IN THE SUPREME COURT OF FLORIDA

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CASE NO.: SC06-835

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ROGER R. MAAS, etc. et al,

Appellants/Cross Appellees,

v.

MARK EVAN OLIVE,

Appellee/Cross Appellant.

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

CORRECTED INITIAL/ANSWER BRIEF OF APPELLEE/CROSS APPELLANT MARK EVAN OLIVE

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Introduction

This appeal concerns the Florida Legislature's improper attempt through its enactment of Section 27.7002, Florida Statues, to overturn this Court's ruling in *Olive v. Maas*, 811 So.2d 644, 654 (Fla. 2002) ("*Olive I*"). In *Olive I* this Court held, consistent with a long and unbroken line of precedent, that trial courts have the inherent authority to grant fees in excess of the statutory caps in capital collateral cases. Section 27.7002, enacted just six weeks after *Olive I,* not only reiterates that attorneys may not seek fees in excess of the cap, but gives unbridled discretion to the State to drop from the Registry attorneys who seek additional fees, regardless of their justification for seeking such fees. Indeed, the statute flatly prohibits the state from paying a judgment for fees above the caps awarded by the Court. As appellant/cross-appellee Roger Maas, the Executive Director of the Commission on Capital Cases, concedes, the statute's intent is beyond argument: "…the Legislature unequivocally expressed its intent that the caps set forth in section 27.711, Florida Statutes, could not be exceeded…" Maas Brief, p.2

Appellee/appellant Mark Olive filed a declaratory judgment action below challenging the constitutionality of Section 27.7002. The trial court granted summary judgment ruling that Section 27.7002 cannot constitutionally be read to

prohibit fees in excess of the cap when justified and to permit automatic punishment of Registry counsel who seek relief from the cap.

In this brief Olive begins by demonstrating that he has standing to pursue this action for declaratory relief under the rationale of either the majority or dissenting opinions in *Olive I.* Olive next demonstrates that the trial court was correct in ruling that it would be unconstitutional to prevent Registry counsel from seeking additional fees in appropriate cases and to punish Registry counsel for seeking those additional fees. Tom Gallagher, Florida's Chief Financial Officer ("CFO") agrees. Although originally aligned with Maas as a defendant below, the CFO has now filed its brief in this case supportive of the trial court's ruling and squarely rejecting Maas' interpretation of the statute and confirming that he "has not interpreted Section 27.7002(5), Florida Statutes, to bar such payment…" Gallagher Brief, p.8.

But the trial court's ruling (and the CFO's position) do not go far enough to protect the rights of defendants and their counsel. Thus, Olive has filed a cross-appeal challenging the trial court's attempt to salvage the constitutionality of Section 27.7002 by declaring that it can be read consistently with *Olive I.* With all due respect to the trial court and to the CFO who is supportive of the trial court's position, the statute cannot be saved, because it simply cannot be read in a way that will cure its constitutional infirmities. As Maas acknowledges, Section 27.7002 is

a direct (and Olive submits unconstitutional) attempt to reverse *Olive I* and cannot be cured through construction. This Court should declare Section 27.7002 to be unconstitutional.

Additionally, Olive asks this Court to declare that death row inmates have a Florida constitutional right to counsel during post-conviction proceedings. As the history of this litigation demonstrates, (and as the performance of registry counsel under the current system demonstrates) the time is ripe for such a declaration. Because Maas' brief only touched on the procedural history of this case, Olive provides the Court with a detailed review.

Olive I

In 1999 Mark Olive sought a determination of his legal rights under Chapter 27, Part IV Florida Statutes (1998) (the "Registry Act.") At the time, Olive had agreed to represent death row inmate Anthony Mungin, but was uncertain as to the compensation he could claim pursuant to the Registry Act and the contract that Maas requested that Olive sign. The Registry Act limited compensation to a total of 840 hours. Yet, upon reviewing Mungin's record on appeal, Olive determined that a minimum of 2,500 hours of time would be necessary to effectively represent Mr. Mungin. Because the Registry Act prohibited him from seeking fees, in apparent contravention of this Court's jurisprudence, Olive sought a declaration of rights. Specifically he asserted that a strict application of the fee and costs

limitations of the Registry Act and the Contract presented to Registry lawyers unconstitutionally curtailed the trial court's inherent power to ensure adequate representation. Further, Olive sought to be restored to the Registry.

The trial court entered summary judgment in favor of Maas on Olive's claim that inflexible caps curtailed the courts' inherent authority to ensure adequate representation. *Olive I* 811 So.2d at 647. But it did enjoin Maas from excluding Olive from the Registry list of available lawyers. *Id.* The parties cross appealed to the First District Court of Appeal which certified the case to this Court.

In *Olive I*, this Court held that Olive had standing to challenge the validity of the Registry Act and the accompanying contract. *See Olive I*, 811 So. 2d at 648. *Olive I* also held that the Registry Act and the contract were invalid to the extent that they purported to restrict the trial courts of Florida from exercising their inherent power to exceed the statutory limits on compensation of Registry Act attorneys on a case-by-case basis. *See Olive I*, 811 So. 2d at 654.

Legislative Response to *Olive I*

The Legislature responded to *Olive I* by adding §27.7002 to the Registry Law on March 21, 2002, a mere six weeks after *Olive I* was decided. As Maas noted, the amended law "unequivocally expressed [the Legislature's] intent that that the caps set forth in §27.711, Florida Statutes, could not be exceeded." Maas Brief pg 2. It also permits the removal from the Registry attorneys who seek fees

in excess of caps or declare in advance their inability to perform the work under the caps.

The new statute retained the same capped fee schedule that Olive challenged in *Olive I*, except that it eliminated payment for petitions for writ of certiorari in the United States Supreme Court. The statute continued to provide that its capped fee schedule is "the exclusive means" of compensating court-appointed counsel.

Olive's Response to *Olive I* & the State's Warning to Registry Counsel

On April 15, 2002, after the *Olive I* decision but prior to learning of the new §27.7002, counsel for Olive wrote a letter to all Registry attorneys calling their attention *Olive I* decision and outlining key issues from the case. (R.2 at 317) It noted, that "the data available to us in the Spangenberg Report indicates that it would be an extraordinary and unusual capital post-conviction case that does not require compensation substantially in excess of the statutory fee schedule." (R.2 at 320) Thus, the letter stated the expectation of Olive's counsel that under the law as articulated and the facts established in the Spangenberg Report, that lawyers would routinely be seeking compensation in excess of caps. The letter advised Registry counsel to inform the court in advance if he or she believed that the hours provided in the statute for a particular phase of work was not sufficient to perform the work.

On May 9, 2002, in reaction to counsel's April 15, 2002 letter, Michael Pearce Dodson ("Dodson"), attorney of record to Defendant Maas, wrote to all

Registry attorneys indicating that counsel's characterization and analysis of the Court's decision in *Olive I* was flawed. (R.2 at 323) Further, Dodson cautioned the Registry attorneys that "following the advice contained in [undersigned counsel's] letter may jeopardize your listing as a registry attorney." For the Registry attorneys' "convenience," Dodson enclosed a copy of Chapter 2002-2003, Laws of Florida, including the new §27.7002, Florida Statutes, with his letter. (R.2 at 323)

Olive II

This current appeal arises from Olive's representation of death row inmate Jacob John Dougan, Jr. in post-conviction proceedings in the case of *State v. Dougan, Jr.*, Case No. 74-4139-F (4th Circuit Court, Duval County, Florida). (R.1 at 133) Olive has been representing Dougan for eight years.[1] (R.1 at 133)

In *State v. Dougan*, the State sought to have counsel appointed for Dougan from Capital Collateral Regional Counsel North. (R.1 at 135) Duval County Circuit Court Judge Charles W. Arnold, Jr., denied that Motion, concluding that Olive should remain as counsel for Dougan and ordering the CFO to send Olive a Contract to represent Dougan pursuant to the Registry Act. (R.1 at 135) Judge Arnold further noted in the Order his desire that Olive be compensated in accordance with the laws of Florida for his representation of Dougan. (R.1 at 135)

[1] Despite the Court's expressed intent to appoint Olive as Registry counsel, Olive's representation is pro bono due to the pendency of these proceedings.

