IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,335

NICHOLAS G. SCHOMMER and JAMES V. LOBOZZO, JR.,

Petitioners,

vs.

THE HONORABLE E. RANDOLPH BENTLEY, CIRCUIT JUDGE, IN AND FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA AND BOARD OF COUNTY COMMISSIONERS OF HIGHLANDS COUNTY, FLORIDA

Respondents.

BRIEF OF AMICUS CURIAE
ACADEMY OF FLORIDA TRIAL LAWYERS

Respectfully submitted,

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INTRODUCTION OF AMICUS CURIAE

The Academy of Florida Trial Lawyers appears in this proceeding as an amicus curiae, with the written consent of all parties previously filed in this Court, in accordance with Rule 9.370, Florida Rules of Appellate Procedure.

The Academy is over 25 years old and consists of nearly 3,000 lawyers statewide. Several hundred of its members are also members of its Criminal Law Section. The objective and goals of the Academy are set forth in its Charter and Bylaws. They are to:

> Uphold and defend the principles of the Constitutions of the United States and the State of Florida; to advance the science of jurisprudence; to train in all fields and phases of advocacy; to promote the administration of justice for the public good; to uphold the honor and dignity of the profession of law; to encourage mutual support and cooperation among members of the bar; to diligently work to promote public safety and welfare while protecting individual liberties; to encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

The Academy is a non-profit corporation under the laws of the State of Florida.

The Academy of Florida Trial Lawyers has previously appeared as amicus curiae on numerous

occasions, before the Florida Supreme Court, District Courts of Appeal, as well as before the Circuit and County courts.

STATEMENT OF CASE AND FACTS

Petitioners Nicholas G. Schommer and James V. Lobozzo, Jr., are attorneys who represented an indigent capital defendant in a case tried before Respondent Circuit Judge E. Randolph Bentley. Schommer was appointed to represent the defendant and was authorized by the trial court to utilize other members of his law firm as may be necessary or expedient in representing the defendant. Both petitioners participated in the five-day trial of the defendant. [Appendix, page 2]

At the conclusion of the representation, both petitioners submitted a motion and affidavit for attorneys fees. Schommer requested $5,182.10, based upon $30.00 per hour of out-of-court time and $50.00 per hour of in-court time. Using the same hourly rates, Lobozzo requested $3,399.00. [Appendix, page 2]

The trial court determined that the requested legal fees were reasonable, but held that it was constrained by Section 925.036, Florida Statutes (1985), to award a total fee of $3,500.00 for both lawyers. The trial court stated that it had trouble finding private counsel who would accept court appointments for indigent defendants and that the financial constraint of the law should be addressed by the legislature or judiciary. [Appendix, pp.2-3]

Petitioners appealed to the Second District Court of Appeal, which treated the appeal as a petition for certiorari and denied it based on its understanding of existing case law. However, troubled by the "important public policy implications" involved in this case, the District Court of appeal certified four questions to this Court:

> I. Where a court issues one order under Section 925.036, Florida Statutes (1983), which authorizes multiple attorneys to represent one defendant on a single charge, may each attorney be awarded the maximum compensation under Section 925.036?
>
> II. Whether Section 925.036, Florida Statutes is unconstitutional on its face because it interferes with the inherent authority of the court to enter such orders which are necessary to carry out its constitutional authority?
>
> III. If Section 925.036 is constitutional, may the statute be held unconstitutional as applied to exceptional circumstances; or, in the alternative, does a trial court have the inherent authority to award a greater fee for trial and appeal than the statutory maximum in an extraordinary case?
>
> IV. If the trial court does have the authority to award a greater fee than the statutory maximum in exceptional circumstances, should the trial court have awarded the requested amount in this case?

[Appendix, pp. 4-5]

SUMMARY OF ARGUMENT

The Academy of Florida Trial Lawyers believes that this Court should find the court-appointed attorneys fee statute, Section 925.036, Florida Statutes (1985), unconstitutional on its face, clarifying or receding from Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981). Such a result is appropriate because the Legislature has legislatively removed the judicial interpretation of the law by which it was previously deemed constitutional. This Court earlier upheld the law because, as interpreted, it allowed the stacking of separate fees for each count defended, therefore permitting a trial court to exceed the apparent limits of the law. The state promptly amended the law to eliminate such an interpretation.

