IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF FINANCIAL SERVICES,

Appellant,

vs.

Case No: SC04-1492
LT Case No: 16 1986 CF 11599

JOHN D. FREEMAN,

Appellee.

_____ /

INITIAL BRIEF OF APPELLANT

STATE OF FLORIDA DEPARTMENT OF FINANCIAL SERVICES

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PRELIMINARY STATEMENT

The following signals and abbreviations wil be employed in this Initial Brief:

Appellant State of Florida Department of Financial Services will be referred to as "the Department."

Appellee John D. Freeman will be referred to as "defendant Freeman." Mr. Freeman's court appointed registry counsel, Frank J. Tassone, Esq., will be referred to as "Mr. Tassone."

References to the Record On Appeal in this matter will be signaled by "R-" in parentheses followed by the appropriate page number cited. References to the Appendix attached to the Initial Brief will be signaled by "A-" in parentheses followed by the appropriate page number cited.

Unless otherwise indicated, all references to Florida statutes are to Florida Statutes (2004).

STATEMENT OF THE CASE AND OF THE FACTS

This case arises out of the court-appointed representation of capital defendant John D. Freeman by Frank J. Tassone, Jr., Esq. between November 12, 2003 (A-13), and April 26, 2004, the date of denial of the capital defendant's petition for writ of certiorari by the United States Supreme Court. Freeman v. Florida, 124 S. Ct. 2069 (2004). By an order dated July 8, 2003, Mr. Tassone was appointed by the Fourth Judicial Circuit from 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-1).

At the time of Mr. Tassone's appointment, Freeman's appeal of the trial court's denial of his motion for postconviction relief was pending before this Court, the Initial Brief, Answer Brief, and Reply Brief had already been filed in this Court and oral argument of counsel had already occurred.[1] On July 11, 2003, the lower court's order denying Freeman's motion for postconviction relief was affirmed by this Court. *See* Freeman v. State, 858 So. 2d 319 (Fla. 2003). On July 21, 2003, Mr. Tassone filed a motion for extension of time to file a petition for rehearing.[2]

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[1] The Department respectfully requests that this Court take judicial notice of the Clerk's Docket contained on the Florida Supreme Court website.

[2] Id.

Subsequently, the motion for an extension of time was granted by this Court and Mr. Tassone filed a motion for rehearing on October 31, 2003.[3] In the forty-two page motion for rehearing styled "Defendant's Motion for Rehearing" approximately twenty-two pages contained argument based on the United States Supreme Court's opinion in Ring v. Arizona.[4] On November 25, 2004, the motion for rehearing was summarily denied by this Court. Freeman v. State, 2003 Fla. LEXIS 2078.

On April 20, 2004, Mr. Tassone filed in the trial court a notice of hearing along with a motion for payment of attorney fees and miscellaneous expenses styled "Motion for Order of Payment of Attorney Fees" in the amount of $27,440.74 for work performed and expenses incurred on and after November 12, 2003. (R-1-2). The motion for attorney fees and miscellaneous expenses alleged in toto:

> 1. The undersigned counsel was appointed to represent the Defendant on July 1, 2003.
>
> 2. The undersigned counsel filed a Petition for Writ of Certiorari to the United States Supreme Court in a timely fashion.
>
> 3. Subsequent to filing the Petition for Writ of Certiorari, the undersigned counsel submitted a statement for payment of fees and costs to the Department of Financial Services in Tallahassee, Florida, in the amount of $20,069.82.

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[3] Id.

[4] The Department respectfully requests that this Court take judicial notice of the motion styled "Defendant's Motion for Rehearing" filed in this Court on October 31, 2003 in Case No. 01-2007.

4. On March 16, 2004, the Department of Financial Services advised the undersigned counsel that they would pay all of the miscellaneous expenses and only pay the sum of $2,500 as and for attorney's fees.

5. To date, the undersigned has not received payment for miscellaneous expenses or $2,500 in attorney fees for filing of Petitioner's Writ of Certiorari.

