IN THE SUPREME COURT OF FLORIDA

MARK EVAN OLIVE,

Appellant/Cross-Appellee,

v. CASE NO. SC00-317

ROGER R. MAAS, in his Official Capacity as Executive Director of the Commission on the Administration of Justice in Capital Cases; and ROBERT F. MILLIGAN, in his Official Capacity as Comptroller of the State of Florida; and ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Appellees/Cross-Appellants.
_____/

On Certification From
the First District Court of Appeal
of a Question Requiring Immediate
Resolution by this Court

ANSWER BRIEF OF APPELLEES/ INITIAL BRIEF OF CROSS-APPELLANTS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0140084

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, SUITE PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEES/CROSS-APPELLANTS ROBERT F. MILLIGAN AND ROBERT A. BUTTERWORTH

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that the size and style of the type used in the Answer Brief of Appellees/Initial Brief of Cross-Appellants is 12 Point Courier New.

_____
Louis F. Hubener

PRELIMINARY STATEMENT

Appellant, Mark Evan Olive, the plaintiff below, will be referred to herein by his proper name, or as "appellant." Appellees, Roger R. Maas, in his official capacity as executive director of the Commission on the Administration of Justice in Capital Cases; Robert F. Milligan, in his official capacity as comptroller of the State of Florida; and Robert A. Butterworth, Attorney General of the State of Florida, will be referred to as "appellees," or by their proper names. References to the record on appeal will be by the use of the symbol "R" followed by the appropriate volume and page number(s), e.g., (R I, p. 7).

STATEMENT OF THE CASE AND FACTS

Appellant Olive's statement of the case and facts is incomplete, inaccurate and argumentative. Appellees Milligan and Butterworth therefore submit the following statement.

Olive first filed in this Court in October 1998 a petition invoking the Court's all writs jurisdiction and challenging sections 27.710 and 27.711, Florida Statutes (Supp. 1998). The Court denied the petition without opinion on February 11, 1999. See Mungin v. State, 729 So.2d 393 (Fla. 1999). Olive then filed an initial complaint in circuit court, R I, pp. 1-117, and an amended complaint. R I, pp. 118-199. Olive purportedly sought "a determination of his legal rights and professional duties" under Chapter 27, Part IV, Florida Statutes (1998) (the 'Registry Act')." This act makes provision for a statewide registry of private attorneys available for court appointment to represent inmates under sentence of death in postconviction proceedings.

Olive sued Roger R. Maas in his official capacity as executive director of the Commission on the Administration of Justice in Capital Cases, and Robert F. Milligan in his official capacity as Comptroller.[1] He alleged that he had applied for and was placed on the statewide registry and that on September 1, 1998, Judge Donald R. Moran, Jr., Chief Judge of the Fourth Judicial Circuit, appointed him to represent Anthony Mungin. R I, p. 122. Shortly

[1]The Attorney General exercised his prerogative to appear and be heard as a party. See sections 16.01(5) and 86.091, Florida Statutes. The Attorney General is a party to this appeal. R III, p. 566 or 568.

thereafter, apparently on September 11, 1998, defendant Roger Maas sent a contract to Olive for his signature. Id. and amended complaint exhibit A-5. Not until February 22, 1999, did Mr. Olive, through counsel, inform Judge Moran that because of "ethical concerns" he would not sign the contract. The letter stated in part:

> On my advice, Mr. Olive has not signed [the] contract with the Comptroller.
>
> * * * *
>
> Presently, Mr. Mungin does not have counsel within the meaning of Rules 3.851 and 3.852, Florida Rules of Criminal Procedure, and Chapter 119, Florida Statutes (1998). ***While an order has been entered appointing Mr. Olive, he has not accepted that appointment by entering into the necessary contract with the Comptroller or his designee.***

R I, p. 123 and amended complaint exhibit D (emphasis added). Enclosed with the letter was a copy of the initial complaint filed in this case. See id.

Promptly thereafter, on March 2, 1999, defendant Maas wrote Judge Moran suggesting the appointment of another attorney to represent Anthony Mungin and providing a list that did not include Olive's name. R I, p. 123 and amended complaint exhibit E. Olive did not object to Judge Moran about the appointment of another attorney although he did reply to Maas. See amended complaint, exhibit F. On March 11, 1999, Judge Moran revoked Olive's appointment, indicating he would appoint another attorney. Id. at 124 and amended complaint exhibit G.

