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IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,780

ROBERT MAKEMSON, et al.,

Petitioners,

vs.

MARTIN COUNTY,

Respondent.

ON REVIEW OF QUESTIONS
CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE
FLORIDA FOURTH DISTRICT COURT OF APPEAL

CONSOLIDATED BRIEF OF AMICUS CURIAE

Florida Criminal Defense Attorneys Association

and

National Legal Aid and Defender Association

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STATEMENT OF INTEREST AND IDENTIFICATION OF AMICUS CURIAE

The Florida Criminal Defense Attorneys Association (FCDAA) is a Miami-headquartered organization of approximately 250 state wide members of the Florida bar actively practicing criminal defense. The FCDAA is dedicated to the reasoned and informed advancement of criminal procedure and jurisprudence. Without question, the focal point of this dedication is the Sixth Amendment guarantee of effective assistance of counsel.

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal services agencies around the nation, as well as assigned counsel plans and private practitioners.

The question of compensation for attorneys who are appointed to represent indigent accuseds is of great concern to FCDAA and NLADA. No segment of the bar shoulders a heavier burden of pro bono work than criminal defense lawyers, a substantial number of whom are members

of FCDAA or NLADA. As the most visible and experienced element of the trial bar, criminal defense attorneys are the most likely candidates to receive uncompensated appointments.

Moreover, FCDAA and NLADA are uniquely familiar with the issue of attorney compensation, having researched the issue thoroughly and having collected extensive materials from other jurisdictions and authorities where the same or similar issue has been debated or adjudicated. In order to assist this Court, much of the research which FCDAA and NLADA has conducted is submitted.

SUMMARY OF ARGUMENT

Amicus Curiae believe the Sixth Amendment forbids the state to impose its fiscal policy upon judges charged with the solemn obligation of appointing competent counsel for indigent accuseds. The state's economic interest is no more relevant to a judge's selection of a particular lawyer than, for example, politics.

Section 925.036, Florida Statutes, provides a reasonable rate of compensation for appointed counsel but arbitrarily limits the attorney fee regardless of the number of hours required to effectively represent the accused. Since lawyers must, regardless of compensation, devote the necessary time the fee limit imposes a pro bono obligation upon appointed counsel. Thus, the fee limit is an unconstitutional legislative encroachment upon this Court's exclusive jurisdiction to regulate the practice law.

When the fee limit and the exceptional circumstances of an individual case make appointment of competent counsel impossible the judge must discharge his constitutional obligation by exercising inherent judicial power and award a greater fee. The appointing judge may do so because Section 925.036 is directory and not mandatory, or because the statute is unconstitutional as applied to exceptional circumstances.

Reflecting these arguments and policies, Amicus

Curiae conclude that certified questions II and IV should be answered affirmatively. No position is taken on certified questions I and III.

ARGUMENT

II

SECTION 925.036, FLORIDA STATUTES (1983), IS UNCONSTITUTIONAL AS APPLIED TO EXCEPTIONAL CIRCUMSTANCES AND THE TRIAL COURT HAS THE INHERENT AUTHORITY TO AWARD A GREATER FEE FOR TRIAL AND APPEAL THAN THE STATUTORY MAXIMUM IN THE EXTRAORDINARY CASE.

Since 1963 the *states* have been constitutionally required to provide counsel to indigents charged with serious offenses. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *In Interest of D.B.*, 385 So.2d 83, 92 (Fla. 1980). It remains, however, the obligation of the *courts* to assure that the states fulfill their mandated duties. This Court has clearly recognized the judiciary's constitutional obligation in the context of individual cases where a particular attorney's conduct is measured against Sixth Amendment standards. *See, e.g., Knight v. State*, 394 So.2d 997 (Fla. 1981). The second certified question implicates individualized Sixth Amendment analysis, but broadens the scope of review to include consideration of the mechanism which Florida has created to supply counsel in a vast class of cases -- those instances where a trial court requires a member of the private bar, rather than a public defender, to

represent an indigent accused.[1]