6. There is due and owing this Firm the sum of $20,069.82 for attorney's fees and miscellaneous expenses for filing the Petition for Writ of Certiorari.

7. The undersigned counsel filed Petitioner's Reply to Brief in Opposition to the United States Supreme Court in a timely fashion.

8. Subsequent to filing Petitioner's Reply Brief in Opposition, the undersigned counsel submitted a statement for payment of fees and costs to the Department of Financial Services in Tallahassee, Florida in the amount of $7,870.92.

9. There is due and owing this firm the sum of $27,440.74 for attorney's fees and miscellaneous expenses for filing of the Petitioner's Writ of Certiorari and Petitioner's Reply Brief in Opposition to the United States Supreme Court.

(R-1-2). In its prayer for relief, the motion stated:

WHEREFORE, the undersigned counsel respectfully requests this Honorable Court enter an Order authorizing the Department of Financial Services to effect payment out of the balance of attorney's fees and miscellaneous expenses due in this case.

(R-2).

On May 5, 2004, a brief telephonic hearing was held regarding the motion for attorney fees and miscellaneous expenses. (A-3-12). Counsel for the Department attended by telephone while Mr. Tassone and the trial court were in Jacksonville. (A-4). During the hearing, neither sworn testimony nor documents were entered into evidence; only argument of counsel was presented to the trial court. (A-3-12).

At the hearing, the court stated: "… apparently Mr. Tassone has a motion. You want to go over that?" (A-6). Mr. Tassone responded and represented to the court:

> I spoke to Mr. Thurber briefly about this. I filed a motion, and attached the billing statement to the motion which reflects that in preparation of the, the initial brief for the petition for writ of certiorari to the United States ` Supreme Court, and the reply thereto, we spent a total of $22,032 in attorney's fees, and had costs in the amount of $5,908.74, the total amount being $27,940.74…

(A-6-7).

The "billing statement" referenced by Mr. Tassone consists of two separate billing statements for work performed and expenses incurred in connection with Mr. Freeman's petition for writ of certiorari filed in the United States Supreme Court. (A-13,24). The first billing consists of $16,496.00 in attorney fees and an additional $3,573.82 in miscellaneous expenses totaling $20,069.82. The first three attorney entries on the billing for $950, totaling 9.5 hours appear to relate to a motion filed in the Florida Supreme Court relating to the motion for rehearing. The remaining 155.46 in attorney hours billed totaling $15,546 in attorney fees appear to all relate to the petition for writ of certiorari. Miscellaneous expenses are comprised of $1,797.75 for 71.91 hours of paralegal/research assistant time billed at $25 per hour; $1,338.07 for professional copying services related to the copying and filing of the petition for writ of certiorari; $138.00 for in house copying; and $300 for the United States Supreme Court docket fee. (A-13-24).

The second billing statement for attorney fees and miscellaneous fees appears to relate to the reply brief filed in the United States Supreme Court. (A-24-28). The second bill consists of 55.36 hours of attorney time totaling $5,536. (A-24-27). Miscellaneous expenses total $2,334.92 and comprise $137.50 for 5.5 hours of paralegal/research assistant time billed at $25 per hour; $1,829.42 for professional copying services related to the copying and filing of the reply brief; $60.00 for in house copying; $288.00 for Lexis/Nexis Research; and $20.00 for long distance telephone charges. (A-25,27).

At the hearing, Mr. Tassone continued by explaining the miscellaneous expenses incurred in Mr. Freeman's case to the trial court:

> The bulk of the costs, I think it was $1,800, or somewhere between $1,500 or $1,800 to get - you have to send them forty copies, and you have to have them bound in a certain way. The statute, the provision of the statute with regard to preparation of the petition for the writ of certiorari sets a cap of $2,500.

