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Roger R. Maas v. Mark Evan Olive

SC06-835 | SC06-1263

THE NEXT CASE ON THE CALENDAR THIS MORNING IS MAAS V. OLIVE.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS JEREMIAH HAUKS AND I AM HERE ON BEHALF OF THE DIRECTOR OF THE CAPITAL COLLATERAL COMMISSION ROGER MAAS IT IS OUR POSITION THAT THIS COURT SHOULD REVERSE THE LOWER COURT AND UPHOLD THE STATUTE'S CONSTITUTIONAL FULLY ENFORCEABLE AS WRITTEN BY THE LEGISLATURE THE ISSUE IN THIS CASE IS WHETHER THE LEGISLATURE IS IN IT'S RIGHT. SUBJECT TO LIMITATIONS PROVIDED BY STATUTE AND SUBJECT TO CONDITIONS MUTUALLY AGREED TO BY THE PARTIES OF THE CONTRACT.

HAS THIS COURT ALREADY ANSWERED THIS QUESTION? IN, IN THE LAST OLIVE CASE?

WELL, NO. THERE'S BEEN A STATUTORY CHANGE SINCE THE LAST OLIVE CASE --.

RIGHT BUT THIS COURT SAID IT WAS A MATTER INN INHERENT WITHIN THE POWER OF THE COURT. TO DEAL WITH INSTANCES OF CASES IN WHICH FOR REASON OF BEING UNUSUAL THERE WOULD HAVE TO BE EXTRAORDINARY FEES. THE COURT DEALT WITH THAT AS A MATTER OF, THAT WAS WITHIN THE POWER OF THE COURT AS POSED TO THE POWER OF THE LEGISLATURE. ISN'T THAT THE WAY THE COURT DEAL WITH IT THEN?

THAT IS THE WAY THE COURT DEALT WITH IT THEN. SINCE THEN THE LEGISLATURE HAS CHANGED THE STATUTE AND IT HAS SAID THAT NO PERSON, NO ATTORNEY, NO DEFENDANT HAS THE RIGHT TO BRING FORWARD AN ACTION AND, AND ASK FOR MORE MONEY.

HE'S GOING BACK TO THAT. ISN'T THAT JUST WHAT THE ORIGINAL DECISION OF THE COURT ADDRESSED? BECAUSE I, I THINK REALLY THE, THE BROAD QUESTION THAT WAS ADDRESSICIDE THAT IF YOU CREATE A SYSTEM AND YOU GIVE THAT ACCESS, CAN YOU THEN MAKE IT ILUSERY BY PUTTING IN THESE LIMITATIONS? I THINK THAT'S REALLY --.

WELL I DON'T THINK THOSE LIMMATIONS MAKE IT ILUSERY. ATTORNEYS SIGN CONTRACTS ALL THE TIME THEY AGREE TO REPRESENT CLIENTS ALL THE TIME AND SOMETIMES YOU KNOW THEY MAKE BAD DEALS.

THE POINT IS THAT IT IS A FORCED REPRESENTATION UNDER A CONTRACT SAYING WE WILL PAY YOU 15 CENTS AN HOUR IT BECOMES AN ILOSERY PROBLEM.

I DON'T THINK IT'S FORCED. YOUR HONOR. YOU HAVE CERTAIN PRECONDITIONS AND YOU AGREE TO BE PLACED ON THE REGISTRY AND WHEN YOU GET PLACED ON THE REGISTRY YOU INDICATE THAT YOU, YOU UNDERSTAND THE TERMS OF THE SCRAKT THAT WOULD BE GIVEN. THEN ARE PLACED ON THE REGISTRY AFTERGRYING THAT YOU COULD ABIDE BY THE TERMS AND CONDITIONS OF THE CONTRACTS.

SINCE THE REGISTRY HAS BEEN IN EXISTENCE, HAVE THERE BEEN TIMES THAT, THAT THERE ARE FEES IN EXCESS OF THE VARIOUS CAPS REQUESTED?

I UNDERSTAND THAT AFTER OLIVE 1 AND THE I DON'T KNOW THE EXACT NUMBER OF CASES. THERE HAVE BEEN CIRCUMSTANCES WHERE THERE'S BEEN --

AND DOES THEN THE REGISTRY, DOES THE BEFORE SENDING IT OVER TO THE DEPARTMENT OF FINANCIAL SERVICES, DOES SOMEONE AT THE, AT YOUR OFFICE LOOK AT IT TO MAKE SURE THAT THERE, YOU KNOW, WASN'T JUST TURNING THE FILE, THAT THESE WERE NECESSARY ADDITIONAL HOURS? I MEAN --

I THINK THAT, THAT PART OF THE RESPONSIBILITY IS, IS GIVEN TO THE CFOs OFFICE UNDER THE STATUTE.

AND THEN THE JUDGE MAKING SURE THAT THIS IS NOT --

AND THEN THE JUDGE.

SO ISN'T -- IT SEEMS TO ME, AND I WAS IMPRESSED WITH THE POSITION BEING TAKEN BY THE

DEPARTMENT OF FINANCIAL SERVICES THAT WHAT WE REALLY WANT TO, THE BIGGEST CONCERN WE HAVE HAD WITH THE REGISTRY IS THAT THERE ARE LAWYERS THAT AREN'T DOING ENOUGH AND YOU KNOW TAKING ON TOO MANY CASES BUT I DON'T KNOW OF, YOU KNOW, I'D BE MORE CONCERNED THAT SOMEBODY WOULD JUST TRY TO EXCEED THE CAP AND DO IT ON A BASIS OF, YOU KNOW, AS IF THEY WERE DOING A, A DIVORCE CASE, YOU KNOW, JUST, LET'S, YOU KNOW, LET'S JUST TURN THE FEES. BUT THAT'S NOT, NO EVIDENCE THAT THAT'S HAPPENING? CHURNING IT FEES?

I MEAN, THAT WOULD BE, THAT WOULD BE A VALID BASIS TO HAVE SOMEONE DISMISSED FROM THE REGISTRY. BUT IF IT'S A EXTRAORDINARILY COMPLEX CASE, AND SOMEBODY HAS LITIGATED AND SPENT, YOU KNOW, WEEKS AND MONTHS AND FOUND THAT THIS PERSON IS, IS ACTUALLY INNOCENT, HOW, FROM A CONSTITUTIONAL BASIS, TO SAY THAT, YOU KNOW, WE'RE JUST GOING TO LIMIT IT TO THOSE THAT CAN JUST SAY THEY'LL DO IT FOR THAT AMOUNT, HOW CAN JUSTICE WELLS SAY WELL HOW IS THAT CONSTITUTIONAL?

THIS IS NOT A CONSTITUTIONAL-BASED PROGRAM. THE LEGISLATURE DID NOT START THIS PROGRAM BECAUSE THERE ARE CONSTITUTIONAL REQUIREMENTS.

BUT HAVEN'T WE SAID OVER AND OVER AGAIN THAT IF THERE IS GOING TO BE COUNSEL, THE COUNSEL HAS GOT -- THEY HAVE GOT STANDARDS OF COMPETENCY. THEY CAN'T JUST GO IN THERE AND DO NOTHING AND BECAUSE THAT'S WHAT THE LEGISLATURE DECIDED THAT THE CAP WOULD BE \$5,000 FOR THE WHOLE THING. I MEAN, THERE WOULD BE SOME LEVEL WHERE IT WOULD JUST BE TOTALLY UNREASONABLE, CORRECT?

WELL, AND AT THAT POINT, YOU WOULD IMAGINE THAT ATTORNEYS WOULD NOT SIGN UP FOR THE REGISTRY AND THE APPOINTMENT ALSO IS, IS ALSOITARY. THE APPOINTMENT PROCESS WORK THAT THE JUDGE HAS SENT A NAME, THAT PERSON IS GIVEN THE FILE, THEY ARE GIVEN TIME TO REVIEW THE FIRBLSH AND THEN THEY AGREE TO THE APPOINTMENT. THE APPOINTMENT DOES NOT BECOME FINAL UNTIL AFTER THEY HAVE HAD A CHANCE TO REVIEW THE CASE AND SAY I WILL TAKE THE CASE. THEN THE APPOINTMENT BECOMES FINAL. SO THESE ATTORNEYS HAVE THEIR EYES WIDE EPIOPEN WHEN THEY ARE GOING INTO THIS, AND IF, AND IF THE, AND IF THE FEES ARE NOT SUFFICIENT TONIGHT COVER, THEN ONE WOULD PRESUME THAT PROFESSIONAL ATTORNEYS WHO HAVE EXPERIENCE IN THE AREA ARE GOING TO KNOW I CAN'T DO THIS CASE FOR THAT AMOUNT AND THEY ARE NOT GOING TO TAKE INCASE.