The mechanism which the state created is Section 925.036. This statute provides that appointed counsel shall be "compensated at an hourly rate fixed by the chief judge or senior judge of the circuit in an amount not to exceed the prevailing hourly rate for similar representation rendered in the circuit . . . ." Section 925.036(1), Fla. Stat. However, the statute sets fixed limits for total compensation in a single case regardless of the number of charges, the seriousness of the charges, the number of witnesses, the complexity of the issues involved, the number of hours expended, the experience and skill of the attorney, or any other special, extraordinary, or exceptional circumstance which would make it financially disadvantageous for a competent lawyer to accept the appointment. Section 925.036(2), Fla. Stat. *See: Metropolitan Dade County v. Lyons*, 462 So.2d 487 (Fla. 3d DCA 1984); *Marion County v. DeBoisblanc*, 410 So.2d 951 (Fla. 4th DCA 1982); *Pinellas County v. Maas*, 400 So.2d 1028 (Fla. 2d DCA 1981); *County of Seminole*

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[1] A trial court may appoint a member of the private bar pursuant to Section 27.53(2), Florida Statutes, to be compensated at county expense, without having to make "any prerequisite findings or allow the county the opportunity to be heard . . . ." Escambia County v. Behr, 384 So.2d 147, 150 (Fla. 1980). Section 27.53(2) precludes narrowing of the certified question to, for example, instances where the trial court must appoint private counsel because of the public defender's conflict of interest.

v. Waddell, 382 So.2d 357 (Fla. 5th DCA 1980).

In 1973 this Court found a predecessor statute which established a $750.00 limit in capital cases not to violate due process or equal protection. *Mackenzie v. Hillsborough County*, 288 So.2d 200 (Fla. 1973). But in *Metropolitan Dade County v. Bridges*, 402 So.2d 411, 414-5 (Fla. 1981), the only decision by this Court construing the present statute, a plurality (joined in substance by the remaining justices[2]) declared:

> Unless it is demonstrated that the maximum amounts designated for representation in criminal cases by Section 925.036 are so unreasonably

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[2] The plurality, consisting of Justices Alderman, England, and McDonald, concluded that the appointed lawyer who sought compensation in excess of the limit had failed to demonstrate the statute impinged an indigent accused's Sixth Amendment right to counsel. Chief Justice Sundberg, joined by Justice England, recognized the "special responsibility of the courts to assure that indigent criminal defendants receive effective assistance of counsel." Id. at 415. Chief Justice Sundberg then concluded that if the limits were "so unreasonable as to make it impossible to secure effective counsel . . . it would be the duty of the courts to strike down such limitations in favor of reasonable compensation." Ibid. Justices Boyd and Adkins found in the "extremely rare, exceptional case where the statutory maximum amount is insufficient to compensate the lawyer to assure a fair trial, with effective assistance of counsel, to the accused, then the court has the power to order compensation in excess of the prescribed amounts. Id., at 416. Justice Adkins also joined Justice Overton who concluded in dissent that the statute was directory and not mandatory because of the Sixth Amendment's application in those cases which have multiple issues and large numbers of witnesses. Thus, all seven members of this Court realized and agreed that the Sixth Amendment may not always be implemented if there is strict adherence to the statutory fee limit.

> insufficient as to make it impossible for the courts to appoint competent counsel to represent indigent defendants, we can not say that Section 925.036 violates the Sixth Amendment right to counsel.

Resolution of the second certified question now requires this Court to address the broad Sixth Amendment implications recognized in *Bridges*. The complexity of the certified question warrants review of the fundamental principles encompassed by the right to counsel.

For nearly two hundred years prior to *Gideon* the states were unaware of, ignored, or inadequately discharged their Sixth Amendment responsibility. *See, e.g., Betts v. Brady*, 316 U.S. 455 (1941). Typically the right to counsel was not invoked or the state relied upon the generosity of private attorneys to carry the burden. *See*: *A National Survey*: *Criminal Defense Systems*, 4-5, Table 2, United States Department of Justice, Bureau of Justice Statistics. Then, beginning with *Gideon*, a steady stream of decisions extended the right to counsel to a growing variety of situations. *See, e.g., Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (misdemeanors resulting in loss of liberty); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (juvenile proceedings); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (appeal as of right). With these decisions arrived the states' escalating burden to systematically provide counsel on an

individualized basis.[3]

In Florida, the legislature responded by funding a public defender system.[4] While Florida's public defenders are undoubtedly the mainstay of the legislature's Sixth Amendment plan for indigent representation, the success of this counsel delivery system is not relevant to evaluation of the statutory mechanism employed when a judge requires appointed private counsel.