The CFO subsequently sent Olive the Contract for his representation of Dougan, along with a letter noting that §27.710, Florida Statutes, provides a thirty-day time limit for execution and return of the Contract. (R.1 at 135) Olive did not sign the Contract. (R.1 at 136) Instead, Olive informed Judge Arnold that he had not signed the contract when presented because of then-pending *Olive I* litigation. Olive further advised Judge Arnold that the previously pending litigation had concluded and that he would now sign the Contract with the CFO for the representation of Dougan. (R.1 at 136)

Judge Arnold ordered the CFO to once again deliver to Olive the Contract, dated *nunc pro tunc* from July 2001, for the representation of Dougan in accordance with §27.710(4), Florida Statutes (2001). (R.1 at 136) The CFO forwarded Olive a second Contract for representation of Dougan pursuant to the Registry Act. (R.1 at 136) On June 3, 2002, Olive advised Judge Arnold that he would not sign the Contract because of the enactment of §27.7002. (R.1 at 137)

In response to a letter from Judge Arnold, Olive explained that he could not ethically agree to enter into the Contract with the CFO for the same reasons that he would not sign the contract at issue in *Olive I* and that he would continue to represent Dougan *pro bono.* (R.1 at 137) Judge Arnold then rescinded his Order insofar as it required the CFO to enter into the Contract with Olive. (R.1 at 137)

Olives Second Complaint for Declaratory Judgment

The enactment of §27.7002 placed Mark Olive back in the same uncertain position he was in at the outset of the proceedings that led to the *Olive I* decision. Thus, in early 2003 Olive filed a new complaint for declaratory judgment, challenging the amended Registry Act and Contract on much the same grounds as he did in *Olive I*, and naming the same defendants. (R.1 at 131-140)

In his 2003 Complaint Olive sought a determination of his rights under the Registry Act and the Contract, as amended, because he believed that they unconstitutionally curtail the court's power to ensure adequate representation and infringe upon his right to seek compensation above the statutory caps. (R.1 at 138-39) He asked the court to determine his legal rights under the Registry Act and the Contract in light of the Florida Supreme Court's decision in *Olive I.* (R.1 at 1-48)

The Dismissal of Olive's 2003 Complaint & Amended Complaint.

In October 2003, the trial court dismissed Olive's original complaint for declaratory judgment without prejudice for failure to state a cause of action and for being too long with too many exhibits. (R.1 at 128-130) Olive then filed an Amended Complaint for Declaratory Judgment on November 7, 2003. (R.1 at 131-200; R.2 at 200-207) Count I sought a declaration that §27.7002 violated the courts' inherent authority pursuant to Article V of the Florida Constitution. Count II sought a declaration that §27.7002 violated the requirement of separation of

powers in Article II of the Florida Constitution. Count III sought a declaration that death row inmates have a Florida constitutional right to post-conviction counsel.

The trial court dismissed the Amended Complaint, finding that it failed to allege a justiciable controversy. (R.2 at 244-53) The court also held that Olive lacked standing to raise a claim as to the constitutional right to counsel for death row inmates. (R.2 at 251) Finally, it ruled that the ten page Complaint filed with nine exhibits violated the requirement of a short, plain statement of facts. (R.2 at 253-55) Olive timely appealed the trial court's order. (R.2 at 257-72)

First District Court of Appeal Decision in Olive II

On September 2, 2005, the District Court of Appeal for the First District reversed the trial court on all three grounds and remanded for further proceedings. It held that both the original Complaint and the Amended Complaint complied with the Florida Rules of Civil Procedure, and that Olive had standing to raise the constitutional challenges set forth in the Amended Complaint. *Olive v. Maas,* 911 So.2d 837 (Fla. 1st DCA 2005). The District Court held that "the facts in this case supporting standing are not materially different from the facts in *Olive I* and in fact they are more supportive of the existence of Olive's standing. . . . *Id.* at 843. Thus, contrary to Maas's assertion, the District Court specifically concluded that the Complaint "presented an actual justiciable controversy. . . ." *Id*. at 839.

Decision At Issue

Upon remand from the First District, the trial court ruled on Olive's second Motion for Summary Judgment. (R3. 577) As to Count I, the trial court relied on *Olive I* when it entered a declaration in favor of Olive finding that the statute could not be applied to curtail the trial court's inherent power under Article V to ensure adequate representation. But contrary to Maas' assertion (Initial Brief pg. 3), the trial court did not hold that the statute was facially unconstitutional and unenforceable. Instead it adopted the CFO's position and attempted to "preserve the constitutionality of §27.7002" by construing it "in a manner consistent with controlling case law." (R.3 at 579) Thus, the trial court construed the law to permit the payment of registry counsel in amounts that exceed the statutory limit. (R.3 at 580) The trial court also construed the statute to prohibit the Commission on Capital Cases from permanently removing an attorney from the registry list for merely seeking compensation above statutory limits. (R.3 at 580)

Thus, when the court reached Count II, it determined that there was no violation of separation of powers as long as §27.7002 was construed in accordance with Florida Supreme Court case law. (R3. 581). On Count III the trial court found that death row inmates have no constitutional right to effective assistance of counsel in post-conviction proceedings in Florida. (R3. 581) The trial court

therefore "granted final declaratory judgment" in favor of Defendants on Counts II and III. Cross appeals ensued.[2]

Olive asks this Court to affirm the trial court's grant of Summary Judgment on Count I and to reverse the trial court's denial of Summary Judgment on Counts II and III of his Second Amended Complaint. (R.3 577-81)

SUMMARY OF ARGUMENT

The facts presented by Olive and the legal theories argued by Maas and Gallagher in this case compel the conclusion that Mark Olive has standing to challenge the capped fee provisions of the amendments to the Registry Act enacted in response to the Court's ruling in *Olive I.* In this case, Mark Olive actually represents a death sentenced defendant in a current case, thus obliterating the standing concerns expressed by the dissent in *Olive I.* Furthermore, the need for a declaration could not be plainer than in this case where the two government entities responsible for administering and paying Registry attorneys disagree on the interpretation of the 2002 amendments Registry Act.

The principles of inherent authority and separation of powers under the Florida Constitution require this Court to uphold its uninterrupted twenty year line

[2] Maas filed his notice of appeal on Count I and asked the First District to certify the appeal as a matter of great public importance. Later that day, Olive filed his notice of appeal seeking to overturn the denial of Counts II and III. The First District certified Maas' appeal to this Court. This Court accepted Maas' appeal and consolidated it with Olive's appeal.

of precedent by finding that the Legislature's attempt to prohibit the payment of fees in excess of caps in all capital post-conviction cases is unconstitutional on its face. Moreover, Olive urges the Court to find that Florida law has now evolved to a point where given the complexity and consequences of capital representation, the appointment of post-conviction counsel is constitutionally required under the Florida Constitution.

ARGUMENT

Olive's answer to Maas' brief is contained in Arguments I and II. Argument I demonstrates that Olive has standing. Argument II seeks affirmance of the trial court's declaration that the court has the inherent power to award a fee in excess of the cap but a reversal of the trial court's determination that the statute could be read to reach that result. Argument III asserts that the Florida Constitution requires appointment of post-conviction counsel in capital cases.

