

SUPREME COURT OF FLORIDA
Case Number SC00-317

MARK EVAN OLIVE,

Appellant/Cross-appellee,

v.

ROGER R. MAAS, in his official capacity
as Executive Director of the Commission on
Capital Cases, and ROBERT F. MILLIGAN,
in his official capacity as the Comptroller of
the State of Florida,

Appellees/Cross-Appellants.

On certification from the District Court of Appeal,
First District, of a question of great public importance

**ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL OF
APPELLEE ROGER R. MAAS**

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PRELIMINARY STATEMENT

Appellant, Mark Evan Olive, the plaintiff below, will be referred to by his proper name, or as “Appellant.” Appellees, Roger R. Maas, in his Official Capacity as Executive Director of the Commission on 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 7.

References to the *Florida Statutes* are to the current 1999 edition, unless otherwise indicated. “An appellate court is generally required to apply the law in effect at the time of its decision.” *Florida Patient’s Compensation Fund v. Von Stetina*, 474 So. 2d 783, 787 (Fla. 1985). For this reason, Appellee Maas notes that the Death Penalty Reform Act of 2000, Chapter 2000-3, *Laws of Florida*, made two amendments relevant here. Mr. Maas, as the Executive Director of the Commission, is no longer responsible for drafting the contract in question. Section 11 of the Act assigns that task to the contract manager, the Comptroller. Section 16 of the Act amended Section 27.711, *Florida Statutes*, by adding a pre-audit by the

Comptroller of registry attorney payment motions before the trial court enters an order to grant or deny the motions. These amendments are effective on 14 January 2000.

STATEMENT OF THE CASE AND OF THE FACTS

Appellee/Cross-Appellant Roger R. Maas adopts the Statement of the Case and Facts in the Answer Brief filed by Appellees/Cross-Appellants Robert F. Milligan and Robert A. Butterworth.

STANDARD OF REVIEW

The order on review is a summary judgment upholding the facial constitutionality of state statutes. Because this is a question of law, the trial court's ruling is subject to *de novo* review. *Execu-Tech Business Systems, Inc. v. New Oji Paper Co., Ltd.*, ___ So. 2d. ___, 25 Fla. L. Weekly S40 (Fla. January 20, 2000) and *Ocala Breeders' Sales Co., Inc. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21, 24 (Fla. 1st DCA 1999).

SUMMARY OF ARGUMENT

The court below did not err when it held that Sections 27.710 and 27.711, *Florida Statutes*, are constitutional on their face. On the record in this case it is premature to consider whether or not the fee schedule for registry attorneys needs examination under the holdings of *Makemson v. Martin County* and its progeny. Such an examination requires a complete record demonstrating unusual representation and extraordinary circumstances. In the absence of such a record, the present fee schedule cannot be considered confiscatory.

The Legislature may decide how it allocates scarce legal resources for postconviction representation of death-sentenced inmates. This is particularly true where there is no constitutional right to postconviction counsel at state expense. It is not a violation of due process, equal protection, or separation of powers concepts for the state to require registry attorneys to agree by contract to follow the requirements of Sections 27.710 and 27.711, *Florida Statutes*.

Because there was no reasonable probability that Mr. Maas would delete Mr. Olive's name in the future from the registry of private postconviction counsel, the trial court had no basis for entering a permanent injunction against Mr. Maas. Mr. Olive did not have a present immediate need for a declaratory judgment on his

ethical responsibilities based on hypothetical circumstances His Amended Complaint should have been dismissed as premature. Courts are not required to render advisory opinions to citizens before they enter into contracts about which they have doubts.

Mr. Olive's request for a declaratory judgment against Mr. Maas is now moot because Mr. Maas no longer has any interest adverse to Mr. Olive. Mr. Maas was named as a defendant here because he once drafted the registry form contract Mr. Olive objects to. The Death Penalty Reform Act transferred that drafting responsibility to the Comptroller.

ARGUMENT

Issue I

The fee schedule established by the Legislature in Section 27.711, *Florida Statutes*, is not unconstitutional on its face.