As stated previously, the legislature has provided appointed counsel with compensation "not to exceed the prevailing hourly rate for similar representation rendered in the circuit . . . ." Section 925.036(1), Fla. Stat. Thus, the legislature permits the rate setting judge to incorporate the aspirational proposition that lawyers have a "professional obligation to provide legal services to the poor." *In Interest of D.B.*, 385 So.2d, at 92; *Metropolitan Dade County v. Bridges*, 402 So.2d, at 414 (plurality opinion). Fla. Bar Code Prof. Resp.,

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[3] Prior to undertaking its burden under Gideon, Florida provided only token compensation to private attorneys who represented indigent capital defendants. See R.G.S. 1920, Sec. 6070 ($50.00 prior to 1939 and $100.00 until 1970).

[4] Nationwide, public defender systems have become predominate, serving 68% of the population and forty-three of the country's fifty largest counties. Criminal Defense Systems, supra, at 3, n.6.

E.C. 2-25.[5] More importantly, however, the legislature's appointed counsel delivery system entitles a lawyer to reasonable compensation, unless he expends a sufficient number of hours to implicate Section 925.036(2) -- the totally arbitrary fee limit.

The fee limit is the state's directive to appointed lawyers that if the case is sufficiently complex they will shoulder the financial burden of the Sixth Amendment. As with any member of the bar, an appointed lawyer cannot ethically avoid his professional obligation by failing to expend the necessary effort to zealously represent his client. See: Fla. Bar Code Prof. Resp., E.C. 5-1. Furthermore, it can safely be assumed that trial judges are not prone to grant belated motions to withdraw premised upon a lawyer's assertion that he will be unable to conclude his appointment within the fee limit. Thus, each time an appointed lawyer's fee is reduced by Section 925.036 the state or county has benefited from, in a haphazard, arbitrary manner, the

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[5] The constitutionality of this provision is not implicated. Since a judge and not the legislature actually sets the hourly rate, there appears no bar to review and ultimately determine whether a set rate precludes appointment of effective counsel.

This is not to say that judicial rate setting, as provided by statute on a circuit by circuit basis, is without complication. Requiring a particular lawyer to bear a portion of the profession's pro bono obligation, if done at all, must be accomplished in an orderly, equitable manner fair to all individual members of the bar.

traditional obligation of the legal profession to serve the poor.

However, there is nothing to suggest that the legislature created the fee limit as a method for encouraging a lawyer's pro bono obligation.[6] To the contrary, in Section 925.036 the legislature has attempted to serve two masters -- the Sixth Amendment and the public treasury. *Wakulla County v. Davis*, 395 So.2d 540, 543 (Fla. 1981). However, this Court cannot suffer the same conflict:

> I realize that it is the statutory financial responsibility of a county which is in issue here due to the apparent disability of the public defender's office. But that is of no constitutional moment. Under the dictates of *Gideon* it is the ultimate responsibility of the state to fund the guarantee of the Sixth Amendment where indigents are concerned.

Metropolitan Dade County v. Bridges, 402 So.2d, at 415 (Chief Justice Sundberg, with Justice England, concurring).

Without question it is of vital concern to all that Florida maintain reliable and efficient counsel delivery systems. That the legislature maintains its own fiscal interest to the solution is not subject to dispute. But it is no longer of any concern that economics play a role

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[6] As discussed in section II.A, infra, the legislature may not constitutionally regulate the practice of law.

in the actual selection of counsel for indigents. That issue was fully resolved in *Gideon*.

If Section 925.036 is held constitutional even where exceptional circumstances and the fee limit make voluntary appointment of effective counsel impossible, an appointing judge must choose to dismiss the case or require involuntary appearance of pro bono counsel.[7] Because the first

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[7] As used here involuntary counsel refers to an attorney appointed in a particular case who does not consent to that specific representation. This involuntary service is clearly distinguished, and entirely unrelated, to mandatory pro bono service which may be required of all members of the general bar. In the latter situation the attorney's obligation is discharged under circumstances that makes the specific representation consensual. Mandatory pro bono service, where there is equitable allocation of financial burdens upon all general members, can be efficiently and fairly administrated by the bar, but involuntary representation is imposed by a judge. Criminal "specialists," who have historically shouldered much of the burden of the traditional obligation to the poor, could continue their efforts under any mandatory pro bono bar-administered program.