I. OLIVE HAS STANDING TO OBTAIN DECLARATORY RELIEF AND PRESENTS A JUSTICIABLE ISSUE

Maas' assertion that Olive has no standing to seek a declaration this case is a direct attack on this Court's decision in *Olive I.* In *Olive I* the Court carefully considered Mark Olive's standing to seek a declaration of rights concerning the Registry Statute. The majority in the 4-3 split in the case held that Olive had standing. The Court noted that Olive was a registry attorney, appointed to represent a client, the state demanded he execute a contract to which he objected and the matter needed expeditious resolution. 811 So.2d at 649-50. The dissent found his claim to be hypothetical as he had, "no contract, no client, no case, and no real facts to support his various claims." *Olive I,* 811 So.2d at 658.

In this proceeding, Olive comes to the Court with all the same factors identified by the majority in *Olive I.* Indeed, Olive's case is even stronger here because his standing claim is also supported by most of the facts identified by the

dissent in Olive I as necessary to demonstrate standing: a client, a case and years of facts to support his claims.[3]

Maas' current assertion that Olive cannot have a ripe claim until he is denied payment in excess of the caps and removed from the registry was specifically rejected by this Court in *Olive I.* His argument was thoroughly addressed a second time by the First District in its *Olive II* decision which noted that this case presents even more facts supporting jurisdiction than *Olive I. Olive I,* 911 So.2d at 843.

As this Court held in *Olive I,* a controversy need not be completely mature before the filing of a declaratory judgment action. For example, in Olive I, the Court found jurisdiction despite the fact that Olive never signed a contract. *Id., citing Holley v. Adams*, 238 So.2d 401, 404 (Fla. 1970) (holding that "the fact that a controversy has not matured is not always essential." *Id.* at 404 (internal citation omitted).

There can be no doubt that Olive is legitimately in need of a legal ruling in light of the new statue. After this Court's opinion in *Olive I,* Olive was prepared to sign the contract. The opinion provided him the guidance he needed by holding that he could obtain fees in excess of the cap if the trial court so ordered, and that he would not be removed from the registry for seeking those fees. The new statute,

[3] He still does not have a contract, because, as explained below, signing a contract would waive his right to seek the declaration.

unfortunately, put Olive right back to square one by throwing the Court's previous holding in doubt.

Moreover, as in Olive I, this is no mere academic exercise. Despite his refusal to sign a contract in light of the new statute, Olive currently represents a death row client, Dougan, and his representation involves an active case. The trial court hearing Dougan's case ordered Maas to provide Olive a contract to represent Dougan and to make the terms of the contract nunc pro tunc from July 2001.[4] (R.3 at 343) Thus, while Olive did not sign the contract proffered, he has five years of representation which would have been covered by a contract had he signed it.

The only factor discussed by the dissent in *Olive I* and not present in this case is an actual signed contract. Had Olive taken the final step of signing a contract, however, he would face the very real prospect of being found to have waived any claim pertaining to the appointment or contract. *Olive I*, 811 So.2d at 650 (fn.5) (citing *Sheppard & White, PA v. City of Jacksonville*, 827 So. 2d 925, 931 (Fla. 2002))

Simply put, it would be fundamentally unfair to hold that the controversy is not ripe before the contract and then moot after the contract is signed. Indeed, the whole purpose of a declaratory judgment action is to remove such uncertainties (and such "Catch-22's") from the law.

[4] That was the date that Judge Arnold became involved in the Dougan case.

Finally, Olive's need for a declaration was crystallized in this case by the diametrically opposite positions that the CFO and Maas have taken. The CFO contends that under the revised Registry Act he is obligated by Court precedent to pay fees in excess of statutory caps in every case where the trial court so orders. (R.3 at 440 and Gallagher Brief, p.8) Maas on the other hand contends in his Initial Brief that the revised Registry Act and accompanying contract absolutely preclude the payment of fees in excess of caps. Olive is entitled to know which of those State entities is correct. Either the State must pay excess fess upon court order or it may not pay such fees.

This Court's *Olive I* ruling on standing is the controlling precedent in this case. Maas has shown no change in the law or facts to support the reversal of that opinion. The only change in facts further supports Olive's standing and the justiciability of his claims. Olive therefore urges the Court to uphold his standing and proceed to the merits of his claim.

II. A LITERAL INTERPRETATION OF § 27.7002 COMPELS THE CONCLUSION THAT THE STATUTE UNCONSTITUTIONALLY INTERFERES WITH THE INHERENT AUTHORITY OF THE COURT TO ASSURE ADEQUATE REPRESENTATION AND THUS VIOLATES THE SEPARATION OF POWERS

Olive urges the Court to uphold it's decision in *Olive I* by affirming the trial court's declaratory judgment in favor of Olive on Count I and reversing the denial

of declaratory judgment in his favor on Count II.[5] The trial court correctly applied *Olive I* when it concluded that this Court's precedent "holds that statutory limits for compensation of counsel may not constitutionally be applied in such a manner as to curtail the trial court's inherent power under Article V to ensure adequate representation." (R3. 579) As the trial court recognized, the Legislature's blatant attempt to overturn *Olive I* incorrectly ignored that the court has a duty to ensure adequacy of representation under the *Makemson, White* and, *Remetta* and *Olive I* line of cases.

But rather than find the statute to be unconstitutional on its face, the trial court erroneously adopted the CFO's position at summary judgment suggesting that Section 27.7002 could be interpreted in a manner "consistent with controlling case law." (R3. 579). Thus, despite the statute's explicit prohibition against payment of fees in excess of statutory caps in subsections (3) and (5),[6] the trial court held that the statute could be construed to mean precisely the opposite -- that payment in

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[5] The trial court did not technically deny Olive's request for a declaration, instead it entered a declaration in favor of Defendants, effectively denying Olive's request. (R3. 581).

[6] Section 27.7002 provides:

> (3) No provision of this chapter shall be construed to generate any right on behalf of any attorney appointed pursuant to s. 27.710, or seeking appointment pursuant to s. 27.710, to be compensated above the amounts provided in s. 27.711. …
> (5) The use of state funds for compensation of counsel appointed pursuant to s. 27.710 above the amounts set forth in s. 27.711 is not authorized.

excess of the caps is permitted upon court order. The trial court also construed the statute to prohibit Maas from removing attorneys from the Registry merely for seeking compensation above the statutory limits; even though the statute explicitly authorizes Maas to remove attorneys from the registry for seeking excess fees.[7] The trial court also found that the "other provisions of §27.7002 must also be interpreted in light of *Olive v. Maas I.*" (R3. 580). Although the trial court reached the correct conclusion that the fee caps and punishment provisions could not be enforced, the trial court erred in suggesting that this conclusion could somehow be read into the language of Section 27.7002.

The one thing upon which both Maas and Olive agree is that the trial court's interpretation of Section 27.7002 was erroneous because the Legislature fully intended its enactment to limit the power of the courts found in *Olive I.* As Maas notes, "Clearly, by enacting the statute, the Legislature rejected the idea that it wanted the Court to exceed the caps and made clear through its intent, through use of its budgetary authority, that contract attorneys are expected to strictly comply with the terms of their contracts." Initial Brief pg. 15 Interpreting a statute so that it is constitutional makes sense when a statute is ambiguous and the court's interpretation can preserve the Legislature's intent. But where the Legislature

[7] Section 27.7002 (6) "The executive director of the Commission on Capital Cases is authorized to permanently remove from the registry list of attorneys provided in ss. 27.710 and 27.711, any attorney who seeks compensation for services above the amounts provided in s. 27.711."

plainly intended to overturn the Court's ruling, this principle of statutory construction cannot be stretched so far as to permit the court to construe the statute to mean what it does not say and what the Legislature did not intend. In such cases, the proper remedy is not to "fix" the statute by interpretation, but to strike it as unconstitutional.

