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Florida Dept. Of Financial Services v. John D. Freeman

CALL THE NEXT CASE OF FLORIDA DEPARTMENT OF FINANCIAL SERVICES VERSUS FREEMAN. ,,GOVERNMENT WHO HAVE JUST ARRIVED , AND THEY ARE HERE AS PART OF THEIR ANNUAL LEGISLATIVE DAY PROGRAM AND ESCORTED BY KATHERINE HAL F. WELCOME TO ALL OF YOU AND WITH BY KATHERINE HUFF B E AND WELCOME TO ALL OF YOU AND WITH THAT , YOU MAYPROCEED.

THANK , MADAM CHIEF JUSTICE AND JUSTICES. MAY IT PLEASE THE COURT. MY NAME IS RICHARD T DONE LAN J R.. I AM CHIEF JUSTICE I AM CHIEF COUNSEL FOR THE DEPARTMENT OF FINANCIAL SERVICES AND REPRESENT THE CHIEF FINANCIAL OFFICER , TOM GALLAGHER. OUR RESPONSIBILITY UNDER CHAPTER 4 IS RELATIVELY PROSAIC AND PROZAIC ONE. THAT IS TO PAY THE CAPITAL COLLATERAL REPRESENTATIVES WHO PROVIDE COUNSEL TO DEATH-SENTENCED INMATES.

HAVE YOU , SINCE THIS HAS BEEN GOING ON WITH THE \$2500MAX , HOW MANY TIMES HAVE THEIR BEEN APPLICATIONS FOR AN AMOUNT IN EXCESS OF THAT \$250?

IN CONNECTION WITH WITH THE \$250?

IN CONNECTION WITH THE WITH THE \$ 2 500?

IN CONNECTION WITH THE FILING BEFORE THE SUPREME COURT? THIS IS THE SECOND TIME IT HAS EVER COME UP.

SO THEY SUBMITTED THEIR BILLS WITHIN THE \$2500 OR THEY HAVEN'T FILED IT YET?

THEY HAVE COME OUT, YOUR HONOR, WITHIN THE STATUTORY LIMITATION. UNDER ORDINARY CIRCUMSTANCES , THE COUNSEL WHO HANDLE THE APPEAL OF THE 3. 850 PROCEEDING, USUALLY MOVES TO THE NEXT STAGE OF THE APPELLATE PROCEEDING , AND A FACTUAL DIFFERENCE IN THIS PARTICULAR SITUATION IS THE FACT THAT COUNSEL FOR THE DEFENDANT CAME IN FOR REHEARING , WHICH IS PROBABLY NOT THE MOST JUDICIAL TIME FOR AN APPELLATE PROCESS.

WOULDN'T THAT BE ENOUGH FOR THE BILL IN EXCESS OF \$2500?

THE QUESTION IS NOT SIMPLY IN THIS CASE, YOUR HONOR, IT IS A MATTER OF THE BILL BEING REASONABLE.IT IS A QUESTION OF THE FACT THAT THE ORDER ON APPEAL DOES NOT ADDRESS, EITHER THE REASONABLENESS OR THE UNUSUALNESS OF THE CIRCUMSTANCES THAT WOULD WARRANT THAT . IF YOU LOOK AT THE BILL OBJECTIVELY , IT SEEKS PAYMENT OF NINE TIMES THE STATUTORY AMOUNT . WHEN YOU LOOK AT THE DETAILS OF THE BILL, A GREAT AMOUNT OF IT IS CONCERNED WITH RESEARCH AND OF COURSE THEY TALK ABOUT IT IN AN APPELLATE PROCEEDING. IT IS SORT OF LATE TO BE DOING THAT NOW, OF COURSE, THERECORD IS COMPLETELY SILENT ON THE ISSUE AS TO WHY THAT COUNSEL WAS INSERTED INTO THE PROCEEDING AT THAT LEVEL.

WAS THAT EVER QUESTIONED AT THE TRIAL LEVEL? WAS THERE AN INQUIRY? DID YOU CROSS-EXAMINATION THE ATTORNEY?

THERE WAS NO TESTIMONY TAKEN.

I UNDERSTAND THAT , BUT DID YOU ASK FOR THE OPPORTUNITY? I ASSUME THAT THERE WAS A HEARING SCHEDULED , AND EITHER SIDE WOULD HAVE HAD THE OPPORTUNITY TO PRESENT SWORN TESTIMONY. WERE THEY PRECLUDED , EACH SIDE , WITH SOME PROHIBITION.

NO , YOUR HONOR , THEY WERE PROHIBITION?

NO, YOUR HONOR, THEY WERE NOT.

IT HAS BEEN MY UNDERSTANDING THAT ATTORNEYS FEES AS LONG AS I HAVE PRACTICED LAW AS AN ATTORNEY HERE IN FLORIDA THAT YOU PROCEED TO ONE OF THOSE HEARINGS WITH SWORN TESTIMONY AND THE JUDGE MAKES A FACTUAL DETERMINATION AS AN OTHER MATTER. WAS THAT FOLLOWED HERE AND IF NOT, WHY WAS IT NOT FOLLOWED?

IT WAS NOT FOLLOWED AND I DON'T KNOW WHY IT WAS NOT FOLLOWED.

DID YOU ASK FOR AN EVIDENTIARY HEARING AND WAS REFUSED?

THERE WAS NO SPECIFIC REQUEST FOR AN EVIDENTIARY HEARING, BUT UNDER THE , UNDER MOS S, YOUR HONOR, THE REQUIREMENT IS PLACED UPON THE COUNSEL WHO SEEKS FEES THAT EXCEED THE STATUTE, TO ESTABLISH THAT THERE ARE UNUSUAL CIRCUMSTANCES , AND THAT THE CAP APPLIED IN STATUTE , WOULD BE UNCONSTITUTIONAL, IF APPLIED IN THE SITUATION OF THAT PARTICULAR REPRESENTATION . NOW , COUNSEL FOR MR . FREEMAN DID NOT DO THAT , AND WE DID NOT FEEL THAT IT IS THE DEPARTMENT'S RESPONSIBILITY TO MAKE THE CASE FOR THE OTHER SIDE , AND CERTAINLY IN THE ORDINARY COURSE OF BUSINESS, WE ARE NOT TRYING TO BE ADVERSARY , BUT THERE IS A FUNDAMENTAL SEPARATION OF POWERS ISSUE, IN THAT THE DEPARTMENT, THE CHIEF FINANCIAL OFFICER , IS A CONSTITUTIONAL OFFICER OF THE EXECUTIVE BRANCH, BUT HE CANNOT SAY , OH, I THINK THAT STATUTORY CAP CAN'T APPLY. IT IS PURELY SEPARATION OF POWERS, SO UNLESS THE JUDICIARY INTERVENES AND GIVES US AN ORDER THAT SAYS THIS CAP WOULD BE UNCONSTITUTIONAL, SO THEREFORE YOU HAVE TO EXCEED THE CAP , THAT WE ARE IN A DEFAULT STATE OF HAVING TO SAY THE CAP APPLIES , UNLESS TOLD OTHERWISE .

IN THIS CASE , WAS THE DEFENSE ATTORNEY PAID A CERTAIN AMOUNT AFTER HE FILED THE MOTION FOR REHEARING OF THE DENIAL OF POSTCONVICTION, APPEAL?

YES , YOUR HONOR.

HOW MUCH WAS THAT?

