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Mark Evan Olive v. Roger R. Maas

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR THIS MORNING IS OLIVE VERSUS MOSS.

HAPS THE COURT. STEVE HANNON -- HANLON OF HOLLAND AND NIGHT AND STEVEN DEFENSE COUNSEL, WHO FILED AN AMICUS IN THIS CASE.

WOULD YOU GIVE US THE FACTS OF UNDERPINNINGS OF THIS CASE.

THE FACTUAL UNDERPINNINGS OF THIS CASE ARE THAT MR. OLIVE, WHO IS, I THINK, RECOGNIZED AS ONE OF THE STATE'S LEADING POSTCONVICTION CAPITAL DEFENSE LAWYERS, APPLIED FOR THE REGISTRY, WAS ACCEPTED AND PLACED ON THE REGISTRY, AND THEN WAS SENT A CONTRACT TO REVIEW. MET WITH MR. MUNGIN BY APPOINTMENT AND WAS APPOINTED BY MR. OLIVE. MR. OLIVE OR HIS ASSOCIATE MET WITH MR. MUNGIN AND ENTERED INTO AN ATTORNEY CLIENT RELATIONSHIP WITH MR. MUNGIN AND DEVELOPED THEORIES OF THE CASE, NOTED THE PRIOR FELONY CONVICTION, WHICH WAS USED AS AN AGGRAVATOR IN THE SENTENCING HEARING FOR MR. MUNGIN, AND FILED AN EXTRAORDINARY WRIT PETITION IN --

DID HE ACTUALLY ENTER INTO A CONTRACT?

HE DID NOT ENTER INTO THAT CONTRACT, AND HE ADVISED THE TRIAL COURT THAT HE HAD NOT ENTERED INTO THE CONTRACT. HE DID NOT ADVISE THE TRIAL COURT THAT HE WOULD NOT ENTER INTO THE CONTRACT, BUT ADVISED THE TRIAL COURT THAT HE WAS SEEKING TO CLARIFY SERIOUS ETHICAL ISSUES THAT CONCERNED HIM. HE PUT THE COURT ON NOTICE OF WHERE HE WAS GOING. WE WERE OVER HERE FOR ABOUT FIVE AND-A-HALF MONTHS ON THE EXTRAORDINARY WRIT PETITION THAT WAS DENIED. NO ACTION WHATEVER WAS TAKEN, WITH RESPECT TO MR. MUNGIN'S STATUS IN MR. MUNGIN'S CASE, DURING THAT PERIOD OF TIME. AFTER THE MATTER, THE EXTRAORDINARY WRIT PETITION WAS DENIED HERE, WE IMMEDIATELY FILED A DECLARER FOR JUDGMENT ACTION IN THE -- DECLARATORY JUDGMENT ACTION IN THE CIRCUIT COURT AND NOTIFIED, AGAIN, THE TRIAL JUDGE, AND AT THAT TIME, MR. MAAS --

THE DECLARATORY JUDGMENT ACTION WAS ON THE BASIS OF WHAT WAS IN THE PROPER THE PROFFERED CONTRACT AND THE STATUTE. CORRECT?

YES, AND THE STATUTE, YES, KPAECHBLTH.

BUT AT NO TIME DURING THIS SCENARIO HAS MR. MUNGIN ENTERED INTO THIS CONTRACT.

YES, AND THAT REMAINS TRUE TODAY, AND THEREAFTER JUDGE MORE AND WAS SENT -- JUDGE MISSOURI RAN WAS SENT -- MORAN WAS SENT ANOTHER LIST. THESE FACTUAL QUESTIONS HAVE BEEN RAISED IN THIS CASE, WITH RESPECT TO THE ISSUES OF STANDING AND JURISDICTION, AND I BELIEVE, UNDER THE CASES THAT WE HAVE SHOWN YOU, PARTICULARLY THE HOLLY CASE, WHERE JUDGE HOLLY SOUGHT A DECLARATORY JUDGMENT ON THE "RESIGN TO RUN" LAW. HE WANTED TO RUN FOR THE FLORIDA SUPREME COURT, AND THIS COURT FOUND THERE WAS STANDING AND JURISDICTION IN THAT CASE. I BELIEVE THAT MR. OLIVE, THAT THE TRIAL COURT HAD JURISDICTION HERE. MR. OLIVE HAD STANDING, AND, OF COURSE, I BELIEVE THE CASE HAS NOT MOVED, BECAUSE THIS CASE HAS BEEN CERTIFIED AS A CASE OF GREAT PUBLIC IMPORTANCE.

WHILE YOU ARE DEALING WITH THE FACTUAL ISSUES, WAS HE TAKEN OFF THE LIST OR WAS HE NOT TAKEN OFF? IT DEPENDS ON WHICH BRIEF I READ, AS TO WHETHER HE IS OFF OR ON.

WE GET INTO SOME SEMANTICS HERE, WHAT A REGISTRY IS, WHAT A LIST IS. I HAVE SOME CONFUSION ABOUT THAT, TO BE PERFECTLY HONEST WITH YOU. WHATEVER IT WAS, HE WAS NOT ON WHATEVER THAT THING WAS THAT WAS SUBMITTED TO JUDGE MORAN, FROM WHICH THERE WAS A LIST OF NAMES. HE HAS NOT BEEN ON, AT THE TIME THAT THERE WAS A RECORD MADE IN THIS CASE -- I AM SORRY, HE IS ON THAT LIST BUT HE HAS NOT BEEN APPOINTED BY ANYBODY ELSE, AND I CAN TELL YOU THAT, AS OF TODAY'S DATE, HE HAS NOT BEEN APPOINTED BY ANYBODY ELSE, AND THAT IS WHY WE SOUGHT INJUNCTIVE RELIEF IN THE TRIAL COURT.

IT IS YOUR POSITION THAT, AS OF TODAY, IS HE OFF THE LIST. IS THAT RIGHT?

IT IS OUR POSITION, AS BEST WE CAN UNDERSTAND IT, THAT HE APPEARS TO BE ON SOME LIST, BUT FOR SOME REASON THE STATE'S MOST EXPERIENCED CAPITAL RELIEF DEFENDER HAS NOT BEEN APPOINTED TO ANY CASES IN THIS STATE.

IS IT YOUR POSITION THAT IT IS UNEQUIVOCAL, THAT UNLESS THE CONTRACT IS SET ASIDE, THAT HE CAN'T ETHICALLY ENTER INTO THIS CONTRACT, AND IF HE CAN'T ENTER INTO THIS CONTRACT, THEN DOESN'T THE REGISTRY HAVE A RIGHT NOT TO KEEP HIM ON THE LIST, IF HE IS NOT GOING TO ACCEPT POINTS?

THOSE ARE TWO QUESTIONS. THE ONE IS, IS IT HIS POSITION THAT HE WILL NOT ENTER INTO THE CONTRACT, UNTIL HE CAN GET THE ETHICAL QUESTIONS RESOLVED?

CORRECT.

THE ANSWER TO THAT QUESTION IS THAT HE HAS NOT ENTERED INTO THE CONTRACT, AND HE WILL NOT, BECAUSE THE ETHICAL QUESTIONS ARE OVERWHELMING. THE SECOND QUESTION IS SHOULD HE BE ON THE LIST AND SHOULD HIS NAME BE SUBMITTED TO TRIAL JUDGES? IS THAT WHAT YOU ARE ASKING ME?

IF THEY CAN'T APPOINT HIM UNLESS HE SIGNS A CONTRACT, THEN ISN'T IT SORT OF A USELESS THING FOR HIM TO BE ON THE LIST?