The court below did not err when it upheld as facially constitutional the fee schedule Mr. Olive agreed to when he volunteered to be a registry attorney. R III 556-557 and R III 446. When a fee schedule is established by the Legislature, the courts may not depart from the schedule unless the record affirmatively demonstrates “unusual representation” under “extraordinary circumstances.” *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), *cert. den.*, 479 U.S. 1043 (1987); *White v. Board of County Commissioners*, 537 So. 2d 1376 (Fla. 1989). Even though this Court in *Makemson* and *White* authorized fees in excess of the amounts provided by Section 925.036(2)(d), *Florida Statutes* (1985), the statute was not declared unconstitutional on its face. As stated by Justice Kogan in *White*:

However, because it is within the legislature's province to appropriate funds for public purposes and resolve questions of compensation, article III, section 12, Florida Constitution; *State ex rel. Caldwell v. Lee*, 157 Fla. 773, 27 So. 2d 84 (1946), we decline to declare the statute unconstitutional on its face.

537 So. 2d at 1379.

Since the fee limits are valid on their face, a failure to adhere to the schedule will be reversed without an adequate record. In *Monroe County v. Garcia*, 695 So. 2d 823 (Fla. 3rd DCA 1997) the court reversed an award of attorney's fees in excess of the limits in Section 925.036(2)(c), *Florida Statutes* (1995). The record justifying the award was incomplete. The court observed:

However, we find that the trial court's order departs from the essential requirements of law. First, Garcia did not show that the number of hours spent on the case was reasonable. See *Beers v. Palm Beach County*, 415 So. 2d 846 (Fla. 4th DCA 1982); *Dade County v. Goldstein*, 384 So. 2d 183, 188 (Fla. 3d DCA 1980). Second, the court did not provide the hourly rate set in Monroe County for court-appointed defense counsel, see *Metropolitan Dade County v. Gold*, 509 So. 2d 407 (Fla. 3d DCA 1987); *Goldstein*, 384 So. 2d at 189, or the requisite finding as to the hours reasonably expended by Garcia in representing Hoffman. See *Weinstein v. Palm Beach County*, 588 So. 2d 329 (Fla. 4th DCA 1991); *Goldstein*, 384 So. 2d at 189. Finally, the court made no finding that the case merited a fee award in excess of the statutory limit. To support such a fee award, the record must show and the court must find that the case involves "extraordinary circumstances and unusual representation." *Makemson*, 491 So. 2d at 1110. E.g., *Hillsborough County v. Marchese*, 519 So. 2d 728 (Fla. 2d DCA), cause dismissed, 526 So. 2d 75 (Fla. 1988). In revisiting the fee award, the trial court shall comply with the supreme court's directives in *Makemson* and *White*.

695 So. 2d at 826 (footnote deleted).

The record here is completely barren.¹ On a proper record the courts may consider whether, in a given case, the constitutional divide between the legislative branch and the judicial branch must be crossed to insure that due process is provided to a particular defendant. As much was recognized by the Legislature when Section 27.711, *Florida Statutes*, was drafted and amended. In the staff analysis on amendments increasing the fees available under Section 27.711, *Florida Statutes*, the analyst noted:

Section 27.711 (4), F.S., provides for the hourly rate and maximum compensation of registry attorneys. In *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986), the Florida Supreme Court held that a statute which set a maximum fee limitation for compensation to attorneys who were appointed by the court to represent indigent criminal defendants was constitutional, on its face. However, the Court stated that such a statute may be unconstitutional when applied in such a manner as to curtail the courts inherent power to ensure the adequate representation of the criminally accused. *Id.* According to the Court, statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right to have the assistance of counsel for his defense. *Id.*; (citation omitted).

Consequently, where unusual or extraordinary circumstances exist, the fees caps established by s. 27.711 (4), F.S., and

¹ Mr. Olive's Affidavit notwithstanding. It was put in issue by Appellees' Answers (R III 534, 529) and Mr. Maas' Affidavit (R III 553) on the amount of fees required in postconviction appeals.

increased by the provisions of this bill, do not prevent a court from ordering payment above the maximum authorized.