Section 925.036 singles out indigents and their court-appointed lawyers, treating them differently than all other officials and personnel associated with the criminal justice system. It treats them differently than Florida law treats other litigants from whom the state seeks life, liberty or property. For indigents and their court-appointed lawyers, fees are capped, regardless of the hours expended on the case, while all others are salaried or have compensation based upon the work performed, without limitation.

It is contended that this Court should find the statute unconstitutional on its face and substitute in its place a Rule of Judicial Administration, a form of which is recommended on pages 11-12 of this brief.

The mandates of constitutional law must remain within the control of courts. If the right of indigents to the effective assistance of counsel in criminal proceedings is to have meaning, it cannot continue to remain hostage to arbitrary financial constraints imposed by the Legislature.

Upon a finding that the law is unconstitutional, or that courts retain the inherent authority to exceed its limits in appropriate cases, this Court should hold that the requested attorneys fees of petitioners are reasonable and should be awarded by the trial court.

ISSUES PRESENTED

I.

SECTION 925.036, FLORIDA STATUTES (1985), IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT INTERFERES WITH THE INHERENT AUTHORITY OF THE COURT TO ENTER SUCH ORDERS WHICH ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY.

II.

IF SECTION 925.036, FLORIDA STATUTES, IS FACIALLY CONSTITUTIONAL, THIS COURT SHOULD INTERPRET IT TO ALLOW A TRIAL COURT TO EXERCISE ITS INHERENT AUTHORITY, NOTWITHSTANDING THE LAW.

III.

THE TRIAL COURT SHOULD HAVE AWARDED THE REQUESTED ATTORNEYS FEES TO NICHOLAS G. SCHOMMER AND JAMES V. LOBOZZO, JR.

I.

SECTION 925.036, FLORIDA STATUTES (1985), IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT INTERFERES WITH THE INHERENT AUTHORITY OF THE COURT TO ENTER SUCH ORDERS WHICH ARE NECESSARY TO CARRY OUT ITS CONSTITUTIONAL AUTHORITY.

The Academy of Florida Trial Lawyers urges this Honorable Court to clarify or recede from the apparent decision of Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981). In doing so, this Court should answer certified question II. as follows:

> Yes, Section 925.036 is unconstitutional on its face because it interferes with the inherent authority of the Court to enter such orders which are necessary to carry out its constitutional authority.

With this answer, the Court dispenses with the need to address the remaining questions. The given answer is appropriate and justified at law.

Why should this Court clarify or recede from Metropolitan Dade County v. Bridges? Because Section 925.036 has been changed. The interpretation of the law which earlier allowed it to be upheld has been legislatively abolished. When deciding Metropolitan Dade County v. Bridges, this Court relied on its prior holding that 925.036 did not completely limit fees to a single maximum since it was permissible to "stack" separate fees for each count defended. The plurality opinion reads:

> The statute, plainly read as a mandatory limitation on the maximum fees allowable and construed by us in Wakulla County v. Davis to permit stacking, does not conflict with any specific constitutional provision.

At 414. The specially concurring opinion of then-Chief Justice Sundberg, joined by Justice England, reinforces this idea. At 415-16. The opinion of Justice Boyd, joined by Justice Adkins, concurring in part and dissenting in part, plainly agrees that the stacking of fees allows for a reasonable legislative scheme. At 417.[1]

But before the ink was dry, the Legislature amended Section 925.036 to disallow the very stacking of fees upon which this Court relied to uphold the earlier law. At 413, fn. 3. Thus, the current law mandates absolute maximums in court-appointed legal fees, without regard for any of the traditional indicia which courts utilize to establish reasonable fees.

The law relating to court-appointed counsel is unique among Florida's legislation for the compensation of essential court personnel.

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[1]The dissent of Justice Overton, concurred in by Justice Adkins, would have found the statute only directory, not mandatory, thereby allowing courts the freedom to set an appropriate fee in all cases.

Official court reporters are paid an annual salary, Section 29.04 (1), Florida Statutes (1985), a daily per diem, Section 29.03, Florida Statutes (1985), a county supplement "as necessary to provide competent reporters", Section 29.04, Florida Statutes (1985), and a reasonable additional sum per page transcribed for the court or the parties, Sections 29.03 and 29.04, Florida Statutes (1985).

The compensation of all court employees is determined solely "by rule of the Supreme Court as provided in s. 2(a), Art. V of the State Constitution." Section 25.382, Florida Statutes (1985).

Counties are legislatively directed to provide for all court personnel, such as clerks and bailiffs, "necessary to operate the circuit and county courts." Section 43.28, Florida Statutes (1985).

