

IN THE SUPREME COURT OF FLORIDA

Case No. SC06-835

On review of
Second Judicial Circuit Case 03-CA-000291

ROGER R. MAAS, ETC.,

Appellants,

v.

MARK EVAN OLIVE, ET AL.

Appellees.

REPLY BRIEF OF APPELLANTS

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on Capital Cases**

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Summary of Argument

This brief addresses the cross appeal filed by Appellee Mark Evan Olive (Olive) arguing for the creation of an absolute right to postconviction collateral counsel. This brief also shortly addresses an argument raised by Appellee Tom Gallagher acting in his capacity as Chief Financial Officer for the State of Florida. (CFO)

I. Olive claims that there are three arguments for the declaration of an absolute right for postconviction counsel.

The first argument he advances is that such a right is already implicit. This argument fails because this Court and the United States Supreme Court have already rejected it for sound reasons. Such an act would be an impressive amendment of the Constitution by the Court and would overstep the Court's bounds.

The second argument, that there is a body of evidence saying there is widespread incompetence among registry attorneys, fails because the information he relies on was not presented to the trial court, not admissible as evidence and even if the premise were true, the Court could address such ills and would not need to make up rights in order to do so.

The third argument, that there are other states who have declared such a right ignores the fact that those states did so solely on state law grounds and their situation in both cases does not apply to Florida.

II. The CFO in his brief based his argument in part on the belief that the Director was arguing that section 27.7002 Florida Statutes would allow the Director to remove attorneys from cases to which they had been appointed. This does not describe the Directors position and runs contrary to the Director's position in that he holds that parties should honor the contracts that they sign.

I. Olive's Claim that Registry Act Encroaches upon the Florida Constitutional Right to Effective Postconviction Counsel is Erroneous

Olive raises three primary arguments in support of his notion that the Court should declare an absolute constitutional right to postconviction counsel. In essence, Olive asks the Court to ignore the fact that there is no constitutional right to postconviction counsel found either in the state constitution (*see State Ex. Rel Butterworth v. Kenny*, 714 So. 2d 404 (Fla. 1998) or the Federal Constitution. *See Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Olive asks the Court to overthrow decades of jurisprudence and suddenly find a right to postconviction counsel in order to prevent a host of imaginary ills. Olive ignores the fact that the Court has no authority to amend the constitution, as only Florida citizens can take such action. Further, the course that the Olive urges would

require the Court usurp the prerogatives and decisions of the Florida Legislature who have acted to advance the public will by creating a statutory right to postconviction counsel.

A. Olive’s First Argument asks the Court to Overturn Long Standing Precedent

Olive argues that the Court has already implicitly recognized a right to postconviction counsel and has only to make it explicit. The Court has done no such thing. As the Court has stated in reiterating there is no constitutional right to postconviction counsel:

“[T]here is a distinction between the need for counsel in preconviction proceedings and the need for counsel in postconviction proceedings. That distinction is based on the fact that during the initial proceedings, the State is presenting witnesses and arguing to a jury in an attempt to strip from the defendant the presumption of innocence; whereas, once the conviction and sentence become final, the presumption of innocence is no longer present and the defendant, in seeking postconviction relief, acts to ‘upset the prior determination of guilt.’” *State Ex. Rel Butterworth*, at 408 quoting *Ross*, at 611, at 2444.

The Court has found that the statutory structure in Florida addresses the concerns raised by Olive:

“Like most other states, Florida, to ensure the credibility and constitutionality of its death penalty process, has provided postconviction representation only in cases where the defendant has been sentenced to death. This statutory right to representation acts to ensure meaningful access to the courts in a complex area of the law and to ensure that our death penalty process is constitutional.” Ibid at 408.

The Court (and the US Supreme Court) has consistently held that there is no right to postconviction counsel and there is no ambiguity in the holding.

B. Olive’s Second Argument Presents Inadmissible Material to Support his Claim

The second argument advanced by Olive is that “there is now a considerable body of data and analysis which clearly establishes that capital collateral representation in Florida has reached a near-crisis level of ineptitude.” Olive’s brief at 41. What Olive seeks to rely on was not presented to the trial court. In fact, there is no rule of evidence that would have allowed its introduction even if he had tried to present it.

Olive relies on a report by the American Bar Association entitled *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*. (ABA Report) While this report did not exist when this case was argued in the trial court, this Court has previously addressed this report stating

“the ABA Report is a compilation of *previously available information* related to Florida’s death penalty system.” *Rutherford v. State*, 2006 WL 2884822 (Fla. 2006)(emphasis added). Olive fails to explain why this information was not, or how it could have been, presented to the trial court and fails to offer any grounds to support why the Court should consider it now.

