IN THE SUPREME COURT OF THE STATE OF FLORIDA

NICHOLAS G. SCHOMMER and JAMES V. LOBOZZO, JR., Petitioner/Appellants, 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, Respondent/Appellees	Case No. 68,335 Second District Court of Appeal No. 85-1289 Circuit Court Case No. CR-83-63

PETITIONERS/APPELLANTS' INITIAL BRIEF

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INTRODUCTION TO ARGUMENT

The Second District Court of Appeal, in this case, has certified four (4) questions to be of great public importance concerning §925.036 Florida Statutes, (1983), which governs compensation to private counsel for representation of indigent accused.

The issue which other courts have stated is "intertwined" with the issues presented in the four (4) certified questions is, of course, the indigent accused's right to effective assistance of counsel.

No court or attorney addressing this question has even inferred that there is no duty on the attorneys of Florida, as officers of the Court, to contribute their time, skills and expertise in their representation of indigent accused to the benefit of our judicial system.

The real question is, does §925.036 Florida Statutes (1983), and the case law construing that section and its predessors, result in a deprivation of the indigent accused's right to effective assistance of counsel.

SUMMARY OF ARGUMENT

This appeal brings before this Court the issue of the constitutionality, or in the alternative, the construction of §925.036 Florida Statutes (1983).

Petitioners argument is that:

1. The Section is unconstitutional on its face because it constitutes a legislative userpation of an exclusive judicial function. The courts of Florida have historically governed the activities and profession of attorneys through the integrated Florida Bar. Indeed, all members of the Bar are officers of the Court, and it is as a result of such status that attorneys have a duty and obligation to represent indigent accused. The indigent's right to counsel in criminal cases is a creature of the judiciary and not a result of legislative action.

2. The Section is unconstitutional as applied. The mandatory limitations set by the Section are impractical, unworkable, unfair to counsel and the indigent accused he represents, and do not take into consideration any exceptional cases. As applied, the Section results in appointed counsel representing indigent accused for much less than a nominal fee or less than no fee at all because his non-compensable out-of-pocket costs exceed whatever amounts counsel has been awarded as fees by the court. The Section is unconstitutional as applied because, as in this case, there may be multiple attorneys appointed in the exceptional case and each would be compelled to represent the indigent

accused for less than what has been recognized as a nominal fee. This has resulted in a limitation on the number of attorneys who are sufficiently qualified and experienced and most importantly willing to accept these types of cases.

3. The Court should declare §925.036 Florida Statutes (1983) unconstitutional on its face and void.

In the alternative, the Court should declare said Section unconstitutional as applied and authorize the Court to award appointed counsel a reasonable fee, using as a guideline the hourly rates established in the applicable administrative orders issued by the administrative judges of the respective circuits.

4. The statute, read in conjunction with §925.035 Florida Statutes (1983), contemplates the appointment of multiple attorneys for each defendant, and §925.036 Florida Statutes (1983) should be construed to authorize payment of up to and including the fee limitations to each counsel.

If the Court determines that the statute is unconstitutional as applied and there should be an exceptional circumstance exception to the statute which would authorize the trial court to exceed the fee maximum set out in the Section, then the factual determination of whether or not those circumstances exist should be addressed by the trial court.

I. WHERE A COURT ISSUES ONE ORDER UNDER §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 §925.036.

This question was addressed by the Second District Court of Appeal, State of Florida in the case of Board of County Commissioners Collier County v. Hayes, et al., 460 So2d 1007 (Fla. 2nd DCA), the Court held that multiple attorneys appointed under §925.035 are entitled only to the maximum compensation provided in §925.036 Florida Statutes (1983). The Court determined the legislative intent to be that the maximum allowed in §925.036 Florida Statutes (1983) to be an absolute cap no matter how many attorneys represented the defendant.

With recognition toward the potential for §925.035 Florida Statutes (1983) to authorize the appointment of more than one attorney, the Court stated that that provision could be interpreted not to mean the appointment of multiple attorneys for one defendant, but the appointment of an attorney for each of multiple defendants, or one attorney per defendant.

The polestar in this entire matter is of course the indigent defendant's constitutional right to counsel as stated in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) and other cases decided thereunder. The right to assistance of counsel as directed in Gideon presupposes the right

to competent, effective assistance of counsel. As Chief Justice Sundberg stated in Metropolitan Dade County v. Bridges, 402 So2d 411 (Fla. 1981) at 415 in his special concurrence:

> "Ineffective counsel is no counsel at all and such representation of the poor would make the promise of the sixth amendment a hollow one indeed."

The unstated but obvious, purpose of providing competent, effective assistance of counsel to indigent accused is to insure that such indigent receive a fair trial. The purpose for the fair trial, again unstated because it is obvious, is that if said indigent accused is convicted he may forfeit his liberty or even his life.