Notwithstanding Olive's clear statement to Judge Moran that he had refused to sign the contract and that Mungin was without counsel, and despite his acknowledgment that his appointment to represent Mungin had been revoked, Olive alleged in the amended complaint filed on March 29, 1999, that he was "in doubt about his legal rights, duties, status and other equitable and legal relations under the Registry Act and the Contract." R I, p. 124. Count I of the amended complaint sought a declaration that the limits on compensable hours and cost imposed by section 27.711, Florida Statutes, were unconstitutional in that they "prohibited" him from requesting compensation for time spent and costs incurred in the excess of the limits. Olive alleged that in his opinion the amounts available for fees and costs would not be adequate for Mungin's case and that he should be permitted to seek more. R I, pp. 126-127.

In Count II Olive asserted that various limitations imposed by section 27.711 and the contract would compel him to violate the Rules of Professional Conduct. R I, pp. 128-129. He also objected to being required to permit access to public records made or received in conjunction with the contract and to having to submit detailed invoices to the executive branch to receive his compensation. R I, pp. 130-131.

In Count III Olive complained that defendant Maas had excluded him from the list of lawyers Maas sent to Judge Moran after Olive declined to represent Mungin. He sought injunctive relief

prohibiting Maas from excluding him from the list of lawyers available for appointment under the Registry Act, R I, p. 16.

Throughout the initial brief (see pps. 2,5,6,9,11,15,15,19,22) Olive repeatedly asserts that the contract for representation and section 27.711 require him to "waive" or "prohibit him from requesting" any additional compensation or reimbursement of costs that might be required in order to provide effective assistance of counsel. There is no such language, however, in either the statute or the contract. Olive also erroneously asserts that Judge Moran revoked his appointment to represent Mungin because Olive challenged the contract. The record is clear that Judge Moran was responding to Olive's admission through counsel that he had not accepted the appointment that had been made almost five months previously. See p. 3, supra.

Comptroller Milligan and the Attorney General filed a motion to dismiss Counts I and II of the amended complaint and a memorandum of law asserting, inter alia, that Olive had no standing to challenge the provisions of section 27.711, Florida Statutes (Supp. 1998), or the contract in view of the fact that he had no contract, no client and no case to pursue. In addition, they contended that the circuit court had no jurisdiction to render a declaratory judgment under Chapter 86, Florida Statutes, because there were no "ascertainable facts" to support Olive's numerous objections in view of his refusal to undertake representation of Mungin and that, consequently, he sought nothing more than an advisory opinion. R II, pp. 282 et seq. (motion) and 251 et seq. (memorandum of law).

The circuit court denied the motion to dismiss without explanation. R III, p. 527. Defendants then filed their answer. R III, p. 529.

Olive sought summary judgment on each of the three counts of the amended complaint contending that there were no disputed issues of material fact. R II, pp. 299 et seq. Defendants responded and objected to this motion on numerous grounds. R III, p. 403 et seq; 410-447; 448-526; 537-553. The affidavit of defendant Maas demonstrated that numerous appointed attorneys had submitted fee requests for less than the statutory maximum for representation through the filing of a Rule 3.850 motion. R III, pp. 537, 539 and 554 (Exhibit 4). It also stated that by October 22, 1999, 100 attorneys had voluntarily registered to represent capital defendants under the terms of sections 27.710 and 27.711, Florida Statutes. At that time, 61 capital defendants were represented by registry counsel. R III, p. 540.

The trial court ruled with respect to Count I that section 27.711, Florida Statues, was not facially unconstitutional in that it did not, on its face, preclude capital defendants from receiving effective assistance of counsel in postconviction proceedings. With respect to Count II, the trial court ruled that section 27.711 (9) and (10) did not infringe on this Court's exclusive jurisdiction to regulate the conduct of lawyers. With respect to Count III, the court did not find that Olive had been excluded from the list or registry of eligible attorneys, but, nonetheless, found

that he was entitled not to be excluded and therefore enjoined Maas from taking such action. R III, p. 556 et seq.[2]

Olive timely filed his notice of appeal. R III, p. 559. Defendants cross-appealed. R III, pp. 566 and 568.

On Olive's suggestion, the First District Court of Appeal certified the appeal to this Court pursuant to Rule 9.125, Fla.R.App.P., as one requiring immediate resolution.