IF , I DON'T KNOW OFF THE TOP OF MY HEAD , BUT MY CO-COUNSEL

WAS IT THAT AMOUNT? DO YOU KNOW IF THAT AMOUNT WAS WITHIN THE STATUTORY CAP?

I BELIEVE IT EXCEEDED THE STATUTORY CAP.

AND WAS THERE A HEARING ON THAT , AND HE WAS ACTUALLY PAID MORE THAN THE STATUTORY CAP?

I HAVE COUNSEL THAT WAS WITH ME . I WOULD HAVE TO CONSULT : I AM INFORMED THAT HE WAS WITHIN THE CAP ON THE REHEARING.

HE WAS WITHIN THE CAP ON THE REHEARING. OKAY.

YES .

AND DO YOU HAVE IN YOUR FILE, I DON'T HAVE IN MINE, THE HOURS THAT WERE SPENT ON THAT PARTICULAR ASPECT OF IT, SHOWING WHAT WAS ACTUALLY DONE TO EARN THE FEE FOR THAT PORTION OF IT?

I DO NOT HAVE THAT WITH ME TO DAY.

I GUESS WHAT I AM INTERESTED IN IS, USUALLY ON A CERT PETITION, THE CERT PETITION GENERALLY RAISES SOME CONSTITUTIONAL ISSUES THAT IS INVOLVED IN THE PRIOR PROCEEDING.

YES.

AND SO I AM TRYING TO GET AT WHETHER OR NOT THIS ATTORNEY ACTUALLY HAD TO GO THROUGH ANY FILE TO DO WHAT KIND OF RESEARCH THAT ATTORNEY HAD TO DO, IN ORDER TO PREPARE FOR THE REHEARING AND THE NEXT STEP, OF COURSE, WOULD HAVE BEEN A CERT PETITION INVOLVED WITH BASICALLY, SOME OF THE SAME ISSUES.

YES. IT IS MY UNDERSTANDING THAT THE ISSUES THAT WERE RAISED IN THE MOTION FOR REHEARING, WERE THOSE INVOLVED, THE SO-CALLED RING ISSUES, AND SO THAT THOSE, THAT PARTICULAR LINE OF QUESTIONING, WAS BROUGHT IN THE MOTION FOR REHEARING, TO THIS COURT, WHICH THE COURT DID NOT GRANT, AND SUMMARILY DENIED. IT IS MY UNDERSTANDING THAT THE SAME ISSUES RAISED IN THE MOTION FOR REHEARING WERE IN ESSENCE RAISED IN THE PETITION FOR CERTIORARI.

WHICH WERE RING AND

RING AND APPRENDI, YES.

NOT DIRECTED TO ANYTHING MORE ABOUT THIS CASE, ANY OTHER CONSTITUTIONAL ISSUES THAT WOULD BE SPECIFIC TO THIS CASE?

YES. THAT'S CORRECT, YOUR HONOR.

AND WE HAVE THE BILL IS ATTACHED TO SHOW THAT, IN FACT, MOST OF THE TIME WAS SPENT, AS YOU SAY, IN RESEARCHING THE LAW. NOW, THERE IS SOMETHING, THERE IS AN ENTRY OF FOUR HOURS, RESEARCH FOUR HOURS, EXECUTION METHOD AND COMPARATIVE CLIENT, LETHAL EXECUTION OR INJECTION RESEARCH. WAS THAT AN ISSUE RAISED, THE CONSTITUTIONALITY OF THE EXECUTION METHOD?

TO THE BEST OF MY KNOWLEDGE, THAT WAS NOT RAISED. OF COURSE IN THE ANSWER BRIEF, THE INDICATION WAS THAT IT WAS THE RING AND APPRENDI ISSUES THAT WERE THE PRIMARY FOCUS.

WELL, ONE OF THE OTHER RAISED ISSUES WAS THAT HE HAD TO GO THROUGH THE BOXES TO RAISE THE CERT BOXES, TO RAISE THE CERT ISSUE. THERE WAS NO QUESTION ABOUT WHAT WAS IN THESE BOXES, ET CETERA, WAS THERE ANYTHING BEFOREHAND THAT INDICATED WHAT WAS IN THESE BOXES, OTHER THAN TRANSCRIPTS?

YOUR HONOR, THE QUESTION OF THE BOXES, WE WOULD HAVE TO RESPECTFULLY SAY THAT THAT DID NOT APPEAR TO BE AN ACCURATE DESCRIPTION OF WHAT WAS INVOLVED, BECAUSE IF YOU LOOK AT THE ACTUAL BILLINGS, AND IF YOU ASSUME THAT COUNSEL'S BILLINGS INCLUDED WHAT HE DID, AND THAT THE READING OF THE 40 BOXES WAS NOT SOMETHING THAT WAS DONE GRATIS, THERE WAS NO BILLING FOR THE READING OF THE BOXES PER SE, AND, OF COURSE, I AM NOT TERRIBLY FAMILIAR WITH THE BILLINGS THAT WERE SUBMITTED IN CONNECTION WITH THE MOTION FOR REHEARING, BUT FROM A LOGICAL STANDPOINT, IF THAT IS THE CASE, THAT WOULD PROBABLY BE THE TIME THAT YOU WOULD BE REREADING YOUR BOXES, BUT HAVING SAID THAT,

YOU WOULD BE INTRODUCED AT AN APPELLATE STAGE AFTER APPELLATE WORK HAS BEEN DONE, SO IT IS NOT THE QUESTION OF I AM GOING TO DO AN ORIGINAL INVESTIGATION FOR THE FIRST TIME. YOU ARE DEALING WITH AN APPELLATE RECORD.

WAS THIS ARGUED TO THE TRIAL COURT JUDGE? IN OTHER WORDS WAS IT ASSERTED TO THE TRIAL COURT JUDGE, JUDGE, THIS IS OUTLANDISH THAT WE HAVE LIMITED REPRESENTATION HERE, AS FAR AS THE FUNCTION IS CONCERNED, AND THE IDEA THAT ALL OF THIS TIME WOULD BE SPENT IN THIS VERY NARROW FOCUS, IS JUST ALMOST PER SE UNREASONABLE. WAS THAT ARGUMENT ADVANCED TO THE TRIAL COURT?

IT WAS, YOUR HONOR. I MEAN, WE RESPONDED TO THE QUESTION OF THE BOXES, BY SAYING THAT THE BILLINGS DID NOT REFLECT THIS AND THAT IT APPEARED TO REFLECT THIS, AND THAT IT APPEARED TO US THAT THE AMOUNT OF TIME SPENT WAS UNREASONABLE.

