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.	)

ANSWER BRIEF OF AMICUS CURIAE, METROPOLITAN DADE COUNTY

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PRELIMINARY STATEMENT

Amicus Curiae, METROPOLITAN DADE COUNTY, submits its brief supporting Respondents' position. The transcript of the motion for attorney's fees before Honorable E. Randolph Bentley on April 25, 1985 shall be referred to as "T.__". Petitioners shall be referred to as SCHOMMER and/or LOBOZZO.

STATEMENT OF THE FACTS AND CASE

METROPOLITAN DADE COUNTY adopts Respondents' statement of facts and case.

QUESTIONS PRESENTED

A. 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?

B. 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?

C. 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?

D. 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?

SUMMARY OF ARGUMENT

The prohibition against stacking of fee limits precludes the trial court from awarding more than one statutory maximum under §925.036, Fla. Stat., to multiple attorneys representing one defendant on a single charge. A contrary ruling would eviscerate the plain intent of §925.036(1) by allowing courts to appoint and pay multiple attorneys separate maximum fees for defending one indigent against a multiple count indictment.

A ruling in favor of Petitioners would allow law firms to nullify statutory fee caps by assigning a defendant's case to many attorneys so that each attorney spends only the amount of time valued at $3,500. The plain language and intent of the Legislature in Chapter 925 is that only one fee limit be awarded for defense of a defendant on a single charge no matter how many attorneys are appointed or used by a law firm.

The courts' inherent power to regulate conduct of attorneys complements rather than conflicts with the Legislature's exclusive power to authorize payment of court-appointed counsel. The trial court has several options available to it short of overriding the statutorily mandated limit on County liability for funding court-appointed counsel. The trial courts may appoint public defenders from other circuits, appoint additional counsel outside a particular county, compel attorneys to represent indigents pro bono and even assess additional fees from the State of Florida under Fla. Stat. §43.28.

The numerous options available to the trial court ensure that §925.036 is constitutional and does not interfere with the requirements of the Sixth Amendment.

Petitioners have failed to demonstrate extreme circumstances that would justify overriding any statutorily mandated fee limits, even if this Court accepted their legal argument. However, Petitioners need show no exceptional circumstances to seek fees from the State of Florida. Unlike the limits placed on county liability, the Florida Legislature has failed to limit the State's responsibility to provide for competent counsel who are "necessary to operate the courts" under §43.28, Fla. Stats.

ARGUMENT

I. SECTION 925.036, FLORIDA STATUTES (1983), PRECLUDES AN AWARD OF THE MAXIMUM COMPENSATION UNDER SECTION 925.036 TO EACH ATTORNEY REPRESENTING ONE DEFENDANT ON A SINGLE CHARGE.

Section 925.036(1), Florida Statutes (1983), unequivocally precludes payment of any fees once the maximum compensation under §925.036(2) has been awarded for representation of one Defendant on a single charge. Section 925.036(1) mandates that "[t]his section does not allow stacking of the fee limits established by this section." Webster's Third New International Dictionary (Merriam-Webster, Inc., 1981), at page 2218, defines the verb "to stack" as

> 1a: to pile up: make into a usu. neat heap or pile; b: to place quantities of something on or in: LOAD; 2: to weight the composition of dishonestly or unfairly; 3: to arrange secretly for cheating; 4: to assign (an airplane approaching an airport) by radio to a particular altitude and position within a group circling and waiting a turn to land; 5: to make the belly of (an archery bow) high and narrow -- vi 1: to form a stack: HEAP, PILE; 2: to form a line or group: ACCUMULATE -- used with up.

Previous decisions have dealt with issues of stacking or piling of one fee limit on top of another when one attorney represents a defendant in a multiple count indictment or information. See, Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981); Wakulla County v. Davis, 395 So.2d 540 (Fla. 1981). However, the concept of stacking fee limits also applies to multiple attorneys representing one defendant on a single

charge. The Florida Legislature has not restricted prohibition of stacking in §925.036(1) to solely cases of multiple charges.

A failure to apply the prohibition against stacking to the stacking of fee limits in cases of multiple attorneys would circumvent the plain intent of the Legislature. The trial court can in a single case appoint different attorneys for one defendant for each separate count charged in an indictment. If the prohibition against stacking did not apply in instances of multiple attorneys, the trial court could award up to the maximum fee to each attorney who represented Defendant on each count. In effect, separate maximum fees would be awarded on each count against one Defendant in a single case. However, such a result would eviscerate the statutory intent of Fla. Stat. §925.036(1) (1983).

