IN THE SUPREME COURT OF FLORIDA

MARK EVAN OLIVE,

Appellee/Cross-Appellant,

vs.

Case No: SC06-835
LT Case No: 2003-CA-000291

ROGER MAAS, et al.,

Cross-Appellees.
_____/

ANSWER BRIEF OF CROSS-APPELLEE TOM GALLAGHER, AS CHIEF FINANCIAL OFFICER

Richard T. Donelan, Jr.
Attorney for Cross-Appellee
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, FL 32399-4247
(850)413-3010
Fax (850) 413-3029

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

PRELIMINARY STATEMENT

The following signals and abbreviations will be employed in this Answer Brief:

Cross-Appellee Tom Gallagher, in his official capacity as Chief Financial Officer of the State of Florida and agency head of the Florida Department of Financial Services will be referred to as "the CFO." The Florida Department of Financial Services will be referred to as "the Department."

Cross-Appellant Mark Evan Olive will be referred to as "Mr. Olive." Cross-Appellee Roger R. Maas in his official capacity as Executive Director of the Commission on Capital Cases will be referred to as "the Executive Director." The registry of counsel compiled and maintained by the Executive Director pursuant to Section 27.710, Florida Statutes, and compensated by the CFO through the Department pursuant to Section 27.711, Florida Statutes, will be referred to as "the registry program."

References to the record on appeal are indicated by (R-) followed by the page number to which citation is made. Unless otherwise indicated, all references to Florida Statutes are to Florida Statutes (2006). Pursuant to Fla. R. App. P. 9.210(c), no Statement of the Case and of the Facts is included in this Answer Brief.

SUMMARY OF ARGUMENT

I. Mr. Olive's standing claim is ostensibly founded on the notion that, but for the enactment of Section 27.7002, Florida Statutes (2003), he would have executed a contract with the Chief Financial Officer and undertaken to represent a death-sentenced inmate while receiving payment from the State of Florida. Because of Mr. Olive's unsupported allegation as to unspecified defects associated with "the Contract," that is, the agreement registry lawyers must sign with the CFO, the CFO has been compelled to participate in years of litigation advanced by Olive for a quixotic purpose: to bring down the registry program of Chapter 27, Part IV, Florida Statutes, because it pays insufficient fees to death penalty lawyers. Mr. Olive's arguments in opposition to the existence of the registry program are repugnant to his claim that his standing is founded on an actual desire to participate in the program. The Court should examine whether Mr. Olive places untoward reliance on its original Olive v. Maas opinion, *supra,* as the foundation of his standing to bring a declaratory judgment action aimed solely at destroying a voluntary program with which he disagrees.

II. It is apodictic that courts should, if at all possible, construe a statute to be constitutional. Instead, Mr. Olive advances a construction of Section 27.7002, Florida Statues, which is deliberately perverse, directly aimed at

causing an unreasonable result: the destruction of the registry program established by Chapter 27, Part IV, Florida Statutes. Mr. Olive claims that it is impermissible to construe Section 27.7002, Florida Statutes, in any way other than as a literal prohibition of the expenditure of state funds to pay extra compensation to registry counsel in accordance with Olive v. Maas. Mr. Olive attacks the right of the Legislature to restrict state payment to individual registry counsel to a level deemed appropriate by the Legislature. He would transfer to the court system the authority to establish payment levels for lawyers appointed to represent capital defendants in post-conviction challenges to their sentences, presumably at unlimited levels. His proposed resolution of a claimed violation of the separation of powers doctrine–judicial appropriation– would be a clear encroachment on the powers of the Legislative branch and itself a violation of the doctrine. The Department's constitutionally sound interpretation of Section 27.7002(5), adopted by the trial court below in the order on review, honors both the legislative "prerogative of the purse" and the judicial authority to ensure justice when it pays registry counsel based on trial court orders entered in accordance with Olive v. Maas. If the Court now determines that the Department's interpretation of Section 27.7002 is incorrect, however, the Department will comply with the decision of the Court.

