SUPREME COURT OF FLORIDA

STATE OF FLORIDA, **CASE NO.: SC01-1301**

Appellant, **Lower Tribunal No.: 77-0116-CFA**

vs.

BENNIE DEMPS,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT, STARKE, BRADFORD COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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ANSWER BRIEF OF THE APPELLEE

I. PRELIMINARY STATEMENT

Bennie Demps was the defendant in the trial court and was executed by lethal injection by the State of Florida on June 7, 2000. He will be referred to in this brief as the "defendant" or by his proper name. The only agency of the State of Florida that is actually appealing the trial court's final order awarding attorney's fees and costs in this case is the Comptroller for the State of Florida (the Honorable Robert F. Milligan) who will be referred to in this brief as the "Comptroller." Because Mr. Demps is now deceased, the real party in interest is Mr. Demps' court-appointed registry counsel, George F. Schaefer. References to Mr. Schaefer in this brief will be as "registry counsel" or by his proper name.

There are two volumes in the record on appeal in this case. Volume I consists of certain pleadings and the transcript of the hearing on Mr. Schaefer's motion for attorney's fees which was held on March 13, 2001. Volume II consists of a supplemental record comprised primarily of pleadings that were omitted from the original record on appeal. References to all documents or the hearing transcript will be by the volume number followed by the appropriate page number in parentheses. For example, page 77 of the original record on appeal would be identified as follows: (I, 77).

In the appendix to the Comptroller's initial brief, there are copies of Mr. Schaefer's reapplication for an award of attorney's fees and costs, attorney time records and documentation, and the Comptroller's objections contained in a letter dated December 8, 2000, and this court's transfer order of February 26, 2001. The Comptroller has suggested that this court take judicial notice of these pleadings. It is the position of the appellee that judicial notice is not necessary because these items remain part of the record in this case in that they were filed with this court and then transferred to the trial court for its consideration. If this is incorrect, the appellee has no objection to judicial notice of all of these pleadings by this court so long as this court take judicial notice of the affidavits submitted in support of the fees requests. Copies of the affidavits of registry counsel and attorneys Robert S.

Griscti and Robert A. Rush, which were also originally filed with this court and considered by the trial court following the transfer, can be found at Attachments A, B, and C in the appendix to this brief.

II. STATEMENT OF THE CASE AND FACTS

The Comptroller's statement of the case and facts is generally supported by the record in this case except as follows. The appellee submits that the following facts are material facts which the Comptroller has omitted or has not accurately stated.[1]

A. DEFENDANT'S *PRO SE* NOTICE OF APPEAL AND SCHAEFER'S MOTION TO WITHDRAW: The Comptroller in the initial brief states, "On May 25, 2001, notwithstanding Mr. Schaefer's appointment the day before, Bennie Demps filed a *pro se* Notice of Appeal as to the denial of 3.850 motion." Comptroller's initial brief at page 4. The Comptroller fails to state that the order of appointment was not formally rendered until May 26, 2001 which was the day after Mr. Demps filed his *pro se* notice of appeal.

The Comptroller further notes that Mr. Schaefer filed an emergency application for stay of execution and alternative motion to withdraw. Comptroller's initial brief at pages 4-5. It should be noted that the alternative emergency motion to withdraw was based on Rule 4-1.1 of the Rules of Professional Conduct of the

[1]Furthermore, an immaterial fact noted in the Comptroller's initial brief is that the trial court conducted a hearing on May 12, 2000; however, this hearing was a "Huff" hearing, not a "Hough" hearing.

Florida Bar which requires an attorney to render competent representation on behalf of a client and Rule 4-1.16 of the Rules of Professional Conduct of the Florida Bar which requires an attorney to withdraw if representation will result in the violation of the bar rules. Mr. Schaefer represented to the trial court, and later to this court, that without a stay of execution he could not competently represent Mr. Demps in his appeal of this death sentence with only a week to prepare before the scheduled execution.

B. <u>SUPREME COURT OF FLORIDA'S TRANSFER ORDER</u>:

The Comptroller correctly notes this court on February 26, 2001 transferred to the lower court Schaefer's attorney's fees application "for evaluation pursuant to Chapter 27, Fla. Stat. (1999)." (Comptroller's initial brief at page 10). It should be clarified that before this court rendered its transfer order, neither party was afforded the opportunity to brief the issue of the constitutionality of the statutory caps found at §§27.703, 27.710 and 27.711, Fla. Stat. (1999).