Thus, the true controversy in this case is whether the statute is an unconstitutional attempt to interfere with the court's power to ensure adequate representation. Maas attacks the trial court judgment on the ground that it usurped the Legislature's authority to place tight controls on the expenditure of funds for collateral counsel. Olive responds that the Legislature's attempt to usurp the Courts' authority to ensure adequate representation is facially unconstitutional. Plainly, this Court must decide whether the Legislature's enactment of §27.7002 as a repudiation of the rulings in *Olive I* can survive constitutional scrutiny.

A. The Doctrine of Separation of Powers Protects the Court's Inherent Power to Ensure Adequacy of Representation.

As this Court reaffirmed in *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004), the doctrine of separation of powers, codified in Article II, § 3 of the Florida Constitution, expressly prohibits members of one branch of government from exercising authority committed to another branch. *Id.* at 329. "Under the express separation of powers provision in our state constitution, the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the

judicial power, and the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches." *Id.* at 330 (internal quotations omitted) (citing *Chiles v. Children A, B, C, D, E & F*, 589 So. 2d 260, 268-69 (Fla. 1991)).

Because the branches are co-equal, "the legislature cannot take actions that would undermine the independence of the judicial … offices." *Office of State Attorney v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993), cited in *Schiavo*, 885 So.2d at 330. This "cornerstone of American democracy" is strictly enforced in Florida. *Schiavo*, 885 So.2d at 329.

B. Courts Have The Inherent Authority to Compel Expenditures When Clearly Necessary to Safeguard Fundamental Rights.

Maas' first argument in his Initial Brief claims that the trial court's ruling "denies the Legislature its constitutional authority to determine what services or programs will be available, how those services and programs will operate and how they will be funded." Initial Brief pg. 6. Maas is correct that it is the Legislature's responsibility to provide for the "adequate and efficient prosecution of violations of the law." *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978). However as the *Rose* Court noted, "where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements." *Id.*

This Court recognized in *Rose* that "[e]very court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions." *Id.* The Court's inherent power includes the power to compel the expenditure of funds by the executive and legislative branches of government when the failure of those branches to take adequate action threatens the courts' "ability to make effective their jurisdiction." *Id.* As explained in *Rose*, "[t]he doctrine [of inherent judicial power] exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government.

Olive acknowledges that the doctrine of inherent power must be approached with extreme caution and invoked only in case of clear necessity. *Id*. at 138. But as the *Rose* opinion noted, the invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights." *Id.* (internal citations omitted). As this Court has long held, ensuring adequate representation is an essential part of the judicial function. S*ee Makemson*, 491 So.2d at 1112; *Olive I*, 811 So.2d at 651-54 (applying *Makemson* to capital collateral cases.) Ensuring the adequacy of representation for defendants facing execution is probably the most solemn obligation of the judiciary.

C. The Court's Obligation to Ensure Meaningful and Effective Assistance of Counsel Includes the Obligation to Ensure that Counsel is Adequately Compensated.

It is axiomatic that effective assistance of counsel requires adequate funding. *See White v. Board of County Comm'rs of Pinellas County*, 537 So. 2d 1376, 1380 (Fla. 1989) (holding that "[t]he relationship between an attorney's compensation and the quality of his or her representation cannot be ignored."); *Hoffman v. Haddock*, 695 So. 2d 682, 685 (Fla. 1997) (Wells, J. concurring). This Court previously recognized the link between adequate funding and effective assistance of counsel when it held that Article V, §1, and Article II, §3 of the Florida Constitution provide courts with the inherent power to ensure adequate representation to criminal defendants. *Makemson*, 491 So. 2d at 1112; *accord Remeta*, 559 So. 2d at 1135; *White*, 537 So. 2d at 1380.

An attorney's right to compensation and the defendant's right to effective assistance of counsel are inextricably intertwined. *Makemson*, 491 So. 2d at 1112; *see also Olive*, 811 So. 2d at 651-53. As this Court recognized in *White*, statutory caps impermissibly create "a risk that the attorney may spend fewer hours than required representing the defendant . . . [thus raising a spectre] that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy." *White*, 537 So. 2d at 1380. Accordingly, the Registry Act, as amended, and the Contract

thereby unconstitutionally pose an imminent threat of interference with the Court's obligation to ensure effective representation as well as Mr. Dougan's Florida constitutional right to effective assistance of postconviction counsel.

D. The Adequacy Of Representation That Death Row Inmates Are Entitled To Cannot be Legislatively or Contractually Reduced.

This Court should not permit the State to eviscerate this Court's obligation to assure that a death row inmate receives meaningful and effective counsel by contracting with attorneys who are willing to accept drastic limitations on their representation. Nor should it perpetuate a dual set of standards for competency of counsel on the grounds that the Legislature alone should set the standards for competence of counsel when the right to counsel is derived from statute.

1. The State And A Private Attorney Cannot Agree to Waive a Defendant's Right to Adequate Representation

Maas' asks this Court to treat capital collateral defense like a commercial contract. He cites to *Pan Am Tobacco Corp. v. Dept. of Corrections,* 471 So.2d 4 (Fla. 1984) for the proposition that, when the Legislature authorizes the state to enter into a contract it intends for both parties to be bound. Thus Maas contends, when the Legislature has the power to set fee caps as a term of representation it's a simple matter of contract interpretation to find that the Registry Counsel is bound

by those fees caps.[8] And as Justice Cantero noted in *Freeman*, the freedom of contract includes the freedom to make a bad bargain. *Fla. Dept. Financial Services v. Freeman*, 921 So.2d 598, 607 (Fla. 2006).

Maas' contract argument seeks to have this Court to throw out the twenty years of jurisprudence that started with *Makemson* in which the Court has always examined the application of fee caps in light of its constitutional obligation to ensure adequacy of counsel, not as a contract dispute. Maas' commercial contract analysis wholly ignores the intended beneficiaries of the agreement. Registry Contracts are third party beneficiary contracts for the payment of attorneys fees where *clients* have the right to, and *courts* have the obligation to ensure that clients receive, meaningful and effective assistance of counsel. The death row inmate, the courts and the entire justice system are the third party beneficiaries of the agreement – and they are the ones who will suffer the effects of the "bad bargain" made by an attorney.

[8] The Legislature's authority to limit fees in workers compensation and sovereign immunity cases is irrelevant because plaintiffs in those matters are not entitled to counsel appointed by and overseen by the courts. Moreover, the state is not a party to the attorney-client agreements in those cases; it merely imposes a term into the agreement. Insurance defense cases provide a much more apt analogy. Attorneys may freely contract with insurance companies to provide legal services to insureds at a fixed rate, but they "may not enter into a set fee agreement in which the set fee is so low as to impair her professional judgment or cause her to limit the representation of the insured." Florida Bar Ethics Opinion 98-2.

