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.

_____ /

# REPLY BRIEF OF APPELLANT

## STATE OF FLORIDA DEPARTMENT OF FINANCIAL SERVICES

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## PRELIMINARY STATEMENT

The following signals and abbreviations will be employed in this Reply Brief:

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

Appellee John D. Freeman will be referred to as "defendant Freeman" or "Appellee." Mr. Freeman's court appointed registry counsel, Frank J. Tassone, Esq., will be referred to as "Mr. Tassone." References to the "Appellee's Answer Brief In Response To Appellant's Initial Brief" will be signaled by "Appellee's Brief" followed by the page number to which reference is made.

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).

## 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.

In its Initial Brief, the Department suggested that the order on review was legally insufficient to support an award of attorney's fees to a registry lawyer that was nearly nine times the amount authorized by law. At no time below did Mr. Tassone ever contend that the applicable statute, Section 27.711(4)(g), Florida Statutes, was unconstitutional, either on its face or as applied to the question of his compensation for the representation of defendant Freeman. The order on review does not find or conclude that Section 27.711(4)(g), Florida Statutes, was unconstitutional, either on its face or as applied to the question of Mr. Tassone's compensation for the representation of defendant Freeman. At no time below did Mr. Tassone establish--or even suggest--that extraordinary or unusual circumstances warranted a massive increase in the statutory fee for submitting a petition for a writ of certiorari to the United States Supreme Court. The order on review does not find or otherwise express a determination by the trial court that extraordinary or unusual circumstances required increased state compensation for Mr. Tassone.

Rather than confess obvious error, Appellee's Brief, for the first time on appeal, attacks instead the constitutionality of the entire statutory scheme for state compensation of registry counsel. Not only does Appellee's Brief implausibly insist that the order on review is consistent with this Court's opinion in Olive v. Maas, 811 So. 2d 644 (Fla. 2002), it also suggests–for the first time on appeal--that Sections 27.7002 and 27.711, Florida Statutes, are facially unconstitutional. Not only does the Appellee's Brief devote its primary thrust to constitutional arguments not preserved for appeal, it also fails to address the fundamental repugnancy of counsel's demand to be paid pursuant to a statute that he now asserts to be unconstitutional. Finally, Appellee's Brief, apparently desperate to bolster weak arguments, attacks the Department and its attorneys.

Turning first to the question of the Department's appellate role, Appellee's Brief offers overheated rhetoric that the Department is "overstepping its bounds," see Appellee's Brief, at p. 24, fn 11; and wants "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." See Appellee's Brief at p. 21. Without any foundation in fact or law, Appellee's Brief purports that this Court's Olive v. Maas opinion "was trying to create a solution to the problem of the consistent dispute between registry attorneys' [sic] and Financial Services." *Id.* Appellee darkly adverts to "the

constant disagreement and refusal by Financial Services in [sic] paying registry counsel in excess of what is allotted in the statutory fee schedule..." Appellee's Brief, at p. 28. Mr. Tassone complains that the Department's Initial Brief "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)[sic]." *Id.*, at p. 24, fn 11.

The Department rejects the notion that the instant appeal represents a vendetta against Mr. Tassone in particular or registry counsel in general. At issue here is a significant legal question: whether a lower tribunal may award to a registry lawyer fees that exceed the statutory fee schedule of Section 27.711, Florida Statutes, without making an express finding that it would be unconstitutional to apply the fee cap and that unusual or extraordinary circumstances warrant such an award. In light of this, it is unseemly for Appellee to personalize the dispute and attempt, with no record support whatsoever, to conjure for the Court an imaginary battle "that has resulted for numerous years and continues to grow between registry counsel" and the Department when no such "cold war" exists. See Appellee's Brief, at p. 23.

The unfortunate rhetoric of the Appellee's Brief starkly illuminates a point of law that Appellee appears not to comprehend: that the Department of Financial Services has no **independent** statutory authority to pay **any**

registry lawyer more than the amounts specified in Section 27.711, Florida Statutes. When, as here, there is no express determination by a trial judge that the statutory fee schedule would be unconstitutional if applied, the Department has no choice but to abide by the fee schedule and refuse to pay "registry counsel in excess of what is allotted in the statutory fee schedule." Appellee's Brief aims wholly unjustified umbrage at the Department and its "inexperienced" attorneys for supposedly "usurping [sic] the trial court's ruling, " Appellee's Brief, at p. 24, and being insufficiently respectful of the lower tribunal., *id*., at pp.23-24, merely because the Department has sought appellate review in this Court .

