IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-1452

MARTIN J. MCCLAIN,

Appellant/Petitioner,

vs.

THE HONORABLE JEFFREY H. ATWATER, ETC.,

Appellee/Respondent.

ANSWER BRIEF OF APPELLEE/RESPONDENT JEFFREY H. ATWATER, AS CHIEF FINANCIAL OFFICER

ON APPEAL FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

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PRELIMINARY STATEMENT

This Answer Brief will refer to the parties as follows:

Appellant/Petitioner, Martin McClain, will be referred to as "Mr. McClain" or "Appellant."

Death-sentenced Inmate Thomas James Moore will be referred to as "Mr. Moore."

Appellee/Respondent, Jeffrey H. Atwater, in his official capacity as Chief Financial Officer and agency head of the State of Florida, Department of Financial Services, will be referred to as "the CFO."

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

References to the record will be indicated by the page number to which citation is made, preceded by the symbol "R." to designate the Record on Appeal and the symbol "Supp. R." to designate the Supplemental Record on Appeal.

References to the Initial Brief of Petitioner will be indicated by the symbol "IB." followed by the page number to which citation is made.

Unless otherwise indicated, references to Florida Statutes are to Florida Statutes (2010).

Pursuant to Florida Rule of Appellate Procedure 9.210(c), no Statement of the Case and of the Facts is included in this Answer Brief.

SUMMARY OF ARGUMENT

I. The lower tribunal correctly applied the governing principles of controlling law when it required evidence to demonstrate that extraordinary and unusual circumstances warrant the reimbursement of excess investigative fees. The lower tribunal did not err when it found that the case of Mr. Moore was "ordinary." Nor did the court err when it held that the circumstances surrounding the excess investigatory costs incurred on Moore's behalf were not "extraordinary." Appellant attempts to draw a vain distinction between "case" and "circumstances" in order to overcome this Court's holding in Olive v. Maas. This illusory distinction should be rejected by this Court.

The lower tribunal's correct application of the rationale of Olive v. Maas is attacked by the Appellant as being inconsistent with the Makemson case which provided the underlying rationale for the original Olive v. Maas case, Olive, 811 So. 2d 644 (Fla. 2002). See IB. at 23, 25 - 26. Appellant makes much of the holding in Makemson that state-paid capital collateral representation cannot be "confiscatory of [court-appointed counsel's] time, energy, and talents." See Makemson v. Martin County, 491 So. 2d 1109, 1115, (Fla. 1986). But at issue here is not, as in Makemson, a constitutionally-prohibited withholding of payment to an attorney for his or her "time, energy, or talents." Appellant has been paid for all of his time expended in representing Mr. Moore. At issue here is only whether the

State is obligated to pay a private investigator an extra $1,844.00 for the reinvestigation of matters which he had already been paid $15,000.00 to investigate. The lower tribunal correctly applied the Olive v. Maas rationale to deny extra compensation for replowing plowed ground, ground which proved ultimately infertile to Mr. Moore anyway.

The lower court's finding that Mr. Moore failed to establish that extraordinary circumstances exist is entirely consistent with the standard established more than five years ago in Florida Department of Financial Services v. Freeman, in which this Court reversed an order issued by Chief Judge Moran – the same judge who issued the order under review here – awarding excess fees in another postconviction capital collateral case. In Freeman, the Court found that the fee award was not supported by competent, substantial evidence in the record from which the trial court might have concluded that extraordinary circumstances existed. Here, the judge required the submission of such evidence and, finding none, denied excess payment. The additional finding that the case itself is "an ordinary capital post-conviction case" logically flows from the finding that extraordinary circumstances do not exist, and so does not create substantial doubt as to whether the denial of excess payment is based on a misconception of controlling law.

II. The lower tribunal did not abuse its discretion in denying reimbursement of the requested excess fees. Circuit court judges have a superior vantage point from which to determine whether the evidence presented warrants excess payment. The absence of a dispute between the Department and Mr. McClain as to the substantive evidence presented in no way obviated the court's obligation to determine whether that evidence showed what it was offered to show - that extraordinary circumstances actually exist. Having presided over several capital collateral postconviction proceedings, the Chief Judge found that the uncontested evidence presented in Mr. Moore's case did not establish the existence of extraordinary circumstances which warranted excess payment. This finding falls squarely within the court's discretion, is entirely reasonable, and should be upheld.

STANDARD OF REVIEW

Point I involves the application of a known rule of law to the factual finding that extraordinary circumstances were not present in this case and as such, is subject to the clearly erroneous standard of review. See Fla. Dep't of Fin. Servcs. v. Freeman, 921 So. 2d 598, 601 (Fla. 2006).