WELL, WHAT I COME BACK TO IS THAT WE HAD THIS CASE, OLIVE v. MAAS, AS A MATTER OF FACT, AND AS A MATTER OF FACT, I DIDN'T AGREE WITH THE MAJORITY HERE. BUT WE HAVE UNDER THE PRINCIPLES OF STARE DECISIS, ONCE THIS COURT RULES ON THE MATTER, THEN UNLESS THERE'S SOME DISTINGUISHING FACTOR, NOT JUST BECAUSE THE LEGISLATURE REITERATED IT'S PRIOR POSITION, THIS COURT HELD THAT THIS WAS A MATTER WITHIN THE POWER OF THE COURT. AND IS THERE SOME DISTINGUISHING FACTOR NOW OTHER THAN THE FACT THAT THE LEGISLATURE JUST REITERATED ITS, ITS PRIOR VIEW?

WELL, I WILL POINT OUT IN THE FIRST OLIVE DECISION, YOUR HONOR, THAT THE COURT FOUND THAT THE LEGISLATURE INTENDED FOR THE, FOR THE COURT TO EXERCISE THIS DISCRETION IN THE WAY THAT IT DID. AND YOU KNOW, THE COURT WENT BACK TO THE REMENA CASE WHERE THE COURT WAS GIVEN COMPLETE DISCRETION OVER THE MANAGEMENT OF ATTORNEYS UNLIKE THIS ONE AND SAID ALL RIGHT RUMEADA PLIES AND THE LEGISLATURE MEANT FOR US TO PLY REMENA AND LOOKED AT THE LEGISLATIVE HISTORY AND DECIDED IT APPLIES AND NOW THE LEGISLATURE SAID NOW WE DO NOT MEAN FOR RUMENA TO APPLY WE DO NOT MEAN FOR THE COURT TO TAKE THIS ACTIVE A ROLE AND SO I MEAN THE DECISION IN OLIVE 1 WAS BASED AT LEAST IN PART ON A PERCEPTION THAT THE COURT HAD THAT THE LEGISLATURE HAD TO EXERCISE THOSE POWERS.

WELL, HOW DOES THAT RELATE TO OUR OLDER CASE LAW BACK WITH THAT WE HAVE SAID THAT THE STATUTORY CAPS, THERE COME AS POINT WHEN THESE STATUTORY CAPS CAN BE CONSISTATORY OF AN ATTORNEY'S TIME AND ENERGY AND ALL OF THAT. AND SO IF THIS STATUTE, IF WE INTERPRET THIS STATUTE AS TO MEAN EXACTLY WHAT IT SAYS, THEN AREN'T WE BACK TO A SITUATION WHERE IF IN THESE EXTRAORDINARY SERVICE CIRCUMSTANCES WE HAVE A SITUATION WHERE ATTORNEY'S TIME WOULD BE THAT THESE AMOUNTS WOULD BE CONSISTATORY.

SO DOESN'T THAT THEN MAKE THIS STATUTE UNCONSTITUTIONAL SNL.

NO, YOUR HONOR, AGAIN BECAUSE THIS IS NOT BASED ON ANY KIND OF CONSTITUTIONAL REQUIREMENT. THERE IS NO CONSTITUTIONAL REQUIREMENT FOR THE LEGISLATURE TO ESTABLISH THIS SORT OF PROGRAM. THIS IS BASED ON A, A, THIS IS BASED ON AN -- THE LEGISLATURE HAD A DESIRE TO SEE CASES MOVE ALONG CAN IN A MORE TIMELY FASHION, -- BUT DOESN'T THE LEGISLATURE, EVEN WHEN IT ACTS IN THIS KIND OF SIT HAS TO ACT IN A CONSTITUTIONAL MANNER?

WELL, THE CONSTITUTION GIVES THE POWER TO THE LEGISLATURE TO SET UP CONTRACTUAL PRAP PROGRAMS AND TO SET UP PARAMETERS OF THE PROGRAMS.

BUT EVEN A CONTRACT CAN'T VIOLATE CONSTITUTIONAL PRINCIPLES, CAN IT?

IT T, IT CANNOT, YOUR HONOR, BUT THERE ARE NO CONSTITUTIONAL PRINCIPLES AT PLAY HERE. I MEAN THERE'S -- THE LEGISLATURE HAS THE POWER TO SET UP A CONTRICTUAL PROGRAM. NOW, THERE'S BEEN SOME DISTINCTION, JUSTICE CONTAROT IN HIS CONCURRENCE IN THE FREEMAN CASE WHILE YEAH WE HAVE A GENERAL PRINCIPLE THAT IF SOMETHING IS UNFORESEEABLE, THEN PEOPLE CAN BE ALLOWED OUT OF THE CONTRACT OR THE COURT CAN STEP IN. BUT WHAT THE COURT HAS SAID IS THAT ALL OF THESE CASES ARE EXCEPTIONAL AND UNUSUAL AND SO THE COURT HASN'T SEEN EXCEPTIONAL AND UNUSUAL AS UNFORESEEABLE.

BUT THE LEGISLATURE DIDN'T SEIZE ON THAT, HAS NOT SEIZED ON THAT STATEMENT IN FREEMAN AND EVEN GIVEN ATTORNEYS THAT KIND OF OUT, THAT IS THAT IF THERE IS SOMETHING TRULY UNFORESEEABLE IN THE CASE, THEN THEY COULD GO BEYOND THE STATUTORY MAX. THE LEGISLATURE HAS MADE THIS AN ABSOLUTE POSITION. YOU CANNOT GO BEYOND THE STATUTORY MAX, AND IF YOU TRY TO, YOU GET, YOU COULD GET BOOTED OFF OF REGISTRY.

WELL, I THINK WHEN WE GET TO, WHEN WE GET TO UNFORESEEABILITY, THE THING HERE IS THE POSITION MR. OLIVE HAS TAKESON THAT ALL OF THESE CASES ARE EXCEPTIONAL AND UNUSUAL AND THAT AT LEAST THE GENERAL RULE WOULD BE THAT WE WOULD BE GOING TO BOTH THE CAPS AND ALMOST ALL OF THE CASES AND.

SO WE KIND OF ACKNOWLEDGE THAT BUT WE KNOW IN GENERAL PRACTICE THAT THERE IS A, A SORT OF, SORT OF, SOME OF THESE CASES DO FALL INTO TSORT OF GENERAL AREA. BUT THERE ARE SOME THAT GO BEYOND WHAT THE REGULAR AND ORDINARY, IF YOU CAN HAVE AN ORDINARY CAPITAL CASE, WOULD ENTAIL.

WELL --

SO IN THOSE LIMITED SITUATIONS, WHAT IS A COURT SUPPOSED TO DO?

IF THE COURT LOOKS AT IT AND SEES THAT EXPERIENCE COUNSEL WHO HAD AN OPPORTUNITY TO REVIEW THE CASE BEFORE THEY TOOK THE CASE SHOULD HAVE KNOWN THAT THOSE CIRCUMSTANCES WERE GOING TO ARISE, AND I AM GOING TO IMAGINE THAT THERE ARE VERY FEW THINGS THAT EXPERIENCED COUNSEL IS NOT GOING TO KNOW AND THEY HAVE HAD AN OPPORTUNITY TO REVIEW THE CASE THEN THEY ARE GOING TO BE HELD TO THE CAPS.

IN -- CASES THINGS ARE SO FLUID. I MEAN AT THIS POINT WHETHER THE ATTORNEY HAS IS WHAT WENT ON IN THE TRIAL COURT, THE TRIAL, AND THE DIRECT APPEAL. CORRECT? WHEN POST-CONVICTION COUNCIL WAS APPOINTED, THAT'S WHAT YOU HAVE.

YOU HAVE COMPLETE TRIAL RECORD AND COMPLETE APPELLATE RECORD, YES.

ONCE THEY DO ALL THESE INVESTIGATIONS AND GET PUBLIC RECORDS AND ALL OF THAT, YOU REALLY HAVE NO IDEA WHAT, WHERE THIS IS GOING TO LEAD YOU. AND SO IT'S, IT SEEMS TO ME THAT IT'S VERY DIFFICULT FOR AN ATTORNEY TO LOOK AT WHAT THEY HAVE AT THAT POINT AND SAY, OH, WOW, THIS IS GOING TO BE ONE OF THOSE EXTRAORDINARY CASES. AND I AM NOT - - THINGS ARE GOING TO HAPPEN IN HERE THAT ARE UNFORESEEABLE. THAT JUST DOESN'T SEEM PRACTICAL AT THAT STAGE OF THE LITIGATION.