This case is only the third appeal ever taken to this Court by the Department regarding trial court orders awarding attorney's fees to registry lawyers in postconviction capital collateral proceedings. The first two appeals concerned fees awarded to appellate co-counsel in the matter of Demps v. State, 761 So. 2d 302 (Fla. 2000). This Court upheld the Department's position in the consolidated appeals *sub nom.* State v. Demps, 846 So. 2d 457 (Fla. 2003). It cannot rationally be contended that the Department's carefully considered decision to take an appeal in this matter represents some kind of "scorched earth policy" aimed at putting registry counsel out of business.

In each of the orders appealed by the Department in the State v. Demps litigation, the lower tribunals expressly invoked the rationale of Makemson v.

Martin County Bd. of Cty. Commr's, 491 So. 2d 1109 (Fla. 1986), to justify deviation upward from the limitations of Chapter 27, Part IV, Florida Statutes. In Makemson and its progeny, including Olive v. Maas, this Court has consistently recognized that the Florida Legislature has the constitutional authority to set fee schedules for state-paid counsel, except in unusual or extraordinary circumstances that adversely implicate the Sixth Amendment rights of capital defendants. This is why the Court has also recognized an "as applied" test as the appropriate benchmark for exceeding fees schedules set by law rather than invalidating the entire fee statute as unconstitutional on its face. By so holding, the Court has struck a just and proper balance between the Legislature's unquestionable, Florida constitution-based "power of the purse" and the impact of wholly inadequate compensation on the right to counsel of an indigent defendant. *See* Olive v. Maas, *supra*, at 654, where the Court concluded that the legislative history of the statute contemplated excess fees in unusual or extraordinary circumstances.

Appellee's argument in favor of the Order is no more than the lower tribunal meant to find circumstances supporting the attorney's fees application. Although the trial court never said the fee cap was unconstitutional and never declared it to be so in the Order, Appellee would have this Court conclude that all the trial court needed to do was to "discuss 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." Appellee's Brief, at p. 19. The Department respectfully suggests that nothing in the record of the lower tribunal's colloquy rises to the level of the required finding of unconstitutionality and unusual or extraordinary circumstances.

Appellee's Brief suggests that Olive v. Maas "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." Appellee's Brief, at p. 16. This suggestion is disingenuous.

Olive v. Maas expressly declared that registry counsel had the right to seek extra compensation if he or she could establish the applicability of the rationale first expressed by this Court in Makemson: "[S]tatutory maximum fees may be unconstitutional when they are inflexibly imposed in cases involving unusual or extraordinary circumstances. . . " *Id*., at 651. It is difficult to conceive how a trial court could ever invoke the Makemson rationale to excuse the application of the statutory fee cap except by the entry of an order that expressly held that the cap in question would be unconstitutional because of either (a) unusual or (b) extraordinary circumstances. *Cf.* Section 27.711(6) , Fla. Stat. (2004) ("[I]f the trial court finds that extraordinary circumstances exist, the attorney is entitled to payment in excess of $15,000" for miscellaneous expenses). Furthermore, Olive **v.** Maas "simply holds" that a registry counsel who desires to obtain compensation

above a statutory cap has the burden to "establish that, given the facts and circumstances of a particular case, compensation within the statutory cap would be confiscatory. . . and violate the principles outlined in Makemson and its progeny." *Id*., at 654. It is difficult to conceive how a registry counsel could ever "establish" for the record that his or her case involved "unusual or extraordinary circumstances" sufficient to invoke the "principles outlined in Makemson" without actually mentioning such words in a pleading to which the Department might at some time respond in accordance with Section 27.711(13), and without adducing facts sufficient to support a specific claim that the statute would be unconstitutional if applied to him in such circumstances.

