IN THE SUPREME COURT OF FLORIDA

Case No. SC06-835

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

ROGER R. MAAS, ETC.,

Appellants,

v.

MARK EVAN OLIVE, ET AL.

Appellees.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

Appellant, Roger R. Maas, seeks review of the First District Court of Appeal's ruling that Appellee, Mark E. Olive, has standing to challenge the statute defining the terms of contracts between the state and collateral counsel. Appellant also challenges the ruling of the Second Judicial Circuit holding the provisions of section 27.7002, Florida Statutes, (2002), are facially unconstitutional and unenforceable.

A. Legislative Background

Exercising its exclusive Article III Section I legislative power the Florida Legislature authorized the appropriation of limited state resources to provide legal assistance in collateral proceedings to defendants convicted of capital offenses. In 1999, the Legislature changed the manner in which the program would be administered and the services offered by creating a statewide registry of attorneys. Each attorney is required to possess certain minimum qualifications and must be willing to enter into a contract with Appellant to represent defendants in one defined region of the state. *See* § 27.710 Fla. Stat. (Supp. 1998). When the Legislature created this Registry it enacted a series of terms and conditions defining attorney performance requirements and setting out a payment schedule upon achievement of certain benchmarks. Contract terms and conditions included limits on compensable

hours and costs. Registry attorneys voluntarily agree to these terms and conditions if they choose to accept appointment under the statute. *See* § 27.711 Fla. Stat. (Supp. 1998).

Mr. Olive filed a challenge to the statute and was granted narrow declaratory relief in *Olive v. Maas*, 811 So.2d 644 (Fla. 2002) (*Olive I*). In *Olive I*, the Court held that, while the limits imposed by section 27.711, Florida Statutes, were not unconstitutional, the Court still had the inherent authority to ensure adequate representation because the Legislature had created a statutory right to counsel. The Court concluded, in extraordinary and unusual cases, it could depart from the fee caps to "ensure that an attorney is not compensated in an amount which is confiscatory of his or her time, energy and talents." *Id*. at 652 (quoting *Makemson v. Martin County,* 491 So.2d 1109 (Fla. 1986).

In 2002, responding to *Olive I,* the Legislature amended the statute by adding section 27.7002, Florida Statutes. Through this amendment the Legislature unequivocally expressed its intent that the caps set forth in section 27.711, Florida Statutes, could not be exceeded and any attorney seeking compensation above the caps could be permanently removed from the Registry list absent a showing of good cause.

B. Course of Proceedings

Mr. Olive, a Florida attorney, was representing a death row inmate on a *pro bono* basis. He sought appointment under section 27.710, Florida Statutes, and was offered the opportunity to enter into a contract. He refused to enter into the statutorily required contract arguing he could not ethically represent his client for the amount of fees authorized by the terms of the contract. Because he refused to execute an agreement, he was never appointed to represent any defendants under the statute before this action was brought.

On February 5, 2003, Mr. Olive filed a complaint for declaratory judgment challenging the provisions of section 27.7002, Florida Statutes. (R1. 128-130). On June 29, 2004, the complaint was dismissed with prejudice for failure to state a ground on which declaratory judgment could be granted. (R2. 243-256). Mr. Olive appealed and the First District Court of Appeal reversed in *Olive v. Maas,* 911 So.2d 837 (1st DCA 2005) (*Olive II*). That court held there was a justicible issue due to the creation of section 27.7002, Florida Statutes even though there was no present controversy. The court remanded the case to the trial court for consideration of Mr. Olive's complaint. On March 23, 2006, the trial court granted summary judgment in favor of Mr. Olive concluding section 27.7002, Florida Statutes, was facially unconstitutional and unenforceable. (R3. 577-581). This

appeal followed.

SUMMARY OF ARGUMENT

I. The trial court erred in ruling that the legislative enactment of section 27.7002, Florida Statutes, was a meaningless act. The Legislature has the exclusive authority to make public policy choices from among various competing interests. Inherent in this authority is the power to decide how programs will operate and how they will be funded. One option the Legislature is free to choose is to contract with private vendors willing to provide the services. The Legislature is also free to determine under what conditions the state will enter contracts. By rendering section 27.7002(6), Florida Statutes, unenforceable the trial judge usurped the Legislature's constitutional prerogative to make policy choices among competing interests.

II. The trial court erred in finding *Olive I* prevents the amended statute from having any force or effect. The statutory amendment enacted after *Olive I* clarifies legislative intent and, thereforee is valuable for proper statutory interpretation. *Olive I* cannot render all future legislative enactments meaningless when the Legislature is making discretionary policy choices.