Jurors and witnesses, are paid a per diem for each day their attendance is required, with no outside limit. Section 40.24, Florida Statutes (1985).

State attorneys, assistant state attorneys, public defenders, and assistant public defenders are paid annual salaries and are paid a full salary whether they try one case or 200 cases per year. Chapter 27, Florida Statutes (1985). Their employees are permitted a reasonable wage, and, when appropriate, overtime wages.

Legislation to reimburse the private lawyer, appointed to assist the Court to effect the mandate of the Sixth Amendment, stands alone by limiting fees regardless of the type, nature or time devoted to the representation. So, as occurs more and more often, a long term trial can play financial havoc on the lawyer who obeys his professional obligation to accept court appointments, while at the same time all other participants in the trial are fairly compensated. Regardless of length of trial or time devoted to the task -- whether it is a two-week trial with a minimum of 80 hours or a two-month trial involving a minimum of 200 hours -- the legal fee is limited to $3,500.[2] More disturbing is the fact that such a financial hardship seems limited to the very small percentage of Florida lawyers who are (1) competent to provide a defense in

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[2]According to the Florida Bar, the average 1983 office cost per lawyer was $48,680, representing overhead of approximately $936 per week. The 1984 Florida Bar Economic Survey, p. 18. It doesn't take long for overhead alone to exceed the maximum court-appointed fee.

criminal cases, and (2) willing to accept court appointments.[3]

In an era of increasingly complex criminal laws and prosecutions -- i.e., RICO, drug trafficking, child abuse, large-scale conspiracies -- where oftimes at least one defendant is represented by court-appointed counsel, there is a great likelihood that a $2,500 fee for trial ($3,500 in capital cases) or $2,000 fee for appeal will be inadequate to assure competent counsel. And this concern is that much more vital in a time when the effectiveness of counsel becomes the subject of further judicial proceedings following nearly every criminal conviction.

Each indigent defendant is entitled to the assistance of counsel. Due process of law requires that it be effective assistance of counsel. Yet absolute limits on court-appointed fees encourage the type of corner-cutting which spawns ineffective assistance of

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[3]The most recent estimates of the Florida Bar show that only 9.5% of Florida lawyers derive primary income from criminal law, 3.8% derive secondary income from criminal law and 3.9% derive tertiary income from criminal law. The 1984 Florida Bar Economics Survey, p.21. Since these figures certainly include prosecutors and salaried public defenders, and since not all criminal lawyers accept court appointments, the financial hardship of the Florida law is completely borne by a very small segment of the Bar.

counsel. Such legislation fails to heed the mandate of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and its progeny. As then-Chief Justice Sundberg observed in his specially concurring opinion in Metropolitan Dade County v. Bridges, supra, at 415:

> 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.

England, J. concurring.

The same due process clauses which provide part of the constitutional basis for the right to court-appointed counsel in criminal cases, also provide due process in all proccedings where the state seeks to deprive a citizen of life, liberty or property. Fifth Amendment and Fourteenth Amendment, United States Constitution; Article I, Section 9, Florida Constitution. In apparent response to the constitutionally mandated right to due process of law, the Florida Legislature has adopted two laws to guarantee the availability of legal counsel. One provides fees for lawyers in eminent domain proceedings, where the taking of property is at issue. Sections

73.091 and 73.092, Florida Statutes (1985). The other provides fees for court-appointed counsel in criminal cases, where life and liberty are at stake. Section 925.036, Florida Statutes (1985).

The tragic irony of these laws stems from the fact that the Florida Legislature is more generous to landowners from whom it seeks property, than it is to poor citizens from whom it seeks life or liberty.

The eminent domain law allows a "reasonable attorney's fee" to be assessed by the court in all cases. Section 73.091, Florida Statutes (1985). To evaluate "reasonable attorney's fees", the Legislature has adopted a six-part criteria which includes (1) benefit resulting to the client, (2) novelty, difficulty and importance of the questions presented, (3) skill employed by counsel, (4) amount of money involved, (5) responsibilities incurred and fulfilled by counsel, and (6) the attorney's time and labor. No outside limit is imposed on fees, leaving the determination solely to the courts. Thus, in State v. Gables-By-The-Sea, Inc., 374 So.2d 582 (Fla. 3d DCA 1979), a fee of $800,000 was justified to protect a corporation's property.

