IN THE SUPREME COURT OF FLORIDA

State of Florida,	)	
	)	
Appellant,	)	
	)	Docket No. SC01-1301
v.	)	LT Case No. 77-116-CFA
	)	
Bennie Demps,	)	
	)	
Appellee.	)	
	)	

INITIAL BRIEF OF APPELLANT

OFFICE OF THE COMPTROLLER
STATE OF FLORIDA

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PRELIMINARY STATEMENT

Preliminary Statement

The following signals and abbreviations will be used in this Initial Brief: References to the Appellant, Robert F. Milligan, Comptroller of Florida, were indicated by "Comptroller" or "Comptroller's Office" as appropriate. References to Appellee George F. Schaefer are to "Mr. Schaefer." Mr. Schaefer's application for attorney's fees, styled "Reapplication for Award of Attorney's Fees and Costs", will be referred to as "the Reapplication." Defendant Bennie E. Demps will be referred to as "Mr. Demps."

This Court's opinion in Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), is central to the issues on appeal, and will be referred to as Makemson. All references are to Florida Statutes (2001) unless otherwise indicated. References to the Amended Record on Appeal filed November 2, 2001, are signalled by "R-" and followed by the appropriate page number.

The Amended Record on Appeal fails to include either the Reapplication, filed with this Court on December 12, 2000, or the Court's Order of February 26, 2001, that transferred the Reapplication to the Eighth Judicial Circuit. These documents are on file with this court and properly subject to judicial notice in this matter. Copies of the Reapplication and Order are therefore included within an Appendix to this Initial Brief in order to avoid further delay in consideration of this

case. References to the Appendix are signalled by "A-" followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

On April 24, 2000, Governor Jeb Bush signed a warrant for the execution of Bennie E. Demps, originally sentenced to death in April 1978. (R-1) This case arises out of the court-appointed representation of Mr. Demps by Appellee George F. Schaefer, Esq., between May 24, 2000, and the date of Demps' execution on June 7, 2000. Mr. Schaefer, a resident of Gainesville, Florida, is a member of the Florida Bar. (R-23). Mr. Schaefer is also a member of the registry, maintained by the Commission on Capital Cases pursuant to Section 27.710, Florida Statutes, of qualified criminal lawyers in private practice who are willing to accept appointment to represent defendants in postconviction capital cases. (R-23). Mr. Schaefer was appointed as "co-counsel for appellate purposes" for Mr. Demps on May 24, 2000, by order of the Eighth Judicial Circuit Court, in conjunction with the representation of Demps during the post-death warrant period by Attorney William Braley "Bill" Salmon, also of Gainesville. (R-22-24; 110).

On July 2, 1999, Mr. Demps, acting *pro se*, filed a Request for Appointment of Counsel with the Eighth Judicial Circuit (R-8). Attorney Baya Harrison, a registry counsel, was appointed by Chief Judge Robert P. Cates on July 12, 1999, to represent Demps in connection with "certain claims pending in the circuit court pethe provisions of Section 27.711". (R- 17). On August 10, 1999, Mr. Salmon, who had previously represented Demps in executive clemency proceedings, entered

a notice of appearance in the Circuit Court for the Eighth Judicial Circuit as 2privately retained counsel for Mr. Demps. (R-17). By trial court order dated November 30, 1999, the court relieved Mr. Harrison as registry counsel and allowed Mr. Salmon to take over a sole attorney for Demps. (R-17). The order stipulated that, because Salmon was not court appointed to represent Demps under Section 27.711, Florida Statutes, he should not "look to [the Florida Commission on Capital Cases] or the State of Florida for the payment of his fees. . .". (R-17).

Mr. Salmon then undertook to represent Demps in Rule 3.850 proceedings based on a "Motion to Vacate and Set Aside Judgment and Sentence and Grant New Trial" filed by Demps on July 2, 1999. After the death warrant was signed, a "Hough" hearing concerning the 3.850 motion was held on May 12, 2000, before Chief Judge Cates. (R-2). Thereafter, on May 22, 2000, Judge Cates entered an "Order Denying Fourth Successive Motion to Vacate Judgment and Sentence." (R-2-7).

That same day, May 22, 2000, Bennie Demps, again acting *pro se*, filed with this Court a handwritten "Motion for Relief, Continuance, and Stay of Execution"; the Motion sought the appointment of new counsel, asserting, *inter alia*, that Mr. Salmon was retained only for circuit court proceedings as to the 3.850 Motion, and not for appeal proceedings. (R-19-21). By Order dated May 23, 2000, Demps'

request for the appointment of new counsel to represent him in this Court was denied "on the grounds that Bennie Demps is represented by William Braley Salmon, P.O. Box 1096, Gainesville, Florida." (R-15).

The next day, May 24, 2000, the Office of Attorney General filed both in this Court and in the Eighth Judicial Circuit a written "Request for Clarification as to Representation of Appellant [Demps] by William Salmon on Appeal".(R-10-21). In this pleading, the Attorney General raised the question of whether Attorney Salmon was under an ethical obligation to continue to represent Demps, especially since Demps' execution was then scheduled for May 31, 2000--one week later. The Attorney General specifically requested that this Court "clarify" that Mr. Salmon was to represent Demps in connection with the appeal of the trial court's denial of the 3.850 motion. (R-12).

That same day, May 24, 2000, Judge Stan Morris of the Eighth Judicial Circuit, acting in the absence from the jurisdiction of Chief Judge Cates, issued an "Order Appointing Co-Counsel For Capital Post-Conviction Relief." (R-22-24). The order stated, in pertinent part:

> [T]he Court is aware that a motion for post-conviction relief was denied on May 22, 2000, and a motion for rehearing was denied on May 23, 2000. The Court is not aware, however, of the perfection of those matters for appeal to the Florida Supreme Court by current post-conviction counsel, William B. Salmon. The Court is concerned that confusion over counsel's status may

> unnecessarily delay consideration of the appeal of those issues in light of a current warrant directing execution of the defendant BENNIE E. DEMPS on May 31, 2000. (R-22).