WELL, I MEAN, I MEAN, SOMETIMES YOU, YOU, YOU MAKE A BAD DEAL, BUT I MEAN YOU CAN STILL FOLLOW THROUGH AND I DON'T THINK THAT SAYING OH WE ARE GOING TO PAY THEM MORE MONEY IS SOMEHOW GOING TO GUARANTEE MORE PROFESSIONALISM. MR. OLIVE WAS REPRESENTING THE PERSON PRO BONO.

I HAVE A QUESTION. IS THERE A FACTUAL DIFFERENCE IN HIS STATUS FROM THIS CASE IN OLIVE 1?

IN OLIVE 1 HE NEVER ACTUALLY TOOK THE CASE. IN THIS INSTANCE HE WAS REPRESENTING THE CHIRBT PRO BONO AND THEN -- CLIENT PRO BONO AND THEN WHEN OLIVE 1 WAS DECIDE HE DECIDED I WILL GO AHEAD AND DO THE REGISTRY PROGRAM AND THEN HE FOUND OUT THERE WAS A POSSIBILITY THAT HE MIGHT BE REMOVED FROM THE REGISTRY IF HE ASKED FOR MORE MONEY AND SO HE FILED THIS ACTION.

WELL, IT WASN'T THAT HE REFUSED TO SIGN A CONTRACT WITH THESE LIMITATIONS?

YES.

ISN'T THAT WHAT THIS REALLY IS?

WELL, HE DID REFUSE TO SIGN THE CONTRACT IN BOTH INSTANCES, YES. BUT --.

SO I MEAN THAT'S THE BASIS ON THIS, TO REPRESENT THIS AS JUST OUT OF THE GOODNESS OF HIS HEART. THIS CONTRACTUAL LIMITATION IS WHAT HE OBJECTED TO. YOU ARE INTO YOUR REBUTTAL SO REMIND YOU IF YOU WANT TO SAVE SOME TIME.

ALL RIGHT I WOULD LIKE TO SAVE SOME TIME. THANK YOU, YOUR HONOR.

MAY IT PLEASE THE COURT, MR. CHIEF JUSTICE, I'M STEVE HANLON WITH HOLLAND AND KNIGHT. ON BEHALF OF MARK EVAN OLIVE.

MR. HANLON AT THE OUTSET YOUR OPPOSITION SAYS THE LEGISLATURE CREATED THIS. THERE IS NO OPERATION -- OBLIGATION TO HAVE ANY SYSTEM LIKE THIS. NO CONSTITUTIONAL REQUIREMENT. AND THE LEGISLATURE HAS THE FULL POWER TO OUTLINE THE TERMS SCPTS REQUIREMENTS TO -- AND THE REQUIREMENTS TO PARTICIPATE IN THIS SYSTEM. HOW DO YOU RESPOND TO THAT?

WELL, I RESPOND, FIRST OF ALL, BY SAYING THAT THE ANSWER TO JUSTICE WELLS' FIRST QUESTION IS YES, THAT THAT QUESTION WAS DETERMINED IN OLIVE, AND THAT THAT LEGISLATIVE POWER TO APPROPRIATE IS SUBJECT TO THE ARTICLE V POWER IN THIS COURT. TO ENSURE EFFECTIVE REPRESENTATION OF COUNSEL. WHICH I BELIEVE IS THE, THE KEY TO THE ANALYSIS HERE. I DO NOT BELIEVE -- IN TIME, ENERGY, TALENT IS THE KEY.

BUT I DON'T THINK IN OLIVE 1 WE ANSWERED JUSTICE LEWIS'S QUESTION, WHICH IS CAN THE LEGISLATURE TOMORROW SAY WE DON'T HAVE THE MONEY TO FUND THE REGISTRY ANYMORE. WE DON'T HAVE THE MONEY TO FUND COLLATERAL COUNSEL. AND SO WE'RE NOT GOING TO FUND IT. WE ARE GOING TO ASK LAWYERS TO DO THIS PRO BONO. CAN THE LEGISLATURE DOOR THAT?

-- LEGISLATURE DO THAT?

THERE ARE MANY WAYS IN WHICH I WOULD RESPOND YOUR HONOR BECAUSE I THINK IT WOULD FORCE THE SECOND QUESTION, WHICH IS --

WELL, BUT THE ANSWER IS CONSTITUTIONALLY KTHEY DO THAT?

UNDER THE CURRENT STATE OF FLORIDA LAW, ARGUABLY THEY COULD --

IN FACT THE SUPREME COURT, THE U.S. SUPREME COURT HAS SAID THERE IS NO CONSTITUTIONAL RIGHT TO COLLATERAL COUNSEL.

I DON'T READ IT QUITE THAT BROADLY, YOUR HONOR. I DON'T, I BELIEVE FIRST OF ALL, THERE IS THE COLEMAN EXCEPTION, AND I ALSO BELIEVE THAT JUSTICE KENNEDY'S CONCURRING IN THE JUDGMENT AND NOT THE OPINION OF THAT COURT IS VERY IMPORTANT.

WELL THEY HAVE NOT JUST SAID IT ONCE, THEY HAVE SAID IT THREE TIMES THAT THERE IS NO CONSTITUTIONAL RIGHT TO COLLATERAL COUNSEL.

I AGREE.

SO JUSTICE KENNEDY'S CONCURRENCE IS NOT IN THE MAINSTREAM OF WHAT THE SUPREME COURT HAS SAID.

IT IS A QUESTION OF HOW YOU READ A 414 DECISION, I THINK.

LET ME TELL YOU WHAT MY CONCERN IS. FIRST OF ALL, I THINK WE KNOW THAT IN THE REAL WORLD THAT IN THIS COURT IF SOMEBODY IS NOT GOING TO BE PUT TO DEATH THAT THEY DON'T HAVE COUNSEL AND THIS WHOLE ISSUE OF WHETHER IT'S CONSTITUTIONALLY REQUIRED OR NOT I THINK THE LEGISLATURE AND YOU KNOW, WHETHER IT'S THE BEST SYSTEM OR IN THE COUNTRY OR NOT, HAS MADE VERY GOOD EFFORTS, GOOD FAITH EFFORTS TO TRY TO FUND THIS SYSTEM. NOW, MY CONCERN IS THIS: YOU KNOW, WE DO SEE EVERY -- WELL THIS WEEK, MANY CASES COMING UP AND THAT HAVE REGISTRY. AND I DON'T KNOW HOW MANY COUNSEL HAVEN'T SIGNED UP BECAUSE OF THE ARTIFICIAL CAP. CERTAINLY THIS COURT HAS EXPRESSED

CONCERNS. BUT IF WHAT I SEE AS YOUR POSITION, AND THIS IS WHATS MR. HAWKES WAS REFERLING TO IS THAT -- REFERRING TO IS THAT A CAPITAL CASE POST-CONVICTION CASE BY IT'S VERY NATURE IS COMPLEX AND UN UNUSUAL. AND THE 100,000, WHATEVER THEY HAVE NOW, CAP, WILL NEVER BE ADEQUATE IF A LAWYER SUCH AS MR. OLIVE OR MR. HAP LON OR -- HANLON OR YOU KNOW, MR. ROGO WERE TO UNDERTAKE THIS. THEY'D BE SPENDING, YOU KNOW, THE KIND OF TIME THAT THE SPANKENBERG REPORT SAYS IT NECESSARY.

3100 HOURS.

BUT IF THAT WERE TO OCCUR, AND WE TOOK, AND WE SAID TO, LET'S JUST, YOU KNOW, CLONE MR. OLIVE AND WE'RE GOING TO PUT HIM ON EVERY POST-CONVICTION CASE, IT WOULD BANKRUPT THE SYSTEM. AND SO THEN YOU'D HAVE RASITUATION AS A PRACTICAL MAT -- YOU'D A SITUATION AS A PRACTICAL MATTER WHERE YOU WOULD GET TWO PEOPLE REPRESENTED AND THE REST WE WOULD HAVE TO START TO SCRAMBLE AGAIN SO I GUESS THE QUESTION I AM ASKING IS ARE YOU REALLY SAYING BY ITS NATURE EVERY CASE IS COMPLEX AND UNUSUAL AND THEREFORE THE CAP WOULD BE UNCONSTITUTIONAL IN EVERY CASE? WHICH IS A FAR MORE DRAMATIC THING THAN WHAT'S BEEN OCCURRING OUT THERE OVER INLAST FEW YEARS IS THAT THERE ARE -- YOU KNOW, THEY'RE ALL UNUSUAL BUT THERE ARE SOME THAT BECAUSE OF THE ISSUES THAT GET DEVELOPED ARE REALLY ABOVE THE NORM OF EVEN THE POST-CONVICTION CASE AND IN THOSE CASES, A JUDGE SHOULD HAVE THE DISCRETION. I MEAN DO YOU SEE THE TWO DIFFERENT POSSIBILITIES OF HOW YOU ARE INTERPRETING THE, WHETHER THERE IS THE STAT UTSS CONSTITUTIONAL OR NOT. -- STATUTE'S CONSTITUTIONAL OR NOT.