C. <u>ATTORNEY'S FEES HEARING</u>: At page 10 of the Comptroller's brief, the following is stated:

> On March 13, 2001, a nonevidentiary hearing - - noticed by Mr. Schaefer for 15 minutes - - was held in Gainesville before Judge Larry G. Turner. (R-89-120). No witnesses were heard, and only argument of counsel was presented. Counsel for the Comptroller and the Office of the Attorney General appeared by telephone. (R-91).

The Comptroller's characterization of the proceedings below is inaccurate. The hearing was heard in Starke, not Gainesville. The supplemental record on appeal proves that the hearing was not noticed as a "nonevidentiary hearing." (II, 1).[2] At the hearing itself, the State conceded that the hearing was an evidentiary hearing:

> MR. NICKELL: Your Honor, we did not send this contract until we heard he had been appointed.
>
> THE COURT: And did you send one after you heard he was appointed?
>
> MR. NICKELL: Did we? We're not sure, Your Honor.
>
> THE COURT: I'll take that as a no. This is the hearing, isn't it? This is when we're having a hearing. You're noticed for the hearing. This is when I'm supposed to receive and consider evidence.
>
> MR. NICKELL: Your Honor, that's true. . . .

(I, 106).

And finally, it is also incorrect that "only argument of counsel" was presented. As the trial court's final order reflects, the court considered the following evidence in addition to argument of counsel:

> In reviewing this matter, this court has considered the affidavit, attorney time records, and costs documentation of Mr. Schaefer. This court has

---

[2] Mr. Nickell and the assigned Assistant Attorney General, Curtis French, obtained permission from the trial court to appear telephonically. (I, 103). In fact, before the hearing was formally noticed, Mr. Schaefer coordinated the hearing with the Comptroller's attorney, Mr. Bill Nickell.

> also considered the affidavits of local attorneys Robert S. Griscti and Robert A. Rush, copies of pleadings filed by the parties with the Supreme Court of Florida in reference to this matter (which include the December 8, 2000 letter from Robert B. Beitler, Deputy General Counsel for the Comptroller, and the response of the Comptroller to attorney fee applications of William P. Salmon and George Schaefer), and the arguments of counsel.

(I, 77; 94). At the hearing, the Comptroller did not offer any evidence, including any affidavits.

D. <u>COMPTROLLER'S CONCESSIONS TO THE TRIAL COURT</u>:

The Comptroller has neglected in the initial brief to state the concessions made by the Comptroller at the attorney's fees hearing. First, at the evidentiary hearing, the Comptroller's counsel did not dispute the total number of attorney hours expended by Mr. Schaefer were reasonable:

> MR. NICKELL: That's correct, Your Honor. I don't oppose the number of hours at all.

(I, 112).

Second, counsel for the Comptroller at the evidentiary hearing did not dispute the quality of the legal services rendered by registry counsel:

> MR. NICKELL: Your Honor, thank you very much for letting me appear by phone. I just wanted to briefly say that I appreciate Mr. Schaefer's work in this matter. I'm not trying to say that he's not worth the money. He certainly did a good job an I thank him for it and I think the Comptroller does, too. . . .

(II, 103).

The Court acknowledged this concession of fact by the State of Florida:

> . . . . I too appreciate Mr. Schaefer stepping into the gap at the time that it appeared to exist. I think that Judge Morris' intent in his order appointing Mr. Schaefer was to ensure that Mr. Demps was properly represented on this life and death matter in the remaining few days before the execution was to be carried out, that Judge Morris was familiar with the same thing others of us in the legal community were familiar with and as I recall, the courts had already extended some limits, some deadlines because of Mr. Salmon's wife's severe illness and Mr. Salmon's - - the necessities of Mr. Salmon to deal with the issues involving Mr. Demps.
>
> Mr. Schaefer in the finest tradition of this Bar simply said, yes, and stepped into the breach, performed his responsibilities under extraordinary circumstances, which means not only did he have only a few days to act, he had a voluminous record to review, issues to familiarize himself with. Death penalty issues are always difficult and always time consuming and always under deadlines, but rarely under the deadline that he found himself dealing with.
>
> We did, as you acknowledged, Mr. Nickell, did an excellent job for his client. You know, this kind of work by defense attorneys is pretty much thankless work in that many members of the community don't particularly value the work done on behalf of those convicted of capital felonies. So it's not - - doesn't win you any popularity.

