IN THE SUPREME COURT OF FLORIDA

Case No. SC06-835

ROGER R. MAAS, etc. et al,

Appellants/Cross Appellee,

v.

MARK EVAN OLIVE,

Appellee/Cross Appellant.

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

CROSS-REPLY BRIEF OF APPELLEE/CROSS APPELLANT MARK EVAN OLIVE

HOLLAND & KNIGHT LLP

Stephen F. Hanlon
Steven Brannock
Robin L. Rosenberg
Leon Fresco
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, DC 20006
(202) 955-3000

Attorneys for Appellee/Cross Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

OTHER AUTHORITIES

ARGUMENT IN REPLY

Gallagher's argument that Olive has no standing is based on the false premise that Olive seeks to destroy the Registry Program. As shown below, however, Olive challenges only those sections that seek to prevent attorneys from seeking fees in excess of the caps. Gallagher must concede that Olive has standing to seek these rulings under the law of the case.

Gallagher's remarkable argument that Section 27.7002 can fairly be read to permit payment above the caps can be reached only by ignoring the language of the statute (which Gallagher's brief proceeds to ignore) and the obvious legislative intent to overrule *Olive I.* This the Court may not do.

Florida should join with Alaska and Mississippi in recognizing a state constitutional right to postconviction capital counsel, thereby vindicating the right of meaningful access to the courts.

I. OLIVE HAS STANDING TO BRING THIS CASE.

Gallagher concedes that Olive has standing to pursue this matter pursuant to the law of the case decided in *Olive I.* Gallagher Reply at 5; *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002). In fact, as the First District noted on intermediate appeal, Olive has an even stronger basis for standing in this case. Olive has already been appointed by a court to represent a real client in a real case and he is rendering that

service *pro bono* precisely because of the restrictions posed by Section 27.7002. *Olive v. Maas*, 911 So.2d 837, 843 (Fla. 1st DCA 2005).

Unable to attack Olive's standing on the merits, Gallagher nonetheless asserts that Olive has no standing because his "real aim" is to "obtain the complete invalidation and elimination of the Registry program." Gallagher Reply at 5. This hyperbolic assertion grossly overstates Olive's position. Olive challenges only those portions of the statute that the Legislature enacted after this Court decided *Olive I.* These subsections improperly penalize attorneys who seek payment of fees in excess of caps as ordered in *Olive I,* purport to regulate the qualifications of counsel, and specifically prohibit the use of state funds to pay fees in excess of the caps. Olive does not challenge any other section of the statute in this lawsuit.

Gallagher likewise misstates the record to claim that Olive does not want to function as a Registry counsel. After *Olive I,* Olive informed the trial court that he was ready and willing to accept the appointment to represent Jacob John Dougan (R.1 at 136). Only after the Legislature again threw his rights into doubt with the enactment of Section 27.7002 did Olive withdraw his agreement to accept the Registry appointment (R.1 at 137). Olive continues to represent Dougan on a *pro bono* basis. It is absurd to suggest that Olive would rather not be paid for his hard work. Olive stands ready and able to accept Registry appointments once he can be

certain that he will not be penalized for seeking fees in excess of caps should the case warrant the expenditure of more time than that allotted by the Legislature.

Gallagher's assertion that a ruling favorable to Olive would discourage other attorneys from participating in the Registry (Brief at 9) is nonsensical. Confirming that counsel will not be penalized for seeking fair compensation for extraordinary services will encourage more and better lawyers to participate in the program.

Finally, Gallagher asserts that Olive does not need a declaration because the CFO is following *Olive I* (and apparently ignoring Section 27.7002). It is true that after *Olive I,* CFO Gallagher's administration has authorized payment of fees above the caps without penalizing counsel. The actions of the Gallagher administration, however, are not binding on the new CFO, who may read Section 27.7002 – as does Maas – to prohibit her from paying fees in excess of caps despite a court order. In any event, Olive finds himself in the middle of a dispute between the entity that administers the Registry and one that pays Registry lawyers. Faced with that uncertainty, Olive is plainly entitled to a declaration stating whether or not he would be entitled to receive fees in excess of caps should a court award such fees.