Requiring an attorney to appear in a particular case, without his consent and without reasonable compensation, is unconstitutional involuntary servitude, Bedford v. Salt Lake County, 447 P.2d 193, 194 (Utah 1968)("[T]he legislature can no more require a lawyer to represent a client for free than it can compel a physician to treat a sick or injured patient without pay."), and deprivation of property without due process of law. Sparks v. Parks, 368 So.2d 528 (Ala. 1979); Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); Weiner v. Fulton Co., 148 S.E.2d 143, 146 (Ga. 1966). In Armstrong v. United States, 364 U.S. 40, 49 (1960), the United States Supreme Court stated the basic due process property right:

> The Fifth Amendment guarantee is designed to bar Government from forcing some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.

(footnote 7 cont.)

of these alternatives is clearly abhorrent and contrary to the legislative intent of Section 925.036,[8] only the second merits discussion.

A. The Supreme Court, And Only The Supreme Court, May Regulate The Practice Of Law.

Section 15, Article V, of the Constitution of the State of Florida provides:

> The Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

Accordingly, this Court has declared that it will not "recognize any legislative control on the subject of who may be admitted to the practice of law or any legislative

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Thus, regardless of the validity of mandatory pro bono service by the general bar, these authorities demonstrate that involuntary court appointments are a breed apart from the professional obligation of lawyers to provide legal services for the poor. This vital distinction must be maintained.

[8] The obvious legislative intent of Section 925.036 is to provide counsel to indigents, but to do so as cheaply as possible. History provides an apt illustration. In Wakulla County v. Davis, 395 So.2d, at 540, this Court avoided constitutional analysis by construing a predecessor statute, Section 925.036, Florida Statutes (1978), to permit fee "stacking" and hence provide "more realistic and equitable" compensation. It was held "illogical to construe the law so that regardless of the number of charges on which a client is defended, his attorney is limited to a $2,500 fee." Id., at 543. The legislature's response was to abolish stacking and raise the fee limit to $3,500. Whatever the reason, it is apparent that legislative intent has been responsive to the Sixth Amendment but not as sensitive to the effectiveness requirement as this Court must now be.

determination on the subject of who must be or shall be disciplined. *State ex rel. v. Evans,* 94 So.2d 730, 733-4 (Fla. 1957). This constitutional separation of power has been vigilantly maintained. *See: In re The Florida Bar,* 316 So.2d 45 (Fla. 1975) (financial disclosure statute not applied to attorney's serving Supreme Court administratively or appointed by judge to represent indigents); *State ex rel. v. Evans, supra* (Supreme Court may independently determine that commission of crime warrants attorney discipline).

Despite being "officers of the court," attorneys are not state or county "officers." *Petition of Florida State Bar Association*, 40 So.2d 902, 907 (Fla. 1949). Thus the Court exercised its inherent power and integrated all practicing attorneys, *Id.*, creating the Florida Bar as its agency. *In re The Florida Bar,* 316 So.2d 45, 49 (Fla. 1975). This Court maintains inherent power to "regulate the conduct of the bar." *Holland v. Flourney,* 195 So. 158, 142 Fla. 459 (1940). *Accord, Sandstrom v. State,* 309 So.2d 17 (Fla. 4th DCA), *cert. discharged,* 336 So.2d 572 (1975). Thus, this Court held:

> Especially since the integration of The Florida Bar in 1950 the prescription of ethical standards, the designation of educational and moral requirements, *and the exercise of supervisory jurisdiction* are all peculiarly judicial functions.

State ex rel. v. Evans, 94 So.2d, at 733 (emphasis

added)[9].

These authorities make clear that it is beyond the province of the legislature to regulate the practice of law. Indeed, regulation of attorneys by the legislature violates the constitutional separation of powers doctrine imposed by Section 3, Article II, of the Constitution of the State of Florida. Thus, there would be little argument supporting legislative power to enact a law requiring attorneys to donate a certain number of hours, or a certain portion of their practice, to pro bono service. However, when the fee limit of Section 925.036 is applied to extraordinary cases, and a judge is unable to appoint a willing pro bono attorney, the legislature has succeed in doing just that. Accordingly, the fee limit of Section 925.036 cannot be a constitutional exercise of legislative power.