SUMMARY OF ARGUMENT

Issues on Appeal

I. The trial court correctly found sections 27.710 and 27.711, Florida Statutes (Supp. 1998), facially constitutional. Contrary to Olive's argument, nothing in those statutes requires an attorney to waive--or prohibits an attorney from requesting--additional compensation that might be justified in the extraordinary and unusual case. Nor is there such categorical language in the contract. Olive has failed to show these statutes cannot be constitutionally applied in any set of circumstances.

II. Olive's objections to section 27.711 and the contract on various hypothesized ethical grounds likewise present no basis for a facial challenge to that statute or the contract. Again, Olive fails to show that the statute cannot be constitutionally applied in any set of circumstances. Moreover, the purported "facts" upon

[2]After the trial court orally denied Olive's motion for summary judgment on Counts I and II, defendants moved ore tenus for summary judgment in their favor and Olive waived any objection to notice. R III, p. 556.

which he relies to create his sundry ethical conundrums are contingent and uncertain and rest in the future. A court may not render a declaratory judgment on such allegations.

Issues on Cross-appeal

I. Olive had no standing to bring this action because he had no contract and no appointment to represent Anthony Mungin in postconviction proceedings under Part IV of Chapter 27. Whatever attorney-client relationship he may now claim to have had with Mr. Mungin, it was not that of an appointed attorney. Olive was not affected by the provisions of section 27.710, 27,711 and the contract, he had no client who was affected, and he therefore lacked standing to bring this action. To the extent any of his concerns have merit, they can be raised at an appropriate time in any of the 60 or more cases in which counsel have been duly appointed to represent capital defendants in postconviction proceedings.

II. The trial court lacked jurisdiction to consider this action and render declaratory relief under Chapter 86, Florida Statutes, and therefore should have granted the motion to dismiss Counts I and II. Olive's claims were not based on any present, live controversy, but rested entirely on speculative assertions and contingent events. A court has no jurisdiction to render a declaratory judgment in such circumstances. Although Olive also claims he sought to have a contract construed, he was not a party to the contract. Courts do not have jurisdiction to render advisory

opinions to persons who are not parties to contracts about what the terms of the contract might mean. Most especially is that true in the complete absence of present, real and ascertainable facts.

ARGUMENT

I. THE PROVISIONS OF SECTIONS 27.711(3) AND (4), FLORIDA STATUTES (SUPP. 1998), AS IMPLEMENTED BY THE CONTRACT ARE NOT VOID AND THE LOWER COURT CORRECTLY FOUND THOSE PROVISIONS FACIALLY CONSTITUTIONAL.

The thrust of Olive's argument in the first point of his brief is that the provisions of section 27.711(3), Florida Statutes (Supp. 1998), and the contract absolutely prohibit counsel in postconviction proceeding from requesting compensation in excess of the specified statutory limits; that the (assertedly) inflexible statutory maximums infringe on a court's inherent authority to insure effective representation in postconviction proceedings; and, finally, that Olive was entitled to a declaratory judgment invalidating "the requirement of an advance waiver of any right to exceed the caps." (Brief at 19,20,22) Olive claims that he was entitled to know before entering the contract whether it was "valid." (Brief at 28)

Assuming that an attorney who has no contract, no client and no facts upon which to base an inadequacy of compensation claim--other than those he has hypothesized--is even entitled to a declaratory judgment (an issue on cross-appeal), defendants Milligan and Butterworth submit the lower court certainly did not err in holding sections 27.710 and 27.711 facially constitutional.

The first and most obvious trouble with Olive's argument is its erroneous premise. The statutory language and the language of the contract simply do not bar an appointed attorney from requesting additional fees. The statute does not instruct courts that they

may not consider such a request and does not purport to interfere with courts' inherent authority.[3] Although most of the pertinent case law is cited in his brief, Olive fails to acknowledge the holdings in those cases and the fatal impact they have on his argument.

