 2 at 13.]

The insufficient amount of the maximum caps is compounded by the Registry Act’s limitations on the number of hours compensable for each “stage” of postconviction representation. Section 27.711(4), Fla.

Stat. For example, the Registry Act provides compensation for 225 hours of work prior to filing the original motion for postconviction relief, whereas experience teaches that substantially greater hours would be required for this work. [A 2 at 13.]

Even if the Legislature fails to appropriate funds to compensate postconviction counsel, the Registry Act and the Contract require postconviction counsel to continue in the representation for free. Likewise, counsel is presumptively responsible for continuing under the trial court's appointment order after the initial series of collateral litigation, although no fees or costs may be provided for any successive litigation. Sections 27.711(3) and 27.710(4), Fla. Stat. [A 2 at 7-8.] The Contract and Registry Act, therefore, make postconviction counsel responsible for the case, and ultimately the inmate's life, without the possibility of additional compensation, or investigative or expert assistance. Counsel must bind not only himself or herself, but also his or her client, to these terms at the very beginning of the representation.

In light of this evidence – a 25-year database documented in

Spangenberg 1998 and Olive's expert opinion – that the maximum compensable

hours are grossly insufficient to ensure effective postconviction representation, the

trial court erred in refusing to furnish a declaratory judgment ruling the Contract

void. This Court has established that the inmate's right to effective counsel must

win the battle between funding and representation. Makemson, 491 So. 2d at 1112. See Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978) (“Where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements. . . . Every court has inherent power to do all things reasonably necessary for the administration of justice within the scope of its jurisdiction. . . .”); Spaziano v. State, 660 So. 2d 1363, 1369-70 (Fla. 1995) (in successive case under death warrant, this Court said “we refuse to endorse or allow [postconviction counsel's] representation to continue when that representation would, admittedly, be less than adequate”). Adequacy of representation includes the right to adequate funding and resources. Haddock, 695 So. 2d at 682 (Wells, J., concurring). Postconviction counsel must have the right to request, and the trial court must have the power to order, reasonable compensation

for postconviction representation of death-sentenced inmates. The Contract unlawfully requires postconviction counsel to waive these protections in advance. Finally, the Contract and Registry Act do not allow compensation for a second attorney to assist with the litigation. Section 27.710(6), Fla. Stat.¹⁴ This prohibition interferes with the trial court's inherent authority to appoint additional counsel to ensure adequate representation. See Spaziano v. Seminole County, 726 So. 2d 772, 774 (Fla. 1999) (trial court has inherent authority to appoint co-counsel for capital defendant); Armstrong v. State, 642 So. 2d 730, 737 (Fla) ("appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial court judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein."), cert. denied, 514 U.S. 1085 (1995).

The prohibition against compensation for a second attorney is also contrary to the record evidence that a second attorney is essential in postconviction capital proceedings. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases require two lawyers for capital postconviction cases. [R II-200, Ex. 6 to Ex. A.] CCRC routinely assigns two lawyers to handle each postconviction case. [A 2 at 10.] The record reflects that Olive is not, in all his experience, aware of any competent lawyer who has undertaken capital postconviction representation alone, without the possibility of co-counsel. [A 2 at 10.] The trial court should not be prohibited by contract or statute

¹⁴ Effective July 1, 1999, an appointed attorney may designate another qualified attorney to assist him. § 27.711(4), Fla. Stat. (1999). Conspicuously absent, however, is any provision for compensating this assisting lawyer. This only means that two lawyers must share, and will deplete more quickly, the same pot of available funds.

from exercising discretion to appoint and compensate a second postconviction counsel to ensure effective representation for death-sentenced individuals.

C. Declaratory Relief Was the Appropriate Remedy.

Olive sought a declaratory judgment of his rights and obligations under the Contract pursuant to chapter 86, Florida Statutes, arguing that the Contract was invalid. [R II-200.] He invoked the proper procedure at the proper time. Olive was entitled to know before entering into the Contract whether the Contract was unenforceable because it required him to waive his right to excess compensation and to agree to violate his duties of loyalty and confidentiality to his client. See Hyman v. Ocean Optique Distributors, 734 So. 2d 546 (Fla. 3d DCA 1999) (after denying a motion to dismiss, the trial court is obligated to declare the parties' respective rights and obligations). The trial judge should have answered the question presented, which was whether or not the Contract was valid.

