IN THE SUPREME COURT OF FLORIDA

ROGER R. MAAS,

Appellant,

vs.

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

MARK EVAN OLIVE, et al.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE TOM GALLAGHER, AS CHIEF FINANCIAL OFFICER

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PRELIMINARY STATEMENT

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

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

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

References to the record on appeal are indicated by (R-) followed by the page number to which citation is made. Unless otherwise indicated, all references to Florida Statutes are to Florida Statutes (2006).

Pursuant to Fla. R. App. P. 9.210(c), no Statement of the Case and of the Facts is included in this Answer Brief.

SUMMARY OF ARGUMENT

I. The Florida Legislature remains in full control over whether to have a state-funded capital collateral representation program. The order on review does not strip the Legislature of its authority to "say what the law is" as to the registry program. At issue here is a lesser question: whether a registry lawyer must be thrown off the registry merely for asking for more compensation than provided for in Section 27.711, Florida Statutes. This issue is a collision between the legislative branch's constitutional power over the State's purse and the judicial branch's constitutional power to assure due process of law: essentially a conflict of right against right.

With respect to Section 27.7002(5), Florida Statutes, the Department has taken the consistent position that we do not have *independent* statutory authority to pay registry counsel anything beyond the sums allowed in the fee and payment schedule of Section 27.711, Florida Statutes. In cases where a trial court, having made the requisite findings to invoke the "as applied" constitutional justification for extra payment to registry counsel approved by this Court in Olive v. Maas, has ordered the CFO to pay such extra compensation, the Department has paid it. The Department does not interpret Section 27.7002(5), Florida Statutes, to bar payment of appropriate court-ordered compensation from funds specifically appropriated by the

Legislature for the costs of the registry program. In the absence of a decision from this Court that relieves the Department from having to pay, the Department believes that it is obligated to pay as ordered by the court.

Troublesome consequences flow from a summary ejection of a registry lawyer from ongoing capital collateral litigation. New, substitute counsel will have to be brought on and given an opportunity to familiarize his or herself with the case–at taxpayer's expense. In most cases, this result would be more costly than to pay the original registry an extra sum directly attributable to extra work mandated by what a trial court finds to be unusual or extraordinary circumstances. In addition, the trial court could still order the CFO to pay the extra compensation sought by the lawyer, despite his or her removal from the registry. Finally, involuntary removal of an inmate's counsel may allow him to claim that the State's actions impair his constitutional rights, and provide a new, independent basis for challenging his sentence. The most cost-effective way for the State to fund capital collateral representation is to pay one registry counsel through all collateral challenge proceedings.

The Executive Director should have clear authority to remove any registry counsel who engages in abusive billing practices, including one who, without justification, demands extra compensation in connection with

every aspect of the representation of a death-sentenced inmate. The order on review should be upheld on the narrowest grounds possible--that removal of counsel merely for seeking additional compensation in the course of a capital collateral representation is unnecessarily costly and disruptive to proceedings.

II. The Department cannot criticize the trial court's interpretation of the Olive v. Maas rationale. The Department had already adopted the same interpretation. As a party to the original Olive v. Maas action, the Department must acknowledge this Court's opinion as controlling. If the Court decides to recede from its previous holding, the Department will comply.

III. If it is possible and reasonable, courts should construe statutes in a manner which preserves their constitutionality. It was not error for the trial court to construe Section 27.7002, Florida Statutes, in order to sustain its constitutionality.

STANDARD OF REVIEW

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

I. THE ORDER ON REVIEW DOES NOT INTERFERE WITH THE AUTHORITY OF THE LEGISLATURE TO ENACT AND FUND THE REGISTRY PROGRAM.

Chapter 27, Part IV, Florida Statutes (2006), defines in prescriptive detail a comprehensive state-funded program to supply post-conviction counsel to death-sentenced inmates held in Florida's penal system. The Florida Legislature specifically expressed its intent behind this enactment:

> It is the intent of the Legislature to create part IV of this chapter, consisting of ss. 27.7001-27.711, inclusive, to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral legal proceedings to challenge any Florida capital conviction may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice.

Section 27.7001, Fla. Stat. (2006).

Chapter 27, Part IV, Florida Statutes, was thus intended to regularize and expedite the formerly chaotic situation that existed with respect to representation of death-sentenced inmates in capital collateral proceedings. *See* Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). *But see* Hill v. Butterworth, 941 F. Supp. 1129 (U.S. D.C. ND Fla., 1996). Reported decisions from the period preceding the enactment of Chapter 27, Part IV, show that representation of death-sentenced inmates in collateral attacks to their sentences was often undertaken on a haphazard, pro bono basis,

resulting in recurrent delays and procedural irregularities flowing from unscheduled substitutions of volunteer counsel and in continuous claims of ineffectiveness on the part of such volunteers, many of whom lacked experience in the complexities of the law relating to capital cases. *See, e.g.*, Adams v. State, 380 So. 2d 421 (Fla. 1980); Graham v State, 372 So. 2d 1363 (Fla. 1979). *Cf.* Spaziano v. State, 660 So. 2d 1363 (Fla. 1995).

