

IN THE  
SUPREME COURT OF FLORIDA

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MARK EVAN OLIVE,

Appellant/Cross-Appellee,

v.

ROGER R. MAAS, in his Official  
Capacity as Executive Director of  
the Commission on the Administration  
of Justice in Capital Cases, and  
ROBERT F. MILLIGAN, in his Official  
Capacity as Comptroller of the  
State of Florida,

Appellees/Cross-Appellants.

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Case No. SC00-317

**AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER**

**by**

**Florida Association of Criminal Defense Lawyers**

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## Criminal Defense Lawyers

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### **C. CERTIFICATE OF TYPE, SIZE, AND STYLE**

Undersigned counsel does hereby certify the Amicus Curiae Brief In Support of Petitioner is reproduced in the following point size and font: 14-point Times New Roman.

## **D. STATEMENT OF THE CASE AND FACTS**

Amicus would adopt the statement of the case and the facts as set forth by the parties.

## **E. SUMMARY OF ARGUMENT**

The Florida Association of Criminal Defense Lawyers (“FACDL”) urges the Court to grant the relief requested by the Appellant/Cross-Appellee in this appeal. The provisions of the Registry Act<sup>1</sup> and Contract outlined in the Petition create an attorney-client relationship that violates the Rules Regulating the Florida Bar. Consequently, attorneys appointed pursuant to the Registry Act are unable to provide the competent capital post-conviction representation required by this Court.

## **F. ARGUMENT AND CITATIONS OF AUTHORITY**

### **1. The attorney-client relationship established pursuant to the Registry Act violates the rules regulating The Florida Bar.**

The attorney-client relationship established by the Registry Act requires immediate scrutiny because it violates the Rules Regulating the Florida Bar adopted pursuant to this Court’s exclusive jurisdiction to regulate the practice of law. Art. V, § 15, Fla. Const. This Court has consistently rejected any statutory interpretation that limits its jurisdiction over the conduct of attorneys. “[W]e will not allow officials or

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<sup>1</sup>§ 27.710, Fla. Stat.

other branches to tread on the constitutional power vested in this court by the people of this state.” *Ciravolo v. The Florida Bar*, 361 So.2d 121, 125 (Fla. 1978) (grant of immunity under Florida statute does not immunize attorneys from disciplinary proceedings authorized by rules of Supreme Court).

As described in the Petition, certain provisions of the Registry Act and Contract directly conflict with a lawyer’s duties under Rule 4-1.7(b), and Rule 4-1.8(f)(2), R. Reg. Fla. Bar. Rule 4-1.7(b) states that

A lawyer shall not represent a client if the lawyer’s exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person or by the lawyer’s own interest, unless (1) the lawyer believes the representation will not be adversely affected; and (2) the client consents after consultation.

Rule 4-1.8(f) permits a lawyer to accept compensation from a third person for representing a client if “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship.” The underlying basis for these Rules is the recognition that an attorney’s loyalty to his client is at the heart of the attorney-client relationship. *See* Comment, Rule 4-1.7(b) (“loyalty is an essential element in the lawyer’s relationship to a client ... [loyalty] is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action of the client

because of the lawyer's interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.”).

The Registry Act also prohibits a lawyer from repeatedly raising arguments that are not supported by existing law. § 27.711(9), Fla. Stat., Par. 4 Contract. All lawyers know that convictions have been reversed, writs of habeas corpus have been granted, and the imposition of the death penalty has been overturned as a result of arguments for the expansion or modification of existing law.<sup>2</sup> A lawyer never knows when a court may accept his argument, and is ethically obligated to continually preserve these arguments for his client. To receive payment under the Registry Act, however, a lawyer must agree to forgo his client's right to argue, repeatedly if necessary, for the expansion or modification of existing law.

Despite a lawyer's obligations under the ethical rules adopted by this Court, the Legislature has established a system that authorizes payment to appointed lawyers only

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<sup>2</sup>Indeed, the Rules of Professional Conduct specifically contemplate arguments for the expansion or modification of existing law. Rule 4-3.1 states that a lawyer shall not bring or defend a proceeding or argue issues unless there is a basis for not doing so that is not frivolous, which includes a good faith argument for the extension, modification or reversal of existing law. The Comment to Rule 4-3.1 goes on to provide:

The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. (emphasis supplied).

if the lawyer refrains from certain courses of action, regardless of whether such action is in the best interest of the client. This shift of a lawyer's ethical duty of loyalty from his client to the third party compensating the lawyer is extremely alarming because the third party is the very entity that seeks to impose the death penalty on the client.

