IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-1452

MARTIN J. MCCLAIN,

Petitioner,

v.

THE HONORABLE JEFFERY H. ATWATER,

Respondent.

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

INITIAL BRIEF OF PETITIONER

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 NE 30th Street
Wilton Manors, FL 33334
(305) 984-8344

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court;

"Supp. R. ___" - Supplemental record on appeal.

All other citations will be self-explanatory or will otherwise be explained.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

A. Procedural History

On May 28, 2011, Petitioner served a motion for reimbursement of counsel for his representation of Thomas James Moore. Petitioner has served as Mr. Moore's court-appointed registry counsel since 2004 (R. 2). The motion was filed after Petitioner had submitted a billing to the Department of Financial Services for attorney fees, investigative fees and miscellaneous expenses arising between April 24, 2006, and May 16, 2011.[1] Attached to the motion was the Department's response approving payment of the billing as to $23,250.00 in attorney fees, $6,498.78 in miscellaneous expenses, and $2,320.00 in investigative fees. The Department did not approve payment of $1,844.00 in investigative fees explaining:

[1]In this billing, Petitioner had notified the Department of Financial Services that he was seeking $23,250.00 in attorney fees, $6,498.78 to reimburse counsel for miscellaneous expenses, and $4,164.00 to reimburse counsel for investigative fees (R. 12). Petitioner had submitted previous billings for which he received reimbursement for attorney fees, investigative fees and miscellaneous expenses arising between the time of his appointment and April 24, 2006.

> With the approval of $2,320 for investigative fees in the letter, you will have already been paid and approved to be paid $15,000 under this section. Consequently, the Department lacks authority to approve your request for the additional $1,844 for investigative fees or to authorize payment absent specific judicial findings that your request is both reasonable and that extraordinary circumstances in your case justify the excess payment.

(R. 6).

A Rule 3.851 motion had been filed on January 26, 2006 (R. 2). In the Rule 3.851 motion, Petitioner on behalf of Mr. Moore had pled new information that his investigator had uncovered through interviews of numerous witnesses, many of whom had been incarcerated with Mr. Moore's co-defendants, Carlos Clemons and Vincent Gaines (R. 2).[2]

---

[2]The State's case at Mr. Moore's trial came down to two witnesses - Carlos Clemons and Vincent Gaines, both of whom had been charged as co-defendants in the murder of Johnny Parrish. The State called Mr. Clemons to testify that he saw Mr. Moore commit the homicide. He was the only witness who claimed to have seen the homicide. His credibility was a central issue at the trial. At Mr. Moore's trial, the State also called Mr. Gaines to testify that while he acted as a lookout, he observed Mr. Moore and Mr. Clemons enter Mr. Parrish's house. He testified after hearing two shots, he saw Mr. Clemons run from the house (Moore trial transcript 545, 548). Moore v. State, 701 So. 2d 545, 547 (Fla. 1997). Mr. Moore testified on his own behalf and disputed the testimony of both Mr. Clemons and Mr. Gaines.

In this Court's opinion on direct appeal affirming the conviction and death sentence, it explained the facts of the case in the following fashion:

> Moore was convicted of robbing and killing Johnny Parrish - - an adult resident of his neighborhood - - and burning down Parrish's house. The two were friends, and Moore occasionally visited Parrish's

After the filing of the Rule 3.851 motion in early 2006, numerous case management hearings had been conducted before Senior Judge John D. Southwood, the judge who had presided at Mr. Moore's trial. Twice Petitioner as Mr. Moore's counsel had been ordered to provide more specific details regarding the new evidence claim contained in the motion. The Rule 3.851 motion had been amended on July 30, 2008 (R. 7). A court-ordered addendum had been filed on or about September 25, 2009 (R. 8).

> home. On January 21, 1993, at about 3 p.m., Moore sat outside Parrish's house drinking with the victim. Moore claims that two other youths, Clemons and Gaines, approached the house. Moore claimed he saw the pair chase a neighborhood youth named "Little Terry" with a gun earlier that day, but Clemons denied it at trial. Clemons and Gaines testified that they had a conversation with Moore about robbing Parrish. Clemons said he agreed to go in the house with Moore, and Gaines was to be the lookout. Gaines said he stood outside but did not see either man go in. He said he heard two shots and then saw Clemons come out of the house and go back in. When Gaines started to walk away, Clemons caught up with him and told him Moore had shot Parrish.
>
> Clemons said that when he and Moore went into the house, Moore pulled out a gun. Moore asked Parrish where his money was and then shot him when he got no response. Later, neighbors saw smoke in Parrish's house and ran in and pulled out Parrish. Parrish was already dead when exposed to the fire, and a fire investigator, Captain Mattox, said that there were two separate fires in the house, both of which were intentionally set.

Moore v. State, 701 So. 2d at 547.

Depositions of Carlos Clemons and Vincent Gaines had been conducted on February 24, 2011 (R. 8, 206-07, 219-20). An evidentiary hearing on the Rule 3.851 motion had been ordered. It was held on March 22, 2011, before the Honorable John D. Southwood (R. 29). A motion for leave to amend the Rule 3.851 motion in light of testimony at the evidentiary hearing was filed on April 6, 2011.[3]

[3]The motion to amend the Rule 3.851 motion sought leave to add a claim premised upon the March 22nd testimony of Carlos Clemons and Vincent Gaines. In that testimony, both Mr. Clemons and Mr. Gaines gave sworn testimony that contradicted the trial testimony and Petitioner argued in the motion to amend the testimony demonstrated that the State had knowingly presented false evidence when those witness had testified at Moore's 1993 trial.

Mr. Moore's written closing argument was submitted on April 28, 2011 (R. 8).

