IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927

FLORIDA DEPARTMENT OF FINANCIAL SERVICES,

Appellant,

vs.

Case No.: SC04-1492
L.T. Case No: 16 1986 CF 11599

JOHN D. FREEMAN,

Appellee.
_____/

ANSWER BRIEF IN RESPONSE TO APPELLANT'S INITIAL BRIEF

_____
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PRELIMINARY STATEMENT

This Answer Brief in response to the State of Florida Department of Financial Services' Initial Brief is filed on behalf of John D. Freeman, whom is the undersigned's client. The undersigned counsel seeks the affirmation of the trial court's order allowing the undersigned fees in excess of the statutory cap enumerated in Fla. Stat. 27.711, based on the undersigned's services rendered in researching, writing, et cetera, Mr. Freeman's Writ of Certiorari and Reply Brief thereto to the U.S. Supreme Court, after the Florida Supreme Court upheld the trial court's denial of Mr. Freeman's 3.850 Motion.

Appellant, State of Florida Department of Financial Services, will be referred to as "FINANCIAL SERVICES." Attorney(s) Frank J. Tassone and Rick A. Sichta, who a represented Mr. Freeman in said preparation and writing of the Writ of Certiorari, will be referred to as the "UNDERSIGNED COUNSEL." Defendant/Appellee John D. Freeman, will be referred to as "APPELLEE.".

References to the Record on Appeal will designated by an "R", followed by the page number indicated on the Index to the Record on Appeal. References to the Appendix attached hereto will be designated by an "A", followed by the appropriate page number cited.

STATEMENT OF THE CASE AND FACTS

The undersigned counsel was court-appointed by Fourth Judicial Circuit Chief Judge Donald R. Moran, Jr. to represent Defendant Appellee on or about July 9th, 2003. The undersigned was a member of the registry of qualified criminal attorneys in private practice that were willing to accept duties in representing postconviction death-sentenced individuals. [1] At the onset of this appointment, the undersigned counsel's first task was to figure out what stage in the postconviction proceedings Appellee was in. Upon determining that a Motion for Rehearing needed to be filed with the Florida Supreme Court (based on the Florida Supreme Court's denial of Appellee's appeal from the trial court's denial of his 3.850 motion), the undersigned received an extension on the time to file said Motion for Rehearing, said Motion was timely filed with the Florida Supreme Court on or about October 31, 2003. On November 25th, 2003, the Florida Supreme Court denied Appellee's motion for rehearing without opinion. *Freeman v. State*, 2003 Fla. LEXIS 2078.

After the Florida Supreme Court's denial of Appellee's Motion for Rehearing, the undersigned began diligently working on Appellee's Writ of Certiorari to the U.S. Supreme Court. In light of the recent progressions and

[1] Said registry is maintained by the Commission on Capital Cases, pursuant to Fla. Stat. 27.710.

disputes in interpreting *Apprendi v. New Jersey* and *Ring v. Arizona*, the undersigned decided that this Writ of Certiorari would have to be intensively researched, for the recent holding from the 6th Circuit Court of Appeals in *Summerlin v. Stewart* had recently become published, thereby intensifying the debate as to what the 2002 holding in *Ring v. Arizona* was applicable to. As such, a plethora of cases were explored. In fact, not only did the undersigned read nearly every case that pertained to *Ring* from all the Florida Courts, but read almost every case from all of the other state appellate courts, federal district courts, federal appellate courts, and opinions concerning the issue(s) from the U.S. Supreme Court.

The undersigned notes that these cases and their subsequent holdings covered a multifaceted number of issues, which needless to say, were not easy to formulate into argument. Further, though aware of the recent holding in *Ring v. Arizona*, the undersigned had never previously explored in-depth said holding and surrounding cases, being that this was one of the first postconviciton death cases the undersigned had been appointed to. Moreover, to become competent in this area of law, the undersigned was required to research, read, and learn and incorporate this vast and complex issue(s) of law in a very short period of time.

However, despite the time limit and the undersigned's lack of knowledge in the topic of review, the undersigned timely filed a Petition for Writ of Certiorari with the U.S. Supreme Court. [2]

Appellee's Writ of Certiorari was denied by the U.S. Supreme Court on April 26, 2004. *Freeman v. Florida*, 124 S. Ct. (2004).

Previous to the U.S. Supreme Court's denial of Appellee's said Writ, the undersigned, on April 20, 2004, filed with the trial court a Notice of Hearing in regards to the payment of attorney fees and miscellaneous expenses used in preparation of said Writ(s). Also, attached to the Notice of Hearing was a motion entitled, "Motion for Order of Payment of Attorney Fees." Said Motion requested $27,440.74 for services rendered in Appellee's Writ of Certiorari and Reply thereto. (R. p. 1-2). In the Motion for Attorney Fees, the undersigned requested $20,069.82 for attorney fees and costs for the initial Writ of Certiorari, and $7,870.92 for attorney fees and costs for the Reply Brief to Respondent's Brief in Opposition to the Writ of Certiorari. Further, contained in said Motion was the fact that Financial Services refused to pay any monies in relation to this representation, though

[2] Petition also subsequently filed a Reply brief to the U.S. Supreme Court, in response to the Respondent's Reply Brief in Opposition that argued the U.S. Supreme Court should not hear Petitioner's Writ because the claim(s) involved were only presented in Petitioner's Motion for Rehearing in State Court, and not in any preceding appeals.

Fla. Stat. 27.711(4) (g) expresses provides for a payment of $2,500.00 for these services rendered.

On May 5, 2004, a hearing was held on the Motion for attorney's fees and costs, whereby Financial Services appeared telephonically, and Chief Judge Donald Moran presided. As to the merits of the undersigned's Motion, (and in response to Financial Services inquiry that it had heard nothing to explain why the case was extraordinary), the undersigned explained to the Court that the monies and expenses incurred in the provided billing statement were the result of the fact that a plethora of research had to be undertaken in order to effectively prepare for the Writ of Certiorari, including reviewing and looking through approximately forty (40) boxes of material that came with the representation of Appellee. (A. p. 4-9).