Olive's dilemma was very real and ripe for determination. He could not retain his court appointment without contractually waiving in advance the protections this Court established in Makemson, White, Remeta, Spalding, Spaziano, and Hoffman, and agreeing to violate his duties of loyalty and

confidentiality to his client. Subsequent to his court challenges, he has not received any further appointments as postconviction counsel, although he remains eligible and purportedly on the registry list, and if appointed again he would be told to sign the Contract. Thus, it makes no difference, as the State argued below, that his appointment was revoked and another attorney appointed in his place to represent Mr. Mungin. These facts present a classic case in which the doctrine of mootness does not apply because “the issue is likely to recur.” Green v. State, 620 So. 2d 188, 189 (Fla. 1993) (quoting Holly v. Auld, 450 So. 2d 217 (Fla. 1984)).

The Florida Legislature has authorized individuals to seek declaratory judgments “on the existence or nonexistence of any immunity, power, privilege, or right; or any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege or right now exists or will arise in the future.” Section 86.011, Fla. Stat. (1997) (emphasis added). This Court has held that “[t]he purpose of the declaratory judgment statute is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations.” Santa Rosa County v. Administration Comm., 661 So. 2d 1190, 1192 (Fla. 1995).

The declaratory judgment statute should be liberally construed. Department of Rev. v. Kuhnlein, 646 So. 2d 717 (Fla. 1994) (granting declaratory

relief in action brought by residents alleging rights under Commerce Clause were being infringed by a legal impact fee), cert. denied, 515 U.S. 1158 (1995); Chiles v. Children A, B, C, 589 So. 2d 260, 263 (Fla.1991) (accepting jurisdiction over complaint for declaratory relief by children seeking to declare certain provisions of budgetary scheme unconstitutional); Martinez v. Scanlon, 582 So. 2d 1167, 1170 (Fla. 1991) (accepting jurisdiction in declaratory action to resolve dispute between various groups and governor over validity of workers compensation laws). An action for declaratory relief is particularly appropriate where, as here, the case addresses a controversy involving governmental functions and the disbursement of public funds. Chiles, 589 So. 2d at 263.

Olive, a registry attorney, is entitled to clarification of conflicting duties imposed on him by the Registry Act, prior decisions of this Court, and the Rules Regulating the Florida Bar. It cannot be the law that he is required to enter the Contract and intentionally breach it before seeking a declaration of his rights and obligations under it. The availability of a declaratory judgment cannot be limited to circumstances where the harm sought to be avoided has already occurred, such as where an attorney interferes with a client's right to effective assistance of counsel by waiving established protections of law, or violates ethical duties, in order to

create a ripe issue. Under Florida law, he has a right to seek such “anticipatory and preventive justice”:

The goals of the Declaratory Judgment Act are to relieve litigants of the common law rule that a declaration of rights cannot be adjudicated unless a right has been violated and to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available. To operate within this sphere of anticipatory and preventive justice, the Declaratory Judgment Act should be liberally construed.

X Corp. v. Y Person, 622 So. 2d 1098, 1100 (Fla. 2d DCA 1993).

II. THE CONTRACT IS VOID TO THE EXTENT THAT IT REQUIRES POSTCONVICTION COUNSEL TO ENGAGE IN UNETHICAL CONDUCT AND JEOPARDIZE THE CLIENT’S RIGHTS TO EFFECTIVE AND ZEALOUS ASSISTANCE OF COUNSEL.

An independent legal profession is an important force in preserving government under law, for abuse to legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Preamble, Rules of Professional Conduct, Rules Regulating the Florida Bar.