In construing the language of section 925.036, Florida Statutes (1985), a statute which set maximum limits on compensation of appointed counsel in criminal cases, this Court has rejected the argument made here. See Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986). The Court held the statute facially valid, invoking the doctrine of inherent judicial power to declare the statutory maximums on fees and costs directory rather than mandatory. It found that in "extraordinary or unusual circumstances" a court had inherent authority to depart from the specified maximums to insure

---

[3]The statutory language Olive apparently relies on provides that, "[t]he fee and payment schedule in this section is the exclusive means of compensating a court-appointed attorney who represents a capital defendant." Section 27.711(3), Florida Statutes. The hourly rate of $100 per hour up to a specified maximum, which is payable at various intervals, is prescribed in section 27.711(4). The contract language that concerns Mr. Olive provides that:

> 3. Payment of Services
>
> A. The parties agree that services performed under this Contract shall be paid in accordance with Section 27.711(4), Florida Statutes (1998), 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....

R I, p. 118, Exhibit A-5. This language merely tracks the statute and adds nothing to it.

a defendant's Sixth Amendment right to effective assistance of counsel.

Soon thereafter, in White v. Pinellas County, 537 So.2d 1376, 1378 (Fla. 1989), this Court, adverting to the Makemson ruling, found that capital cases "by their very nature can be considered extraordinary and unusual and arguably justify an award in excess of the [section 725.036(2)(d)] cap." (emphasis added.) "Arguably," of course, does not mean "always." This Court has also held that in other types of proceedings, such as executive clemency, counsel appointed for a capital defendant may be entitled to compensation exceeding a statutory cap if necessary to fairly compensate counsel and insure effective representation. See Remeta v. State, 559 So.2d 1132 (Fla. 1990). The summary judgment appealed here acknowledges Makemson and White as controlling authority on the question of the facial validity of sections 27.710 and 27.711. R III, p. 556.

Although Olive cites and relies on all of these cases as supporting a right to additional compensation, he completely ignores the fact that this Court declined to hold the statutes facially invalid, ruling that caps on compensation and costs, when appropriate, are to be construed as directory rather than mandatory. Apparently, what he really sought by this purported declaratory judgment action was a ruling that he was entitled to additional compensation for representing Mr. Mungin before he even undertook that representation. Besides being a misuse of the declaratory judgment act, the ruling he sought is contrary to those

cases that make clear that the appropriate fee is to be determined by the trial court after services are performed, not before the attorney commits to represent a defendant. See, e.g., Monroe County v. Garcia, 695 So.2d 823 (Fla. 3d DCA 1997) (award of fee in excess of statutory limit quashed because counsel did not show that the number of hours spent on the case was reasonable and the lower court did not find that the case involved "extraordinary circumstances and unusual representation"); Brevard County v. Eisenmenger, 567 So.2d 1059 (Fla. 5th DCA 1990) (requiring detailed documentation of attorney's services); Hillsborough County v. Unterberger, 534 So.2d 839 (Fla. 2d DCA 1988)("there was no showing that the $40 hourly rate denied adequate representation of indigent criminal defendants or that their rights to counsel were violated").

In light of the absence of any argument as to what facts and statutory language might compel a different interpretation of section 27.710 and 27.711, Olive has presented no basis for a reversal of the decision of the lower court finding those provisions facially valid. Moreover, to succeed on a facial challenge a plaintiff must show that there exists no set of circumstances in which the statute can be constitutionally applied. See Voce v. State, 457 So.2d 541 (Fla. 4th DCA 1984), rev. denied, 464 So.2d 556 (Fla. 1985); State v. Barnes, 686 So.2d 633, 637 (Fla. 2d DCA 1996). The mere fact that a statute "might be unconstitutionally applied in certain situations [provides] no ground for finding the statute itself unconstitutional." State v.

Ecker, 311 So.2d 104, 110 (Fla. 1975). Olive has not shown that section 27.711 provides inadequate compensation in all postconviction capital collateral proceedings. Indeed, the evidence was to the contrary. See R III, pp. 537, 539 and 554 (Exhibit 4) (reflecting attorneys' compensation requests below specified limits). The trial court had a duty to give the statutes a constitutional construction if possible, and it correctly did so. See Felts v. State, 537 So.2d 995 (Fla. 1st DCA 1988), decision approved, 549 So.2d 1373 (Fla. 1988).[4]

II. THE PROVISIONS OF SECTION 27.711, FLORIDA STATUTES (1998 SUPP.), DO NOT ON THEIR FACE REQUIRE POSTCONVICTION COUNSEL TO ENGAGE IN UNETHICAL CONDUCT OR VIOLATE A CAPITAL DEFENDANT'S RIGHT, IF ANY, TO EFFECTIVE ASSISTANCE OF COUNSEL.