Financial Services responded to the undersigned's explanation of attorney's fees and costs by telling the court that the billing statement indicates that the undersigned did numerous "research", and "I know research can be a broad term, and for my agency to concede that point we would want something indicating, yes, I was reading the record on appeal, or

I was reading box 9, box 10, whatever it is, and that's just not contained in the billing."[3] (A. p. 7-8).

The court responded to Financial Services response by stating, "Well, I'm sure - - Mr. Tassone enjoys an excellent reputation, and I'm sure if he says he had to review all of that in order to be competent, then I'm confident that that's what he did, and I don't think we could ask him to do any less, particularly in a case as important as this. So, Mr. Thurber, I understand the statute and things like that, but I also understand the attorney's responsibility, and I'm confident that Mr. Tassone spent the time that he said, therefore I'm going to grant his Motion." (A. p. 8).

Financial Services then said the following in response: "Your Honor, may I move for a clarification? I don't know exactly where we should put this funding under the statute." (A. p. 8). The Court then responded, "Well Sir, it doesn't matter to me where you put it, quite frankly. I'm not – you can do anything you want to do with it. You can appeal it, but what I'm saying is I – Mr. Tassone is a very competent attorney, and, in fact, I'm pleased he's willing to take cases like this, and think he should be compensated in reasonable, and it appears that the hours he's put are

[3] The undersigned also notes that Financial Services also called the undersigned's 200+ hours worth of work in this case "unreasonable." (A. p. 6).

reasonable in such an important case, and therefore I'm going to sign this order for attorney's fees. (A. p. 9).

Subsequent to the attorney fee motion hearing, the court entered an order entitled, "Order on Motion for Payment of Attorney Fees." [4]

Financial Services, on June 4, 2004, served their Notice of Appeal regarding the trial court's order granting attorney fees to the undersigned. (R. p. 6-9).

[4] The undersigned notes that this order was given on May 5, 2004.

STANDARD OF REVIEW

The Florida Supreme Court's standard of review for this case is *de novo* review, to-wit: whether the order of the lower tribunal departed from the essential requirements of law. Moreover, the Florida Supreme Court has held that the evidence presented to the trial court is not to be reweighed on appeal. *See* *Markham v. Fogg*, 458 So. 2d 1122 (Fla. 1984); *Sheppard & White v. City of Jacksonville*, 827 So. 2d 925 (Fla. 2002).

STATEMENT OF THE ISSUES

I. WHETHER FLA. STAT. 27.711(4) (g) AS APPLIED TO APPELLEE'S INSTANT CASE IS UNCONSTITUTIONAL BECAUSE IT IS CURTAILING THE TRIAL COURT'S INHERENT POWER TO ENSURE THAT APPELLEE IS RECEIVING EFFECTIVE AND ADAQUATE REPRESENTION IN HIS POSTCONVICTION APPEALS.

II. ALL CAPTIAL CASES, INCLUDING POSTCONVICTION APPEALS, BY THEIR VERY NATURE, INVOLVE EXTRAORDINARY AND/OR USUAL FACTS AND CIRCUMSTANCES JUSTIFYING AN AWARD EXCEEDING THE STATUTORY ALLOTTED FEE SCHEDULE. THEREFORE, ALL CAPITAL CASES SHOULD BE PRESUMED TO BE EXTRAORDINARY AND/OR UNUSUAL, WHEREBY ATTORNEY FEES IN EXCESS OF THE STATUTORY CAP SHALL BE AND THEREBY PRESUMED TO BE CORRECT, ABSENT CLEAR EVIDENCE TO THE CONTRARY.

III. ON ITS FACE, FLA. STAT. 27.711 AND FLA. STAT. 27.7002 ARE UNCONSTITUTIONAL PER SE, AS THEY

ARE A VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FLORIDA AND U.S. CONSITUTIONS, THE EQUAL PROTECTION CLAUSE UNDER THE FLORIDA AND U.S. CONSTITUTIONS, ARTICLE ONE, SECTION TWO, AS WELL AS AN INPERMISSABLE LEGISLATIVE INTRUSION UPON AN INHERENT JUDICIAL FUNCTION UNDER ARTICLE V, SECTION II, AND ARTICLE III.

SUMMARY OF ARGUMENT

The trial court's Order granting the undersigned attorney's fees and costs in excess of Fla. Stat. 27.711(4)(g) was in accordance with the case law established by the Florida Supreme Court in *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002), *White v. Board Of County Commissioners of Pinellas County*, 537 So. 2d 1376 (Fla. 1989), *Remeta v. State*, 559 So. 2d 1132 (Fla. 1990), and *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986). These cases authorize the right to exceed the statutory caps enumerated in Fla. Stat. 27.711, if extraordinary and/or unusual circumstances exist.

Appellant repeatedly alleges that the trial court failed to apply the "test" set out in *Olive v. Maas* in granting an award of attorney's fees in excess of the cap set in Fla. Stat. 27.711(4)(g). However, according to the undersigned, Financial Services is mistaken in its interpretation and application of *Olive* to the instant case. In particular, Financial Services argues that the trial court's order is erroneous because it failed to make an "express determination" of whether the expenses the undersigned was reasonable, and that no finding of unusual or extraordinary circumstances existed in said order. The "test" in *Olive v. Maas* does not establish such rigid guidelines for compensation beyond the statutory cap. Moreover, counsel, as well as the trial court, conclusively established that said

circumstances existed and said fees were reasonable, and such evidence is clearly contained on the Record on Appeal.