Olive also refers to comments by current Justices of the Court demonstrating a lack of confidence by those Justices in the general competence shown by postconviction counsel. This again is not evidence nor was that information provided to the trial court. These comments obviously have no relevancy to these proceedings. There is no indication that there are any disciplinary cases against any attorney for failing to meet professional obligations to provide competent representation. Legislative hearings on the matter failed to turn up any evidence of incompetence. When asked by the Chairman of the House Justice Council the Court did not provide the names of any counsel who failed to meet professional standards. See *Lawmaker Asks High Court for Names of Bad Lawyers*, Jackie Hallifax (AP News March 22, 2005)¹

Olive does not explain how converting the statutory right that currently exists into a constitutional right would give the Court any greater ability to regulate the competency of counsel. Since the Court is already charged with the oversight

¹ This article can be found at <http://www.fadp.org/news/TBO-20050323.htm>

of the professional performance of all attorneys in the state there is no need for the Court to start creating Constitutional rights in order to address the performance of counsel. As Olive acknowledges the Court has already found “the Legislature has provided explicit standards for assistant collateral capital counsel and for conflict counsel appointed in capital postconviction proceedings, see section 27.704 Fla. Stat. (2000), as well as providing for judicial oversight and monitoring of assigned counsel’s performance in postconviction proceedings. *See* §27.711(12) Fla. Stat. (2000).” *In re Amendment to Florida Rules of Criminal Procedure- Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185 (Fla. 2002). Accordingly, Olive’s claim that a constitutional right needs to be declared to allow the Court oversight to cure defects in the postconviction process is belied by the fact the statute already provides the Court oversight.

C. Out of State Cases are Unpersuasive to Change the Florida Constitution

The third and final argument addressed by Olive is that Alaska and Mississippi have declared a constitutional right to postconviction counsel and their example should persuade Florida to do the same. Neither of the cases cited by Olive in support of this proposition are persuasive.

The case cited by Olive from Mississippi is *Jackson v. State*, 732 So. 2d 187 (Miss. 1999). Mississippi Code allows for postconviction proceedings though the Uniform Post-Conviction Collateral Relief Act (UPCCRA). Unlike Florida, the

UPCCRA does not provide for any postconviction counsel unless the court provides counsel at an evidentiary hearing. Mississippi found that the UPCCRA could not provide any effective relief for prisoners unless counsel was provided, and since prisoners could not take advantage of federal remedies unless all state remedies were exhausted the Court found the prisoners were being denied due process. It is worth noting that the court urged the state legislature to adopt a statutory scheme (such as the one Florida has) to provide for such counsel. This problem simply does not exist in Florida as counsel is provided.

The Alaska case is *Grinols v. State*, 74 P.3d 889 (Alaska 2003) which states that the Alaska constitution provides a due process right to postconviction counsel. The court acknowledges that the US Constitution provides no such right and their decision is based solely on the Alaska constitution. Clearly this is not the Florida situation. In this case the court found that a postconviction proceeding could be sustained in order to challenge the effectiveness of counsel in an earlier postconviction proceeding presumably setting up a never ending chain of postconviction proceedings. This Court has specifically rejected this approach in *Zack v State*, 911 So. 2d 1190 at 1203 (Fla. 2005) which held that attacks on the effectiveness of counsel do not provide a valid basis for relief. It is surprising that Olive would ask this Court to violate the rule of law and rewrite the Florida Constitution.

Both of these cases are based on the state law of the two respective states and are not persuasive in interpreting the Florida Constitution or statutes. The minority status of the approach taken by these two states also argues against adopting the approach adopted by them.

II. The Director of the Commission on Capital Cases does not Assert the Ability to Cancel Contracts

The CFO incorrectly presents the position of Director. The CFO states in his brief that upholding the Director's position would result in registry lawyers being removed from cases in the middle of a proceeding. The Director does not maintain nor does the statute suggest he has the power to remove attorneys from cases to which they have been appointed.

The CFO in his brief states "troublesome consequences flow from a summary ejection of a registry lawyer from ongoing capital litigation." *See* CFO's Brief at 2. This argument misapprehends the Director's position. The statute allows for an attorney to be removed from the registry, it does not address removing counsel from any case they are currently appointed to. *See* Fla. Stat. § 27.7002(6). The Director's position is that removal from the registry would prevent an attorney from being appointed to future cases but would not result in his disqualification from cases he is currently handling pursuant to a court order and a signed contract. Central to the Director's position is the tenet that parties are bound to the contracts that they sign and one party does not have the right to

unilaterally change the terms of their binding agreement. The Director would not have the power to terminate the contract and has not argued that he does. He does have the statutory power to decide not to contract in the future with an attorney who has breached their previous contracts.

Conclusion

The Appellant urges the Court to reject the arguments advanced by Olive and continue to uphold Florida jurisprudence stating there is no absolute constitutional right to postconviction counsel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by **U.S. Mail**, postage prepaid, to Stephen F. Hanlon and Elizabeth L. Bevington, Counsel for Appellee, PO Drawer 810, Tallahassee, FL 32302, and Richard T. Donelan, Jr., Counsel for Co-Appellant, Department of Financial Services, Constitutional Issues Section, Fletcher Building, Suite 464, 200 East Gaines Street, Tallahassee, FL 32399-4247 this ____ day of December 2006:

JEREMIAH M. HAWKES
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

JEREMIAH M. HAWKES
Counsel for Appellant