III. This Court has expressly declined to recognize a constitutional right to postconviction counsel in capital cases. Mr. Olive claims that the Court must recognize such a right now because of a supposed "near-crisis level of ineptitude" on the part of registry attorneys caused by their low rate of remuneration. For the first time on appeal Mr. Olive claims that "a considerable body of data and analysis"—which body Olive never presented to the trial court below, demonstrates this, but his claim is not proven. That a presumably well-qualified registry lawyer misses a filing deadline is not caused by insufficient state remuneration.

Sound jurisprudential reasons support the refusal of the Court to declare a constitutional right to postconviction counsel in capital cases. Whether a death-sentenced inmate is effectively represented in postconviction proceedings has nothing whatsoever to do with whether reversible errors actually occurred in the conviction or sentencing of the inmate. Moreover, the application of the constitutional concept of effective assistance of counsel to the postconviction context would create an endless loop of successive "ineffective assistance of counsel" claims. Given the State of Florida's provision of a statutory right to post conviction counsel in capital cases, it is simply not necessary for this Court to establish a constitutional foundation for that statutory right.

STANDARD OF REVIEW

The standard of review for issues of law in a declaratory judgment order is *de novo*. See Volusia County v. Aberdeen at Ormond Beach, 760 So. 2d 126 (Fla. 2000).

ARGUMENT

I. MR. OLIVE ONLY HAS STANDING BECAUSE OF THE OPERATION OF THE DOCTRINE OF LAW OF THE CASE.

In this protracted litigation, initiated in 1999, Mr. Olive has been awarded standing to obtain a declaratory judgment with respect to his rights under the registry program established in Chapter 27, Part IV, Florida Statutes. *See* Olive v. Maas, 811 So. 2d 644 (Fla. 2002) (hereafter referred to as "Olive v. Maas"). Mr. Olive's standing claim is ostensibly founded on the notion that, but for the enactment of Section 27.7002, Florida Statutes (2003), he would have executed a contract with the Chief Financial Officer and undertaken to represent a death-sentenced inmate while receiving payment from the State of Florida. See Amended Complaint (R-203-207). The original trial judge below, however, noted that Mr. Olive had already received a declaration as to his compensation rights from this Court in Olive v. Maas and correctly discerned that Mr. Olive's professed concern for his personal rights under Chapter 27, Part IV, was merely a stalking horse for his real aim: to obtain the complete invalidation and elimination of the registry program. In dismissing Mr. Olive's Complaint for Declaratory Judgment, the trial judge found that Mr. Olive wanted a declaration that "the Registry Act and the Contract violate the separation of powers doctrine of

Article II, Section 3, Florida Constitution." With complete accuracy, the trial judge went on to conclude:

> He does not seek a declaration that only a part of the Registry Act is in violation of the Florida Constitution. He seeks a judicial declaration that the *entire* registry act, as contained in Chapter 27, Florida Statutes, violates the separation of powers doctrine of Article II, Section 3, Florida Constitution. He does not allege the existence of any justiciable controversy pertaining to such separation of powers issue, nor does his Amended Complaint allege an actual present need for the declaration sought.

(R-255-256)(emphasis added).

Cross-Appellee is, of course, aware that the First District Court of Appeal reversed the trial court's dismissal with prejudice of the Amended Complaint and allowed the entry of the order on review. *See* Olive v. Maas, 911 So. 2d 837 (Fla. 1st DCA 2005). But the First District completely ignored that the Department, in accordance with this Court's ruling in the original Olive v. Maas case, has regularly paid registry counsel more than the statutory limits on fees when ordered to do so by trial courts. There certainly was no "need" for Mr. Olive to be told this by a judge of the Second Judicial Circuit. In his Initial Brief here, however, Mr. Olive asserts that the order on review "erroneously adopted the CFO's position" on this issue. See Olive Initial Brief, at p. 17.