THE ONLY WAY I CAN FAIRLY ANSWER THAT QUESTION IS TO GIVE YOU MY CONCLUSIONS FROM MY EXPERIENCE IN NOT ONLY DOING THE WORK BUT HAVING STUDIED THIS ISSUE FOR QUITE SOME TIME RIGHT NOW. I BELIEVE THE -- GOT IT RIGHT. AND AN AVERAGE OF 3100 HOURS IS ABOUT RIGHT. THERE ARE CASES THAT MAY TAKE 6,000 HOURS. IN FACT, THEY ARE INIST THE SPANKENBERG REPORT. THIS IS APPROPRIATELY REFERRED TO AS THE BRAIN SURGERY OF OUR PROFESSION.

AND I KNOW YOU, YOU KNOW, I THINK BACK YEARS BACK YOU'VE SAID THAT BUT WE HAVE NOW HAD THE SYSTEM IN PLACE AND SO YOU'RE, WHAT YOU, I THINK WHAT I AM HEARING YOU BECAUSE YOU HAVEN'T ANSWERED IT DIRECTLY IS THAT YES, THE LODGECOME -- LOGICAL CONCLUSION WOULD BE THAT IF MR. OLIVE WAS IN EVERY CASE WHETHER SOMEONE GAVE A CONFESSION AND THERE WERE 20 YIBSSS AND HAD THE BEST LAWYER REPRESENTING -- EYEWITNESSES AND HAD THE BEST LAWYER REPRESENTING HIM,ION ON THE DIRECT TRIAL IN DIRECT APPEAL IT WOULD STILL BE A COMPLEX AND UNUSUAL CASE TO CAUSE THE TRIAL JUDGE TO EXCEED THE CAP.

I BELIEVE, THE ANSWER IS YES. I BELIEVE JUSTICE SPEAKING FOR A UNANIMOUS COURT SPEAKING WAS CORRECT WHEN HE SAID VIRTUALLY EVERY CASE QUAL SNEL LET ME A QUESTION -- QUALIFIES.

WELL LET ME ASK A QUESTION. YOU ARE BASICALLY SAYING THE CAP IS UNCONSTITUTIONAL AS IT STANDS AND MY QUESTION IS AND YOU TALK ABOUT THIS CONFISCATORY ASPECT WE HAVE PUBLIC DEFENDERS, STATE ATTORNEYS, AND PEOPLE PROVIDING WORK FOR INDIGENT PEOPLE ALL THE TIME AT MUCH REDUCED RATES. IF WE HAVE SUFFICIENT ATTORNEYS WILLING TO SIGN UP FOR THIS REGISTRY COUNSEL AND DO THE WURBSH -- WORK, AT LESS THAN WHAT THEY WOULD GET AT THEIR NORMAL PRIVATE ATTORNEY RATES, THEN WHY IS IT NOT REASONABLE FOR THIS COURT TO INTERPRET THAT THIS STATUTE -- READ IN BASICALLY A, A TRULY UNUSUAL CASE EXCEPTION?

FIRST OF ALL --

AND NOT MAKE EVERY CASE UNUSUAL.

BECAUSE IT JUST DOESN'T COLONEL PORT WITH THE REALITY OF CAPITAL POST-CONVICTION DEATH PENALTY LITIGATION. I THINK -- IN HIS REPORT PREDICTED, AND SAID AT THE TIME THIS MATTER WAS BEING CONSIDERED THAT A PRIVATE COUNSEL YOU DO NOT HAVE SUFFICIENT QUALIFIED ATTORNEYS IN THIS STATE TO DO THAT AND IT WILL FAIL AND I THINK THIS QUOTE WAS IT WILL WIND UP BACK --

BUT IS THERE EVIDENCE THAT THAT HAS HAPPENED IN THIS CASE? ARE THERE NOT SUFFICIENT NUMBER OF REGISTRY COUNSEL WILLING TO TAKE THE CASE FOR THE CAPS? AS NAY EXIST?

-- AS THEY EXIST.

IT IS AND APPARENTLY THERE ARE SUFFICIENT REGISTRY COUNSEL BUT IN JUSTICE PARIENTE'S CONCURRENCE JOINED BY JUSTICE CANTERO AND JUSTICE ANSTEAD THAT'S A MATTER OF GRAVE CONCERN THAT THERE ARE, THIS IS BEING DONE BY SOLE PRACTITIONERS WHO ARE WILLING TO SIGN UP AND RISK THE CAPS.

WELL, LET'S EXPLORE THAT A LITTLE BIT F. WE ACCEPT THE FUNDAMENTAL STATEMENT, MAYBE ARGUABLY, BUT IF WE ACCEPT THEN THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE SYSTEM WE CREATED. BUT ONCE IT IS CREATED, DOES THAT CHANGE THE CONSTITUTIONAL DISCUSSION? AND IF SO, HOW SO?

THEN, AND WE HAVE GIVEN YOU THE EVANS CASE, IF THEY ARE GOING TO CREATE THE SYSTEM, THEN DUE PROCESS APPLIES TO THAT RIGHT.

OKAY.

AND IT HAS TO BE ON MEANINGFUL AND EFFECT RIGHT.

I THOUGHT WE WERE TALKING ABOUT RIGHT TO COUNSEL, NOT DUE PROCESS.

I'M SORRY?

I THOUGHT WE WERE ANALYZING THE RIGHT TO COUNSEL, NOT DUE PROCESS. ISN'T DUE PROCESS WHAT THE COURT AND, AND THE STATE GIVES? NOT WHAT THE DEFENSE ATTORNEY GIVES? THE DEFENSE ATTORNEY GIVES THE COUNSEL. THAT'S A 6th AMENDMENT RIGHT.

EXACTLY.

NOT A 5th AMENDMENT RIGHT. I'VE NEVER HEARD OF IT ANALYZED AS A 5th AMENDMENT RIGHT. WELL, WE GIVE YOU THE EVANS CASE FOR THAT PROPOSITION, YOUR HONOR, THAT ONCE THE STATE CREATES THE RIGHT, FOR INSTANCE, IT WOULD BE OBVIOUS IF THE STATE SAID WE WILL COMPEN STAIT SATE YOU FOR \$100. -- COMMON SATE YOU FOR \$100. AT THAT POINT, AND I THINK AT SOME POINT GIVEN WHAT WE KNOW ABOUT 840 HOURS, THAT IS THAT IS NOT GOING, THAT RIGHT BECOMES MEANINGLESS.

WELL YOU WERE REFERING TO CASES LIKE MAKENSOME AND WHITE.

YES.

ISN'T IT TRUE THAT MAKENSOME AND WHITE WERE BOTH DIRECT APPEAL CASES, THOSE WERE CASES WHERE THE DEFENDANT DID HAVE A CONSTITUTIONAL RIGHT TO COUNSEL?

YES THEY WERE.

OKAY. SO WE'RE DEALING WITH REALLY WITH A SEPARATE SITUATION.

YES, WE ARE. YES, WE ARE. AND, OF COURSE 6RBSH WITH A STATUTORY RIGHT. THAT THAT RIGHT MUST BE EFFECTIVE. AND THAT'S WHY WE GO ABOVE THE CAPS THERE.

SO YOU ARE SAY FIGURE THAT RIGHT --

IT IS NOT JUST A QUESTION OF STATUTORY INTERPRETATION BUT ALSO AS ONE OF THE STATES ESTABLISH -- ONCE A STATE ESTABLISHES THAT RIGHT THEN DUE PROCESS DOES APPLY --

IT SEEMS TO ME THAT YOU, IT'S A DOG ENDS UP CHASING HIS TAIL WITH THAT KIND OF ARGUMENT. I MEAN, WHAT, WHAT WE HAVE GOT GOING ON HERE PLAINLY IS FRUSTRATION ON YOUR PART BECAUSE YOU DON'T THINK THE STATE'S DOING ENOUGH BUT EVERY TIME THE STATE, THE LEGISLATURE ACTS, SOMEBODY FILES SUIT. AND TRIES TO STOP THE PROCESS THAT HAS BEEN PUT IN PLACE. AND THAT'S WHAT MR. OLIVE HAS DONE THIS TIME. HE DID IT LAST TIME. THAT'S MY FRUSTRATION, MY FRUSTRATION IS THIS IS A MATTER WHICH AS LONG AS WE HAVE THE DEATH PENALTY IN THIS STATE REQUIRES THOSE PEOPLE WHO ARE REALLY INTERESTED IN SOLVING SOME OF THESE PROBLEMS TO GET IN AND GET TOGETHER AND WORK IT OUT RATHER THAN TRYING TO LITIGATE IT IN SUCH A WAY THAT IT TURNS INTO SOME TYPE OF CONSTITUTIONAL QUESTION, WHICH IS NEVER GOING TO REALLY SOLVE THE PROBLEM.

