IN THE SUPREME COURT OF FLORIDA

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

REPLY BRIEF OF APPELLANT

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Preliminary Statement

The following signals and abbreviations will be used in this Reply Brief: References to the Appellant, Robert F. Milligan, Comptroller of Florida, ere 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 (2002) unless otherwise indicated. References to the Amended Record on Appeal filed November 2, 2001, are indicated by "R- " followed by the appropriate page number.

The Amended Record on Appeal did not 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 were included within an Appendix to the Initial Brief in this case. References to that Appendix are signalled by "A- "

followed by the appropriate page number.

SUMMARY OF ARGUMENT

When the Legislature specifies by law an hourly rate to be paid for services by a government contractor, the applicable rate is established. Because Mr. Schaefer rendered services as registry counsel, he should be paid at the hourly rate set by law for such services. This Court has declined to consider "confiscatory" an hourly rate of $50 for 550 hours of capital appellate work. The statutory rate of $100 for 130.9 hours of such appellate work is not "confiscatory."

By transferring the fee application for "evaluation pursuant to Chapter 27", the Court rejected Mr.Schaefer's claim to be paid at the rate of $200 per hour, and thereby precluded a lower court decision to the contrary. By rejecting Appellee's claim that the Court had "inherent authority" to Mr. Schaefer for his services without reference to Chapter 27, the Court established the "law of the case".

The Comptroller lacks the authority to waive the applicability of the statutory rate for registry counsel. The lack of a formal contract of employment with Mr. Schaefer does not signify a waiver of the application of Chapter 27, Part IV. A contract covering the appointment of registry counsel is intended to memorialize the legal requirements as to voluntarily accepted employment.

A fixed hourly rate is not a "cap" within the meaning of Makemson and its

progeny. The Court properly distinguishes betwen a legislative "one size fits all" compensation arrangement and a fixed hourly rate in capital cases.

ARGUMENT

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

Introduction

In his Answer Brief, at p. 10, Appellee admits the fundamental reason why Mr. Schaefer should be paid at the rate of $100 per hour for his services before this Court in State v. Demps :

> 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 Section 27.710, Fla. Stat., and that Mr. Schaefer was appointed as cocounsel for Mr. Demps because he was a registry counsel.

The basic argument of the Comptroller, as chief fiscal officer of the State of Florida, is a simple one, accurately expressed by the argument heading set forth above. Appellant asserts that when the Florida Legislature, exercising the

constitutional "power of the purse," passes a law that plainly specifies an hourly rate for services rendered by a government contractor, the applicable rate of pay is that specified by law. Section 215.425, Florida Statutes, which governs State purchasing, plainly states, in pertinent part: "No extra compensation shall be made to any . . .contractor after the service has been rendered or the contract made. . . . Mr. Schaefer accepted appointment and rendered services as registry counsel. He should therefore be paid for his services as registry counsel at the applicable rate of $100 per hour.

Appellee's Answer Brief, however, has refused even to respond to this simple basic argument, going so far as to omit any response under Appellant's single argument heading. Rather, Appellee "has chosen to restate the issues," complaining that "the Initial Brief has framed each issue in an argumentative fashion, " as if it were somehow unprecedented at law for the arguments of an appellate brief to be framed in an argumentative manner. *See* Answer Brief, at. p.9. Appellant suggests that this "restatement" is no more than a gambit offered to obscure the vital distinction between an hourly rate of pay fixed by law and a statutory limit on the maximum amount of compensation to be paid, irrespective of the numbers of hours actually worked by a contracting attorney. This distinction was squarely recognized in White v. Bd. of Count Comm'rs of Pinellas County,

537 So. 2d 1376 (Fla. 1989). The distinction was expressly reaffirmed by this Court in its opinion in Sheppard & White, P.A., v. City of Jacksonville, 827 So. 2d 925 (Fla. 2002). *Accord*, Hillsborough County v. Unterberger, 534 So. 2d 838 (Fla. 2d DCA 1988).

By an exercise in terminological rectification, Appellee's "restated" arguments seek to identify the $100 hour rate of pay set by Chapter 27, Part IV, Florida Statutes, as a "$100 statutory cap," as if Florida law had limited the remuneration of state-paid capital collateral counsel to $100 for each representation! There are, of course, as discussed in the Court's declaratory opinion in Olive v. Maas , 811 So. 2d 644 (Fla. 2002), statutory maximum compensation ceilings included in Chapter 27, Part IV. See, e.g., Section 27.711(5), Fla. Stat. (2002). These limitations on overall compensation for registry counsel, however, are in no way involved here.