The seriousness of this is recognized both by this Court in its rule providing for direct appeal of all death penalty cases, (Rule 9.030(a)(D)(A)(i) Fla. R. App. P.), and by the recognized grounds for reversal of convictions for ineffective assistance of counsel. (Rule 3.850 Fla. R. Crim. P. and Rule 3.987, Paragraph 14(i) Fla. R. Crim. P.)

Under the Second District Court of Appeal's construction of §925.035 Florida Statutes (1983), the scenario consists of the lone defense attorney, working with an extremely limited amount of resources, consisting of the hourly rate established by the administrative order in the applicable Circuit, and the fee cap set in §925.036 Florida Statutes (1983), aligned against the State Attorneys Office and staff of salaried attorneys and

investigators, along with the county sheriff's office at its disposal, potentially the Florida Department of Law Enforcement and municipal law enforcement agencies also at its disposal. To restrict the indigent accused to one attorney working for a nominal fee against such an array is patently unfair.

To acknowledge that there are those serious cases, which almost without exception would include capital and life felonies, which require the appointment of more than one counsel for the indigent, acknowledges that there should be an exceptional circumstance exception to §925.036 Florida Statutes (1983), or construe the pertinent sections as a grant of authority to award up to the statutory maximum to each attorney. The complex case which would require multiple defense counsel would inherently also require more time and effort by them in preparation. The problems mentioned by the Second District in this case and by the Fourth District in Martin County v. Makemson, 464 So2d 1281 (Fla. App. 4th DCA 1985) and Okeechobee County v. Jennings, 473 So2d 1314 (Fla. App. 4th DCA 1985), would be compounded and exacerbated. The attorneys end up working for less than a nominal fee. It then becomes an issue of not how much time is given by the local criminal defense bar, but based on todays overhead to run a law office, how much out-of-pocket expense is incurred by the criminal defense bar in handling these cases. Judge Bentley, the Trial Court Judge herein stated that Highlands County was down to three (3) attorneys competent to handle these

cases in a county of forty (40) practicing attorneys. Relief was obtained by going out of the county to appoint newly licensed attorneys, even though yet the judge questioned the competency of appointing those attorneys to handle cases against those charged with serious offenses.

The Collier County v. Hayes case speaks of the appointment of any payment to multiple counsel as circumvention of the statute. As Judge Bentley mentioned at the hearing on the award of fees:

> "Now, some games are being played by attorneys asking for the appointment of an investigator which is more and more coming to be seen as a tool necessary for effective representation on a capital case."

There is no limit on what an investigator might receive from the county coffers as a cost incurred by the indigent defendant. The purpose is obviously to reduce the amount of time and labor put into the case by the attorney and lay off much of the preparation of the case to an investigator. What result this might have on the effectiveness of the defendant's assistance of counsel is questionable. Yet defense counsel feels compelled to do something to match the armament lined up against him by the state.

Where the Court recognizes a clear need for the appointment of more than one (1) attorney to effectively represent an indigent accused, the Court inferentially acknowledges that exceptional circumstances exist. The Court should have the power

and authority to award reasonable compensation to each attorney, based upon the hourly rates established by the pertinent administrative order, or in the alternative award up to and including the maximum fee prescribed in §925.036 (1983) to each attorney. The result of the Court's lack of authority to do either of the above is the shrinkage of the pool of qualified, experienced willing attorneys from which to draw and appoint to these types of cases. In turn, the indigent defendant's right to counsel becomes, to paraphrase Chief Justice Sundberg in Metropolitan Dade, a hollow promise indeed.

II. WHETHER §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?

As stated in the lower court opinion of the Second District Court of Appeal in the instant case, the Fourth District has addressed this issue in the Makemson opinion and in the special concurrence in Jennings authored by Chief Judge Anstead.

In Makemson the Court cited the New Hampshire case of Smith v. State, 118 N.H. 764, 394 A.2d 834 (1978) a New Hampshire Supreme Court Opinion striking down fee cap statutes as an unconstitutional intrusion into an exclusively judicial function. A copy of the Makemson case is attached hereto, in the appendix, said quote from the Smith v. State case being found on page 1284.

It is submitted that the regulation of attorneys from

their entrance to the bar to their discipline and rules of conduct are exclusively within the purview of the Supreme Court of the State of Florida, particularly since the Florida Bar is an integrated mandatory bar and not voluntary. Florida Bar members are officers of the Court, and it is precisely such status upon which their obligation to defend indigent accused by order of the Court rests. It is the Courts and not the legislature which should determine the compensation, if any, such attorneys should receive as a result of said representation.

The sixth amendment right to counsel was a creature of judicial construction of the United States Constitution in Gideon, and not a creation of the legislature. The power and authority to insure that such right to counsel attains the level of right to effective assistance of counsel is contained within the judiciary and not the legislature.