With respect to "the Contract," that is, the contractual agreement between the CFO and registry counsel required by Section 27.710(4),

Florida Statutes, neither the Amended Complaint nor the order on review identify any particular provision of "the Contract" that would–even arguably–adversely affect Mr. Olive or violate organic law in any way. The Amended Complaint contains no allegation suggesting that the CFO either actually or potentially created an adversarial or antagonistic relationship with Mr. Olive. There is no allegation that the CFO has threatened to do or not do anything in connection with Mr. Olive's status, rights, or responsibilities as a member of the registry program. There is no allegation that the CFO ever attempted in any way to interfere with the inclusion or retention of Mr. Olive on the registry. There is no allegation of any present controversy over payment by the CFO to Mr. Olive for services rendered under a registry contract. There is no allegation of any potential controversy over payment by the CFO to Mr. Olive that is based on any "present, ascertained or ascertainable state of facts." See May v. Holley, 59 So.2d 636 (Fla. 1952). Consequently, it is not surprising that Mr. Olive's Initial Brief here does not identify any specific provision of "the Contract" which he claims to be unconstitutional.

By dint of Mr. Olive's unsupported allegation as to unspecified badness associated with "the Contract," the CFO has been compelled to participate in years of litigation advanced by Olive for a quixotic purpose:

to bring down the registry program of Chapter 27, Part IV, Florida Statutes, because it pays insufficient fees to death penalty lawyers. The CFO understands that he may lawfully be compelled to participate in a declaratory action which seeks to dispel a counsel's bona fide uncertainties as to his or her rights under the registry program. Mr. Olive's previously professed uncertainties as to compensation under the registry program were–or should have been–resolved by this Court's original Olive v. Maas opinion, as Judge Smith correctly found in his dismissal of Mr. Olive's Amended Complaint for declaratory judgment. But there is no "need" for the CFO to be compelled to participate in a declaratory action, as here, whose sole aim is the elimination of the registry program itself.

While paying the scantest of lip service to the upholding of the conclusion of the order on review that registry lawyers may ask for more money without being immediately thrown off the registry, the center of gravity of the Olive Initial Brief is an attack on any interpretation of Chapter 27, Part IV, Florida Statutes, that would sustain the registry program. *See, e.g.*, Olive Initial Brief at pp.17-19. This Court should not countenance a party's "false flag" invocation of Chapter 86 jurisdiction as an expedient for that party to raise issues for which that party has no standing. Mr. Olive professes that this Court's original Olive v. Maas opinion allows him

permanent standing to assault the constitutionality of the registry program. *See* Olive Initial Brief at p. 13-16. If this is true, then any lawyer would have standing to attack the constitutionality of any statute with which he or she disagrees, regardless of whether he or she has any personal stake in the matter.

It is impossible to read the Olive Initial Brief and come away with an impression that Mr. Olive actually desires to function as a registry counsel under contract to the CFO. Mr. Olive's claim of unconstitutionality for the entire registry program is mute proof of his desire to see the program destroyed before he agrees to participate in it. His strenuous arguments in opposition to the existence of the registry program are wholly repugnant to his claim that his standing is founded on an actual desire to participate in the program. *See* Sovereign Camp of The Woodmen of The World v. Hodges, 72 Fla. 467; 73 So. 347 (1916).

Mr. Olive need never participate in the registry program: it is strictly voluntary. Unfortunately, should this Court find merit to his constitutional arguments, then no one else will participate in the registry program, either—even if they are, like the vast majority of serving registry counsel, willing to represent death-sentenced inmates under the statutory terms and conditions of the registry program. Cross-Appellee urges the Court to examine whether

Mr. Olive places untoward reliance on its original Olive v. Maas opinion, *supra,* as the foundation of his standing to bring a declaratory judgment action aimed solely at destroying a voluntary program with which he disagrees.

II. A DELIBERATELY PERVERSE INTERPRETATION OF SECTION 27.7002, FLORIDA STATUTES, IS NEITHER WARRANTED NOR APPROPRIATE.

Mr. Olive's second argument offers a rambling discourse on why this Court must read Section 27.7002, Florida Statutes, as if this Court had never issued its original decision in Olive v. Maas, and as if the CFO and the Department had never implemented that decision by paying registry counsel in accordance with that decision. Mr. Olive baldly urges that the trial court erred by construing Section 27.7002, Florida Statutes, in accordance with Olive v. Maas and in a manner that sustained the registry program. *See* Olive Initial Brief, at p. 18-19. This argument is simply wrong.