In Wakulla County v. Davis, supra, the Florida Supreme Court interpreted §925.036, Florida Statutes (Supp. 1978), to allow stacking of fee limits in cases where the State charges more than one count in an indictment or information. The applicable statute in Davis structured fee limits "per case per defendant". The Davis Court, noting that the Legislature did not prohibit stacking, found the language of "per case per defendant" permitted stacking of fee limits in separate counts which were in effect separate cases.

In response to the Florida Supreme Court's decision in Wakulla County v. Davis, supra, the Florida Legislature eliminated references to "per case per defendant" and

specifically prohibited stacking of fee limits. See, Fla. Stat. §§925.036(1) and (2) (1981). Board of County Commissioners of Collier County v. Hayes, 460 So.2d 1007, 1009 (Fla. 2d DCA 1984). Clearly, the legislative intent was to eliminate stacking of fee limits. As Davis stated:

> In statutory construction legislative intent is the pole star by which we must be guided, and this intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction. State v. Sullivan, 95 Fla. 191, 207, 116 So. 255, 261 (1928).

Davis, supra, at 542. In the instant case, disallowance of stacking is the letter and intent of §925.036 (1983). To allow the trial court to apply separate fee limits and appoint several attorneys to defend one indigent against a multiple count indictment is clearly contrary to statutory intent and logic. The only sensible interpretation of Fla. Stat. §925.036(1) (1983) is that it prohibits stacking of fee limits in all instances, whether or not one or multiple attorneys represent one defendant for one charge or multiple charges in one case.

Subsection (2) of Florida Statutes §925.036 (1983) also prohibits awards of two maximum fees to LOBOZZO and SCHOMMER. Section 925.036(2)(d) (1983), provides:

> The compensation for representation shall not exceed the following:
>
> * * *
>
> (d) For capital cases represented at the trial level: $3,500.

Section 925.036(2) thus mandates $3,500 as the limit for a fee in a court-appointed capital case.

The plain language of Fla. Stat. §§925.035 and 925.036 along with legislative history indicate that payment for all representation of a Defendant in a capital case is limited to $3,500.00.

Interpreting §925.036(2)(d) to provide for a $3,500 limit per case per attorney is contrary to logic, statutory interpretation and legislative history. As the Second District stated in Hayes, supra, references to appointment of multiple attorneys are found in §925.035, Florida Statutes (1983). However, the better interpretation adopted by Hayes is that the Legislature meant that more than one attorney may be appointed for multiple defendants who have conflicts with the public defender. An interpretation of the statute allowing appointment of only one paid attorney for a defendant in a case comports with the Legislature's elimination in 1981 of the standards of reasonableness and stacking of fee limits. The 1981 legislative change in Chapter 925 unmistakably was an attempt to sharply limit fees in court-appointed cases. To assert that the Legislature meant to allow multiple fee limits for each attorney or each attorney's partners appointed to represent a Defendant on a single charge is contrary to legislative intent to limit such fees.

To allow an attorney, such as SCHOMMER, to charge for the time of his partner would lead to double billing and open a "Pandora's box" of excessive fee charges. For example, in the

instant case, the trial court instructed an appointed attorney to use the resources of his own law firm. See, T.2. Petitioners' position would allow such an attorney to maximize his fee by assigning an attorney to work up to the $3,500 limit and then transfer the case to another attorney in the office.

If Petitioners' argument is accepted, a law firm could conceivably charge the full $8,421.10 for State v. Eddie Alexander by assigning the case to three or more attorneys who were careful not to work more than the time valued at $3,500. In effect, if Petitioners' argument is accepted, law firms could easily circumvent the statutory maximums. Nullifying the statutory maximum fee limits violates statutory mandates and intent. Such a result would have a severe adverse effect upon the treasury of the counties. At present, Dade County spends in excess of $3 million in court-appointed attorney's fees pursuant to Chapters 27 and 925 of the Florida Statutes. A system without fee limits is unworkable because of the limited treasuries of the counties and the abuses necessarily engendered. Often motions for attorney's fees are based upon the court-appointed lawyer's recollection and records. Such a showing is difficult to contradict even when the County suspects the attorney is overestimating his time for research, conferences or other items. The statutory fee cap has the salutory effect of limiting both the county's liability and the ability of unscrupulous attorneys to overestimate their time spent on a particular case.