The gravamen of Olive's second issue on appeal is that ***"[o]n 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

[4]In the trial court Olive argued that because section 27.711(6) allows for payment of costs that exceed the $15,000 cap in extraordinary circumstances, the application of the maxim "expressio unius est exclusio alterius" means the legislature did not intend there to be any payment of attorney fees in excess of the caps. Understandably, Olive has not pursued this contention in his brief. The "expressio unius" maxim is not applied to invalidate statutes as it plainly conflicts with a bedrock principle: "This court is committed to the proposition that it has a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution." State v. Gale Distributors, Inc., 349 So.2d 150, 153 (Fla. 1977) (emphasis added).

death-sentenced clients their right to effective representation of counsel." (Brief at 31) (emphasis added)

Considered in more detail, Olive's argument raises only the ***possibility*** of potential ethical conflicts in ***some*** cases. Thus, he asserts that:

> 1. Section 27.711(10) **might** in some cases preclude a Johnson challenge. (See Johnson v. Mississippi, 486 U.S. 578 (1988))
>
> 2. Section 27.711(10) **might** prohibit further representation by appointed counsel in retrial or resentencing proceedings.
>
> 3. Section 27.711(9) prohibits the filing of frivolous or repetitive pleadings which, according to Olive, **might** preclude the making of good faith arguments based on the expansion, modification or reversal of existing law.
>
> 4. Compliance with the contract's public records requirement **might** violate lawyer-client confidentiality and the lawyer's exercise of independent professional judgment.
>
> 5. Compliance with the contract's requirement to submit detailed billing invoices to the Comptroller has the **"real potential"** to violate duties of loyalty and confidentiality.
>
> 6. The language of section 27.711(1)(c) which would preclude payment for repetitive or successive collateral challenges is unethical because it is unreasonable.[5]

All of these contentions present, at best, hypothetical and even remote contingencies. They certainly constitute no basis for a facial challenge to section 27.711. (Nor do such contingent assertions present a proper basis for a declaratory judgment

[5]This point was not raised in Olive's motion for summary judgment (or in the amended complaint) and is therefore not properly before the Court.

action, an issue raised in the cross-appeal.) It is possible, even likely, that most postconviction proceedings will involve no Johnson challenge. It is possible, indeed probable, that in any given case no public records in the possession of counsel will betray a client confidence. The same would be true of billing invoices. Olive cites no authority to support the proposition that he should be able to submit all billing invoices to a trial court ex parte and in camera, the declaration he requested. (See also Brief at 38) Furthermore, what is "frivolous or repetitive" as distinguished from a good faith argument to modify existing law cannot be determined apart from the circumstances of a particular case. Even the language of section 27.711(10) might best be interpreted as only prohibiting state compensation to a previously appointed collateral attorney for representation of the defendant at retrial, resentencing or the other specified proceedings, if that should be necessary to sustain its validity. Furthermore, the idea that a capital defendant who is indigent for purposes of collateral representation would later be able to compensate the attorney appointed for the collateral proceedings for representation at a retrial or resentencing presents the remotest of possibilities.

As with his first issue, Olive has made no case for the facial invalidity of section 27.711 in that he has failed to show that the statute is invalid in all applications and in all cases. Indeed, it is not the task of this Court on appeal "to envision theoretical combinations of factors which, if present, might render a statute

unconstitutional." See Fieldhouse v. Public Health Trust of Dade County, 375 So.2d 476, 478 (Fla. 1979). Nor was it the duty of the trial court to engage in such imaginings in a declaratory judgment action. See Williams v Howard, 329 So.2d 277, 282 (Fla. 1976) ("a court will not entertain a suit to determine a declaration of rights for parties upon facts which have not arisen, upon matters which are contingent, uncertain or rest in the future....").

Olive's arguments betray a fundamental misunderstanding of postconviction capital collateral proceedings as structured under Chapter 27, Pt. IV, Florida Statutes. This Court has clearly held that Part IV is not created to implement a constitutional right to representation in postconviction relief proceedings, for there is no such right. See State ex rel. Butterworth v. Kenny, 714 So.2d 404, 407 (Fla. 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." Id. at 408. A capital defendant thus has a statutory right to representation under Part IV, but that representation "is for the sole purpose of 'challenging the legality of the judgment and sentence imposed,' and...such litigation is not to include 'civil litigation.'" Id. at 407. It seems absolutely clear from the Kenny decision that given the legislature's expressed intent to limit collateral representation to challenges to the validity of a capital defendant's conviction and sentence, the legislature could prohibit extending representation by CCRC to "retrials, resentencings, proceedings commenced under chapter 940, or civil

litigation." Id. at 408 (citing section 27.7001, Florida Statutes). Section 27.711(10), reflects the same legislative intent as section 27.7001.