On June 3, 2011, after the motion for reimbursement was filed, a notice of hearing was entered as to the reimbursement motion. This notice announced that the motion would be heard on June 21, 2011, before Chief Judge Donald R. Moran (R. 19).[4]

On June 21, 2011, the hearing on the motion for reimbursement was conducted telephonically. As the parties have stipulated:

[4]Chief Judge Moran had not presided at the March 22nd evidentiary hearing. He is not the judge before whom the Rule 3.851 motion is pending. It also should be noted that the record on appeal prepared by the Clerk of the Circuit Court erroneously lists Judge Adrian Soud as the presiding judge. However, Judge Soud did not preside over the motion for reimbursement, nor over the evidentiary hearing and the pending Rule 3.851 motion. It is a mystery as to why Judge Soud's name appears on the record on appeal.

> 5. During the June 21st hearing, Mr. McClain relied upon his written motion for reimbursement and the court record in *State v. Moore*, including the transcript of the March 22nd evidentiary hearing before Judge Southwood. At the evidentiary hearing, the investigator, Daniel Joseph Ashton, had testified as to the work that he had performed on Mr. Moore's behalf since becoming involved in the case in early 2005. His testimony was presented to demonstrate due diligence on Mr. Moore's behalf in connection with new evidence that Mr. Ashton located from his interviews of numerous witnesses over the years. He detailed the work that he had done in investigating Mr. Moore's case and the various leads that he had unearthed. Mr. McClain argued that Mr. Ashton's testimony at the evidentiary hearing, as well as the testimony from the various witnesses he had located who were also called to testify, established that his billing was reasonable and that extraordinary circumstances justified payment of the investigative fees at issue.
>
> 6. At the June 21st telephonic, Lori Jobe on behalf of the Department of Financial Services asserted that the Department's position remained as set forth in the letter to Mr. McClain which was dated May 19, 2011, and was attached to the motion for reimbursement, *i.e.* the Department lacked authority to approve fees that would exceed statutory caps "absent specific judicial findings that your request is both reasonable and that extraordinary circumstances in your case justify the excess payment."
>
> 7. Before taking the matter under advisement after allowing the parties to state their positions, Chief Judge Moran indicated that Mr. McClain had erred in failing to comply with the policy in his circuit requiring attorneys to obtain pre-approval of investigative fees in excess of the statutory cap.

(Supp. R. at 6-7).[5]

[5]Attached to the motion for reimbursement was Mr. Ashton's billing invoice dated April 2, 2011 (R. 13-18). It showed that Mr. Ashton, who billed at the rate of $40 per hour, worked 104.1 hours on behalf of Mr. Moore between February 2, 2011, and March 23, 2011. This work was done in connection with the March 22nd evidentiary hearing. Of the hours billed by Mr. Ashton, over 60

On June 24, 2011, Chief Judge Moran entered an order denying the motion for reimbursement in part. The portion of the motion for reimbursement that was denied was the portion requesting $1,844.00 for reimbursement of the investigator's fees (R. 21). The order denying reimbursement of these fees provided in pertinent part:

---

hours were worked the week of the evidentiary hearing itself (R. 15-16).

1. Defendant's counsel served as post-conviction counsel pursuant to a contract with the Department of Financial Services;

2. The Motion alleges that the investigator was one of the main witnesses at the post-conviction evidentiary hearing on March 22, 2011;

3. The investigative fees and expenses have exceeded the maximum statutory cap, pursuant to § 27.711(5), Florida Statutes;

4. The Department of Financial Services (which is responsible for payment) and the State Attorney's Office did not object to the request for fees in excess of the statutory cap, but pursuant to Florida Statutes § 27.711(13), the fact that the Department has not objected to the billing, is not binding on the Court;

5. In order for this Court to approve the excess fees, such fees must be reasonable pursuant to Florida Statute §27.711(13);

6. In order for the attorney to be entitled to the excess fees, this Court must also find that "extraordinary circumstances" exist, as required by Florida Statute §27.711(6);

7. This Court finds that this is an ordinary capital post-conviction case, involving an evidentiary hearing, and that the Defendant has not established that extraordinary or unusual circumstances existed that would have warranted an extra $1,844.00 in investigator's fee over and above the $15,000.00 already spent, as required by Florida Statute § 27.711(6). Therefore, it is

ORDERED AND ADJUDGED that:

1. The Motion for Reimbursement of Counsel for His Representation of the Defendant is **DENIED**, and the request for the $1,844.00 investigator's fees is not approved.

2. In the future, counsel for Defendant must seek the Court's prior approval for extraordinary expenses that are expected to exceed the statutory maximum for fees and expenses, before they are expended.

(R. 21-22).[6]

On Monday, July 25, 2011, Petitioner filed a notice of appeal in the circuit court seeking to appeal the order denying reimbursement of the investigative fees in excess of the statutory cap to this Court.

B. Relevant Facts

On September 10, 2003, Petitioner was appointed as registry counsel for Thomas James Moore pursuant to §27.710, Fla. Stat. (R. 1). Petitioner and the Department of Financial Services formally executed a contract regarding Petitioner's representation of Mr. Moore on March 11, 2004.

At the time that Petitioner was appointed to represent Mr. Moore, Mr. Moore's appeal from the denial of a Rule 3.851 motion premised upon Ring v. Arizona, 122 S. Ct. 2428 (2002), was pending before this Court.[7] Petitioner filed a reply brief on Mr. Moore's behalf in April of 2004. Shortly thereafter, this Court issued an order on June 7, 2004, affirming the denial

---

[6]Since Mr. Ashton billed at the rate of $40 per hour, the denial of $1,844.00 in fees translates into 46.1 hours of time.

[7]The Office of the Capital collateral Regional Counsel for the Northern Region had previously represented Mr. Moore until its demise on June 30, 2003. John Jackson, an Assistant CCRC-North, had acted as Mr. Moore's lead attorney and filed Mr. Moore's initial Rule 3.851 motion in 1999 (R. 146-47). After this motion was ultimately summarily denied by the circuit court, Mr. Moore through CCRC-North appealed to this Court. This Court affirmed the summary denial of the initial Rule 3.851 in 2002. Moore v. State, 820 So. 2d 199 (Fla. 2002).

of Mr. Moore's Ring claim. Moore v. State, FSC Case No. SC03-489.