II. OLIVE'S INTERPRETATION OF SECTION 27.7002 COMPORTS WITH THE PLAIN LANGUAGE OF THE STATUTE AND THE LEGISLATURE'S ACTUAL INTENT.

Six weeks after *Olive I* was rendered, the Legislature enacted Section 27.7002. The new Section states in part, "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**." Fla. Stat. 27.7002(5) (emphasis supplied). Although Gallagher's brief never mentions the actual language of the statute, he interprets it to mean that use of state funds for compensation of counsel above the amounts set forth in s. 27.711 **is authorized**, if ordered by a trial court. Gallagher justifies his interpretation by relying on the rule of construction that courts should, if at all possible, construe a statute to be constitutional. Gallagher Brief at 11.

But, as this Court recently noted, "Before resorting to the rules of statutory interpretation, courts must first look to the actual language of the statute itself." *Koile v. State*, 934 So.2d 1226, 1230 (Fla. 2006) (citations omitted). "When the language is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." The language of the statute could hardly be clearer, it makes no exception to the prohibition on the use of state funds. What could possibly be ambiguous about the statement that payment above the caps is "not authorized?"

Moreover, even if the statute were in need of construction, the intent of the Legislature is the polestar of statutory construction, and there is no doubt about the intent of the Legislature here. The circumstances and timing could not make it more obvious that Section 27.7002 was a direct response to *Olive I.* Confirming the obvious, the legislative history of the bill leaves no doubt that the Legislature's

intent was to overrule *Olive I.*[1] Section 27.7002 must be interpreted in accordance with its plain language and the obvious legislative intent.

Next, Gallagher concedes that the Registry system is more concerned with cost containment than the provision of adequate and effective legal representation to death sentenced defendants. Thus, a literal matter of life and death has been relegated to "a registry program which costs the taxpayers as little as possible." Gallagher Brief at 14. Olive does not quarrel with the proposition that the Registry program should be cost effective and efficient. His concern lies with the fact that Registry Caps are artificially low. Indeed, as Justice Cantero has previously noted, the caps are "unrealistic" and offer little more than "token compensation." *Fla. Dept. of Financial Serv. v. Freeman,* 921 So. 2d 598, 605 (Fla. 2006) (Cantero concurring) citing *White v. Bd of County Comm'r of Pinellas County*, 537 So. 2d 1376, 1379-80 (Fla. 1989). The fee caps as set forth in the statute do not just save costs. To the contrary, they are precisely the kind of "oppressive limitation" condemned by *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986). The right to postconviction counsel means the right to effective assistance of

---

[1] See House of Representatives Committee on Crime Prevention, Corrections and Safety, Final Analysis of HB 1091 (Passed as SB 1568) pg 5 available at http://www.flsenate.gov/data/session/2002/House/bills/analysis/pdf/2002h1091z.cpcs.pdf and attached as Appendix A. That report states: "In response to the Olive v. Maas case discussed above, the bill provides the following: . . . No registry attorney is entitled to be compensated above the statutory maximums. The use of state funds for compensation of counsel above the statutory maximum is not authorized."

counsel, not the illusion of a lawyer which is all that is available under the current "unrealistic" fee schedule.

III. THIS COURT SHOULD EXPLICITLY RECOGNIZE A CONSTITUTIONAL RIGHT TO EFFECTIVE POSTCONVICTION COUNSEL IN CAPITAL CASES.

Olive urges this Court to recede from its decision in *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005), where this Court declined to recognize a Florida constitutional right to effective postconviction counsel in capital cases. In response, Maas and Gallagher argue that *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and *Murray v. Giarratano*, 492 U.S. 1 (1989) stand for the unqualified proposition that capital defendants have no constitutional right to counsel in postconviction cases. Appellants overstate these holdings. In *Finley*, the Court held that the states have no constitutional obligation to provide counsel to indigent prisoners pursuing claims in state postconviction proceedings in general. *Finley*, 481 U.S. at 555. In *Giarratano*, the Court considered whether *Finley* applied to death cases. In a narrow 4-1-4 plurality decision, the *Giarratano Court* held that the *Finley* rule should also apply to capital cases in Virginia at that time. *Id*. at 10.