NOW, HELP ME WITH, IN OUR CASE LAW, YOU KNOW, WHICH NOT ONLY INCLUDES REFERENCES TO FEE CAPS WHICH HAVE BEEN IMPOSED BEFORE, WE HAVE SAID THAT THE REPRESENTATION OF COUNSEL IS, REALLY, UNIQUE, AND, OF COURSE, IT IS CONSTITUTIONALLY GUARANTEED IN THAT, IF YOU PUT AN ARBITRARY CAP, WHICH DOESN'T ALLOW FOR COMPETENT COUNSEL, THEN, UNDER THE CIRCUMSTANCES OF A PARTICULAR CASE, AN EXTRAORDINARY OR WHATEVER THE SITUATION MAY BE, AND SOME OF OUR CASES, WE HAVE ACTUALLY SUGGESTED THAT DEATH PENALTY CASES THEMSELVES, ARE THOSE EXTRAORDINARY CIRCUMSTANCES SO CAN WE RECONCILE HERE, IF THE LAWYER HAS ACTUALLY, NOW, TESTIFIED TO THE TRIAL COURT JUDGE, HE HAS SUBMITTED THE DETAILED BILL, HE WAS THE ONLY LAWYER, IF I UNDERSTAND IT, THAT THE DEFENDANT HAD, AT THE PARTICULAR TIME, AND SO WHY, WITHOUT ANY FACTUAL CHALLENGE TO WHAT OCCURRED HERE, AND THIS BEING A DEATH-PENALTY CASE, WHICH IS IN A CATEGORY OF EXTRAORDINARY CIRCUMSTANCES, ALL BY ITSELF, WITH NOTHING TO REFUTE THIS AT THE HEARING THAT WAS PRESENTED, HOW, WHERE DID THE TRIAL COURT GO WRONG?

WELL, THE, WE SUGGEST, YOUR HONOR, THAT THE ORDER DOES NOT INVOLVE THE DOCTRINE OF MACOMSON, AS EXPLICITLY INDICATED BY THIS COURT AS EXPLICATED BY THIS COURT. THERE WAS NOTHING THAT WOULD INDICATE ANYTHING OTHER THAN THAT \$2500 WOULD BE SUFFICIENT, AND FROM THE STANDPOINT AFTER EXECUTIVE OFFICER, THAT IS NOT CLOSE ENOUGH.

YOUR ARGUMENT AS I UNDERSTAND IT, IS BASICALLY THAT YOU ARE IN AN ADMINISTRIAL POSITION, AND UNLESS THERE IS SOMETHING IN THE ORDER THAT WOULD BE A BASIS FOR YOU TO READ THIS AS EXTRAORDINARY, THEN YOU HAVE TO FOLLOW THE LEGISLATION, WHICH SAYS \$2500.

THAT IS ABSOLUTELY CORRECT.

YOUR POSITION IS A TOTALLY LEGAL POSITION.

YES. WE DO NOT HAVE THE LUXURY TO PICK AND CHOOSE OURSELVES, AND THAT IS WHERE WE ARE HERE, IN SOMEWHAT OF AN ODD POSITION, BECAUSE WE WANT TO MAKE SURE THAT LAWYERS GET PAID, AND INDEED WE PAY OUT MILLIONS OF DOLLARS OUT TO REGISTRY COUNSEL, INCLUDING ON RELATIVELY FREQUENT OCCASIONS, PURSUANT TO ORDERS FROM TRIAL COURTS THAT SAY THAT THERE ARE EXTRAORDINARY CIRCUMSTANCES HERE, WE THINK THE CAP IS UNCONSTITUTIONAL IF IT IS APPLIED, SO THEREFORE PAY MORE MONEY.

LANGUAGE IN THE ORDER, IF THIS ORDER HAD SAID I AWARD THIS AMOUNT TO COUNSEL AND FIND THAT, UNDER OLIVE VERSUS MOSS, THAT DEFENSE COUNSEL HAS MET THAT BURDEN, THAT YOU WOULD NOT BE HERE.

YES , THAT IS CO RRECT .

LE T ME MAKE SUR E THAT I KNOW ABOUT THIS , BECAUSE THIS IS RE GISTRY COUNSEL ANDWHETHER THE AMOUNT THAT THE LEGISLATURE HAS SAID, HAS BEEN A MATTER OF SOME DE BATE , AND THE LEGISLATURE, THAT IS WHY , IF IN SE TTING THE \$2500WHICH YOU TOLD ME IS THAT ALL OF THE OTHER TIMES THAT PETITIONS FOR CERT HAVE BEEN FILED, THAT THEY HAVE BEEN A BLE TO HAVE DONE IT WITHIN THE CAP AND NOT EXCEED THECAP , IS THAT CORRECT?

THAT'S CORRECT.

SO I F IN THIS SITUATION YOU HAD THE SAME CIRCUMSTANCE BUT THE JUDGE SIMPLY SAID , WELL , THIS IS \$ 2500 ISN'T GOING TO DO IT , SO FILE A PE TITION FOR CERT , WOULD THAT , YOU WOULD , AT THAT POINT , BE IN A SITUATION OF , IT WOULDN'T BE THE MA GIC WOR DS. IN OTHER WORD S YOU LO OK QUALITATIVE LY AT WHAT THE JUDGE HAS SAID AS TO WHY THIS IS AN EXTRAORDINARY CIRCUMSTANCE.

YES. YES.

SO THAT IS NOT MINISTERIAL.THAT IS REALLY EXERCISING DISCRETION THEN, IN DE CIDING WHEN SOMETHING IS TR ULY EXTRAORDINARY , THAT IS REQUIRING SOMEBO DY TO SPEND MORE HOURS THAN THE LEGISLATURE HAS DEEMED TO BE REASONABLE . IN OTHER WORDS , IF YOU ARE EVALUATING, NOT ONLY , IT IS NOT JUST THAT THE ORDER HAS TO SAY THAT IT IS EXTRAORDINARY, BUT YOU HAVE TO, IN LOOKING AT IT , AND IN LOOKING AT THE CASE , MAKE A CERTAIN DISCRETIONARY DECISION .

I DON'T THINK IT IS A TERRIBLY DISCRETIONARY DECISION, BECAUSE WE, REALLY, ARE NOT IN A POSITION , I M EAN, THE STATUTE IN SE CTION 27.2711 , PLACES UPON THE TRIAL JUDGE THE OBLI GATIONTO DETERMINE THE REASONABLENESS OF THE FEES AND TO DETERMINE ULTIMATELY WHETHER THEY ARE EXTRAORDINARY CIRCUMSTANCES. SEVERAL PLACES, PARTICULARLY WITH EXPENSES , THAT IS EXPLICIT.

THAT IS WHY I ASKED YOU THIS QUESTION BE FORE, AND I WANT TO BE CAREFUL THAT WE ARE NOT P U TTING WORDS INTO YOUR MO UTH.

YES.

OKAY.MY QUESTION TO YOU BEF ORE, WAS , IF THIS ORDER HAD PROVIDED IN A SENTENCE OR SEVERAL SENTENCES, THAT THE TRIAL COURT FINDS THAT COUNSEL HAS MET THE BURDEN IMPOSED IN THE MOSS CASE , THAT YOU WOULD NOT BE H ERE.

YES.

THAT IS A CORRECT ANSWER , YOUR HONO R.

THANK YOU.

I JUST , IN THE SENSE THAT I THINK CHIEF JUST ICE IS SUGGESTING THAT THERE M A Y BE MORE OF A , DO WE BE LIEVE THE JUDGE , AND I DON'T THINK THAT ENTERS INTO IT. THERE IS NOT THAT KIND OF MINIREVIEW SITUATION THAT GOES ON.IF AN ORDER WERE TO COME TO US FROM A JUDGE THAT WOULD BE COMP LETELY UNREASONABLE , UNEXPECTED, WE MIGHT FEEL THE NEED TO PU RSUE A N APPELLATE HEARING .

IT IS APPARENT HERE THAT THE JUDGE DI DN'T GO THROUGH THE EXERCISE THAT WE REQUIRED IN THE MOSS CASE. THAT HAS LED YOU TO THIS .