The Court stated its reason for appointing Mr. Schaefer to represent Demps:

> [I]n order to protect defendant BENNIE E. DEMPS's right to counsel under Florida Statute 925.035 [sic], which ensures post-conviction representation for capital defendants, this Court hereby appoints co-counsel for appellate purposes in this case. (R-22).

Finally, in reliance upon Mr. Schaefer's status as a registry lawyer, the Court ordered:

> George F. Schaefer, a member of the Florida Bar, *whose application has been filed and accepted with the Commission* [on Capital Cases] is hereby appointed co-counsel for defendant BENNIE E. DEMPS in Case No. 77-116-CFA. (R-23) (emphasis added).

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 his 3.850 motion. (R- 25). Also on May 25, 2000, this Court entered an Order directing that appellate briefs be filed on May 27, 2000; the Order was amended specifically to provide that simultaneous briefs would be filed by the State and Bill Salmon. (R-26-27). That same day, May 25, 2000, Schaefer filed with Judge Morris an "Emergency Application for Stay of Execution and Alternative Motion to Withdraw By Court-Appointed Counsel." (R-28-44). In this pleading, Mr. Schaefer argued for a stay of execution to allow him time to prepare for appellate activity, or if, no

extension was forthcoming, to allow him to withdraw "immediately." (R- 28).

Following an expedited hearing on the afternoon of May 25, 2000, a stay was refused and Schaefer was denied leave to withdraw. Noting that the execution of Mr. Demps was scheduled for May 31, 2000, Judge Morris's order found, in pertinent part:

> [D]efendant is still represented by co-counsel Salmon as well as George Schaefer. Salmon has represented that it is his intention to file appropriate pleadings to perfect the appeal of the trial court's denial of the motion for post conviction relief. . . .
>
> ***
>
> This Court has declined to pass on the merits of the stay because Salmon, post-conviction counsel, has full knowledge of all facts and circumstances necessary to fully and fairly present Defendant's position on review of these matters by the Supreme Court, if that court should deem such review appropriate.
>
> ***
>
> The Court has declined to allow co-counsel George Schaefer to withdraw without passing on the merits of whether or not a just resolution of the case would compel a stay if Schaefer were the only counsel representing Defendant.

(R-45-46).

Schaefer renewed his motion to withdraw as counsel to this Court, where it was denied by order entered on Saturday, May 27, 2000. (R-49). The Court's Order of May 27, 2000, extended the time for the filing of the Defendant's brief "submitted by **Bill Salmon**" until June 1, 2000; set oral argument for June 5, 2000; and rescheduled the execution of Defendant Demps for June 7, 2000. (R-49)

(boldface in original). The Order concluded, stating: "Counsel for appellant shall submit applications for fees and costs to this Court at the conclusion of their representation of Bennie Demps in this Court." (R-49).

Time records submitted by Mr. Schaefer disclose that during the period May 28-June 4, 2000, he performed the following legal services on behalf of Mr. Demps: Mr. Schaefer traveled to Tallahassee from Gainesville to obtain and review archival records; traveled to Starke for client conferences; participated in a series of conferences with Mr. Salmon and other counsel; performed legal research; prepared and reviewed arguments for the brief to be submitted by Mr. Salmon to this Court; and prepared an original action for submission to this Court, a Petition for Mandamus. On June 4, he traveled to Tallahassee to attend oral argument in this Court the next day. (A-8-14).

On June 5, 2000, oral argument was held. Mr. Schaefer appeared and argued his Petition for Mandamus in conjunction with Mr. Salmon's presentation of the appellate issues contained in the Demps brief. Later that day, the Court issued an order denying relief. Demps v. State, 761 So.2d 302 (Fla. 2000). The Petition for Mandamus was denied as "without merit." Id., at 306. Following the entry of the order, Mr. Schaefer filed an "Emergency Motion for Stay of Execution Pending Application for Writ of Certiorari to the United States Supreme Court." (R-51-53).

The "Emergency Motion" was denied by the Court on June 6, 2000. (R-54).

Following the execution of Defendant Demps on June 7, 2000, Mr. Schaefer filed an application for attorney's fees and costs in this Court; copies were served on the Office of Attorney General and the State Attorney for the Eighth Judicial Circuit, but no copy was provided to the Office of Comptroller. After being directed by this Court's Order of July 17, 2000, to respond to the applications of both Schaefer and Salmon, on August 10, 2000, the Office of Comptroller filed its Response. (R- 55-72.).

In responding to Mr. Schaefer's application, the Office of Comptroller suggested that, although Judge Morris's order of May 24, 2000, referenced Section 925.035, Florida Statutes, it was probably intended that appointment be made under Section 27.710, Florida Statutes, especially in a capital case. (R-56). Under the assumptions that Chapter 27, Part IV, was applicable, and that Mr. Schaefer was familiar with the fee limitations of the Chapter (R-57; 67-70), four criticisms were raised with this Court.

First, noting that Schaefer had requested attorney fees at the rate of $200 per hour, the Response stated: "These fees are set at $100 per hour by §§27.703 and 27.711, Fla. Stat. (1999)." (R-57). Second, the Response suggested that Schaefer's total claim for $26, 180 in fees exceeded the $25,000 maximum set forth

in §27.711(4) Florida, Statutes (1999). (R-57-58). Third, the Response questioned undocumented charges relative to approximately 3,500 pages of photocopies. (R-58).

Finally, the forth point of the Comptroller's Response stated as follows:

> Schaefer failed to contract with the Office of the Comptroller as required by § 27.710(4), Fla. Stat. (1999). Because exigent circumstances may have existed at the time of Schaefer's appointment, the Office of the Comptroller is inclined to waive that failure. However, after the case Schaefer also failed to comply with the billing procedures set forth in Section 16 of CS/HB 1-A, Second Engrossed, Spec. Session (2000) (enacted), which failure cannot be justified or excused on the basis of exigent circumstances.

(R-59). In its conclusion, the Response specifically asked this Court to enter an order paying Mr. Schaefer's fees and costs but further asked the Court "to abide by limits on payments set forth in §§ 27.710 and 27.711, Fla. Stat. (1999), for such awards. . . ." (R-64).