The precedential value of the 4-1-4 plurality ruling, however, is constrained by Justice Kennedy's deciding vote (in the form of a concurrence in the judgment, but not the plurality opinion) which stopped well short of extending the *Finley* rule to all capital cases. Rather, Justice Kennedy found that "collateral relief

proceedings are a central part of the review process for prisoners sentenced to death" and that "it is unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Id*. at 14. Nevertheless, because "no prisoner on death row in Virginia ha[d] been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system [wa]s staffed with institutional lawyers to assist in preparing petitions for postconviction relief," Justice Kennedy found no constitutional violation "[o]n the facts and record of this case." *Id*. at 14-15.

The most significant aspect of the Court's ruling in *Giarratano* is that a majority of the Justices -- Justice Kennedy and the four dissenting Justices -- agreed that collateral relief was a central part of the review process for prisoners sentenced to death and that capital defendants would probably be unable to file postconviction petitions successfully without the effective assistance of counsel – precisely what Olive argues in this case.[2]

Adding force to this argument is the Court's decision in *Coleman v. Thompson*, 501 U.S. 722, 755 (1991). In *Coleman*, the Court recognized that its narrow holding rejecting the right to effective postconviction counsel may not be

[2] As the Supreme Court has taught, "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *See Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

applicable in cases where "state collateral review is the first place a prisoner can present a challenge to his conviction." *Id*. Thus, the Court refused to foreclose the possibility that a death row inmate could challenge the ineffectiveness of their postconviction counsel at the state habeas trial level. *Id*.

Given *Giarratano's* splintered decision (and the reasoning behind Justice Kennedy's concurrence in the judgment), *Giarratano* cannot be unqualifiedly cited as authority for the proposition that no death row inmate has a constitutional right to counsel in postconviction proceedings under any circumstance.[3] This is especially the case with regard to the question of whether death row inmates have a right to collateral counsel under the Florida Constitution when postconviction proceedings represent the first and only opportunity that death row inmates have to raise constitutional violations arising from ineffective assistance of counsel.

In any event, this Court should recede from its summary statement in *Zack*. Florida's constitutional rights often exceed the scope of rights provided for under the U.S. constitution. *See Traylor v. State*, 596 So. 2d 962-63 (Fla. 1992). As

---

[3] The continuing viability of *Giarratano* has been the subject of a serious constitutional challenge before the United States Court of Appeals for the Eleventh Circuit in the case of *Barbour v. Haley*, No. 06-10920-cc (11th Cir.). In *Barbour*, the Eleventh Circuit held that there is no federal constitutional right to counsel for postconviction proceedings. The appellants will now petition the U.S. Supreme Court to challenge that holding and the viability *Giarratano* giving the Court the opportunity to clarify its fractured holding. The *Barbour* case has been brought by Bryan Stevenson of the Equal Justice Initiative of Alabama and Stephen F. Hanlon, counsel for appellees in this case.

such, this Court should conclude, as did Justices Anstead and Kogan in *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999), that death row inmates in Florida have a constitutional right to effective assistance of postconviction counsel.

A. Like Mississippi and Alaska, Florida is Aptly Positioned to Explicitly Recognize a Constitutional right to Effective Postconviction Counsel in Capital Cases.

As recognized by the Supreme Courts of Mississippi and Alaska, the current realities of the death penalty system require effective postconviction counsel to allow petitioners to meaningfully access their only opportunity to address any significant constitutional errors which, by their very nature, could not have been raised during trial or on direct appeal. *See Jackson v. State*, 732 So. 2d 187, 190-191 (Miss. 1999); *see also Grinols v. State*, 74 P.3d 889, 894 (Alaska 2003).