THAT IS THEIR POSITION, AND I UNDERSTAND THAT. WHAT WE ARE SAYING IS THAT --

WHAT IS -- WHY WOULDN'T THAT BE A USELESS THING?

THAT HE WOULD FILE, AGAIN, AS A LIKELIHOOD THAT HE WAS HE WOULD FILE AGAIN, RIGHT. MIGHT WELL BE. MIGHT WELL BE.

YOU ARE SPENDING AN AWFUL LOT OF TIME, SORT OF, ON THE PRELIMINARIES. YOU HAVE GOT A LIMITED AMOUNT OF TIME. I WOULD APPRECIATE IT, FOR ONE, IF YOU WOULD MOVE ON, AND ADDRESS THE MORE SUBSTANTIVE ISSUES.

I THINK THE BEST WAY TO MOVE ON IS TO PUT YOU UP ON DEATH ROW WITH MR. OLIVE AND HIS CLIENT, MR. MUNGIN. AND LET YOU LISTEN TO THE CONVERSATIONS THAT WOULD GO ON BETWEEN MR. OLIVE AND HIS CLIENT. MR. OLIVE WOULD TELL HIS CLIENT THAT HE HAD BEEN APPOINTED TO BE ON THE REGISTRY. HE WAS A SOLO PRACTITIONER, LIKE MANY OTHER LAWYERS ON THE REGISTRY. AND THAT HE WAS GOING TO BE ENTITLED TO RECEIVE PAYMENT FOR HIS SERVICES. BUT HE HAD TO AGREE TO CERTAIN THINGS, BEFORE HE WOULD RECEIVE PAYMENT FOR HIS SERVICES. AND HE HADN'T AGREED TO DO THIS YET, BUT HERE IS WHAT IS ON THE TABLE. HE HAD TO AGREE THAT HE WOULD NOT CHALLENGE ANY PRIOR CONVICTIONS THAT WAS USED AS AN AGGRAVATOR, IN MR. MUNGIN'S CASE, AND A PRIOR CONVICTION WAS USED AS

AN AGGRAVATOR, IN SENTENCING, MR. MUNGIN'S CASE. HE HAD TO AGREE -- EXCUSE ME -- HE WOULD, ALSO, TELL MR. MUNGIN THAT MR. MUNGIN'S BUDDY, DOWN THE CELL, WHO WAS REPRESENTED BY CCR, HIS LAWYER WOULDN'T HAVE THAT RESTRICTION, BUT MR. OLIVE WOULD HAVE THAT RESTRICTION. HE WOULD HAVE TO TELL HIM THAT HE COULD NOT FILE REPRESENTATIVE PLEADINGS ON HIS BEHALF, AND HE COULD NOT FILE PLEADINGS WHICH WERE NOT SUPPORTED BY LAW OR THE FACTS OF THE CASE, WHICH MEANT THAT HE COULD NOT MAKE GOOD FAITH, NONFRIVOLOUS, REPRESENTATIVE ARGUMENTS FOR THE EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW.

YOU SEE THE RESTRICTION AS BEING FAR MORE REPRESSIVE THAN UNDER OUR CODE OF CONDUCT.

FAR MORE REPRESSIVE, PARTICULARLY, JUSTICE LEWIS, IN THE CONTEXT OF THE HISTORY OF DEATH PENALTY LITIGATION, THAT IS HOW DEATH PENALTY LAW HAS BEEN MADE, BY REPEATED GOOD FAITH ARGUMENTS FOR THE EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW. ALL I HAVE GOT TO DO IS SAY "HITCHCOCK", AND WE KNOW WHAT THAT MEANS.

ISN'T EVERY LAWYER BOUND, ETHICALLY, NOT TO FILE FRIVOLOUS, REPRESENTATIVE, AND SUCCESSIVE CLAIMS? IS THAT SOMETHING --

THE ONLY WORDY AGREE WITH YOU ON, THERE, IS FRIVOLOUS. BOUND NOT TO FILE A FRIVOLOUS CLAIM BUT TO FILE REPRESENTATIVELY, AN ARGUMENT, A CLAIM FOR THE GOOD FAITH MODIFICATION OR EXTENSION OR REVERSAL OF EXISTING LAW, IS THE NATURE OF DEATH PENALTY PRACTICE.

BUT YOU READ THAT WOULD BE A VIOLATION OF THE STATUTE AND OF THE CONTRACT, IS WHAT YOU ARE SAYING.

HE SAYS HE WILL NOT DO THAT, UNDER THIS STATUTE, AND UNDER THIS CONTRACT. AND THAT BRINGS A LAWYER INTO A COURTROOM WITH HIS ARM BEHIND HIS BACK, AND A LAWYER CANNOT AGREE TO DO THAT. HE, ALSO, AGO GREASE THAT HE WILL NOT PLEAD CLAIMS IN ANTICIPATION OF FACTUAL DEVELOPMENT. THEREFORE WAIVING THE VENTURA OPPORTUNITY TO DO THAT, AND THAT IS PARTICULARLY DIFFICULT IN DEATH PENALTY WORK, BECAUSE THESE FACTS ARE DISCOVERABLE, ALL OVER THE COUNTRY.

BUT ISN'T THERE A "OUT" ON THIS, IN THAT THE JUDGE CAN FIND EXTRAORDINARY CIRCUMSTANCES, AND HE COULD BE PAID FOR HIS REPRESENTATIVE CLAIMS OR HIS SUCCESSIVE CLAIMS, IF THEY ARE, IN FACT, MERITED, AND I RECOGNIZE WHAT YOU ARE SAYING, DEATH PRACTICE IS DIFFERENT, AND YOU HAVE THESE TYPES OF CLAIMS, BUT WOULDN'T HE, THEN, PETITION THE COURT TO FUND WILL FOR THAT?

THIS STATUTE PURPORTS TO LIMIT --

ISN'T THAT PROVIDED FOR?

NO, IT IS NOT.

IT IS NOT?

BECAUSE THE LEGISLATURE, HERE, YOUR HONOR, AT ITS CORE, IS TRYING TO, IN THE WORDS OF THE ATTORNEY GENERAL, HAD WHICH I COMPLETELY AGREE -- WHICH I COMPLETELY AGREE WITH AND ADOPT AS IF THEY WERE MY OWN, STRUCTURE THE POSTCONVICTION LITIGATION, BOTH THE SUBSTANCE OF IT AND THE CHRONOLOGY OF IT, AND THAT IS AN ARTICLE V VIOLATION.

HE HAS NO PROVISION FOR ASKING THE JUDGE TO GO BEYOND THE CONTRACT IN THIS CASE?

THERE IS ONLY ONE ON WHAT YOU SUGGESTED, AN EXTRAORDINARY CASE, AND THAT IS FOR -- THAT GETS INTO THE MONEY SECTION, WHICH I AM GOING TO GET TO, AND THAT IS FOR MISCELLANEOUS EXPENSES, BUT OTHERWISE THERE IS NO EXCEPTION. THIS IS AN ATTEMPT TO STRUCTURE POSTCONVICTION LITIGATION AND MAKE IT A VERY DIFFERENT THING THAN IT HAS BEEN IN THE LAST 25 YEARS.

ARE THERE -- I GUESS THERE ARE TWO DIFFERENT THINGS. ONE IS WHETHER, IN FACT, BY THESE RESTRICTIONS, THE LEGISLATION WAS ATTEMPTING TO, FOR EXAMPLE, PROHIBIT COUNSEL FROM ARGUING FOR EXPANSION, MODIFICATION OR REVERSAL OF EXISTING LAW.