The position advocated by Petitioners is thus contrary to the plain language and intent of the Legislature. It would in effect permit stacking of fee limits and nullify statutory fee caps. Such a result is contrary to statutory intent and public policy and would have severe adverse effects upon the counties' treasuries.

II. SECTION 925.036, FLORIDA STATUTES (1983), CANNOT BE DECLARED UNCONSTITUTIONAL ON ITS FACE AS AN INTERFERENCE WITH INHERENT POWERS OF TRIAL COURTS.

Justice Alderman in his opinion in Bridges, supra, at 413-414, enunciated the standard for reviewing the constitutionality of Fla. Stat. §925.036:

> A legislative enactment is presumed valid and will not be declared unconstitutional unless it is demonstrated beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution. Whenever reasonably possible and consistent with the protection of constitutional rights, courts will construe statutes in such a manner as to avoid conflict with the constitution. But the court, in constructing a statute, may not invade the province of the legislature and add words which change the plain meaning of the statute. State v. Elder, 382 So.2d 687 (Fla. 1980). Furthermore, courts may not vary the intent of the legislature with respect to the meaning of the statute in order to render the statute constitutional. State v. Keaton, 371 So.2d 86 (Fla. 1979).

Petitioners and the record fail to show that the fee limits of Fla. Stat. §925.036 (1983) is unconstitutional beyond a reasonable doubt.

The statutory fee limits cannot be declared unconstitutional as an interference with the trial court's inherent powers either to regulate the legal profession or ensure effective assistance of counsel. On pages 8 and 9 of Petitioner's Initial Brief, they note that Florida lawyers' entrance to the bar, their discipline and rules of conduct are within the purview of the Supreme Court of Florida. From this premise, Petitioners at pages 9 and 10 of their brief

illogically conclude that payment of court-appointed attorneys, as officers of the court, is within the sole province of the Judiciary.

Assuming arguendo that statutory fee caps interfere with the courts' disciplinary function regarding attorneys, such an alleged interference does not amount to a constitutional violation. Regulation and discipline of attorneys are not found within any of the provisions of the United States or Florida constitutions. Bridges requires conflict with the constitution to declare §925.036 unconstitutional.

Statutory fee limits also do not violation separation of powers, because award of court-appointed fees is the sole province of the Legislature, not the Courts.

The cases of Dade County v. McCrary, 260 So.2d 543 (Fla. 3d DCA 1972), and Dade County v. Grossman, 354 So.2d 131 (Fla. 3d DCA 1978), demonstrate Florida's adherence to the majority rule in this country that court-appointed attorneys are not permitted to obtain any compensation from public funds in the absence of statutory provisions authorizing their payment. While Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978), recognized that in certain limited circumstances courts possess the inherent power to do things reasonably necessary for the administration of justice in the scope of their jurisdiction, the Supreme Court also reaffirmed that statutes providing for the rates of compensation of court-appointed attorneys concern

a subject over which the legislature exercises sole control. The Court stated in its opinion at footnote number 5:

> Some previous decisions of this Court indicate generally that the will of the Legislature is to prevail on the matter of compensation of court appointed public prosecutors and defenders. Mackenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1973); Strauss v. Dade County, 253 So.2d 864 (Fla. 1971); Carr v. Dade County, 250 So.2d 865 (Fla. 1971). Rose, supra, at 417, n.5.

The Rose Court placed the above footnote next to the text limiting the definition of inherent powers to those things within the court's jurisdiction, subject to valid existing laws.

This Honorable Court reaffirmed in Bridges that the Legislature has exclusive power to regulate court-appointed attorney's fees:

> . . . if a change in the foregoing statutorily-provided compensation [for special public defenders] be called for, it is within the province of the Legislature, not the courts, to make such a change. [Footnote omitted] 288 So.2d at 201 Metropolitan Dade County v. Bridges, 402 So.2d 411, 414 (Fla. 1981).

Aside from jurisdictional problems of invoking the courts' inherent power in these situations, Section 925.036 itself precludes the invocation of inherent powers. Section 925.036(2) (1983) reads:

> . . . (2) The compensation for representation [of an indigent having a conflict with the public defender] shall not exceed the following:
>
> (a) For misdemeanors and juveniles represented at the trial level: $1,000.
>
> (b) For noncapital, nonlife felonies represented at the trial level: $2,500.

(c) For life felonies represented at the trial level: $3,000.