Senate Committee on Fiscal Policy, *Staff Analysis and Economic Impact Statement on CS/CS SB 2054* at 7 (Fla. Legislature. March 30, 1999). This analysis was noted by Justice Anstead in his concurring opinion in *Arbelaez v. Butterworth*, 738 So. 2d 326, 328 (Fla. 1999), where this Court declined petitioners' invitation to find a due process right to postconviction counsel in capital cases.

When challenging a state statute on its face, the plaintiff has the burden of showing there is no conceivable instance in which the statute could be valid. See *State v. Efthimiadis*, 690 So. 2d 1320 (Fla. 4th DCA 1997) where the court held:

A legislative enactment is void on its face or facially invalid only "if it cannot be applied constitutionally to any factual situation." *Voce v. State*, 457 So. 2d 541, 543 (Fla. 4th DCA 1984), rev. den. 464 So. 2d 556 (Fla. 1985); see also *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

Id. at 1322.

There were numerous circumstances before the trial court to refute Mr. Olive's contention that in all postconviction capital cases all fee limits are

unconstitutional. The Affidavit of Roger Maas² submitted in opposition to Appellant's Motion for Summary Judgment shows that by 22 October 1999 registry attorneys for 11 cases had requested payment for representation through the filing of a rule 3.850 motion. In eight of the cases counsel requested less than the maximum fee of \$22,500 for that stage. R III 553 and Section 27.711(4)(a) and (b), *Florida Statutes*.

The Legislature has not been so negligent providing fees for private capital collateral counsel that this Court must intrude on the Legislature's appropriations prerogative. One hundred dollars per hour is not a constitutionally deficient rate. See *Bobbitt v. State*, 726 So. 2d 848 (Fla. 5th DCA 1999)³(approving a rate of \$50/hr.); *County of Volusia v. Vedder*, 717 So. 2d 206 (Fla. 5th DCA 1998)(approving a rate of \$45/hr.); and most recently, *Sheppard & White, PA, v. City of Jacksonville*, ___ So. 2d ___, 25 Fla. L. Weekly D465 (Fla. 1st DCA February 18, 2000)(reluctantly approving a rate of \$50/hr.).

² The Court may note the irony of Mr. Maas' being a defendant in this case. As counsel to a first-degree murder defendant Mr. Maas was awarded a fee in excess of the limits established in Sections 27.53 and 925.036, *Florida Statutes* (1979). In an appeal by Pinellas County where Mr. Maas was represented by Mr. (now Judge) Padovano, the fee award was reversed on a holding that the statutes were constitutional and no more than a total of \$2,500 could be awarded to Mr. Maas and his co-counsel. *Pinellas County v. Maas*, 400 So. 2d 1028 (Fla. 2nd DCA 1981) *cert. den.*, 412 So. 2d 467 (Fla. 1982).

³ *Rev. den.* 733 So. 2d 515 (Fla. 1999).

Mr. Olive argues that the fee limits are an absolute barrier to the number of hours he can work for his Mr. X, his hypothetical client. Like the alleged “waiver” Mr. Olive protests, no such limit appears in either the proffered contract or the applicable statutes. He creates a straw man limit on compensable hours by refusing to work for any rate less than \$100/hr. If Mr. Sheppard can represent capital defendants at a rate of \$50/hr., then perhaps Mr. Olive can too. He will then provide Mr. X twice the representation alleged in his brief. See Appellant’s Initial Brief at 17-18.

One of the factors examined by the *Sheppard* court was whether the compensation, although low,⁴ was adequate to attract a sufficient number of qualified counsel. 25 Fla. L. Weekly at D467. Here, Mr. Maas’ Affidavit, referenced above, shows that by October 19, 1999, 100 attorneys volunteered for the registry. R III 540. By that time they were representing 61 inmates. *Id.* The registry includes attorneys such as Messrs. Baya Harrison, Gary Printy, and Joseph McDermott. It also includes five attorneys Board Certified in criminal law.⁵

⁴ The court certified to this Court the question of whether the rate is confiscatory. 25 Fla. L. Weekly at D486.