In early 2005, Petitioner contacted Daniel Ashton, a private investigator, and asked him if he was available to work on Mr. Moore's case (R. 163). After Mr. Ashton indicated that he was, he began his investigation. He then obtained "investigator boxes, prior boxes from investigators or attorneys" who had previously worked on Mr. Moore's case (R. 164). This included "the investigator boxes which would have been compiled by previous CCRC investigators" (R. 164). Mr. Ashton testified that he was sure that this included "the trial attorney files or at least copies of the trial attorney files" (R. 164). Mr. Ashton got the "record on appeal" from Mr. Moore's direct appeal (R. 164). This included "everyone's testimony" (R. 164).

Mr. Ashton "reviewed all of the records that I had that were supplied to me, came up with a list of names, talked with Mr. Moore, with [Petitioner], family members" (R. 164). After getting familiar with all of these records, Mr. Ashton conferred with Petitioner in order to map out a plan as to how to proceed. According to Mr. Ashton,

> there seemed to be a number of names that came up periodically throughout the records that I had reviewed and I'm sure I discussed with Mr. McClain, you know, which of these people had been seen, which

> people should we see at this point and a list was generated, and then I just systematically went through the list of individuals that we decided were important to speak with.

(R. 165).

Included on the list of people to speak to were Mr. Moore's co-defendants: Carlos Clemons and Vincent Gaines (R. 165). Mr. Ashton located Mr. Gaines and went to Century Correctional Institution to speak with him in February of 2005 (R. 166).[8] During this interview, Mr. Gaines made statements to Mr. Ashton regarding Mr. Moore's case "that were inconsistent with his trial testimony" (R. 176).[9] In fact, Mr. Gaines told

---

[8]The notes from this interview were dated February 21, 2005, and introduced into evidence during the State's cross of Mr. Ashton (R. 190).

[9]Mr. Gaines had testified at Mr. Moore's trial and denied seeing Mr. Clemons chase Little Terry with a gun and in so doing maintained that Mr. Moore's trial testimony was not true:

> Q Mr. Gaines, around noontime or shortly thereafter on the date of Mr. Parrish's death, did you go to Grand Park with Carlos Clemons?
>
> A No, sir.
>
> Q At about that same time did you observe Mr. Clemons with a chrome-plated .38 in his possession?
>
> A No, sir.
>
> Q Did you see a young fellow whose nickname is Little Terry that day?
>
> A Not that I remember.

Mr. Ashton that he "believe[d] the gun that killed Mr. Johnny was a .38 that Carlos had." (R. 187).[10] Nearly a year later in

---

(Moore trial transcript 568-69). However, Mr. Gaines told Mr. Ashton something quite different. He revealed he was in fact with Mr. Clemons when Little Terry was chased at Grand Park:

> Q Now, you were asked about whether you had told an investigator about having a gun and chasing Little Terry. Do you recall that?
>
> A Yes, I recall that.
>
> Q Did that come up in the discussion with the investigator at all?
>
> A Yes, it did.
>
> Q And what did you tell the investigator about the Little Terry incident?
>
> A I told him we chased Little Terry but we didn't have a gun.
>
> * * *
>
> Q Okay. But you definitely recall chasing Little Terry?
>
> A Yes, I do.
>
> Q And you recall Mr. Clemmons was part of that?
>
> A Right.

(R. 225-26)(Within the March 22nd evidentiary hearing transcript, Mr. Clemons' name is consistently misspelled as "Clemmons"). This statement was in direct conflict with Mr. Gaines' testimony at Mr. Moore's trial. This change in Mr. Gaines' story meant that he confirmed Mr. Moore' trial testimony, as opposed to refuting it.

[10]Mr. Ashton testified that Mr. Gaines "told me that he and Carlos Clemmons chased Little Terry around the neighborhood with

early 2006, Mr. Ashton again spoke with Mr. Gaines at Century Correctional Institution after he conducted numerous interviews of other individuals who had been incarcerated with Mr. Gaines and Mr. Clemons (R. 176).[11]

Mr. Ashton testified that a note from the public defender's file made reference to Charles Simpson (R. 166-67).[12] This note which was dated 2/5/94 referenced a conference with Mr. Simpson in the Duval County Jail regarding information he had about a gun involved in Mr. Moore's case (R. 167). Mr. Ashton was successful in locating Mr. Simpson and interviewed him at Charlotte Correctional Institution in 2005 (R. 127,

---

a chrome-plaed .38 which was stolen from a black Mustang from a person named Tat in an apartment complex and that Carlos Clemmons had that .38 when he went into Mr Johnny's house" (R. 185).

[11]Mr. Ashton's notes from the second interview of Mr. Gaines were dated January 4, 2006 (R. 189). These notes were introduced into evidence and read aloud during the cross of Mr. Ashton (R. (189-90). According to these notes, Mr. Gaines told Mr. Ashton that during Mr. Moore's trial "a male courtroom bailiff told him that Angela Corey [the prosecuting attorney] was pissed at him for lying" (R. 189). Mr. Gaines told Mr. Ashton that "the only thing he lied about was chasing Little Terry with a gun" (R. 189-90).

[12]Mr. Moore's trial counsel was with the Public Defender's Office and the public defender's files on Mr. Moore had been provided to CCRC-North when Mr. Jackson with that office represented Mr. Moore prior to its closure in 2003 (R. 154).

169).[13] During this interview, Mr. Simpson told Mr. Ashton about the juvenile pod at the Duval County Jail in which he, Mr. Clemons, and Mr. Gaines had been incarcerated during the 1993-94 time period (R. 170). Both Carlos Clemons and Vincent Gaines were incarcerated on the sixth floor when Mr. Simpson arrived.[14] Mr. Simpson had gone to school with Mr. Clemons, and he knew Mr. Gaines "[f]rom the hood" (R. 123-24). Mr. Clemons told Mr. Simpson "[t]hat the older guy took the rap" (R. 125).[15] Mr. Simpson gave Mr. Ashton a list of "names of people that he might also talk to that [he] remembered were also incarcerated" with Mr. Clemons and Mr. Gaines in the Duval County Jail in the 1993-

---

[13]Mr. Jackson, who had represented Mr. Moore until the closure of CCRC-North, testified that he was aware of the name Charles Simpson and had "absolutely" wanted to interview him, but had been unable to do so (R. 154).