(d) For capital cases represented at the trial level: $3,500.

(e) For representation on appeal: $2,000.

The Legislature has clearly mandated that an appointed attorney may be compensated from the County in an amount up to a maximum for representing a defendant. Any compensation from the County in excess of that amount is not authorized by statute and is contrary to established precedent. If the Petitioners feel that they and their fellow attorneys should be compensated from the County in a greater amount in extraordinary cases, they should urge the Legislature to amend the law. Thus, there can be no doubt that the statutory maximums in Section 925.036 are mandatory. Bridges, supra, at 415, held "that the maximum fee schedule in section 925.036 is mandatory, and we uphold the constitutionality of this statute." Bridges held that it was error for the trial court to amend the statute to make it directory rather than mandatory. Bridges, supra, at 414. Accord, County of Seminole v. Waddell, 382 So.2d 357 (Fla. 5th DCA 1980) (holding statutory limits in capital cases are mandatory and constitutional).

In an analogous situation, this Honorable Court held in Kaulakis v. Boyd, 138 So.2d 505 (Fla. 1962), that even Dade County and its Board of County Commissioners could not waive by home rule amendment state-mandated immunity from tort actions. A fortiori, the trial court has no inherent authority to waive state-mandated limits on the counties' liability for fees.

Without a statute or contract entitling an attorney to payment, there are no grounds for seeking payment from the county. Dade County v. McCrary, 260 So.2d 543 (Fla. 3d DCA 1972); Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971), cert. denied, 253 So.2d 864 (1971), cert. denied, 406 U.S. 924 (1972). The Florida Supreme Court more recently in In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980) held that there was no authority for paying for counsel appointed for parents and children in certain dependency proceedings. The clear impact of such decisions is that trial courts lack inherent power to award attorney's fees to court-appointed counsel. The only avenue for awarding such fees is by statute or contract.

The statutory mandates that limit county liability does not limit the obligation of the State for personnel necessary to operate the courts. Section 43.28, Fla. Stat., obligates the State as well as counties to provide for personnel necessary to operate the court. If this Honorable Court finds the attorney's fees cap facially objectionable, §925.036 limits on county-paid attorney fees cannot be declared unconstitutional on its face because courts can assess fees against the State. In an analogous situation, courts have assessed attorney's fees under §43.28 against the State's Department of Health and Rehabilitative Services without explicit legislation stating the State should pay. In In the Interest of M.P., 453 So.2d 85 (Fla. 5th DCA 1984), cert. denied, 472 So.2d 732 (Fla. 1985), attorney Birr was appointed

as counsel for a child under Fla. Stat. §827.07(16) (1981). The statute had no specific provisions for the source of payment. The Fifth District in In the Interest of M.P., supra, at 90, found the language "unless provided by the State" significant:

> The counties shall provide appropriate courtrooms, facilities, equipment, and, unless provided by the State, personnel necessary to operate the circuit and county courts.

Fla. Stat. §43.28. In excluding Lake County from liability for attorneys appointed pursuant to §827.07(16), the Fifth District found that the State, having prime responsibility for the provisions of Chapter 827, should provide the personnel necessary for representing indigent children in dependency proceedings. M.P., supra, at 90. Accord, State Dept. of H.R.S. v. Metropolitan Dade County, 459 So.2d 1182 (Fla. 3d DCA 1984). Similarly, under §43.28, the courts could pay court-appointed attorneys from the State for any fees it awards in excess of Fla. Stat. §925.036. The State has brought the prosecution of this action and the State, rather than the counties, has primary responsibility for the administration of criminal justice and courts. The Legislature has provided an avenue for State and county liability for personnel necessary under §43.28. The Legislature has mandated limits on county liability; however, no such limits exist on the State of Florida's liability for such necessary personnel. Therefore, the courts, state entities exercising state powers, should tax

fees exceeding the county's liability against the State pursuant to §43.28.

The Legislature's limits concerning county liability for court-appointed attorney's fees do not interfere on their face with the inherent power of the courts.

The inherent power of the courts to appoint counsel as well as the historical obligation of lawyers to represent the poor pro bono obviates any alleged need to compensate court-appointed counsel beyond the fees allowed in Sections 925.036 and 43.28. The inherent power of courts to appoint counsel does not and need not extend to compensating such counsel beyond the provisions of the statutes. Florida courts have upheld the inherent power of the court to appoint competent counsel and at the same time denied that the court has inherent power to compensate such attorneys.