III. The trial court erred for two reasons in holding section 27.2007(6), Florida Statutes, unenforceable and concluding section 27.711 unconstitutionally interfered with the courts' inherent powers under Article V to ensure adequate representation.

First, neither of these issues is ripe. Although Mr. Olive is currently listed on the Registry, he has never signed a contract, has never been appointed to a capital case through the Registry, has never sought attorneys' fees through the Registry, and no steps have been taken to remove him from the Registry. In the four years since the enactment section 27.2007(6), Florida Statutes, no attorney has ever been removed from the Registry for seeking excess compensation.

Second, before a court can hold that a statutory fee cap applied to state-funded counsel interferes with the Court's inherent power under Article V to ensure adequate representation, it must conduct an "as applied" analysis. The trial court reversibly erred by holding the statute unconstitutional without conducting the required analysis. For these reasons the lower court's decision must be reversed.

STANDARD OF REVIEW

This is an appeal taken of a summary judgment entered by the trial court. All the issues involved are issues of law subject to *de novo* review. See *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000).

ARGUMENT

I. THE TRIAL COURT'S RULING DENIES THE LEGISLATURE ITS CONSTITUTIONAL AUTHORITY TO DETERMINE WHAT SERVICES OR PROGRAMS WILL BE AVAILABLE, HOW THOSE SERVICES OR PROGRAMS WILL OPERATE AND HOW THEY WILL BE FUNDED.

Article III, section 1 of the Florida Constitution vests all legislative power in the legislative branch of government. The legislative power inherently includes the power to create or fund a program, to decline to create or fund a program and to define the extent and level of funding. In making these decisions, the Legislature has the exclusive authority to decide how to fund any particular program.

Florida's Constitution provides that "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." Art. VII, § 1(c), Fla. Const. "The power of deciding how, when, and for what purpose the public funds shall be applied in carrying on the government is secured exclusively to the Legislature." *See State v. Fla. Police Benevolent Ass'n, Inc.,* 613 So.2d 415, 418 (Fla.1992) ("[E]xclusive control over public funds rest solely with the legislature."). It is well-established that the power to appropriate state funds may be exercised only through duly enacted statutes. *Chiles v. Children A, B, C, D, E, & F,* 589 So.2d 260, 265 (Fla.1991). Thus, the State may not employ state funds unless such

use of funds is made pursuant to an appropriation by the Legislature. *See State v. Fla. Police Benevolent Ass'n, Inc.,* 613 So.2d 415, 418 (Fla.1992).

"The object of a constitutional provision requiring an appropriation made by law as the authority to withdraw money from the state treasury is to prevent the expenditure of the public funds . . . without the consent of the public given by their representatives in formal legislative acts." *State ex rel. Kurz v. Lee,* 121 Fla. 360, 163 So. 859, 868 (1935). Accordingly, Florida's Constitution expressly limits the state's ability to expend funds and enter contracts by requiring specific legislative authority. *See Am. Home Assur. Co. v. Nat'l Railroad Passenger Corp.*, 908 So. 2d 459, 474-475 (Fla. 2005).

Consequently, "[w]here the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into a contract, the legislature has clearly intended that such contracts be valid and binding on **both parties**." *Pan Am Tobacco Corp. v. Dep't of Corrections*, 471 So. 2d 4, 5 (Fla. 1984)(emphasis added).

As stewards of the public coffers, the Legislature enacted section 27.7002, Florida Statutes, which establishes the terms for private attorneys entering State contracts to provide capital representation. One of the terms of representation is agreement as to the maximum fee each attorney may charge the State. Clearly, the

State has a legitimate interest in budgeting and regulating State moneys being spent and setting a maximum fee is a permissible way to accomplish this objective. Thus, statutory fee caps are not unusual.

For example, in the workers' compensation context, the Legislature limits the payment of attorneys fees to a percentage of the benefits secured for the claimant. *See* § 440.34(1), Fla. Stat. Another example of fee caps is in sovereign immunity cases where attorney's fees are capped at twenty five percent of any judgment or settlement. *See* § 768.28(8), Fla. Stat. The cap applies even if, after accepting the representation, the attorney finds the case is far more complex and difficult than anticipated, resulting in compensation far below what his skill and time spent may otherwise demand. By accepting the case, the attorney enters into an agreement (statutorily or otherwise) to accept the fee cap.

The case law upholding the validity of these fee caps is instructive here. Workers' compensation and sovereign immunity cases are creatures of statute, and are governed by statutory enactments. Similarly, the right to state-funded counsel in post-conviction proceedings is purely statutory. There is no constitutional right to state-funded counsel in post-conviction proceedings. *See Arbalaz v. Butterworth*, 738 So. 2d 326 (Fla. 1991); *Zack v. State*, 911 So. 2d 1190, 1203 (Fla. 2005).