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[9] Cases from other jurisdictions universally hold that the obligations and responsibilities of the bar are matters of exclusive judicial concern. See Schware v. Board of Bar Examiners, 353 U.S. 232, 248, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957)(Frankfurter, G., concurring); Smith v. State, 394 A.2d 834, 838-9 (N.H. 1978); State v. Rush, 46 N.J. 399, 411, 217 A.2d 441, 447 (1966); Petition for Integration of Bar of Minnesota, 216 Minn. 195, 12 N.W.2d 515 (1943); Ruckenbrod v. Mullens, 102 Utah 548, 133 P.2d 325 (1943); In re Intergration of State Bar of Oklahoma, 185 Okl. 505, 95 P.2d 113 (1939); In re Lacey, 11 Cal.2d 699, 701, 81 P.2d 935, 936 (1938); People ex rel. Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937); In re Intergration of Nebraska State Bar Association, 133 Neb. 283, 275 N.W. 265 (1937); In re the opinion of the justices, 279 Mass. 607, 180 N.E. 725 (1932); In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932); In re Spane, 123 Pa. 527, 16 A. 481 (1889).

B. The Judiciary Has The Inherent Power To Award Fees In Excess Of The Statutory Limit When Necessary To Secure Effective Assistance Of Counsel For Indigent Accuseds.

The inherent power of a court arises from its very existence, "from the fact of the Court's creation or from the fact that it is a court." *Petition of Florida State Bar Association*, 40 So.2d, at 905. *Accord: Rose v. Palm Beach County*, 361 So.2d 135, n.3 (Fla. 1978). No express grant of authority is necessary for the judiciary to exercise inherent power, *Petition of Florida State Bar Association*, 40 So.2d, at 905, but extreme caution is necessary to avoid areas of responsibility confided to the executive and legislative branches of government. *Rose v. Palm Beach County*, 361 So.2d, at 138. When specific constitutional authority is at issue, such as that framed by the second certified question, the doctrine of inherent power is properly invoked. *See, Ibid* (power to implement right to compulsory process); *State, Department of Health and Rehabilitative Services v. Hollis*, 439 So.2d 947 (Fla. 1st DCA 1983) (power to require executive action to safe-guard vital interests of minors). *See also, Chief Judge of the Eighth Judicial Circuit v. Board of County Commissioners of Bradford County*, 401 So.2d 1330 (Fla. 1981) (power to require burden of proof on executive branch desiring to reallocate currently used court space in executive's building).

In *Rose v. Palm Beach County* this Court was required to examine the extent of inherent judicial power as the doctrine pertains to the Sixth Amendment right to compulsory process. The indigent accused in *Rose* had obtained a change of venue which necessitated witnesses to travel three hundred miles and be lodged away from home, all at county expense. The trial court determined that statutory witness fees[10] were inadequate and ordered the county to make additional payment. This Court addressed the issue as follows:

> Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. *The doctrine of inherent judicial power as it relates to the practice of compel-*

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[10] Section 90.14 (1979) provided:

> Witness in all cases, civil and criminal, and in all courts, now or hereafter created, and witness summoned before any arbitrator or master in chancery shall receive for each day's actual attendance $5.00 and also 6 cents per mile for actual distance traveled to and from the courts.

Counties are required to pay witness fees for indigent criminal defendants. Section 914.11, Fla. Stat. (1977).

> *ling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction.* The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. *The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.*

361 So.2d, at 135 (emphasis added, footnotes omitted).

This Court resolved *Rose* by finding the witness fee statute directory and holding that the expenditure of public funds beyond statutory limits, where required to implement an accused's right to compulsory process, is supported by inherent judicial power. *Id.*, at 139. The notion that an accused could be protected by holding non-responding witnesses in contempt and transporting them in custody was rejected. *Id.*, at 138.[11]

If a statutory limit which impinged Sixth Amendment compulsory process rights could not survive inherent

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[11] Chief Justice England was joined by Justice Sundberg in a dissenting opinion which found the Rose holding inconsistent with the statement made in Mackenzie v. Hillsborough County, 288 So.2d, at 201, that "if a change in the [statutory level of appointed counsel] compensation be called for, it is within the province of the Legislature, not the courts, to make such change." In Mackenzie, this Court merely decided that a statutory limit on compensation provided attorneys accepting court appointments in criminal cases did not violate the attorneys' rights to due process and equal protection of law. The inconsistent language from Mackenzie is, with respect to its holding, surplusage.

judicial power, should a different rule apply when the Sixth Amendment right to effective counsel is at stake?