⁵ Robert Norgard, Hilliard Moldof, Jeanine Sasser, Carolyn Van Zant, and Peter Baranowicz. R III 545-552 and 73 *Florida Bar Journal*, Board Certified Lawyers at 18-20

The Legislature has not ignored the competency of registry counsel. The minimum standards for being on the registry are the same as for assistant capital collateral counsel in the regional offices. Section 27.710(1), *Florida Statutes*. Registry attorneys who have active cases are entitled to an annual continuing legal education stipend of \$500. Section 27.711(7), *Florida Statutes*. Through its Commission on Capital Cases, the Legislature recently provided a training symposium to all counsel in the capital postconviction process. *More than 100 lawyers turn out for Capital Collateral Symposium*, The Florida Bar News, March 15, 2000, at 13.

The present fee schedule is simply not confiscatory. Counsel are now entitled to a maximum fee payment of \$84,000. Section 27.711(4), *Florida Statutes*, and *Staff Analysis and Economic Impact Statement on CS/CS SB 2054* at 8. Counsel may be paid up to \$15,000 for investigative expenses and an additional \$15,000 for miscellaneous expenses.⁶ Section 27.711(5) and (6), *Florida Statutes*. This last figure may be exceeded without limit when “the trial

(Directory Issue September 1999).

⁶ When the amount for miscellaneous expenses was increased, the increase and the opportunity to show extraordinary circumstances were made retroactive for all appointments. Section 6, Chapter 99-221, *Laws of Florida*.

court finds that extraordinary circumstances exist.” *Id.*

Mr. Olive has failed to show that the fees schedule established in Section 27.711, *Florida Statutes*, prevents clients of registry counsel from receiving competent representation in any case. His burden was to show that representation is inadequate in all cases. *State v. Efthimiadis* at 1322. Under these circumstances the fee schedule must be presumed constitutional on its face, as held by the Declaratory Judgment appealed here. That judgment should therefore be affirmed, subject to the cross-appeal.

Issue II

The state may limit the scope of legal services it provides to death-sentenced inmates for postconviction appeals.

Death-sentenced inmates do not have a constitutional right to postconviction representation. *Graham v. State*, 372 So. 2d 1363 (Fla. 1979) (most recently revisited in *Arbelaez*) and *Murray v. Giarranto*, 492 U.S. 1 (1989). This court has further recognized that claims of ineffective postconviction counsel are not a valid basis for relief. *Shere v. State*, 742 So. 2d 215, 217 n.6 (Fla. 1999) and *State v. Riechmann*, ___ So. 2d ___, 25 Fla. L. Weekly S163, S171 n.21 (Fla. February 24, 2000) citing *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1996) and *Giarranto*. Despite these holdings, Mr. Olive asserts that the terms of Sections 27.710 and 27.711, *Florida Statutes*, are unconstitutional because they will make him ineffective as postconviction counsel.

Section 27.710(4), *Florida Statutes*, requires: “Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Comptroller.” As noted earlier, the version of the contract about which Mr. Olive complains is no longer in use, but all the provisions he challenges are required by Chapter 27, Part IV, *Florida Statutes*, or Section 287.058(1), *Florida Statutes*, as the following table illustrates.

Contract	Statute
<p>The Contractor further certifies that he or she intends to continue the representation under the terms and conditions set forth in this contract until the sentence is reversed, reduced, or carried out, or until released by order of the trial court.</p>	<p>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. Section 27.710(4)</p>
<p>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.</p>	<p>The 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)</p>
<p>Contractor agrees to refrain from filing repetitive or frivolous pleadings or pleadings unsupported by law and/or facts during the course of representing the Inmate. After hearing and for good cause shown, the trial court may impose sanctions for willful violation of this section.</p>	<p>This section does not authorize an attorney who represents a capital defendant to file repetitive or frivolous pleadings that are not supported by law or by the facts of the case. Section 27.711(10)</p>
<p>That no amount of money or investigator hours that relate to the requested payment were spent in initiating or prosecuting or assisting in the prosecution of any civil suit, except habeas corpus proceedings, and that neither appointed or assigned counsel represented the Inmate or participated in civil or criminal litigation on behalf of the Inmate in any other state;</p>	<p>An attorney appointed under s. 27.710 to represent a capital defendant may not represent the capital defendant during a retrial, a resentencing proceeding, a proceeding commenced under chapter 940, a proceeding challenging a conviction or sentence other than the conviction and sentence of death for which the appointment was made, or any civil litigation other than habeas corpus proceedings. Section 27.711(11)</p>