We see no reason why the Registry Act lawyers should have conditions placed on them that are not placed on any other private lawyers appointed to represent indigents in criminal cases, or on the capital post-conviction lawyers employed by the three Capital Collateral Regional Counsels.

It is this Court's duty to prevent private lawyers who wish to provide capital post-conviction representation from being forced to conform to a system that compromises their ethical duties to their clients, and their duties as officers of the Court:

An attorney as an officer of the Court and a member of the third branch of government occupies a unique position in our society. Because attorneys are in a position where members of the public must place their trust, property, and liberty, and at times even their lives, in a member of the bar, society rightfully demands that an attorney must possess a fidelity to truth and honesty that is beyond reproach. When an attorney breaches this duty, the public is harmed. Not only is the individual citizen harmed by the unethical practitioner, all of society suffers when confidence in our system of law and justice is eroded by the unethical conduct of an officer of the Court. To protect the public the bar is mandated to inquire into an attorney's conduct when even the appearance of impropriety exists.

*DeBock v. State of Florida*, 512 So.2d 164, 166-167 (Fla.), *cert. denied* 484 U.S. 1025, 108 S.Ct. 748, 98 L.Ed.2d 761 (1988).

**2. The Registry Act prevents lawyers from providing competent capital post-conviction representation.**

The adversary process in our criminal justice system presupposes that lawyers will vigorously defend their clients against the State's attempt to convict and impose punishment. Courts rely upon zealous counsel to identify the law and to develop the factual record necessary for full and fair adjudication of all claims.

Historically, this Court has recognized that lawyers are essential to ensuring the full and fair adjudication of post-conviction challenges. In *State v. Weeks*, 166 So.2d 892 (1964), a non-capital case decided in the immediate aftermath of *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9L.Ed.2d 799 (1963), this Court required the appointment of post-conviction counsel if the motion raised "apparently substantial claims for relief," that were "potentially so complex" to necessitate a hearing. Fifteen years later, this Court in *Graham v. State*, 372 So.2d 1363 (1979), modified the *Weeks* test for determining the need for post-conviction counsel in capital cases. Counsel are required in capital post-conviction cases when "a colorable or justiciable issue or meritorious grievance prima facially appears in the appellant's petition." *Graham* at

1366. The Court recently affirmed the continuing viability of *Weeks* and *Graham* in *Russo v. Akers*, 724 So.2d 1151 (Fla. 1998).

The journey from the “apparently substantial claim” test in *Weeks* to the “colorable or justiciable issue or meritorious grievance” test in *Graham* means, and we suggest, should always mean, that no person sentenced to death in Florida will be executed without benefit of post-conviction counsel to zealously review his case and argue his claims. The Legislature recognized this basic precept when it established a statutory right to capital post-conviction counsel, which carries with it the right to competent, effective assistance of counsel. *Spaziano v. State*, 660 So.2d 1363, 1370 (Fla. 1995); *Spalding v. Dugger*, 526 So.2d 71, 72 (Fla. 1988).

The Registry Act’s imposition of limitations on the professional judgment of lawyers interferes with the recognized need for and requirement of competent capital post-conviction counsel. Registry Act lawyers cannot present certain claims, even if they believe they are meritorious. The Registry Act thus prohibits the zealous, competent capital post-conviction representation required and relied on by this Court:

It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the

court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

*Wilson v. Wainwright*, 474 So.2d 1162, 1165 (Fla. 1985).

### **G. CONCLUSION**

Wherefore, the FACDL respectfully requests this Court to grant the relief requested by Appellant.

### **H. CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this is a true and correct copy of the foregoing instrument has been furnished to:

Michael P. Dodson  
General Counsel  
Office of Legislative Services  
The Florida Legislature  
Room 701, 111 West Madison Street  
Tallahassee, Florida 32399-1400

by hand/mail delivery this \_\_\_\_ day of May, 2000

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Respectfully submitted,

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