The answer to this question must be a resounding no. Just as custodial means for obtaining witness testimony was rejected in *Rose*, so must all ad hoc methods of forcing involuntary pro bono counsel upon indigents.[12] Each is fraught with great potential for misapplication of competing doctrines and, more significantly, the substantial possibility of failure.

First, judicial ad hoc imposition of involuntary pro bono service is incompatible with Sixth Amendment responsibilities. An appointing judge's sole constitutional obligation is to provide an indigent with competent counsel. The judge should be unconcerned that the appointment will adversely affect the economic interest of the lawyer. Nor should the judge be mindful, for example, that other lawyers have eluded pro bono appointments. The judge who undertakes such considerations may be fair to lawyers, but he is confusing the Sixth Amendment with the bar's traditional obligation to the poor.

Second, plain reality dictates that even good lawyers do not provide effective assistance of counsel just

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[12] It has been stated that attorneys are officers of the court and bound to serve its needs. See, e.g., Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932). However, in Powell the United States Supreme Court never stated, or even intimated, that counsel's obligation was to be without compensation.

because they have been appointed. Involuntary pro bono lawyers must simultaneously earn a living. "[I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he would be reasonably compensated." *Okeechobee County v. Jennings*, 10 F.L.W. 572, 573 (Fla. 4th DCA March 6, 1985)(Anstead, C.J., concurring specially).

Even the United States Supreme Court recognized this problem when it determined that the Criminal Justice Act of 1964, which established compensation for federally appointed lawyers, was created "[i]n response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel. . . ." *Ferri v. Ackerman*, 44 U.S. 193, 199, 100 S.Ct. 402, 406-7, 62 L.Ed.2d 355 (1979) (footnote omitted). Modern studies clearly document the connection between inadequately compensated attorneys and effective assistance of counsel. For convenience, an annotated bibliography of these sources is attached to this brief as Appendix A.

Moreover, there already exist cases revealing that appointed attorneys have failed their clients because of financial considerations. See *State v. Pelfrey*, 256

S.E.2d 438 (W.Va. 1979) (appointed attorney refused to seek mistrial to avoid re-trial); *In Matter of Bale*, 247 N.E.2d 246 (N.C. 1978) (appointed attorney, who was former judge without savings to live upon, placed priority on renumerative cases and neglected to file appeal for indigent); *In re Hunoval*, 247 S.E.2d 230 (1977) (appointed lawyer notified court by letter that based upon financial considerations he would not seek appeal).

Finally, the problem of involuntary pro bono counsel must also be considered from a post-conviction point of view. One shudders to imagine the litigation to be spurred by a judge's involuntary pro bono appointment premised upon the finding that the fee limit made voluntary competent counsel impossible.

Providing effective assistance of counsel to indigents is of such fundamental importance that judges must, whenever necessary, exercise inherent power and award fees sufficient to obtain the appearance of voluntary competent counsel.[13] This Court must hold the fee

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[13] Section 925.036(1), and Section 43.28, Florida Statutes, which requires counties to furnish "personnel necessary to operate the circuit and county courts," obviate the need to determine whether there is inherent judicial power to award fees in the absence of statutory authority. In some jurisdictions such inherent power has been exercised. See: State ex rel. Fitas v. Milwaukee County, 221 N.W.2d 902 (Wis. 1974); State ex rel. Grecco v. Allen Circuit Court, 153 N.E.2d 914 (Ind. 1958); Ferguson v. Pottawattamie County, 278 N.W. 223 (Iowa 1938); Millholen v. Riley, 211 Cal. 29 (1930). Federal courts may award attorney fees in the absence of statutory authority when, in the exercise of there equitable powers,

limit of Section 925.036 directory and not mandatory, or unconstitutional as applied to exceptional circumstances.

C. This Court Should Establish Guidelines To Assist Lower Courts In Their Responsibility To Determine When A Specific Case Warrants Attorney Fees In Excess Of The Statutory Limit.