[14]During the cross of Mr. Gaines by Petitioner at the March 22nd evidentiary hearing, he confirmed that Mr. Simpson was incarcerated in the same pod with him and Mr. Clemons in 1993 (R. 226).

[15]During the State's cross-examination of Mr. Simpson at the March 22nd evidentiary hearing, the following exchange occurred:

> Q What specifically are you saying that you're saying under oath right now is the truth, Mr. Simpson?
>
> A That he wasn't the guy. He wasn't the guy that shot that dude.

(R. 134). Mr. Simpson also testified during the State's cross-examination that he "knew who the triggerman was" and he knew that to be "Carlos, the 13 year old" (R. 136).

94 time period (R. 127). Mr. Simpson testified that this list of names included "Raimundo Hogan, Mandell Rhodes, Junior Foster. I think a Darryl Jenkins" (R. 127).[16]

Thereafter, Mr. Ashton located Mandell Rhodes and spoke to him (R. 171).[17] Mr. Rhodes did not know Mr. Moore (R. 96). However, Mr. Rhodes did recall having conversations with Mr. Clemons, Mr. Moore's co-defendant, while they were incarcerated together. Mr. Clemons told Mr. Rhodes that "he was the one who did it" (R. 98). According to Mr. Rhodes, Mr. Clemons said: "I shot him" (R. 98).

Mr. Ashton also located Raimundo Hogan (R. 171). Mr. Ashton interviewed Mr. Hogan in 2005 at Tomoka Correctional Institution (R. 119). Mr. Hogan also did not know Mr. Moore (R. 119). However, Mr. Hogan had been incarcerated with Mr. Clemons and Mr. Gaines in the juvenile pod at the Duval County Jail in 1993 (R. 111-12).[18] According to Mr. Hogan, Mr. Gaines had told him when they were incarcerated together that:

---

[16]Mr. Ashton was not asked to testify to the number of interviews he conducted of witnesses that did not lead to pertinent evidence that could be presented in support of Mr. Moore's motion to vacate.

[17]Prior to his interview of Mr. Simpson, Mr. Ashton had not seen any reference any where in Mr. Moore's files and records regarding the name Mandell Rhodes (R. 171).

[18]During Petitioner's cross of Mr. Gaines on March 22nd, he recalled knowing Raimundo Hogan from county jail. To the best

of his recollection, the only time that he could have been incarcerated with Mr. Hogan in the juvenile pod of the Duval County Jail in 1993 (R. 227).

> him and Clemmons robbed the dude, Clemmons shot him, and then I asked him, you know, what you all going to do. He say they were going to put it on somebody else. He was like, we ain't got no choice, because the dude they're going to blame it on, he's a nobody.

(R. 113).[19] Mr. Hogan explained what "he's a nobody" meant:

[19]Within the March 22nd evidentiary hearing transcript, Mr. Clemons' name is consistently misspelled as "Clemmons".

> Well, he ain't really got no family, no friends going to take, you know, get some get-back when they tell on him. That's a nobody.

(R. 113).[20](R. 113).

[20]Mr. Hogan explained that "get-back" meant:

> Well, if I tell on somebody, your family members find out that I told on you, they going to want to kill me or do something bodily harm me. With Moore, there was no fear. He didn't have nobody in his family that they were scared of.

According to Mr. Hogan, Mr. Gaines explained "that actually the reason they robbed him because the dude supposed to be selling drugs" (R. 114). Mr. Gaines also told Mr. Hogan that "Clemmons shot him" (R. 114). When Mr. Hogan asked with what, Mr. Gaines "said a .38" (R. 114). Later when Mr. Hogan was talking with Mr. Clemons, he asked him "did he really shoot the dude and he said yeah" (R. 114).

Mr. Ashton also interviewed David Hallback, Jr. (R. 172). Mr. Hallback's "name had appeared in the files that were turned over to" Mr. Ashton (R. 172). In the public defender's files there was a note concerning an interview of Mr. Hallback in the summer of 1993 (R. 173).[21] Mr. Hallback told Mr. Ashton

[21]This note referred to Mr. Hallback as someone with pertinent information. After Mr. Clemons told Mr. Hallback that Mr. Moore was not there when the crime occurred, Mr. Hallback who was Mr. Moore's first cousin, told his grandmother about the conversation with Mr. Clemons (R. 62). She then told the attorneys representing Mr. Moore, and shortly thereafter, two men who indicated they were representing Mr. Moore arrived at the jail to talk with Mr. Hallback about his conversation with Mr. Clemons (R. 63-64, 75-77). Introduced at the March 22nd evidentiary hearing as Defense Exhibit 3 was a document from Moore's public defender's files reflecting that "either 7 or 9/2 of '93, conference at jail with David Hallback, Jr., and it listed a case number that he must have been in jail on" (R. 173). In fact, Mr. Moore's collateral counsel in the 1999-2003 time frame, John Jackson, had sought to speak with Mr. Hallback regarding this note because it indicated that Mr. Hallback "had some information about some statements that Mr. Clemons had made" (R. 159-60). However, Mr. Jackson's investigator at the time spoke to the wrong David Hallback, speaking to the senior as opposed to the junior (R. 173).

that, when he was a juvenile, he was incarcerated with Carlos Clemons in the Duval County jail on the sixth floor (R. 48-49).[22] Mr. Hallback was already in the jail facility when Mr. Clemons arrived in early 1993 (R. 49-50). Mr. Clemons recognized Mr. Hallback from school and began talking with him shortly after his arrival on the 6th floor (R. 51). Mr. Clemons discussed his case with Mr. Hallback because "he was very scared about his charges" (R. 52). In this conversation, Thomas Moore's name came up:

[22]Carlos Clemons in his testimony on March 22nd did remember that he had been incarcerated with David Hallback (R. 212). This was after passing Mr. Hallaback in the hallway outside the courtroom before being called to testify on March 22nd (R. 210).