If the majority shareholder of Gables-By-The-Sea, Inc. fell upon hard times, became indigent, and was indicted for a capital offense requiring court-appointed counsel -- and if the same time, labor and skill was required to defend him to save him from the death

penalty or imprisonment -- his court-appointed lawyer could be paid no more than $5,500 ($3,500 for trial, $2,000 for appeal). See Section 925.036, Florida Statutes (1985).

It is unseemly for the People of Florida to value property over life and liberty. The lament of Chief Judge Harry Lee Anstead, Fourth District Court of Appeal, eloquently conveys the anomaly:

> Surely something is wrong with a system that prevents a reasonable fee from being assessed in a capital case but authorizes the state to provide counsel for private landowners in eminent domain proceedings where fees have been as high as $800,000.

Martin County v. Makemson, 464 So.2d 1281 (Fla. 4th DCA 1985), Anstead, C.J. dissenting, at 1287, cert. pending in Florida Supreme Court Case No. 66,780, oral argument heard February 12, 1986.

Under the present law, a task force of a dozen prosecutors and police officers can investigate a case for many months, subject only to the Statute of Limitations, and be paid salary for each day of investigation. The task force prosecutors can file an information or take the case before a grand jury for indictment; all grand jurors, prosecutors, witnesses and police will be paid on a daily basis, for as long as it takes, without dollar limitation. When the information or indictment is returned, it will pend in a court where

all court officers and personnel -- judges, court reporters, deputies, clerks and prosecutors -- will be paid their wage or salary without a per-case limitation. But if the unfortunate accused is indigent and the public defender is ineligible to represent him, the court-appointed lawyer will have to investigate, prepare and defend the prosecution for a maximum fee of $2,500 ($3,500 in a capital case), stopping his clock after approximately 50 hours of representation. If the trial court finds it necessary to appoint additional defense counsel to help meet the onslaught of the prosecution task force, the trial court is without power to help. If the trial court finds the statutory fee shockingly inadequate, the court is without power to increase the fee. And if the trial court cannot find competent counsel willing to accept the appointment, the poor soul goes to trial with less competent counsel. The constitutional right to counsel becomes hostage to the Legislature's charity.

No one, least of all the Academy, expects lawyers to profiteer from court-appointments. Profit is not the issue; reasonable compensation is. See fn. 2, above. But the reality of this era is that the Legislature has singled out private court-appointed criminal lawyers to bear the financial responsibility for supporting the state's obligation to provide poor criminal defendants with counsel.

Courts have lost control of their duty to enforce a constitutional mandate. The problem is not imaginary or speculative, but has now become reality. See, Okeechobee County v. Jennings, 473 So.2d 1314 (Fla. 4th DCA 1985), Anstead, C.J., concurring specially; Martin County v. Makemson, supra. In order for courts to regain control over the right to counsel, they must have ultimate control of the purse-strings. Only then can indigents be assured that they will have effective assistance of counsel.

It is respectfully submitted that this Court should find Section 925.036 unconstitutional on its face, as an abusive interference with the inherent authority of courts to enforce the Fifth, Sixth and Fourteenth Amendments, as well as Article I, Sections 9 and 16 of the Florida Constitution. In doing so, this Court should adopt an appropriate Rule of Judicial Administration to guide judges in establishing reasonable compensation for court-appointed counsel. The Academy would recommend an additional rule of Judicial Administration of the following tenor:

> **Rule 2.060. Attorneys**
>
> * * *
>
> (m) **Court Appointed Counsel.** The court before which a criminal prosecution is pending shall have the authority to appoint counsel for indigent defendants. The office of the public defender shall be appointed unless it is disqualified or otherwise unable to provide effective repre-

> sentation to the defendant. In such cases the court shall have the authority to appoint private counsel as a special public defender to represent the defendant. Special public defenders shall be reimbursed for expenses reasonably incurred, as provided by law, and the court shall have the authority to award reasonable attorneys fees based upon an hourly rate to be adopted by administrative order by the chief judge or senior judge of the judicial circuit or appellate court. The hourly rate fixed by administrative order shall not exceed the prevailing hourly rate for similar representation rendered in the circuit or district.

Such a rule embodies the essence of Section 925.036, without the unfair contraints which currently hamper the judicial resolve to provide indigents with the effective assistance of counsel. It guards the public treasury from profiteering, while according the courts with a continuing flexibility with which to honor the constitutional right to counsel.