These decisions are solidly based on the rule first announced by the Supreme Court in *Douglas v. California*, 372 U.S. 353, 357 (1963). In *Douglas*, the Supreme Court held that due process is violated "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel." *Id*. In Florida, as in Mississippi, it is undisputed that "[c]ertain issues must often be deferred until the postconviction stage, such as the claim of ineffective assistance of counsel." *Jackson*, 732 So. 2d at 191. As in *Douglas*, this is the *one and only* opportunity an indigent death row inmate has to seek relief.

In Mississippi, the Supreme Court refused to "sit idly by" while the Legislature developed a solution for providing postconviction counsel to death row inmates. *Jackson*, 732 So. 2d at 191. In *Jackson*, the court recognized that postconviction litigation is "specialized, complex, and time-consuming litigation" and found that death row defendants were entitled to appointed and compensated counsel in postconviction proceedings. *Id*. In *Grinols*, the Alaska Supreme Court recognized that the importance of guaranteeing competent, effective counsel in state postconviction proceeding outweighed the administrative and fiscal burdens that may be placed on the state. Thus the state was required to provide effective postconviction counsel even when it meant additional burdens on the state. *See Grinols*, 74 P.3d at 895.

Like Mississippi and Alaska, Florida is aptly positioned to explicitly recognize a state constitutional right to postconviction counsel. Currently, Florida has a state capital postconviction regime which is broken. As described in Olive's initial brief, dozens of state-appointed postconviction attorneys have failed to meet court deadlines and failed to even remotely approximate the qualifications for postconviction counsel recommended by the American Bar Association ("ABA"). Postconviction proceedings represent the first and only opportunity that death row inmates have to raise constitutional violations arising from ineffective assistance of counsel. Indeed, as Justice Anstead recognized in *Arbelaez*, "the critical

importance of state postconviction proceedings has been magnified since the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 . . . severely restricting a death-sentenced defendant's access to the federal courts." *Arbelaez*, 738 So. 2d at 331.

Given the current alarming levels of incompetence in the Florida's postconviction regime, it is virtually inevitable that the failure to recognize a constitutional right to effective postconviction representation in capital cases will result in wrongful executions. Rather than upholding a death penalty regime plagued by "doubt and lack of confidence in an outcome untested by a meaningful collateral review," *Arbelaez*, 738 So. 2d at 330, this Court should seek to ensure that no death row inmate is executed without representation "at every level, by an advocate who represents his client zealously within the bounds of the law." *Id*.

B. Recognizing a Florida Constitutional Right to Postconviction Counsel Need Not Result in An Endless Cycle of Successive Claims as Appellants Allege.

Appellants insist that "the application of the constitutional concept of effective assistance of counsel to the postconviction context would create an endless parade of successive 'ineffective assistance of counsel' claims." Gallagher Brief at 22; Maas Brief at 7. Appellants' claim is overstated and provides no basis to deny the right to effective assistance of postconviction counsel.

To begin with, this case concerns the right to the appointment of effective counsel in the first instance – not whether the postconviction process will later be abused by successive petitions. Moreover, as to the latter issue, this Court has already held that successive claims of ineffective assistance of counsel on different grounds are not permitted and are barred. See *Lambrix v. State*, 698 So. 2d 247, 248 (Fla. 1997). Most importantly, Gallagher and Maas overlook the true stakes in this case. Here, the state's interests in the finality of the judgment must be balanced with the inmate's concern with the finality of death. As the Utah Supreme Court, in *Menzies v. Galetka*, No. 20040289 (Utah December 15, 2006), has succinctly observed, sometimes there are principles more important than finality of litigation:

> The State also argues that "writing an effective assistance requirement … would make capital post-conviction litigation interminable and end the finality of death sentences." It is true that there is a general judicial policy favoring the finality of judgments… However, as important as finality is, it does not have a higher value than constitutional guarantees of liberty. We would be remiss in our constitutional role if we were to allow finality to trump the interests at stake in post-conviction death penalty proceedings.
>
> *Menzies v. Galetka*, No. 20040289 at 36 (internal citations omitted).

C. Olive Properly Relies On ABA Reports and Recommendations; This Court and the U.S. Supreme Court have Repeatedly Endorsed the Findings and Recommendations of the ABA.