Q But did - - did Carlos Clemons mention Thomas Moore to you?

A Well, when we discussed about the case, you know.

Q What did he tell you about Thomas Moore?

A Well, basically he was saying that he wasn't - - I asked him myself like, you know, where was - - where was this other guy at and he was like, well, he had left because he had to wait for him to leave.

Q Okay. And did he explain why they needed to wait for him to leave? Well, let me back up. Where did he leave from, according to Mr. Clemons?

A He left from - - I guess from the scene of the crime or whatever.

Q Okay.

A He left before all this had happened.

Q Okay.

A Because basically he was saying that that was - - Thomas was the old man's best friend, they was always hanging out together, always around there.

Q Okay. And so then after he left, then what did Mr. Clemons - - after Thomas Moore left, what did Mr. Clemons say happened?

A Well, basically say they - - I guess they went back to the house or whatever. They didn't say, you know, what - - they did or anything. He didn't go on and that, you know, he did anything. He just said that Thomas had to leave, they had to wait on him to leave because they - - you know, Thomas wasn't going to let them do that.

Q Okay. And did he indicate that Thomas Moore didn't have anything to do with the crime?

A Yeah. Well, basically he said he wasn't there.

(R. 52-54).

Mr. Ashton also located and spoke to Randy Jackson in early 2005 (R 175). Mr. Jackson made statements to Mr. Ashton that impeached Mr. Jackson's testimony at Mr. Moore's trial.[23] Mr. Ashton testified regarding Mr Jackson's statements to him that impeached his testimony at Mr. Moore's trial:

[23]At the March 22nd evidentiary hearing, Judge Southwood sustained a hearsay objection to Mr. Ashton testifying to the statements that Mr. Jackson made to him that impeached his testimony at Mr. Moore's trial (R. 176). Mr. Moore's collateral counsel thereupon sought to proffer Mr. Jackson's statements to Mr. Ashton. When Judge Southwood ruled that it would not permit a proffer, the State interceded saying, "Judge, if the Court doesn't mind, we would prefer just for purposes of future litigation that they go ahead and proffer [Mr. Jackson's statements to Mr. Ashton]" (R. 179).

> Q And what did Mr. Jackson relay to you about Mr. Parrish's murder?
>
> A What I specifically remember him telling me was that he wanted to be paid for his testimony, that he was previously paid for his testimony by the State, that his brother and father were also paid for their testimony, and that if I showed him the money he would tell me what I wanted to know. And then I remember him making a statement about Thomas, that there were people a lot guiltier than Thomas out on the street, and that was pretty well where the conversation ended, I believe.

(R. 180).[24]

Mr. Ashton also spoke with and interviewed Wilhelmenia Moore, Thomas Moore's mother (R. 85-87). Ms. Moore testified at the March 22nd evidentiary hearing concerning a conversation that she had with Chris Shorter, a witness the State called at Mr. Moore's trial. According to Ms. Moore, Mr. Shorter approached her after Mr. Moore's conviction while she was pumping gas at a filling station. Mr. Shorter said, "I don't mean no harm, but I had to do what I had to do because I had to think about my children." (R. 58). Ms. Moore testified that she reported this conversation to Mr. Ashton when he interviewed her (R. 87-89).

Another witness called at the evidentiary hearing was Michael Allen Dean, who was Randy Jackson's half-brother and who

[24]During the cross of Mr. Ashton and not as a part of Mr. Moore's proffer, the State chose to ask Mr. Ashton "who on behalf of the State paid Randy Jackson?" (R. 181). The State elicited testimony from Mr. Ashton that Mr. Jackson simply "said they paid me, they paid me every time I came to court." (R. 181-82).

had testified on behalf of the State at Mr. Moore's trial. Mr. Ashton had also interviewed Mr. Dean.[25]

Mr. Ashton was, himself, called as a witness at the March 22nd evidentiary hearing and testified at length regarding his work on behalf of Mr Moore.[26] During the cross-examination, the State was critical of Mr. Ashton for failing to do more investigative work. For example, the State asked Mr. Ashton "And what action did you take against Vincent Gaines back in 2005 to pursue perjury charges against him?" (R. 184). The State also asked "what action did you take, based on these other crimes you're claiming you have evidence of" (R. 183). The State inquired about why Mr. Ashton did not tape record his interviews (R. 190-92). The State inquired about Mr. Ashton's failure to obtain the services of a court reporter to transcribe Mr. Gaines' statements to him (R. 181). The State inquired about Mr. Ashton's failure "to track down anything to with that chrome-plated .38?" (R. 193).[27]

---

[25]During the State's cross of Mr. Ashton, he was asked regarding his interview of Michael Dean (R. 183).

[26]At the March 22, 2011, evidentiary hearing Mr. Moore called seven witness: David Hallback, Jr., Michael Allen Dean, Wilhelmenia Moore, Mandell Rhodes, Raimundo Hogan, Charles Simpson, John Jackson, and Daniel Ashton (R. 30-31). The State called two witnesses: Carlos Clemons and Vincent Gaines (R. 31).

[27]Mr. Ashton testified that "I asked every single person I interviewed if they knew where the gun came from and where it

During the cross of Mr. Ashton, he was questioned about the fact that he had also interviewed "Little Terry Ashley who told me he was being chased by Carlos Clemmons with a gun" (R. 194). Mr. Ashton's understanding was that Mr. Clemons "chased Little Terry the same day as the murder" with a gun that Mr. Gaines said was a chrome-plated .38 (R. 194).