THAT'S CORRECT, MR. JUSTICE ANSTEAD. BECAUSE THERE IS A TELLING EXCHANGE IN THE TRANSCRIPT, WHERE COUNSEL, OUR COUNSEL, SAYS TO THE JUDGE, WELL, JUDGE, WHERE DO YOU WANT US TO GET THIS MONEY FROM, UNDER WHICH HEADING OF THE STATUTE, AND THIS IS PARTIALLY AN ARTIFACTS OF THE WAY THE STATUTE IS SET UP, BECAUSE FOR THE VARIOUS STAGES, THE PERFORMANCE BASED STAGES, THERE IS \$20,000 FOR PRIOR TO THE FILING OF THE 3.850 AND \$25,000 BEFORE THE COURT RENDERS ITS ORDER BEFORE BEFORE THE APPEAL IS FILE. YOU HAD A SMALL PIECE AT THE INTRODUCTION AND SMALL PIECE AT THE END OF THE PROCEEDING FOR THE PETITION FOR CERT AND WE ASKED, JUDGE, WHERE DOES THIS GO, AND THE JUDGE SAID I DON'T CARE. WE HAVE MORE CONCERNS WITH TRYING TO FIT THE SQUARE PEG INTO THE ROUND HOLE, SO TO SPEAK THAT, THE COURTS DON'T HAVE, AND ONE OF THE THINGS THAT IS WE WOULD SINCERELY WISH THAT THE COURT COULD PROVIDE US AND TO PROVIDE THE TRIAL JUDGES WHO HAVE TO PASS ON THESE THINGS, IS, A DIRECTION THAT WOULD SAY, PLEASE PAY ATTENTION TO THIS, BECAUSE OTHERWISE, IT CAUSES THE PEOPLE WHO HAVE TO PAY THE BILLS, AN INORDINATE AMOUNT OF PROBLEM, BECAUSE IT IS MONEY THAT HAS TO BE SENT OUT, BUT WE ARE CERTAINLY NOT TRYING TO SECOND-GUESS THE TRIAL COURTS. WE ARE NOT TRYING TO SECOND-GUESS THIS COURT. ALL WE ARE SAYING, IS IF WE HAVE TO EXCEED THE CAP, WE NEED HAVE AN ORDER WHICH IS REGULAR ON ITS FACE AND WHICH COMPLIES WITH THE TEST THAT THIS COURT HAS SET IN OLIVE V MOSS, BECAUSE OTHERWISE THEN WE ARE ESSENTIALLY IN A STANDOFF POSITION.

LET ME POSE THIS QUESTION, BECAUSE IN ALL OF THESE CASES, ARE YOU SUGGESTING THAT NONE OF THEM CONTEMPLATE ANY TYPE OF ADVERSARIAL TESTING OR TESTING OF EVIDENCE THAT IS PRESENTED, TO JUSTIFY KNEES AWARDS? IS THAT WHAT

NOT TO

WHO IS GOING TO PRESENT THE OTHER SIDE OF THE COIN TO THE TRIAL JUDGE, THEN, YOU ARE ADMINISTERIAL, SO YOU DON'T CARE WHAT THEY SAY. JUST TELL ME IN AN ORDER WHAT YOU HAVE FOUND. WHO IS GOING TO TEST?

WE HAVE PARTICIPATED IN THOSE SORTS OF PROCEEDINGS. AND THEY HAVE

THEN YOU ARE MORE THAN ADMINISTRATIVE THEN.

SORRY?

YOU ARE MORE THAN AN ADMINISTERIAL OFFICER, IF YOU HAVE PARTICIPATED AS AN ADVOCATE.

IT IS DIFFICULT TO SAY. IT IS NOT THAT WE ARE ADVOCATING PEOPLE NOT BE PAID. IT IS AN ARGUMENT OF PUTTING IT TO THE PROOF.

SO THE QUESTION IS DO YOU DO THAT OR DO YOU NOT DO THAT?

WE DO THAT FROM TIME TO TIME, YOUR HONOR.

WAS IT DONE HERE? WAS IT TESTED HERE?

IT WAS NOT TESTED IN ANY KIND OF MEANINGFUL WAY, OTHER THAN BY COUNSEL ASKING QUESTIONS, IN THE TRADITIONAL FACT THAT WE DID NOT STAGE A FULL-BLOWN PROCEEDING WITH EXPERT WITNESSES AND A KIND OF ATTACK.

ATTORNEY GENERAL DOES PARTICIPATE.

THE ATTORNEY GENERAL DOES PARTICIPATE, AND THEY DO OR NOT, PLAY MUCH OF A SIGNIFICANT ROLE.

A GAIN , GETTING BACK TO WHERE THIS MIGHT HAPPEN THAT , IS WHY I WONDERED, IF IN EVERY OTHER CASE, COUNSEL ARE ABLE TO FILE THEIR PETITION, AND KEEP IT WITHIN THE \$2500, WOULD THAT BE SOMETHING THAT YOU WOULD, THEN, PRESENT , IF THE ISSUE CAME UP , TO THE TRIAL COURT? SO THAT YOU DON'T HAVE SOMETHING THAT JUST IN A REGULAR AMOUNT THAT THERE IS ONE TRIAL JUDGE THAT IS DECIDING, WELL, I AM JUST GOING TO GIVE WHATEVER THE LAWYER ASKS AND SAY THIS IS EXTRAORDINARY. YOU WOULD PRESENT THAT AND SAY, WELL , JUDGE , TIME AFTER TIME , WE HAVE HAD REGISTRY COUNSEL THAT CAN DO IT FOR WITHIN THIS AMOUNT.

YES . THE WAY THE STATUTE IS SETUP , WE CAN NOT PAY WITH OUT AN AFFIRMATIVE COURT ORDER , IF COUNSEL HAS EXCEEDED, SO WHEN COUNSEL IS UNDER THE STATUTE TO FILE A PETITION TO BE PAID WITH THE COURT AND WE RESPOND. IT IS VERY DIFFICULT, JUSTICE LEWIS, FOR US TO COME IN COLD , INTO A CAPITAL CASE AND TAKE A FULLY ADVERSARY ROLE , ATTACKING WHAT WAS DONE . I MEAN , IT IS SOMEWHAT UNSEEMLY BURKES , ALSO , THIS IS NOT OUR PRIMARY DUTY IN LIFE. ULTIMATELY THIS IS WHAT I POINT TO THE TRIAL COURT. NOW , IF THE TRIAL COURT IS JUST GOING TO SAY , YEAH, THAT IS FINE , WELL PAY WHATEVER THE ATTORNEY DESIRES , UNLESS IT IS SO UNREASONABLE , THEN WE ARE VERY MUCH , YOU KNOW, IN A POSITION WHERE WE CANNOT PREVAIL.

WAS A PETITION FOR REHEARING OR MOTION FOR REHEARING FILED, CALLING TO THE TRIAL JUDGE'S ATTENTION, YOU NEED THIS MAGIC LANGUAGE IN THIS ORDER ?

IN THIS PARTICULAR CASE?

YES .

NO , THERE WAS NOT. BECAUSE WE FILED A NOTICE OF APPEAL. BECAUSE

WHO PREPARED THE ORDER?

EXCUSE ME?

WHO PREPARED THE ORDER?

I BELIEVE THAT OPPOSING COUNSEL PREPARED THE ORDER. WE DID NOT EVEN SEE THE ORDER. ACCORDING TO THE TRANSCRIPT , THE ORDER WAS SIGNED ON THE BENCH IMMEDIATELY. SO IT WAS NOT A SITUATION WHERE

WITH OUR HELP , YOU HAVE USED UP YOUR TIME.