Contract	Statute
<p>The State of Florida's performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature. All funds for payment after June 30 of the current fiscal year are subject to the State of Florida's legislative appropriation for this purpose. Payments during subsequent fiscal periods are dependent upon the same action. In the event this contract extends into succeeding fiscal year periods and if the governing body appropriating the funds does not allocate sufficient funds for the next succeeding fiscal year payment, the affected services shall be terminated as of June 30 of the then current fiscal year.</p>	<p>(1) No agency or branch of state government shall contract to spend, or enter into any agreement to spend, any moneys in excess of the amount appropriated to such agency or branch unless specifically authorized by law, and any contract or agreement in violation of this chapter shall be null and void. (2) Any person who willfully contracts to spend, or enters into an agreement to spend, any money in excess of the amount appropriated to the agency or branch for whom the contract or agreement is executed is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. Section 216.311</p>
<p>In accordance with Section 287.058, Florida Statutes, The Commission shall have the right to cancel this contract upon the refusal of the Contractor 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 the Contractor in conjunction with this contract. Such materials shall not be provided to any person not a party to this contract, except CAJCC, without prior approval by Commission. If there is disagreement between Commission and the 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.</p>	<p>(1) Every procurement of contractual services. . . shall be evidenced by a written agreement which provisions and conditions shall . . . include . . .</p> <p>(a) A provision that bills for fees or other compensation for services or expenses be submitted in detail sufficient for a proper preaudit and postaudit thereof.</p> <p>* * *</p> <p>(c) A provision allowing unilateral cancellation by the agency for refusal by the contractor to allow public access to all documents, papers, letters, or other material subject to the provisions of chapter 119 and made or received by the contractor in conjunction with the contract Section 287.058(1)</p>

As shown by the table, Mr. Olive's request for relief against the proffered contract is really an attack on the constitutionality of the foregoing statutes. It was

no surprise to Mr. Olive that the provisions of Section 27.711, *Florida Statutes* would appear in the contract. When Mr. Olive submitted his application to be listed on the registry he agreed to this provision:

By signing this application you are certifying:

* * *

If appointed to represent a person in postconviction collateral proceedings, you will continue such representation *under the terms and conditions set forth in s. 27.711, Florida Statutes*, until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court.

R III 446 (emphasis added).

All of the provisions of the contract, and therefore of the statutes, attacked by Mr. Olive comport with the holding of *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998). Mr. Olive makes the same arguments here that the Capital Collateral Regional Counsel (CCRC) made in *Kenny* and that were rejected by this Court. Neither due process nor equal protection concepts prevent the Legislature from making policy choices on how the more than 10 million dollars⁷ appropriated to the capital collateral postconviction counsel effort shall be

⁷ In Fiscal Year 1999-2000 at least \$10,081,908 were appropriated to capital collateral counsel representation. R III 431. No less would appear to be available in the coming fiscal year. See Line Items 778A, 778B, 1070-1092, and 1890A in House Bill 2145 for a total of \$12,685,569.00 or Line Items 768A, 771, 1070-1092, and 1890A in Senate Bill 2200 for a total of \$15,866,368.00, as passed by their respective chambers and pending. (Florida Legislature. 2000 Regular Session)

allocated. As stated by Justice Overton:

[T]he Florida legislature has made a choice, "based on difficult policy considerations and the allocation of scarce legal resources," to limit the representation of CCRC by (1) prohibiting that representation from extending to representation "during trials, resentencings, proceedings commenced under chapter 940, *or civil litigation*," § 27.7001 (emphasis added); and (2) providing that such representation shall be "*for the sole purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed.*" § 27.702(1)(emphasis added). In our view, the statute empowers CCRC with the authority to challenge the validity of a capital defendant's conviction and sentence only through traditional postconviction relief proceedings in criminal and quasi-criminal proceedings.