The Legislature has chosen to provide legal counsel to death row inmates to

assist them in collateral attacks on their convictions and sentences. Because the provision of counsel in this situation is purely permissive, the means of providing, funding and operating this service falls exclusively within the prerogative of the Legislature. Clearly, the Legislature has the authority to create a system that allows willing, qualified attorneys to enter into binding contracts when those attorneys choose to become vendors providing defined services to the state.

The private attorneys who meet the minimum requirements and choose to enter into these contacts are placed on a Registry and selected by trial judges to represent eligible inmates. Upon selection the attorney is offered an opportunity to enter into a contract that defines the parties' agreement and contains a payment schedule for accomplishing pre-defined objectives. An attorney is free to decline to participate in the Registry and free to decline assignment to a particular case.

However, the State has the right to expect the attorneys who choose to enter into these contracts will fully perform under the terms of the contract. Nothing is more basic in any contest of a contract claim than that the rights and duties of the parties are defined by that specific contract. Here, Mr. Olive asks to exclude from the Court's consideration that very starting point.

Mr. Olive skips over any consideration of the contract and urges the Court to allow him to participate in the Registry without being bound by any of its statutory

provisions. By barring enforcement of section 27.7002(6), Florida Statutes, the trial court is essentially allowing Mr. Olive to be untethered from the requirements of the only authority by which the state of Florida provides post-conviction representation through private attorneys. Mr. Olive can no more seek to operate outside the constraints of the Registry statutes than he can seek appointment and state funding to represent non-capital defendants in state post-conviction proceedings. Neither are authorized by, nor funded by, the Legislature. The representation Mr. Olive seeks to provide is only authorized by statute and he has no basis to ask this Court to authorize him to establish a program to provide representation in a manner suited to his own personal liking, in violation of the statutory provisions establishing the Registry.

Lawyers, like all other professionals, are free to voluntarily accept compensation for their services that are lower than their usual hourly rate. It is not confiscatory of their time or talents when the compensation is precisely what they agreed to in advance of providing the service, and in advance of entering into a contract.

The State of Florida employs a multitude of lawyers; at the attorney general's office, state attorney and public defender offices, office of capital collateral regional counsel, state agencies, and even the courts, for less than the $100 per hour

provided for in the Registry. No rational claim could be made that, with respect to all of these lawyers, the State of Florida is confiscating their time and talents. Private attorneys agreeing to provide professional services, with notice of the compensation schedule, are no different than a state employed attorney who works extra hours because the extra time is needed to ethically perform their respective duties.

When he applied to be on the Registry Mr. Olive, like all applicants for the Registry, made the following certification: "if appointed to represent a person in postconviction capital collateral proceedings, [the applicant] shall continue such representation under the terms and conditions set forth in s. 27.711 until the sentence is reversed, reduced, or carried out or unless permitted to withdraw from representation by the trial court." *See* § 27.710(3) Fla. Stat.

Now he seeks to renege on that certification with the Court's blessing. Mr. Olive has made it abundantly clear that he will seek fees or costs in excess of the caps in almost every instance. (R1. 22-26). This means he will not be abiding by his certification that he will comply with section 27.711, Florida Statutes. Abiding by that certification is a continuing requirement for eligibility to remain on the Registry. As a party to a contract, the State cannot be compelled to enter into contacts with individuals who freely proclaim in advance their full intention to

violate the statute, seek excess fees or costs and who feel no compunction to abide by the express terms of their contracts.

The trial court erred as a matter of law by ruling section 27.7002(6), Florida Statutes, is unenforceable, and accordingly should be reversed.

II. THE TRIAL COURT ERRED IN CONCLUDING *OLIVE I* WAS A LIMITATION ON THE POLICY CHOICES THE LEGISLATURE MADE WHEN ENACTING SECTION 27.7002.

In *Olive I*, this Court held section 27.711, Florida Statutes allowed the Court to exceed the statutory fee caps in cases involving extraordinary and unusual circumstances. The Court set forth two grounds upon which its finding was based. The first was based on the reasoning in *Remeta v. State,* 559 So.2d 1132 (Fla. 1990). The second ground was what the Court found to be the legislative intent. Both of these grounds are invalid in light of the recent statutory amendments.