To rectify this situation, the Legislature first established in 1985 a central Office of Capital Collateral Representative. *See* Ch. 85-332, Laws of Fla. Then, in 1997, the Legislature determined to replace the single Office with three regional offices of capital collateral counsel. *See* Ch. 97-313, Laws of Fla. Then, in 1998, the Legislature elected to create a registry of qualified and experienced private counsel available to be appointed to represent death-sentenced inmates ("the registry program"). *See* Ch.98-197, Laws of Fla. Then, in 2003, the legislature determined to suspend the activities of the Northern Region office of capital collateral counsel and assign its cases to registry lawyers as a "pilot program." *See* Ch. 2003-399, Laws of Fla.

The foregoing historical recitation demonstrates unequivocally that the Florida Legislature remains in full control over whether to have a state-funded capital collateral representation program and, if so, how it should be

configured. To the extent that the Initial Brief suggests that the order on review strips the Legislature of its unquestionable authority to "say what the law is," the claim is rhetorical overstatement. Rather, at issue here is a far less weighty question: whether a duly appointed registry lawyer must be thrown off the registry maintained by the Executive Director of the Commission on Capital Cases merely for asking for more compensation than provided for in the "fee and payment schedule" of Section 27.711, Florida Statutes.

The CFO, acting through the Department, is well situated to observe and comment on this issue because the Department has the unenviable task of administering payment to registry counsel on a daily basis. We suggest that the issue here is, in fact, a collision between the legislative branch's constitutional exercise of power over the State's purse and the judicial branch's constitutional exercise of the State's judicial power to assure due process of law: essentially a conflict of right against right, of the type that the judiciary has traditionally been called upon to resolve.

The Department strives to administer the CFO's responsibilities under Chapter 27, Part IV, Florida Statutes, in strict conformance with the plain meaning of the statutes: to see that the law is faithfully executed, in accordance with the basic duty of executive branch officials. With respect to

Section 27.7002(5), Florida Statutes, the Department has taken the consistent position before this Court, *see* Fla. Dept. of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006); and before the First District Court of Appeal in this case, *see* Olive v. Maas, 911 So. 2d 837(Fla. 1st DCA 2005); that we do not have *independent* statutory authority to pay registry counsel anything beyond the sums allowed in the fee and payment schedule of Section 27.711, Florida Statutes. *See also* State v. Demps, 846 So. 2d 457 (Fla. 2003). In the Freeman case, the Department appealed a trial court order that merely ordered payment in excess of statutory limits without finding, as required by Olive v. Maas, 811 So. 2d 644 (Fla. 2002), that extraordinary or unusual circumstances would render unconstitutional the application of the statutory limits. In the Demps case, the Department appealed trial court orders that erroneously found facially unconstitutional the $100 hourly rate for registry lawyers set by law.

In most cases where registry counsel represent death-sentenced inmates, attorneys' fees for the representation do not exceed the statutory maximums. But in cases where a trial court, having made the requisite findings to invoke the "as applied" constitutional justification for extra payment to registry counsel approved by the Court in Olive v. Maas, *supra*, has ordered the CFO to pay such extra compensation, the Department has

paid it. The Department has not interpreted Section 27.7002(5), Florida Statutes, to bar such payment from the funds specifically appropriated by the Legislature for the costs of the registry program. In the absence of a decision from this Court that relieves the Department from having to pay, the Department believes that it is obligated to pay, based on Olive v. Maas, *supra*, and on the supervisory authority to determine controversies over fees to registry lawyers conferred on trial courts by Section 27.711(13), Florida Statutes.

The Initial Brief urges this Court to read Section 27.7002(6), Florida Statutes, as an appropriate mechanism to enforce the maximum fee limitations of Section 27.711, Florida Statutes. See Initial Brief at p. 10. The Initial Brief does not address however, the troublesome practical consequences that would attend the summary ejection of a registry lawyer from ongoing capital collateral litigation. The first of these consequences is mundane but costly: new, substitute counsel will have to be brought on and given an opportunity to familiarize his or herself with the case–at taxpayer's expense. *See, e.g.*, Freeman, *supra*. In most cases, unfortunately, the result would be more costly than to pay the original registry an extra sum directly attributable to extra work mandated by what a trial court finds to be unusual or extraordinary circumstances. *See, e.g.*, State v. Demps, *supra*. Having

already administered payments to successive registry counsel in a number of cases–the Freeman case is a particularly clear example-- our experience would support the conclusion that the most cost-effective way for the State to fund capital collateral representation is by retaining one qualified registry counsel who is familiar with the issues of the case through all collateral challenge proceedings. It is noteworthy that this concept is embodied in Section 27.710(4), Florida Statutes, which requires each registry counsel "to continue the representation under the terms and conditions of the contract until the sentence is reversed, reduced, or carried out, or until released by order of the trial court."