Maas has not and cannot make a credible claim that Registry Act and the Contract compensate counsel for anything near the actual number of hours that a competent counsel would work to provide effective representation. The Spangenberg Report found that a typical post-conviction representation in Florida took 3,100 hours. *See Olive v. Maas*, 911 So.2d 837 (Fla. 1st DCA 2005) (noting that this Court had previously relied on this same Spangeberg Report in *Arbelez v. Butterworth*, 738 So.2d 326 (Fla. 1999) (J. Anstead concurring specially). Yet the Registry Act and contract offer compensation for about 1/4th of the actual time required to perform the legal services. Justice Cantero's concurrence in *Freeman* correctly notes that "the caps for registry counsel are frequently 'unrealistic' and amount to little more than 'token compensation.'" *Freeman*, 921 So.2d at 607 (internal citation omitted). But it was exactly the fact that a fee statute provided for "token compensation" that caused the *Makemson* Court to find an inflexible cap unconstitutional. *Makemson*, 491 So.2d at 1112 (noting with a token fee, "[t]he availability of effective counsel is therefore called into question in those cases when it is needed most.")

This Court should not succumb to Maas' entreaties to analyze this as a freedom of contract matter. There is nothing "free" about the ability to contract, as the Registry Contract is a take it or leave it proposition. And while a counsel may decline representation under the terms offered, it is the death sentenced inmate, the

court and the justice system who suffer because of the bad terms. Unlike the contract at issue in *Pan Am*, the Registry contract at issue is not an arms length commercial contract where the gravest concern is the amount of profit that the contractor will earn from cigarette vending machines. If an attorney's "bad bargain" causes him to loose his zeal for advocacy, the consequence may be his client's death.

2. Legislative Establishment of a Right to Counsel Should Not Result in a Less Effective Attorney.

Maas asks this Court to re-examine its jurisprudence of the last sixteen years in order to find that a different standard for adequacy of counsel applies to counsel appointed pursuant to a statutory right rather than a constitutional right. In 1990, the *Remetta* Court noted that "[t]he appointment of counsel in any setting would be meaningless without some assurance that counsel could give effective representation." 559 So.2d at 1135. Accordingly the *Remetta* Court refused to deviate from the *Makemson* and *White* rationale when it was faced with a counsel appointed pursuant to statute. *Remetta* 559 So.2d at 1135. Maas now contends that *Remetta* can be distinguished and that the *Makemson, White, Remetta and Olive I* line of cases can be discarded in favor of the Legislature's "alternate means of assuring competent performance of counsel." Initial Brief pg. 13.

The alternate means that Maas refers to is set out in sections 27.7002(2) and 27.711 (12). Section 27.7002(2) provides that "with respect to counsel appointed

to represent defendants in collateral proceedings pursuant to ss 27.710 and 27.711, the **sole method of assuring adequacy of representation** provided shall be in accordance with the provisions of s. 27.711(12) (emphasis supplied). Section 27.711 (12) states:

> The court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel. The Chief Financial Officer, the Department of Legal Affairs, the executive director, or any interested person may advise the court of any circumstance that could affect the quality of representation, including, but not limited to, false or fraudulent billing, misconduct, failure to meet continuing legal education requirements, solicitation to receive compensation from the capital defendant, or failure to file appropriate motions in a timely manner.

Maas asserts that the Legislature can create this "alternative means" to assure adequacy because it created the right to post-conviction counsel by statute. Olive agrees that the Legislature can add additional measures to ensure the adequacy of counsel, but contends that it cannot eliminate the Court's existing method of ensuring adequacy of counsel.

As argued in detail above, the primary responsibility for ensuring adequacy of counsel rests with the courts under Article V of the Florida Constitution. Since the *Makemson* decision, this Court has linked adequacy of representation with attorneys fees. Thus the revisions to the Registry Act plainly seek to deprive the courts of one of their primary tools for ensuring that defendants get competent

representation – the ability to ensure that counsel are adequately compensated. This link should not be abandoned, particularly at the time when the fees provided for by statute are so low as to constitute merely "token compensation." *Freeman*, 921 So.2d at 607.

Moreover, the proposed Legislative substitution is simply not adequate for the task. The mere supervision of the Registry attorney's performance after the fact cannot assure effective assistance of counsel. The Registry also must be supervised in a way that assures that competent counsel will sign up. As discussed in Section III below, this Court is well aware of the problems with Registry counsel under the current system. Moreover, competence of counsel should not be a variable measure subject to a legislative decision that defendants with a statutory right to counsel are entitled to less effective representation than those with a constitutional right. Certainly, nothing in this Court's jurisprudence suggests that the Court will evaluate the effectiveness of counsel's representation by differing standards. Effective representation is effective representation, regardless of the origin of the right to counsel and the Legislature may not limit how this Court exercises its duty to assure that representation is effective.

Section 27.7002(2) was plainly a Legislative encroachment on the Court's exercise of inherent power to ensure adequate compensation for appointed counsel.

E. Section 27.7002 Must Be Stricken as A Facially Unconstitutional Attack on the Court's Inherent Power to Assure Effective Representation.

By enacting Section 27.7002, the Legislature has intruded upon the judicial power, undermining it through denial of funding and coercion of Registry attorneys. The solution proposed by the trial court and the CFO to this unconstitutional intrusion on judicial power is to argue that the statute can be interpreted in a manner consistent with *Olive I.* 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. No amount of "construction" can convert a clear statutory prohibition into a Legislative blessing.[9]

There is nothing hidden about the Legislative intent here. First, the Legislature has categorically prohibited the CFO, or anyone else, from spending state money to enforce a court's award to an attorney of compensation above the Registry Act's statutory caps. This prohibition against spending state funds to enforce judgments the trial court is empowered to make nullifies those judicial determinations.

[9] To the contrary, the trial court and CFO's interpretation violates the primary principle of statutory construction – which is to first consider the plain meaning of the language used. *Tillman v. State*, 934 So.2d 1263 (Fla. 2006). "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." *Id.* (internal citation omitted). In this case the language is unambiguous and supports the legislative intent.

As even the CFO acknowledges, the prohibition on use of any state funds to compensate an attorney in excess of the statutory caps is impermissibly inconsistent with this Court's precedent.[10] The Legislature's evisceration of the trial court's Article V power violates the separation of powers doctrine. Unlike prior attacks on statutory fee caps, Olive's claim here is a facial challenge to the statute. Olive is not attacking the right of the Legislature to set caps, but the right of the Legislature to prevent the courts from entering orders that permit payment in excess of caps.

Second, by authorizing permanent removal from the Registry list, the amended Registry Act punishes attorneys who attempt to exercise their right under *Olive I* to seek compensation above the statutory caps. By authorizing permanent disqualification from the Registry list, the amended law punishes attorneys who attempt to raise concerns about adequate representation before the court. These penalties have an inevitable chilling effect on attorneys, like Olive, who are effectively precluded by statute from raising these issues before a court if they desire to continue representing inmates in post-conviction proceedings. This chilling effect in turn severely hampers the court's ability to ensure adequate

[10] Thus, to avoid acting unconstitutionally, the CFO construes Section 27.7002 "in strict conformance with the *Makemson* rationale approved by the Florida Supreme Court in *Olive v. Maas*" and pays fees in excess of caps upon court order (R3. 441) But, as noted above, such an "interpretation"- i.e. that a statute means precisely the opposite of what it says - simply cannot "save" a facially unconstitutional statute.

representation: it cannot properly discharge its function if the attorneys who must raise the issue are silenced. This provision cannot simply be ignored – it must be stricken.

The amended Registry Act gives Maas, as Executive Director, absolute, unbridled discretion in determining whether to permanently remove from the list Registry attorneys who seek compensation above the statutory caps. The statute lacks any standards to govern the exercise of this discretion, enabling Maas to permanently remove even attorneys who file good faith petitions for compensation in extraordinary or unusual cases. Under the current Section 27.7002, Florida Statutes, each attorney who seeks compensation in excess of the caps, no matter how bona fide the request, is therefore rendered vulnerable to Maas's whim. Such vulnerability clearly only enhances the law's chilling effect on Registry attorneys and further demonstrates why the statute must be stricken as unconstitutional.