(A-7). In response, counsel for the Department reiterated to the trial court that the statutory cap under Section 27.711(4)(g), Florida Statutes for attorney time associated with the petition for writ of certiorari is limited to $2,500. (A-7). Counsel for the Department then attempted to clarify to the trial court that it appeared that nine and one half hours of the attorney hours billed on the first attorney billing appeared to be work performed prior to the capital defendant's

motion for postconviction relief became final in the Florida Supreme Court and appeared to be payable under Section 27.711(4)(f), Florida Statutes. (A-8).

In response to the Court's inquiry "Anything else?" (A-8). Counsel for the Department then raised the issues of reasonableness and extraordinary circumstances stating:

> Well, it actually goes to both reasonableness and that I haven't heard that there's been anything extraordinary in this case. The Florida Legislature set a cap at 25 hours in this for attorney's fees, for a maximum of $2,500. In this case we have been billed for over 200 hours on the work done, being performed for the petition for writ of certiorari in the United States Supreme Court. So, as a result, we, my agency feels that that is unreasonable.

(A-8). Mr. Tassone responded by arguing:

> I believe the Legislature in enacting this statue contemplated that the attorney who handled the petition of writ of certiorari to the United States Supreme Court would have handled the appeal to the Florida Supreme Court in response 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 writ of certiorari to the United States Supreme Court. That's exactly why it took those many hours.

(A-8-9). Counsel for the Department countered:

> [W]hen you review the billing it doesn't indicate that they were actually reviewing the boxes, the forty boxes…Instead it appears on the face of the billing that instead research is being done on case law and those types of things.

(A-10). The trial court then granted Mr. Tassone's motion in its entirety. The trial court stated:

> 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-10). Counsel for the Department then asked the trial court:

> "Your honor, may I move for clarification? I don't know where exactly we should put this funding under the statute?"

(A-10). The trial court responded:

> Well, sir, it doesn't matter to me where you put it, quite frankly. I'm not--you can do anything you want with it. You can appeal it, but what I'm saying is--Mr. Tassone is a very competent attorney, and in fact, I'm pleased he is 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. I'm going to sign this order for attorney fees.

(A-10-11).

The hearing concluded and on the same day, the trial court entered an order styled "Order on Motion for Payment of Attorney Fees" which is the subject of this appeal. (R-9). In the opening paragraph the Order stated:

> THIS CAUSE came before the Court on "Defendant's Motion for Order of Payment of Attorney's Fees" filed by Frank Tassone, Esquire, pursuant to Florida Statutes, Chapter 27.711(4)(a). A hearing was held before the Court on Wednesday, May 5, 2004. After hearing brief argument of counsel, and over the objection William J. Thurber IV, Esquire, Assistant General Counsel, Department of Banking & Finance and finding that the $2,500 statutory maximum would not be sufficient for the attorneys fees necessary

> for the preparation and filing of the Petitioner's Writ of Certiorari and Petitioner's Reply Brief in Opposition both to the United States Supreme Court, and otherwise fully advised in the premises, the Court Orders as follows:

(R-4). The Order on review concluded by stating the following:

> 1. The Defendant's Motion for Order of Payment of Attorney's Fees, is hereby granted.
>
> 2. The Department of Financial Services, Chief Financial Officer and/or Contract Manager, Bureau of Accounting and Auditing shall effectuate payment by warrant to Frank J. Tassone, Esquire in the amount of $22,032.00 for compensation of attorney's fees, and $5,908.74 for miscellaneous expenses, for a total payment of $27,940.74, or the balance of attorney's fees and miscellaneous expenses due in this case for compensation of attorney's fees and miscellaneous expenses, pursuant to Fla. Stat. Sec. 27.711 (4)(a)(d), and Fla. Stat. Sec. 27.711 (6).

(R-5).

On June 4, 2004, the Department of Financial Services served a Notice of Appeal regarding the trial court's Order dated May 5, 2004. (R-6-9). This Notice was filed by the Duval County Clerk on June 4, 2004. (R-6).

