

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, Cross-Appellant.

**REPLY AND CROSS-ANSWER BRIEF
OF
APPELLANT, CROSS-APPELLEE,
MARK EVAN OLIVE**

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REPLY ARGUMENT

Appointed to represent a death-sentenced person in postconviction proceedings, Olive was offered a contract setting forth the terms of the representation. The contract, required by statute and offered by the party seeking to execute Olive's client, asked Olive to agree that his conduct would conform to the "structure" of postconviction litigation dictated by the Registry Act [M/B Ans. Br. 17];¹ that he would agree to accept the State's view of whether any documents he possessed were "public records";² that he would neither pursue certain avenues of investigation or litigation, nor raise certain claims or arguments in the course of the litigation he was appointed to conduct;³ that he would not seek the appointment of co-counsel even if

¹ This Court recently rejected the notion that the Legislature could "structure" capital postconviction litigation by placing constraints on what appointed counsel can and cannot file. Allen v. Butterworth, No. SC00-113 (April 14, 2000) (holding unconstitutional section 2 of Chapter 2000-3, Laws of Florida, which purported to limit the pleadings filed by state-paid capital postconviction lawyers to those "authorized by statute").

² This Court has held that the state's constitutional obligation to respect the independence of capital postconviction counsel means that the files of such counsel are never "public records." Kight v. Dugger, 574 So. 2d 1066, 1068-69 (Fla. 1990).

³ This Court has reminded capital postconviction counsel of their ethical obligation to diligently and effectively prepare and present all non-frivolous claims for relief. See Peede v. State, 748 So. 2d 253 (Fla. 1999); see also Porter v. State, 723 So. 2d 191, 193 (Fla. 1998) (failure of postconviction counsel to pursue and present available claims for postconviction relief may lead to procedural bar). The Rules of Professional Conduct explicitly prohibit attorneys from allowing a third

co-counsel were necessary to provide competent representation;⁴ that he would not represent the client he was appointed to represent after the contract ended, even if appointed to do so and even if willing to do so pro bono;⁵ and that he would accept the statute's fee schedule, with its caps on compensable hours and its absolute bar on successive litigation, as the "exclusive means" of compensation for fees and expenses.⁶ Faced with drastic conflicts between the Registry Act and Contract and this Court's rules and precedent, Olive sought a declaratory judgment that would

party, particularly one paying the lawyer's fees, to impair their exercise of independent professional judgment. R. Regulating Fla. Bar 4-1.8(f).

⁴ Rule 4-1.1, Rules Regulating the Florida Bar, provides that competence in representation is an advocate's prime directive. This Court has reminded capital postconviction counsel of their ethical obligation to provide competent, effective representation, and has admonished trial court's to ensure such representation is provided. Peede v. State, 748 So. 2d 253 (Fla. 1999).

⁵ Rule 4-5.6, Rules Regulating the Florida Bar, explicitly prohibits Florida attorneys from entering into any employment agreement which would restrict the attorney's practice after the termination of the employment relationship.

⁶ This Court has held that people sentenced to death in Florida are entitled to effective postconviction representation and that this right requires that adequate financial and other resources be available when needed. Allen v. Butterworth, No. SC00-113 (Fla. Apr. 14, 2000); Hoffman v. Haddock, 695 So. 2d 682 (Fla. 1997); Spaziano v. State, 660 So. 2d 1363, 1369-70 (Fla. 1995), cert. denied, 516 U.S. 1053 (1996); see also Remeta v. State, 559 So. 2d 1132 (Fla. 1990); Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988).

allow him to continue under the court’s order of appointment without violating his ethical obligations.⁷ He asked the trial court to declare, notwithstanding the Act’s directive that its capped fee schedule “shall be the exclusive means” of payment, that courts have the inherent authority to appoint co-counsel when necessary, and to award fees at times other than those prescribed in the schedule, and, if necessary, beyond the statutory limits. [R II-200 at 17-18 (“wherefore” clause of Amended Complaint setting forth relief sought).] In order to continue under the appointment order without subjecting himself to discipline, Olive also asked the trial court to declare that his conduct is governed by this Court’s precedent, its rules of court, and Rules Regulating the Florida Bar, notwithstanding any provisions of the Act or Contract to the contrary. [Id.] Remarkably, Appellees Milligan and Butterworth now say they agree with Olive [M/B Ans. Br. 5, 10-11]; and Appellee Maas at least suggests the same position. [Maas Ans. Br. 10.] If their arguments are correct, i.e., nothing in the Registry Act or Contract restricts the timing or amount of compensation or the attorney’s conduct of the postconviction litigation, then the trial court should have entered the declaratory judgment Olive sought.

⁷ Maas does not dispute that the State, through Maas, responded by orchestrating Olive’s removal from the case for which he was appointed. [Maas In. Br. 21.]

Olive never sought a declaration of the Registry Act’s constitutionality, but the trial court nevertheless ruled that the Registry Act is not facially unconstitutional. Although Appellees Milligan and Butterworth initially raised this “facially unconstitutional” red herring in the trial court [R II-282], they now recognize that Olive did not “attack” the Registry Act in that way. They note in their initial brief on the cross-appeal that “Olive’s amended complaint contained no clear allegation that sections 27.710 and 27.711 were unconstitutional on their face.” [M/B In. Br. at 24.] Despite that recognition, the Appellees proceed as if their task were merely to support the trial court’s order in a vacuum, divorced from the challenges Olive is actually raising. As a result, their briefs fail to confront the real issues before this Court.

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