(I, 110-111).

E. <u>PAYMENT STATUS</u>: The Comptroller's statement of the case does not include the current payment status for the trial court's award of attorney's fees and costs. Mr. Schaefer moved the trial court to vacate the automatic stay of

judgment that was invoked when the Comptroller appealed the award pursuant to Rule 9.310(b)(2) of the Fla. R. App. P. (II, 3-5). A request was made in that motion to impose as a condition of the automatic stay a provision awarding attorney's fees and costs and interest on the original award should the Comptroller lose its appeal. The trial court vacated the automatic stay only for the portion of attorney's fees not in dispute and all costs. (II, 14-15). The trial court denied without prejudice the request for an award of interest and appellate attorney's fees and costs, but reserved jurisdiction to entertain a renewed motion following conclusion of the Comptroller's appeal in this case. (II, 15).[3]

[3]The appellee has a pending motion for attorney's fees and costs incurred in the appeal in this case that was recently filed with this court in accordance with Rule 9.400 of the Fla. R. App. P.

III. SUMMARY OF ARGUMENT

For the reasons stated in the appellee's motion to dismiss, this court does not have jurisdiction to entertain the Comptroller's appeal. If this court disagrees, the arguments of registry counsel can be summarized as follows.

The Comptroller's contention that this court's order transferring the fees issue to the lower court precluded a challenge to the statutory cap on attorney's fees in the registry law is completely without merit. The Comptroller claims that the "law of the case" doctrine required the lower tribunal to adhere to the statutory cap. The appellee relies on this court's holding in Florida Department of Transportation v. Juliano, 801 So. 2d 101 (Fla. 2001) in opposition to this argument. This court did not address whether the registry statutory caps are enforceable in this case and this court's transfer order cannot be characterized as a decision in a prior appeal which is a prerequisite to application of the law of the case doctrine.

The Comptroller's argument that under the registry statute it was registry counsel's duty to execute a contract is not supported by traditional rules of statutory construction. The plain and unambiguous language of the registry law replaces the obligation on the Comptroller to develop the form of the contract, function of contract manager, and enforce performance of the terms. The Comptroller's complete failure to even offer a contract to registry counsel is fatal to

enforcement of the statutory caps. To hold otherwise would render significant portions of the registry law meaningless.

And finally, the Comptroller's request that this court reject the trial court's extension of the Makemson rationale to the registry law has already been rejected by this court's holding in Olive v. Maas, 2002 Fla. LEXIS 219, 27 Fla. L. Weekly S139 (Fla. February 14, 2002). The Comptroller has simply failed to demonstrate that the trial court clearly abused its discretion in awarding attorney's fees in excess of the statutory cap. The unrefuted affidavits tendered by registry counsel at the evidentiary hearing constitute competent and substantial evidence to support the trial court's award.

IV. ARGUMENT

A. INTRODUCTION

After the initial brief of the Comptroller was filed in this court, the appellee filed a motion to dismiss the Comptroller's appeal for lack of jurisdiction. At the time of the filing of this answer brief, this court has not ruled on the motion to dismiss. This answer brief is submitted subject to the appellee's jurisdictional objections. The appellee's counsel, George F. Schaefer, remains adamant that this court lacks jurisdiction at this time to review the trial court's order awarding attorney's fees and costs for the reasons stated in the motion to dismiss which are incorporated by reference.

The Comptroller in the initial brief has framed each issue in an argumentative fashion. The appellee has chosen to restate the issues. Because the three issues presented by the Comptroller are really separate and distinct and not just subparts one main issue, the appellee has also elected to treat each issue separately in this answer brief.