The Legislature has established a right to representation by counsel in capital post-conviction proceedings, and having done so, it has created a system that necessarily activates the courts' Article V judicial power to ensure that that representation is adequate. In response to this Court's ruling in *Olive I* the Legislature has not eliminated the statutory right to counsel in post-conviction proceedings. Instead it has prevented the courts from exercising their coequal, inherent power to enforce that right by scrutinizing the relationship between

compensation and adequacy of representation pursuant to *Makemson* and its progeny. Yet as long as the right to counsel in post-conviction proceedings exists, the Legislature lacks the constitutional authority to so interfere – or empower state actors to interfere – with the judiciary's constitutional role and responsibility to ensure adequate representation. *Olive I*, 811 So.2d 644.

The net effect of the Legislature's attempt to circumvent the Court's substantive rulings in *Olive I* and to blackmail Registry attorneys into foregoing their rights to seek compensation in excess of the statutory caps is to deprive Olive and all other Registry lawyers of the protection that this Court intended to give them with respect to their representation of their death sentenced clients. In the face of this "oppressive limitation," *see Makemson*, 491 So.2d at 1112, this Court must confirm that the Florida Supreme Court's decision in *Olive I* remains in effect; that Florida's trial courts retain their Article V power to ensure adequate representation by awarding compensation in excess of the statutory caps; that such a restriction violates the separation of powers doctrine under Article II of the Florida Constitution; that Olive may, in a proper case, seek compensation in excess of the caps, without risk of losing his status as a Registry attorney on the list of those eligible for appointments; that state funds may be used to compensate Olive above the caps if a trial court so orders; and that challenging the caps or refusing to comply with them cannot, by itself, serve as a disqualification from Registry Act

status for Olive or other attorneys. In short, the limitations in Section 27.7002 are unconstitutional.

III THE REGISTRY ACT IMPERMISSIBLY ENCROACHES UPON THE FLORIDA CONSTITUTIONAL RIGHT TO EFFECTIVE POSTCONVICTION COUNSEL IN CAPITAL CASES

A. Introduction

Florida's Constitution guarantees death row inmates the right to effective assistance of postconviction counsel. This right arises from several constitutional provisions including Article I, § 16 (right to counsel); Article I, § 9 (due process); Article I, § 2 (equal protection); Article I, § 13 (habeas corpus); Article I, § 17 (cruel and unusual punishment); and Article I, § 21 (access to courts) of the Declaration of Rights of the Florida Constitution.[11]

Appellees acknowledge that this Court has previously declined to explicitly recognize a Florida constitutional right to effective postconviction counsel in capital cases. *See Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005) (stating without separate analysis for Florida law, that under Florida and federal law, death row inmates have no constitutional right to effective collateral counsel). But Maas's argument requires the Court to come to grips with this constitutional right in this

[11] As recognized by Justice Anstead's special concurrence in *Arbelaez v. Butterworth*, 738 So. 2d 326, 327 n.1 (Fla. 1999), this Court should give primacy to the provisions of the Florida constitution rather than the United States constitution in deciding whether there is a fundamental right to effective postconviction counsel for death row inmates in Florida.

case. If this Court were to determine that Maas is correct and that the Legislature has the power to limit the statutory right to effectiveness of counsel by severely limiting the judiciary's oversight powers, then this Court would have no choice but to determine whether the Constitution provides a constitutional right to effective collateral counsel. As discussed below, there is no question that these limitations, if strictly enforced in accordance with the plain intent of Section 27.7002, would result in death row inmates not receiving effective representation in postconviction proceedings.

But even if this Court agrees that the statute improperly intrudes on the judiciary's supervisory powers, this Court's death penalty jurisprudence now requires the Court to unambiguously recognize a Florida constitutional right to effective postconviction capital counsel in order to remedy the paradox that exists in this Court's existing precedents. This Court has long recognized a prospective case-by-case due process right to postconviction counsel in capital cases where there are colorable and/or justiciable issues. *See Graham v. State*, 372 So. 2d 1363, 1366 (Fla. 1979).

The remainder of this section explains why this Court's failure to explicitly announce a constitutional right to effective postconviction counsel in capital cases has rendered this due process right devoid of any meaningful practical application. Moreover, this section explains why the due process rights of death row inmates

will not be protected in the future absent a plain statement by this Court that the right to effective postconviction capital counsel derives from the Florida Constitution. Declaring a constitutional right to effective postconviction counsel in capital cases, will facilitate this Court's ability to promulgate standards and conduct oversight to ensure the effective operation and administration of Florida's capital postconviction system.

Section 27.7002 precludes the state from spending any amount over the inflexible statutory caps allotted for compensation of postconviction counsel even if the additional spending is necessary to ensure minimally competent representation. Moreover, the statute provides the Executive Director of the Commission on Capital Cases with unfettered authority to penalize attorneys by permanently removing them from the attorney registry upon any attempt -- even a good faith attempt -- to seek compensation above the statutory caps to provide even minimally competent postconviction representation. As such, the Registry Act and its attendant Contract impermissibly interfere with death row inmates' Florida constitutional right to effective assistance of postconviction counsel.

As retained *pro bono* postconviction counsel for death row inmate Jacob J. Dougan, Jr., Olive has standing to assert the violation of his client's constitutional right to effective postconviction counsel. *Olive v. Maas*, 911 So.2d 837, 842-43 (Fla. 1st DCA 2005); citing *Makemson v. Martin County*, 491 So. 2d 1109, 1112

(Fla. 1986) (recognizing that a criminal defendant's right to effective representation and his attorney's right to fair compensation are inextricably intertwined).

B. Florida's Death Penalty and Right to Counsel Jurisprudence has Implicitly Recognized a Constitutional Right to Effective Postconviction Capital Counsel.

The confluence of this Court's death penalty and right to counsel jurisprudence has created a paradoxical situation in which this Court has *implicitly* recognized a prospective due process right to competent collateral counsel on a case-by-case basis in death penalty cases while, at the same time, refusing to *explicitly* recognize an absolute and unconditional due process right to effective postconviction capital counsel. This Court can resolve the apparent conflict by explicitly adopting the straightforward principle that Florida's death row inmates have two separate and distinct bases for asserting a right to effective collateral counsel under the due process clause of the Florida constitution. First, Florida's death row inmates have a specific due process right to meaningful implementation of their statutory right to postconviction counsel.[12] Second, death row inmates have a general constitutional due process right to postconviction counsel, given this Court's repeated pronouncements that postconviction counsel is

[12] *See e.g.* Eric M. Freedman, *Further Developments in the Law of Habeas Corpus: Giarratano is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 Cornell L. Rev. 1079, 1095 (July 2006).

constitutionally required in complex cases in which there are colorable or justiciable issues. Because all death penalty cases are inherently complex and inevitably contain colorable and justiciable issues, this Court's precedents compel the conclusion that death row inmates have a due process right to effective assistance of postconviction counsel.