As early as 1971, this Honorable Court distinguished appointment from compensation in Carr v. Dade County, 250 So.2d 865 (Fla. 1971). Without questioning the trial court's authority to appoint a special prosecutor, this Honorable Court denied the courts' power to compensate the appointed attorney without statutory authority. Carr, supra, at 866. Even the dissenting opinion of Justice Drew recognized that the inherent authority of courts extended only to the power to appoint acting prosecutors essential to the proper functioning of the court.

In Dade County v. Strauss, 246 So.2d 137 (Fla. 3d DCA 1971), cert. denied, 253 So.2d 864 (Fla. 1971), cert. denied, 406 U.S. 924 (1972), the Third District found no authority for awarding fees to special assistant public defenders without authority by contract or statute. This Honorable Court in Mackenzie v. Hillsborough County, 288 So.2d 200, 201 (Fla. 1973), found that attorney's fees must be provided by the Legislature if at all.

The clearest enunciation of the distinction is found in Dade County v. Goldstein, 384 So.2d 183 (Fla. 3d DCA 1980). In Goldstein, the trial court appointed two attorneys to represent one defendant and awarded two fees, each above the statutory maximum. The Third District found that the trial court had the inherent authority to appoint two attorneys. However, Goldstein held that the court had authority to compensate only one attorney. Goldstein also found that the trial court had no inherent authority to award that one attorney any more than authorized by the Legislature.

The rationale behind the distinction between appointing and compensating attorneys is based on (1) lack of jurisdiction of the court over actions involving appropriation of public funds and (2) the historical obligation of attorneys, as officers of the court, to represent the poor without compensation. As Justice Drew found in Carr, supra, at 867, the constitutional power and responsibility of providing compensation for state or county officers is a peculiar and exclusive function of the legislative branch. Such

compensation is an appropriation of public funds which must be approved by the Legislature.

Justice Drew's rationale was reiterated in Strauss, supra. Strauss found that the lack of common law rights to attorney's fees meant that such fees could be awarded only by statute or contract. Strauss, supra, at 141, held that the trial court exceeded its jurisdiction in awarding fees in excess of statutory maximums. Accord, Mackenzie, supra, at 201 (Legislature is sole authority for attorneys' fees because of the lack of common law right to such fees); Metropolitan Dade County v. Lyons, 462 So.2d 487 (Fla. 3d DCA 1984), pet. for rev. pending, FSC No. 66,731; County of Seminole v. Waddell, 382 So.2d 357 (Fla. 5th DCA 1980).

This Honorable Court in Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), clearly deferred to the Legislature in the matter of court-appointed attorney's fees. The plurality decision found that the provisions of Section 925.036 are mandatory and not directory and that the trial court may not award fees in excess of the statute. Rose v. Palm Beach County, 361 So.2d 135, 137 n.5 (Fla. 1978), even recognized that this Honorable Court had held that Legislative will is supreme in matters of court-appointed attorney's fees.

The court in United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), traced the historical roots of the obligation of attorneys to represent the poor without compensation. Fifteenth-century England and pre-Revolutionary America traditionally obligated attorneys to represent the poor. In

England, the obligation was a matter of common law and in the seventeenth century statutes provided that attorneys must represent indigents charged with treason.

In colonial America, statutes obligated counsel to represent indigents upon a court's order. The obligation to serve indigents is a well-established and time-honored tradition of the legal profession. Florida courts have reiterated this obligation to represent indigents pro bono or with little compensation.

As Dillon, supra, at 638, indicates, if a court requires an attorney to represent the poor pro bono, it is merely invoking the attorney's pre-existing obligation. Such requirements are not considered "takings". All Florida courts have adopted the reasoning of Dillon. Justice Drew in Carr, supra, at 867, recognized that attorneys as officers of the court are expected to render many services without expectation of any payment or of more than token compensation. Mackenzie, supra, held that requiring attorneys to serve within the fee limits of $750.00 does not constitute a violation of Equal Protection or Due Process.

The plurality of the Bridges Court recognized this pro bono obligation of the bar. Bridges cited In the Interest of D.B. and D.S., 385 So.2d 83 (Fla. 1980), for the proposition that attorneys remain under an obligation to represent the poor without compensation even though the state has shifted some of the burden of representing indigents to the counties. Indeed,

this Honorable Court found in D.B. and D.S. that court-appointed attorneys have no right to compensation for representing the parents or the child in certain dependency cases.