It is apodictic that courts should, if at all possible, construe a statute to be constitutional. Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 51 (Fla. 2000); VanBibber v. Hartford Accident & Indemnity Ins. Co., 439 So. 2d 880, 883 (Fla. 1983). In Caple, *supra*, this Court reaffirmed that it was bound "to resolve all doubts as to the validity of the statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with legislative intent." Id., at 51. *See* State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)); Dept. of Legal Affairs v. Rogers, 329 So. 2d 257 (Fla. 1976); State v. Dinsmore, 308

So. 2d 32 (Fla. 1975). Nevertheless, Mr. Olive has the temerity to assert that the trial court erred below by construing Section 27.7002, Florida Statutes, in such a way as to preserve the constitutionality of the registry program.

Mr. Olive would have this Court believe that it is impermissible to construe Section 27.7002, Florida Statutes, in any way other than as a literal prohibition of the expenditure of state funds to pay extra compensation to registry counsel, that is, for the CFO to honor orders of a trial court entered in accordance with Olive v. Maas. Apparently relying totally on one case, Tillman v. State, 934 So.2d 1263 (Fla. 2006), Mr. Olive asserts: "Although statutes should certainly be construed when possible to avoid constitutional conflict, that solution does not work when the statute is *directly aimed* at an unconstitutional result." *See* Olive Initial Brief at p. 29. (emphasis added). Mr. Olive proffers the Tillman case as authority for the proposition that only a literal reading of a statute is permissible. This claim, however, ignores the very language on which it professes to rely. The full quotation from Tillman reads as follows:

> In construing statutes, we first consider the plain meaning of the language used. *Id*.; State v. Ruiz, 863 So. 2d 1205, 1209 (Fla. 2003). When the language is unambiguous and conveys a clear and definite meaning, that meaning controls unless it leads to a result that is either unreasonable or clearly contrary to legislative intent. State v. Burris, 875 So. 2d 408, 410 (Fla. 2004).

Moreover, it is noteworthy that at least three members of the Tillman Court were concerned enough about a pure "plain meaning" construction of Sections 784.07(2) and 843.01, Florida Statutes, to join in a special concurrence to raise the issue of whether such an interpretation might lead to an unreasonable result that might be contrary to legislative intent. *See* Tillman, at 1274-1275. Issues of statutory construction are rarely as simple as advocates are wont to suggest.

Mr. Olive advances a construction of Section 27.7002, Florida Statues, which is deliberately perverse, directly aimed at causing an unreasonable result: the destruction of the registry program established by Chapter 27, Part IV, Florida Statutes. Mr. Olive's claim ignores an ineluctable fact, clearly expressed in Section 27.7001, Florida Statutes: the Florida Legislature desires to maintain a program of state paid counsel for the sole purpose of representing death-sentenced inmates in collateral challenges to their sentences. It is impossible to see how this clearly stated legislative intent is "directly aimed at an unconstitutional result." Moreover, given the clearly expressed intent manifested in Section 27.7001, Florida Statutes, only a special pleader can assert that there is no room for judicial interpretation within the confines of Chapter 27, Part IV, with respect to Section 27.7002, Florida Statutes.