As to the first point, it is undisputed that Florida's death row inmates have had a statutory right to postconviction counsel since 1985. *See* § 27.7001, Fla. Stat. (1985). This Court has subsequently recognized that the statutory right to postconviction counsel necessarily encompasses a right to effective assistance by the postconviction attorney assigned to the case. *See Spaziano v. State*, 660 So. 2d 1363, 1370 (Fla. 1995) (recognizing that Spaziano was entitled to "adequate counsel and resources."); *Spalding v. Dugger*, 526 So. 2d 71, 72 (Fla. 1988) (holding that "each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings."). Indeed, this Court has even recognized that "[t]he appointment of counsel in any setting would be meaningless without some assurance that counsel give *effective* representation." *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990).[13]

[13] In *Remeta*, this Court held that trial courts have the authority to exceed statutory fee caps to compensate statutorily appointed counsel for representation of

This Court, however, has failed to explicitly elucidate what it has already implicitly recognized -- i.e. death row inmates have a Florida constitutional due process right to the meaningful implementation of their statutory right to postconviction counsel. The U.S. Supreme Court has repeatedly recognized that once a state has chosen to provide a statutory right to its citizens, due process requires that the right be meaningful. *See Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (holding that if a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the due process); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that states violate Due Process by failing to provide prisoners with transcripts once they have chosen to provide a right to appellate review).

This Court has interpreted Florida's Declaration of Rights to provide equal or greater due process protection than the United States constitution. *See e.g. Traylor v. State*, 596 So. 2d 957, 962-63 (Fla. 1992). As recognized by Justice Anstead's special concurrence in *Arbelaez v. Butterworth*, 738 So. 2d 326, 327 (Fla. 1999), "the right to postconviction relief in capital cases is meaningless without a right to counsel." Accordingly, due process is violated when Florida's death row inmates are provided a statutory right to postconviction counsel, but are

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death row inmates in executive clemency proceedings when necessary to ensure effective representation. *Id.*

subsequently 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 client.

In addition to having a specific due process right to effective collateral representation which arises from the right to meaningful implementation of the statutory right to counsel provided under§ 27.7001, this Court's jurisprudence also reveals that death row inmates have a general due process right to effective collateral counsel. This broader due process right was first contemplated by this Court in *State v. Weeks*, 166 So. 2d 892 (Fla. 1964). In *Weeks*, an armed robbery case, the Florida Supreme Court held that there is no absolute right to collateral counsel under the Sixth Amendment, but that counsel may be required under the due process clause "if the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need." *Id.* at 896. Fifteen years later, in *Graham v. State*, 372 So. 2d 1363, 1366 (Fla. 1979), this Court held that there is a limited due process right to collateral counsel if "the application on its face reflects a colorable or justiciable issue or a meritorious grievance." The *Graham* test reflected this Court's initial experiences demonstrating a need for collateral counsel in death penalty litigation, and, thus, placed a considerably lighter burden on death-sentenced individuals

seeking collateral counsel; *i.e.*, the "substantial merit" test in *Weeks* was replaced with a "colorable or justiciable issue" test in the context of capital cases.

This broader due process right to effective postconviction counsel in all death penalty cases was first explicitly recognized by Justice Anstead's special concurrence in *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999) (Anstead, J., Kogan J., concurring). In *Arbelaez*, Justice Anstead cited decades of Florida Supreme Court precedent in support of the proposition that this Court has "in effect enforced a state constitutional right to counsel without formally announcing the basis of [its] action." *Id.* at 330. Justice Anstead observed that the Court had consistently refused to permit an execution to be carried out absent a record demonstrating that the death-sentenced defendant has received the assistance of counsel in a meaningful post-conviction proceeding. *Id.* Moreover, Justice Anstead explained that since all capital litigation is necessarily complex and difficult, this Court's holdings in *Graham* and *Weeks* required the Court to find a due process right to effective assistance of counsel during all death penalty postconviction proceedings. *Id.* at 330-331. While this Court's jurisprudence has implied that an unambiguous due process right to effective collateral counsel exists in all death penalty cases, this Court has nonetheless been reluctant to adopt the unambiguous right proposed by Justice Anstead in *Arbelaez*. *See e.g. Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005).

C. The Grossly Incompetent Postconviction Representation Currently Being Provided by a Significant Percentage of Florida's Registry Attorneys Constitutes a Significant Change in Circumstances Compelling this Court to Recognize a Constitutional Right to Effective Assistance of Collateral Counsel in Capital Cases.

As this Court well knows, 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. First and foremost, a newly-published report of the American Bar Association ("ABA") has concluded that "the qualifications of some capital collateral registry attorneys are questionable and the performance of these attorneys has been criticized on a number of occasions." American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report*, at 182 (Sep. 2006) (hereinafter "ABA Report") *available at* http://www.abavideonews.org/ABA340/index.php. The report details a system in which "a number of registry attorneys have missed state post-conviction and federal habeas corpus filing deadlines possibly precluding their clients from having their claims heard." *Id.* Specifically, "registry attorneys in at least twelve separate cases filed their clients' state post-conviction motions or federal habeas corpus petitions *between two*

months to three years after the applicable filing deadline." *Id.* at 182-183 (emphasis added).[14]

Justices of this Court -- i.e., those persons in the best position to review the work product submitted by registry attorneys on a daily basis -- have candidly assessed the qualitative skills possessed by many registry attorneys to be grossly incompetent. For instance, Justice Cantero has commented that the representation provided by registry attorneys is "[s]ome of the worst lawyering" he has ever seen. Jan Pudlow, *Justice Rips Shoddy Work of Private Capital Case Lawyers*, THE FLORIDA BAR NEWS (Mar. 1, 2005). In particular, Justice Cantero highlighted the fact that "some of the registry counsel have little or no experience in death penalty

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[14] These cases include, among others, *Lawrence v. Florida*, 421 F.3d 1221 (11th Cir. 2005), *cert. granted*, ___ U.S. ____, 126 S. Ct. 1625 (2006); *Howell v. Crosby*, 415 F.3d 1250 (11th Cir. 2005); *Cole v. Crosby*, No. 05-CIV-222, 2006 WL 1169536 (M.D. Fla. May 3, 2006); *Wainwright v. Crosby*, No. 05-CIV-27 (M.D. Fla. Mar. 10, 2006); *Sweet v. Crosby*, No. 03-CIV-844 (M.D. Fla. Aug. 5, 2005); *Banks v. Crosby*, No. 03-CIV-32 (N.D. Fla. July 29, 2005); *Foster v. Crosby*, No. 03-CIV-109 (N.D. Fla. Dec. 13, 2004); *Downs v. Crosby*, No. 01-CIV-139 (M.D. Fla. Oct. 21, 2004). *See* Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *Lawrence v. Florida*, ___ U.S. ____, 126 S. Ct. 1625 (2006) (No. 05-8820) *available at* 2006 WL 1858832.

In addition, the following are federal habeas cases in which the State is arguing there were untimely filings. *Holland v. Crosby*, No. 06-CIV-20182 (S.D. Fla.); *Brown v. Crosby*, No. 06-CIV-142 (M.D. Fla.); *Asay v. Crosby*, No. 05-CIV-147 (M.D. Fla.); *Hamilton v. Crosby*, No. 05-CIV-813 (M.D. Fla.); *Johnson v. Crosby*, No. 05-CIV-23293 (S.D. Fla.); *Gordon v. Crosby*, No. 04-CIV-35 (M.D. Fla.); *Damren v. Crosby*, No. 03-CIV-39 (M.D. Fla.); *Thomas v. McDonough*, No. 03-CIV-237 (M.D. Fla.). *See* Brief for the American Civil Liberties Union et al. as Amici Curiae Supporting Petitioner, *Lawrence v. Florida*, ___ U.S. ____, 126 S. Ct. 1625 (2006) (No. 05-8820) *available at* 2006 WL 1858832.

cases. They have not raised the right issues . . . [and] [s]ometimes they raise too many issues and still haven't raised the right ones." *Id.* Moreover, Justice Pariente has also noted that the Court has "observed deficiencies and … would definitely endorse the need for increased standards for registry counsel, as well as a continuing system of screening and monitoring to ensure minimum levels of competence." Gary Blankenship, *Registry Lawyers Defended At Committee Meeting*, FLORIDA BAR NEWS (April 1, 2005). These objective reports and accounts conclusively establish that many of Florida's registry attorneys lack the quantitative experience and the qualitative skills to provide even minimally competent postconviction representation.