Like every Florida lawyer, Olive’s professional and ethical obligations are governed by this Court and its delegate, the Florida Bar. These obligations do not change when Olive is compensated by the state for representation pursuant to a court appointment. Kight v. Dugger, 574 So. 2d 1066, 1069 (Fla. 1990). See West

v. Atkins, 487 U.S. 42 (1988) (public defender’s professional and ethical obligations require him to act in a role independent of and in opposition to the state); accord, State ex rel. Smith v. Brummer, 426 So. 2d 532, 533 (Fla. 1982), cert. denied, 464 U.S. 823 (1983). On their face, certain provisions of the Registry Act and the Contract compel postconviction counsel to violate ethical duties under the Rules Regulating the Florida Bar, which has the effect of denying death-sentenced clients their right to effective representation of counsel.

First, section 27.711(10) of the Registry Act prohibits postconviction counsel from providing representation during a re-trial, a re-sentencing proceeding, a clemency proceeding, 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 the habeas corpus proceedings. Paragraph 3B of the Contract prohibits counsel from “representing,” or “participat[ing]” in civil or criminal litigation in any other State with respect to the client, or “assigning” another lawyer to participate in such litigation, even if this work is necessary for the purpose of meaningful habeas review.

The restriction on participation in other civil litigation ignores the fact that the circumstances of a client’s postconviction case may require competent, ethical counsel to engage in reasonable and necessary civil litigation related to the

postconviction proceeding. [A 2 at 6-7.] For example, if a client’s prior conviction was introduced at the sentencing phase of trial, competent postconviction counsel would investigate and, if warranted, challenge the constitutionality of that prior conviction as authorized by Johnson v. Mississippi, 486 U.S. 578 (1988). See Burr v. State, 576 So. 2d 278 (Fla. 1991) (this Court vacated sentence of death and ordered new sentencing trial after reconsideration in light of Johnson).

Yet the Registry Act and Contract prohibit postconviction counsel from investigating, litigating, or filing a Johnson challenge, even if supported by facts and law, and even if counsel wished to do so without compensation. This restriction imposed by a third-party fee agreement with the opposing party contravenes counsel’s duty to exercise independent professional judgment in the representation of the client. See R. Regulating Fla. Bar 4-1.7(b) (duty to avoid limitation on independent professional judgment); 4-1.8(f) (lawyer cannot accept compensation for representation from third party if there is interference with the lawyer’s independence of professional judgment or with the client lawyer relationship); 4-5.4(d) (lawyer shall not permit a person who... pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services).

Section 27.711(10) also impermissibly interferes with postconviction counsel’s ethical duty to refrain from “making . . . an employment

agreement that restricts the rights of the lawyer to practice after termination of the relationship,” by prohibiting counsel from providing representation at re-trial, re-sentencing, or clemency hearings. See Rule 4-5.6, R. Regulating Fla. Bar & Comment (prohibition against lawyer’s acceptance of restriction on right to practice seeks to protect both the professional autonomy of lawyers and clients’ access to a lawyer of their choice). The statute offers no explanation for this restriction, which on its face appears calculated merely to deprive the death-sentenced inmate of the benefit of counsel from the one attorney most likely to have become expert in the inmate’s case.¹⁵ It is Olive’s practice to continue representation of a client in re-trial and re-sentencing. [A 2 at ¶ 16.]¹⁶ The State cannot validly prohibit him or any other postconviction counsel from continuing such independent representation if he chooses to do so.

¹⁵ This restriction would affect every case in which Contract counsel appears on behalf of a person sentenced to death, particularly under the so-called “dual track” procedures proposed by the DPRA.

¹⁶ The position of The Florida Bar on this matter is clear:

While courts in Florida have enforced agreements that are in violation of Rule 4-5.6(a), this does not absolve Florida attorneys from their duties to comply with Rule 4-5.6(a)... Therefore, while Florida attorneys might find a court that would enforce some portions of a restrictive agreement in violation of Rule 4-5.6(a), they would still be subject to discipline for entering into such an agreement.

The Florida Bar News, June 1, 1999, p. 26.