RIGHT.

DOING THINGS THAT MR. OLIVE OR ANY ATTORNEY MIGHT FIND ETHICALLY BOUND TO DO, IN ORDER TO ADVOCATE FOR HIS CLIENT. THE SECOND THING IS WHETHER THERE IS, JUST BY THE CAP ON HOW MANY HOURS HE CAN SPEND, I GUESS WHETHER THAT CAP IS, PER SE, UNREASONABLE, AS TO EACH AND EVERY CATEGORY.

THAT'S RIGHT.

SO ARE THOSE TWO DIFFERENT ISSUES?

THEY ARE. BUT THEY, BOTH, EVIDENCED THIS ATTEMPT TO STRUCTURE THE POSTCONVICTION LITIGATION, BOTH IN TERMS OF ITS SUBSTANCE AND ITS CONROLLING.

AND YOUR ARGUMENT IS THAT THAT IS A FACIALLY UNCONSTITUTIONAL --

NO, NOT REALLY. THAT IS HOW THE STATE ATTEMPTED TO PRESSURE MY ARGUMENT.

MR. OLIVE HAS NOT ENTERED INTO A CONTRACT. THERE HAS BEEN NO ADJUDICATION HERE, AS TO ANYTHING THAT, IN FACT HE HASN'T UNDERTAKEN THE REPRESENTATION OF MR. MUNGIN OR ANYBODY ELSE. AND SO WHAT WE ARE -- WE DON'T HAVE ANYTHING TO APPLY, BECAUSE THERE IS NOTHING THAT IS A CASE IN CONTROVERSY, AND SO WE ARE JUST DEALING WITH THESE SORT OF VARIOUS PROVISIONS THAT -- HOW IS THAT DIFFERENT THAN A FACIAL ATTACK?

IT IS. WHAT YOU HAVE TO APPLY IS THE QUESTION, HERE, OF AN ADVANCED WAIVER, WHICH IS SOUGHT BY THE STATUTE, WHICH COMPELS THE AGREEMENT, AND YOU DON'T HAVE TO WAIT FOR THESE FACTS TO DEVELOP. MR. OLIVE SEEKS A DECLARATORY JUDGMENT THAT THIS STATUTE, MAKING THIS REQUIREMENT OF THIS CONTRACT, IMPOSES A REQUIREMENT, WHICH IS VOID, BECAUSE THE LEGISLATURE CANNOT STRUCTURE THE POSTCONVICTION LITIGATION IN THAT WAY. THAT IS A MATTER FOR THE COURTS TO DO, AND NOT FOR THE LEGISLATURE TO DO, AND ALL YOU HAVE TO LOOK AT IS THE STATUTE, BECAUSE THE STATUTE COMPELS THE CONTRACT, AND WE NORTH COMPLAINING ABOUT ANY DIFFERENCE BETWEEN THE STATUTE AND THE CONTRACT. YOU DON'T NEED TO WAIT FOR THESE THINGS TO DEVELOP. THE QUESTION, HERE, IS WHETHER MR. OLIVE CAN AGREE, IN ADVANCE, TO DO IT, AND THE ANSWER IS HE CAN'T AGREE, BECAUSE THE LAWYERS CAN'T DO THAT. LAWYERS CANNOT LET A THIRD PARTY, WHO IS PAYING THEM, PARTICULARLY THEIR CLIENT'S POTENTIAL EXECUTIONER, THEY CANNOT LET THAT THIRD PARTY TELL THEM HOW TO STRUCTURE THE LITIGATION.

WELL, THEN, YOU ARE ATTACKING THE STATUTE AS FACIALLY UNCONSTITUTIONAL.

I DON'T BELIEVE --

IF IT IS NOT -- IF WE DON'T HAVE FACTS AS TO HOW THIS ACTUALLY HAPPENED, OPERATED, IN MR.

MUNGIN'S CASE, TO SEE WHETHER, IN FACT, MR. OLIVE WANTED TO FILE SOMETHING AND COULDN'T FILE IT OR FELT LIKE HE, YOU KNOW, IT WAS GOING TO TAKE TWICE THE NUMBER OF HOURS AND DIDN'T GET THAT COMPENSATION, THEN YOU HAVE TO -- WE HAVE GOT TO SAY THAT, ON ITS FACE, THESE RESTRICTIONS ARE VIOLATION OR SEPARATION OF POWERS. ISN'T THAT WHAT YOU ARE ASKING US TO DO?

WE ARE ASKING YOU TO DO THAT, AS A MECHISM IN A DECLARATORY JUDGMENT.

YOU ARE NOT ASKING US TO INTERPRET -- ARE YOU ASKING US TO INTERPRET THE STATUTE, SO TO SAY, NO, HE COULD, IN GOOD FAITH, ARGUE FOR THINGS LIKE EXPANSION, MODIFICATION AND REVERSAL?

I AM ASKING YOU TO SAY THAT THE STATUTES' REQUIREMENT THAT IS A CONDITION OF RECEIVING THE MONEY, HE AGREED THAT HE WILL NOT MAKE GOOD FAITH ARGUMENTS FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW. THAT REQUIREMENT IS VOID. IT CAN'T BE APPLIED TO THIS -- TO ANY LAWYER.

BECAUSE --

BECAUSE IT IS AN ENCROACHMENT OF THE LEGISLATURE ON THE JUDICIAL FUNCTION. ALL RIGHT. WITH REGARD TO THE CAPS AND THE STAGES OF THE CAPS, THAT IS AN ATTEMPT TO SAY THAT THE TRIAL COURT HAS TO PROCEED IN THIS MANNER, AT THIS TIME, IN THIS WAY, AND NO OTHER, BUT THE TRIAL COURT HAS INHERENT POWER TO AWARD COMPENSATION WHEN IT FEELS APPROPRIATE, INDEPENDENTLY OF THESE STAGES OF COMPENSATION.

YOU ARE IN YOUR REBUTTAL TIME, MR. HANLON. MR. DODSON.

MAY IT PLEASE THE COURT. I AM MICHAEL DODSON, APPEARING ON BEHALF OF ROGER MOSS. WITH -- OF ROGER MAAS. WITH ME AT COUNSEL TABLE IS MS. SNURKOWSKI, WHO WILL SPEAK ON BEHALF OF THE COMPTROLLER AND DEFENSE'S CONSTITUTIONAL EIGHT OF THE STATUTE.

CAN WE GET SOME OF THESE THINGS OUT OF THE WAY, TO BEGIN WITH. IT SEEMS AS THOUGH THE PARTIES ARE RECOGNIZING THE APPLICATION OF REMETTA AND THE ANDDATION OF SOME OF THESE -- AND THE APPLICATION OF SOME OF THESE OTHER THINGS THAT COUNSEL HAS PREVIOUSLY MENTIONED. IS THAT, REALLY, GOING TO BE A SUBJECT OF OUR DISPUTE HERE, TODAY, THE MACOMSON AND WHITE AND THE CONTEXT OF THOSE THINGS? IS EVERYONE AGREEING ON THAT, OR AM I NOT CORRECT IN MY ASSUMPTION?

YOU ARE CORRECT IN YOUR ASSUMPTION MUCH THE LEGISLATURE RECOGNIZED THE WHITE DECISION IN ITS STAFFING ANALYSIS, WHEN IT WAS DESIGNING THESE STATUTES, AND RECOGNIZED THAT, IN TRULY EXTRAORDINARY CASES, WHERE THIS FUNDING IS NOT SUFFICIENT THAT, THE TRIAL COURT MAY AWARD ADDITIONAL COMPENSATION TO COUNSEL.