SUMMARY OF ARGUMENT

The final order on appeal departs from the essential requirements of law governing the payment of fees to court-appointed private attorneys in death penalty cases. Section 27.711, Florida Statutes, specifies the applicable compensation for registry participants appointed to represent death sentenced inmates. For purposes of this appeal, the controlling provision is Section 27.711 (4)(g), Florida Statutes, which allows a registry lawyer "$100 per hour, up to a maximum of $2,500, after filing a petition for writ of certiorari in the Supreme Court of the United States ." The fee and payment schedule in this section is the exclusive means of compensating a court-appointed registry attorney.

Each of eight statutory caps contained in Section 27.711(4)(a-h) embodies a separate legislative allotment to fund a discrete stage of typical postconviction capital collateral litigation. The registry lawyer's right to payment is expressly conditioned on his or her achievement of a specific milestone in the proceedings. Assuming that a registry attorney were to complete each stage of postconviction proceedings in accordance with Section 27.71 l(4)(a-h), Florida Statutes, he or she would be entitled to receive attorney's fees totaling $84,000. The Legislature intended this overall figure, and the eight intermediate "milestone caps" that comprise it, as maximum State remuneration for applicable representation by court-appointed registry lawyers. This subsection is an express legislative limitation

on the Department's independent statutory authority to pay attorney's fees to registry counsel.

In situations where maximum fee limits have been set at unreasonably low levels compared to the professional efforts expected on behalf of capital defendants, this Court has declined to apply caps that were confiscatory of the time and talents of counsel. *See* Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986). Statutory fee caps have not been invalidated by the Court as facially unconstitutional, but rather held unconstitutional *as applied* in specific factual circumstances where inadequate remuneration to counsel would be likely to compromise the Sixth Amendment rights of the capital defendant.

The Makemson rationale was expressly extended to the capital collateral context in Olive v. Maas, 811 So. 2d 644 (Fla. 2002). A registry lawyer is not "forever foreclosed" by the execution of the contract with the Chief Financial Officer required by Section 27.710, Florida Statutes, from securing state payment for hours worked that exceed a statutory cap, provided that the lawyer establish that because of unusual or extraordinary circumstances, under the facts and circumstances of his or her particular case, compensation within the statutory cap would be confiscatory of his or her time, energy and talent.

Notwithstanding clear decisional law relative to the compensation of registry counsel, and without reference to any factual or constitutional justification for the

trial court's action, the Order on review directs Appellant to pay $22,032.00 in attorney's fees –almost *nine times* the $2,500 fee allotment fixed by law for such service. The Order contains no specific finding with respect to the reasonableness of either the fees or expenses claimed by Mr. Tassone. Most importantly, 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. No separate discussion as to constitutionality of the application of the statutory cap is contained in the Order. No finding that unusual or extraordinary circumstances existed is found in the Order.

The lower tribunal made no express determination of whether the expenses for which Mr. Tassone sought reimbursement were reasonable. The order on review is facially erroneous because it failed to contain any finding on the reasonableness of the expenses in question. As to attorney's fees, 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. In direct consequence, the Order on review is erroneous as a matter of law. The Order must be reversed because the lower tribunal failed to apply the teaching of this Court in Olive v. Maas in granting an award of attorney's fees in excess of the limit specified by Section 27.711(4)(g), Florida Statutes.

STANDARD OF REVIEW

The standard of review is *de novo*: whether the order of the lower tribunal departed from the essential requirements of law.

ARGUMENT

THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW BY REFUSING TO APPLY THE STATUTORY MAXIMUM FEE LIMIT PRESCRIBED BY SECTION 27.711(4)(G), FLORIDA STATUTES, TO THE ATTORNEY'S FEE APPLICATION OF REGISTRY COUNSEL FRANK J. TASSONE.

The final order on appeal, issued May 5, 2004, and entitled "Order on Motion for Payment of Attorney's Fees" (R-4-5) ("the Order") clearly departs from the essential requirements of Florida law governing the payment of fees to court-appointed private attorneys in death penalty cases. Under Article IV, Section 4(c) of the Florida Constitution, the Chief Financial Officer is the chief fiscal officer for the State of Florida and the statutory head of the Department of Financial Services ("the Department"). *See* §20.121(1), Fla. Stat. (2004). The Chief Financial Officer's unenviable task of assuring faithful compliance with the compensation limitations of Chapter 27, Part IV, Florida Statutes, brings the Department before this Court as appellant to seek reversal of the order on review. See § 27.711(13), Fla. Stat.(2004).