On November 15, 2000, the Court, upon consideration of Schaefer's application for fees and costs, entered an Order directing Messrs. Schaefer and Salmon "to submit the appropriate documents to the Office of the Comptroller in conformity with Part IV, Chapter 27, Florida Statutes (1999)." (R-73). After review of the revised application submitted on November 21, 2000, by Mr. Schaefer, the acting General Counsel to the Comptroller, replied with a letter dated December 8, 2000, regarding the application. (A-5-6).

The Comptroller raised three objections to the Schaefer application. First, Schaefer's claim for 130.9 hours of fees at $200 per hour was deemed to conflict with the $100/hr limitation of Sections 27.703 and 27.711, Florida Statutes. (A-5). Second, the reasonableness of Schaefer's claim for $657.72 worth of photocopies was questioned. (A-5). Third, it was noted that Mr. Schaefer had failed to submit any billing covering the activities of his co-counsel, Mr. Salmon, in contravention of Section 27.710(6), Florida Statutes. (A-6).

Without responding to the Comptroller as to the letter of December 8, 2000, Mr. Schaefer, on December 12, 2000, filed with this Court a "Reapplication for Award of Attorney's Fees and Costs."("the Reapplication") (A-1-20). Schaefer renewed his claim for $27, 310.59 in costs and fees. He asserted that he was not bound by the $100 per hour fee limit for registry counsel like himself, stating: "[U]ndersigned counsel . . . was appointed to represent Mr. Demps while Mr. Demps was under a death warrant and this court has the inherent authority under the Florida Constitution to award a reasonable amount of attorney's fees to court-appointed counsel in such extraordinary circumstances." (A-2). Schaefer claimed his copying charges were reasonable. (A-3). He admitted not filing for fees attributable to the labors of Mr. Salmon, but asserted that Salmon's claims for fees were "independent of this application. (A-3).

Thereafter, by Order dated February 26, 2001, this Court transferred Mr. Schaefer's "Reapplication" to the Eighth Judicial Circuit Court "for evaluation pursuant to Chapter 27, Fla. Stat.(1999)." (A-22). 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 Attorney General appeared by telephone. (R-91).

Mr. Schaefer offered two arguments in favor of receiving payment at the rate of $200 per hour for his representation of Demps. First, he suggested that the Comptroller had "waived an argument" that the trial court was limited to the $100 per hour rate set by law "because in 27.710 the Comptroller's Office has an obligation to prepare a contract for the attorney," and had not done so for him. (R-101). The second argument offered was that the trial court had inherent authority under the Makemson decision to pay him at the rate he requested. Schaefer suggested to the court why this authority applied:

> [T]rial courts have inherit [sic] power in extraordinary and unusual cases to depart from fee guidelines when it's necessary to defend the accused and that really is the situation here, Your Honor. We have an accused under a death warrant. There were--it was an extraordinary situation . . .(R-102)

The Comptroller's counsel urged the trial court to apply Section 27.711,

Florida Statutes, and simply reminded the court:

> The Comptroller does not have the authority to pay Mr. Schaefer under Section 925. The only authority that we have to pay Mr. Schaefer is under 27 and that that Section 27.711 sets the rate we can pay to $100 an hour. (R- 103).

The trial court then ruled from the bench that "the Makemson decison of our Supreme Court controls." (R-111). The court went on to find:

> I find as a matter of fact that Mr. Schaefer has served the public by defending Mr. Demps and, frankly, the integrity of the legal system. I find as a matter of fact that to compensate Mr. Schaefer at a rate of less than $200 an hour would be confiscatory of his time, energy and talents, and I quite honestly think that $200 an hour is on the low end of reasonable compensation for the work performed and under the circumstances it was performed. I find to apply the statute any other way and limit him to $100 an hour under the statute would be unconstitutional as applied under these circumstances and I'll thus authorize payment of Mr. Schaefer at the rate of $200 an hour as he has requested. (R-111-112).

The trial court then announced:

> [P]ursuant to Section 27.710 (4), Florida Statutes, the Comptroller's Office and the State of Florida through the Comptroller's Office has waived its right to challenge the fees there bing no evidence that they met the requirements of that statute. (R-112).

On May 3, 2001, the trial court rendered the order on review: "Final Order on George F. Schaefer's Reapplication for Award of Attorney's Fees." (R- 77-81). On May 16, 2001, the Comptroller filed a timely Notice of Appeal (R-82) and this Appeal ensued.

SUMMARY OF ARGUMENT

The order on appeal clearly departs from the essential requirements of Florida law relating to the payment of fees to private attorneys in death penalty cases. Without substantial factual justification, the order on review spurns the Florida Legislature's express prescription, set forth in Section 27.711, Florida Statutes, for compensating such attorneys by ordering payment for the legal services of registry counsel George F. Schaefer at $200 per hour instead of the $100 per hour rate fixed by law.

The order on review exceeded the jurisdictional authority of the trial court by failing to apply the "law of the case" in this matter: the trial court did not evaluate the Schaefer fee application under Chapter 27. This Court determined on remand to the trial court that Mr. Schaefer should be paid at the statutory rate for registry counsel under part IV of Chapter 27, Florida Statutes. This determination, as a matter of traditional appellate law, pretermitted the discretionary authority of the trial court to rule otherwise in the context of this case.

The order on review expresses plain legal error as to the applicability of Chapter 27, Part IV to the services of registry counsel. Based on no evidentiary

support whatsoever, and in derogation of the record to the contrary, the order erroneously finds that the State of Florida, through the Comptroller, has "waived" the right to require compliance with the provisions of Chapter 27, Part IV, by registry counsel Schaefer. The Comptroller could not lawfully have waived the applicability of Chapter 27, Florida Statutes, in the case of a registry attorney whose representation of a death sentenced inmate lasted only two weeks. The order's conclusion of law that an *involuntar*y "waiver" of the applicability of Chapter 27 was committed by the Comptroller is inequitable and contrary to the record in this case.