The courts may even use their contempt powers to ensure attorneys fulfill their obligation to represent the poor. Justice Drew's research in Carr, supra, at 867, indicated that there was no record of an attorney refusing a court appointment. Apparently courts have not had to resort to the contempt power in the past.

All attorneys have this obligation. Assistant Dade County Attorneys are appointed and indeed honored to represent Circuit Court Judges in various proceedings without compensation.

To avoid problems engendered by the low fee limits of §925.036, courts have authority to appoint public defenders from another circuit under Fla. Stat. §27.53(3)(b).

The inherent power of the trial court to require counsel, including public defenders from different circuits, to represent the poor is sufficient to ensure the Sixth Amendment rights of indigents are not violated. The trial courts need not intrude upon the province of the Legislature in appropriating funds. Therefore, the Legislature's provision of little or even no compensation does not interfere with the trial court's duty to uphold the Sixth Amendment.

The appointment of attorneys to represent indigents is in sharp contrast to the necessity of inducing witnesses to appear in Rose. Rose involved the taxation of witness fees against

Palm Beach to pay for the travel of indigent witnesses subpoenaed to appear at a criminal trial 300 miles away in Duval County. The court specifically determined that the contempt power could not be used to enforce the subpoenas, because the indigent witnesses lacked the funds to travel to the distant locale and to afford lodging. Therefore, the court found it necessary to provide witness fees in excess of the statutory maximums in order for essential witnesses to be available for trial. In finding that this unique situation authorized the exercise of the trial court's inherent powers, the Supreme Court warned:

> The doctrine of inherent powers should be invoked only in situations of clear necessity. The courts' zeal in the protection of their prerogatives must not lead them to invade areas of responsibility confided to the other two branches. Accordingly, it is with extreme caution that this Court approaches the issue of the power of trial courts to order payments by local governments for expenditures deemed essential to the fair administration of justice. The same extreme caution should be used by trial courts seeking solutions to practical administrative problems that have not been resolved or provided for by the legislature. 361 So.2d at 138.

Such a compelling case for the exercise of the trial court's inherent power to award attorney's fees in excess of the limits set by the Legislature cannot be found in cases of attorneys appointed to represent indigents. Defendants' attorneys have a professional responsibility to serve their client pursuant to their appointment and have an obligation to advocate effectively on their behalf, even though the Legislature limits their fees to an amount which is less then they think they

deserved. See, Dade County v. McCrary, 260 So.2d 543 (Fla. 3d DCA 1972); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965). Because the attorney has this obligation, exceeding statutory fee limits is not a "clear necessity" for which the court is authorized to invoke its inherent powers.

In conclusion, inherent powers of the court to appoint counsel are distinct from and are aided by the legislative power to approve payment of counsel. In fact, courts pursuant to Fla. Stat. §43.28 are permitted to assess unlimited fees against the State to ensure appointment of personnel necessary to operate the court. Chapters, 27, 43 and 925 of the Florida Statutes, which authorize initial payment from the county, unlimited funding from the State and appointment of public defenders and private attorneys, complement rather than conflict with the inherent powers of the trial court to uphold the Sixth Amendment.

III. SECTION 925.036 IS NOT UNCONSTITUTIONAL AS APPLIED TO EXTREME CIRCUMSTANCES AND THE TRIAL COURT DOES NOT HAVE INHERENT AUTHORITY TO AWARD FEES ABOVE STATUTORY MAXIMUMS EVEN IF CONFRONTED WITH EXTREME CIRCUMSTANCES.

Extreme circumstances do not render Fla. Stat. §925.036 unconstitutional. Nor do such circumstances trigger any inherent power of the trial court to override statutory mandates of limiting counties' responsibility for court-appointed attorney's fees.

"Extreme circumstances" supposedly occur when court-appointed counsel represent an indigent in lengthy, complicated proceedings requiring hundreds or thousands of hours of attorney time. The attorney in this hypothetical is on the verge of bankruptcy, the statutory fee limits have been exhausted and provide utterly insufficient compensation.

The above situation in Mackenzie, supra, was held not to constitute a "taking" of an attorney's property without due process of law. An attorney is in a different posture vis-a-vis the courts, because of his pro bono obligation to represent the poor. As Carr, supra, indicates, the trial court can always use its contempt power to ensure an attorney continues to render effective assistance of counsel. As delineated below, the contempt power is not the only option available to the court in this situation to ensure effective assistance of counsel. However, even if the contempt power is the only available option, the question of whether or not it is wise to bankrupt such an attorney is a legislative judgment. One can assert that the limits on salaries for State Attorneys

and judges are unjust and should be increased because of the extreme workload faced by each. Yet, the courts have no authority to override statutorily mandated salaries just as they have no authority to override legislatively mandated fees under §925.036.