In *Remeta,* the Court reasoned a statutory right to counsel "necessarily carries with it the right to have effective assistance of counsel." *See id*. at 1135. The Court then applied the logic of cases involving constitutional right to counsel, to hold the caps can be exceeded to "ensure the adequate representation of the criminally accused". *See id*. at 1134. Three facts distinguish *Remeta*. First, the Legislature had not set forth an alternate means of assuring competent performance

of counsel as they did in section 27.7002, Florida Statutes. Second, the *Remeta* claim for fees above the statutory cap was not based solely on speculation as to the inadequacy of the fee, as is Mr Olive's claim. Third, providers in *Remeta* did not sign contracts specifically setting out each aspect of performance and the fee provided for that performance.

The Court's second ground was founded upon a legislative staff analysis which indicated the *Remeta* reasoning could be applied to section 27.710, Florida Statutes, and section 711, Florida Statutes. *See Olive I* at 653. The Court used the legislative history to conclude the Legislature intended trial courts to have the power to exceed the caps.

Justice Cantero noted the problematic nature of this conclusion in his concurrence in *Florida Department of Financial Services v. Freeman,* 921 So.2d 528 (Fla. 2006)(*Freeman*), wherein he expressed concern that the Court's interpretation of the statute "appears to elevate the staff analysis over the statute's plain text." Justice Cantero went on to state: "[W]here the language is clear, courts need no other aids for determining legislative intent. Even if the language were *not* clear, legislative staff analysis add nothing to an investigation of legislative intent. Staff analyses are not written by legislators but, as the name implies, by *staff*—that is *unelected* employees." *Am. Home Assurance Co. v. Plaza Materials Corp.,* 908

So. 2d 360, 376 (Fla. 2005)(Cantero, J., concurring in part and dissenting in part)(citations omitted)."

Justice Cantero highlighted a major flaw in *Olive I.* A staff analysis is an unpublished document of varying quality designed as reference for the members of the Legislature while they consider legislation. It is not intended to provide insight into what the Legislature ultimately decided or why it ultimately reached its decision. Unlike Congressional staff analyses, the document is not voted on by the committee or the body, nor is it published in the journal. Senate staff analyses state "This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate." To use a staff analysis in the manner the Court did in *Olive I* would be like counsel obtaining a bench memo prepared by a law clerk and elevating that document over the Court's final published opinion.

Here, by passing section 27.7002, Florida Statutes, within weeks of *Olive I,* the Legislature clearly indicated its intention that Registry attorneys be bound by the contract they voluntarily signed. Sections 27.7002(1)-(5) read:

> (1) This chapter does not create **any** right on behalf of any person, provided counsel pursuant to any provision of this chapter, to challenge in any form or manner the adequacy of the collateral representation provided.
>
> (2) 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).
>
> (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.
>
> (4) No attorney may be appointed, at state expense, to represent any defendant in collateral legal proceedings except as **expressly authorized** in this chapter.
>
> (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. (emphasis added)

Clearly, by enacting this statute, the Legislature rejected the idea it wanted the Court to exceed the caps and made clear its intent, through use of its budgetary authority, that contract attorneys are expected to strictly comply with the terms of their contracts. The Legislature also attempted to curb the potential onslaught of attorneys perceiving an invitation to seek excess fees and costs from the state based on the notion that all capital cases are "extraordinary and unusual." (R1. p.23 last paragraph).

Consequently, due to the change in the statute, the reasoning in *Olive I* does not limit the application of section 27.7002, Florida Statutes. The Legislature did create a statutory right, but one strictly limited to the terms and conditions provided by the statute.

The Legislature addressed the concern raised in *Olive I,* that defendants receive adequate representation, by providing in subsection 2 that the procedure outlined in section 27.711(12)[1], Florida Statutes, will be used. Subsection 1 prohibits the type of actions Mr. Olive brings now. Clearly, the Legislature wished to provide adequate representation, but has rejected the notion that exceeding the caps in certain cases is the way to achieve its objective. It is also clear the Legislature wishes to foreclose proceedings seeking more compensation and sanction those attorneys who bring such matters to the court.

III. THE TRIAL COURT ERRED BY HOLDING SECTION 27.7002 UNCONSTITUTIONALLY INTERFERES WITH THE COURTS' INHERENT AUTHORITY UNDER ARTICLE V TO ENSURE ADEQUATE REPRESENTATION.