Finally, the trial court's reliance on this Court's Makemson decision is misplaced, and generates a constitutional conundrum. Section 27.711 's statutory definition of Mr. Schaefer's hourly State compensation under Chapter 27 guidelines is objectively sustainable. It is a constitutionally permitted definition by the Legislature of State spending authority. It is not directly comparable to the arbitrary maximum fee limit at issue in Makemson. By ruling the statute unconstitutional "as applied" to Mr. Schaefer, however, the trial court has effectively invalidated Section 27.711, Florida statutes on its face. By so doing, the order on review obliterates a meaningful constitutional distinction previously maintained by this Court. This court has allowed trial courts to grant relief from

statutory maximum fee caps in extraordinary circumstances involving unusual representation. The Makemson rationale does not allow allow a statutory enactment to be declared facially unconstitutional simply because a capital case is involved, as the trial court erroneously declared here. 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 statue 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.

ARGUMENT

THE TRIAL COURT ERRED IN REFUSING TO APPLY THE HOURLY RATE PRESCRIBED BY SECTION 27.711 TO THE FEE APPLICATION OF REGISTRY COUNSEL GEORGE F. SCHAEFER.

Introduction

The order on appeal clearly departs from the essential requirements of Florida law relating to the payment of fees to private attorneys in death penalty cases. The Comptroller is the chief fiscal officer for the State of Florida,.under Article III, Florida Constitution. The unenviable task of assuring faithful compliance with this spending law brings the Comptroller before this Court as appellant to seek reversal of the order in the public interest.

Chapter 27, Part IV, Florida Statutes, is a comprehensive prescription for public support of the right to postconviction counsel for death sentenced inmates,. It supports of a registry of qualified, publicly compensated private attorneys to serve in Capital Collateral conflict cases such as that of the late Bennie E. Demps. Without substantial factual justification, the order on review spurns the Florida Legislature's express prescription for compensating such attorneys by ordering payment for the legal services of registry counsel George F. Schaefer at $200 per hour instead of the $100 per hour rate fixed by law.

The order on review expresses plain legal error as to the applicability of

Chapter 27, Part IV to the services of registry counsel such as Mr. Schaefer. Based on no evidentiary support whatsoever, and in derogation of the record to the contrary, the order erroneously finds that the State of Florida, through the Comptroller, has "waived" the right to require compliance with the provisions of Chapter 27, Part IV, by registry counsel Schaefer.

Most importantly, however, the order on review exceeded the jurisdictional authority of the trial court by failing to apply the "law of the case" in this matter: notwithstanding this Court's express command to evaluate the Schaefer fee application under Chapter 27, the trial court did not do so. The Comptroller respectfully suggests that this Court's explicit determination on remand to the trial court was that Mr. Schaefer be paid at the statutory rate for registry counsel under part IV of Chapter 27, Florida Statutes. This determination, as a matter of traditional appellate law, pretermitted the discretionary authority of the trial court to rule otherwise in the context of this case.

This Initial Brief will turn first to the failure of the trial court to apply the "law of the case" and thereby obviate the present controversy over the hourly rate at which George Schaefer is entitled to be paid for his services to the late defendant.

It will then turn to the related legal question of whether the Comptroller could lawfully have waived the applicability of Chapter 27, Florida Statutes, in the case of

a registry attorney whose representation of a death sentenced inmate lasted only two weeks. The order's conclusion of law that an *involuntar*y"waiver" of the applicability of Chapter 27 was committed by the Comptroller is inequitable and contrary to the record in this case.

Finally, it will demonstrate that the trial court's reliance on this Court's Makemson decision is misplaced, and generates a constitutional conundrum. Section 27.711 's statutory definition of Mr. Schaefer's hourly State compensation under Chapter 27 guidelines is objectively sustainable; it is a constitutionally permitted definition by the Legislature of State spending authority. It is not directly comparable to the arbitrary maximum fee limit at issue in Makemson. By ruling the statute unconstitutional "as applied" to Mr. Schaefer, however, has effectively invalidated it on its face, and obliterated a meaningful constitutional distinction previously maintained by this Court.

STANDARD OF REVIEW

The appropriate appellate standard for review of a trial court's rulings on the pure questions of law involved in this matter is de novo review. Demps v. State, 761 So. 2d 302, (Fla 2000).

A. THE TRIAL COURT WAS PRECLUDED BY THE LAW OF THE CASE FROM PAYING GEORGE SCHAEFER AT AN HOURLY RATE OTHER THAN THAT PRESCRIBED BY CHAPTER 27, PART IV.

In Chapter 27, Part IV, Florida Statutes, the Florida Legislature has unmistakably specified the hourly rate to be paid by the State of Florida to attorneys appointed to represent death sentenced inmates in collateral proceedings relative to their convictions: $100 per hour. Section 27.703, Florida Statutes, which authorizes state-funded, court-appointed private counsel in cases where a conflict of interest precludes representation of an eligible inmate by the capital collateral regional counsel offices established by Section 27.701, states as follows regarding pay for such conflict counsel:

> Appointed counsel shall be paid from funds appropriated to the Comptroller. The hourly rate may not exceed $100. However, effective July 1, 1999, all appointments of private counsel under this section shall be in accordance with ss. 27.710 and 27.711.

Section 27.703 (2), Fla. Stat. (2001).

By Chapter 98-197, Laws of Florida, the Legislature first established the registry of private attorneys eligible to serve as conflict counsel under Section 27.703, Florida Statutes. Chapter 98-197, §4, created Section 27.711, Florida Statutes, entitled "Terms and conditions of appointment of attorneys as counsel in postconviction capital collateral proceedings." As presently codified, Section

27.711(4), Florida Statutes, provides, in no fewer than eight separate subsections, that a court-appointed attorney is "entitled to $100 per hour" for the performance of legal services at various stages of the postconviction process. For example, Section 27.711(4)(a) states: "Regardless of the stage of postconviction capital collateral proceedings, the attorney is entitled to $100 per hour, up to a maximum of $2500, after accepting appointment and filing a notice of appearance." Similarly, subsections 27.711(b) through (h) each specify maximum fee allotments for each stage of the process, with each specifying the hourly rate for payment of each allotment at $100 per hour. It is plain that the Florida Legislature intended these fee prescriptions to be binding, for Section 27.711(3), Florida Statutes, expressly states: "The fee and payment schedule in this section is the exclusive means of compensating a court-appointed attorney who represents a capital defendant."