O'CLOCK ON.

CHIEF JUSTICE: THANK YOU VERY - - USED UP YOUR TIME.

OKAY.

THANK YOU VERY MUCH.

OKAY .

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS FRANK TASSONE , AND I REPRESENT MR. FREEMAN. I THINK THIS CASE BEFORE THE COURT TODAY , IS A DECISION AS TO WHAT LEVEL OF EFFORT IS NECESSARY BY COUNSEL FOR A DEATH-SENTENCED INDIVIDUAL , TO EFFECTIVELY REPRESENT THAT INDIVIDUAL , WHAT LEVEL OF REVIEW OF THAT ATTORNEY'S WORK IS NECESSARY AND SHOULD BE DONE BY THE TRIAL COURT, TO MAKE A DETERMINATION THAT THE FEE

SHOULD OR SHOULD NOT BE, SHOULD NOT EXCEED THE CAP.

HAVEN'T WE MANDATED IN MOSS, THAT THERE BE THE SHOWING OF EXTRAORDINARY CIRCUMSTANCES AND THE MOTION HERE DOESN'T EVEN ALLUDE TO THAT, SO DOESN'T THE REQUIREMENT THAT UNDER THE MOSS HOLDING, THAT THE CAP CAN BE EXCEEDED IN PARTICULAR CASES, AND THAT THIS IS ONE OF THOSE CASES AND THAT YOU MAKE THAT ALLEGATION IN THE MOTION AND THEN YOU MAKE A DEMONSTRATION OF THAT TO THE TRIAL COURT JUDGE, IN ORDER FOR THIS AGENCY TO, THEN, PAY YOU?

I DON'T KNOW IF THERE IS A REQUIREMENT THAT IT SHOULD BE INCLUDED IN THE MOTION.

THAT IS THE OPINION, IN ESSENCE, SAY THAT, THAT ORDINARILY WE HOLD THAT THE CAP IS CONSTITUTIONAL, BUT WE HOLD THAT IT IS CONSTITUTIONAL, BECAUSE WE RECOGNIZE, AS WE INDICATED THE LEGISLATURE DID, IN POSING THE CAPS, THAT THERE WOULD BE EXTRAORDINARY CIRCUMSTANCES IN SOME INSTANCES, WHERE THE CAP WOULD HAVE TO BE EXCEEDED, SO ISN'T IT NOT IMPLICIT BUT EXPLICIT IN OUR DECISION UPHOLDING THE CONSTITUTIONALITY OF THE SCHEME, THAT COUNSEL HAS THE BURDEN OF MAKING SOME SHOWING, AND THE TRIAL JUDGE, THEN, HAS THE RESPONSIBILITY OF MAKING A FINDING OR DETERMINATION IN THOSE CASES WHERE A FEE IS ASKED FOR IN KPEFS THE CAP IN EXCESS OF THE CAP? WHAT IS THE BIG DEAL?

IN MY OPINION, THE ORDER COULD HAVE BEEN MORE TIGHTLY DRAWN.

WHAT ABOUT THE MOTION?

AND I THINK THE MOTION COULD HAVE BEEN MORE TIGHTLY AND MORE EXPLICITLY DRAWN.

LET ME GO BACK TO THIS PARTICULAR CASE. YOU WERE APPOINTED AFTER THE REPLY BRIEF HAD BEEN FILED, CORRECT?

WE WERE APPOINTED AFTER THIS COURT AFFIRMED THE TRIAL COURT'S DENIAL OF THE MOTION FOR POST-CONVICTION RELIEF.

OKAY. SO HE HAVE EASTBOUND SO EVEN BEYOND THAT.

YES YES, MA'AM.

TO UNDERSTAND THIS, WHO WAS REPRESENTING THE DEFENDANT, UP TO THAT TIME?

I BELIEVE THAT CCR WAS REPRESENTING THE DEFENDANT UP UNTIL THAT TIME.

AND DO YOU KNOW, FOR WHAT REASON, THAT IS, THIS WAS CCR NORTH.

YES, MA'AM.

AND WAS THE, WHO WAS THE LAWYER?

I THINK IT WAS MR. DOSS.

AND WAS THERE A REASON THAT YOU WERE APPOINTED INSTEAD OF JUST HAVING MR. DOSS CONTINUE AS THE POSTCONVICTION COUNSEL? DO YOU KNOW THAT?

I, IF THERE WAS A REASON, IT WAS NOT EXPLAINED TO ME.

AND YOU WERE, AT THIS TIME, HOW MANY OTHER, WERE YOU APPOINTED TO SEVERAL OTHER OF THESE NORTHERN DISTRICT OF FLORIDA CASES?

I THINK THIS WAS THE FIRST APPOINTMENT.

BUT YOU HAD HOW MANY OTHER POINTS?

SINCE THEN? I THINK A TOTAL OF FOUR OTHER POINTS SINCE THEN.

AND THEY WERE ALL FROM THE NORTHERN, FROM THE , AFTER THE DISSOLUTION OF THE NORTHERN DISTRICT.

YES, MA'AM .

MY HERE IS THAT YOU HAVE RAISED MY CONCERN HERE IS THAT YOU HAVE RAISED EXTRAORDINARY CIRCUMSTANCES, THAT YOU WERE HAVING TO TAKE OVER A CASE THAT YOU WERE NOT FAMILIAR WITH , BUT IS IT YOUR POSITION THAT , IF YOU HAD BEEN ABLE TO BE COUNSEL FROM THE BEGINNING , THAT THE \$2500 THAT IS ALL OBTAINED TO FILE A PETITION FOR CERTIFICATION IN THE SUPREME COURT , IS A , THAT THAT IS NORMALLY A REASONABLE AMOUNT, OR DO YOU , AS AN EXPERIENCED DEFENSE LAWYER , DO YOU THINK THAT, BECAUSE I SEE LOTS OF HOURS FOR RESEARCH ON LEGAL ISSUES, THAT THAT IS JUST PER SE UNREASONABLE?

I DON'T KNOW WHETHER THE \$2500 IS REASONABLE OR NOT. I WOULD THINK THAT CERTAINLY, IF WE HANDLED THE MOTION FOR POST-CONVICTION RELIEF , IF WE ATTENDED THE HEARING, IF WE PRESENTED EVIDENCE AND INTRODUCED TESTIMONY , IF WE HEARD THE STATE'S CASE , FILED THE BRIEFS , DID THE FINAL ARGUMENTS , HAD PREPARED THE BRIEFS ON APPEAL TO THIS COURT , ATTENDED ORAL ARGUMENTS , READ THE OPPOSING BRIEFS AND HAD ALL THAT KNOWLEDGE THAT CLEARLY WE WOULD HAVE HAD A MUCH BETTER CHANCE OF STAYING UNDER THAT \$2500 CAP , BUT OUR POSITION AT THAT TIME , JUSTICE PARIENTE , WASTO DETERMINE WHAT LEVEL OF EFFORT WAS NECESSARY IN ORDER FOR US TO REPRESENT MR . FREEMAN EFFECTIVELY.