A court-appointed lawyer is an officer of the court by which he is appointed. Section 454.11, Florida Statutes (1985). His value to the court and our cherished system of justice cannot be overestimated. He is entitled to fair compensation which past history demonstrates that the Legislature seems unwilling to provide. Courts must not let public opinion and politics minimize the right to counsel. By dealing with court-appointed counsel as it does with other court officers

and personnel, see Rule 2.070 (e), Florida Rules of Judicial Administration; Section 25.382 (3), Florida Statutes (1985), this Court ensures competent and fair judicial proccedings for all defendants, free from the political currents of the Legislature.

II.

IF SECTION 925.036, FLORIDA STATUTES, IS FACIALLY CONSTITUTIONAL, THIS COURT SHOULD INTERPRET IT TO ALLOW A TRIAL COURT TO EXERCISE ITS INHERENT AUTHORITY, NOTWITHSTANDING THE LAW.

If this Court finds Section 925.036, Florida Statutes, to be facially constitutional, it must be agreed that cases may develop in which its application deprives courts of the ability to fulfill constitutional mandates regarding due process, equal protection and the right to effective assistance of counsel. Indeed, the opinion of the District Court of Appeal herein details just such problems. Schommer v. Bentley, ___ So.2d _____ (Fla. 2d DCA 1985), Case No. 85-1289, Opinion filed February 7, 1986, at 2.

At the very minimum, this Court should hold that, notwithstanding the strictures of Section 925.036, a trial court in Florida has the inherent authority to enter any order necessary to fulfill its constitutional duties. This includes, in appropriate cases, the appointment of more than one special public defender for a given indigent defendant and the setting of reasonable attorneys fees in excess of the statutory scheme. With such a holding, this Court should answer certified questions I. and III. "Yes."

III.

THE TRIAL COURT SHOULD HAVE AWARDED THE REQUESTED ATTORNEYS FEES TO NICHOLAS G. SCHOMMER AND JAMES V. LOBOZZO, JR.

The trial court determined that the requested legal fees of Nicholas G. Schommer and James V. Lobozzo constituted reasonable compensation, but was constrained not to grant them by statute and case law. Schommer v. Bentley, ____ So.2d _____ (Fla. 2d DCA 1986), Case No. 85-1289, Opinion filed February 7, 1986, at 2. Upon a finding by this Court that the law is unconstitutional or that the trial court had the inherent authority to enter such an order on fees, this Court should allow them.

The amount of fees requested by Schommer and Lobozzo was certainly reasonable. Their requested fees of $5,182.10 and $3,399.00 were submitted by motion and affidavit and were based on hourly rates of $30.00 per hour of out-of-court time and $50.00 per hour of in-court time. These rates are only 30% to 50% of the average statewide hourly rate of criminal lawyers ($100.00 per hour), a more-than-fair request of the public coffers. The 1984 Florida Bar Economics Survey, p. 17.

Certified question IV. should be answered "Yes."

CONCLUSION

This Court is presented with an opportunity to resolve a continuing dilemma between the right of poor criminal defendants to legal representation and the power of the state to minimize that right through inadequate funding.

Based upon the arguments and authorities contained in this amicus curiae brief, the Academy of Florida Trial Lawyers prays that this Honorable Court grant the following relief:

1. Section 925.036 be declared facially unconstitutional through an affirmative answer to certified question II., and replaced by an appropriate Rule of Judicial Administration.

2. In the absence of a determination of facial unconstitutionality, a holding that courts retain the inherent authority to (a) appoint counsel for indigents, as circumstances require, and (b) pay such court-appointed counsel reasonable attorneys fees beyond statutory limitations.

3. A finding that the requested attorneys fees of petitioners is reasonable and should be granted by the trial court.

Respectfully submitted,

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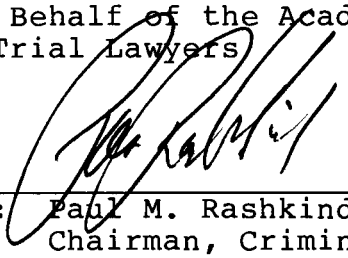
On Behalf of the Academy of Florida Trial Lawyers



By: Paul M. Rashkind
Chairman, Criminal Law Section
Academy of Florida Trial Lawyers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE was served by mail to: Nicholas G. Schommer and James V. Lobozzo, Jr., 329 South Commerce Avenue, Sebring, Florida 33870; Bert J. Harris, III, Dunty and Harris, 212 Interlake Boulevard, P.O. Box 548, Lake Placid, Florida 33852; and The Honorable Jim Smith, Attorney General, Park Trammel Building, Suite 804, Tampa, Florida 33602; this 14th day of March, 1986.