There is no dispute that Mr. George Schaefer is a member of the registry of counsel maintained by the Commission on Capital Cases pursuant to Section 27.710. It is indisputable that Mr. Schaefer was appointed by Judge Morris of the Eighth Judicial Circuit as co-counsel for Mr. Demps *because* he was a registry counsel. The order appointing Schaefer makes this clear:

> George F. Schaefer, a member of the Florida Bar, *whose application has been filed and accepted with the Commission [on Capital Cases]* is hereby appointed co-counsel for defendant BENNIE E. DEMPS in Case No. 77-

116-CFA.

(R-23) (emphasis added). It is reasonable to infer that, had Mr. Schaefer not been a duly qualified registry counsel, he would not have been selected for appointment to represent Mr. Demps by the Judge Morris of the Eighth Judicial Circuit.

It is equally indisputable, however, that Mr. Schaefer, despite his status as registry counsel, accepted appointment to represent Demps with a significant mental reservation: he would not agree to the hourly rate of compensation set by Section 27.711. He expressly stated this to the trial court on March 13, 2001, during the hearing on his "Reapplication". (R-95). Both times that Mr. Schaefer submitted his billing for his representation of Demps to this Court, he asserted the right to be compensated for his service as "counsel in postconviction capital collateral proceedings" at the rate of $200 per hour.

On each previous occasion on which this Court has considered Mr. Schaefer's fee application, the Court did not to grant his demand for double the hourly rate set by the law for registry counsel. In December 2000, after having been ordered by this Court to furnish his original fee application to the Office of the Comptroller for review under Chapter 27, Part IV, Schaefer had the temerity to submit a "Reapplication" for the same claim for a $200 hourly rate directly to the Court. It was fully within the Court's discretion to rule in Mr. Schaefer's favor at that time if

it accepted his argument that the Court had "inherent authority under the Florida Constitution to award a reasonable amount of attorney's fees to court-appointed counsel... ". (A-3). But the Court did not accept his argument; it sent the "Reapplication" back to the trial court for evaluation under Chapter 27, Part IV.

By this mandate, this Court resolved against Mr. Schaefer the legal issue of whether he is entitled to receive payment for his services as registry counsel at a rate higher than the rate prescribed by Section 27.711, Florida Statutes. This Court's Order of February 26, 2001, established the "law of the case" and pretermitted the authority of the trial court, in its limited role in passing on the reasonableness of Schaefer's claims under Chapter 27, Part IV, from ordering the Comptroller to pay Mr. Schaefer at the rate of $200 per hour.

It is settled that questions of law decided on appeal to a court of ultimate resort must govern the case through all subsequent stages of the proceedings. Strazzulla v. Hendrick, 177 So. 2d 1, 3 (Fla. 1965); Gabor v. Gabor and Co., 599 So 2d. 737 (Fla. 3rd DCA 1992). *Accord*, Hodges v. Marion County, 774 So. 2d 950 (Fla. 5th DCA 2001). When a point of law is decided by an appellate court, the trial court, on remand, lacks discretionary power to decide otherwise, and it is reversible error for the Court to do so. Wilcox v. Hotelerama Assoc., 619 So. 2d 444 (Fla 3rd DCA 1993). This principle applies even when the appellate decision is

a per curiam decision entered without separate opinion, if the issues and parties are the same. E.g. Toledo v. Hillsborough County Hospital Authority, 747 So. 2d 958 (Fla 2d DCA 1999); Mitzenmacher v. Mitzenmacher, 656 So 2d 178 (Fla 3d DCA 1995); New England Ins. Co. v. International Bank of Miami, 537 So 2d 1025 (Fla 3d DCA 1988). The principle applies when the appellate decision is embodied in a order denying rehearing. Federal Deposit Ins. Co. v. Levine, 763 So. 2d 344, 345 (Fla 4th DCA 1998). There is no public policy reason why this Court's Order of February 26, 2001, should not be deemed to have the same preclusive effect on the discretion of the trial court below. *See* Strazzulla v. Hendrix, *supra*, at 4. (Law of the case reconsidered only for the most cogent reasons).

If the Court applies the doctrine of the law of the case here, then it must hold that the trial court lacked discretionary jurisdiction to declare that Chapter 27, Part IV, was unconstitutional as applied to Mr. Schaefer. It must also hold that the court could not lawfully declare an involuntary "waiver" on the part of the State to apply Section 27.711 simply because Mr. Schaefer refused to sign the contract required by Section 27.710(4), Florida Statutes.

There are strong public policy reasons to apply the "law of the case" here. The logical extension of the order on review effectively threatens to interfere substantially with the orderly administration of the registry counsel program. The

defective "waiver" rationale espoused by the order on review provides an open invitation for existing registry counsel, like Mr. Schaefer, to avoid the fiscal limitations of the chapter by the simple expedient of refusing to sign a written contract of employment with the Comptroller. Moreover, as discussed in more detail in Argument C below, the trial court effectively declared Section 27.711 unconstitutional on its face, calling into question the future of entire registry program.

B. THE TRIAL COURT ERRED IN DETERMINING THAT THE STATE OF FLORIDA WAIVED THE APPLICABILITY OF CHAPTER 27, PART IV, TO GEORGE SCHAEFER

Section 27.710(4), Florida Statutes, expressly places a duty on any private attorney enrolled on the registry of capital collateral conflict counsel, effective upon acceptance of appointment by the court to represent a capital defendant, to execute a contract with the Comptroller in his capacity as contract manager for the Commission on Capital Cases:

> 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.

The order on review states this conclusion of law:

> [T]he 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 Section 27.710(4), Fla. Stat.

(R-79).

This conclusion represents plain legal error by the trial court. There is no question that Mr. Schaefer did not execute a contract of employment with the Comptroller prior to or during his two week long representation of the defendant. But it is clearly erroneous as a matter of law for the court to have concluded that the <u>absence of evidence</u> of such a contract constitutes proof of a waiver of anything, let alone a blanket waiver of the applicability of Chapter 27, Part IV, to the employment of a registry counsel.

The order on review declares that the mere failure of the Comptroller to secure Mr. Schaefer's signature on a contract insulated him, as a registry counsel, from the need to abide by the requirements of Chapter 27, Part IV. Approval of this rationale by this Court would create a perverse incentive for enrolled registry counsel to refuse to sign the contract required by Section 27.710(4), Florida Statutes. This result is directly contrary to the plain language of the statute.