Point II involves a question born of the circumstances of the individual case and, as such, is controlled by the personal judgment of the court, subject to review for abuse of discretion. See Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980).

ARGUMENT

I. THE LOWER TRIBUNAL CORRECTLY APPLIED THE GOVERNING PRINCIPLES OF CONTROLLING LAW WHEN IT REQUIRED EVIDENCE TO DEMONSTRATE THAT EXTRAORDINARY AND UNUSUAL CIRCUMSTANCES WARRANT THE REIMBURSEMENT OF EXCESS INVESTIGATIVE FEES.

The lower court did not misconstrue the controlling legal standard established in Olive and Freeman. Where, as here, the evidence is uncontested, the tribunal's application of the law to that evidence should only be reversed where the court's order "has demonstrably resulted from the judge's misconception of rules of law in their application to the particular facts offered in evidence in a case." Smith v. McEwen, 119 Fla. 498, 593, 161 So. 68, 69 (1935). In postconviction capital cases, this Court has clearly held that "only in those cases where counsel requests additional compensation due to extraordinary and unusual circumstances, the trial court issues an order awarding such fees, *and* there is competent, substantial evidence in the record to support fees in excess of the statutory limit will the statutory caps not apply."See Maas v. Olive, 992 So. 2d 196, 204 (Fla. 2008) (emphasis in original). The lower court's finding that "this is an ordinary capital post-conviction case" is entirely consistent with the finding "that the Defendant has not established that extraordinary or unusual circumstances existed" to warrant excess payment. (R. at 22). These findings do not indicate that the lower court

misconstrued the legal standard for awarding excess payment in a capital case; in fact, they demonstrate that the court clearly understood and followed that standard.

The factual finding that Mr. Moore's *case* is "ordinary" in addition to the finding that the *circumstances* are not "extraordinary" does not create substantial doubt as to whether the lower court based the denial of excess payment on a misconception of controlling law, and so does not warrant reversal. Knight v. City of Miami, 127 Fla. 585, 589, 173 So. 2d 801, 803 (1937). In opinions holding that courts may award excess payment in capital cases, this Court has recognized both "circumstances" and "cases" as extraordinary and unusual. For example, in Makemson v. Martin County, the Court held "it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual *cases*, departure from the statute's fee guidelines." Makemson v. Martin County, 491 So. 2d 1109, 1115 (Fla. 1986) (emphasis supplied).

Applying the Makemson rationale to postconviction capital collateral cases, the Court in Florida Department of Financial Services v. Freeman, stated "it is within the trial judge's discretion to grant fees beyond the statutory maximum to registry counsel in capital collateral cases when 'extraordinary or unusual *circumstances* exist.'" Fla. Dep't of Fin. Servs. v. Freeman, 921 So. 2d 598, 602 (Fla. 2006), citing Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002) (emphasis supplied). The use of the words "case" and "circumstances" interchangeably

demonstrates nothing more than an understanding that when extraordinary circumstances are present in a particular case, that case may itself be described as extraordinary.

II. THE LOWER TRIBUNAL DID NOT ABUSE ITS DISCRETION IN DENYING REIMBURSEMENT OF THE REQUESTED EXCESS FEES.

Throughout the CFO's stewardship of the registry program for court-appointed counsel, the CFO has always emphasized that the ultimate decisions as to the reasonableness of claimed expenditures rest with the trial courts responsible for the challenged convictions and not with the CFO. These decisions necessarily fall within the sound discretion of the lower tribunals. See § 27.711(13), Fla. Stat.

The lower tribunal's determination here that excess payment was not warranted is supported by competent, substantial, uncontested evidence in the record. This Court has refused to substitute its judgment for that of the motion court on questions of fact and the weight of the evidence. Arbelaez v. State, 898 So. 2d 25, 32 (Fla. 2005). This is in part because the lower court has a superior vantage point from which to review the case and the evidence presented. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Additionally, when a court reviews essentially similar cases - such as payment requests in postconviction collateral cases - it would be unreasonable not to reach essentially the same result. Id., at 1203. Requiring evidence of extraordinary circumstances in Mr. Moore's

case is reasonable in light of the decision that such evidence was necessary to support the payment request in Freeman.

The lower tribunal exercised its sound discretion to review the record and the uncontested evidence in order to determine whether to grant the motion seeking excess payment. In his motion, Appellant sought reimbursement of $4,164.00 in investigative fees which, when added to investigative fees already reimbursed, exceeded by $1,844.00 the $15,000.00 authorized by section 27.711(5), Florida Statutes, for the reimbursement of investigative fees in postconviction collateral proceedings. (R. at 1 - 5). The Department did not approve payment of the excess fees. (R. at 6). However, because "some cases merit payment in excess of the statutory limits," Appellant was entitled to seek approval of the excess if he met his burden to demonstrate that extraordinary circumstances warranted payment. See Fla. Dep't of Fin. Servs. v. Freeman, 921 So. 2d 598, 602 (Fla. 2006); Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002). Following the filing of the motion for reimbursement and a telephonic hearing on the motion, Chief Judge Moran issued an order finding that Appellant had not met this burden, and denied the motion. (R. at 22).