B. STANDARD OF REVIEW

An award of attorney's fees is a matter committed to the sound judicial discretion of the trial court which will not be disturbed on appeal, absent a showing of clear abuse of discretion. DiStefano Construction, Inc. v. Fidelity and Deposit

Company of Maryland, 597 So. 2d 248, 251 (Fla. 1992) citing Lucas v. Evans, 453 So. 2d 141 (Fla. 1st DCA 1984) and 3 Fla. Jur. 2d Appellate Review §339 (1978). *See also* Afrazeh v. Miami Elevator Co. of America, 769 So. 2d 399 (Fla. 3rd DCA 2000). An appellate court may not substitute its judgment on findings of fact pertaining to a fee's award that are supported by competent, substantial evidence. Moore v. Excal Enterprises, Inc., 769 So. 2d 1062 (Fla. 2nd DCA 2000) citing First Fed. Sav. & Loan Ass'n of the Palm Beaches v. Bezotte, 740 So. 2d 589 (Fla. 4th DCA 1999), *review denied*, 753 So. 2d 563 (Fla. 2000).

C. ISSUES PRESENTED

ISSUE I (RESTATED)

DID THIS COURT'S TRANSFER ORDER PRECLUDE THE LOWER COURT FROM AWARDING ATTORNEY'S FEES IN EXCESS OF THE $100.00 STATUTORY CAP FOUND AT §§27.703 AND 27.711, FLA. STAT. (1999) BECAUSE OF THE "LAW OF THE CASE" DOCTRINE?

The appellee agrees with the Comptroller that Mr. Schaefer is a member of the registry of counsel maintained by the Commission on Capital Cases pursuant to §27.710, Fla. Stat. and that Mr. Schaefer was appointed as cocounsel for Mr. Demps because he was a registry counsel. The appellee disagrees, however, with the Comptroller's claim that this court's order of February 26, 2001 transferring the

attorney's fees issue to the trial court for resolution precluded the trial court from awarding attorney's fees in excess of $100.00 an hour because of the "law of the case" doctrine.

Before this court rendered its transfer order, neither party was afforded the opportunity to brief the legal issues presented in this appeal. Thus, the enforceability of the statutory caps on attorney's fees was never a question of law actually decided by this court in this particular case. The appellee relies upon this court's recent decision in Florida Department of Transportation v. Juliano, 801 So. 2d 101 (Fla. 2001) on this issue.

In Juliano this court clarified the differences between the doctrine of *res judicata* and law of the case, and stated in pertinent part:

> As to the scope of the law of the case doctrine, this Court in U.S. Concrete, 437 So. 2d at 1063, explained that the doctrine is "limited to rulings on questions of law actually presented and considered on a former appeal." (Emphasis supplied.) *See also* Two M. Dev. Corp. v. Mikos, 578 So. 2d 829, 830 (Fla. 2d DCA 1991). By reaffirming the principle articulated in earlier decisions that the law of the case doctrine is limited to questions of law actually presented and considered on a former appeal, U.S. Concrete was consistent with prior cases from this Court. *See, e.g.*, Greene, 384 So. 2d at 28*;* Strazzulla, 177 So. 2d at 3*;* Finston v. Finston, 160 Fla. 935, 37 So. 2d 423, 424 (Fla. 1948). Additionally, the law of the case doctrine may foreclose subsequent consideration of issues implicitly addressed or necessarily considered by the appellate court's decision. *See* Dade County Classroom Teachers' Ass'n v. Rubin, 238 So. 2d 284, 289 (Fla. 1970)*;* Dicks v. Jenne, 740 So. 2d 576, 578 (Fla. 4th DCA 1999).

> A corollary of the law of the case doctrine is that a lower court is not precluded from passing on issues that "have not necessarily been determined and become law of the case." Greene, 384 So. 2d at 27. As stated in Wilder v. Punta Gorda State Bank, 100 Fla. 517, 129 So. 865, 866 (1930), the law of the case doctrine "has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon a former writ of error and consequently were not before the appellate court for adjudication."

Juliano, 801 So. 2d at 106.

This court's transfer order merely directed the trial court to evaluate Mr. Schaefer's fees application "for evaluation pursuant to Chapter 27, Florida Statutes (1999)." It was not a decision rendered on appeal. Whether the Chapter 27 statutory caps on attorney's fees were enforceable in this case is clearly not an issue that has necessarily been determined by this court's mere transfer order.