Further, the Florida Supreme Court has repeatedly and consistently held that "virtually every capital case…justifies the [trial] court's exercise of its inherent power to award attorney's fees in excess of the current statutory fee cap. *Remeta v. State*, 559 So. 2d (Fla. 1990). The trial court's award of excess attorney fees under Fla. Stat. 27.711, was justified under *Makemson* and its progeny, and therefore Financial Services in the instant case did and is curtailing the trial court's inherent authority to ensure the adequate representation of the criminally accused. Therefore, Fla. Stat. 27.711, as applied to the instant case, is unconstitutional on its face, for allowing Financial Services to only compensate the undersigned $2,500 dollars would be confiscatory to the undersigned's time, energy, and talents, usurp the trial court's "great deference in determining whether to award fees above the statutory cap, and most importantly, circumvent Appellee's right to competent and effective representation. *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986).

Lastly, the undersigned alleges that Fla. Stat. 27.711 and Fla. Stat. 27.7002 are unconstitutional on their face, and that all death penalty cases,

by their very nature, should be presumed to be extraordinary and/or unusual, absent convincing evidence to the contrary.

SUPREME COURT OF FLORIDA

CASE NO.: SC04-1492
Lower Tribunal No.: 16-1986 CF 11599

FLORIDA DEPARTMENT OF FINANCIAL SERVICES	vs.	**JOHN D. FREEMAN**
Appellant(s)		Appellee(s)

ARGUMENT ONE

THE LOWER COURT, IN ACCORDANCE WITH THE FLORIDA SUPREME COURT'S PRECEDENT SET OUT IN OLIVE V. MAAS, CORRECTLY AUTHORIZED THE GRANTING OF FEES IN EXCESS OF THE STATUTORY SCHEDULE IN FLA. STAT. 27.711(4)(g), BECAUSE EXTRAORDINARY AND/OR UNUSUAL CIRCUMSTANCES EXISTED IN THE INSTANT CASE.

Appellant Financial Services argues in its Initial Brief that the trial court erred by awarding fees in excess of the statutory fee limits designated by Fla. Stat. 27.711(4)(g). In support of its argument, Financial Services simply states that the trial court's said ruling was a departure from the essential requirement of law governing the payment of fees to court-appointed private attorneys in death penalty cases. In particular, Financial Services argues the trial court erred for the following reasons: (1) The trial court order contains no specific finding with respect to the reasonableness of either the fees or the expenses claimed by Mr. Tassone (2) The order offers

no legally sufficient explanation of why the lower tribunal ignored the $2,500 limitation on attorney's fees contained in Section 27.711(4)(g), Florida Statutes (3) The order contains no separate discussion as to constitutionality of the application of the statutory cap, and lastly (4) The order contains no finding that unusual or extraordinary circumstances existed. In sum, because of the aforementioned reasons, Financial Services argues that "neither the two page "Motion for Payment of Attorney Fees, the lawyer's billings, nor the Order on appeal satisfy the *Olive v. Maas* test for exceeding the statutory maximum fee cap… and in direct consequence, the Order on review is erroneous as a matter of law… and the Order must be reversed." (See Appellant's Initial Brief, p. 12.).

However, Financial Services' logic and analysis of the Florida Supreme Court case law in incorrect in application to the instant case. The holding in *Olive v. Maas* states that "by accepting an appointment, a registry attorney is not forever foreclosed from seeking compensation should he or she establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory of his or her time, energy, and talent and violate the principles outlined in *Makemson* and its progeny. 811 So. 2d 644 (Fla. 2002). This ruling says nothing about specifically delineating in a trial court order that "extraordinary and/or

unusual circumstances" exist, or that registry counsel has to specifically enumerate the terminology "extraordinary and/or unusual", in order to receive compensation above the statutory cap. Appellant is attempting to strictly construe a Florida Supreme Court ruling that is not. In fact, as held by the Florida Supreme Court, the ruling "simply holds" that registry attorney "establish that", given the facts and circumstances of the case, compensation within the statutory cap would be essentially be conflicting with his or her time, energy, and talent, and violate the principles outlined in Makemson and its progeny.

This direction for obtaining fees in excess of the statutory cap from the Florida Supreme Court in *Olive* was precisely followed by the undersigned, and the trial court, in the instant case. For example, as directed by the Florida Supreme Court in *Olive*, the undersigned counsel specifically told the court numerous times why the facts and circumstances of the instant case was confiscatory of his time, energy, and talent, and violate the principles outlined in *Makemson* . In particular, in explaining the costs at the May 5, 2004 hearing on attorney's fees and costs, the undersigned's billing statement contained the receipts paid for the cost of making, copying, and producing such Petitions for Writ of Certiorari to the U.S. States Supreme

Court. (A. p. 7-10).[5] Further, in detail, and after Financial Services explicitly told the court that it had not heard that "there's anything extraordinary in this case," the undersigned stated,

> "I believe the Legislature in enacting this statute contemplated that the attorney who handled the petition of the writ of certiorari to the United States Supreme Court would have handled the appeal to the Florida Supreme Court in responses thereto, all of which would have allowed him or her to read the transcripts, go through the boxes. We got appointed after the denial of the last item in the Florida Supreme Court and consequently had to read the 40 boxes of material in order to prepare the petition for the writ of certiorari to the United States Supreme Court. That's exactly why it took those many hours." (A. p. 7).

Financial Services only response the undersigned's answer was that the billing doesn't actually indicate they were actually reviewing the boxes… "and for my agency to concede that point we would want something indicating, yes, I was reading the record on appeal, or I was reading box 9, box 10, whatever it is. [6](A. p. 7-8). In hearing the arguments from the respective parties, the trial court held that the undersigned was entitled to fees in excess of the statutory fee schedule of Fla. Stat. 27.711(4)(g). In explaining its decision, the court stated, "Mr. Tassone

[5] Appellant even contested this figure in a prior conversation with the undersigned, telling the undersigned that they have a company that could do it for less. The undersigned further notes that despite the Appellant's concession at the May 5, 2004 hearing that it had "no objection to paying the $2,500 in attorney's fees," and that "we have no problems with those nine-and-a-hour hours either" (which were hours spent on writing the previous Motion for Rehearing to the Florida Supreme Court), not one iota of monies have been given to the undersigned as of the writing of this answer brief.