WELL, THAT COULD TURN INTO A CONSTITUTIONAL PROBLEM IN TERMS OF COUNSEL BUT CONSTITUTIONAL PROBLEM ARISES THAT ON THE ARTICLE V ISSUE, YOUR HONOR, AND THE QUESTION OF THIS COURT'S INHERENT POWER TO AWARD FEES ABOVE THE CAPS, TO ENSURE THE EFFECTIVE REPRESENTATIVE!!!!!!!!!!!!!!!!!!!!!!!!!!!! REPRESENTATIVEATION OF -- REPRESENTATION OF COUNSEL.

I HAVE A CONCERN ABOUT THAT STATEMENT ABOUT EFFECTIVE REPRESENTATION OF COUNSEL. IF WE AGREE WITH YOU, AREN'T WE VERY CLOSE TO SAYING THAT IF THERE IS INEFFECTIVE ASSISTANCE OF COUNSEL, NOT CONCERNING THE FEES, BUT CONCERNING THE REPRESENTATION

ITSELF, THEN ESSENTIALLY THE DEFENDANT HAS A, A RIGHT EFFECT TO A EFFECTIVE ASSISTANCE AND CAN FILE A CLAIM FOR INEFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL, WHICH WE HAVE NEVER HELD?

EXACTLY THE OPPOSITE. IT MEANS THAT YOU CAN'T DO THAT AND THAT IS, THIS COURT'S CALL. THE COURT MAKES THE CALL ON WHETHER OR NOT THE SECOND PETITION IS, A APPROPRIATE AND YOU'VE MADE IT VERY CLEAR.

WELL BUT YOU KEEP SAYING THE DEFENDANT HAS A RIGHT TO EFFECTIVE COUNSEL ON POST CONVICTION. WELL, THAT RIGHT TO EFFECTIVE COUNSEL SEEMS TO INCLUDE EFFECTIVE REPRESENTATION.

BUT THE COURT HAS MADE CLEAR THAT IT'S NOT GOING TO ALLOW THE SECOND CHALLENGE TO THAT EVEN THOUGH THE STATUTORY RIGHT TO COUNSEL AND WHAT WE HAVE SUGGESTED AS THE BRIEFS TO YOU IS THAT FIRST OF ALL, THAT'S THE COURT'S CALL WHETHER IT'S A STATUTORY RIGHT OR A CONSTITUTIONAL RIGHT BUT OTHER COURTS HAVE VIEWED IT DIFFERENTLY. BOTH ALASKA AND UTAH HAVE SAID EXAMINE THE INTERESTED STATES, FINALITY OF JUDGMENT BY STATE IS --

DOES ALASKA HAVE A DEATH PENALTY?

NO. THEY DO NOT. [LAUGHTER]

YOU ARE, YOU ARE INTO YOUR REBUTTAL SO I WOULD --

WHAT ARE YOU ASKING US TO DO DO HERE? BECAUSE IT SEEMS TO ME THAT YOUR ARGUMENT REALLY BREAKS DOWN TO THAT THERE SHOULD BE NO CAPS. AT ALL. ON REPRESENTATION. SO IS THAT WHAT YOU ARE ASKING THIS COURT TO SAY?

I AM ASKING YOU TO FIND THAT THIS STATUTE, WHICH IS PASSED IN THE AFTERMATH OF -- SIX WEEKS AFTER THE DECISION, AND WHICH SAID COMPENSATION ABOVE THE CAPS IS NOT AUTHORIZED, THAT THAT IS SPATIALLY UNCONSTITUTIONALLY? AND THEN WHERE DO WE GO FROM THERE?

SIMPLY TO HOLD THE LINE OF CASES YOU HAVE HAD FOR 20 YEARS, WHICH SAYS THE TRIAL COURTS IN APPROPRIATE CASES HAVE, HAVE THE --

BUT THAT'S WHAT WE SAID IN OLIVE 1.

RIGHT.

AND THEN THIS LEGISLATURE COMES BACK AND PASSES THESE TWO PORTIONS OF THE STATUTE THAT SAYS, NO, WE ARE NOT GOING TO AUTHORIZE PAYMENT BEYOND THAT. SO WHAT ARE WE GOING TO DO? WAIT FOR THE LEGISLATURE TO THEN SAY DESPITE WHAT THE SUPREME COURT SAYS, WE ARE NOT GOING TO PAY ANYMORE MONEY OTHER THAN WHAT WE'VE SAID IN THE STATUTE. I MEAN, IT SEEMS TO ME THAT YOU ARE JUST ASKING US TO DO EXACTLY WHAT WE DIWITH WHAT KIND OF RESULTS?

WELL, I THINK YOU -- THE ATTEMPT TO TAKE AWAY THIS COURT'S POWER TO PRESERVE EFFECTIVE REPRESENTATION OF COUNSEL UNDER ARTICLE V IS VOID. AND I THINK YOU NEED TO INSIST THAT TRIAL COURTS CONTINUE TO HAVE THAT POWER. AND I THINK THE CONTROLSER GOING TO GET UP HERE NOW AND SAY THEY ARE CONTINUING TO PAY. FOR, OBSERVE THE CAPS. YOU MUST ENSURE AND GIVE THEM WHAT YOU KNOW ABOUT CAPITAL POST-CONVICTION REPRESENTATION THAT PAYMENT ABOVE THE CAPS CONTINUE.

SO BASICALLY WHAT YOU ARE ASKING FOR IS --

YOU HAVE USED UP ALL YOUR TIME PLUS THE REBUTTAL TIME SO LAST QUESTION.

I JUST WANT TO MAKE -- IN ESSENCE WHAT YOU WANT IS THE ATTORNEYS TO BE ABLE TO GET A REASONABLE FEE FOR THE REPRESENTATION IN THESE CASES.

SUBJECT TO REVIEW BY THE TRIAL COURT, YES. THANKS.

MAY IT PLEASE THE COURT. MY NAME IS RICHARD. I AM HERE ON BEHALF OF ALEX SINK, CHIEF FINANCIAL OFFICER OF THE STATE OF FLORIDA. THIS CASE BEGAN BY PLL -- SUING TOM GALLAGHER AND ASSUMED HIS ENTIRE TERM OF CHIEF FINANCIAL OFFICER? 72 THAT ALL HE DID? [LAUGHTER]

I THINK HE DID SOME OTHER THINGS AS WELL. YOUR HONOR. BUT IN MR. OLIVE'S BRIEF, THERE IS A SUGGESTION THAT THERE'S A POSSIBILITY THAT THE NEW CHIEF FINANCIAL OFFICER MIGHT CHANGE THE INTERPRETATION OF THE SFACHUTE. AND I CAN TELL YOU THAT FROM THE LAST COMPTROLLER TO THE STATE OF FLORIDA, GENERAL MILLIGAN THROUGH MR. GALLAGHER AND

THROUGH, MS. SINK AT THE PRESENT TIME THE INTERPRETATION OF CHAPTER 27 PART 4 HAS REMAINED THE SAME. AND --

WAS THERE EVER ANY -- ABOUT -- FACT THAT THE LEGISLATURE HAD SEVERAL MONTHS AFTER THE OLIVE DECISION SAID NO STATE FUNDS SHALL BE USED?

-- SHALL WE USED?

YOUR HONOR, WE VIEWED THAT ALWAYS AS THAT WE HAVE NEVER BEEN AUTHORIZED TO PAY VOLUNTARY MORE THAN THE STATUTORY LIMITATIONS. AND ANY TIME THAT WE WOULD GET A BILL THAT WOULD BE WIN THE STATUTORY LIMITATIONS WE WOULD LOOK IT OVER AND IF IT WAS IN ORDER WE WOULD PAY IT.

THAT'S AN IMPORTANT STATEMENT THAT YOU MADE. WE'D LOOK IT OVER AND IF IN ORDER. WHAT HAS BEEN THE REVIEW PROCESS ON THE GROUND WITH REGARD TO BOTH THE REGISTRY AND YOUR OFFICE WITH REGARD TO LOOKING OVER OR INVESTIGATING OR PARTICIPATING IF THERE'S DISAGREEMENT IN CONNECTION WITH THESE REQUESTS FOR FEES?

WE HAVE A FULL-TIME ACCOUNTANT WHO, WHO LOOKS OVER THE NUMBERS TO MAKE SURE THAT THEY ALL MATCH THE AMOUNTS BEING CLAIMED OF A FULL-TIME LAWYER WHO DOES LOOK OVER THAT AS WELL TO DETERMINE IF IT APPEARS TO BE REASONABLE. AND IN THE MAJORITY OF THE CASES, THE LAWYERS INVOLVED GIVE, YOU KNOW, REASONABLE BILLINGS, WHICH, WHICH ARE DEFENDABLE. IF WE FIND OUT THAT WE CANNOT TELL FROM THE BILLINGS THAT WERE PROVIDED WHAT EXACTLY WENT ON, WE WILL ASK FOR MORE DETAILED INFORMATION.