Section 27.710(4) places on the *counsel* who accepts employment the duty of executing a contract with the Comptroller. Neither law nor equity allows the failure of registry counsel to perform his statutory duty--while still accepting the benefits of State employment-- to bar the Comptroller from his statutory duty to enforce compliance with a law relating to public expenditures. While trial court conclusions of law usually carry a presumption of validity on appeal, the court's finding of "waiver" in these circumstances cannot withstand even a cursory critical analysis.

It is axiomatic that: "There can be no waiver without knowledge, express or implied, of that which is to be waived." Gulf Life Ins. Co. v. Green, 80 So. 2d 321, 322 (Fla 1955). There is no evidence in this record that any identifiable agent of the Comptroller had express or implied knowledge that the Comptroller would waive the applicability of Section 27.711, Florida Statutes, by failing to get Mr. Schaefer to sign a written contract *afte*r his representation of Demps had concluded. The finding of "waiver" in this context is clearly erroneous. Mr. Schaefer's argument to the trial court was inartfully seeking to invoke waiver's cousin: equitable estoppel. He told the court that the Comptroller had "waived *an argument*" that the trial court was limited to the $100 per hour rate set by law "because in 27.710 the Comptroller's Office has an obligation to prepare a contract

for the attorney,. . ."(R-101). This claim was just wrong. Nonetheless, following Mr. Schaefer's plainly erroneous interpretation of law, the order on review--equally erroneously--purports to estop the State of Florida to *claim* that an oral contract of employment with Schaefer existed---a contract also governed by the provisions of Chapter 27, Part IV. This, too, is just wrong, as a matter of fact and law.

At no time during this Court's review of Mr. Schaefer's fee application has the Comptroller's Office ever represented, in any positive manner, written or oral, that the provisions of Chapter 27, Part IV, would not cover Schaefer's employment by the State of Florida as registry counsel for Demps. There is no evidence that Mr. Schaefer was induced to take any action to his detriment by a Controller's Office representation that he would obtain a higher hourly rate for representing Demps if he avoided signing a written agreement. This record simply does not demonstrate the traditional elements necessary to find an equitable estoppel. In short, neither "waiver" or "estoppel" can lawfully be invoked to oust the Comptroller from his statutory role in vetting State spending under Chapter 27, Part IV.

The Comptroller is constitutional chief fiscal officer and executive branch administrator of banking and securities regulation. It is the duty of the Comptroller to see that the fiscal laws of Florida are faithfully executed, not to waive their

application without notice. This Court outlined that duty, long ago, in First National Bank of Key West v. Filer, 107 Fla 526, 145 So. 204 (Fla. 1933):

> Public officers cannot rightfully dispense with any of the essential forms of proceedings which the Legislature has prescribed for the purpose of investing them with the power to act in the matter of contracting debts and issuing evidence thereof . . . . [T]he authority of public officers to proceed in a particular way and only upon specific conditions as to such matters implies a duty not to proceed in any manner than that which is authorized by the law.

105 So. at 206.

The record is clear that the 14 day employment of Mr. Schaefer was undertaken and completed without prior notice to the Comptroller. Cf. Section 27.710(4), Fla Stat. (2001) (30 day period to secure written contract executed by registry counsel). At every opportunity presented by this Court, as well as before the trial court, the Comptroller has insisted that Mr. Schaefer's appointment and employment in the role of registry counsel was governed by the applicable provisions of Chapter 27, Part IV, and that his hourly rate was that fixed by Section 27.711. The order on review appears to precondition the Comptroller's right to participate in the Schaefer fee proceeding on an impossibility: proof of a written contract that all parties agree was never signed. This is not only inequitable, but also contrary to Section 27. 711(13), Florida Statutes: the Comptroller's contract manager is an automatic party to cases involving fees for registry counsel.

This Court should reject, as patently erroneous, the pernicious proposition that the refusal of appointed registry counsel to sign the required contract will induce an involuntary "waiver" of the Comptroller's duty and ability to enforce Chapter 27, Part IV, Florida Statutes. In carrying out his statutory duties under Chapter 27, Part IV, relative to public expenditures, the Comptroller is exercising the police power of the sovereign to assist the essential judicial function of assuring adequate representation in capital postconviction proceedings. This Court should never sanction an involuntary waiver of the State's right to exercise its police power in this regard. The order on review must be reversed.

C. THE TRIAL COURT ERRED BY DECLARING SECTIONS 27.703 AND 27.711, FLORIDA STATUTES, UNCONSTITUTIONAL

The order on review states this ultimate conclusion of law:

> [U]nder the holding and analysis of Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), the $100.00 statutory hourly cap found at Sections 27.703 and 27.711 as applied in the extraordinary circumstances of this capital case is unconstitutional under the Florida Constitution.

(R-79).

The order includes this single finding enumerating the "extraordinary circumstances" supporting the conclusion set forth above:

> At the time of the appointment [of Mr. Schaefer] extraordinary

> circumstances existed, which included the fact that the appeal by Mr. Demps to the Supreme Court of Florida had not been perfected, co-counsel William Salmon's wife was severely ill, and the Governor had signed a death warrant for Mr. Demps.

(R-78).

The order includes this finding, which presumably identifies the unconstitutional consequences of the application of the statutory hourly rate:

> [T]o compensate Mr. Schaefer at a rate of less than $200 per hour would be confiscatory of Mr. Schaefer's time, energy, and talents.

(R-79).

This minimal rationale is in no way sufficient to support a judicial declaration that Sections 27.703 and 27.711, Florida Statutes, are unconstitutional. It must be rejected by this Court as plainly erroneous. Assuming *arguendo* that, as shown in Argument A, supra, the trial court was not barred by the law of the case from reaching the issue of constitutionality at all, the holding and analysis of Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), are not apposite to the circumstances of this case. The facts here in no way resemble the factual situation in Makemson, and there was no record evidence adduced below on which an "as applied" constitutionality decision could lawfully be based. Most importantly, at issue in Makemson was not a statutorily prescribed hourly rate for counsel, but rather an arbitrary cap on the total number of hours for which an appointed trial

defense counsel in a capital case *could* be paid by the county of venue.