[6] The undersigned respectfully requests this Court to take Judicial Notice to the particularity and effort that was used in the billing statement, whereby the undersigned even uses specific case names from different jurisdictions and States.

enjoys an excellent reputation, and I'm sure if he says he had to review all of that in order to be competent, then I'm confident that that's what he did, and I don't think we could ask him to do any less, particularly in a case as important as this. So, Mr. Thurber, I understand that statute and things like that, but I also understand the attorney's responsibility, and I'm confident that Mr. Tassone spent the time that he said, therefore I'm going to grant his motion." The trial court continued (in response to Financial Services question as to which section of the statute the funding should be put), "Well, sir, it doesn't matter to me where you put it, quite frankly. I'm not –you can do anything you want to do with it. You can appeal it, but what I'm saying is I – Mr. Tassone is a very competent attorney, and, in fact, I'm pleased he's willing to take cases like this, and I think he should be compensated in a reasonable amount, and it appears that the hours he's put are reasonable in such an important case, and therefore I'm going to sign this order for attorney's fees." (A. p. 8-9).

The testimony from this May 5, 2004 hearing completely satisfied the Florida Supreme Court's requirement(s) and directions set out in *Olive*, *Makemson*, and its progeny in order to receive fees in excess of the statutory

cap.[7] Specifically: (1) The extraordinary and or unusual circumstances were addressed by Financial Services (2) In response to Financial Services requesting proof that the instant case was extraordinary and/or unusual, the undersigned stated that (a) the fee statute contemplates that an attorney will being representation of the individual at the beginning of the collateral proceedings, and because the undersigned was beginning at the near end of said proceedings, much reading and/or learning of Appellee's case was required to be competent, and as such (b) much reading was done in regards to Appellee's case, nearly forty (40) boxes worth (3) The trial court agreed with the undersigned that the instant case was extraordinary and/or unusual, and thereby exercised it's inherent power to ensure adequate representation of Appellee, stressing that this was "an important" case (4) The trial court discussed the undersigned's competency by stating that he was a very good attorney, and that he was pleased that the undersigned took cases like this (5) The trial court expressly stated that such fees were reasonable because of the

[7] *Makemson* and its progeny can be summed up by the following statements made by the Florida Supreme Court in said cases: (1) Statutory maximum fees may be unconstitutional when they are inflexibility imposed in cases involving unusual or extraordinary circumstances because these caps interfere with the trial court's inherent power to ensure adequate representation and the defendant's Sixth Amendment right to counsel (2) Statutory caps are unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused (3) It is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably intertwined (5) 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 fee cap. *White*, 537 So. 2d 137 (6) When extraordinary or unusual circumstances exist, trial court are authorized to award fees in excess of the statutory schedule set out in section 27.711 (4). *Olive v. Maas* 811 So. 2d 644 (Fla. 2002).

importance of the case, and that to be "competent" and effectively represent Appellee, such a cap would be confiscatory of the undersigned's time, energy, and talents[8]. (A. p. 8).

When this hearing is read in complete context, Financial Services argument that the trial court's ruling was erroneous holds no water. There is variety of ways to express and show that because a case is extraordinary and/or usual, the statutory cap should be exceeded. Also, there are a variety of ways to describe why a limitation of payment within a statutory cap is confiscatory of an attorney's time, energy, and talents. The undersigned, as well as the trial court, did exactly what the Florida Supreme Court asked of them when an issue of awarding access fees arises. They discussed the facts and circumstances of the case, they addressed the extraordinariness and/or unusual aspects of the case by giving specific examples of said facts and circumstances; they addressed the reasonableness of the statutory cap of $2,500, whereby stating that said cap would not be reasonable, for to make the undersigned competent and effective in his representation of Appellee such time was necessary, and a denial of excess fees would be confiscatory

[8] The undersigned asks this Court to take notice that the total billable hours in the instant case was 296.28. With the statutory cap set at $2,500, the undersigned wrote said Petition(s) to the U.S. Supreme Court for approximately $8.44 a hour, which is (and understanding that an attorney should be only compensated reasonably and not at a market rate) $241.56 less than the undersigned bills an hour for privately retained clients.

of the undersigned's time, energy, and talent; and they addressed the fact that the undersigned number of attorney hours was reasonable.

The aforementioned discussion(s) at the May 5, 2004 hearing is the type of discussion(s) the Florida Supreme Court envisioned (to determine whether excess fees should be given) when it decided *Olive* and its preceding cases. Reading Financial Services argument, it appears that they want some rigid, strict, yet undisclosed rule or policy to be followed in order for registry counsel to be paid in excess of the statutory cap. This argument from Financial Services is not what the Florida Supreme Court had intended. The Court was trying to create a solution to the problem of the consistent dispute between registry attorneys' and Financial Services. If Financial Services' appeal is granted, it would only add and complicate the problem between the parties and make Financial Services more of an indirect adversary to registry counsel (and more important, as payment and effective representation are intricacy intertwined, the defendant) than they already are. [9]

Further, Financial Services ignores the too-often repeated rule by the Florida Supreme Court that the trial court's ruling "should be accorded great

[9] For clarification, Financial Services alludes to the fact that the undersigned spent a "disproportionate amount of time devoted to legal research." The undersigned states that this is absolutely correct. It was the undersigned's opinion at the time that the recent holding in *Summerlin v. Stewart* clouded even more the 2002 holding in *Ring v. Arizona*, and therefore the time was ripe to extensively research the issue as it applied across the U.S., for a U.S. Supreme Court ruling on the holding in *Summerlin* was imminent.

deference," and that "the principles outline in Makemson and its progeny" specifically state that "in order to safeguard that individual's right, it is the court's duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter." *Makemson*, 491 So. 2d 1109 (Fla. 1986); *Olive*, 811 So. 2d 644 (Fla. 2002).