AND WOULD THAT, ALSO, INCLUDE TO VARY THE SCHEDULE, THE TIMINGS, AS WELL?

THERE IS ABSOLUTELY NO INTENT TO MANAGE THE TIMING OF THE TRIAL OR THE POSTCONVICTION RELIEF, THAT THE TRIAL COURT FEELS IS NECESSARY TO DO IT. THIS WAS AN ATTEMPT TO ESTABLISH A BUDGET FOR THESE VARIOUS STAGES, THAT MOST OF THE POSTCONVICTION CASES GO THROUGH. AND TO GIVE A REASONABLE ALLOCATION, SO COUNSEL AND THE TRIAL COURT, WHEN THE TRIAL COURT IS MAKING FEE AWARDS, KNOWS HERE IS A POT OF MONEY THAT YOU CAN WORK WITHIN, IN ORDER TO HANDLE THIS PARTICULAR PART OF THE LITIGATION.

THAT BEING SAID, AND THAT CONCESSION, UNLESS SOMEONE ELSE DISAGREES, WOULD YOU ADDRESS MR. HANNON LON'S -- MR. HANLON'S POSITION, WITH REGARD TO THIS LEGISLATION AND

THIS CONTRACT. IT STEPS DIRECTLY IN AND PROHIBITS A LAWYER FROM MAKING REASONABLE ARGUMENTS OR MAKING ARGUMENTS FOR THE EXTENSION OF THE LAW, AND WHAT IS YOUR RESPONSE TO THAT?

THE CONTRACT DOES NOT PROHIBIT COUNSEL FROM MAKING GOOD FAITH ARGUMENT THAT ARE SUPPORTED BY THE FACTS OR THE LAW. A COURT WILL READ THE STATUTORY LANGUAGE. IT DOESN'T SAY IT IS NOT NEARLY AS BROAD IN THE PROHIBITION AS HAS BEEN REPRESENTED TO THE COURT. THE PURPOSE OF THAT IS TO TRACK THE REQUIREMENTS OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND PROHIBIT FRIVOLOUS, REPRESENTATIVE ARGUMENTS BEING MADE THAT ARE NOT SUPPORTED BY THE FACTS OR THE LAW OF A PARTICULAR CASE.

IS THERE A DIFFERENCE AT ALL, BETWEEN THAT PROVISION AND THE CODE PROVISION,? IF SO, WHAT IS IT?

I DON'T BELIEVE THERE WAS AN INTENDED DIFFERENCE.

IS THERE A DIFFERENCE?

I AM NOT AWARE OF THE DIFFERENCE, YOUR HONOR. IT WAS INTENDED TO HAVE COUNSEL ADHERE TO THE CODE OF PROFESSIONAL RESPONSIBILITY AND PROVIDE GUIDANCE TO THE TRIAL COURT, NOT TO AWARD FEES FOR ARGUMENTS THAT WERE OUTSIDE OF WHAT COUNSEL ARE ALLOWED TO BRING, UNDER THE CODE.

SO IF COUNSEL MADE THESE ARGUMENTS, AND IN SUBMITTING AN INVOICE FOR SERVICE, THE COURT DETERMINES THAT SOME OF THESE ISSUES WERE FRIVOLOUS AND NOT SUPPORTED BY THE FACTS OR THE LAW, THEN, AS TO THAT, THE COURT COULD NOT OR WOULD BE FREE NOT TO AWARD FEES.

EXACTLY, YOUR HONOR. IT IS THESE FEE AWARD DETERMINATIONS ARE MADE BY THE TRIAL COURT. THIS IS NOT SOME BUREAUCRAT, DECIDING WHETHER OR NOT THOSE ARGUMENTS WERE PROPERLY MADE BY COUNSEL. THE PAYMENT PROCEDURE IS FOR COUNSEL HAVING FINISHED ONE OF THESE STAGES, TO PRESENT ITS CLAIM FOR FEES TO THE COMPTROLLER. THE COMPTROLLER HAS TEN DAYS IN WHICH TO REVIEW AND COMMENT ON THE REQUEST FOR FEES. THE TWO DOCUMENTS ARE, THEN, SUBMITTED TO THE TRIAL COURT, FOR THE ENTRY OF AN ORDER BY THE TRIAL COURT, TO THE COMPTROLLER, TO TAKE COUNSEL -- TO PAY COUNSEL FOR THAT PARTICULAR STAGE OF THE PLEADING, SO ALL OF THIS IS DONE UNDER THE SUPERVISION OF THE TRIAL COURT, WHO KNOWS THE CASE AND WHO HAS THE PRIMARY RESPONSIBILITY OF MANAGING THAT CASE.

SO ARE YOU, REALLY, ARGUING TAKE, HERE, THAT -- ARGUING, HERE, THAT THIS IS, REALLY, JUST A LIMIT AGENCY OF WHAT YOU -- A LIMITATION OF WHAT IS GOING TO BE PAID TO COUNSEL AND NOT A LIMITATION ON WHAT COUNSEL CAN DO?

THE INTENTION, HERE, IS TO PROVIDE A FUNDING, FOR THE FIRST TIME, FOR A STATEWIDE CORE OF LAWYERS TO SUPPLEMENT THE CCRC'S. IT IS NOT AN ATTEMPT TO MANAGE THE POSTCONVICTION APPELLATE PROCESS. IT IS TO PROVIDE FUNDS FOR THOSE LAWYERS AND TO PROVIDE --

BUT HOW DOES THAT, REALLY, DIFFER FROM TELLING COUNSEL THAT YOU CAN'T DO THIS, IF COUNSEL KNOWS THAT, TO SPEND HOURS DOING IT, YOU ARE NOT GOING TO GET PAID FOR DOING IT?

COUNSEL KNOW UP-FRONT WHAT THEY ARE GOING TO GET PAID FOR AND AGREE TO IT. THIS IS TO PROVIDE THEM GUIDANCE AND UNDERSTANDING THAT, IN FACT, THIS IS WHAT IS TO BE PAID FOR, AND IT IS UNDER THE SUPERVISION OF THE TRIAL COURT. YES.

ARE YOU SAYING THAT, IF SOMETHING IS NOT ETHICAL, IN OTHER WORDS IF SOMETHING IS THE VIOLATION OF THE CODE OF PROFESSIONAL RESPONSIBILITY, THEN THOSE KINDS OF SERVICES AREN'T GOING TO GET PAID, BUT THAT THAT IS ALL THAT IS INTENDED TO BE THE LIMIT ON WHAT A TRIAL COURT CAN AWARD COMPENSATION FOR?

NO. THERE ARE OTHER RESTRICTIONS AS TO WHAT KINDS OF PROCEEDINGS REGISTRY ATTORNEYS CAN PARTICIPATE IN, FOR INSTANCE.

LET'S TAKE -- LET'S NOT ADDRESS, LIKE, A CIVIL LAWSUIT, BUT IN THE CONTEXT OF THE POSTCONVICTION PROCESS, IS THERE AN ATTEMPT TO FURTHER LIMIT WHAT CAN BE PLED, VERSUS WHAT IS GOING TO GET PAID?

THE INTENT WAS TO LIMIT WHAT CAN BE PLED, ACCORDING TO THIS COURT'S HOLDINGS, AND WHAT IS ETHICAL TO BRING.