Even if a registry counsel were to be thrown off the registry for seeking extra compensation, however, that act would not resolve the question of whether counsel's pending request for additional compensation would be approved by the trial court having jurisdiction over the collateral challenge litigation. As the Initial Brief correctly notes, see Initial Brief at p. 16, fn. 1, Chapter 27, Part IV, contemplates that the judiciary will exercise primary supervisory review over the billings of registry counsel. *See* Section 27.711(12-13), Fla. Stat. (2006). The trial court could still order the CFO to pay the extra compensation sought by the lawyer, notwithstanding his or her removal from the registry, because payment under the registry

program is made on a reimbursement rather than advance payment model. *See* Section 27. 711(4), Fla. Stat.(2006). In that event, the Department would be presented with the dilemma of honoring the court's order or appealing it, as in the Freeman case.

The second foreseeable consequence of "disappointing" registry counsel in mid-representation is that it would disrupt the orderly continuation of the very process that state-funded capital collateral representation is expressly intended to facilitate: the expeditious exhaustion of all collateral challenges that preclude the administration of a death sentence. Indeed, involuntary removal of an inmate's counsel may allow him to claim that the State's actions impair his constitutional rights, and provide a new, independent basis for challenging his sentence. Even though the provision of state-paid counsel is an act of legislative grace, actions taken to frustrate an inmate's ability to utilize state-funded counsel may still be deemed a Sixth Amendment violation. *See* Hill v. Butterworth, *supra*.

The Department believes that the Executive Director of the Commission on Capital Cases needs, and should have, clear authority to remove from the registry any counsel who engages in abusive billing practices, including counsel who, without substantial justification, demands extra compensation in connection with every aspect of the representation of

a death-sentenced inmate. Section 27.7002(6), Florida Statutes, does not require the Executive Director to remove counsel who seeks extra compensation, but rather authorizes the removal of a counsel "who seeks compensation for services above the amounts provided in s. 27.711." The Department urges the Court to uphold the order on review on the narrowest grounds possible-- that immediate removal of a registry counsel merely for seeking additional compensation in the course of a capital collateral representation is unnecessarily costly and disruptive to proceedings–while preserving the removal authority of the Executive Director to be exercised at an appropriate time when it would not be potentially disruptive to the rights of an inmate and under circumstances that warrant such a drastic remedy.

II. THE TRIAL COURT DID NOT ERR BY CONCLUDING THAT THIS COURT'S PREVIOUS OLIVE V. MAAS DECISION WAS CONTROLLING

The thrust of the Initial Brief's second point on appeal is that the rationale for this Court's decision in Olive v. Maas, *supra*, has been superseded by the enactment of Section 27.7002, Florida Statutes (2002), and therefore the trial court erred in relying on this Court's rationale in that case. It is impossible for the Department to criticize the trial court's interpretation of the applicability of the Olive v. Maas rationale here because the Department had already adopted the same interpretation in its administration of registry payments. This fact is recognized in the order on review. (R-580).

If this Court determines to recede from its previous holding that registry counsel are not foreclosed from seeking extra compensation in judicially-determined unusual or extraordinary circumstances, the Department will certainly abide by that decision. As a party to the original Olive v. Maas declaratory action, however, the Department has had no choice but to acknowledge the Olive v. Maas opinion as controlling precedent for the proposition that courts may decree extra compensation for registry lawyers. Consequently, we have honored duly rendered court orders

that did so decree. We believe that we are obligated to abide by this Court's Olive v. Maas rationale unless and until it is overruled. We earnestly seek the Court's guidance on this important question of law.

III. THE TRIAL COURT DID NOT HOLD THAT SECTION 27.7002 UNCONSTITUTIONALLY INTERFERES WITH THE COURTS' INHERENT AUTHORITY UNDER ARTICLE V TO ENSURE ADEQUATE REPRESENTATION

The essence of the rationale underlying the order on review is that Section 27.7002, Florida Statutes, must be interpreted in a manner that preserves its constitutionality. The order on review does not find Section 27.2002, Florida Statues to be facially unconstitutional. The crux of the order is found in this excerpt:

> Florida Supreme Court 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 to ensure adequate representation. (Citations omitted) Thus to preserve the constitutionality of section 27.7002, all of its provisions must be construed in a manner consistent with controlling case law. (R-579)

It is apodictic that, if it is possible and reasonable, courts should construe statutes in a manner which preserves their constitutionality. *See* Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd., 894 So. 2d 954 (Fla. 2005); State v. Mitro, 700 So. 2d 643 (Fla. 1997). The trial did so in the order on review. It was not erroneous for the trial court to construe Section 27.7002, Florida Statutes, in order to sustain its constitutionality.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer Brief was furnished by U.S. Mail this 2d day of October, 2006, to the following persons: Jeremiah M. Hawkes, Esq., 327 The Capitol, Tallahassee, FL 32399-1300; Stephen F. Hanlon, Esq., Holland and Knight LLP, 2099 Pennsylvania Ave, NW Suite 100, Washington, D.C., 20006; and Elizabeth Bevington, Esq., Holland and Knight LLP, P.O. Drawer 810, Tallahassee, FL, 32302-0810.

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Richard T. Donelan, Jr.

CERTIFICATE OF COMPLIANCE

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

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Richard T. Donelan, Jr.