Olive's point on appeal is not that the limitations on collateral representation in Part IV deny capital defendants meaningful access to the judicial process. Rather, it is the scatter gun contention that all the limitations "on their face" require postconviction counsel to engage in "unethical conduct" which jeopardizes the "right to effective assistance of counsel."

It is open to question whether section 27.711(10) absolutely prohibits representation in retrial or resentencings or in civil litigation or simply prohibits compensation to postconviction counsel for such undertakings. But in any case, Part IV of Chapter 27 does not create rights for attorneys. It provides for representation of capital defendants in postconviction collateral proceedings. There is no capital defendant in this case who is claiming a right to representation by a particular attorney at a retrial or resentencing. A declaratory judgment on that issue would, in this case, be wholly advisory. Furthermore, it is also an open question whether a so-called Johnson challenge would in all cases be noncompensable because a court may well have inherent authority to compensate counsel for such an undertaking in "extraordinary or unusual circumstances." Again, however, Mr. Olive is not applying for such compensation, but rather an advisory opinion.

All of Mr. Olive's ethical concerns are plainly hypothetical. All of his various, peculiar and, indeed, remote possibilities could be addressed by a court should they occur in the context of a real case. The trial court correctly denied Olive's facial challenge on these points.

CONCLUSION ON ISSUES ON APPEAL

Assuming Olive had standing and the trial court had jurisdiction under Chapter 86, Florida Statutes, the court did not err in holding sections 27.710 and 27.711, Florida Statutes (Supp. 1998), facially valid. That decision should be affirmed, subject to determination of the standing and jurisdictional issues on cross-appeal.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT ERRED IN DENYING APPELLEES' MOTION TO DISMISS COUNTS I AND II OF THE AMENDED COMPLAINT ON THE GROUND THAT OLIVE LACKED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTIONS 27.710 AND 27.711, FLORIDA STATUTES (SUPP. 1998).

Olive's attack on sections 27.710 and 27.711 in Count I asserted the fees and costs limits impermissibly curtailed a trial court's inherent power to ensure adequate representation for capital defendants in postconviction proceedings. In Count II he asserted that section 27.711 and the contract might compel him to violate the Rules of Professional Conduct in his representation of Anthony Mungin. Appellees Milligan and Butterworth submit the trial court

erred in denying their motion to dismiss Counts I and II for lack of standing. R II, p. 282 (motion) and R III, p. 527 (order).

It is clear that by the time Olive filed the amended complaint he had acknowledged that he would not sign a contract for representation of Mungin and that Judge Moran had revoked his appointment and appointed other counsel.[6] He therefore had no contract, no client, no case and no real facts to support his various claims. To the extent Olive believed that sections 27.710 and 27.711 provided for less than adequate compensation, he had no client who could assert that effective representation was impaired. Nor did he have a contract the lower court could construe, as he had refused to sign one. In sum, Olive had no contractual right then in doubt and no legal relationship that was affected by sections 27.710 and 27.711. See section 86.021, Florida Statutes. Although Olive argued below that he was entitled to bring a declaratory judgment action because the rights at issue would arise in the future, that is not so; they could not arise if he never signed a contract and never represented a capital defendant. Only if he signed a contract could a client's rights or his own rights ever be at issue.

In the absence of a signed contract and a client he was actually representing in postconviction proceedings, Olive was not "directly affected" by the fee limits set forth in that section.

[6]The record reflects that Wayne F. Henderson was appointed to represent Mr. Mungin. See Affidavit of Maas, R III, p.543 (Exhibit I, p. 3).