In Makemson, appointed trial counsel spent 248.3 hours representing a defendant in a death penalty trial. 64 hours were spent in court. Venue for the trial had been moved to a site 150 miles from the home of counsel. The trial involved over 150 witnesses and 50 depositions. In the face of a statutory maximum fee for a capital trial of $3500, the attorney sought and was awarded $9500 --an effective rate of $38 per hour. On review, this Court upheld the award of fees, finding that the trial court's action was "necessary in order to enable it to perform its essential judicial function of ensuring adequate representation by competent counsel." Makemson, supra, at 1113. In affirming the award, the Court held that statutory maximum fee limitations may be "unconstitutional when applied to cases involving extraordinary circumstances and unusual representation." Id., at 1110.

The gravamen of the Makemson decision was to protect the right to counsel of an accused capital defendant by assuring equitable remuneration to appointed trial counsel at the most critical stage of a capital case: the determination of guilt or innocence, where the most rigorous Sixth Amendment protections apply to the accused. In the crux of its Makemson rationale, this Court emphasized this point in a manner far more nuanced than the order on review:

[T]he statute is unconstitutional when applied in such a manner as to curtail

> the Court's inherent power **to ensure the adequate representation of the criminally accused**. At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates Article V, Section 1, and Article II, Section 3 of the Florida Constitution.

491 So. 2d at 1110. (Emphasis added). In this context, it is noteworthy that the order on review does not identify exactly what provisions of the Florida Constitution were violated by the application of Section 27.711, Florida Statutes, to the compensation of Mr. Schaefer.

In contrast to the Makemson paradigm, in this case there is no recognized constitutional right to counsel in postconviction proceedings to be protected by the court. State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 407 (Fla. 1998); *see also* Arbalaez v. Butterworth, 738 So. 2d 326, 328 (Fla. 1999). But even if such a right existed, it would not be implicated here, for Mr. Schaefer served only as appellate *co-counsel* for Demps. Long before Schaefer's appointment, Mr. Demps had been represented in postconviction proceedings by Mr. William Salmon. There certainly could be no cognizable constitutional claim based on the absence of *multiple* State-funded legal representation for a defendant in postconviction proceedings. *See* Ferrell v. State, 653 So. 2d 367 (Fla. 1995); Lowe v. State, 650 So. 2d 969 (Fla. 1994), *cert. denied*, 516 U.S. 887, 116 S.Ct. 230, 133 L.Ed. 2d

159 (1995).

Most importantly, the order on review does not articulate any finding or conclusion as to the impact of Mr. Schaefer's compensation level on any constitutional right possessed by Mr. Demps. It says flatly: "To compensate Mr. Schaefer at a rate of less than $200 per hour would be confiscatory of Mr. Schaefer's time, energy, and talents. " In interpreting Makemson, however, this Court has cautioned: "It must be remembered that an indigent defendant's right to competent and effective representation, not the attorney's right to reasonable compensation, gives rise to the necessity of exceeding the statutory maximum fee cap." White v. Bd. of County Comm'rs. of Pinellas County, 537 So. 2d 1376, 1379-80 (Fla.1989).

Unlike Makemson, there is no record evidence here of problems in securing competent counsel to represent capital defendants in postconviction cases. On the contrary, the creation of the registry by Chapter 27, Part IV, is expressly intended to assure a roster of qualified postconviction counsel. This Court may take judicial notice that the provisions of Chapter 27 creating State-paid Capital Collateral attorneys as well as the registry of State-paid qualified conflict counsel represent a meaningful effort by the State of Florida, as the sovereign, to rectify some of the recurring compensation problems addressed by Makemson and its progeny relative

to the representation of death sentenced defendants at county expense. They are remedial statutes, and should be construed to achive the intended legislative purpose, not defeat it.

There is no evidence in this record of a lack of qualified counsel willing to represent postconviction defendants for $100 per hour-- only that Mr. Schaefer begrudges appointment at the statutory rate. Ultimately, there is no evidence whatsoever in this record that payment to Mr. Schaefer at double the statutory rate for his services in this particular case is necessary to enable either this Court or the trial court to carry out the function of ensuring adequate representation of death-sentenced inmates on appeal.

The order on review, as a case of first impression, attempts to extend the holding in Makemson to the existing postconviction context: the State-funded capital collateral representation registry. The order, however, is silent as to the implications of current registry counsel program for the issues addressed in Makemson. And, under the express holding in Makemson, the trial court would be able to exceed only *statutory maximum fee* caps for postconviction proceedings "when applied to cases involving extraordinary circumstances and unusual representation." 491 So.2d at 1110.

Although certain circumstances were found to be "extraordinary" below, a

closer analysis shows that this finding is not supportable by record evidence. For example, the record is indisputable that, less than 24 hours after Mr. Schaefer was appointed on the afternoon of May 24, 2000 (R-22), Mr. Demps filed his own Notice of Appeal on May 25, 2000. (R-25). Even if the circumstance "that the appeal by Mr. Demps to the Supreme Court of Florida had not been perfected" on May 24 could be deemed "extraordinary", it was only so for *less than a day*: hardly the equivalent of the impact of the 150 mile change of venue for the guilt-or-innocence trial in Makemson's death penalty case.

As to the circumstance that "co-counsel William Salmon's wife was severely ill, " it must be pointed out that there is no competent evidence whatsoever in this record to support the finding. Moreover, even if it is assumed that Mrs. Salmon was incapacitated by illness on or about May 24, 2000, there is no readily apparent nexus between that situation and Mr. Schaefer's ability to represent Mr. Demps. If the impact of such an illness was viewed as extraordinary, the trial court erred by failing to offer any explanation of why there was a causal relationship between the illness and Mr. Schaefer's representation of Mr. Demps.