First, there is no justiciable issue ripe for adjudication. To have an actual controversy here three things must occur: Mr. Olive must be appointed to a case; he must seek more compensation than the caps allow; then he must be removed from the Registry. None of those requirements have been met. Interestingly, prior to the entry of the order in this case, Mr. Olive was never appointed to represent

[1] Subsection 12 provides: 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.

any client under section 27.710, Florida Statutes. Additionally to date, no attorney has ever been removed from the Registry for seeking excess compensation. In fact, the Executive Director of the Commission on Capital Cases is aware of only one attorney who has ever notified any court that he was unable to provide adequate or proper representation under the terms of section 27.711, Florida Statutes. That attorney was Mr. Olive himself, who almost represented Anthony Mungin in the case that spawned *Olive v. Maas* 811 So. 2d 644 (Fla. 2002). Significantly, Mr. Olive is still listed on the Registry, even though his actions and his recantation of his application certification has rendered him ineligible to remain on the Registry.

There is no legal basis for the trial court's ruling that the statute is facially unconstitutional. Where state-funded counsel are provided the Florida Supreme Court has held trial courts may award fees to private counsel in excess of legislative limits if it can be shown capped fees would be confiscatory of the attorney's time and services. *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986); *White v. Bd of County Commissioners of Pinellas County*, 537 So. 2d 1376 (Fla. 1989); *Olive I* at 654. It is important to note that in none of the foregoing cases did the Court declare the fee limits facially unconstitutional. Instead, the *Makemson* line of

cases require the trial court conduct an "as applied" analysis before finding any fee limit interferes with the courts' inherent powers. *See Olive I.*

The rationale of the *Makemson* line of cases is to insure the availability of competent, effective counsel to represent criminal defendants. However, legislatively imposed fee caps may not be overcome unless it can be affirmatively shown that the fee caps make it impossible for such counsel to be found. *See Sheppard & White v. City of Jacksonville*, 751 So. 2d 731 (Fla. 1st DCA 2000) (affirming trial court's award of $40 per hour in capital case, where plaintiff presented 28 affidavits of attorneys stating they would not take a capital case at $40 per hour, and the State presented affidavits of a few qualified attorneys attesting they would accept this fee), *affirmed*, 827 So.2d 925 (Fla. 2002).

Here, the trial court failed to conduct the required analysis before holding section 27.7002, Florida Statutes, facially unconstitutional. However, even if the court had conducted the required analysis, the required showing could not have been made.

When section 27.7002, Florida Statutes, was enacted four years ago, there were 128 attorneys on the registry. There are now 141 attorneys participating. *See* http://www.floridacapitalcases.state.fl.us/c-registryattorney. It is obvious that the pool of attorneys willing to represent death-sentenced inmates has not been

diminished by the challenged provisions of section 27.7002, Florida Statutes. Mr. Olive has not produced one scintilla of evidence to show the availability of competent counsel has been impaired by the challenged law.

Like Mr. Sheppard's challenge to a $40 per hour fee, Mr. Olive's attack on section 27.7002, Florida Statutes must fail, because there is no evidence to show there is a lack of competent, effective counsel available to prosecute defendants' capital collateral appeals. The language at issue is almost four years old. Any fears that section 27.7002, Florida Statutes would have a chilling effect to deprive the courts of competent counsel available to represent indigent inmates are clearly unfounded.

Finally, for an attack on the facial constitutionality of a statute to be successful, the proponent must show there are **no** circumstances under which the law can be constitutionally applied. *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004).

Here, Mr. Olive has failed to show even one instance where the challenged language has deprived a death-sentenced inmate of competent, effective counsel. As long as there is a pool of competent counsel awaiting appointment for those capital collateral cases not handled by the Capital Collateral Regional Counsel, the

Legislature, as the appropriating authority for the State, may decide the terms and conditions for hiring that pool of attorneys.

Notably, there has been no showing that there are no circumstances under which the statute could be constitutionally applied. The court did not consider all circumstances under which counsel could request more compensation, and which they might be removed from the list. The trial court reversibly erred by concluding the challenged statute was facially unconstitutional without conducting an "as applied" analysis; therefore its order should be reversed.

CONCLUSION

Appellant requests the Court reverse the trial court's order granting Mr. Olive standing. Appellant also requests the Court reverse the trial court's order granting declaratory judgment, and clarify that the legislative amendments to section 27.7002, Florida Statutes are enforceable.

Respectfully Submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by **U.S. Mail,** postage prepaid, to Stephen F. Hanlon and Elizabeth L. Bevington, Counsel for Appellee, PO Drawer 810, Tallahassee, FL 32302, and Richard T. Donelan, Jr., Counsel for Co-Appellant, Department of Financial Services, Constitutional Issues Section, Fletcher Building, Suite 464, 200 East Gaines Street, Tallahassee, FL 32399-4247 this ____ day of September 2006:

____
JEREMIAH M. HAWKES
Counsel for Appellant

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 requirement of Rule 9.210, Florida Rules of Appellate Procedure.

____
JEREMIAH M. HAWKES
Counsel for Appellant