Id. at 408. Mr. Olive's concerns about not being able to represent clients outside the bounds of Sections 27.710 and 27.711, *Florida Statutes*, were answered by *Kenny*. If Mr. Olive should ever be appointed to represent a death-sentenced inmate whose case has a *Johnson v. Mississippi*⁸ issue, and Mr. Olive certifies that any challenge to the *Johnson* conviction will be at absolutely no cost to the state, the appointing trial court can consider all the circumstances and allow him to proceed *pro bono*. The purpose of the restrictive language in the statutes and their incorporation into the contract is to make it absolutely clear to counsel that state

⁸ 486 U.S. 578 (1988).

resources will not be expended contrary to the wishes of the Legislature. The situation that precipitated the *Kenny* case demonstrates the need for absolute clarity in such limitations.

Mr. Olive's complaints about his relationship with the State of Florida under the proffered contract ignore the reality of being a government contractor. When public funds are being expended, everyone must account to someone. For this reason, if appointed, his expenses will be subject to audit. Section 287.058(1), *Florida Statutes*. His travel expenses will be subject to Section 112.061, *Florida Statutes*; and the records he creates and receives will be subject to Chapter 119, *Florida Statutes*.⁹ The same is true of public defenders.

In *Remeta v. State*, 707 So. 2d 719 (Fla. 1998), The Capital Collateral Regional Counsel moved to withdraw from representing Mr. Remeta because of the same kind of conflict of interest alleged by Mr. Olive here. The CCRC alleged that members of the Commission on the Administration of Justice in Capital Cases had questioned him about his client's participation in the civil suit that was the subject of the *Kenny* decision. This Court observed that oversight of how government allocates its resources is necessary. If oversight by the Commission

⁹ Subject, however, to this Court's decision in *Kight v. Duggar*, 574 So. 2d 1066 (Fla. 1990) as to which records are within the reach of Chapter 119, *Florida Statutes*.

creates an ethical conflict, the whole legal system would collapse. There is not a public defender who does not have the same “conflict.” *Remeta* at 719.

The limits in Section 27.711(11), *Florida Statutes*, on Mr. Olive’s representation of death-sentenced inmates beyond the vacation of sentence mirrors the public defender system. A particular attorney in a public defender office might handle a defendant’s trial, but she will not handle the appeal. Section 27.51(4), *Florida Statutes*. Indigent criminal defendants do not have a constitutional right to representation by a particular attorney. *Jones v. State*, 612 So. 2d 1370, 1373 (Fla. 1992). The Florida Bar ethics opinions on non-competition agreements for law firm employees relied upon by Appellant, Initial Brief at 33, are not to the contrary. As a practical matter, keeping Mr. Olive out of the resentencing or retrial proceedings keeps him untainted by trial level proceedings. In any subsequent collateral proceedings he will be available to raise ineffectiveness of counsel claims as to the performance of the trial level attorneys.

ARGUMENT ON CROSS-APPEAL

Issue I

The trial court erred by entering an injunction against Mr. Maas.

An injunction will not be granted in Florida “where it appears the acts sought to be enjoined have already been committed and there is no showing that there is a reasonable probability that such acts will continue in the future.” *Leach-Wells v. City of Bradenton*, 734 So. 2d 1168 (Fla. 2nd DCA 1999) (citing *Daniels v. Bryson*, 548 So. 2d 679, 681 (Fla. 3rd DCA 1989)). Under that holding there was no basis for the court below to enjoin Mr. Maas from deleting Mr. Olive’s name from the list of registry attorneys.

The issue of whether Mr. Olive’s name had ever been excluded from the registry arose from Mr. Olive’s letter written by counsel, dated 26 February 1999, in which he told Judge Moran:

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 II 236. A copy of the letter went to Mr. Maas.