AND IF YOU DISAGREE, DO YOU THEN FORCE IT INTO THE TRIAL COURT FOR A DETERMINATION? ONLY IN THE CIRCUMSTANCES WHERE THEY'RE ASKING FOR MORE MONEY THAN THE, THE STATUTORY LIMITATIONS ALLOW.

YOU'VE COME TO US BEFORE AND ACTUALLY PREVAILED AS I RECALL. THERE WAS ONE CASE WHERE THE TRIAL COURT AWARDED A FEE ABOVE THE CAP, BUT DID NOT MAKE FINDINGS WITH REFERENCE TO THE SFRORD CIRCUMSTANCES. -- EXTRAORDINARY CIRCUMSTANCES AND WE ACTUALLY REMANDED THAT CASE ON REALLY ON YOUR INITIATIVE AND REQUEST. THAT A COURT SHOULD HAVE TO DO THAT. IF THERE IS TO BE A FEE. DO YOU RECALL THAT?

YES, SIR. MR. JUSTIN ANSTEAD, THAT WAS THE CASE I LITIGATED ON REMAND AND IN MY ONE OF MY BRIEFS I DID SUPPLY THE DETAILED FINANCIAL ORDER, THAT THE, THAT THE TRIAL COURT ISSUED IN THAT CASE DENYING THE EXTRA MONEY OVER THE CAP BECAUSE THAT WHICH WAS BEING SOUGHT WAS SIMPLY NOT, NOT CONSISTENT.

IN THAT PARTICULAR CASE.

YES.

SO WHEN I TAKE IT THAT YOU'RE OFFICES PRACTICE HAS CONTINUED, TO INSIST ON THAT WHEN A FEE IS AWARDED, ABOVE THE CAP?

YES, YES.

IS THAT CORRECT?

YES WE HAVE NEVER VOLUNTARILY PAID MORE THAN THE CAPS. ANY, ANY MONEY THAT HAVE BEEN PAID IN EXCESS OF THE CAPS HAS BEEN BASED UPON A SPECIFIC COURT ORDER THAT FINDS THAT THERE ARE EXCEPTIONAL CIRCUMSTANCES THAT REQUIRE IT IN ORDER WITH THE TEACHINGS OF THE COURT IN, IN THIS COURT IN THE ORIGINAL OLIVE v. MAAS DECISION. WE HAVE A BAIZE FOR OUR APPEAL IN FREEMAN WAS BECAUSE THE TRIAL COURT ORDER DID NOT COMPORT WITH THIS COURT'S RULING TO AND THAT ULTIMATELY ENDED UP WITH A A DENIAL OF THOSE EXTRA.

THAT IS CORRECT.

NOW WHAT A NORMATIVE? IN THE ONES THAT YOU RECEIVE, IS THE NORM AS YOUR OPPONENT OR, THE OPPONENT SUGGESTS THAT EVERY CASE IS UNUSUAL? OR, OR IS THE NORM WITHIN THE CAPS?

I WOULD SAY THAT THE MAJORITY OF CASES, AND I HESITATE TO PUT A, TO PUT A NUMBER ON IT, BUT 70% OF THE CASES COME IN UNDER THE CAPS. S AND YOU KNOW WITH QUALITY REPRESENTATION.

DID YOU SAY UNDER THE CAP?

UNDER THE CAPS. THAT IT IS IT IS THE EXCEPTION RATHER THAN THE RULE THAT WE ARE

CALLED UPON TO, YOU KNOW, TO BE REQUESTED TO PAY MORE.

NOW, YOU SAID SOMETHING, AND I, YOU IN ANSWER TO JUSTICE LEWIS'S QUESTION ABOUT HOW, WHAT KIND OF QUALITY CONTROL AND YOU SAID 70% OF THE CASES COME IN UNDER THE CAP WITH QUALITY REPRESENTATION. HOW DO YOU KNOW THAT THERE HAS BEEN QUALITY REPRESENTATION, AND I DON'T MEAN THAT IN ANY ARGUMENTIVE WAY. I JUST WANT TO KNOW BECAUSE YOU KNOW THERE WAS THE AUDITOR GENERAL'S REPORT ABOUT REGISTRY COUNSEL VERSUS THE EFFECTIVENESS OF THE OFFICES IN THIS AND WE MUST REMEMBER IN THIS THAT REGISTRY COUNSEL IS REALLY THE EXCEPTION. THE RULE IN THE STATE IS REPRESENTATION THROUGH THE ORIGINAL CCR OFFICES SO HOW DO YOU VERIFY OR HOW DO YOU, HOW ARE YOU ABLE TO MAKE THE STATEMENT THAT 70% OF THOSE CASES WHERE THEY DON'T EXCEED THE CAP THEY HAVERAPHER GOTTEN THE DEFENDANT'S HAVE GOTTEN QUALITY REPRESENTATION? WELL WE HAVE, WE HAVE REGULAR CUSTOMERS, YOUR HONOR. IN ENACT, MANY OF THE LAWYERS WHO HAD BEEN PART OF THE CAPITAL CHRATERATE NORTH OFFICE THAT WAS -- COLLATERAL NORTH OFFICE THAT WAS CLOSED DOWN STILL REPRESENT YOU KNOW A VERY SIGNIFICANT NUMBER OF DEFENDANTS. I MEAN, THERE ARE CASES IN WHICH YOU KNOW I PROBABLY WOULD SAY IT WOULD BE DIFFICULT TO SAY THAT THE REPRESENTATION WAS QUALITY. BUT GIVEN THE ISSUES THAT ARE INVOLVED, YOU KNOW SUCH AS IN FREEMAN OFFICE. QUALITY REPRESENTATION, BECAUSE IT WASN'T YOU KNOW REALLY CALLED FOR UNDER THE CIRCUMSTANCES. BUT, IN --

SO YOU HAVE GAINED YOURSELF SOME FAMILIARITY WITH THE KIND OF ISSUES THAT COME UP AND WHICH ONES ARE, YOU KNOW, AS YOU SAID, THIS SORT OF THE, THEY'RE BEING RAISED TO JUST PRESERVE ISSUES AND DO, DO YOU ASK LOOK AT THE BRIEFS IN THE CASES OR ANYTHING LIKE THAT?

FROM TIME TO TIME, WE CERTAINLY FOLLOW THE PROGRESS OF THE CASES AND SINCE VIA THE MAGIC OF ELECTRONICS THE BRIEFS ARE AVAILABLE ONLINE, WE CAN CERTAINLY SEE THOSE. WE CAN WATCH THE ORAL ARGUMENT. WE ARE AWARE THAT THERE WAS AN ORAL ARGUMENT INVOLVING AN EXTRA FEE CASE FROM A REGISTRY ATTORNEY THAT WAS PRESENTED TO THE COURT AND VERY RECENTLY. AND WE, WE TAKE PROFESSIONAL INTEREST IN THAT. YOU KNOW, THAT'S SORT OF A BUSMAN'S HOLIDAY TO WATCH IT, BUT YOU KNOW WE TRY TO REMAIN CURRENT ON, AT LEAST I DO, REMAIN CURRENT WITH THE JURISPRUDENCE, WITH A SENSE OF WHETHER, YOU KNOW, A JUSTICE IS BEING CARRIED OUT. YOU KNOW, WHETHER FAIRNESS IS BEING CARRIED OUT WITH REGARD TO, TO THE, THE STUFF THAT WE HAD TO SUPERINTEND. FROM THAT PERSPECTIVE, HAVE YOU HAD ANY EXCHANGE OF IDEAS WITH REGARD TO REGISTRY AND WHETHER REGISTRY IS ITSELF MONITORING THOSE INVOLVED OR WHETHER WE NEED SOME ADDITIONAL PROGRAMS OR, OR METHODS IN PLACE TO DO THAT EVALUATION AS THOUGH WE ARE TALKING ABOUT QUALITY REPRESENTATION AND ALSO WITHIN THE, THE PROPER FINANCIAL GUIDELINES?

I HAD A CONVERSATIONS WITH THE EXECUTIVE DIRECTOR OF THE COMMISSION ON CAPITAL CASES ABOUT THE FACT THAT MANY OF THE REGISTRY LAWYERS DO NOT REPORT TO THE COMMISSION. YOU KNOW, THEY ARE OBLIGATED UNDER CHAPTER 27 PART 4 TO REPORT YOU KNOW QUARTERLY ON HOW THEY ARE DOING IN THE PROGRESS OF THE CASES. THEY ARE NOT DOING THAT. THAT SHOULD BE DONE. YOU KNOW, FOR QUALITY CONTROL PURPOSES. AND YOU KNOW THEY SHOULD BE COMPENSATED FOR FILING THOSE REPORTS.