Second, the Contract prohibits postconviction counsel from “filing repetitive or frivolous pleadings or pleadings unsupported by law and/or facts during the course of representing the Inmate.” [A 2 at 3, ¶ 4 (emphasis added).] Thus, by signing the Contract, postconviction counsel would agree, for instance, not to renew a claim based on a change in the law applicable retroactively in postconviction review. The prohibition would have postconviction counsel agree in general to refrain from making repetitive, but good faith and non-frivolous arguments based on the expansion, modification, or reversal of existing law, even though such arguments are permitted by the Rules of Professional Conduct. R. Regulating Fla. Bar 4-3.1. Such a constraint forces Olive to violate Rules Regulating the Florida Bar 4-1.7(b) (duty to avoid limitation on independent professional judgment); 4-1.8(f) (lawyer cannot accept compensation for representation from third party if there is interference with the lawyer’s independence of professional judgment or with the client lawyer relationship); and 4-5.4(d) (lawyer should not permit person who compensates lawyer for legal services to another to regulate the lawyer’s professional judgment).

Neither Olive nor any postconviction counsel can ethically waive the obligation to make such good faith arguments, even on a repeated basis. Counsel cannot predict when a court might be persuaded by an argument to expand or modify the law, because Eighth Amendment and capital postconviction law is continually

evolving. Sentences of death have been overturned based on arguments for the expansion, modification, or reversal of existing law. Hitchcock v. Dugger, 481 U.S. 393 (1987); Houston v. Dutton, 50 F.3d 381 (6th Cir. 1995); Williams v. Dixon, 961 F.2d 448 (4th Cir.), cert. denied, 506 U.S. 991 (1992); Copeland v. Dugger, 505 So. 2d 425 (Fla. 1987), vacated and remanded by 484 U.S. 807 (1987), opinion on remand, 565 So. 2d 1348 (1990). If the Contract had been in place before the United States Supreme Court's decision in Hitchcock, it would have barred presentation of meritorious claims that persons were sentenced to death in violation of the Eighth Amendment.

Additionally, the Contract's waiver would prevent capital postconviction counsel from pleading claims in anticipation of factual development through discovery and public records acquisition, a right that is well established in the law. Ventura v. State, 673 So. 2d 479 (Fla. 1996); Engle v. State, 576 So. 2d 696 (Fla. 1991). The Contract would unlawfully extract an advance waiver of these rights and render postconviction counsel ineffective.

Third, Paragraph 6 of the Contract, without specific authority from the Registry Act, subjects Olive to suit or forfeiture of compensation if he refuses to open information relating to the

representation to public access. The Contract requires postconviction counsel to

permit public access to all documents, papers, letters, or other materials subject to the provisions of Chapter 119, Florida Statutes, and made or received by Contractor in conjunction with this contract. Such materials shall not be provided to any person not a party to this contract, except the CAJCC, without prior approval by Commission. If there is disagreement between Commission and Contractor as to what is a public record, the opinion of Commission will govern. Nothing herein, however, shall require the production of material covered by the attorney-client privilege.

Paragraph 6 impermissibly permits a determination by a third-party, the Commission, to trump postconviction counsel's professional obligation to keep client information confidential without the client's consent. R. Regulating Fla. Bar 4-1.6. This provision also interferes with the duty to exercise independent professional judgment, by forcing counsel to agree to accept the Commission's determination that a document is a "public record." See Rule 4-1.7(b) (duty to avoid limitation on independent professional judgment); Rule 4-1.8(f) (lawyer cannot accept compensation for representation from third party if there is interference with the lawyer's independence of professional judgment or with the client lawyer relationship).

Confidentiality is a "fundamental principle in the client-lawyer relationship," and applies to all information relating to the representation, no matter the

source. Comment, Rule 4-1.6. There is a presumption against any statute superseding the ethical obligation to maintain client confidences. Comment, R. Regulating Fla. Bar 4-1.6.

As with any other attorney-client relationship, the records pertaining to a postconviction legal challenge belong to the client, and are not public records. Kight v. Dugger, 574 So. 2d 1066, 1068-1069 (Fla. 1990). Only the client may consent to their release. Id. Thus, this provision impermissibly subjects a client represented by postconviction counsel to conditions that cannot be imposed upon lawyers employed by the Capital Collateral Regional Counsel or other private counsel. Id. at 1069.