If counsel fails to allege before the lower tribunal that a statute is unconstitutional as applied, the argument is waived on appeal. *See* State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993), *quoting* Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982). Merely asking for extra money does not represent a claim that the statutory fee limit is unconstitutional as applied.

In the absence of a constitutional infirmity in the statutory compensation scheme of Chapter 27, Part IV, that scheme is equally binding on the trial court and the Department. It is apodictic that both the executive and the judicial branches must apply statutes in accordance with legislative intent, called by this Court the "pole star." *See* Parker v. State, 406 So. 2d 1089, 1092 (Fla. 1982); Radio

Telephone Communications, Inc. v. Southeastern Tel. Co., 170 So. 2d 577 (Fla. 1964). The Department, as an administrative agency, a creature of the legislature, has no lawful power to "say what the law is." *See* Bush v. Schiavo , 885 So. 2d 321 (Fla 2004); Sims v. State, 754 So. 2d 657,668 (Fla. 2000). Even the Chief Financial Officer--a constitutional officer of Florida, elected statewide-- possesses no unrestricted discretion in administering his statutory duties. *See, e.g.*, Second District Court of Appeal v. Lewis, 550 So. 2d 522 (Fla. 1st DCA 1989). It is logically inescapable that only a court's express exercise of its inherent authority to vindicate a constitutional right opens the door to the setting aside of an otherwise valid statute. *See* Bush v. Schiavo, supra . If, as here, that uniquely judicial authority is neither expressly invoked by motion of counsel nor expressly applied by a valid trial court order in connection with an application for attorney's fees under Chapter 27, Part IV, then there is no lawful basis for the Department to make payment in excess of the statutory cap.

Appellee's Brief, at p.17-19, attempts to make much of Mr. Tassone's representation at the motion hearing below that he "got appointed after the denial of the [3.850 motion filed by CCRC-N] 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." Appellant did not then and does not now concede either the allegation or the suggestion that it

constitutes proof of "extraordinary circumstances." Most significantly, as stated below by counsel for the Department, the billings submitted by Mr. Tassone do not seek compensation for reading boxes of materials. (A-7-8) Rather, the billings seek payment for tasks that center on the research and drafting of a petition for certiorari.

For example, for the roughly two month period from November 24, 2003 through February 5, 2004, Mr. Tassone billed the State for 76.41 hours of research performed on 17 separate days during the period: $7641 at the statutory rate. See A-13-17 In comparison, during the roughly three week period January 27-February 19, 2004, Mr. Tassone billed the State for 75 hours of activities associated with drafting of the petition for certiorari: exactly $7500 at the prescribed rate of pay. See A-16-20. In addition to these hours expended prior to the filing of the petition on February 20, 2004, Mr. Tassone also billed the State for for a total of 55.41 hours, or $5461, associated with the review of the Attorney General's Response to the Freeman petition and the preparation and filing of a rebuttal brief during the 10 days between March 30, 2004 and April 9, 2004. (A-24-25). Over 206 hours--over 90 per cent of the billed attorney's fees-- were described on Mr. Tassone's billings in terms that have no apparent or obvious connection to reading 40 boxes of materials. In light of this, it is evident that the representation offered to the lower

tribunal constituted a less than exhaustive explanation for extensive billings that vastly exceeded the amount allotted by law for the filing of a petition for certiorari.

Appellee's Brief does not dispute that a disproportionate time was devoted to research, and, at p. 3-4, offers for the first time on appeal a justification that which was never mentioned to the lower tribunal:

> [T]hough 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 postconviction 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) [sic] 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.

Appellant respectfully suggests that the appropriate place for such an explanation in the first instance is before the lower tribunal, not in an Answer Brief in this Court. Contrary to the Appellee, Mr. Tassone's representation at the hearing below was not sworn "testimony" and was in no way "conclusive" in light of his actual billings. *See* Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So. 2d 1015 (Fla. 4th DCA 1982).

The Appellee's Brief offers 10 pages of argument directed towards the Appellant's single point on appeal. Fully 15 pages of the Appellee's Brief, however, is argument devoted to matters raised for the first time on appeal, matters which center on a claim that "the statutory fee schedule caps enumerated [sic] Fla.