Chapter 27, Part IV, Florida Statutes (2004), is a comprehensive program for public funding of postconviction counsel for death sentenced inmates. As first enacted in 1985, the program was carried out exclusively by state-employed counsel who undertook most, if not all, postconviction capital collateral representation under the statute. See § 27.701, Fla. Stat. (2004). In 1998, by Chapter 98-197, Laws of

Florida, the Legislature first established a registry of private attorneys willing to serve as court-appointed capital collateral conflict counsel under Section 27.703, Florida Statutes ("the registry").

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, specifies the applicable compensation for registry participants appointed to represent death sentenced inmates. In eight separate subsections, the statute provides that a registry lawyer "is entitled to $100 per hour" up to certain specified limits or "caps, " which caps correspond to the completion of significant and discretely-identified milestones in the course of postconviction litigation. For purposes of this appeal, the controlling provision is Section 27.711 (4)(g), Florida Statutes, which states as follows: "At the conclusion of the capital defendant's postconviction capital collateral proceedings in state court, the attorney is entitled to $100 per hour, up to a maximum of $2,500, after filing a petition for writ of certiorari in the Supreme Court of the United States ." It is plain that the Florida Legislature intended the fee provisions of Section 27.711(4) to be binding on registry participants and the Department. Section 27.711(3), Florida Statutes (2004), 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."

Section 27.711(4), Florida Statutes, embodies the Florida Legislature's sovereign determination of what the State of Florida, in ordinary circumstances, is prepared to pay a registry lawyer for the performance of legal services. Each statutory cap embodies a separate legislative allotment to fund a discrete stage of typical postconviction capital collateral litigation. Except for Section 27.711(4)(a), where newly-appointed counsel are entitled to $2,500 immediately, the lawyer's right to payment under each of the other seven subsections is expressly conditioned on his or her achievement of a specific milestone in the proceedings. For example, Section 27.71 l(4)(d), Florida Statutes, authorizes a registry lawyer to be paid by the Chief Financial Officer "up to a maximum of $20,000, after timely filing in the Supreme Court the capital defendant's brief or briefs that address the trial court's final order granting or denying the capital defendant's motion for postconviction relief and the state petition for writ of habeas corpus." It is clear that this structured, performance-based approach to payment is intended to encourage the expeditious completion of capital collateral litigation. See § 27.7001, Fla. Stat. (2004).

Assuming that a registry attorney were to commence and complete each stage of capital collateral postconviction proceedings in accordance with Section 27.71 l(4)(a-h), Florida Statutes, he or she would be entitled to receive attorney's

fees totaling $84,000. This no paltry sum, especially in light of the fact that the representation does not include the crucial and highly demanding trial and direct appeal stages of capital litigation. This is a far cry from the $500 available by law for capital trial represention by court-appointed counsel which this Court considered in the Makemson case. *See* Makemson v. Martin County Board of Cty Commr's, 491 So. 2d 1109 (Fla. 1986) (hereafter Makemson). It is clear that the Legislature intended this overall figure, and the eight intermediate "milestone caps" that comprise it, as maximum State remuneration for applicable aspects of capital collateral representation by court-appointed registry lawyers. *See* §27.7002(5), Fla. Stat. (2004). The Department must view and does construe this subsection as an express legislative limitation on its independent statutory authority to pay attorney's fees to court-appointed counsel.