The lower court having found that he failed to demonstrate that the excess was warranted, Appellant now seeks to have this Court find that the lower court ruling is unsupported by competent, substantial evidence, is therefore

unreasonable, and should be reversed. See Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) ("If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion."). This he cannot do, because the lower tribunal's factual findings are entirely consistent with the provisions of Mr. McClain's own contract, the statutes governing payment, and this Court's previous decisions concerning excess payment in postconviction capital collateral proceedings. See Fla. Dep't of Fin. Servs. v. Freeman, 921 So. 2d 598, 602 (Fla. 2006); Olive v. Maas, 811 So. 2d 644, 654 (Fla. 2002).

When an attorney accepts appointment and executes a contract with the CFO to represent an inmate, he agrees to be bound by the statutory allowances and the terms and conditions of the contract he signed. *See* § 27.710(3), Fla. Stat. Mr. McClain is only entitled to the statutory and contractual fees to which he agreed when he accepted appointment. Anything more must be supported by competent, substantial evidence that extraordinary and unusual circumstances in Mr. Moore's case warrant the excess. Freeman, at 602. As evidence of extraordinary and unusual circumstances, Appellant offered the following in his motion seeking an order approving reimbursement:

> Accordingly, undersigned counsel submits in this motion that because of the need to interview so many witnesses who had been incarcerated with Mr. Clemons and Mr. Gaines in preparing the Rule 3.851 motion in 2005-06, and the[] need to [] investigative services in connection

> with the March 22, 2011, evidentiary hearing regarding what these witnesses had advised the investigator, including lengthy testimony from the investigator, himself, "extraordinary circumstances" are present which justify payment of the $1,844 for investigative fees which exceed the statutory cap.

(R. at 3).

Based on this argument and the transcript of the evidentiary hearing held on March 22, 2011, the lower tribunal exercised its discretion to find that "this is an ordinary capital post-conviction case, involving an evidentiary hearing." (R. at 22). Given that section 27.711(4)(c), Florida Statutes, allows up to $20,000.00 for representation after the court grants a motion for an evidentiary hearing, it is reasonable for the court to have found that it is not unusual or extraordinary to hold an evidentiary hearing on a postconviction motion. The lower court's refusal to hold the State responsible for funding Appellant's decision to conduct a new round of "investigation," "records review," and "prison visitation," prior to the evidentiary hearing is entirely reasonable.

In addition to showing that a particular capital case is extraordinary as compared to other capital cases, a registry attorney who voluntarily accepts appointment and signs a contract should also show that the extraordinary circumstances were unforeseeable at the time he accepted the representation. <u>See</u> <u>Sheppard & White, P.A. v. City of Jacksonville</u>, 751 So.2d 731, 733-36 (Fla. 1st DCA 2000), <u>approved</u>, 827 So.2d 925 (Fla.2002). As Justice Cantero explained in

his concurring opinion in Freeman, "Olive strongly suggests that attorneys who sign a contract with the Department that incorporates the statutory fee schedule may recover compensation above the statutory caps only for work that was *unforeseeable* at the time of contracting. Unless counsel can show that circumstances have somehow changed from the time he signed the contract, and that he should not reasonably have anticipated that change, Olive requires that he be held to the terms of his bargain." Fla. Dep't of Fin. Servs. v. Freeman, 921 So.2d 598, 608 (Fla. 2006) (Cantero, J., concurring) (emphasis in original).

The lower court's finding that the need to conduct an evidentiary hearing in a capital postconviction case is not unreasonable. It is not unreasonable for the court to have found find that, having accepted appointment and signed a contract to represent Mr. Moore, Appellant should be reimbursed in accordance with the terms of the statutory limits and his contract. Because these reasonable findings are wholly within the court's discretion, the order on review should be upheld.

CONCLUSION

Based on the foregoing, Appellee/Respondent requests that the order on appeal be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was furnished by U.S. Mail on January 9, 2012, to Martin J. McClain, McClain & McDermott, P.A, 141 NE 30th Street, Wilton Manors, Florida 33334.

____

Lori L. Jobe

CERTIFICATE OF COMPLIANCE

I certify that this computer generated Answer Brief is prepared in Times New Roman 14-point font and complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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Lori L. Jobe