Moreover, the trial court is in the best position to judge whether attorney's fees are reasonable, and/or whether a statutory fee cap should be exceeded. In particular, the trial court, by having previous dealings with the registry attorney, knows that the attorney is trustworthy, will do what he or she says they will do, is competent and intelligent in handling issues pertaining to the death penalty, is respected amongst his or her peers, is a hard worker and will put in the time necessary to effectively represent a defendant, and most important, will put in more time that would undoubtedly exceed the statutory cap (thereby risking a loss of capital in the representation) if it would serve the client's best interests.

The trial court's knowledge of these aspects of an attorney cannot be ignored. However, when an authority such as Financial Services usurps a court's granting excess fees, such authority impliedly tells the trial court that

its belief in the appointed registry counsel's abilities is mistaken. [10]In turn, Financial Services usurping the trial court's ruling will further create a hesitancy of registry counsel in taking such cases, for if they cannot trust the trial court or believe that the trial court has little decision-making power in granting excess fees, why would they take such cases? Although the cause is definitely a legitimate reason and noble cause, knowing that the trial court has little authority in the payment of fees causes great concern to registry counsel, for a legitimate reason and noble cause will not pay the bills with such token compensation and thereby keep a roof over counsel's head.

In light of the preceding facts and law, the undersigned requests this Honorable Court deny Appellant's Appeal of the trial court's award of attorney fees and costs that exceed the statutory allotted cap enumerated in Fla. Stat. 27.711(4)(g). However, because of consistent and ongoing dilemma that has resulted for numerous years and continues to grow between registry counsel and Financial Services, the undersigned makes the following claims in accordance with applicable law and in an effort to

[10] The undersigned notes that Financial Services questions the inherent decision-making authority and power of the trial court by questioning the undersigned's choice to file a Reply brief in their Petition for Writ of Certiorari to the U.S. Supreme Court. (Appellant's Initial Brief, p. 22).

resolve said problem, and thereby incorporates said claims into their main argument.[11]

SUB-ISSUE ONE:

FLA. STAT. 27.711(4)(g) AS APPLIED IN THE INSTANT CASE IS UNCONSTITUTIONAL, BECAUSE IT HAS AND IS CURTAILING THE TRIAL COURT'S INHERENT POWER TO ENSURE THAT APPELLEE IS RECEIVING EFFECTIVE AND ADEQUATE REPRESENTATION IN HIS POSTCONVICTION APPEALS

As previously stated, the trial court decision in granting excess fees should be allowed great deference, and should a dispute arise between a statutory fee between a Financial Department and an a individual [defendant], such dispute shall be resolved in favor of the latter. *See White v. Board of County Commissioners of Pinellas County*, 537 So. 2d 1376

[11] Though the undersigned understands Financial Services duty imposed on it to regulated registry counsel's finances, the undersigned believes that in exercising said duty the Financial Services is overstepping its bounds. For example, Financial Services, in their initial brief in regards to the instant case, has made the undersigned spend numerous hours researching and writing this instant answer brief (whereby at the expense of other clientele that have privately retained and whereby already have paid for services); second-guesses the undersigned's decision-making abilities as to what arguments and strategies it makes in representing Appellee; calls the trial court's order granting attorney fees "oblique" and "garbled," when the testimony given previous to the order at the May 5, 2004 hearing was conclusive, and whereby cites no case law that the undersigned is aware of that requires such an order that Financial Services has described to be devised.

(Fla. 1989). [12]Such a justification did not occur from mere happenstance. The Florida Supreme Court is keenly aware that the trial court, by being aware of the registry counsel's reputation, work ethic, responsibility, trustworthiness, etc., chooses counsel of these important death penalty cases that will ensure that a death-sentenced individual will receive effective and adequate representation. Moreover, when it comes time for a trial court to decide whether counsel should receive attorney fees in excess of a statutory cap, questioning and disagreeing with such a decision is to question the trial court's decision to appoint counsel in the first place. By a trial court appointing a counsel, it knows that if an attorney cannot effectively represent a defendant within the statutory cap, the attorney will work above and beyond a statutory cap, and ask questions (regarding payment) at a later time. Therefore, not allowing a trial court to award excess fees is essentially telling the court that it and the attorney should be able to be effective in representation by spending lower hours on the case. Allowing this situation to occur would thereby allow a Financial Department to second-guess the decisions, choices, strategies, and avenues taken in a death penalty case, and

[12] In *White* the court explained the importance of the doctrine of inherent judicial power by stating, "the doctrine of inherent judicial power s it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the court's ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights. 537 So. 2d 1376 (Fla. 1989).

considering that said Financial Department and their attorney's have rarely, if ever, handled such a case and therefore are inexperienced in this type of law, the situation in allowing an inexperienced attorney dictate representation [by deciding how much money a registry counsel shall be paid for his services] would be catastrophic to a death-sentenced defendant.

Unfortunately, the aforementioned situation is currently occurring in Florida, and by the reasoning for reversing the trial court's order in the instant case (as stated throughout Financial Services' initial brief), the problematic situation is occurring in this very case.