At the conclusion of the evidentiary hearing, Judge Southwood advised the parties that the evidence that he had heard concerned him:

> THE COURT: I'm not sure yet what I can tell you. Okay? I have to make a decision as to whether or not - - I don't necessarily have to determine the truthfulness of any or all of these witnesses. I will tell everybody. For what it's worth, that all of this testimony concerns me. Okay? I'm not at this point in time ready to absolutely disregard all of the testimony I've heard. I may. But the cumulative effect concerns me of the testimony. So for whatever that's worth to you.

---

went and I would have done everything I could have to track it down, if I could have found the gun." (R. 193).

(R. 238).

STANDARD OF REVIEW

The issue presented in this appeal is one of law. The evidence presented by Petitioner was uncontested. The only issue was whether the uncontested evidence presented established "extraordinary or unusual circumstances" within the meaning of Florida Department of Financial Services v. Freeman, 921 So. 2d 598 (Fla. 2006). The circuit court's refusal to find "extraordinary or unusual circumstances" within the meaning of Freeman as to uncontested and uncontroverted evidence is subject to *de novo* review by the Court, particularly in light of the circuit court's reasoning in which it denied reimbursement because Petitioner failed to demonstrate this was anything other than "an ordinary capital post-conviction case." (R. 22).

SUMMARY OF THE ARGUMENT

The circuit erroneously required Petitioner to establish that Mr. Moore's case was something more than an ordinary capital case in order to receive reimbursement of investigative fees in excess of the statutory cap. The uncontroverted and uncontested evidence demonstrated that extraordinary and unusual circumstances were present in Moore's capital case which justified exceeding the statutory cap on investigative fees. Accordingly, this Court should find that

the uncontroverted and uncontested evidence justified reimbursement of investigative fees in excess of the statutory cap.

ARGUMENT

THE CIRCUIT COURT'S REFUSAL TO FIND EXTRAORDINARY OR UNUSUAL CIRCUMSTANCES EXISTED IN MR. MOORE'S CAPITAL POSTCONVICTION CASE WAS ERROR IN LIGHT OF THE UNCONTESTED EVIDENCE PRESENTED BY PETITIONER.

In Florida Department of Financial Services v. Freeman, 921 So. 2d 598, 599-601 (Fla. 2006), this Court held:

> Section 27.711, Florida Statutes (2005), governs the payment of fees to appointed counsel in postconviction capital proceedings, and is the "exclusive means of compensating a court-appointed attorney who represents a capital defendant." *Id.* § 27.711(3). Section 27.711(4) outlines the maximum amount an attorney is entitled to be compensated at each stage of the postconviction process.
>
> * * *
>
> This Court has held that 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." *Olive v. Maas*, 811 So.2d 644, 654 (Fla.2002). In *Olive,* this Court held that fees in excess of the statutory cap are not always awarded to registry counsel in capital collateral cases; however, registry counsel is not foreclosed from requesting excess 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.; see also Makemson v. Martin County,* 491 So.2d 1109 (Fla.1986).

Makemson is the seminal case for determining whether appointed counsel in capital cases is limited to the compensation provided within the statutory schemes set forth by the Legislature. At issue in *Makemson* was the constitutionality of a statute that set a fee schedule for compensation to attorneys who represented capital defendants at the trial and during direct appeal stages. This Court held that the statute was not unconstitutional on its face, but further indicated the statute could be unconstitutional if applied "in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused." *Makemson,* 491 So.2d at 1112. This Court then explained that the trial court may depart from the statutory fee caps and award excess fees "in extraordinary and unusual cases ... to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents." *Id.* at 1115. Inadequate compensation could create an economic disincentive for appointed counsel to spend more than a minimum amount of time on the case and discourage competent attorneys from agreeing to represent indigent capital defendants. In effect, such a lack of competent attorneys could jeopardize an indigent defendant's constitutional right to the effective assistance of counsel. While the defendant's right to effective representation was the main focus of the *Makemson* decision, this Court nonetheless reasoned that counsel's right to fair compensation was inextricably intertwined with that right. *Id.* at 1112.

The *Makemson* rationale, that compensation of counsel and the effectiveness of counsel are inextricably intertwined, was applied in the capital collateral context in *Olive.* That rationale is also expressed in the legislative staff analysis to chapter 99-221, Laws of Florida, which clearly articulates the Legislature's concern with the fee caps in capital collateral cases. The legislative history states specifically that "where unusual or extraordinary circumstances exist, the fees caps established by s. 27.711(4), F.S., and increased by the provisions of this bill, do not prevent a court from ordering payment above the maximum authorized." Fla. S. Comm. on Crim. Just., CS for SC 2054, Staff Analysis 7

> (March 17, 1999) (on file with the comm.); *see also Olive,* 811 So.2d at 653; *Arbelaez v. Butterworth,* 738 So.2d 326, 328 (Fla.1999) (Anstead, J., specially concurring).

Accordingly, this Court explained the procedure to be followed when duly appointed registry counsel seeks reimbursement which is "in excess of the statutory limits":

> While an attorney assigned to represent a death row inmate for the first time at the federal appeal stage may face extraordinary or unusual circumstances requiring many hours of work to justify payment in excess of the statutory limits, the attorney has the burden of establishing facts in support of such an award. The record in this case, however, provides no evidence upon which the judge could rely to determine if extraordinary or unusual circumstances existed to support an award of excess fees. The record in this case consists of only nine pages comprising the motion for an order of payment of attorney's fees, the notice of hearing, the order on the motion for payment of attorney's fees, and the notice of appeal. While the transcript of the hearing includes arguments of counsel, no sworn testimony was presented. There is no discussion of what was contained in the boxes of record or how many volumes pertained to postconviction proceedings as opposed to those proceedings on direct appeal, etc. The billings were not verified, there is no testimony regarding the propriety of the time submitted in the billings, and there is no testimony from any expert as to the extraordinary or unusual aspects of Tassone's representation.

Freeman, 921 So. 2d at 601-02.