On receipt of Mr. Olive's letter Mr. Maas sent Judge Moran a new list of registry attorneys. R II 238-239. Because Mr. Olive had withdrawn from representing Mr. Mungin, or so Mr. Maas and Judge Moran thought,¹⁰ Mr. Maas sent a new list of registry attorneys to Judge Moran, less Mr. Olive's name,¹¹ in order that new counsel could be appointed to represent Mr. Mungin. In his 2 March 1999 letter to Judge Moran, Mr. Maas observed, "It is my understanding that Mr. Olive through his attorney Mr. Hanlon, now takes the position that Mr. Olive does not represent Mr. Mungin." Apparently Judge Moran came to the same conclusion. He revoked Mr. Olive's appointment and appointed a new attorney for Mr. Mungin. R III 543. The revocation order entered on 11 March 1999 stated:

Mr. Olive has now tendered a letter to this Court dated February 26, 1999, through his attorney, indicating that he is unable to accept the appointment as counsel in the instant case due to his perception that his acceptance would create a conflict of interest.

¹⁰According to Appellant, "The State responded by orchestrating the revocation of his [Mr. Olive's] 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 declaratory judgment before signing the Contract." Appellant's Initial Brief at 14.

¹¹Mr. Olive has never explained why, after he said he could not represent Mr. Mungin, that Mr. Maas should have included Mr. Olive's name in the group of attorneys from which Judge Moran would make a successor appointment.

R II 249. Mr. Olive did not appeal this Order.

In the pleadings and papers before the court below Mr. Olive alleged:

31. Defendant Roger R. Maas, in his official capacity as Executive Director of the Commission, excluded Mr. Olive from the list of lawyers provided to Judge Moran.

Motion for Summary Judgment at R II 307 and:

53. Defendant Roger R. Maas, in his official capacity as Executive Director of the Commission, has excluded Mr. Olive from the list of lawyers provided to Judge Moran.

Amended Complaint at R I 132. He never alleged facts that would justify a finding by the trial court that Mr. Maas ever intended to exclude Mr. Olive from the registry in the future.¹² In fact Mr. Olive was listed on the registry on 16 July 1999. R III 428. On 19 October 1999 he was still on the registry. R III 545. See also Mr. Maas' Answer where he admits at paragraph 54 that Mr. Olive is qualified to be on the registry. R III 535. There has never been a dispute about Mr. Olive's qualifications to be on the registry. His inability to represent Mr.

¹² The only finding made on this issue was speculation about whether or not Mr. Olive's name may or may not have been deleted from the registry in the past. As stated by the court, ". . . regardless of whether plaintiff may or may not have been deleted from the list or registry of attorneys eligible for appointment under Sections 27.710 and 27.711, *Florida Statutes*, plaintiff is entitled not to be excluded from the list or registry, in any shape or form, sent to trial courts pursuant to those sections." R III 557.

Mungin does not

exclude him from further consideration by trial courts. Such appointments are committed solely to the discretion of the trial courts.¹³

Because there is no reason from the record to believe that Mr. Maas would ever omit Mr. Olive's name from the registry in the future, the case should be remanded to the trial court to dissolve the permanent injunction entered therein.

City of Jacksonville v. Wilson, 157 Fla. 838, 843; 27 So. 2d 108 (1946).

¹³ [T]he court must immediately appoint an attorney, selected from the current registry. . . . In making an assignment, the court shall give priority to attorneys whose experience and abilities in criminal law, especially in capital proceedings, are known by the court to be commensurate with the responsibility of representing a person sentenced to death. The trial court must issue an order of appointment which contains specific findings that the appointed counsel meets the statutory requirements and has the high ethical standards necessary to represent a person sentenced to death. Section 27.710(5), *Florida Statutes*.

Issue II

Mr. Olive had no immediate need for a declaration of his rights under Sections 27.710 and 27.711, *Florida Statutes*, and Mr. Maas is no longer a proper defendant.

There are no death-sentenced inmates who claim in this case that they are not receiving competent postconviction counsel or that Sections 27.710 and 27.711, *Florida Statutes*, are unconstitutional. In the absence of a client who claims his rights are infringed by those sections, Mr. Olive attempted to create a justiciable case by saying he is in doubt about his ethical responsibilities if he were to sign the contract in question. R I 118-199. The courts are not required to render legal advice to citizens before they enter into contracts. Chapter 86, *Florida Statutes*, appears to encompass only contracts, not proposed contracts. Sections 86.021 and 86.031, *Florida Statutes*.