Consequently, Olive did not have standing to attack the constitutionality of those limits. See, e.g., Tribune v. Huffstetler, 489 So.2d 722, 724 (Fla. 1986) (holding that petitioner lacked standing to challenge constitutionality of statute because "[o]ne may only challenge the constitutionality of a public law when that law directly affects him"); State v. Hagan, 387 So.2d 943, 945 (Fla. 1980) (citations omitted) (holding that "[a]ppellees may not challenge the constitutionality of a portion of the statute which does not affect them"); Isaac v. State, 626 So.2d 1082, 1083 (Fla. 1st DCA 1993) (citation omitted) (holding that "appellant lacks standing because it is apparent from the record that he has not been adversely affected by the asserted infirmity in the statue"), review denied, 635 So.2d 624 (Fla. 1994).

Although this Court stated in Makemson v. Martin County, 491 So.2d at 112, that it was the defendant's right to effective representation rather than the attorney's right to fair compensation that was the focus of its concern, it also found the two "inextricably linked." This dictum, however, cannot create standing where it does not otherwise exist; and standing cannot exist where, as here, there is no contract for representation and no attorney-client relationship in the context of postconviction proceedings. There are at least 50 or more other attorneys, all of whom accepted appointment, who can raise all the issues raised here in the context of a real case and concrete facts, should it be

necessary. The trial court therefore erred in permitting Olive to pursue his challenge to sections 27.710, 27.711 and the contract.

II. THE TRIAL COURT ERRED IN DENYING APPELLEES' MOTION TO DISMISS COUNTS I AND II OF THE AMENDED COMPLAINT ON THE GROUND THAT THE COURT LACKED JURISDICTION TO ENTERTAIN OLIVE'S REQUEST FOR DECLARATORY RELIEF.

The trial court should also have dismissed Counts I and II as it lacked jurisdiction to entertain Olive's request for declaratory relief. Because Olive's claims under those counts of the amended complaint were entirely speculative, and because they were not based on a present controversy, the trial court was without jurisdiction to consider them in a request for declaratory relief under Chapter 86, Florida Statutes.

In Martinez v. Scanlan, 582 So.2d 1167 (Fla. 1991), this Court stated:

> This Court has long held . . . that individuals seeking declaratory relief must show that
>
> "there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependant upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest [sic] are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. These elements are necessary in order to maintain the

> status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts."
>
> *May v. Holley*, 59 So.2d 636, 639 (Fla. 1952) (emphasis added). Accord *Williams v. Howard*, 329 So.2d 277 (Fla. 1976); *Bryant v. Gray*, 70 So.2d 581 (Fla. 1954). Thus, although a court may entertain a declaratory action regarding a statute's validity, **there must be a bona fide need for such a declaration based on present, ascertainable facts or the court lacks jurisdiction to render declaratory relief.** *Ervin v. Taylor*, 66 So.2d 816 (Fla. 1953); see § 86.011, Fla. Stat. (1989).

Id. at 1170 (bold, underlined emphasis added; underlined emphasis in original).

Additionally, in Santa Rosa County v. Administration Comm'n, 661 So.2d 1190 (Fla. 1995), the Court held:

> [I]t is well settled that, Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future.

Id. at 1193 (emphasis in original; citations and internal quotation marks omitted). Thus, if a request for declaratory relief does not involve "a bona fide, actual, present practical need for the declaration" based on "a present, ascertained or ascertainable state of facts," then the circuit court is without jurisdiction to consider a request for declaratory judgment under Chapter 86.

Olive's claims for relief under Counts I and II of the amended complaint were based entirely on speculation and hypothesis, rather than on a **present** controversy or state of facts. The very

decisions on which Olive relied below to support his claim demonstrate that the appropriate means of challenging fee limits like those in section 27.711 is by undertaking and completing representation of the defendant, documenting the actual work performed in the case, justifying compensation in excess of the statutory fee limits, and then allowing a trial court to make an after-the-fact determination, based on the actual, existing record. See, e.g., White v. Board of County Comm'rs of Pinellas County, 537 So.2d 1376, 1380 (Fla. 1989) (declining to find statutory fee limit on attorney compensation unconstitutional "on its face," but holding that "[i]n determining whether to exceed the statutory maximum fee cap, the focus should be on the time expended by counsel and the impact upon the attorney's availability to serve other clients, not whether the case was factually complex"); Makemson v. Martin County, 491 So.2d 1109, 1115 (Fla. 1986) (holding that "it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's [Section 925.036(1), Fla. Stat. (1985)] fee guidelines...").