LET ME GIVE YOU, RIGHT NOW THERE IS A CASE, LAST YEAR, OUT OF THE U.S. SUPREME COURT, AND RENT I, AND A LOT OF -- APRENDI, AND A LOT OF CASES ARE BEING BROUGHT AND SAYING THAT -- WE HAD ONE THIS WEEK THAT THE CAPITAL SENTENCING IS THE WAY IT IS STRUCTURED, IS A VIOLATION OF APRENDI, THAT WOULD BE A CHANGE IN THE LAW. WOULD THAT BE SOMETHING THAT A REGISTRY COUNSEL WOULD BE PROHIBITED FROM BRINGING, UNDER THE STATUTE?

NOT IF THE TRIAL COURT MAKES THE JUDGMENT THAT THAT WAS A REASONABLE ARGUMENT, TO ARGUE FOR A CHANGE IN LAW, BASED ON THE FACTS AND THE LAW OF THIS COURT, AT THE TIME THE ARGUMENT WAS MADE THIS IS FOR THE JUDGES TO CONTROL, AND IF THE JUDGE FEELS THAT AN ARGUMENT, FOR INSTANCE, THAT FELONY MURDER IS UNCONSTITUTIONAL IN ITS CONCEPT, HAS -- IS A FRIVOLOUS ARGUMENT THAT IS ALREADY REDUNDANT AND HAS ALREADY BEEN MADE, THEN COUNSEL WOULD NOT BE PAID FOR THAT ARGUMENT.

JUSTICE SHAW HAD A QUESTION.

MY UNDERSTANDING OF MR. HANLON'S ARGUMENT IS IT IS BROADER THAN THE APPROACH THAT THE STATE IS ADDRESSING. AS I UNDERSTAND HIS ARGUMENT, IT IS THAT THE LEGISLATURE WANTS, ONCE IT -- ONCE IT DECIDES TO FUND THESE OFFICERS, THEN IT CANNOT DICTATE, BY ITS FUNDING STRUCTURE, HOW THE LAWYER SHOULD REPRESENT THE CLIENT. I THINK THAT --

IT CAN CHANNEL THE KINDS OF CASES THAT COUNSEL ENGAGES IN. FOR INSTANCE, WHEN THIS COURT ADDRESSED THAT ISSUE IN BUTTERWORTH VERSUS KENNY CASE, REGISTRY COUNSEL, FOR INSTANCE, CAN'T GO TO FEDERAL COURT AND FILE CIVIL RIGHTS CASES AND EXPECT TO GET COMPENSATED UNDER THIS, SO TO THAT DEGREE, THERE ARE RESTRICTIONS ON WHAT COUNSEL CAN DO. BUT IT IS -- THE STATUTE IS NOT INTENDED TO MANAGE THE ACTIVITIES OF COUNSEL, WITHIN THE SCOPE OF WHAT THIS COURT BELIEVES IS GOOD ADVOCACY, IN THE POSTCONVICTION PROCESS.

BUT ISN'T THE BOTTOM LINE IS THAT THE LEGISLATURE IS SAYING, ALL RIGHT, WE ARE FUNDING THIS, BUT THIS IS HOW YOU SHALL PRACTICE LAW.

NO. THE LEGISLATURE --

REPRESENTING THESE PEOPLE.

NO, YOUR HONOR. THE LEGISLATURE IS SAYING WE HAVE FUNDED A PANEL, WHOSE PURPOSE IT IS TO STAND IN THE SHOES OF THE CCRC. THEY ARE TO BE BROUGHT IN, WHEN CCRC HAS A CONFLICT OR ARE AN OVERFLOW, AND -- OR AN OVERFLOW, AND THOSE ARE THE KINDS OF

LIMITATIONS THAT THIS STATUTE IS INTENDED TO IMPOSE ON COUNSEL, AND WILL PAY FOR WHAT YOUR TRIAL COURTS DECIDE ARE GOOD ARGUMENTS AND WILL NOT PAY FOR WHAT YOUR TRIAL COURTS WILL DECIDE ARE NOT GOOD ARGUMENTS.

BE MINEFUL OF YOUR TIME.

YES, YOUR HONOR.

IF THAT IS THE CASE, WHAT ABOUT THE ARGUMENT THAT CCR COULD CHALLENGE A PRIOR CONVICTION BUT REGISTRY COUNSEL CANNOT, UNDER THIS CONTRACT?

THIS CONTRACT DOES NOT PAY FOR COUNSEL TO GO OUT-OF-STATE AND, FOR INSTANCE, AND CHALLENGE AN OUT-OF-STATE CONVICTION. I AM NOT SURE WHETHER CCR'S ARE FUNDED TO DO THAT OR NOT. MY TIME IS UP. WHAT I WANT TO IMPRESS ON THE COURT IS THE REGISTRY IS A NEW SYSTEM OF, BOTH, MAKING COUNSEL AVAILABLE TO THE TRIAL COURTS, FOR POSTCONVICTION RELIEF, AND FOR FUNDING. AS IT HE INVOLVES, THE LEGISLATURE -- AS IT EVOLVES, THE LEGISLATURE HAS SHOWN FLEXIBILITY IN MODIFYING, FIRST OF ALL, THE AMOUNT OF MUST NOT THAT I IS AVAILABLE AND HAS RESPONDED TO -- MONEY THAT IS AVAILABLE AND HAS RESPONDED TO CONCERNS THAT THE REGISTRY HAS BROUGHT, WITH REGARD TO CAPITAL CASES, FOR INSTANCE, AND CONTINUES TO DO THAT, AS JUSTICE HARDING OBSERVED, THE LEGISLATURE AND THE COURTS ARE IN THE SAME BOAT, AND I THINK THE REGISTRY IS AN EXAMPLE WHERE WE ARE ROGUE IN THE SAME DIRECTION. THANK YOU VERY -- WHERE WE ARE ROWING IN THE SAME DIRECTION. THANK YOU VERY MUCH.

MS. SNURKOWSKI IS GOING, I THINK -- HOW MUCH TIME DO THEY HAVE LEFT MARSHAL SOME THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS CAROLYN SNURKOWSKI. I THINK I WOULD LIKE TO START OFF BY REMINDING EVERYONE WHAT WAS THE PURPOSE OF PUTTING THE REGISTRY COUNSEL IN PLACE. THAT WAS TO TAUPE THE DEFICIENCIES THAT EXISTED BECAUSE THE CCR'S WHERE THERE WAS A CONFLICT OF COUNSEL OR, IN FACT, NO COUNSEL HAD BEEN AVAILABLE BECAUSE OF OTHER REASONS, AND THAT IS, IN FACT, WHAT THE LEGISLATURE INTENDED IN PUTTING IT TOGETHER. I THINK WE, NEXT, HAVE TO LOOK AT WHAT IS THE PURPOSE OF CCR, BECAUSE WHAT IS THE PURPOSE OF CCR DIRECTLY TRANSLATES TO WHAT THE PURPOSE OF THE REGISTRY COUNSEL, BECAUSE THEY STAND IN THE SHOES OF CCR. AND, OF COURSE, 277.001 IS TO PROVIDE THE COLLATERAL REPRESENTATION OF ANY PERSON CONVICTED AND SENTENCED TO DEATH IN THIS CASE, SO THAT COLLATERAL LEGAL PROCEEDINGS TO CHALLENGE ANY FLORIDA CAPITAL CONVICTION AND SENTENCE MAY BE COMMENCED IN A TIMELY MANNER, AND SO AS TO ASSURE THE PEOPLE OF THIS STATE THAT THE JUDGMENTS OF THIS COURT MAY BE REGARDED WITH FINALITY, WHICH THEY ARE ENTITLED, IN THE INTEREST OF JUSTICE. AND THAT IS WHAT THIS WHOLE SENTENCING DILEMMA HAS CAUSED US. WE HAVE, NOW, A SYSTEM IN PLACE, WHERE WE HAVE CCR COMING INTO POSTCONVICTION LITIGATION AND SAYING THEY CAN'T DO IT, FOR ONE REASON OR ANOTHER, EITHER CASELOADS ARE TOO HEAVY OR THERE IS A CONFLICT OF INTEREST, AND WE ARE OUT THERE, NOW, WAITING TO SEE WHO IS GOING TO TAKE UP THE CUDGEL, AND IT IS TAKEN UP BY THE REGISTRY COUNSEL. THEY HAVE PUT INTO PLACE A PROCESS. THEY HAVE PUT INTO PLACE A PAYMENT SCHEME. THERE IS NO REQUIREMENT THAT ONE FOLLOW THE OTHER, WITH REGARD TO THE PAYMENT SCHEME. IT IS JUST AN EXPLANATION OF WHAT DOLLARS WILL OCCUR, AS A RESULT OF COMPLYING WITH OR, IN FACT, COMPLETING CERTAIN STAGES OF THE LITIGATION.