Mr. Schaefer, although he strains to avoid saying so, has already been paid by the State of Florida for every single hour for which he has claimed compensation in connection with his appellate representation of the late defendant: 130.9 hours, at the rate of $100 per hour, for a total of $13, 090, a weekly rate of $6545. Although Appellee dismisses this sum as "grossly below market rates," see Answer Brief at p.15, the Court can easily conclude that this rate of pay does

not constitute "confiscatory" remuneration, either as a matter of fact or as a matter of law, for two weeks of work by Mr. Schaefer as appellate co-counsel in the Demps matter. In Sheppard & White, *supra*, at 928-929, the Court answered this certified question in the negative:

> IS THE FIXED RATE OF $50 PER HOUR FOR APPELLATE ATTORNEY'S FEE CONFISCATORY WHEN APPLIED IN A CAPITAL CASE REQUIRING 550 HOURS OF ATTORNEY TIME?

If a $50 per hour rate for 550 hours of appellate representation in a capital case is not "confiscatory, " then an hourly rate twice as large for 130.9 hours as appellate co-counsel is certainly not "confiscatory."

Notwithstanding Appellee's refusal to follow the Rules of Appellate Procedure and respond to the Comptroller's argument as framed, this Reply Brief will respond to each of Appellee's subarguments in the order presented in the Answer Brief.

A. THIS COURT'S TRANSFER ORDER PRECLUDED THE LOWER COURT FROM AWARDING FEES TO REGISTRY COUNSEL AT A RATE IN EXCESS OF THE STATUTORY RATE OF $100 PER HOUR.

On June 19, 2000, 12 days after the conclusion of his appellate representation of Mr. Demps, Mr. Schaefer submitted to this Court an application for attorney's fees in which he sought to be paid at the rate of $200 per hour for 130.9 hours of work. In December of 2000, Mr. Schaefer submitted to the Court a

"reapplication" for fees claiming the same number of hours at the same $200 per hour rate. Mr. Schaefer urged the Court to exercise its "inherent authority" to pay him at above the statutory rate of $100 per hour. (A-2). This Court declined to do so, and instead transferred the "reapplication" for "evaluation pursuant to Chapter 27, Fla. Stat. (1999). (A-22). Appellant suggests that this decision represents this Court's specific rejection of Mr. Schaefer's claim for compensation at a higher hourly rate than that set by Chapter 27, Part IV, Florida Statutes, which rejection precluded the trial court from paying Mr. Schaefer other than in conformance with the Registry law.

Appellee suggests that this Court's order does not represent the "law of the case" because Mr. Schaefer did not have the opportunity to brief the argument that Chapter 27, Part IV, was unconstitutional. See Answer Brief, at. p.2, 11. In response, Appellant asserts that, in submitting to this Court two applications for appellate attorneys fees in the Demps case, Mr. Schaefer had ample opportunity to present to the Court an argument that the $100 hourly rate specified in Section 27.711, Florida Statutes, would be unconstitutional as applied to him. Before he submitted his "reapplication" for fees, both Mr. Schaefer and the Court were fully apprised of the Comptroller's position that the $100 statutory hourly rate was applicable to his fee claim. See R-57. If Mr. Schaefer failed then to raise a

constitutional argument in support of his claim, it is because he waived the opportunity to do so, not because he did not have a chance to raise the issue. In short, Appellee failed to preserve the issue he now claims as dispositive. However, review of Mr. Schaefer's fee application shows that he raised a Makemson claim, which claim was rejected by the Court.

In his applications for fees, Mr. Schaefer invoked the terminology of this Court's Makemson decision by suggesting that the Court had the "inherent authority" (A-2) to pay him whatever it deemed appropriate for his services in State v. Demps. This claim mirrored the following statement from the Makemson decision:

> It is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual case, departure from the statutory fee guidelines when necessary to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time energy and talents.

Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986).