SUB-ISSUE TWO

ALL CAPITAL CASES, INCLUDING POSTCONVICTION APPEALS, BY THEIR VERY NATURE, INVOLVE EXTRAORDINARY AND/OR UNUSUAL FACTS AND CIRCUMSTANCES JUSTIFYING AN AWARD EXCEEDING THE STATUTORY ALLOTTED FEE SCHEDULE PURSUANT TO FLA. STAT. 27.711. THEREFORE, ALL CAPITAL CASES, WHETHER AT THE TRIAL LEVEL OR AT THE POSTCONVICTION LEVEL, SHOULD BE PRESUMED TO BE EXTRAORDINARY AND/OR UNUSUAL, WHEREBY ATTORNEY FEES IN EXCESS OF THE STATUTORY CAP SHALL BE AND THEREBY PRESUMED TO BE EXTRAORDINARY AND/OR UNUSUAL, ABSENT CLEAR EVIDENCE TO THE CONTRARY

The issue regarding adequate funding to registry counsel(s) appointed to represent death-sentenced individuals, and therefore the effectiveness of such representation as the result of said funding thereto, has been the topic of this Honorable Court for quite some time. *See* *Arbelaez v. Butterworth*,

738 So. 2d 326 (Fla. 1999) (*citing Justice Anstead's concurring opinion)[Stating that this Court has previously acknowledged its responsibility to ensure that counsel [CCRC] receive adequate funding, and as Justice Wells stated in his dissenting opinion in Capital Postconviction Public Records Production (Time Tolling), 708 So. 2d 913 (Fla. 1998), "I believe that we not only have a role in postconviction proceedings but that at present we have no more important or immediate responsibility…Not dealing with the representation issue is a prescription for capital postconviction cases to continue as in the past and for them to drag on for another twenty years."]*

As explained in a recent decision by the Florida Supreme Court, the representation of a death-sentenced individual requires counsel to possess large measures of intellect, skill, character, creativity, and emotional stability, because counsel is charged with the dreadful responsibility involved in trying to save his client from execution. *Sheppard & White v. City of Jacksonville*, 827 So. 2d 925 (Fla. 2002). Further, this Court stated that Florida's system for capital trials and appeals is far from simplistic…and have reinforced the notion that capital cases involve the most special and intricate of circumstances by noting that "death is different." *Id.* Additionally, this Court has explicitly recognized that all

capital litigation is particularly unique, complex, and difficult, and further requires more scrutiny in regards to violating the Eighth Amendment of the U.S. Constitution. *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999). [13] Lastly, in *White*, this court held capital cases require a vast amount of time and effort spent on behalf of the appointed attorney. 537 So. 2d 1376 (Fla. 1989).

In apparent response to the complicated issues that come with representing a death-sentenced individual, the Florida Supreme Court also acknowledged that "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 fee cap. *White*, 537 So. 2d 1378 (Fla. 1989).

In light of the aforementioned case law, because of the constant disagreement and refusal by Financial Services in paying registry counsel in excess of what is allotted in the statutory fee schedule for death-sentenced individuals, the undersigned suggests that it should be declared that all

[13] Contained in this opinion is a statement supporting the undersigned's contention that all death penalty cases are extraordinary and/or unusual. Specifically, the court stated, "we have also enacted complex rules that expressly govern capital postconviciton proceedings and discovery in those proceedings. We have shortened the time for filing petitions in capital cases to one year while allowing two years in other criminal cases. In addition, the critical importance of state postconviction proceedings has been magnified since the enactment of the Anti- Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. 2254 (Supp. III 1997), severely restricting a death-sentenced defendant's access to the federal courts. In other words, today state postconviction proceedings are undeniably critical and complex, and by their very nature present the serious and difficult issue contemplated by Graham to require the assistance of counsel." *Arbelaez v. Butterworth*, 738 So. 2d 326 (Fla. 1999).

death-penalty cases, both at the trial level and at the collateral appellate level, be presumed to be either extraordinary and/or unusual, or both, thereby putting the burden to rebut such an excess of fees on Financial Services. The undersigned states that such a ruling would not only save the State of Florida a tremendous amount of money (for there would be less appeals of awards in regards to excess attorney fees, as well as registry counsel's responses thereto), but would contribute to the cause that this Court has long tried to protect, to wit: the death-sentenced individual's right to effective and adequate representation in accordance with the Eighth Amendment. In other words, less disagreement and subsequent appeals and answers thereto means more time being effective and adequate for the person whose rights we are continually trying to protect. [14]

In conclusion, the undersigned alleges that every capital case, whether in trial or postconviction appeal, should be presumed extraordinary and/or unusual. Therefore, because such presumption exists, a trial court award of attorney fees in excess shall not be disturbed absent some conclusive finding

[14] The aforementioned argument has been recognized by all courts in the United States for many years, including the U.S. Supreme Court. For instance, Justice Blackmun, in his dissenting opinion in *Mcfarland v. Scott*, explained the ongoing problem in regards to counsel and capital representation: "My 24 years of overseeing the imposition of the death penalty from this Court have let me in grave doubt whether this reliance is justified and whether the constitution requirement of competent legal counsel for capital defendant is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failing of our present system of capital presentation and the conviction to do what is necessary to improve it. 512 U.S. 1256 (1994).

to the contrary that such case is not extraordinary and/or unusual. The burden of proof should be borne by Financial Services, and not the person given the ultimate responsibility of trying to save their client from execution.

SUB-ISSUE THREE

ON ITS FACE, THE STATUTORY FEE SCHEDULE SET OUT TO COMPENSATE REGISTRY COUNSEL IN FLA. STAT. 27.711, AND FLA. STAT. 27.7002 IS UNCONSTITUTIONAL PER SE, AS IT IS A VIOLATION OF THE DUE PROCESS CLAUSE UNDER THE FLORIDA AND U.S. CONSTITUTIONS, AS WELL AS THE EQUAL PROTECTION CLAUSE UNDER THE FLORIDA CONSTITUTION, ARTICLE ONE, SECTION TWO, AND AN IMPREMISSIBLE LEGISLATIVE INTRUSION UPON AN INHERENT JUDICIAL FUNCTION UNDER ARTICLE V, SECTION 2; ARTICLE III, UNDER THE FLORIDA CONSTITUTION

The undersigned alleges the statutory fee schedule caps enumerated Fla. Stat. 27.711 and explained in Fla. Stat. 27.7002 are not only unconstitutional as applied, but are unconstitutional on their face.