Stat. 27.711 and explained in Fla. Stat. 27.7002 are not only unconstitutional as applied, but are unconstitutional on their face." Appellee's Brief at p. 30. (underscoring in original). Appellee would have the Court declare that all capital cases should be presumed "extraordinary and/or unusual" and therefore subject to no statutory fee caps, with attorney's fees to be determined in the sole discretion of the trial judge. Without explaining where "conclusive" contrary findings could come from, Appellee's Brief at p. 29 asserts: "[A] trial court award of fees in excess shall not be disturbed absent some conclusive finding to the contrary that such case is not extraordinary and/or unusual."

It is settled that a facial challenge to a statute's constitutionality may be raised for the first time on appeal only if the error is fundamental. *See* State v. Johnson, 616 So. 2d 1 (Fla. 1993); Trushin v. State, 425 So. 2d 1126 (Fla. 1982); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Sanford v. Rubin, 234 So. 2d 134 (Fla. 1970). Regarding new "as applied" challenges, the Johnson Court, at 616 So. 2d 3, quoted Trushin v State as follows: "The constitutional application of a statute to a particular series of facts is another matter and must be raised at the trial court level." *See* Trushin, supra, at 1129-30. Appellee did not raise the question of the constitutionality of any part of Chapter 27, Part IV below. No cross-appeal was filed. Under basic appellate law, these issues of constitutionality were waived because they were not preserved for appeal.

Appellee professes to attack the facial constitutionality of the only statutes that provide funds for State payment to registry counsel. Were this Court to declare void the challenged statutes, it would cut off the source of State funds and ensure that no registry counsel could be paid. This claim is therefore totally repugnant to the primary relief Appellee prays for in this tribunal: affirmance of "the trial court's award of attorney's fees and costs." See Appellee's Brief at p. 38.

Appellee's Brief reprises at length the argument made in the Olive v. Maas case that no limit should ever be placed on attorney's fees in capital cases, and repeatedly refers to the statement in White v. Pinellas County Bd. of County Comm'rs, 537 So. 2d 1376, 1378 (Fla. 1989) that "all capital cases. . . arguably justify an award of attorney's fees in excess of the current statutory fee cap." But the White opinion referred to the $3500 cap of Section 925.34 as applied to trial court representation of a capital defendant at the crucial guilt-or-innocence stage, not the considerably more generous caps of Chapter 27, Part IV. More importantly, this Court has already determined in Olive v. Maas that not every postconviction proceeding merits exceeding the caps of Section 27.711, Florida Statutes: "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." *Accord*, State v. Demps, 846 So. 2d 457 (Fla. 2003).

Appellee's Brief even goes so far as to ask this Court to place the burden of proof on the Department in registry fee disputes, branding the Department as an "indirect adversary to registry counsel," and even suggesting that allowing the "inexperienced" Department to decide "how much money a registry counsel shall be paid" [*i.e.*, by enforcing Section 27.711] "would be catastrophic to a death-sentenced defendant." Appellee's Brief, at p. 26. These claims are overblown rhetoric, and should be rejected by the Court.

In its intemperate assault on the State of Florida's payment program for registry counsel--and, regrettably, on its paymaster as well-- Appellee's Brief consistently misses that the statutory scheme of Chapter 27, Part IV, requires the Department to apply--inflexibly, to be sure--the maximum payment limitations set by law. Yet, as the Olive v. Maas opinion plainly states, the Legislature contemplated that caps could be exceeded under judicial supervision, because of unusual or extraordinary circumstances. Under this scheme, judicial intervention, not executive action, provides the flexibility needed to assure that caps are not "inflexibly" applied to the detriment of indigent defendants.

In the final analysis, Appellee's counsel encouraged the trial judge below--who, ironically, also served as lower tribunal in Olive v. Maas–to enter an Order in his favor that was inconsistent with the principles of Makemson as explicated in

Olive v. Maas. If the Court agrees with the Appellant on this dispositive point of law, it need only reverse and remand the Order.

## 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 Reply Brief of Appellant State of Florida Department of Financial Services was furnished by U.S. Mail on February 14, 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.

## CERTIFICATE OF FONT

I hereby certify that the foregoing Reply Brief of Appellant 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).

Richard T. Donelan, Jr.