OUR VIEW -- HAVE YOU REMOVED ANY ATTORNEY'S BEEN REMOVED FROM THE LIST BASED ON FAILURE TO TO REPRESENT THEIR CLIENTANE MANNER THAT IS -- TO THE BEST OF MY KNOWLEDGE, YOUR HONOR, NO LAWYER HAS BEEN REMOVED FROM, FROM THE REGISTRY FOR ANY REASON.

BUT THAT'S NOT, THAT WOULDN'T BE YOUR DOMAIN ANYWAY.

NO, IT WOULD NOT, AND YOU KNOW --.

AND WHO THE OBLIGATION OF DOING THAT? IS THAT MR. MAAS'S OFFICE?

YES, THAT'S CORRECT.

LET ME ASK --

PAY THE BILLS.

YOU WERE TALKING EARLIER ABOUT THE FACT THAT YOU MONITOR THE CASES TO MAKE SURE

THAT THE REPRESENTATION IS ADEQUATE AND TO KEEP UP WITH THE JURISPRUDENCE. WHAT HAPPENS IF YOU DISCOVER THAT THE REPRESENTATION IS INADEQUATE? WHAT, WHAT DO YOU DO? DO YOU COMMUNICATE WITH THE COMMISSION ON CAPITAL CASES WITH MR. MAAS'S OFFICE?

YES, YOUR HONOR. IN, IN CERTAIN CIRCUMSTANCES, WE HAVE HAD DISCUSSIONS. I PERSONALLY HAVE HAD DISCUSSIONS WITH MR. MAAS, YOU KNOW, SUGGESTING THAT, YOU KNOW, THIS, THIS DOES NOT LOOK LIKE IT'S GOING WELL. WHAT HE HAS DONE WITH THAT IS, YOU KNOW, HIS BUSINESS AND NOT OURS. BUT --

WELL, HAVE YOU EVER, THE STATUTE DOES PROVIDE THAT THE, THE COURT, WHOEVER THE COURT IS, SHALL MONITOR THE ADEQUACY OF THE REPRESENTATION. I'M PARAPHRASING. I AM NOT SURE WHAT THE EXACT LANGUAGE IS. HAVE YOU OR THE COMMISSION OR THE MR. MAAS EVER EXPRESSED CONCERNS TO THE TRIAL COURT THAT THIS PARTICULAR DEFENDANT IS NOT GETTING ADEQUATE REPRESENTATION?

I DON'T KNOW THAT WE HAVE EVER HAD OCCASION TO EXPRESS THAT TO THE TRIAL COURT. I MEAN, WE HAVE RECEIVED INFORMATION WHICH WE HAVE SHARED WITH THE TRIAL COURT, YOU KNOW, IN CERTAIN CIRCUMSTANCES CAPITAL DEFENDANTS WILL WRITE TO THE CFO AND SAY I AM NOT GETTING A GOOD --

I'M SO SURPRISED. YOU GET THOSE LETTERS TOO?

YOU KNOW, IT'S, BUT YOU UNDERSTAND HOW THAT WORKS AND WE HAVE TRANSMITTED THAT INFORMATION TO THIS COURT AND TO THE TRIAL COURT AND YOU KNOW IT HAS BEEN EXAMINED. WE TRY TO BE AS HELPFUL AS WE CAN BECAUSE THIS INVOLVES OF COURSE THE ADMINISTRATION OF JUSTICE AT THE VERY HIGHEST LEVEL AND, YOU KNOW, THAT IS WHY WE HAVE YOU KNOW, TRIED TO FOLLOW THIS COURT'S TEACHINGS. AND IF I COULD SAY JUST ONE THING BEFORE I FINISH UP, AND THAT IS THE SYSTEM NOW, THE CAPS, THAT REPS A TRIP WIRE A TRIGGER POINT THAT WHEN REPRESENTATION IS UNDERTAKEN AND IT PASSES THAT LEVEL, YOU KNOW, IT'S A SCRUTINY OF WELL, WHY IS THIS TAKING PLACE, AND THE SITUATION THAT APPLIES NOW, WHERE THE COURT CAN, IF IT DETERMINES IT'S EXCEPTIONAL EXCEEDS THE CAPS IS COMPLETELY CONSISTENT WITH MAINTAINING THE CONSTITUTIONALITY OF THE SYSTEM. NOT FOR 6TH AMENDMENT REASONS BUT FOR 5th AMENDMENT.

IT'S NOT CONSISTENT WITH THE AMENDMENT TO THE STATUTE WHICH IS WHY WE ARE HERE.

WELL, I THINK IT IS. BECAUSE I THINK YOU HAVE TO READ THE NO AUTHORIZATION LANGUAGE AS APPLICABLE TO THE CFO, TO THE EXECUTIVE BRANCH BECAUSE IF IT APPEALS TO THE COURTS THEN I BELIEVE IT WOULD BE A SEPARATIONS OF POWERS PROBLEM AND YET THAT THIS IS AN EXAMINE WHERE THE LEGISLATURE HAS MADE PERFECTLY CLEAR AND THE CFO HAS ATTEMPTED TO SAY WE ARE NOT GOING TO PAY ANYMORE BUT IT'S THE COURT AND THE EXERCISE OF ITS SUPERVISORY JURISDICTION OVER JUSTICE SAYS THAT JUSTICE NEEDS TO BE DONE AND MORE MONEY NEEDS TO BE PAS, THERE IS AN APPROPRIATION FROM WHICH THAT CAN BE PAID. AND IF IT IS, IF THE COURT IS COMPLETELY OUT OF WHACK, WE WILL TAKE AN APPEAL AS WE DID IN THE FREEMAN CASE. BUT IF THERE'S NO REASON TO TAKE AN APPEAL.

WE WILL BAIL.

THERE LIES THE PROBLEM AS TO WHETHER THERE IS AN APPROPRIATION TO COVER THAT CORRECT? BECAUSE IF THERE IS NOT AN APPROPRIATION BY THE LEGISLATURE TO COVER THAT YOU'RE NOT GOING TO BE ABLE TO MAKE THE PAYMENT?

WELL, IF, IF THE LEGISLATURE DECIDES NOT TO SUPPORT THE PROGRAM CBMG, I MEAN WE HAVE, THE STATUTE IS CLEAR. THAT THE LEGISLATURE INTENDS TO FUND A CAPITAL COLLATERAL PROGRAM TO EXPEDITE THE FINALITY OF THE DEATH PENALTY.

JUST ONE QUICK QUESTION. HOW MANY CASES ARE WE TALKING ABOUT?

I, MY, MY CAPITAL COLLATERAL LAWYER IS HERE. I COULD ASK HER. SHE PROBABLY WOULD HAVE THAT DO YOU KNOW HOW MANY CASES WE HAVE --

INAUDIBILITY -- [INAUDIBLE] [INAUDIBLE] 138 APPROXIMATELY.

WITH OUR ASSISTANCE, YOU'VE GONE WELL BEYOND YOUR TIME. WE THANK YOU FOR YOUR CANDOR. WE THANK YOU FOR THE INFORMATION YOU HAVE BROUGHT TO US FROM WHAT'S HAPPENING ON THE GROUND. THANK YOU VERY MUCH.

THANK YOU VERY MUCH, MR. CHIEF JUSTICE, IT'S A PLEASURE TO BE HERE.

THANK YOU. YOU ARE GOING TO COME BACK THROUGH. HOW ARE YOU GOING TO COME BACK THROUGH. SO THE QUESTION, HAVE YOU DECIDED THAT? YOU BOTH HAVE JUST A COUPLE OF MINUTES LEFT.

[INAUDIBLE]

NO, YOU HAVE A COUPLE OF MINUTES LEFT.

OKAY MR. HANLON TWO MINUTES.

MAKE SURE. WHAT IS IT THE CROSS -- I'M STARTING TO GET CONFUSED ABOUT WHAT IT IS THAT WE ARE SUPPOSED TO BE DECIDING TODAY. YOU HAVE A CROSS APPEAL? IS THAT IT? WHY YOU'RE UP HERE ON REBUTTAL BECAUSE I THOUGHT YOU WON AT THE FIRST 1st DISTRICT LEVEL. IT TOOK ME A HOUR AND A HALF --

SO WHAT PART ARE YOU COMPLAINING?

THE PART THAT I AM COMPLAINING ABOUT THE STATUTE, THE AMENDMENT TO THE STATUTE SAYS PAYMENT ABOVE THE CAPS, QUOTE IS NOT AUTHORIZED.