The circumstances of this case demonstrate precisely why the approach in Makemson and White is appropriate, and why the trial court in this case should have determined that because Olive's claims were entirely speculative, it lacked jurisdiction to consider his claim for declaratory relief. Olive's amended complaint contained no clear allegation that sections 27.710 and 27.711 were unconstitutional on their face. Indeed, Olive would

have been hard-pressed to make such a claim in light of the fact that this Court has declined numerous times to find statutes like the ones at issue here facially unconstitutional. See, e.g., White v. Board of Comm'rs of Pinellas County, supra; Makemson v. Martin County, supra. Olive's claim rested entirely on his analysis of Anthony Mungin's case, which Olive asserted would require more attorney and investigative time that the statutes allow. However, Olive's appointment had been revoked, he had done no work that entitled him to compensation, and it was not clear that any of the "parade of horribles" recited in the amended complaint would ever occur if Olive did represent Mungin. In fact, contrary to Olive's assertions, it may well be that after Mungin's post-conviction proceedings are completed, the fee schedule set forth in section 27.711 will be sufficient to compensate Mungin's actual attorney. Simply put, it would have been impossible for the trial court in this case to determine in advance whether it would be necessary for Mungin's appointed counsel to request fees in excess of the limits set forth in section 27.711, or whether such a request would be reasonable and supported by the record. As the evidence showed, there are at least 50 other appointed attorneys who might raise such a claim at the appropriate time, but Mr. Olive, having declined appointment, is not one of them.

Furthermore, although Olive vaguely alleged that portions of the Mungin contract and section 27.711 were invalid because, among other things, they would (1) preclude Olive from representing Mungin in other litigation; (2) violate Olive's duty to exercise

independent professional judgment in the representation of his client; (3) impermissibly prohibit him from making repetitive, non-frivolous arguments on behalf of Mr. Mungin; and (4) prevent Olive from representing Mungin at his new trial should he have prevailed in his post-conviction proceedings, none of those perceived difficulties had yet occurred when Olive challenged the statute. They were only remote, contingent and uncertain possibilities. The appropriate means of addressing such claims would be by raising them in the context of actual proceedings, and permitting the court in those proceedings to make the necessary legal and factual determinations. It would have been impossible for the trial court in this case to determine in advance whether the statute and contract would in fact interfere with Olive's or any other attorney's ability to raise a specific argument on Mungin's behalf, or otherwise cause an attorney to violate the Rules of Professional Conduct.

Olive's challenges to the statutes and the unsigned contract therefore were not ripe when Olive filed his complaint, and because another attorney already had been appointed to represent Mungin in his post-conviction proceedings, Olive's challenges to the statutes could not become ripe. Even if Olive had been representing Mungin, it may well have been that the circumstances he complained of would never have occurred. Given the entirely speculative nature of Olive's claims, then, there was no present, actual controversy, based on ascertained or ascertainable facts, for the trial court to resolve, and there was no bona fide, actual, present, practical

need for the declaration Olive sought. The trial court therefore was without jurisdiction to consider Olive's complaint for declaratory relief, and the court erred in denying appellees' motion to dismiss Counts I and II of the amended complaint with prejudice. See Martinez v. Scanlan, 582 So.2d at 1174 (citations omitted) (holding that "it is well-settled that courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the possibility of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, and rest in the future").

CONCLUSION ON CROSS-APPEAL

For the reasons set forth in their argument on cross-appeal, the trial court erred in denying appellees' motion to dismiss Counts I and II of the amended complaint. This action should be remanded with directions to the lower court to dismiss those counts.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0140084

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, SUITE PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300

COUNSEL FOR APPELLEES/CROSS-APPELLANTS MILLIGAN AND BUTTERWORTH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to STEPHEN F. HANLON, Esquire, and SUSAN L. KELSEY, Esquire, of Holland & Knight LLP, P.O. Drawer 810, Tallahassee, Florida 32302, counsel for appellant/cross-appellee; ROBERT J. SHAPIRO, P. O. Box 1288, Tampa, Florida 33601, counsel for appellant/cross-appellee; and to MICHAEL PEARCE DODSON, Esquire, General Counsel, Office of Legislative Services, The Florida Legislature, Room 701, 111 West Madison Street, Tallahassee, Florida 32399-1400, counsel for appellee/cross-appellant Maas, this ____ day of April, 2000.

_____
Louis F. Hubener
Attorney for Appellees/Cross-Appellant's Milligan and Butterworth