The Makemson case and its progeny, including White v. Bd. of County Commr's of Pinellas Cty, 537 So. 2d 1376 (Fla. 1989), and Remeta v. State, 559 So. 2d 1132 (Fla. 1990), are emblematic of this Court's jurisprudence resolving the tension between the demands of justice and the constraints on public funding of court-appointed counsel in capital cases. In situations where maximum fee limits were set at unreasonably low levels compared to the professional efforts expected on behalf of capital defendants, this Court has declined to give effect to statutory caps that were, in application, confiscatory of the time and talents of

court-appointed counsel. *See* Makemson, *supra*, at 1112. Statutory fee caps have not been invalidated by the Court as facially unconstitutional, but rather held unconstitutional *as applied* in specific factual circumstances where inadequate remuneration to counsel would be likely to compromise the Sixth Amendment rights of the capital defendant. *See, e.g.*, White v. Bd. of County Commr's of Pinellas Cty, 537 So. 2d 1376 (Fla. 1989).

The White opinion underscored that the Court's paramount consideration was for the rights of the capital defendant rather than the financial expectations of the lawyer: "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." *Id.* at 1379-1380. In Makemson, this Court held that the statutory maximum fee cap can only be exceeded "when applied to cases involving extraordinary circumstances and unusual representation." 491 So. 2d at 1110. *Accord*, White, at 1380.

The Makemson rationale was expressly extended to the capital collateral context in Olive v. Maas, 811 So. 2d 644 (Fla. 2002). This Court held that a registry lawyer was not "forever foreclosed" by the execution of the contract with the Chief Financial Officer required by Section 27.710, Florida Statutes, from securing state payment for hours worked that exceed a statutory cap in extraordinary circumstances. Olive v. Maas, *supra*, at 654. This Court endorsed

the Makemson test as follows:

> [T]rial courts are authorized to grant fees in excess of the statutory schedule where extraordinary or unusual circumstances exist in capital collateral cases. To be sure, by so concluding, we do not purport to hold that fees in excess of the statutory cap will always be awarded to registry attorneys in capital collateral cases. Obviously the Makemson standard clearly envisions an "as applied" analysis. Instead, we simply hold 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.

Id. In notable contrast, however, this Court has refused to apply a Makemson rationale to invalidate the $100 hourly rate of Section 27.711(4), and reversed a lower court holding that did so. *See* State v. Demps, 846 So 2d 457 (Fla. 2003). *See generally* Sheppard & White, P.A. v. City of Jacksonville, 827 So. 2d 925 (Fla. 2002).

Notwithstanding this Court's clearly articulated decisional law relative to the compensation of court-appointed counsel, and without reference to any factual or constitutional justification for the trial court's action, the Order on appeal simply spurns the Florida Legislature's fee and payment schedule in the case of Mr. Tassone. Appellant suggests that this represents plain, reversible error on the part of the trial court.

As compensation for the filing by Mr. Tassone of "the Petitioner's Writ of Certiorari and Petitioner's Reply Brief in Opposition" on behalf of capital defendant

John D. Freeman in the Supreme Court of the United States., the Order, at R- 4,A-1, directs "the Department of Financial Services, the Chief Financial Officer and/or Contract Manager, Bureau of Auditing" to pay $22,032.00 in attorney's fees –almost *nine times* the $2,500 fee allotment fixed by law for such service. See § 27.711(4)(g), Fla. Stat. (2004). In addition, the Order, at R- 5, A-2, directed that Mr. Tassone also be paid $5,908.74 for "miscellaneous expenses." The Order recites that these payments are to be made "pursuant to Fla. Stat. Sec.27.711(4) (a) (d), and Fla. Stat. Sec. 27.711(6)." *Id.* (Underscoring in original.)

At the brief telephonic hearing concerning Mr. Tassone's motion held before the trial court on May 5, 2004, in Jacksonville, counsel for the Department duly objected to Mr. Tassone's request for fees in excess of the statutory limit. (A-7-8). Counsel stated:

> The Florida Legislature set a cap at 25 hours in this for attorney's fees, for a maximum of $2,500.00. In this case we have been billed for over 200 hours on the work done, being performed for the petition for writ of certiorari in the United States Supreme Court. So, as a result, we, my agency feels that this is unreasonable.