BUT WOULDN'T THAT HAVE HAPPENED, AND THIS IS WHAT GETS BACK TO WHAT JUSTICE QUINCE WAS ASKING , FOR DISPERSE COUNSEL ARGUMENT , WOULDN'T THAT HAVE OCCURRED AT THE TIME OF THE MOTION FOR REHEARING , IN FRONT OF OUR COURT , NOT IN THE PETITION FOR CERTIFICATION TO THE SUPREME COURT , WHERE YOU ARE GOING TO BE , REALLY , HAVE VERY LIMITED ABILITY TO RAISE ISSUES THAT THE SUPREME COURT IS GOING TO EVER ACCEPT?

ABSOLUTELY . WHAT WE DID , IN OUR MOTION FOR REHEARING , WAS RAISE SOME RING V ERSUS ARIZONA ISSUES . AT THAT TIME , THERE WERE ANUMBER OF CASES PENDING BEFORE THE UNITED STATES SUPREME COURT AND BEFORE THIS COURT, AND THERE WERE OPINIONS THAT WERE COMING OUT BY UNITED STATES CIRCUIT COURTS OF APPEALS THROUGHOUT THE COUNTRY BY DIFFERENT STATE COURTS AFTER RING , THAT WE WANTED TO EVALUATE .

WHAT CONCERNS ME , IN THIS SITUATION , IS THAT THE , THE LEGISLATURE HAS SET UP WHAT IT IS SAYING IS GOING TO BE PAID FOR REGISTRY COUNSEL IN THESE POSTCONVICTION CASES . AND I RECOGNIZE THAT OLIVE VERSUS MOSS , SAID THAT MACOMBSON APPLIES, BUT THERE IS A LITTLE DIFFERENCE, IN THAT POSTCONVICTION COUNSEL IS PROVIDED BY THE LEGISLATURE , AND NOT AS A CONSTITUTION , IT DOESN'T HAVE A CONSTITUTIONAL BASIS , AND THEY PROVIDE THAT THERE IS A FEE SCHEDULE. THIS COURT HAS COME ALONG AND SAID THERE CAN BE UNUSUAL CIRCUMSTANCES TO GO ABOVE WHAT THE LEGISLATURE HAS SET OUT . NOW , WHAT HAS TO BE DEMONSTRATED BY COUNSEL , THEN , AND HOW DOES COUNSEL HAVE TO DEMONSTRATE IT , IN ORDER FOR THERE TO BE THE UNUSUAL CIRCUMSTANCES TO OVERRIDE WHAT THE LEGISLATURE HAS SAID IS GOING TO BE PAID , IN THE COUNSEL THAT IT HAS MANDATED BE PROVIDED?

I DON'T KNOW SPECIFICALLY WHAT COUNSEL SHOULD DO. I MEAN, I CERTAINLY WAS HOPING FOR A LONGER HEARING TO PRESENT INFORMATION IN THAT REGARD AT THE TRIAL LEVEL, BUT THE

HEARING ONLY LASTED A VERY SHORT PERIOD OF TIME.

IT WAS A TELEPHONE HEARING, CORRECT?

I ATTENDED PERSONALLY. MR. THERBER ON BEHALF OF THE DEPARTMENT, APPEARED ELECTRONICALLY.

DID YOU REQUEST TO PRESENT ANOTHER LAWYER OR

I THINK THERE WAS A TOTAL OF EITHER 30 OR 45 MINUTES REQUESTED FOR THE HEARING. THE HEARING PROBABLY LASTED LESS THAN TEN MINUTES. THAT IS MY RECOLLECTION.

DID YOU HAVE ANY WITNESSES THAT YOU WANTED TO PRESENT AT THE HEARING THAT YOU DID NOT PRESENT?

NO, SIR.

THAT YOU COULD NOT PRESENT?

NO, SIR.

DID YOU PRESENT ANY AFFIDAVITS OF OTHER ATTORNEYS?

NO, SIR.

HOW IS THIS TESTED? IS IT JUST SITUATION. YOU CAN COME IN AND SAY THESE ARE MY HOURS, AND THAT IS THE FACTUAL BASIS, OR IS THERE ANY TESTING? I GUESS THAT IS THE QUESTION.

I THINK THERE SHOULD BE TESTING.

WHO OR WHAT ENTITY DOES THIS OR SHOULD DO THIS?

WELL, I THINK RIGHT NOW THAT RESPONSIBILITY IS ON THE COURT. NOTICE FOR THE HEARING WAS THE ATTORNEY GENERAL'S OFFICE AND THE STATE ATTORNEY'S OFFICE.

THE COURT TO TEST - -

I AM SO SORRY.

TO ACT AS AN ADVERSARIAL POSITION? THAT IS WHAT I AM TRYING TO UNDERSTAND. HOW DO YOU, IF YOU COME IN AND SUBMIT A BILL OR THIS IS WHAT MY TIME IS, THIS IS WHAT IS EXTRAORDINARY, HOW IS THAT TESTED? BY, IS THERE ANYONE ALLOWED TO CONTEST THAT?

I THINK THE ATTORNEY GENERAL'S OFFICE IS ALLOWED. I THINK THE STATE ATTORNEY'S OFFICE IS ALLOWED. IN THIS PARTICULAR CASE, THE DEPARTMENT ACTED AS FAR MORE THAN A MINISTERIAL FAR MORE THAN A MINISTERIAL DEPARTMENT IN THIS PARTICULAR CASE. THEY QUESTIONED WHY A REPLY BRIEF WAS NECESSARY. THEY QUESTIONED WHY THE NUMBER OF HOURS WERE NECESSARY TO BE SPENT ON RESEARCH. THERE WERE A NUMBER OF QUESTIONS THAT THEY ASKED IN THIS PARTICULAR CASE.

I GUESS THE PROBLEM, THE PROBLEM, AS I SEE IT, READING THIS TRANSCRIPT, YOU CAME INTO THE HEARING, AND YOU SAID TO THE JUDGE, BASICALLY, JUDGE, THIS IS A DEATH-PENALTY CASE. I CAME IN AT THE MOTION FOR REHEARING STAGE AT MOST POST THE CONVICTION. AT POST CONVICTION I HAD THESE BOXES TO GO THROUGH. THAT IS IT. THERE IS NOTHING IN THE RECORD THAT DEMONSTRATES THAT WE COULD EVEN READ FROM THIS RECORD, WHAT WAS IT ABOUT THIS CASE, THAT MADE IT NECESSARY TO DO ALL OF THIS RESEARCH? WHAT ABOUT,

THERE IS JUST NOTHING THAT INDICATES TO US WHAT THESE EXTRAORDINARY CIRCUMSTANCES ARE, AND IT WOULD BE THE BURDEN OF THE DEFENSE ATTORNEY, TO PRESENT THAT TO THE COURT, IN ORDER TO GET BEYOND THE STATUTORY CAP. THAT IS WHERE THE PROBLEM, I THINK, REALLY IS, IN THIS CASE.

JUSTICE QUINCE, IN THIS PARTICULAR CASE, I THINK THE FACT THAT WE WERE APPOINTED SHORTLY BEFORE THE PETITION FOR REHEARING, A PETITION FOR REHEARING WAS TIMELY FILED BEFORE THE FLORIDA SUPREME COURT, AND THEN PROCEEDED TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT, ALL WITHIN A PERIOD OF 210 DAYS, WAS IN AND OF ITSELF EXTRAORDINARY.

BUT TO SAY THAT AT ONE END YOU GET PAID FOR THE MOTION FOR REHEARING, CORRECT? YOU GOT, DID YOU GET

JUSTICE QUINCE, WE HAVE NOT BEEN PAID A PENNY FOR COSTS OR FEES IN THIS PARTICULAR CASE.