I THOUGHT YOUR CROSS APPEAL WAS THE STATUTE IS UNCONSTITUTIONAL ON ITS CASE.

BUT WHAT I MEAN BY THAT IS THAT AMENDMENT TO THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE.

BUT I THOUGHT THAT BECAUSE THE TRIAL COURT DISMISSED THE COMPLAINT, DISMISSED YOUR COMPLAINT, THE 1st DISTRICT REINSTATED IT. SO WOULDN'T IT LOGICALLY GO BACK TO -- LOGICALLY GO BACK, TO YOU KNOW, THE TRIAL COURT TO MAKE A JUDGMENT ON THE CONSTITUTIONALITY?

THE TRIAL -- WE HAD A TRIAL COURT DISMISSAL OF THE DECLARATORY ACTION FIND WE DIDN'T HAVE STANDING WENT BACK TO THE 1st DCA THEN THE TRIAL COURT THEN THE TRIAL COURT DECLARED ON THE DECLARATORY JUDGEMENT AND FOUND THAT THAT IS NOT AUTHORIZED LANGUAGE COULD BE CONTRUED TO INCLUDE AUTHORIZATION TO PAY OVER THE CAPS. I JUST DON'T, I DON'T HOW YOU CAN CONSTRUE HOW IS NOT AUTHORIZED --

I THINK IT IS ALONG THE LINES OF APPLICATION THAT THE CFO IS GIVEN THAT THERE MAY BE ONE. THERE MAY BE OTHERS.

WE HEARD THAT IF THE FIRST TIME TODAY. BUT IT, IT'S, MY BOUGHT 78 LINE THING IS THAT I WANT -- BOTTOM LINE THING IS THAT I WANT REGISTRY LAWYERS TO BE ABLE TO GET COMPENSATION ABOVE THE CAPS.

DO YOU AGREE, AND I KNOW YOU ARE ABOUT TO, BUT EXTRA MONEY DOESN'T EQUATE WITH NECESSARILY COMPETENT REPRESENTATION?

OF COURSE NOT NECESSARILY.

BUT, AND YOU KNOW AND, I MEAN AGAIN, IF YOU LOOK AT THE REGISTRY LAWYERS AND THE LAWYERS, THE SITUATIONS WHERE WE HAVE BEEN FLUSTERED, I MEAN MANY OF THOSE LAWYERS MAY START TO ASK FOR MORE MONEY THAN THE CAP BUT IF THEY ARE NOT REALLY DOING A QUALITY JOB TO BEGIN WITH, THIS IS, WOULD BE ALL FOR NOT ANYWAY.

THERE'S NO EXCEPTION ABOUT THAT BUT THIS COURT HAS REPEATEDLY FOUND AND I THINK IT MAKES GREAT GOOD SENSE THAT THERE IS A LINK BETWEEN COMPENSATION AND EFFECTIVE ASSISTANCE OF COUNSEL. THOSE TWO ARE INEXTRICABLY INTERTWINED AND YOU HAVE REPEATED THAT OVER AND OVER BUT THERE IS ANOTHER QUALITY PART TO THAT EQUATION NOT JUST QUANTITY BUT QUALITY PART AND THAT IS OF COURSE WHY I AM ASKING YOU TO FIND A CONSTITUTIONAL RIGHT UNDER THE FLORIDA CONSTITUTION BECAUSE IN YOUR RULES YOU SAID I'M NOT GOING TO DEAL WITH STANDARDS FOR POST-CONVICTION COUNSEL BECAUSE THAT'S JUST STATUTORY WHEREAS YOU DID DEAL WITH STANDARDS FOR TRIAL COUNSEL BECAUSE THAT WAS CONSTITUTIONAL. AND THAT'S AGAIN WHY I THINK YOU SHOULD EXTEND GRAHAM BEYOND A CASE-BY-CASE BASIS TO AND AS JUSTICE ANSTEAD DID OR ARGUED IN HIS CONCURRING OPINION IS THAT IT'S AN ACROSS THE BOARD CONSTITUTIONAL RIGHT AND I KNOW THAT ZACK HELD OTHERWISE BUT ZACK DID NOT OVERRULE GRAHAM. I THINK YOU ARE IN THE SAME POSITION AS UNITED STATES SUPREME COURT ON GIDEON WHERE THE COURT SAID IT'S IF IT'S NOT WORKING IT'S SIMPLY NOT WORKING, OKAY I THINK IT'S NOT WORKING. I THINK YOU HAVE SOME STRONG EVIDENCE IN FRONT OF YOU THAT IT'S NOT WORKING AND THAT IF YOU MOVE TO A CONSTITUTIONAL RIGHT UNDER THE FLORIDA CONSTITUTION, WE WILL NOT HEAR THIS ARGUMENT THAT -- CONSTITUTIONAL, WE WILL NOT HEAR THE ARGUMENT. I THINK IT IS A

BIG PROBLEM. THANK YOU.

THANK YOU.

MR. HANLON MENTIONS THE COURT BEING IN THE SAME POSITION AS GIDEON AT GIDTIAN THEY WERE LOOKING AT A 6th AMENDMENT RIGHT. IN THIS INSTANCE THEY HAVE NOT IDENTIFIED ANY CONSTITUTIONAL RIGHT THAT THEY ARE TALKING ABOUT. THERE IS NO PORTION OF THE CONSTITUTION THAT SAYS YOU GET POST-CONVICTION COUNCIL COUNSEL.

I GUESS THAT, AND WE HAVE A CASE, AND WE HAVE A CASE LATER THIS MORNING WHERE AN UNCOUNSELED MISDEMEANOR QUESTION THERE IS -- IS THERE A RIGHT TO COUNSEL IF IT'S SIX MONTHS OR MORE AND AT SOME POINT THE THOUGHT WHEN SOMEONE'S LIFE OR DEATH, THAT THERE IS SOMEHOW NO CONSTITUTIONAL RIGHT, YOU KNOW MAYBE SOMETHING THAT WEAL -- WE'LL LOOK AT AS ANACHRONESTIC AS THE GIDEON CASE LAW LOOKS NOW AND THAT'S JUST AN OBSERVATION. I APPRECIATE YOUR ADVOCACY ON BEHALF OF YOUR CLIENT.

YES, YOUR HONOR. I I WOULD JUST SAY THAT IF WE WERE TO EXTEND THAT TO, YOU KNOW, TO DEATH PENALTY CASES YOU RUN INTO WHAT JUSTICE AN A -CANTERO TALKS ABOUT WHICH IS THE NEVER ENDING CYCLE OF EFFECTIVE COUNSEL.

LET ME ASK YOU A QUESTION ABOUT THAT. IS THAT WHILE THE STATE MAY NOT HAVE THE OBLIGATION TO DO SO, DO YOU BELIEVE THAT THERE IS NO UNDER, UNDER ANY CLAUSE, ONCE YOU ESTABLISH THAT, THAT THERE IS NO CONSTITUTIONAL IMPLICATION AT ALL OF ANY KIND IF YOU PROVIDE JUST AFTER YOU PROVIDE AA SYSTEM? YOU DON'T THINK THAT SYSTEM HAS TO OPERATE WITHIN A CONSTITUTIONAL PARAMETER OF AT LEAST A DUE PROCESS?

I THINK THAT IS A IF A DEFENDANT CAME FORWARD AND WAS ABLE TO SHOW THAT A SIMILARLY SITUATED DEFENDANT WAS GETTING SOMETHING BETTER THAN WHAT HE WAS GETTING BUT WE DON'T HAVE THAT. WE HAVE ATTORNEYS BEING BORED AND SAYING I AM NOT GETTING ENOUGH MONEY.

WELL, AND THAT'S AFFECTING THE QUALITY OF THE COUNSEL YOU WOULD GET SO IT WOULD BE CASE-BY-CASE ANALYSIS, AS APPLIED.

YES, AND THAT IS WHAT THE U.S. SUPREME COURT HAS SAID.

LET ME BE SURE THAT I UNDERSTAND YOUR BOTTOM LINE. I UNDERSTAND YOU CORRECTLY. YOU ARE ASKINGTUSE RECEDE FROM OUR HOLDING IN OLIVE 1?

YES, YOUR HONOR.

WITH OUR HELP YOU HAVE GONE WAY OVER YOUR TIME. YOU ARE ABOUT TO THREE MINUTES OVER ALL OF IT PLUS YOUR REBUTM TIME ALL RIGHT. THANK YOU.

THANK YOU VERY MUCH. WE THANK ALL OF YOU FOR YOUR PARTICIPATION A VERY IMPORTANT ISSUE AVERY IMPORTANT TO THE COURT. THANK YOU VERY MUCH. THE COURT WILL TAKE ITS MORNING RECESS.

ALL RISE. COURT ADJOURNED.