This Court has consistently held that "statutory maximum fees may be unconstitutional when they are inflexibility imposed in cases involving unusual or extraordinary circumstances, because these caps interfere with the trial court's inherent power to ensure adequate representation and the defendant's Sixth Amendment right to counsel." *Makemson*, 491 So. 2d 1109 (Fla. 1986). Further, this Court has also held that "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 fee cap. *White*, 537 So. 2d 1376. (Fla. 1989). Combining the two aforementioned statements, the logical conclusion is the following statement: statutory maximum fees are unconstitutional when inflexibly imposed in cases involving extraordinary or unusual circumstances, and since all capital cases by their very nature can be considered extraordinary and/or unusual, statutory maximum fees that are inflexibly imposed in capital cases are unconstitutional.

Taking this logical conclusion, and applying it to the statement made by Financial Services in their Initial Brief in this instant case, shows that Fla. Stat. 27.711's statutory fee cap is per se unconstitutional, for attorney fees for representing a death sentenced client are inflexibly imposed.

Specifically, Financial Services, the sole entity controlling dispersing the statutory fees enumerated in Fla. Stat. 27.711, clearly stated how it interpreted and applied said statute. For example, Financial Services believes that, "it is clear that the Legislature intended this overall figure, [15] and the eight intermediate "milestone caps" that comprise it, as maximum State remuneration[16]…and the Department [Financial Services] must view and does *construe* this subsection as an express legislative limitation on its

[15] Assuming that a registry attorney started collateral representation immediately after the defendant's direct appeal was denied by the Florida Supreme Court, and completed each stage of the collateral postconviction proceedings, the maximum overall figure a registry attorney could receive would be $84,000.

[16] Financial Services cites to Fla. Stat. 27.7002(5) (2004).

independent statutory authority to pay attorney's fees to court-appointed counsel. (Appellant's Initial Brief, p. 17). The language in the preceding sentences shows that Financial Services believes and in fact applies the belief that it must inflexibly impose the statutory enumerated fee caps of Fla. Stat. 27.711.

Moreover, Fla. Stat. 27.7002, the statute Financial Services bases this belief from, is likewise volatile of the Florida Constitution as well as the previous Florida Supreme Court case law mentioned above. For example, Fla. Stat. 27.7002(2004)(3)(5)(6)(7) collectively holds that: (1) "no provision of this chapter shall be construed to generate any right on behalf of any attorney appointed pursuant to 27.710, or seeking appointment pursuant to 27.710, to be compensated above the amounts provided in 27.711 (2) The use of State funds for the compensation of counsel appointed pursuant to Fla. Stat. 27.710 above set amounts set forth in Fla. Stat. 27.711 is not authorized and, (3) an attorney can be permanently removed from registry attorney list if they seek compensation for services above the amounts provided in statute.

Therefore, Financial Services, and the aforementioned Florida Statutes, conclusively stand for the fact that not only shall "no state funds be used to compensate counsel above the amounts set forth in 27.711 and

compensation above said amount are not authorized under the statute, but if undersigned attempts to obtain attorney fees above said cap, registry counsel can be permanently removed from the attorney registry list and possibility removed from the case.

The undersigned states that the language and rules listed in this statute are in direct conflict and directly contradicts (for all the reasons explained in the preceding argument(s) of why the undersigned is entitled to fees in excess of the statutory cap) the Florida Supreme Court rulings of *Makemson*, *White*, *Sheppard*, *Remeta*, *and Arbelaez*. [17]

In light of the aforementioned statutes and admission by Financial Services, to say anything but Fla. Stat. 27.711 being inflexibly imposed by the Legislature and Financial Services would be severely misconstruing the plain meaning of the statute(s). The statute(s) provide for no additional compensation above the statutory fee cap, provides that no authorization shall be given to exceed the cap, and further allow a registry attorney to be possibly terminated from representation or either the attorney registry list should they ask for excess fees. This is hardly what this court had envisioned when it decided *Makemson* and its progeny. Therefore, as explicitly

[17] The undersigned states that these statutes are in direct conflict with every principle and rule this Honorable Court had enumerated in said prior rulings during the last twenty years, including but not limited too: (1) impermissible legislative intrusion upon an inherent judicial function volatile of Fla. Const. Art. V, Sect. II, Art. III (2) Eighth Amendment violation of the U.S. Constitution (3) Equal Protection violation under Fla. Const. Art. I, Sect. II and, (4) Due Process violation under the Florida and U.S. Constitutions

enumerated in Fla. Stat. 27.711, Fla. Stat. 27.7002, and strictly followed by the payor, Financial Services, the statutory fee schedule cap prescribed to compensate registry attorney in their representation collateral death-sentenced individuals is inflexibly imposed, and thereby unconstitutional per se.

Additionally, the undersigned contends that Financial Services refusal and consistent inability to pay for fees in excess of the statutory cap in Fla. Stat. 27.711 does not comply with Florida's Constitution in another way. Under Under Fla. Const. Art. I., Sect. II, (2004) (Basic Rights), it states:

> "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability"

The aforementioned paragraph gives an inalienable right for all natural persons to be rewarded for industry, including the undersigned and like registry attorneys. However, in Fla. Stat. 27.711 and Fla. Stat. 27.7002, registry attorneys shall only be compensated within the statutory caps, there is no additional compensation above the cap, and if an attorney requests fees above the statutory cap, his is subject to termination from the registry

attorney list and therefore most representation of death-sentenced individuals. Having said this, Fla. Stat. 27.711 provides that when a registry attorney is appointed to a death-sentenced individual's case, "By accepting court appointment to represent a capital defendant, the attorney agrees to continue such representation under the terms and conditions set forth in this section until the capital defendant's sentence is reversed, reduced, or carried out, and the attorney is permitted to withdraw from such representation by a court of competent jurisdiction." Fla. Stat. 27.711(8).