Amicus Curiae, the Academy of Florida Trial Lawyers, asserts that attorneys "short-change" their indigent clients because of the extremely low compensation in court-appointed cases. See, Brief of Amicus Curiae, Academy of Florida Trial Lawyers, at 6. If such practice does occur, it is in violation of the canons of ethics.

The Academy of Trial Lawyers has not cited to any statistic or case to show that such shoddy practice is being rendered in any county by attorneys appointed for indigents. As in the instant case, attorneys in Dade County render excellent assistance of counsel to indigents. Joel Hirschorn, Esquire, and other leading criminal attorneys in Dade County are appointed under Chapters 27 and 925 and render outstanding counsel to indigents.

The Florida statutes do provide alternatives to bankrupting court-appointed attorneys. The trial court can appoint one or several additional attorneys to represent the indigent. The court would thereby limit the burden placed on any one attorney. The court can appoint a Public Defender from another circuit under Fla. Stat. §27.53(3)(b) as substitute or additional counsel. Trial courts would be wise to appoint an outside public defender at the outset in those cases involving

extreme amounts of work. If it becomes apparent only in the middle of the case that an extreme workload is involved in representing the defendant, the court should appoint a public defender as substitute or additional counsel. If the original attorney can withdraw without impairing a defendant's rights, the court should allow him to do so. If defendant's rights would be impaired by a withdrawal, the court should immediately appoint a public defender from another circuit and such additional counsel as necessary.

The trial court can appoint private attorneys from different circuits. In Highlands County, judges can appoint one of the many wealthy criminal attorneys from Dade County. Trial courts have the authority to appoint even civil attorneys to aid a hard-pressed criminal attorney defend an indigent. Although an attorney may develop a speciality in civil law, he does not thereby lose all experience and knowledge he had regarding criminal law and procedure.

The courts can under §43.28 pay court-appointed attorneys fees from the State. As explained above, the State has no mandated limit on its responsibility to provide personnel necessary to operate the court. In extreme circumstances, an indigent's counsel, as an officer of the state court, is such personnel necessary to operate the court. An attorney who feels his payment is too low could conceivably seek a claims bill asking the Legislature to specifically appropriate fees in excess of the statutory mandates.

Thus, even in extreme circumstances, §925.036 fee limits are constitutional as applied. The trial court has numerous options to ensure effective assistance of counsel short of declaring §925.036 unconstitutional. Beyond a reasonable doubt, §925.036 is not unconstitutional under any circumstances.

The question of whether courts can override statutory maximums which are constitutional is also answered in the negative. By definition, Florida trial courts lack the inherent power to award attorney's fees in excess of the maximums found in Florida Statutes §925.036 (1983), even in extreme circumstances. Rose v. Palm Beach County, 361 So.2d 135, 137 (Fla. 1978), limited a trial court's inherent power to do "all things . . . reasonably necessary for the administration of justice within the scope of its jurisdiction subject to valid existing laws and constitutional provisions." An award of attorney's fees from the county in excess of §925.036 is outside the scope of a trial court's inherent power for three definitional reasons:

> (1) Such an award is not reasonably necessary for the administration of justice;
>
> (2) Such an award is not within the scope of the trial court's jurisdiction; and
>
> (3) A valid existing law, Section 925.036, Florida Statutes (1983), precludes the exercise of any inherent powers over attorney's fees from the county.

Under any set of circumstances, trial courts have no reasonable need to award fees exceeding statutory maximums in order to ensure administration of justice.

In extreme circumstances, the trial courts have numerous options to ensure competent representation of indigents having conflicts with the local public defender. The courts can:

> (a) Appoint a public defender from another jurisdiction; (b) Solicit and appoint pro bono counsel; (c) Appoint counsel pursuant to the statutory fee limits in Section 925.036; (d) Appoint additional counsel if necessary; (e) Assess unlimited fees against the state; (f) Require counsel to serve an indigent client or face contempt of court; (g) Encourage counsel to file a claims bill.

There is thus no reasonable necessity to override the statutory maximum fee limits in §925.036.