ISSUE II (RESTATED)

DID THE TRIAL COURT ERR IN ITS DETERMINATION THAT THE STATE OF FLORIDA FAILED TO SUBMIT ANY EVIDENCE AT THE EVIDENTIARY HEARING OF COMPLIANCE WITH §27.710(4), FLA. STAT. (1999) AND THEREFORE WAIVED ITS RIGHT TO CHALLENGE AN AWARD OF ATTORNEY'S FEES IN EXCESS OF THE $100.00 STATUTORY CAP FOUND AT §§27.703 AND 27.711, FLA. STAT.?

At the evidentiary hearing, the Comptroller's contract manager and attorney were uncertain on whether the standard contract called for under §27.710(4), Fla. Stat., was sent to Mr. Schaefer. (I, 106-107). The Comptroller's attorney thought that a contract had been mailed, but conceded that he had no information that Mr. Schaefer was ever even asked to sign a contract. (II, 107). The Comptroller now belatedly admits in the Comptroller's initial brief that no contract was ever signed. (Comptroller's initial brief at page 24).

Nevertheless, the Comptroller insists that the trial court committed reversible error in its finding that the "State of Florida has waived its right to challenge the requested fees because of its failure to submit at the hearing any evidence of compliance with §27.710(4), Fla. Stat." (I, 79). The Comptroller now argues for the first time on appeal that the nonexistence of a contract is essentially Mr. Schaefer's fault. The Comptroller in the initial brief states, "Section 27.710(4) places on the *counsel* who accepts employment the duty of executing a contract with the Comptroller." (Emphasis supplied). (Comptroller's initial brief at page 24). The Comptroller reasons that because registry counsel has duty to execute a contract, the trial court was bound to adhere to the statutory hourly attorney's fees cap of $100.00.

What makes this argument particularly dubious is this court's recent judicial finding in Olive v. Maas, 2002 Fla. LEXIS 219, 27 Fla. L. Weekly S139, S144 n. 4 (Fla. February 14, 2002) that the Comptroller's standard registry contract is "a legally questionable contract." Traditional rules of statutory construction also do not support the Comptroller's position.

First, when the words of a statute are plain and unambiguous and convey a definite meaning, courts are not permitted to resort to rules of construction. The courts must instead read the statute as written, because to do otherwise would constitute an abrogation of legislative power. Nicoll v. Baker, 668 So. 2d 989, 991 (Fla.1996) citing Holly v. Auld, 450 So. 2d 217 (Fla. 1984). *See also* Savona v. Prudential Ins. Co. of America, 648 So. 2d 705, 707 (Fla. 1995); Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993); and Forsythe v. Longbeat Key Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992). The statute in question is clearly plain and unambiguous that it is the *Comptroller*, not registry counsel, who has the obligation to develop and manage the contract. The statute provides:

> Each private attorney who is appointed by the court to represent a capital defendant must enter into a contract with the Comptroller. If the appointed attorney fails to execute the contract within 30 days after the date the contract is mailed to the attorney, the executive director of the Commission on Capital Cases shall notify the trial court. **The Comptroller shall develop the form of the contract, function as contract manager, and enforce performance of the terms and**

> **conditions of the contract.** By signing such contract, the attorney certifies that he or she intends to continue the representation under the terms and conditions set forth in the contract until the sentence is reversed, reduced, or carried out or until released by order of the trial court.

§27.710(4), Fla. Stat. (1999). (Emphasis added). Under the statute, it is the duty of the Comptroller to present and make sure a contract is signed by registry counsel. It is impractical, if not absurd, to expect registry counsel to solicit a contract limiting their fees in a capital case to an amount grossly below market rates.

The Comptroller's suggested interpretation of the registry law also violates another fundamental rule of statutory construction that courts should avoid readings that would render part of the statute meaningless. Unruh v. State, 669 So. 2d 242, 245 (Fla. 1996) quoting Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d at 456. Statutes should be construed to give each word effect. Christo v. State, Department of Banking and Finance, 649 So. 2d 318, 321 (Fla. 1st DCA 1995) citing Gretz v. Florida Unemployment Appeals Comm'n, 572 So. 2d 1384 (Fla. 1991). Under the Comptroller's construction of the statute, if adopted, the phrase, "By signing such contract" would be meaningless because an attorney would be obligated to follow the terms and conditions set forth in the contract, which track the statute, even when the attorney does not sign the contract.