There is no doubt, however, that the Florida Legislature also desires and intends to have a registry program which costs the taxpayers as little as possible. The Chief Financial Officer, as the State's chief steward of the expenditure of public money, cannot disagree with the proposition that the registry program should be as cost effective as possible. For its part, the Department strives to administer all payments under the registry program in strict conformance with the limits expressed in Section 27.711, Florida Statutes; this position is demonstrated by our resort to this Court in Fla. Dept. of Financial Services v. Freeman, 924 So.2d 598 (Fla. 2006) (hereafter "Freeman.") Controlling the rate at what rate registry attorneys are compensated is hardly, as Mr. Olive contends, an effort by the Florida Legislature to "eviscerate" the authority of the judicial branch. It is, purely and simply, an exercise of the legislature's constitutional appropriations authority. *See* Brown v. Firestone, 382 So. 2d 654, 663 (Fla. 1980) where this Court stated:

> The Florida Legislature is vested with authority to enact appropriations and reasonably to direct their use. In furtherance of the latter power, the legislature may attach qualifications or restrictions to the use of appropriated funds. In re Advisory Opinion to the Governor, 239 So.2d 1, 9 (Fla. 1970).

Contrary to Mr. Olive's overblown argument, no titanic battle between the legislative and judicial branches is generated by the existence of

Section 27.7002, Florida Statutes. Olive disingenuously asserts: "Olive is not attacking the right of the Legislature to set caps, but [sic] the right of the Legislature to prevent the courts from entering orders that permit payment in excess of caps." See Olive Initial Brief at p. 30. On the contrary, however, Mr. Olive is, in fact, attacking the right of the Legislature to restrict state payment to individual registry counsel to a level deemed appropriate by the Legislature. Moreover, Olive would transfer to the court system the authority to establish payment levels for lawyers appointed to represent capital defendants in postconviction challenges to their sentences, presumably at unlimited levels. While Mr. Olive stridently asserts that Section 27.7002 is an "evisceration of the trial court's Article V power [that] violates the separation of powers doctrine," Olive Initial Brief at p. 30, his proposed resolution of the "violation"–judicial appropriation– would represent a clear encroachment on the powers of the Legislative branch and an even more compelling violation of the doctrine of separation of powers than that decried by Olive. *See* Chiles v. Children A, B,C, D, and E, 589 So. 2d 260 (Fla. 1991); Office of the State Atty. for the Eleventh Judicial Circuit v. Polites, 904 So.2d 527 (Fla. 3rd DCA 2005); Dept. of Corr. v. Grubbs, 884 So.2d 1147 (Fla. 2d DCA 2004); Brown v. Feaver, 726 So.2d 322 (Fla. 3d DCA 1999).

In interpreting Section 27.7002(5), Florida Statutes, as limiting the Department's *independent* statutory authority to exceed the caps–an interpretation which was tacitly accepted by this Court's Freeman opinion and concurrences– the Department has sought to balance the unquestionable constitutional authority of the Legislature to set up, fund, and reasonably restrict the registry program; and the trial court's unquestionable constitutional authority to assure due process and equity in proceedings before it. Whatever shortcomings may be ascribed to the capital collateral programs of Chapter 27, Part IV, they are unquestionably valuable to the judicial system by regularizing the availability of postconviction counsel to death-sentenced inmates. It is probably unavoidable that, in extraordinary circumstances, state-paid capital collateral counsel will have to expend extra hours on their representation of death-sentenced inmates. In light of this, the holding of the original Olive v. Maas decision drew a sensible balance between a lean capital collateral program and one that required a registry counsel to provide free legal services by leaving the question of whether additional compensation was warranted to the sound discretion of the trial court. The Olive v. Maas Court stated the following, at 811 So.2d 654, in terms directly relevant to the case at bar:

> [A]lthough section 27.711 indicates that the fee schedule set forth in subsection (3) is the "exclusive means of compensation," the

> legislative history and staff analysis clearly contemplate, and indeed accommodate, fees in excess of the statutory schedule in cases where unusual circumstances exist. In doing so, it is obvious that the legislative process patently acknowledged that unless room is made to allow compensation in excess of the fee caps, a statutory framework may run afoul of this Court's precedent in Makemson and its progeny.

In circumstances where the trial court has decreed that compensation for extra hours worked by a registry lawyer is warranted, the Department has acknowledged the judicial authority and paid the sums so ordered out of the specific appropriation provided by the legislature for the support of the registry program. In so doing, the Department honors both the legislative "prerogative of the purse" and the judicial authority to ensure justice. The Department did not need this Court to "confirm" that its decision in Olive v. Maas "remains in effect;" we implemented it.