Notwithstanding the existence of the statutory cap, the lower tribunal granted Mr. Tassone's motion in its entirety. The trial court stated:

> 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-10) Department counsel then asked the trial court:

> Your honor, may I move for a clarification? I don't know exactly where we should put this funding under the statute?

The court rejoined:

> Well, sir, it doesn't matter to me where you put it, quite frankly. I'm not–you can do anything you want with it. You can appeal it, but what I'm saying is–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 am going to sign this order for attorney's fees.

(A-11) The hearing then concluded.

The Order contains no specific finding with respect to the reasonableness of either the fees or expenses claimed by Mr. Tassone. Most importantly, 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. No separate decretal paragraph relative to the constitutional application of the statutory cap is contained in the Order. Rather, only a run-on sentence in the opening paragraph of the Order even obliquely addresses the matter:

> [A]fter hearing brief argument of counsel and over the objection of William J. Thurber, IV, Esquire, Assistant General Counsel, Department of Banking and Finance [sic] and *finding that the $2,500.00 statutory maximum would not be sufficient for the attorneys fees* necessary for the preparation and filing of

> the Petitioner's Writ of Certiorari and Petitioner's Reply Brief in Opposition both to the United States Supreme Court, and otherwise being fully advised in the premises, the Court ORDERS as follows:

(R-4, A-1). (emphasis added).

The Department does not object to the reimbursement of Mr. Tassone for reasonable expenses necessarily incurred in having a petition for writ of certiorari printed and filed in the Supreme Court of the United States, assuming that Mr. Tassone was unable to obtain leave to proceed *in forma pauperis.* It is not clear at all, however, why a "Reply Brief in Opposition" was in order, given that the underlying petition for writ of certiorari was summarily denied by the Supreme Court of the United States. To the extent that any such expenses are deemed by the trial court to be reasonable and necessary in accordance with Section 27.711(13), Florida Statutes, they should be reimburseable, and the Department does not desire to erect any needless barriers to the process.

In the absence of a specific determination by the trial court that a registry counsel's claimed expenses are reasonable, however, it is difficult, at best, for the Department to make its own independent determination of the matter. The individual counsel, in the first instance, and, ultimately, the trial court are better positioned to explicate the reasonableness of expenditures by counsel in the context of postconviction proceedings. The Department has no special substantive expertise in capital collateral litigation that would enable it to second-guess the trial court's

determination with respect to such a matter, even if it were appropriate to do so. But if a trial court does not require the affected registry counsel to create a record to justify his or her expense reimbursements, then the Department's task in assuring compliance with Section 27.711 is frustrated.

In its consideration of Mr. Tassone's Motion, the lower tribunal made no express determination of whether the expenses for which Mr. Tassone sought reimbursement were reasonable. The order on review is thus facially erroneous because it failed to contain any finding on the reasonableness of the expenses in question. Section 27.711(6), Florida Statutes, establishes a $15,000 maximum limit on miscellaneous expenses incurred in a capital collateral representation, absent extraordinary circumstances. While, in this case, the overall total of expenses claimed falls under the cap, in other capital collateral proceedings expense claims regularly exceed the limit and invoke the need for express judicial determination of whether extraordinary circumstances warrant payment of the claimed expenses. It is not possible to discern from the face of the Order what expenses the trial court deemed reasonable in this case.

With respect to the issue of attorney's fees, however, neither Mr. Tassone's two page "Motion for Payment of Attorney Fees" (R-1-2), his billings (A-13-28), nor the Order on appeal satisfy the test set out by this Court in Olive v. Maas, *supra*, for exceeding the statutory maximum fee cap of Section 27.711(4)(g),

Florida Statutes. As quoted above at p. 19 of this Initial Brief, Olive v. Maas places on the registry lawyer who desires to exceed a cap the burden to "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." *Id*. at 654. Mr. Tassone did not even try to carry this burden, and the trial court did not make him try. In direct consequence, the Order on review that allowed Mr. Tassone to exceed the cap is manifestly erroneous. The Order must be reversed because the lower tribunal failed to apply the teaching of this Court in Olive v. Maas

in granting an award of attorney's fees in excess of the limit specified by Section 27.711(4)(g), Florida Statutes.