Appellants argue that Olive's claims about the ineptitude of postconviction counsel are based on "inadmissible evidence" such as the ABA's assessment of

Florida's death penalty system. Maas Brief at 4; Gallagher Brief at 20. The ABA assessment is cited in our brief for what it is – a scholarly analysis, not evidence. Moreover, as Appellant Maas points out, this Court has itself relied on the ABA's assessment as a "compilation of previously available information related to Florida's death penalty system [which] consists of legal analysis and recommendations for reform…." *Rutherford v. State*, 940 So.2d 1112 (Fla. 2006).

In fact, many federal and state courts have cited to ABA reports and guidelines as reliable authority in reaching their legal conclusions.[4] Significantly, the United States Supreme Court has endorsed the ABA's guidelines. In *Wiggins v. Smith*, the Court stated, "we have long referred to these ABA standards as guides to determining what is reasonable." 539 U.S. 510, 524 (2003). In *Rompilla v. Beard*, the Court relied on ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases to conclude that the defendant was provided with ineffective assistance of counsel. 545 U.S. 374, 387 (2005). In *Florida v. Nixon*, the Court relied on ABA Guidelines to assess the defense counsel's trial

[4] *Hedrick v. True*, 443 F.3d 342 (4th Cir. 2006); *Lundgren v. Mitchell*, 440 F.3d 754 (6th Cir. 2006); *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005); *Smith v. Dretke*, 422 F.3d 269 (5th Cir. 2005); *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005); *Smith v. Mullin*, 379 F.3d 919 (10th Cir. 2004); *Commonwealth v. Brown*, 872 A.2d 1139 (Pa. 2005); *In re Larry Douglas Lucas*, 94 P.3d 477 (Cal. 2004); *Franks v. State*, 278 Ga. 246, 599 S.E.2d 134 (Ga. 2004); *Peterka v. State*, 890 So. 2d 219 (Fla. 2004); *Armstrong v. State*, 862 So. 2d 705 (Fla. 2003); *Zebroski v. State*, 822 A.2d 1038 (Del. 2003); *Ackerberg v. Johnson*, 892 F.2d 1328 (8th Cir. 1989); *Clark v. Vandermeer*, 740 P.2d 921 (Wyo. 1987); *SEC v. Tome*, 638 F. Supp. 596 (S.D.N.Y. 1986).

strategies. 543 U.S. 175, 191 (2004). The Supreme Court's repeated reliance on ABA standards in its opinions is a testament to the sound research and analysis that that underlies the formulation of ABA reports and guidelines. This Court should not be persuaded by the appellant's evidentiary objections.

CONCLUSION

This case presents questions of fundamental importance to the integrity of Florida justice. Should this Court abandon its twenty-year recognition of the link between adequate compensation and effective representation of counsel? Should it instead give its imprimatur to a system which can be fairly characterized as "unrealistic," and providing little more than "token compensation"? Most importantly, should this Court acknowledge that the State's twenty year experiment in providing a statutory right to postconviction capital counsel has failed and that it is time to recognize a Florida Constitutional right to such counsel?

The Court knows our answer to these questions. But it hardly needs our advocacy on these issues. The Court already knows firsthand the results of the Legislature's choices and will live with the results of its decision in this case in every subsequent postconviction case. In the words of Justice Brandies: "A judge rarely performs his functions adequately unless the case before him is adequately presented." Louis D. Brandeis, *The Living Laws*, 10 Ill. L. Rev. 461, 740 (1916). How true, especially when a court is deciding who shall live and who shall die.

Respectfully submitted,

Stephen F. Hanlon
Florida Bar No. 209430
Steven Brannock
Florida Bar No. 319651
Robin L. Rosenberg
Florida Bar No. 907332
Leon Fresco
Florida Bar No. 0673943

HOLLAND & KNIGHT LLP
Suite 100
2099 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 955-3000

Counsel for Appellee/Cross Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by US Mail to **JEREMIAH M. HAWKES**, 327 The Capitol, Tallahassee, Florida 32399-1300; **RICHARD T. DONELAN, JR**., 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 January, 2007.

_____

4262940_v5