COULD YOU RESPOND TO JUSTICE QUINCE'S INQUIRY, WITH REGARD TO ARE THERE ANY ITEMS, ANYTHINGS THAT REGISTRY COUNSEL CANNOT DO THAT CCRC COUNSEL CAN DO, AND DO WE HAVE MORE LIMITATIONS IN THE STATUTE THAN CCRC FUNDING OR OPERATION HAS?

I THINK IT WAS CONTEMPLATED THAT THEY WOULD HAVE THE SAME SAMEABILITY AS CCR -- THE

SAME ABILITY AS CCR HAS. NOW, IN ANSWERING THAT QUESTION, I WOULD SUGGEST TO THE COURT THAT THERE HAVE BEEN EXPANSIONS OF WHAT COUNSEL MAY DO, BY CCR, IN A GIVEN CASE, AND THERE IS NO MECHANISM BY WHICH TO SUGGEST THAT THAT CEASE AND DESIST THE, BUT THAT IS NOT TO SAY THAT THE ROLE THAT IS GIVEN TO THE REGISTRY COUNSEL IS NOT IDENTICAL TO THAT OF CCR, SO, FOR EXAMPLE, THE JOHNSON VERSUS MISSISSIPPI ISSUE. IF YOU RECALL, JOHNSON VERSUS MISSISSIPPI DOES NOT TALK ABOUT A LAWYER GOING OUT TO ANOTHER STATE, PARTICULARLY NEW YORK, AND FINDING OUT WHETHER THERE ARE PRIOR CONVICTIONS. JOHNSON VERSUS MISSISSIPPI TALKS ABOUT THE FACT THAT THERE MAY BE A CONVICTION OUT THERE AND, IN FACT, THERE WAS, AND THAT IS SUBSEQUENTLY, AFTER THE SENTENCING HAD BEEN IMPOSED, HAD BEEN DETERMINED NOT TO BE VALID, AND A CHALLENGE WAS MADE TO THAT, AND THAT THE FACT THAT YOU HAVE AN IMPROPER CONVICTION CANNOT BE PART OF THE FACTOR AND SHOULD NOT BE PART OF THE FACTOR IN CONSIDERATION OF THE APPROPRIATENESS OF THE DEATH PENALTY, SO THAT IS A RED HERRING, IN THE SENSE OF CAN A LAWYER DO. THAT A LAWYER CAN ALWAYS DO. THAT THEY CAN ALWAYS CHALLENGE IT, AND I MIGHT ADD, WE ARE FORGETTING WHERE THE ROLES OF ALL OF THESE PLAYERS ARE. FOR EXAMPLE -- ANOTHER ISSUE IS NOT WHETHER THEY CAN DO IT. THE RACIAL EW IS WHETHER THEY CAN BE PAID -- THE ISSUE IS WHETHER THEY CAN BE PAID TO IT, IS WHAT YOU ARE GETTING DOWN TO, AND AT THE SAME TIME CCR IS FUNDED TO DO THAT.

I DON'T THINK THEY ARE FUNDED TO DO. THAT I THINK WHAT THEY ARE FUNDED TO DO IS EXACTLY WHAT THE INTENT OF LEGISLATURE IS TO THEM, AND THAT IS TO --

ARE YOU SUGGESTING THAT, IN FACT, THEY DO THAT, ALTHOUGH THEY ARE NOT FUNDED TO DO IT. IS THAT WHAT YOU ARE TELLING ME?

I WOULD SUGGEST THAT, AND I WOULD, ALSO, SUGGEST THAT THEY HIRE COUNSEL, WITHIN THEIR ABILITY UNDER THE PARTICULAR STATUTE, TO HIRE COUNSEL AND PAY THEM \$100 AN HOUR AND IN FACT THEY DON'T DO THAT, BUT WHAT THEY DO IS HIRE THEM AS CONSULTANTS AND THEN GO OUT AND GET THE INFORMATION, SO THEY ARE HIRING OTHER PEOPLE TO DO OTHER THINGS. THAT DOESN'T MEAN TO SAY THAT THAT CORE YOU GET THE CURRENT -- CORE UPTS THE CURRENT SYSTEM THAT -- CORRUPTS THE CURRENT SYSTEM THAT WE ARE LOOKING ADD UNDER SCRUTINY, AND WHAT I AM SUPPOSED TO BE UP HERE FOR IS THE CONSTITUTIONALITY OF THE REGISTRY STATUTE. THE STATE WOULD SUBMIT, FIRST OF ALL, THAT THAT IS NOT WHAT IS SUBMITTED TO THE COURT. THERE ARE NO FACTS IN THIS CASE AND THERE IS NO BASIS UPON WHICH THIS COURT CAN TAKE UP THE MATTER. IN FACT, THE TRIAL COURT --

IS A PART OF YOUR ARGUMENT, ALSO, THAT MR. OLIVE DOESN'T HAVE STANDING IN THIS CASE?

ABSOLUTELY. ABSOLUTELY. THIS INDIVIDUAL HAS NOT ENTERED INTO A CONTRACT, AND I MIGHT ADD, AS A SEGUE TO THAT, THERE ARE OTHER REMEDIES, BEFORE COMING BEFORE THIS COURT. FIRST OF ALL, THE QUESTION IS, IS THE DISTRICT COURTS OR ARE THE DISTRICT COURTS GOING TO MAKE DETERMINATIONS WITH REGARD TO THE FEES? WE HAVE CASES ALREADY OUT THERE, THAT ARE STARTING THROUGH THE PIPELINE, WHERE REGISTRY COUNSEL HAS DONE THEIR JOB, GONE THROUGH THE PROCESS, HAS MADE ASSERTIONS THAT THEY ARE ENTITLED TO EXCESS FEES, BASED ON, FROM THE STATUTE, AND THEY ARE IN THE PROCESS AS WE SPEAK. IN FACT, WE HAVE HAD COUNSEL GO TO THE COMMISSION ON CAPITAL CASES AND REPORT TO THEM, WHICH IS WHAT THEIR FUNCTION IS, TO HEAR PUBLIC INPUT AND TO SEE HOW THE SYSTEM CAN BE MODIFIED. GO TO THEM AND SAY, YOU KNOW WHAT? THERE IS A PROBLEM HERE. THERE IS NOT ENOUGH MONEY IN THIS SECTION OR THERE IS NOT ENOUGH MONEY IN THAT SECTION. DID MR. OLIVE GO AND DO THAT? NO. DID HE GO TO THE COMMISSION AND SAY WHO IS SUPPOSED TO BE THE OVERSIGHT OF ALL OF THIS? DID HE GO THERE AND ASK THEM IF THERE WAS ANY LIMITATIONS WITH REGARD TO HIS REPRESENTATION? NO. THE POINT BEING THAT THERE ARE OTHER AVAILABLE ADMINISTRATIVE, I HATE TO USE THAT WORD, BECAUSE IT IS NOT, REALLY, APPROPO.