The order on review approved the Department's approach to this balancing test. If this Court is of the opinion that the Department's interpretation is correct, we would appreciate confirmation that our interpretation is not, as Mr. Olive contends, unconstitutional. In the event that the Court is persuaded that the Department's interpretation is not correct, then we will implement whatever approach that the Court deems is consistent with applicable law.

III. THERE IS NO RIGHT UNDER THE FLORIDA CONSTITUTION TO EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL IN CAPITAL COLLATERAL CASES.

Mr. Olive's third argument asserts that death-sentenced inmates have a right under the Florida Constitution to "effective assistance of postconviction counsel." Mr. Olive acknowledges that this Court expressly declined to recognize such a right in its recent decision in Zack v. State, 911 So.2d 1190 (Fla. 2005). Notwithstanding this fact, the Olive Initial Brief devotes fifteen pages of argument in opposition to this Court's "failure to explicitly announce a constitutional right to postconviction counsel in capital cases." Mr. Olive's primary argument in favor of this supposed right is not that death-sentenced inmates are not being provided capital collateral lawyers at state expense; this "Gideon-style" argument is simply not available when the State of Florida sponsors both Capital Collateral Regional Counsel offices and the registry program especially to provide state-paid counsel to represent death-sentenced inmates in collateral challenges to their sentences. *See generally* Gideon v. Wainwright, 372 U. S. 335 (1963); *cf.* Chapter 27, Part IV, Florida Statutes (2006). Rather, Mr. Olive concedes that Florida death row inmates have a statutory right to postconviction counsel at state expense, but asserts that they are "divested of this right by the appointment of grossly incompetent counsel due to state-

imposed restrictions on the time state-appointed counsel can realistically spend representing their [sic] client." Olive Initial Brief at p. 39. To this assertion, Appellee can only respond with the Scottish common law verdict of "Not Proven."

To support his *a priori* argument that competent capital collateral counsel do not take "the CFO's shilling," Mr. Olive stoops to claiming for the first time on appeal that "a considerable body of data and analysis"—which body Olive never presented to the trial court below—"clearly establishes that capital collateral representation in Florida has reached a near-crisis level of ineptitude." Olive Initial Brief at p. 41. Mr. Olive proffers to the Court a September 2006 American Bar Association report that purports to show late-filed postconviction pleadings by registry counsel. This report, however, did not even exist at that time of proceedings below, and was never considered as part of the summary judgment proceedings initiated by Mr. Olive with respect to the Amended Complaint. In short, Mr. Olive is raising now as substantive proof a matter never raised below. It is settled that this is improper. *See* Fla. Dept. of Financial Services v. Freeman, 924 So.2d 598 (Fla. 2006); *see also* Turner v. State, 888 So.2d 73 (Fla. 5th DCA 2004).

But even if the procedural irregularity of Mr. Olive's bootstrap appellate reliance on the ABA report is disregarded, his argument based on that report fails for logical irregularity: there is simply no irreducible logical correlation between the remuneration of a lawyer and his or her professional competence. Registry lawyers are all required by Section 27.710(3), Florida Statutes, to have significant experience in death penalty cases as the primary statutory precondition to registry membership; ironically, the required qualifications for a registry lawyer are far more stringent than those required for the office of Capital Collateral Regional Counsel under Section 27.701(1), Florida Statutes. That a presumably well-qualified registry lawyer misses a filing deadline cannot be ascribed merely to insufficient state remuneration. It is noteworthy that the Freeman case, *supra*, is the only case to date where a registry lawyer's claim for remuneration in excess of statutory limitations has been contested via evidentiary hearing on remand from this Court. On remand, the trial judge concluded that counsel had sought to be paid extra for unnecessary and procedurally incorrect actions rather than work he was compelled to perform because of the exigencies of the representation. *See* State v. Freeman, 4th Judicial Circuit Case No. 86-11599-CF, Division CR-E, final judgment filed June 5, 2006; a copy of the Freeman Final Judgment on remand is attached as the Appendix to this

Answer Brief. Had Freeman's counsel been able to show that his work was required by extraordinary or unusual circumstances associated with the representation of his client, the Olive v. Maas rationale would have assured him pay beyond the limits assailed by Mr. Olive.