YOU MAY NOT HAVE GOTTEN THE MONEY YET BUT YOU FILED A SEPARATE BILL, I WOULD ASSUME, FOR THE MOTION FOR POSTCONVICTION PROCEEDING, IS THAT CORRECT?

WE FILED TWO BILLS, ONE CLEAR WHAT WORK WAS DONE FOR THE PETITION FOR REHEARING AND WHAT WORK WAS DONE FOR THE PETITION FOR CERT.

BUT THAT IS NOT, THE \$20,000 THAT YOU REQUESTED FOR THE CERT PETITION, THAT WAS JUST FOR THE CERT PETITION, AND THEN YOU, ALSO, REQUESTED ANOTHER \$7,000, ALMOST \$8,000 FOR THE REPLY BRIEF IN THE CERT PETITION, CORRECT?

NO, MA'AM.

OKAY.

THERE WERE APPROXIMATELY \$4500 IN COSTS EXPENDED FOR THE BINDING OF THE BRIEFS TO THE UNITED STATES SUPREME COURT, SO THERE ARE COSTS AND THERE ARE APPROXIMATELY \$4500 TO \$5,000, ALSO, FOR WHICH WE HAVE NOT BEEN PAID FOR TO DATE.

RIGHT, BUT DIDN'T YOU HAVE A SEPARATE AMOUNT FOR THE COSTS AND THE ATTORNEYS FEES? AS I LOOKED AT THIS, THERE WERE TWO DIFFERENT COST ITEMS.

I THINK THAT THERE WERE, THE COSTS WERE SPELLED OUT SEPARATELY FROM THE ATTORNEYS FEES, YES.

SO STILL, I GUESS I AM CONCERNED HERE, BECAUSE YOU START OUT WITH YOUR MOTION FOR REHEARING, AND THERE IS A CERTAIN AMOUNT OF PREPARATION AND EVERYTHING THAT YOU HAVE TO DO, IN ORDER TO FILE THE MOTION TO REHEARING.

YES, MA'AM.

AND THEN YOU FILED A MOTION FOR REHEARING, THAT REALLY JUST WENT TO THE RING ISSUE, NOT ANY OF THE ISSUES THAT WERE ACTUALLY RAISED IN THE POSTCONVICTION MOTION, IS THAT CORRECT?

WELL, WE IDENTIFIED ALL THE ISSUES THAT WE COULD IN THAT SHORT PERIOD OF TIME, AS TO THE ISSUES THAT THIS COURT DECIDED IN ITS OPINION, AND THEN ADDED THE RING ISSUE TO OUR MOTION FOR REHEARING, IN ANTICIPATION OF FILING THE PETITION FOR CERT TO THE UNITED STATES SUPREME COURT.

SO AT THAT POINT , YOU WERE SURE THAT THAT WAS WHAT YOU WERE GOING T O FILE IN THE UNITED STATES S UPREME COURT, THE RING ISSUE.

I THINK THAT WAS , YES, MA'AM . YES .

WOULD YOU AGREE THAT , UNDER THE O LIVE VERSUS MOSS CASE, AND IN V IEW OF THE SCHEDULE THAT IS SET OUT BY THE LEGISL ATURE , THAT, IN ORDER FOR THERE TO BE A PAYMENT IN EX CESS O F THE LEGISLATIVE AMOUNT , THAT THERE HAS TO BE A FI NDING BY THE TRIAL JUDGE , OF EXTRAORDINARY OR UN USUAL CIRCUMSTANCES .

I THINK THERE HAS TO B E A FINDING BY THE TRIAL JUDGE. I A M NOT TOO SURE WH ETHER O LIVE VERSUS MOSS OR MacONLY SON RE QUIRE THAT TH OSE OR MACOMBSON REQUIRE THAT THOSE BE USED , BUT CLEARLY IN THE TOTALITY OF THE ORDE R, I THINK THAT IS W HAT THE COURT SHOULD FIND, BEFORE IT CANAUTHORIZE A FEE IN EXCESS OF THE STATUTORY MAXIMUM.

WELL , DID THIS TRIAL JUDGE ENTER AN ORDER THAT SAYS THAT HE IS FINDING THAT THERE WERE UNUSUAL AND EXTRAORDINARY CIRCUMSTANCES, AND ON THAT B ASIS , THERE SHOULD BE PAID , THE \$20-WHATEVER THOUSAND?

JUSTICE WEL LS AS I INDICATED BEFORE , IN MY OPINION THIS ORDER COULD HAVE BEEN MORE TIGHTLY DRAWN AND THE MOTION MORE TIGHTLYPRESENTED TO THE COURT.

AND THE ORDER DOESN'T REALLY SAY THAT.

NO, SIR, NO, AND WE THINK IT SAYS WORDS THAT INDI CATE EXTRAORDINARY AND UNUSUAL CIRCUMSTANCES , BUT CERTAINLY IT DOESN'T HAVE THE WORD EXTRAORDINARY AND UNUSUAL CIRCUMSTANCES IN T HERE.

IF WE FIND THE MO TION AND THE ORDER INSUFFICIENT , WHAT SHOULD WE DO?

I WOULD ASK THE COURT TO REMAND IT B ACK TO THE TRIAL COURT FOR F URTHER HEARING , CONSISTENT WITH THIS COURT'S OPINION.

TRIAL COURT AT THEHEARING , ALSO , DID NOT ORALLY FIND THAT THERE WERE EXTRAORDINARY CIRCUMSTANCESHERE, DID HE?

THAT IS M Y RECOLLECTION .

IN FACT, FROM MY RECOLLECTION, HE SAID , WELL , I KNOW MR . TASSONE IS A GOOD LAWYER, AND IF HE SAID IT I S \$27,000, THEN I B E LIEVE HIM , SOMETHING TO THAT EFFECT?

YE S, SIR.

AND, A GAIN , I WANT TO MAKE SURE, I N TERMS OF WHETHER YOU ARE SAYING WE SHOULD RE MAND IT FOR HIM TO MAKE FU RTHET FINDINGS, BUT THE TRUTH OF THE MATTER IS THAT THERE IS NOTHING IN THIS RECORD , B ASED ON , OR ANY PRO FFER OF TESTIMONY , THAT YOU WERE PREPARED T O GIVE. YOU SAID IT SHOULD , THEHEARING SHOULD HAVE LA STED 45 MINUTES, BUT YOU HAD N O WITNESSES TO , REALLY , T ALK ABOUT WHY THIS CASE PRESENTED UNUSUAL CIRCUMSTANCES BEYOND THE FACT THAT YOU SAID, WELL , I CAME IN, WHAT YOU HAVE BEEN SAYING THIS MORNING, WHICH IS THAT YOU CAME IN AT THE END O F A CASE. IS THAT CORRECT?

I WAS PREP ARED TO PRESENT, TO BE QUESTIONED , MYSELF TO BE QUESTI ONED UNDER OATH , A S TO WHAT EFFORTS WERE NECESSARY ON THIS PARTICULAR CASE.

DID YOU ASK THAT , TO , TO PUT YOURSELF UNDER OA TH AND THE JUDGE DENIED THAT?

I HAD NOT ASK AND THE COURT DID NOT DENY IT. AS I THINK THE RECORD WOULD REFLECT, THIS HEARING WAS VERY , VERY QUICK.