DID I UNDERSTAND THE STATE TO AGREE THAT MR. OLIVE IS NOT AN ATTACK ON THE FACIAL CONSTITUTIONALITY? DO YOU AGREE WITH THAT?

BASED ON THE PLEADINGS IN THIS CASE, I DO NOT BELIEVE THAT HE, BELOW, WAS FACIALLY ATTACKING. HE WAS TALKING HE WANTED DECLARATORY RELIEF, WITH REGARD TO WHAT HIS ROLE WAS, WHETHER HE WAS BEING RESTRICTED, WITH REGARD TO REPRESENTATION OF MR. MUNGIN, AND, IN FACT, HE HAS NOT SAID, TODAY, THAT HE WANTS THE STATUTE TO BE DECLARED UNCONSTITUTIONAL. THAT WOULD BE THE WORST THICK THAT WOULD HAPPEN. HE WANTS -- WORST THING THAT WOULD HAPPEN. HE WANTS TO HAVE THE ABILITY TO COME IN AND REPRESENT THESE INDIVIDUALS, WITHOUT A CONTRACT, CONTRARY TO THE STATUTE, AND THEN TO BE ABLE TO ASSESS WHAT HIS COSTS AND HIS FEES ARE, WITHOUT RESTRICTIONS.

BUT AS SOON AS HE SIGNS THE CONTRACT, THEN THE DEFENSIVE ARGUMENT IS, WELL, YOU HAVE AGREED TO THIS AND THIS IS YOUR CONTRACT.

BUT IT IS KNOWINGLY ENTERING INTO T THAT'S RIGHT.

BUT, AGAIN, IT IS A CATCH-22. LET'S FACE REALITY HERE. IT IS A CATCH-22, AND WE HAVE GOT TO GET SOME OF THESE ISSUES RESOLVED. YOU HAVE GOT A CONTRACT AND A STATUTE AND A BANK OF LAWYERS, APPARENTLY, TO WORK ON THIS, AND IF YOU SIGN THE CONTRACT AND THEN THE DEFENSE SAYS, WELL, YOU SIGNED THE CONTRACT. TOO BAD, THEN HOW DO WE HAVE RESOLVE IT?

THE IRONY OF IT, I THINK THAT IS THE CASE THAT YOU HEARD SEVERAL MONTHS AGO, IN SHEPPARD VERSUS CITY OF JACKSONVILLE.

THEY HAD ALREADY DONE THE WORK THOUGH. THAT IS A DIFFERENT SCENARIO. THEY HAD ALREADY DONE THE WORK AND THEY WENT BEFORE THE JUDGE AND ASKED FOR THE FEES AND THEY WERE DENIED, AND THERE WAS NOT THAT WRITTEN CONTRACT, REALLY.

BUT THERE WAS AN ISSUE. THERE IS NO RIGHT OF MR. OLIVE TO THIS CONTRACT.

WELL, I UNDERSTAND THAT. BUT --

THERE IS NO RIGHT TO A SPECIFIC DEFENDANT TO HAVE -- MR. OLIVE AS HIS LAWYER.

BUT, AGAIN, HE CANNOT ENTER INTO THE CONTRACT, BECAUSE YOU ARE GOING TO FACE THE SAME KIND OF SITUATION. HOW ARE YOU GOING TO GET AROUND THAT PROBLEM? AS SOON AS HE ENTERS THE CONTRACT, IT IS THAT YOU HAVE KNOWINGLY ENTERED INTO THIS CONTRACT. THERE IS NO DISPUTE. THERE IS NO ISSUE. THAT IS THE DEFENSE. SO YOU COULD NEVER REACH THE ISSUE, IS WHAT MY POINT IS.

THAT IS THE VERY PROBLEM OF HOW THIS CASE IS BEFORE THE COURT. I MEAN THE "HOW YOU RESOLVE IT", IS IF YOU HAVE A BASIS UPON WHICH TO SAY THERE IS SOMETHING WRONG WITH THE CONTRACT. WE DON'T HAVE THAT HERE. ALL WE HAVE IS SPECULATION, WITH REGARD TO WHAT MR. OLIVE HAS SUGGESTED IS WRONG WITH THE STATUTE.

DO YOU AGREE -- LET ME GO BACK TO ONE THING. ARE THERE THINGS THAT REGISTRY COUNSEL IS PROHIBITED FROM DOING THAT CCR IS NOT PROHIBITED FROM DOING?

I SAY NO.

OKAY. AND THEN IS -- SO YOU WILL AGREE THAT COUNSEL IS NOT PROHIBITED FROM ARGUING FOR EXPANSION, MODIFICATION, AND REVERSAL OF EXISTING LAW.

THEY ARE ABLE TO ARGUE THOSE ISSUES, WHICH THEY FEEL COMPELLED THAT ARE NOT FRIVOLOUS OR IN ANY WAY FRIVOLOUS. THAT IS THE BOTTOM LINE HERE.

ISN'T THAT, WHAT YOU ARE SAYING, IS THAT A LAWYER, IS THAT ALL THIS KRAT IS SAYING IS -- CONTRACT IS SAYING IS THAT A LAWYER MUST ADHERE TO THE CANON, THE CODE OF CANONS OF PROFESSIONAL RESPONSIBILITY, IN ENTERING THIS CONTRACT.

TO SOME DEGREE, CORRECT.

WOULDN'T THAT BE A BETTER WAY TO SAY IT?

NO, BECAUSE THERE IS ANOTHER COMPELLING, AND THAT IS WHAT THIS COURT HAS DETERMINED HIS CASE LAW, WITH REGARD TO THE DECISIONS AND ISSUES. I MEAN, THERE COMES A POINT IN TIME THAT YOU SEE THE SAME -- YOU SEE IT ALL THE TIME. WE SEE IT ALL THE TIME, AS FAR AS LITIGANTS, WHERE, IN A CAPITAL LITIGATION, THERE WILL BE 25 ISSUES, AND TWENTY OF THOSE ISSUES WILL BE REPRESENTATIVE, JUST TO MAINTAIN THIS ISSUE. NOW, IF THAT IS COUNTERED A FRIVOLOUS ISSUE, THEN I SAY THEY PROBABLY SHOULDN'T BE DOING THAT, BUT THE BOTTOM LINE IS NO ONE HAS CHALLENGE THEM, WITH REGARD TO THAT, AND, AGAIN, I THINK THERE IS A QUANTITATIVE DIFFERENCE BETWEEN WHAT YOU PAY FOR AND WHAT THEY ARE SAYING THE KIND OF WORK THEY HAVE TO DO, WHICH IS HOW THIS CASE STARTED.

MS. SNURKOWSKI, YOUR TIME IS UP. THANK YOU VERY MUCH. MR. HANLON.

I WANT TO CLARIFY A COUPLE OF THINGS ABOUT MR. OLIVE AND --

MR. HANLON, LET ME INTERRUPT YOU JUST FOR A SECOND, AND JUSTICE SHAW HAD AN ADDITIONAL QUESTION FOR THE STATE, ON A FACTUAL MATTER.