At any rate, notwithstanding his invocation of the Makemson rationale, this Court refused to pay Mr. Schaefer at the rate of $200 per hour. The necessary implication of the remand of the matter to the lower court for "evaluation pursuant to Chapter 27, Florida Statutes" was that the provisions of Chapter 27 would be applied to Mr. Schaefer's claim, not that the lower court would have an

independent opportunity to declare the statute unconstitutional as to that claim. The Appellant suggests that this appellate determination precluded the trial court from deciding independently to pay Mr. Schaefer at the rate of $200 per hour.

B. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT THE STATE OF FLORIDA WAIVED THE RIGHT TO CHALLENGE THE CLAIM THAT MR. SCHAEFER SHOULD BE PAID AT DOUBLE THE STATUTORY RATE.

According to the Answer Brief, at p. 16, the Comptroller "simply dropped the ball at the inception of in [sic] this case" by failing to obtain Mr. Schaefer's signature on a supposedly "legally questionable" contract attesting to the fact that he was representing Mr. Demps as a registry counsel. Presumably, under this view of employment law, only if the Office of the Comptroller had tracked down Mr. Schaefer and compelled him to execute a registry contract covering his two weeks work on behalf of Mr. Demps, would the trial court have been bound to apply the $100 rate specified by law.

Appellant rejects the notion that the applicability of the statutory hourly rate for registry counsel is waiveable by the Comptroller. Only a court of competent jurisdiction may excuse compliance with the terms of Chapter 27, Part IV, Florida Statutes, and then only in "extraordinary" circumstances. The Answer Brief presents no legal authority to support its waiver contention. As noted at the outset of this Argument, the Answer Brief specifically agrees that Mr. Schaefer's

appointment by the circuit court to represent Mr. Demps on appeal was based on, and in reliance on, Mr. Schaefer's status as a member of the registry of capital collateral conflict counsel. Whether a formal contract of employment existed was and is irrelevant to the issue of what the Florida legislature has fixed by law as the hourly remuneration for qualified attorneys who voluntarily agree to serve as State-paid capital collateral conflict counsel. There is no question that Mr. Schaefer agreed to be State-paid capital collateral conflict counsel for Mr. Demps. By so agreeing, Mr. Schaefer honor-bound himself to accept the statutory hourly rate of pay, irrespective of whether the Comptroller was able to memorialize this agreement by means of a written contract.

Furthermore, the argument that the Comptroller involuntarily waived the application of Chapter 27, Part IV, because Mr. Schaefer did not execute a contract flies in the face of the reality of the Comptroller's limited role in the administration of capital collateral payments. The Comptroller neither appoints registry counsel nor receives official notice of such appointments. Consequently, he is dependent on the court-appointed counsel--who presumably desires to be compensated--to contact the Office of Comptroller and enter into a contract to regularize the relationship. Moreover, the Comptroller has no authority to forbid a lawyer from accepting appointment and undertaking representation without prior

notice to the Comptroller--just as Mr. Schaefer did in this matter. Given the brief period of Mr. Schaefer's appointment in this matter, it is inconceivable that official remonstrations would have been effective in obtaining his signature on a contract before the representation had concluded. Even if Mr. Schaefer had contacted the Office of Comptroller immediately after his appointment, it defies common sense to suppose that the Comptroller would have forbidden him to assist his client until the execution by both parties of a written contract embodying the statutory hourly rate.

The Answer Brief engages in extensive rhetorical questioning relative to the "need" for a formal registry contract. See Answer Brief at pp. 14-16. This is a red herring, because the requirement of a contract for capital collateral counsel is imposed by the Legislature, not by the Comptroller. The real--if mundane-- reason why a contract is required is to allow effective administration of the law. Such work-a-day details as addresses for billing and payment, specifications for travel reimbursement, and the like can only be administered successfully if the parties have a mutual comprehension of the parameters of the relationship, traditionally expressed in the form of a written contract.

The execution of a contract covering the appointment of a registry counsel is intended as a written understanding between the Comptroller and counsel embodying the legal requirements as to voluntarily accepted employment. It is

neither a meaningless formality nor a trap laid by the Comptroller for "impractical" death penalty lawyers unwary or unsophisticated enough to enter into a "contract limiting their fees in a capital case to an amount grossly below market rates." See Answer Brief, at. 14-15. If Mr. Schaefer believed that representation of Mr. Demps at the lawful hourly rate was contrary to his economic best interest, he should have refused the appointment. Having accepted a statutorily defined appointment, he should not be heard to complain now that the hourly rate was too low.