In *Metropolitan Dade County v. Bridges, 402 So.2d, at 415-6*, Justices Sundberg and England suggested that exceptional circumstances which would warrant awarding fees in excess of the statutory limit "would have to relate to lawyers or types of cases as a class and should not be entertained on an individual lawyer or individual case basis . . . ." Justice Overton, joined by Justice Adkins, dissented in *Bridges* and stated that the fee limit could be lifted when multiple issues or large numbers of witness required an exceedingly large amount of the attorney's time. *Id.*, at 417. Justice Adkins also joined Justice Boyd who stated in his partial dissent that a remand was appropriate to determine if "extraordinary

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the interests of justice require. Hall v. Cole, 412 U.S. 1, 4-5, 93 S.Ct. 1943, 1945, 36 L.Ed.2d 702, 707 (1973); 307 U.S. 1, 166, 59 S.Ct. 777, 780, 83 L.Ed. 1184 (1939).

In Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA), cert. denied, 253 So.2d 864 (Fla.), cert. denied, 406 U.S. 924 (1975), it was stated that there was no inherent authority to recover attorney fees for appointed counsel as part of the costs of litigation. This language is inapplicable to the certified question since appointed attorneys do not seek fees as part of litigation costs.

circumstances" existed justifying an award greater than the fee limit. *Id.*, at 417. Amicus Curiae respectfully conclude that Justice Overton's approach is most likely to implement the Sixth Amendment's requirements.

Analyzing cases and lawyers as classes or types is an exceedingly difficult, if not impossible, responsibly. For example, it might be concluded that all first degree murder cases warrant fees in excess of the statutory limit, but virtually any lesser crime can become enormously complex and time consuming when certain types of evidence, such as tape recordings, sophisticated scientific tests, or extensive psychiatric testimony, is involved. Moreover, classifying lawyers, presumably by years of experience, specialization, or reputation, will require a complex procedure just to achieve fairness, let alone accuracy.

On the other hand, individual determination by the appointing judge on a case by case basis presents advantages. The appointing judge is in the best position to know the availability of counsel sufficiently skilled to handle a particular case competently. The judge will be able to determine what factors in the case make it extraordinary. Just as reviewing courts routinely analyze ineffectiveness of counsel claims on a case by case basis, so should an appointing judge analyze prospective competency problems.

The key to any determination of exceptional circumstances must be the amount of time required to effectively represent the indigent accused. Whether the attorney's time is consumed in listening to surreptitiously recorded tape recordings of his client's alleged participation in a drug trafficking conspiracy, researching novel legal issues, deposing vast numbers of witnesses, or traveling great distances to and from court following a change of venue, the appointing judge should be able to consider whether a competent lawyer could complete the task within the hours allotted by the fee limit. Any other method of determining exceptional circumstances will suffer from the same rigidity which taints the present system.

IV

THE TRIAL COURT HAS THE INHERENT AUTHORITY TO ORDER PAYMENT OF AN ATTORNEY FEE BEFORE REPRESENTATION IS COMPLETED WHEN EXCEPTIONAL CIRCUMSTANCES REQUIRE.

For the same reasons presented in section II, *supra*, to assure effective assistance of counsel and when exceptional circumstances warrant, an appointing judge has inherent power to order payment of fees prior to completion of counsel's representation.

CONCLUSION

Based upon the preceding cases, authorities, and policies, Amicus Curiae urge reversal of the judgment below and further suggest this Court hold that the fee limit of Section 925.036, Florida Statutes, is directory and not mandatory, or is unconstitutional as applied to exceptional circumstances, and that appointing judges have inherent power to award a greater fee at any time when necessary to provide indigents with effective assistance of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the Consolidated Brief of Amicus Curiae and Appendix A were delivered by mail to: Michael H. Olenick, Martin County Attorney, 50 Kindred Street, Stuart, Florida 33497, Robert Makemson, 200 Seminole Street, P.O. Box 538, Stuart, Florida, 33495, Eric Gressman, Assistant Dade County Attorney, 73 West Flagler Street, Room 1626, Miami, Florida 33130, and Robert G. Udell, 217 E. Ocean Blvd., Stuart, Florida 33494, on this 28 day of May, 1985.

Respectfully submitted,

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