Unlike the circumstances in Freeman, here Petitioner presented uncontested evidence in support of his position that "extraordinary or unusual circumstances" existed which justified payment of Mr. Ashton's investigative fees that exceeded the

statutory cap. As Chief Judge Moran noted in his order denying reimbursement, Petitioner relied upon the evidence presented at the March 22, 2011, evidentiary hearing as establishing "extraordinary or unusual circumstances" were present (R. 21). Also as noted by Chief Judge Moran, the State did not object to or contest the evidence presented by Petitioner. As a result, the question presented in this appeal is whether the uncontested, uncontroverted evidence presented in support of Petitioner's motion for payment of Mr. Ashton's investigative fees in excess of the statutory cap establish "extraordinary or unusual circumstances exist[ed]" which justified payment of such fees. After being presented with the uncontested and uncontroverted evidence, Chief Judge Moran found "that this is an ordinary capital post-conviction case, involving an evidentiary hearing" (R. 22). In describing Mr. Moore's case as "an ordinary capital post-conviction case", Chief Judge Moran clearly construed this Court's ruling in Freeman as allowing reimbursement in excess of the statutory caps only upon a finding that the case for which reimbursement was sought was an extraordinary or unusual capital case. However, that is not what this Court held, nor is it consistent with this Court's case law.

The principle that the statutory caps may be breeched when "extraordinary or unusual circumstances" exist arises not from the statutory language in § 27.711, but from this Court's jurisprudence. This was explained when this Court addressed the concern that the statutory caps could not be exceeded that had been raised by the registry attorney in Olive v. Maas:

> His concern is based on a series of cases from this Court which, in short, provide that statutory maximum fees may be unconstitutional when they are inflexibly 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 assistance of counsel. See *Makemson v. Martin County*, 491 So.2d 1109 (Fla.1986); *see also White v. Board of County Commissioners of Pinellas County,* 537 So.2d 1376 (Fla.1989). For example, in *Makemson,* the Court addressed the constitutionality of section 925.036, Florida Statutes (1981), setting fee caps on compensation provided to attorneys who represented defendants at trial and first appeal as a matter of right. The Court held that, although the statute was not unconstitutional on its face, the statute was "unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused." *Makemson,* 491 So.2d at 1112. The opinion added:
>
> > [I]t is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the accused is not compensated in an amount which is confiscatory of his or her time, energy and talents.
>
> *Id.* at 1115. The *Makemson* Court also focused greatly on a defendant's constitutional right to the effective assistance of counsel, reasoning:

> Most fundamentally ... [a mandatory fee cap] interferes with the sixth amendment right to counsel. In interpreting applicable precedent and surveying the questions raised in the case, we must not lose sight of the fact that 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.

Id. at 1112.

Olive v. Maas, 811 So. 2d at 651-52.

This Court's reliance in Olive upon White v. Board of County Commissioners of Pinellas County, 537 So. 2d 1376 (Fla. 1989), is especially significant here. There, the court-appointed attorney in a capital case sought reimbursement in excess of a statutory cap. The circuit court found that the capital case to which Mr. White had been appointed "was not sufficiently 'complex' to meet [the extraordinary or unusual] standard" this Court had adopted in Makemson. White, 537 So. 2d at 1378. In reversing, this Court held:

> 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 maximum fee cap. Thus we must determine the circumstances under which the judiciary should exercise its inherent power and exceed the statutory maximum fee cap in order to award compensation in an amount which is reasonable in light of an attorney's professional obligation to provide services to the indigent and not "confiscatory of his or her time, energy, and talents."

Id. This court elaborated:

In this case, an award of attorney's fees capped by the statutory maximum equals a fee of to $26.12 per/hour ($3500-134 hrs.). This fee is far from reasonable compensation for the attorney who, in the words of the *Makemson* trial court, has "the dreadful responsibility of trying to save a man from electrocution." 491 So.2d at 1111. As Justice Ervin said in his dissent in *MacKenzie v. Hillsborough County,* 288 So.2d 200, 202 (Fla.1973) (Ervin, J., dissenting), which this Court approved in *Makemson:*

> No citizen can be expected to perform civilian services for the government when to do so is clearly confiscatory of his time, energy and skills, his public service is inadequately compensated, and his industry is unrewarded.
>
> ....
>
> I do not believe that good public conscience approves such shoddy, tawdry treatment of an attorney called upon by the courts to represent an indigent defendant in a capital case.

However, if the statutory cap is exceeded and fees awarded based upon the local prevailing hourly rate for indigent cases, the compensation would be "reasonable" and would then balance the state's constitutional obligation and the attorney's ethical obligation.

We are mindful of the potential burden placed on county treasuries as a result of departure from the statutory maximum fee cap. However, since the State of Florida enforces the death penalty, its primary obligation is to ensure that indigents are provided competent, effective counsel in capital cases. As this Court stated in *Makemson:*

> In order to safeguard the individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.

491 So.2d at 1113.

Id. at 1379.

The issue under Freeman is not whether Mr. Moore's case was or is an extraordinary or unusual capital case.[28] The issue under Freeman is whether the case presented "extraordinary or unusual circumstances" that justify reimbursement in excess of the statutory caps. Chief Judge Moran failed to employ the correct standard which was adopted in Freeman when he denied reimbursement for Mr. Ashton's investigative fees that exceed the statutory cap by $1,844.00.[29]

---

[28]The standard employed by Chief Judge Moran assumes that there is an ordinary capital case which serves as a base line for measuring whether the case in which reimbursement is sought is comparatively extraordinary or unusual. This is a different standard than evaluating the circumstances presented in an individual case and determining whether those circumstances were or are extraordinary or unusual. In this latter standard, the fact that a case is a capital case is but one circumstance that may make the case extraordinary or unusual such that exceeding the statutory caps is justified.