As explained above, at pages 13-17 of this brief, an award of attorney's fees under §925.036 is the sole province of the Legislature. It is therefore beyond the scope of the trial court's jurisdiction under any circumstances to award fees against the County above the statute's authorization. However, the trial court does have the jurisdiction under §43.28 to award fees under any circumstances from the State to ensure the service of competent counsel, who are certainly "personnel necessary to operate the courts".

Finally, the third prong of the definition of inherent powers delineated in Rose precludes use of inherent power to award fees in excess of the statutory maximums from the counties. As illustrated above, §925.036 limits are constitutional and valid mandates. The court could use its

powers to assess fees against the State because such powers in no way conflict with a valid existing law. Section 43.28 obligates the State to ensure the provision of personnel necessary to operate the courts. In contrast to the limited county liability under §925.036 for such necessary personnel, the Florida statutes do not limit fees from the State.

IV. THE TRIAL COURT SHOULD NOT HAVE AWARDED THE REQUESTED AMOUNT IN THIS CASE, UNLESS THE REQUESTED FEE IN EXCESS OF $3,500 IS ASSESSED AGAINST THE STATE AND NOT THE COUNTY.

Petitioners requested $8,581.10 in fees. Undoubtedly, Petitioners are entitled to $3,500.00 in fees from Highlands County. The remaining $5,081.10 in fees must come, if at all, from the State of Florida.

Even if extreme circumstances would justify awarding fees exceeding the statutory maximums, the record is insufficient to show extreme hardship upon Petitioners. Petitioners made no showing they are or were close to bankruptcy. Petitioners never raised the issue of fees until the close of case. Moreover, a loss of $5,081.10 or $3,500, in Petitioners' alternative, is hardly a loss arising to "hardship levels". Petitioners rendered effective assistance of counsel and therefore this case does not indicate that an excessive fee or even a promise of a fee above §925.036 was necessary to encourage counsel to render effective assistance.

Petitioners were on notice at the outset that their fee would be limited by §925.036. Broward County v. Wright, 420 So.2d 401, 402 n.1 (Fla. 4th DCA 1982). The trial court merely authorized use of other attorneys in the same law firm without promising an excessive fee. Petitioners have not shown any detrimental reliance. Thus, under Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981), Petitioners have no basis for challenging §925.036. SCHOMMER and LOBOZZO need not show extreme circumstances to receive $5,081.10 from the State. As

stated above, the State and counties are responsible for providing personnel necessary to operate the courts. The Legislature has not limited the State's liability for providing indigents competent counsel, who are personnel necessary under §43.28. Assessing fees against the State would satisfy Petitioners and send a message to the Legislature that the fees mandated to be paid by counties, though constitutional, are not sufficient in all circumstances. If Petitioners' viewpoint is adopted, assessing fees against the State may alert the Legislature to the inadequate funding from the County that attorneys such as Petitioners have been limited. However, as pointed out above, Petitioners need not resort to just the Highlands County for payment. Under §43.28, the State also has an obligation to provide for their services.

CONCLUSION

Florida Statutes, Section 925.036, limiting county liability for special assistant public defender fees is constitutional on its face and as applied to extraordinary circumstances. The trial court has no authority to override such limits on County payment of fees even in an extraordinary case. However, the courts can assess additional fees against the State under §43.28, Fla. Stat.

Petitioners have failed to demonstrate that this case falls within the category of extreme circumstances; however, petitioners can seek additional payment from the State of Florida without a showing of extraordinary circumstances.

This Honorable Court should affirm the decision of the Second District and the trial court or, in the alternative, remand this matter to the trial court for determination of the amount of additional fees taxable against the State of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Amicus Curiae, Metropolitan Dade County, was mailed this 7th day of April, to: NICHOLAS G. SCHOMMER, ESQUIRE, and JAMES V. LOBOZZO, JR., ESQUIRE, 329 South Commerce Avenue, Sebring, Florida 33870; BERT J. HARRIS, III, ESQUIRE, Dunty & Harris, 212 Interlake Boulevard, P.O. Box 548, Lake Placid, Florida 33852; PAUL M. RASHKIND, ESQUIRE, Chairman, Criminal Law Section, Bailey, Gerstein, Rashkind & Dresnick, 4770 Biscayne Boulevard, Suite 950, Miami, Florida 33137; and THE HONORABLE JIM SMITH, Attorney General, Park Trammel Building, Suite 804, Tampa, Florida 33602.

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