WE UNDERSTAND THAT, BUT I THINK THAT THE DIFFERENCE BETWEEN THIS AND ANOTHER TYPE OF ATTORNEYS FEES HEARING , IS THAT THERE , FIRST , HAS TO BE , YOU HAVE GOT THE BURDEN OF SHOWING EXTRAORDINARY OR UNUSUAL CIRCUMSTANCES. I DON'T THINK WE CAN PUT IT ON THE DEPARTMENT OF FINANCIAL SERVICES , TO SAY, WELL, THEY ARE COMING IN IN A FULL-BLOWN HEARING, TO CHALLENGE IT , THEY EXPECT THERE TO BE TESTIMONY , THAT, THEN , IS USED BY THE JUDGE OR IS CHALLENGED BY THEM FOR , IN ORDER TO COME UP WITH THIS ORDER , SO I DON'T SEE HOW REMANDING IT JUST TO HAVE THE JUDGE ENTER MAGICWORDS , THAT WOULD JUST MAKE THIS A SHAM, UNLESS YOU HAVE GIVEN US , TODAY , SOMETHING THAT SAYS WHERE THE , WHY THE TRIAL COURT'S ORDER SHOULD BE SUSTAINED , EVEN THOUGH ALL IT NEEDED WAS JUST THESE MAGIC WORDS. DO YOU SEE , IT JUST SEEMS THAT THERE IS A LACK OF PROOF ON YOUR PART.

I THINK I UNDERSTAND WHAT THE COURT IS SAYING OR WHAT JUSTICE , YOU ARE SAYING, BUT WHAT I AM SUGGESTING TO THE COURT IS THAT A LOT OF THIS INFORMATION WAS KNOWN BOTH TO THE TRIAL COURT AND TO APPELLANT , AT THE TIME THAT THIS MOTION WAS HEARD. I THINK IT IS VERY, VERY RARE, AND I DON'T KNOW HOW MANY MOTIONS OR WRIT OF PETITIONS FOR CERTIORARI CAME IN UNDER THE CAP, BUT I WOULD SUSPECT THAT, IF NO MOTION WAS MADE TO EXCEED THE CAP, THAT ALL OF THOSE INDIVIDUALS PAID UNDER THAT SCHEME WERE PAID AND HAD HANDLED PRIOR ISSUES . WHAT THE DEPARTMENT KNEW AT THAT TIME AND WHAT THE COURT KNEW AT THAT TIME , WAS THAT THERE WERE VERY SHORT TIME PERIODS IN ORDER TO PREPARE THIS MOTION.

BUT I THINK THAT THE PROBLEM THAT AT LEAST I AM STRUGGLING WITH, IS THAT IN MY EXPERIENCE , WHEN THERE IS AN ATTORNEYS FEE ISSUE , IN AN INSURANCE CASE , AND TRYING TO GET THE COURT TO AWARD A REASONABLE FEE , THEN YOU LINE UP LAWYERS TO TESTIFY AS TO WHAT WOULD BE A REASONABLE FEE UNDER THE CIRCUMSTANCES OF THAT CASE , AND THAT IS PRESENTED TO THE TRIAL JUDGE IN AN ATTORNEY FEE HEARING . NOW, HERE , YOU DON'T HAVE JUST REASONABLE FEE STANDARD. YOU HAVE GOT AN UNUSUAL CIRCUMSTANCE STANDARD, WHICH WOULD SEEM TO ME, TO REQUIRE THERE TO BE SOME RECORD THAT, UPON WHICH A TRIAL JUDGE COULD, THEN , MAKE A DETERMINATION THAT THIS WAS, IN FACT , AN EXTRAORDINARY OR UNUSUAL CIRCUMSTANCE , AND I DON'T SEE THAT THAT WAS DONE HERE. THAT IS THE PROBLEM THAT I AM HAVING .

THAT THERE WERE NO ATTEMPTS TO PRESENT WITNESSES?

THAT'S RIGHT. THERE WASN'T A RECORD.

AND JUSTICE WELLS, IN MY OPINION, AND I HAVE HANDLED THOSE, I HAVE HANDLED HEARINGS LIKE THAT FOR ATTORNEYS FEES, WHERE IT IS COMMON TO SUBMIT AFFIDAVITS OR TESTIMONY OF COUNSEL TO SUPPORT THE FEE , THAT WAS NOT DONE IN THIS PARTICULAR CASE. SHOULD IT HAVE BEEN DONE? IN RETROSPECT , SURELY , BUT YOU KNOW, I DON'T THINK , I THINK THAT THE ATTORNEY TESTIFYING UNDER OATH , BEGINS SUFFICIENT TIME TO PRESENT HIS OR HER REASONS FOR EXCEEDING THE MAXIMUM CAP , WOULD CERTAINLY BE REASON ENOUGH FOR THE COURT TO , SUBJECT TO CROSS-EXAMINE BY THE STATE ATTORNEY , THE ATTORNEY GENERAL AND THE APPELLANT , WOULD CERTAINLY BE REASON ENOUGH TO FIND THAT EXTRAORDINARY OR UNUSUAL CIRCUMSTANCES EXIST .

AND LET ME JUST HELP WITH THE PROCESS IN THIS . IN A TYPICAL CASE , YOU WOULD TALK TO OPPOSING COUNSEL AND SAY THIS IS WHAT , ANY OBJECTION TO THIS AMOUNT OF FEE I AM REQUESTING? WAS THAT DONE IN THIS CASE?

YES, SIR. ATTEMPTS WERE MADE TO RESOLVE THIS. WE FILED A MOTION TO RELINQUISH JURISDICTION TO THE TRIAL COURT. WHEN THE DEPARTMENT TOOK, THERE WAS NO MOTION FOR REHEARING OR MOTION FOR CLARIFICATION. WE, THEN, AND IT CAME AS A SURPRISE TO US THAT THE DEPARTMENT TOOK AN APPEAL. THERE IS NO LETTER WRITTEN BY THE DEPARTMENT OR THE APPELLANT, SAYING, LOOK, HERE IS OUR AUDIT. WE FIND A, B AND C WRONG, THAT THE ATTORNEYS FOR BOTH SIDES CAN RESOLVE, BUT THAT WAS WHAT PROMPTED OUR MOTION TO RELINQUISH JURISDICTION TO THE TRIAL COURT, WHICH WAS OPPOSED BY APPELLANT, SO WE END UP BEFORE THIS COURT ON THE ISSUES THAT I THINK COULD EASILY HAVE BEEN RESOLVED BY THE TRIAL COURT.

BUT PRIOR TO GOING TO JUDGE MORAN, DID YOU TO JUDGE MORAN, DID YOU PRESENT YOUR PROPOSED REQUEST FOR FEES TO THE STATE?

SURELY. HAD THEY IT IN THEIR HANDS FOR APPROXIMATELY 30 DAYS.

DID THEY INFORM THAT THEY WERE OBJECTING TO IT BASED ON THE STATUTE?

NO, SIR.

SO GOING INTO THE HEARING WAS THE FIRST TIME YOU KNEW THERE WAS GOING TO BE OBJECTION, WAS AT THE HEARING?

YES, SIR. CHEEVER CHIEF YOUR TIME EXPIRED WITH OUR ASSISTANCE, AND I THINK YOU HAVE USED UP YOUR, ALL OF YOUR TIME.

NO REBUTTAL.

THANK VERY MUCH. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RISE.