Another provision of this statute that would be rendered meaningless if the Comptroller's construction were to be adopted by this court is the requirement that the executive director of the Commission on Capital Cases must notify the trial court within 30 days of the failure of the registry attorney to execute the contract. Why would the legislature require such notice to the trial court if it does not matter whether the attorney has signed the contract? Indeed, the Comptroller's position begs the question: If it makes no difference whether the registry attorney signs the contract in order for the statutory caps to apply, why have a contract in the first place?

The Comptroller simply dropped the ball at the inception of in this case.

Faced with the Comptroller's failure to comply with the registry law, the trial court awarded attorney's fees based solely upon affidavits presented by registry counsel which was not objected to by opposing counsel. The Comptroller's silence at the evidentiary hearing and lack of objection constituted acquiescence in the handling of the attorney's fee issue by affidavit and therefore the trial court's award of attorney's fees based on the affidavits was not an abuse of discretion. *See* Insurance Co. of North America v. Julien P. Benjamin Equipment Co., 481 So. 2d 511, 514 (Fla. 1st DCA 1985). *See also* Saussy v. Saussy, 560 So. 2d 1385, 1386 (Fla. 2nd DCA 1990). The affidavits of Mr. Schaefer, time records, and two

affidavits of qualified local counsel (see appendix) are competent as substantial evidence to support the trial court's award in the absence of any evidence submitted at the hearing by the Comptroller, including a contract.

ISSUE III (RESTATED)

DID THE TRIAL COURT ERR IN ITS FINDING THAT UNDER THE HOLDING AND ANALYSIS OF MAKEMSON V. MARTIN COUNTY, 491 SO. 2D 1109 (FLA. 1986), THE $100.00 STATUTORY HOURLY CAP FOUND AT §§27.703 AND 27.711, FLA. STAT. AS APPLIED IN THIS CAPITAL CASE, IS UNCONSTITUTIONAL UNDER THE FLORIDA CONSTITUTION?

At the evidentiary hearing, registry counsel argued to the trial court that the statutory hourly rate cap of $100.00 is unconstitutional as applied to the extraordinary circumstances of this case under the holding and analysis of Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). The trial court agreed and found this cap unconstitutional as applied. The Comptroller on appeal in the initial brief states:

> There is only one option open to the Court which will avoid the constitutional collision inherent in approving the facial invalidation of an otherwise valid statute dealing with compensation for public service: to reject the trial court's extension of the Makemson rationale to invalidate the statutory rate fixed for Chapter 27, Part IV, Florida Statutes.

Comptroller's initial brief at page 39. After the Comptroller filed the initial brief, this court rendered its opinion in Olive v. Maas, 2002 Fla. LEXIS 219, 27 Fla. L. Weekly S139 (Fla. February 14, 2002). In Olive this court examined the legislative history of §§27.710 and 27.711, Fla. Stat. (1999) and recounted the legislative history as follows:

> Respondents candidly conceded during oral arguments that Makemson, White, and Remeta were applicable to the present case and that, accordingly, in capital cases where extraordinary or unusual circumstances exist, trial courts are authorized to award fees in excess of the statutory schedule set out in section 27.711(4). That Makemson and its progeny control this issue is expressly noted in a staff analysis forming part of the legislative history of section 27.711. Specifically, the Staff Analysis to SB 2054, which ultimately became chapter 99-221, Laws of Florida, amending sections 27.710 and 27.711, indicates the following under the heading "Other Constitutional Issues:"
>
> Section 27.711(4), F.S., provides for the hourly rate and maximum compensation of registry attorneys. In Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), the Florida Supreme Court held that a statute which set a maximum fee limitation for compensation to attorneys who were appointed by the court to represent indigent criminal defendants was constitutional, on its face. However, the Court stated that such a statute may be "unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused." Id. According to the Court, "statutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right 'to have the assistance of counsel for his defense.'" Id[.] (citation omitted).
>
> Consequently, where unusual or extraordinary circumstances exist, the fees caps established by s.27.711(4), F.S., and increased by the