[29]Though Chief Judge Moran did not specifically rely upon the failure to seek prior approval to deny reimbursement of the $1,844.00 at issue, it clearly was of concern to him since he criticized counsel's failure to obtain prior approval during the June 21st hearing and he included a paragraph in his order directing counsel to obtain prior approval in the future (R. 22). However, requiring prior approval, something that is not statutorily mandated, creates all sorts of knotty issues. For example here, there was no reason to be concerned about the statutory cap on investigative fees until the evidentiary hearing was ordered in January of 2011 and set to occur within sixty days. Even then, it was not a certainty that the investigative fees would exceed the cap. Seeking approval to exceed the statutory cap on the eve of a court ordered

In Mr. Moore's case, CCRC-North originally provided the capital collateral representation. However when that office was legislatively shuttered, a new investigator, Mr. Ashton, was necessary. He had to learn the case from scratch. He had to physically obtain all the records previously received and reviewed by CCRC-North staff. He then had to study those records himself searching for investigative leads. From those leads, Mr. Ashton had to then begin locating and interviewing witnesses who may have possessed information pertinent to building a case on behalf of Mr. Moore that could challenge the validity of the judgment and sentence.

Certainly, the fact that Mr. Moore had two co-defendants who testified for the State at Mr. Moore's trial and were able to plead to reduced charges was a significant circumstance which warranted serious investigation. And when Mr. Ashton began investigating that aspect of the case, multiple leads appeared which lead to the need to find and interview numerous individuals, many incarcerated in various prisons around the State of Florida. Those individuals when interviewed

---

evidentiary hearing could easily be construed as an effort to leverage a continuance. If the State Attorney's Office got wind of it and obtained the pleadings seeking prior approval or attended a hearing held on the request, that office could in essence obtain nonreciprocal discovery from registry counsel's efforts to insure reimbursement of fees and expenses.

provided additional leads and names of other individuals to interview. This was a time consuming process which provided the basis for the filing of a successive Rule 3.851 motion premised primarily upon newly discovered evidence within the meaning of Jones v. State, 591 So. 2d 911 (Fla. 1991).

After the Rule 3.851 motion was filed in 2006, reimbursement was sought for Mr. Ashton's investigative fees. These fees were within the statutory cap and were found to be reasonable and were paid. However, five years later the presiding judge concluded that an evidentiary hearing was warranted on the newly discovered evidence claim. This required Mr. Ashton to again locate the relevant witnesses and assist counsel in making sure of their availability to testify in court to what they had previously told Mr. Ashton. In addition, it was clear that at the evidentiary hearing Mr. Ashton was a necessary witness as to the manner in which the witnesses were located and the diligence of Mr. Moore's collateral litigation team. Thus in preparing for evidentiary hearing, Mr. Ashton also had to review his files and records as to the investigative work he had conducted six years before in order to be prepared to provide the requisite testimony.

When the presiding judge determined that an evidentiary hearing was necessary in January of 2011, the State

had insisted that the evidentiary hearing be conducted immediately. This led to scheduling the evidentiary hearing within sixty days. The short time parameters were set by the judge at the State's urging and imposed upon registry counsel and his investigator, Mr. Ashton.

Though the evidentiary hearing itself took only one day, it is important to recognize the claim that the evidentiary hearing was on was the type of claim that most involves an investigator and intensive investigative work. For example, hearings that concern mental issues and/or ineffective assistance of counsel claims are often much lengthier in terms of court time. But because cases focused on those types of issues involve mental health professionals and lawyers, the investigative work may be much less intensive and less time consuming for the investigator assisting a registry attorney. And in the normal course of such hearings, testimony from the collateral investigator is often not necessary. But in Mr. Moore's case, the investigative work done by Mr. Ashton was the lynchpin of the newly discovered evidence claim and his testimony was absolutely a critical piece of the evidentiary hearing.[30]

[30]It is interesting to note that the attorney fees billed in Mr. Moore's case have yet to exceed the statutory cap. It is only the billed investigative fees that have been in excess of the

Certainly another aspect of the Mr. Moore's case that suggests the presence of extraordinary or unusual circumstances that justify investigative fees in excess of the statutory caps, is the quality and quantity of the evidence presented in support of the claim. At the conclusion of the evidentiary hearing, Judge Southwood stated on the record that the evidence that he had heard concerned him. It is extraordinary and unusual for a successive Rule 3.851 to have a claim that requires evidentiary development and at the conclusion of the evidentiary hearing gives the presiding judge such pause that he voices on the record that the evidence has caused him to become concerned.

When all of the uncontroverted and uncontested evidence in this case is considered, it is clear that extraordinary or unusual circumstances exist which justify payment of investigative fees in excess of the statutory cap. Even under the standard used by Chief Judge Moran, which Petitioner, submits is an erroneous standard, Mr. Moore's case is not an ordinary capital case.[31] The ordinary capital case does require an evidentiary hearing to be conducted on a

---

cap. This is a reflection of the fact that the primary claim presented on Mr. Moore's behalf has been investigative intensive.

[31]Certainly, there is absolutely no evidence in the record that Mr. Moore's case is an ordinary capital case.

successive Rule 3.851 motion and does not give the presiding judge cause to be concerned.

The order denying reimbursement for Mr. Ashton's investigative fees in excess of the statutory cap should be reversed and the matter remanded with instruction that reimbursement of those fees should be ordered.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the circuit court's order denying reimbursement of Mr. Ashton's investigative fees and determine that the uncontroverted and uncontested evidence presented by Petitioner warrants reimbursement of investigative fees in excess of the statutory cap.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Lori Jobe, Assistant General Counsel, Department of Financial Services, 200 East Gaines Street, Tallahassee, FL 32399, on December __, 2011.

MARTIN J. MCCLAIN
Florida Bar No. 0754773
McClain & McDermott, P.A.
Attorneys at Law
141 NE 30th Street
Wilton Manors, FL 33334
(305) 984-8344

CERTIFICATE OF FONT

This is to certify that this Initial Brief has been produced in a 12 point Courier type, a font that is not proportionately spaced.

MARTIN J. MCCLAIN