That the statute purports to protect attorney-client privileged material does not save it from challenge. Attorney-client privilege is a limited exception to the general principle that, in formal legal proceedings, the legal system should have all relevant information available as part of the search for truth. The ethical duty of confidentiality is broader than the evidentiary attorney-client privilege, Campbell v. Pioneer Savings Bank, 565 So. 2d 417 (Fla. 4th DCA 1982); Buntrock v. Buntrock, 419 So. 2d 402 (Fla. 4th DCA 1982), and does not set the ethical standard of lawyer-client confidentiality. Ethics Opinion of Florida Bar, 95-4, May 30, 1997.

Fourth, the Contract requires postconviction counsel to submit to the trial court “invoices in sufficient detail for a proper pre-audit and post-

audit thereof, showing time and expenses incurred.” [A 1 at 2 ¶¶ 3B, 3C.]¹⁷ These provisions have the very real potential to compel violations of the ethical duties of loyalty and confidentiality by requiring disclosure of confidential information relating to the representation. To the extent that the Contract or the Registry Act require disclosure to a State officer while the case remains pending, rather than the filing of such records under seal for in camera inspection and approval by the trial court, they are invalid and unenforceable.

Finally, postconviction counsel agrees to representation that excludes “repetitive or successive collateral challenges to a conviction and sentence of death which is affirmed by the Supreme Court and undisturbed by any collateral litigation.” § 27.711(1)(c), Fla. Stat. (Supp. 1998). The fee schedule does not include a provision for any repetitive or successive litigation. In practice, this means postconviction counsel will have agreed to represent a person facing execution without resources to investigate or plead newly discovered evidence of innocence, ineligibility for the death penalty, incompetence for execution, newly discovered evidence that the conviction or sentence was based on a constitutional violation, or to present claims based on a fundamental change in the law made applicable retroactively on habeas corpus review.

¹⁷ The 1999 amendment to the statute requires postconviction counsel to submit these invoices directly to the Comptroller. § 27.711(13), Fla. Stat. (1999).

As Olive points out in his affidavit, numerous people in Florida have been saved from execution when their attorneys were able to plead such claims in successive applications for relief. [A 2 at 7-8.]

The Legislature may impose reasonable restrictions on the representation provided by the CCRCs by prohibiting them from litigating lawsuits unrelated to habeas corpus. Butterworth v. Kenny, 714 So. 2d 404, 410 (Fla. 1998). However, the ethical restrictions contained in the Registry Act and Contract are so arbitrary and unreasonable that they practically guarantee ineffective assistance of counsel. They interfere with the lawyer's exercise of independent professional judgment in the very litigation in which the appointment was made, and they infringe on the trial court's inherent authority.

CONCLUSION

Olive is entitled to a declaration that the challenged terms and conditions of the Contract are void and unenforceable. Accordingly, the Court should reverse and remand with instructions to enter a declaratory judgment for Olive invalidating the advance waiver and practice-restrictive provisions of the Contract.

Respectfully submitted this 20th day of March, 2000.

HOLLAND & KNIGHT LLP

Stephen F. Hanlon (FBN 209430)
Susan L. Kelsey (FBN 772097)
P.O. Drawer 810
Tallahassee, FL 32302
Ph. (850) 224-7000
Fax (850) 224-8832

Robert J. Shapiro (FBN 231381)
P.O. Box 1288
Tampa, FL 33601
Ph. (813) 227-8500
Fax (813) 229-0134

**Counsel for Appellant, Cross-Appellee,
MARK EVAN OLIVE**

CERTIFICATE OF FONT AND OF SERVICE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced; and that a true and accurate copy of the foregoing with its attached appendix was furnished by United States mail to counsel for Maas, Michael P. Dodson, General Counsel, Office of Legislative Services, The Florida Legislature, Room 701, 111 West Madison Street, Tallahassee, FL 32399-1400; and to counsel for Milligan, Amilia L. Beisner, Assistant Attorney General, Office of the Attorney General, Suite PL-01, The Capitol, Tallahassee, FL 32399-1050, this 20th day of March, 2000.

Attorney

INDEX TO APPENDIX

A 1 Contract For Capital Collateral Legal Services

A 2 Olive's Affidavit

A 4 Order under review

TAL1 #214028 v1