The "Motion for Order of Payment of Attorney Fees" contains no attempt whatsoever to justify why the $2,500 cap of Section 27.711(4)(g) should not apply. It contains no explanation of what "extraordinary or unusual circumstances" relative to Mr. Tassone's representation of defendant Freeman warranted the maximum fee cap's being considered unconstitutional as applied to Mr. Tassone; it does not even allege that "extraordinary or unusual

circumstances" existed. Rather, the Motion simply recites that Mr. Tassone was appointed, work was performed, bills were presented to the Department, and no

payment was received. Such a motion is not legally sufficient to justify exceeding a fee cap under Olive v. Maas, *supra*.

As to Mr. Tassone's billings to the Department, these do not independently show "extraordinary or unusual circumstances." They appear to disclose that a disproportionate amount of time was devoted to legal research, but offer no explanation as to why extensive additional research was necessary at this stage of postconviction proceedings. Under any circumstances, it was incumbent upon Mr. Tassone to justify why the statutory cap was unconstitutional, and the mere submission of billings claiming hundreds of hours worked does not demonstrate that the work in question was necessary.

Finally, the Order on review simply does not address the Olive v. Maas test, but rather provides only an unsupported, conclusional observation that "the $2,500.00 statutory maximum would not be sufficient." (R-4,A-1). This observation does not constitute a judicial determination that the statutory cap would be unconstitutional if applied in respect of Mr. Tassone's representation of capital defendant Freeman. It fails to point to any particular "extraordinary or unusual circumstances" that might render the maximum fee "not sufficient" and thus fails to meet the requirements of Olive v. Maas.

In comments at the hearing below, the trial court plainly indicated indifference towards the statutory "milestone cap" arrangement of Section 27.711(4), Florida

Statutes. See A-11, quoted in full at p. 21 above. In addition, the Order on review, in directing payment to Mr. Tassone by the Department, purports to justify the payment with garbled references to the statute in question. For example, it mentions "Fla. Stat. 27.711(4)(a)(d)," notwithstanding the fact that the representation at issue in no way involved either the initial action of newly-appointed counsel, *see* Section 27.711(4)(a); or the filing in this Court of "the capital defendant's brief or briefs that address the trial court's final order granting or denying post conviction relief and the state petition for habeas corpus." *See* Section 27.711(4)(d), Fla Stat.(2004). Unfortunately, the Department is without authority to consider the various statutory caps as mere legal niceties or interchangeable distinctions without practical difference. The Department is required by law to implement these distinctions and has no authority whatsoever to disregard them. To the extent that trial courts ignore the applicability of the caps and proceed to make fee awards to registry counsel without reference to this Court's decision in Olive v. Maas, the Department will continue to experience great difficulty in serving as paymaster for capital collateral representation in lawful conformance with its legislative mandate.

In the best legal judgment of the Department, the Order on review departs from the essential requirements of law by ignoring the applicable Olive v. Maas test for exceeding the statutory maximum fee limits of Section 27.711(4), Florida Statutes. If the Court determines this judgment to be correct, the Department

respectfully requests the Court to reverse the order on review and provide further guidance to the Department and all affected parties as to the appropriate procedures for payment to registry counsel who claim an entitlement to compensation that exceeds applicable statutory maximum fee caps.

CONCLUSION

Based on the foregoing, the order on review must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Initial Brief of Appellee State of Florida Department of Financial Services was furnished by U.S. Mail on January 27, 2005 to Frank J. Tassone, Esq., Tassone and Eler, 1833 Atlantic Blvd., Jacksonville, FL 32307; and Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050.

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CERTIFICATE OF FONT

I hereby certify that the foregoing Initial Brief of Appellee State of Florida Department of Financial Services was prepared using a 14 point Times New Roman font in accordance with Fla. R. App. P. 9.210(a)(2).

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