The test for declaratory relief is set out in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), where this Court stated:

This Court has long held, however, 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 dependent 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 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.

(Emphasis added). *Id.* at 1170. Mr. Maas adopts the argument of Appellees/Cross-Appellants Robert F. Milligan and Robert A. Butterworth in support of their cross-appeal, but further notes that the Death Penalty Reform Act of 2000 has made this case moot as to him. Assuming that there was no basis for an injunction against him as argued above, Mr. Maas has no “actual, present, adverse and antagonistic interest in the subject matter, either in fact or law,” required by *Scanlan*. Other than the question of leaving Mr. Olive off the registry, Mr. Olive’s only other complaint against Mr. Maas was over the content of the contract. Mr. Maas no longer drafts the contract, and he has no power to alter future contracts. Section 11, Chapter 2000-3, *Laws of Florida*, transferred that responsibility to the Comptroller as of 14 January 2000.

The Declaratory Judgment Act is not a license for “drive-by” litigation. As stated in *Peoples National Bank of Commerce v. First Union National Bank of Florida*, 667 So. 2d 876, 878 (Fla. 3rd DCA. 1996):

"A complaint seeking declaratory relief must allege ultimate facts showing a bona fide adverse interest between the parties concerning a power, privilege, immunity or right of the plaintiff..." *Floyd v. Guardian Life Ins. Co. of Am.*, 415 So. 2d 103, 104 (Fla. 3d DCA 1982).

Mr. Maas has no interest adverse to Mr. Olive. Mr. Maas has become an innocent bystander in this case. He does not pay registry counsel; he does not contract with them; he does not select them for appointment; and he does not discharge them. In short, Mr. Maas' only responsibility related to registry counsel is the ministerial task of maintaining the registry list and notifying trial courts when capital collateral counsel need to be appointed for a given defendant. Section 27.710(1) and (4), *Florida Statutes*. For this reason, Mr. Maas should be dismissed from this case after the improperly issued injunction is dissolved.

CONCLUSION

Time has passed this case by. We can only speculate on the form of contract registry attorneys presently sign. Since January the Comptroller has been the author of the contract. The fee schedule about which Mr. Olive complained has been increased, and Mr. Olive now has no client. All of these factors demonstrate that his case was not ripe for a declaratory judgment. If and when he is again appointed from the registry, he can raise all his concerns with the appointing judge who will know the case. That court can make the kind of factual assessment required by *Makemson* and its progeny before the judiciary confronts the Legislature's judgment on how to allocate scarce legal resources.

Only time and experience will tell whether the registry fee schedule falls short of its goal of providing competent collateral counsel to death-sentenced inmates. The Legislature has already shown a willingness to amend the schedule where adjustment was necessary. Sections 4 and 5, Chapter 99-221, *Laws of Florida*. It is the job of the Commission on Capital Cases to suggest such adjustments. *Cf.*, *Amendments to Florida Rules of Criminal Procedure*, 708 So. 2d 913, 915 (Fla. 1998)(Justice Wells dissenting); *Porter v. State*, 700 So. 2d 647, 648-49 (Fla. 1997); and *Hoffman v. Haddock*, 695 So. 2d 682 (Fla. 1997) where

Justice Wells concurring observed:

The legitimate purpose of postconviction capital proceedings requires adequate funding. The Commission will be in a position to follow each of these cases and to report on an ongoing basis on the progress in cases, to analyze the reasons for cases being prolonged in being adjudicated, and to advise the legislature as to causes for delay and appropriate funding so that this legitimate purpose can be effectively and efficiently carried out.

Id. at 685.

On the basis of the foregoing argument Mr. Maas requests that the judgment of the court below be affirmed as to Counts I and II of the Amended Complaint, and that Count III for a permanent injunction be dismissed.

Alternatively, he requests that the case be remanded to the circuit court with directions to grant Appellees/Cross-Appellants' Motions to Dismiss.

CERTIFICATE OF SERVICE

Respectfully submitted on this ____ day of April 2000, on which date this Answer Brief, formatted in Times New Roman, 14 points, was served by United States mail on the counsel listed below.

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