C. THE TRIAL COURT ERRED BY UTILIZING THE *MAKEMSON* RATIONALE AS A BASIS TO DECLARE THE STATUTORY HOURLY RATE UNCONSTITUTIONAL ON ITS FACE.

The Answer Brief quotes extensively from this Court's February 2002 opinion in the declaratory judgment action of Olive v. Maas, 811 So. 2d 644 (Fla. 2002). The Appellant in no way disagrees with the holding in Olive v. Maas . There are foreseeable circumstances when registry counsel may be called upon to expend an extraordinary amount of time and effort in collateral representation of a death-sentenced inmate. In such a situation it would be inequitable to require the lawyer to enter peonage in order to complete his or her representation of the defendant. It is in just such an extraordinary case--analogous to the original capital *Makemson* trial--where the courts may and should grant relief from statutory limits on maximum attorney compensation.

Nothing in Makemson, however, authorizes a court to grant a higher hourly rate of pay in addition to relief from maximum compensation limitations. Nothing in the Olive v. Maas opinion authorizes a court to declare unconstitutional an hourly rate of pay for lawyers who have not been compelled to work hours beyond the statutory maximum ceilings. Nothing in either case authorizes courts to provide a lawyer with a "bonus" payday for work already performed simply because the court concludes that, in its judgment, the applicable statutory hourly rate is too low for a lawyer of standing within the local legal community. See Section 215.425, Florida Statutes (2002).

The Answer Brief strains to convert the hourly rate of pay specified in Section 27.711, Fla. Stat., into a "statutory hourly cap," expressly to facilitate Mr. Schaefer's claim that statutory "caps", however described, may be disregarded in a case falling under the Makemson rationale. This claim fails both as a matter of semantics and as a matter of law. First, a fixed hourly rate of pay is a fixed rate of pay, not a "cap." This court explicitly reaffirmed this distinction in Sheppard & White v. City of Jacksonville, 827 So. 2d 925, 929 (Fla 2002), where the Court stated:

> [U]nlike the circumstances presented in White, we are concerned not with an amount of compensation set by the Legislature in a "one size fits all" manner, but, rather, with a rate that has been determined by the chief judge of the

> circuit after consideration of the compensation rates prevailing in the judicial circuit. Of additional import, although we allowed the statutory cap to be exceeded in White, the fee ultimately awarded to the petitioner there 'conformed with the hourly rate set by the chief judge of the circuit pursuant to section 925.036(1), Florida Statutes (1985).

Section 27.711 does not authorize the Comptroller to pay registry counsel a discretionary amount "up to" $100 per hour, with the expectation that he will negotiate for the lowest rate possible. Rather, the rate of pay is fixed at $100 per hour, irrespective of whether circumstances are "extraordinary" or not. The Comptroller has no authority to determine that a registry case is "ordinary" and therefore negotiate a lesser rate of remuneration for registry counsel.

In Sheppard & White, *supra*, at 931, the Court also found "highly persuasive" the Second District's decision in Hillsborough County v. Unterberger, 534 So. 2d 838 (Fla 2d DCA 1988), where the Court declined to hold unconstitutional a $40 per hour rate under the same rationale employed by the lower court in this case. This Court, at 931, approved the following quote from that decision:

> We do not read Makemson to hold even in the absence of a showing that the rights of criminal defendants are being violated, that it is unconstitutional to compensate an attorney at a rate that he or she believes will not cover the overhead or at a rate that he or she believes is not in line with his or her experience or reputation in the community.

534 So. 2d at 842.

The Sheppard & White decision demonstrates that the lower court's reliance on the Makemson rationale to invalidate the statutory hourly rate for registry counsel was plain legal error. Based only on the same documents that this Court reviewed in declining to grant Mr. Schaefer fees at the rate of $200, the trial court facially invalidated the statutory rate, even while purporting to declare that the rate was unconstitutional as applied to Mr. Schaefer. This plain error should be reversed by this Court under the rationale expressed in White, Sheppard & White, and Hillsborough County v. Unterberger.

CONCLUSION

Based on the foregoing, the order on appeal should be reversed.

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 11th day of December, 2002, 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 Reply Brief was prepared in 14 point Times New Roman font.

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