If the brief delay in the perfection of the appeal and Mrs. Salmon's alleged illness are discounted, as they surely must be, the only remaining "extraordinary circumstance" that could possibly provide support the trial court's invalidation of

the statutory hourly rate is the fact that a death warrant against Demps was pending: in short, because this was a death penalty case. This was, in fact, precisely the reason urged by Mr. Schaefer in his "Reapplication": "[U]ndersigned counsel . . . was appointed to represent Mr. Demps *while Mr. Demps was under a death warrant* and this court has the inherent authority under the Florida Constitution to award a reasonable amount of attorney's fees to court-appointed counsel in such extraordinary circumstances."(A-2) (emphasis added). In this context, the trial court candidly commented: "I think that Judge Morris' intent in his order appointing Mr. Schaefer was to ensure that Mr. Demps was properly represented in this life and death matter in the remaining few days before the execution was to be carried out. . .". (R-110).

This record does not demonstrate that there was anything particularly extraordinary about the actual legal services performed by Mr. Schaefer on behalf of Mr. Demps. He helped formulate an appeal brief that did not persuade this Court to disturb the trial court's decision to deny relief. The Petition for Mandamus he drafted and argued was summarily denied as "without merit." His Motion for Emergency Stay was denied. All of his work was completed within a two week period. There is no evidence that his practice was adversely affected by his representation of Mr. Demps. *See* White, supra, at 1380: "[T]he focus should

be on the time expended by counsel and the impact upon the attorney's availability to serve other clients, not on whether the case was factually complex."

This Court has previously stated: "We find that all capital cases by their very nature can be considered extraordinary and unusual and arguably justify an award of attorney's fees in excess of the current statutory maximum fee cap." White v. Bd. of County Comm'rs. of Pinellas County, 537 So. 2d 1376, 1378 (Fla.1989). Yet to read Makemson and White as providing blanket authority for a trial court to exceed a statutorily prescribed *hourly rate*--rather than a statutory *maximum fee cap*--for legal services on appeal of capital postconviction cases risks collision with a constitutional conundrum. This conundrum is specifically discussed in White, and is why this Court has approved "as applied" supersession only of maximum fee caps and has sustained statutorily derived fixed hourly rates.

Justice Kogan, in White, at 1379, expressed agreement with the trial court's criticism of the $3500 maximum fee then fixed by Section 925.036(2)(d), Florida Statutes (1985). Nonetheless, this Court declined to declare that maximum facially unconstitutional:

> The trial court has correctly observed that "it is patently clear that the statutory limitations are, in this day and age, unrealistic." However, because it is within the legislature's province to appropriate funds for public purposes and resolve questions of compensation, article III, section 12, Florida Constitution; State ex rel Caldwell v. Lee, 157 Fla. 773, 27 So.2d 84

(1946), we decline to declare the statute unconstitutional on its face.

The decisional principle of Makemson is not that any statutory fee limitation can be freely invalidated by invoking an inchoate "inherent authority" to raise fees in capital cases. To do so would place in direct collision the constitutional authority of the judicial and legislative branches. As in White, this Court has traditionally honored the constitutional appropriation authority discussed in State ex rel. Caldwell v. Lee, 157 Fla. 773, 27 So.2d 84 (Fla. 1946) to "resolve questions of compensation" but has granted relief from arbitrary fiscal restrictions on the number of hours needed to serve the system of justice. If Makemson is deemed now to allow a trial court the inherent discretion to invalidate a statutory hourly rate, then its reach will be expanded into just that area of constitutional collision that this Court has scrupulously avoided to date.

The practical effect of the order on review is not merely to excuse Mr. Schaefer from the impact of a statutory maximum fee cap. In his representation of Mr. Demps, Mr. Schaefer expended only 130.9 hours. This total is far below the 250 hour ($25,000) statutory maximum fee provided by 27.711, Florida Statutes (2001). See R-56-57 (maximum fee explained). Unlike the situation in Makemson, where counsel would have been compelled to forgo any compensation at all for many hours of labor if this Court had not provided relief, Mr. Schaefer is *entitled*

by law to be paid for each hour he claims to have worked here on behalf of Mr. Demps, including hours of travel time.

The practical effect of the order is to declare the statutory rate of $100 per hour established for registry representation unconstitutional on its face, not "as applied." The sole "extraordinary circumstance" present here to to justify a decision to exceed the statutory rate "as applied" to *appellate co-counsel* is that capital cases are inherently extraordinary. If this is true, there would be no rational basis to distinguish when it would *ever* be constitutional for the statutory rate to apply to counsel working solo in a postconviction capital case funded through the registry. By design, the rate specified by Sections 27.703 and 27.711, Florida Statutes, only applies in postconviction capital cases; it would become instantly ineffective as a limitation on hourly compensation for registry counsel. If this Court agrees that $100/hr. was facially "confiscatory" when applied to Mr. Schaefer, no trial court will ever consider requiring a registry counsel to work for a rate of pay branded "unconstitutional" by the Supreme Court of Florida.

No rational basis exists to limit the application of "Mr. Schaefer's Rate" to postconviction cases involving an active death warrant. This Court has not sanctioned the notion that the phases of a death penalty case are qualitatively different. In Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990), the Court

classified an executive clemency proceeding for a capital defendant as "literally a life-or-death situation" in order to extend the applicability of the Makemson rationale. Nor does Chapter 27, Part IV, draw a distinction between responsibility of registry counsel based on the pendency of a warrant. An enrolled registry counsel agrees to abide by the terms and conditions of Section 27.711, Florida Statutes "until the sentence is reversed, reduced, or carried out. . . ."; no sentence can be carried out, of course, without an active death warrant in force. There would be obvious equal protection concerns raised if two separate classes of registry counsel were sanctioned by this Court, with 100 per cent disparity in hourly rate attributable only to the existence of an active death warrant at the time of litigation.

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 statue 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.

CONCLUSION

Based on the foregoing, the order on review should be reversed and the

Court should enter an order directing the Comptroller, if he has not already done so, to pay George F. Schaefer for 130.9 hours spent in representation of Bennie E. Demps

at the rate of $100 per hour fixed by Section 27.711, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U.S. Mail on this 17th day of December, 2001, to:

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CERTIFICATE OF COMPLIANCE

In accordance with Fla. R. App. P. 9.210(2), undersigned counsel certifies that this computer-generated Initial Brief was prepared in 14 point Times New Roman font.

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Richard T. Donelan, Jr.