Therefore, the Legislature and the statute contemplate and thereby presume that a registry counsel will remain, for numerous years, as the counsel for such individuals. However, if and when a circumstance arises during representation that a registry counsel requests excess fees, said statutes which provide for such fees explicitly condone such, and thereby state that no excess fees should be given or authorized. This problem, given the fact that "all death cases by there nature can be considered extraordinary or unusual," will almost certainly occur during some point in a counsel's representation, and therefore has a devastating effect in a myriad of ways.

First, an attorney that undertakes in representation is presumed to represent the individual through the collateral state appellate process, and therefore representing the individual for numerous years. If, for instance, an

attorney needs additional fees, like an expert witness to determine whether trial counsel was ineffective in failing to find mitigation, and attorney will need fees for both his attorney time spend in finding, deposing, talking to, etc., the expert, as well as paying the expert for his time. If an attorney is over the cap when this situation occurs and is not allowed to obtain additional fees, not only does the attorney pay the expert fees from his own pocket, but the attorney is forced to continually represent the individual for free or try to withdraw from the case with the looming possibility of being subsequently terminated from the registry list, which inevitably will cause havoc with his or her private practice one way or another.

Given the extraordinary amount of time it takes to represent such a death-sentenced individual, an attorney that runs out of statutory money and is not allowed to obtain more is almost forced to work as in indentured servant. The attorney will not receive any more fees, thereby representing the individual for free, and thereby losing thousands of dollars, if not hundreds of thousands of dollars, as well as loss of potential private clients, and time, effort, and energy used to help the privately retained clients that the attorney already has. Moreover, given the worst case scenario, the said Florida Statutes have the possibility of putting a well respected attorney into

debt, or worse, out of business (if an attorney represent five death-sentenced individuals, as does the undersigned).

The undersigned points to the following statement made in response to attorneys being under-compensated or not compensated at all, for their services, in support that said statutes are volatile of the Due Process Clause under the Florida and U.S. Constitution, and under Florida's Equal Protection Clause under Art. I., Sect. II:

> "To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic. The law which requires gratuitous services from particular class, in effect imposes a tax to the extent upon such class – Cleary in violation of the fundamental law, which provides for a uniform and equal rate of assessment and taxation upon all the citizens. *Knox County Council v. State*, 217 Ind. 493 N.E. 2d 405 (1940).

Furthermore, the death-sentenced individual undoubtedly will suffer with said current statutory scheme. If his or her attorney reaches the statutory cap, and is not allotted additional monies, the following could occur: (1) He or she will be grossly underrepresented, for example, for if a expert is needed to prove that his trial counsel was ineffective in introducing no mitigation, the inability to retain said expert because of lack of funds guarantees the issue will surely not be won in State court, and subsequently not in Federal Court, because such issue will be procedurally barred, and (2)

He or she has the possibility of losing the attorney that has represented him or her for many years, and whom has established a trust, bond, and a relationship (on a personal level and on a professional level).

In summary, such a rigid and inflexible statutory fee cap enumerated under Fla. Stat. 27.711 and Fla. Stat. 27.7002 is volatile of the Due Process Clause(s) of the Florida and U.S. Constitutions, as well as volatile of Florida's Equal Protection Clause under Fla. Const. Art. I, Sect. II (2004).[18]

CONCLUSION

In light of the aforementioned reasons, the undersigned respectfully requests this Honorable Court to affirm the trial court's award of attorney's fees and costs in excess of Fla. Stat. 27.711(4)(g).

Further, the undersigned requests that this Court declare all death-penalty cases, both at the trial level and at the collateral appellate level, be presumed to be either extraordinary and/or unusual, or both, thereby putting the burden to rebut such an excess of fees on Financial Services.

Additionally, counsel requests this Honorable Court to hold Fla. Stat. 27.711 and Fla. Stat. 27.7002 per se unconstitutional, because of the aforementioned reasons given, the statutes are voilative of the Due Process

[18] "Setting rigid and maximum fees without regard to the circumstances in each case is arbitrary and capricious and violates the Due Process clause of the U.S. and Florida Constitutions. *See* *Aldana v. Holub*, 381 So. 2d 321 (Fla. 1980).

Clause under the Florida and U.S. Constitutions, the Equal Protection Clause under Fla. Const. Art. I, Sect. II, as well as an impermissible legislative intrusion upon an inherent judicial function under Fla. Const. Art. V, Sect. II, Art. III, because they are being inflexibly imposed as described in Fla. Stat. 27.711 and Fla. Stat. 27.7002, and as applied by Financial Services.

ORAL ARGUMENT

The undersigned respectfully requests that Oral Arguments be held in regards to these issues.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S. Mail to all counsel of record on this ____ day of February, 2005.

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SUPREME COURT OF FLORIDA

CASE NO.: SC04-1492
Lower Tribunal No.: 16-1986 CF 11599

FLORIDA DEPARTMENT OF FINANCIAL SERVICES	vs.	**JOHN D. FREEMAN**
Appellant(s)		Appellee(s)

NOTICE OF CERTIFICATE OF COMPLIANCE AND AS TO FONT

I HEREBY CERTIFY that this Motion for Rehearing is submitted by Appellee, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellee, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in Appellee's Answer Brief.

_____

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IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA
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Tallahassee, Florida 32399-1927

FLORIDA DEPARTMENT OF FINANCIAL SERVICES,

Appellant,

vs.

Case No.: SC04-1492
L.T. Case No: 16 1986 CF 11599

JOHN D. FREEMAN,

Appellee.
_____/

APPENDIX TO ANSWER BRIEF IN RESPONSE TO APPELLANT'S INITIAL BRIEF