JUST TRYING TO HAMMER DOWN WHETHER MR. OLIVE'S NAME IS ON THE LIST.

YES.

AS FAR AS THE STATE IS CONCERNED.

YES. HIS NAME IS ON THE LIST.

OKAY.

THANK YOU. THANK YOU, MR. HANLON.

TO CLARIFY THIS ISSUE, THERE HAS BEEN A LOT OF TALK, HERE, TODAY, ABOUT WHAT THE LEGISLATURE INTENDED OR DIDN'T INTEND. WHAT MR. OLIVE, WHEN HE IS LOOKING AT THAT CONTRACT, DOESN'T HAVE THE BENEFIT OF STATEMENTS OF COUNSEL, ET CETERA, MADE IN HEARING. HE IS LOOKING AT THE CONTRACT. LET'S LOOK AT THE STAGES AND CAPS ISSUE. THAT CONTRACT SAYS THESE WILL BE THE EXCLUSIVE MEANS, OKAY. NOW. MR. OLIVE SAYS, WHEN HE GOES INTO THE TRIAL COURT, I AM IN DOUBT ABOUT THAT, AND I WILL TELL YOU WHY I AM IN DOUBT ABOUT THAT. BECAUSE THE LEGISLATURE HAS PROVIDED THAT, WITH REGARD TO EXPENSES, INCLUDING EXPERT FEES, THAT CAN BE, YOU CAN EXCEED THE CAPS, IN EXTRAORDINARY CASES.

BUT IT DOESN'T SAY THAT.

IF THIS STATUTE IS NOT FACIALLY UNCONSTITUTIONAL, WE HAVE A SITUATION HERE, WHERE HE DOES NOT HAVE -- HE ONLY HAS HYPOTHETICALS OF WHAT MIGHT HAPPEN, IN CONJUNCTION WITH HIS REPRESENTATION OF MR. MUNGIN, AND HE CAN -- HE DOES NOT HAVE ANY ASSERTIONS

THAT HE CANNOT DO WHAT HE IS CONTRACTED IT DO, BECAUSE OF ETHICAL VIOLATIONS. AND SO IF IT IS NOT A FACIAL, AND WE CANNOT ATTACK IT AS APPLIED, WHAT CAN WE DO?

YOU CAN FIND THAT THE REQUIREMENT IN HERE, WHICH I SUBMIT, IF YOU READ IT, WILL SHOW YOU THAT IT PROHIBITS A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION OR REVERSAL OF EXISTING LAW, THAT THAT IS INCONSISTENT WITH THE RULES OF PROFESSIONAL CONDUCT, AND A LAWYER CANNOT ENTER INTO SUCH A CONTRACT.

BUT WE DON'T KNOW THAT HE HAS -- THAT HE HAS ENCOUNTERED THAT.

WHAT WE ARE TRYING TO SAY, HERE, REGARDLESS OF WHETHER HE HAS ENCOUNTERED IT, HE CANNOT ENTER INTO A ADVANCE AGREEMENT TO WAIVE, AN ADVANCE AGREEMENT TO DO, TO ACT IN A WAY WHICH IS UNETHICAL, AND THAT IS WHY YOU SEEK THE DECLARATORY JUDGMENT. HE DOESN'T NEED TO ENCOUNTER IT, YOUR HONOR. HE NEEDS TO PROTECT HIMSELF FROM A GREEK.

FOR INSTANCE, THOUGH -- FROM AGREEING.

FOR INSTANCE, THOUGH, IF YOUR COLLEAGUES AT THE OTHER TABLE ARE SAYING, IF THE WORD "FRIVOLOUS" IS, REALLY, INTENDED TO BE THE CONTROLLING ADJECTIVE, YOU WOULD AGREE, UNDER THE CODE OF CONDUCT, THAT COUNSEL, CERTAINLY, IS NOT AUTHORIZED OR OBLIGATED TO DO ANYTHING FRIVOLOUS, AND SO IF THE WORD "FRIVOLOUS", AS HAS BEEN SUGGESTED HERE, IS TAKEN AS THE ADJECTIVE, THE CONTROLLING ADJECTIVE, TO ALL OF THIS CONDUCT, THEN THERE WOULD NOT BE A PROBLEM. IS THAT NOT CORRECT?

THAT IS EXACTLY RIGHT. THE PROBLEM IS THE WORD FRIVOLOUS IS IN THE DISJUNCTIVE, AND THE STATUTE --

I UNDERSTAND, BUT WE HAVE HAD A PRETTY CANDID DISCUSSION HERE, TODAY, IN TERMS OF FROM WASN'T, REALLY, ANY -- IN TERMS OF THERE WASN'T, REALLY, ANY INTENT TO PROHIBIT SOMEBODY FROM CARRYING OUT THEIR OBLIGATIONS, UNDER THE CODE OF ETHICS OF LAWYERS IN THE ADVERSARY SYSTEM, SO IT LOOKS LIKE THERE IS A LOT OF ROOM, IN HERE. YOU DON'T, AND I DO HAVE SOME CONCERN, YOU ARE NOT FUNDAMENTALLY COMPLAINING ABOUT THE FACT THAT THE LEGISLATURE DOESN'T HAVE THE RIGHT TO ORGANIZE THIS SYSTEM IN SOME WAY.

THAT'S RIGHT.

AND PROVIDE A STRUCTURE, DO YOU?

AS LONG --

I MEAN, IN OTHER WORDS, WHAT I AM SAYING THERE IS, OBVIOUSLY WITH CCR OR WHATEVER, THEY ARE GOING TO HAVE TO SAY, WELL, SOME LAWYERS ARE GOING TO GET \$40,000 TO START AND SOME OF THEM ARE GOING TO BE PAID \$50,000, BUT WE DON'T EXPECT THOSE LAWYERS, AFTER DOING THAT, TO COME BACK INTO COURT AND SAY, WELL, I SHOULD HAVE GOTTEN \$100,000 TO START OR, YOU KNOW, THERE HAS GOT TO BE SOME ACCOUNTABILITY AND ORGANIZATION AND WHATEVER. YOU ARE JUST SAYING, INSOFAR AS IT VIOLATES THE OATH OF A LAWYER AND THE CODE OF ETHICAL CONDUCT, THAT THE STATUTE EITHER HAS TO BE HARMONIZED OR THAT IT VIOLATES THE OBLIGATION OF A LAWYER. IS THAT --

THAT IS PAECKT EXACTLY WHAT I AM SAYING, YOUR HONOR, AND THERE ARE POINTS IN THIS -- THAT IS EXACTLY WHAT I AM SAYING, YOUR HONOR, AND THERE ARE POINTS IN THIS STATUTE AND POINT IN THIS CONTRACT WHICH NEED TO BE HARMONIZEED AND DO NOT NEED TO WASTE THE DEVELOPMENT OF A FACTUAL RECORD. THAT STATUTE IS BE LEFT, RIGHT NOW, OF -- IS BEREFT, RIGHT NOW, OF THE STATEMENT THAT HAS BEEN MADE HERE THAT THERE WAS NO

INTENT TO HAVE ANYTHING DIFFERENT THAN THE RULES OF PROFESSIONAL CONDUCT, WITH RESPECT TO FRIVOLOUS OR NONFRIVOLOUS PLEADINGS, THAT ARGUE LAW THAT IS DEVELOPING LAW.

THANK YOU, MR. HANLON. I THINK YOUR TIME IS UP. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS MATTER. THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.