Recognition of a state constitutional right to capital collateral counsel is the only means available for safeguarding the rights of future death row inmates who, absent competent postconviction counsel to correct constitutional errors arising during trial and direct appeal, face a significant likelihood of being wrongfully executed. Without an enumerated constitutional right to effective assistance of postconviction counsel in death penalty cases, the Florida Legislature could decide at any moment to strip death row inmates of their statutory right to collateral

counsel or, as in this case, could pass legislation which effectively prohibits collateral counsel from providing effective representation to their clients.[15]

Moreover, the current Registry regime restricts this Court's ability to promulgate minimum standards for postconviction counsel in capital cases. Specifically, this Court has previously recognized that it was "persuaded . . . not to include minimum standards for postconviction counsel in its prior recommendations because the right to capital postconviction counsel is a statutory right" and not a constitutional right. *In re Amend. to Fla. R. Crim. P. – Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 820 So. 2d 185, 188 (Fla. 2002). In addition, this Court was also reluctant, at the time, to promulgate minimum standards for postconviction counsel because it believed that the legislative standards provided under Sections 27.704 and 27.711(12) of the Florida Statutes were sufficient to ensure minimally competent postconviction representation. In light of the new objective data plainly establishing that the Legislature's standards have failed to provide even minimally competent counsel in a significant number of collateral proceedings, this Court should now "formally acknowledge that the [statutory] right to postconviction relief in capital cases is

[15] In this respect, it is noteworthy that efforts in the 2005 Florida Legislature designed to improve the standards for capital collateral counsel have failed. *See* ABA Report, p. 164-65 n. 208.

meaningless without a [Constitutional] right to counsel." *Arbelaez*, 738 So. 2d at 327.

D. This Court Should Follow the Decisions of the Mississippi and Alaska Supreme Courts and Declare a State Constitutional Right to Effective Collateral Counsel in Death Penalty Cases.

Other states have similarly recognized that their constitutions require a right to postconviction counsel in capital cases. For instance, in *Jackson v. State*, 732 So. 2d 187, 190-191 (Miss. 1999), the Mississippi Supreme Court recognized that Mississippi's death row inmates have a broad due process right to effective collateral counsel under the Mississippi constitution. Accordingly, the Court held that postconviction counsel in capital cases is constitutionally mandated. *Id.* The Mississippi Supreme Court analyzed the U.S. Supreme Court's holding in *Giarratano* and held that *Giarratano* did not control the issue because "post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level. The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus." *Jackson*, 732 So. 2d at 190. Therefore, the Court concluded that, regardless of whether there is a federal constitutional right to capital postconviction counsel, a constitutional right exists under Mississippi's constitution given the

realities of the current death penalty system and given Mississippi's past failures in protecting the due process rights of death row inmates.

Moreover, in *Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003), the Supreme Court of Alaska held that Alaska's death row inmates have a specific due process right to meaningful state implementation of their existing statutory right to postconviction counsel. Specifically, the Court held that "the right to counsel in a first application for post-conviction relief is of a constitutional nature, required under the due process clause of the Alaska Constitution." *Id.* The Court held that without a constitutional due process right to effective assistance of postconviction counsel, the statutory right to postconviction counsel would be devoid of substance. *Id.*

Regardless of whether this Court chooses to adopt the specific due process right to postconviction counsel adopted in *Grinols*, or the broader due process right adopted in *Jackson*, this Court should nonetheless announce a Florida constitutional right to postconviction counsel in death penalty cases in order to meaningfully ensure that no death row inmate is executed without due process of law. Absent a constitutional right to postconviction counsel, Florida's death row inmates will be left with a statutory right to counsel that is devoid of meaning and is a triumph of form over substance.

The recent legal and factual developments necessitating this Court's reconsideration of its previous decisions declining to announce a constitutional right to effective capital collateral counsel are remarkably analogous to those encountered by the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Prior to *Gideon*, the Supreme Court had held in *Betts v. Brady*, 316 U.S. 445 (1942), that the Due Process clause did not require the states to furnish counsel to all indigent criminal defendants, but rather, would be determined on a case-by-case basis. In *Gideon*, however, the Court revisited its decision in *Betts* after noting that it "ha[d] been a continuing source of controversy and litigation." *Gideon*, 372 U.S. at 338. The *Gideon* Court concluded that *Betts* was wrongly decided because it failed to recognize the Court's prior precedents indicating that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 344-45.

This Court should similarly recognize that it is now appropriate to recede from its ruling in *Zack v. State*, 911 So. 2d 1190 (Fla. 2005). *Zack* summarily concluded that a death row inmate could not address the incompetence of collateral counsel because death row inmates have no constitutional right to effective collateral counsel under Florida or federal law. *Id*. at 1203. Just as in *Betts*, the *Zack* decision failed to recognize the Court's prior precedents indicating that "[t]he appointment of counsel in any setting would be meaningless without some

assurance that counsel give *effective* representation." *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990); *see also Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999) (Anstead, J., concurring).

As this case demonstrates, the only way to safeguard that right to effective representation is to recognize a constitutional right to effective collateral counsel in capital cases. The alternative is to invite another twenty years of litigation testing the statutory limits of the Legislature's power to restrict the terms and effectiveness of that litigation.

This Court should therefore reverse the trial court's denial of Summary Judgment on Count III and find: (1) a constitutional right to effective assistance of postconviction counsel for death row inmates exists under the Florida Constitution; (2) effective assistance requires that Registry attorneys be adequately compensated for their services in representing death row inmates; and (3) the Registry Act, as amended, and the Contract impermissibly interfere with the Florida constitutional right of death row inmates to effective postconviction counsel.

CONCLUSION

For all the foregoing reasons, Mark Evan Olive respectfully requests that this Court, consistent with its decision in *Olive I*, affirm the trial court's decision that the Legislature's attempt in Section 27.7002 to prohibit the payment of attorneys fees in excess of statutory caps in post-conviction capital cases violates

both the inherent authority of the courts to supervise the right to effective assistance of counsel (Article V) and the separation of powers doctrine (Article II). This Court should reverse the trial court's decision that the statute could be construed in a constitutional matter to avoid any intrusion upon the judiciary's powers. Instead, the statute should be stricken as unconstitutional to the extent that it seeks to limit the power of the judiciary to award fees in excess of the statutory caps, gives unbridled discretion to Maas to remove from the Registry attorneys who seek such fees, and attempts to prohibit the payment of such fees when ordered by a court. Finally, this Court should re-examine its previous decisions concerning the constitutional nature of the right to post-conviction counsel in capital cases and find that the Florida Constitution does require the appointment of meaningful and effective postconviction counsel in capital cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Corrected Initial/Answer Brief has been furnished by U.S. Mail to: **JEREMIAH M. HAWKES, ESQ.,** Florida House of Representatives, Room 327 The Capitol, 402 South Monroe Street, Tallahassee, Florida 32399-1300 and **RICHARD T. DONELAN, JR., ESQ.**, Attorney for Tom Gallagher, Department of Financial Services, Division of Legal Services, Fletcher Building, Suite 526, Tallahassee, Florida 32399-0333, on this the ____ day of October, 2006.

_____
Attorney

CERTIFICATE OF TYPE SIZE AND FONT COMPLIANCE

I HEREBY CERTIFY that the type size and style used throughout this Corrected Initial/Answer Brief is 14-point Times New Roman, double-spaced, and that this brief fully complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
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