Turning to the substantive issue of whether a right to effective assistance of counsel should be recognized, both this Court and the United States Supreme Court have declined to recognize a right for sound jurisprudential reasons. *See* Zack v. State, *supra*; Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987). First, whether a death-sentenced inmate is effectively represented in postconviction proceedings has nothing whatsoever to do with whether reversible errors actually occurred in the conviction or sentencing of the inmate. Rather, the question of what quality of postconviction representation was performed can only be a "meta-error," capable of generating no substantive relief for the inmate except further delay in proceedings. It is inconceivable that this Court—or any other appellate court—would free, or commute the sentence of, a demonstrably guilty capital criminal because his lawyer was not paid enough by the state, for example. Yet such a purported error, standing alone, is offered by Mr. Olive as the sole reason to invalidate the registry program. At best, the result would be a "do over"—by a better paid lawyer, of

course—of claims initially raised by the insufficiently paid original collateral counsel.

Moreover, the application of the constitutional concept of effective assistance of counsel to the postconviction context would certainly create an endless parade of successive "ineffective assistance of counsel" claims: by definition, any lawyer that failed to win reversal of the capital conviction and sentencing of an inmate would be "ineffective," irrespective of how much he or she was being paid. That lawyer's "ineffective representation" would then be the target of a second postconviction challenge by a new lawyer. If, in turn, the second challenge were to prove unsuccessful, the second lawyer would also be branded "ineffective." A theoretically endless loop would continue. In this regard, it is noteworthy that the Alaska court in Grinols v. State, 74 P. 3rd 889 (Alaska 2003) sought to limit the constitutional right to effective counsel to "the first application for postconviction relief." Unfortunately, however, even such a formulation does not eliminate the possibility of endless litigation over the "first" capital collateral lawyer's effectiveness.

Ultimately, given the State of Florida's provision of a statutory right to post conviction counsel in capital cases, it is simply not necessary for this Court to establish a constitutional foundation for that statutory right. Under

Chapter 27, Part IV, Florida Statutes, each death-sentenced inmate may obtain state-paid counsel for a collateral challenge to his or her sentence in state court. This is not a situation where no state-paid lawyers for death row inmates are available and volunteer counsel willing to represent indigent capital defendants in a *pro bono* capacity are either hard to come by or simply unavailable. Were this state of affairs to prevail in Florida—as it once did, to be sure—a stronger case might exist for recognition of a constitutional right to postconviction counsel. But it does not now prevail, and no reason exists today for the Court to declare such a right for the purpose advocated by Mr. Olive: enhanced legal fees for capital collateral counsel.

CONCLUSION

Based on the foregoing, Cross-Appellee requests the Court to review the order on appeal and determine whether it should be upheld.

Respectfully submitted,

Richard T. Donelan, Jr.
Fla. Bar No. 198714
Attorney for Cross-Appellee
Department of Financial Services
Division of Legal Services
200 East Gaines Street
Tallahassee, FL 32399-4247
(850)413-3010
Fax (850) 413-3029

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer Brief was furnished by U.S. Mail this 13th day of November, 2006, to the following persons: Jeremiah M. Hawkes, Esq., 327 The Capitol, Tallahassee, FL 32399-1300; Stephen F. Hanlon, Esq., Holland and Knight LLP, 2099 Pennsylvania Ave, NW Suite 100, Washington, D.C., 20006; and Elizabeth Bevington, Esq., Holland and Knight LLP, P.O. Drawer 810, Tallahassee, FL, 32302-0810.

_____
Richard T. Donelan, Jr.

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 requirements of Rule 9.210, Florida Rules of Appellate Procedure.

_____
Richard T. Donelan, Jr.