> provisions of this bill, do not prevent a court from ordering payment above the maximum authorized.
>
> Fla. S. Comm. on Crim. Just., CS for SB 2054 Staff Analysis 7 (March 17, 1999) (on file with comm.) (emphasis supplied); *see also* Arbelaez v. Butterworth, 738 So. 2d 326, 328 (Fla. 1999) (Anstead, J., specially concurring) (discussing 1999 amendments to section 27.711 and noting that the "staff analyses from both the Senate and the House specifically indicate that the legislature is concerned about compliance with this Court's decision in Makemson."). Accordingly, although section 27.711 indicates that the fee schedule set forth in subsection (3) is the "exclusive means of compensation," the legislative history and staff analysis clearly contemplate, and indeed accommodate, fees in excess of the statutory schedule in cases where unusual or extraordinary circumstances exist. In doing so, it is obvious that the legislative process patently acknowledged that unless room is made to allow compensation in excess of the fee caps, a statutory framework may run afoul of this Court's precedent in Makemson and its progeny.

Olive, 27 Fla. L. Weekly at S141-142.

This court held that by accepting an appointment, a registry attorney is not forever foreclosed from seeking compensation above the statutory cap. This court adopted the Makemson standard which allows compensation above the statutory cap when the facts and circumstances of a particular capital case demonstrate that compensation within the statutory cap would be confiscatory of the registry attorney's time, energy and talent and would violate the Makemson principles. The

trial court should be affirmed on the basis of Olive. This is essentially what the trial court did without the benefit of this court's holding in Olive.[4]

The Comptroller correctly points out that the registry provisions at Chapter 27, Part IV, are remedial statutes and should be construed to achieve the intended legislative purpose. In Olive this court also explained the remedial purposes behind the registry law:

> In 1998, the Legislature enacted sections 27.710 and 27.711 which, as previously explained, provide for the maintenance of a registry of private attorneys to represent indigent death row defendants in postconviction proceedings, and establish the fee schedule and other guidelines which must be adhered to by these private attorneys, respectively. The purpose of this program was to "alleviate . . . CCRC's backload of capital cases which have not been assigned to an attorney." Fla. S. Comm. on Crim. Just., CS for SB 1328 Staff Analysis 1 (Mar. 3, 1998) (on file with comm.).

Olive, 27 Fla. L. Weekly at S140.

A statute which is a remedial act should be construed liberally in favor of granting access to the remedy. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) citing Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994) and Green v. Burger King Corp., 728 So. 2d 369, 371 (Fla. 3d DCA 1999). *See also*

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[4]In light of the concession by the Comptroller's attorney before the trial court that the Comptroller believes registry counsel did a "good job," it is unnecessary to respond to insinuations to the contrary in the Comptroller's initial brief at page 35-38. (I, 103).

Martin Co. v. Edenfield, 609 So. 2d 27, 29 (Fla. 1992) and Wesley Group Home Ministries, Inc. v. City of Hallandale, 670 So. 2d 1046, 1049 (Fla. 4th DCA 1996). The trial court's order awarding fees in excess of the $100.00 statutory cap through application of Makemson is consistent with a liberal construction of this remedial law.

Without some flexibility in the application of the hourly cap, the remedial purposes of the law will be defeated. It is unlikely that competent registry attorney, in the future, would agree to represent a death row inmate who is scheduled to be executed within a week of appointment at a confiscatory hourly rate of compensation in the amount of $100.00.

V. CONCLUSION

If this court denies the appellee's motion to dismiss for lack of jurisdiction, only then should it consider the merits of the Comptroller's appeal. The trial court's order awarding attorney's fees and costs should be affirmed because the Comptroller has failed to prove that the trial court clearly abused its discretion; furthermore, there is competent and substantial evidence to support the trial court's award. If this court affirms the trial court, then the appellee's motion for an award of appellate attorney's fees and costs should be granted and the case remanded to the trial court to determine the appropriate amount with an assessment of interest.

DATED this 2nd day of March, 2002.

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CERTIFICATE OF SERVICE[5]

I CERTIFY that a true copy of this brief was sent by United States mail on March 2, 2002 to Richard T. Donelan, Jr., Chief Counsel, Department of Banking and Finance, 101 East Gaines Street, Suite 526, Tallahassee, Florida 32399-0350.

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 9.210(a)(2) of the Fla. R. App. P., I certify that this computer-generated brief complies with the font requirements. The font contained in this brief is New Roman point 14.

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[5] Counsel for other agencies before the trial court did not join in the Comptroller's notice of appeal; accordingly, they have not been served.

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