As Chief Justice Sundberg stated in Metropolitan Dade County v. Bridges, the duty imposed by Gideon was a duty imposed upon the State. Our State of Florida responded admirably by setting up one of the first public defender systems in the country. As stated in Smith v. State, the legal profession, being taxpayers of course, share in the burden of providing such representation through the tax supported Public Defenders Office.

Petitioners agree with the Smith decision that the Bar should continue to contribute something more than the general public, because of their status as officers of the Court. However, again, to quote the Smith decision:

"The obligations and responsibilities of the Bar are matters of judicial concern alone."

The amount of compensation awarded to appointed counsel to represent indigent defendants should be exclusively within the authority of the judiciary. It is submitted that the decision in Smith v. State is well reasoned and this Court is urged to follow its holding.

III. IF §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?

The common thread among the prior decisions in Metropolitan Dade County v. Bridges, Marion County v. DeBoisblanc, 410 So2d 951 (Fla. 5th DCA, petition for review denied 419 So2d 1196 (Fla. 1982) and the other decisions rendered since the Metropolitan Dade County decision is that the answer to this question depends on a showing of impossibility of rendering effective assistance of counsel as a result of the fee caps contained in §925.036 Florida Statutes. It is inherently impossible for a Court to address that issue.

As Justice Sundberg stated in Metropolitan Dade County v. Bridges at page 415:

"Should it be demonstrated that the monitary limitation placed by the legislature on the compensation paid to court appointed attorneys representing indigent criminal defendants be so unreasonable as to make it impossible to secure effective counsel to those individuals, then

> there is no doubt in my mind that it would be the duty of the Courts to strike down such limitations in favor of reasonable compensation.

Judge Sharp, in her special concurrence in Marion County v. DeBoisblanc at page 953, recognized:

> "The difficulties of making such a showing, but I conclude we should recognize it theoretical existence, and leave for another case the problems of its proof."

It is submitted that the issue of the problems of proof is now ripe for decision. Judge Anstead addressed this in his special concurrence in Okeechobee v. Jennings at page 1318:

> "A laywers professional ethics and personal concern for justice may motivate him to devote whatever time and effort is necessary in the individual case. Indeed, that is what keeps the present system afloat."

There will never be a showing of impossibility because those members of the criminal defense bar who are qualified and sufficiently competent to represent indigent defendants in the complex capital and life felony cases will do whatever is required to insure their respective clients receive effective assistance of counsel, no matter how nominal the fee.

The circuit judges of this state also help keep the present system afloat by insuring that only those members of the criminal defense bar, sufficiently competent and qualified to represent indigent defendants in the serious, complex, capital or

life felonies are appointed. However, as Judge Bentley has pointed out, the well ran dry in Highlands County, and counsel located in other counties were appointed. Under these circumstances fewer and fewer attorneys will be handling criminal defense cases at all. The burden of providing effective assistance of counsel to indigent defendants, which duty rests upon the State, with the aid and extra assistance of all the members of the Florida Bar has now fallen upon a very small and shrinking percentage of that organization.

There will be those cases where a trial judge will determine that the appointment of two or more attorneys to an indigent defendant is required to provide that defendant effective assistance of counsel. The current problems faced by trial courts, namely the limited number of attorneys willing and qualified to handle these cases will be severely compounded.

The Court must have an outlet to insure that the judicially mandated effective assistance of counsel is provided. There must be an exception to §925.036 Florida Statutes (1983) which authorizes the trial judge to exceed the maximums and award fees to multiple counsel in excess of the maximums.

The history of the proceedings in the case of State v. Alexander for which Petitioners herein were appointed, illustrates the unfairness and unconstitutional application of §925.036 Florida Statutes (1983). Defendant Alexander was charged with the crime of murder in the first degree and after a competency

hearing in which the testimony of experts in the field of psychiatry and psychology was taken, was determined by the Court to be incompetent to stand trial at that time. Defendant Alexander was then institutionalized for a period of time. The issue of competency to stand trial was again addressed, a hearing was held thereon with the testimony of the above referenced experts taken. At that time he was determined to be competent to stand trial. It was at that point that current counsel was appointed.

It is not very difficult to conceive that in a complex capital felony a similar situation could arise in which most or virtually all the funds available under §925.036 Florida Statutes (1983) have been used up, before trial by motions, hearings, discovery procedures, etc. and then an appointed attorney must conduct days of trial potentially involving both the guilt and death sentencing phase working for virtually no fee. The instant case was complex, taking five (5) full days to try, without a sentencing phase. The fee limitations contained in §925.036 Florida Statutes (1983) are impractical, unfair, work an intolerable hardship on indigent defendants and are unconstitutional as applied.

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?

Basically, the question to be answered is, did exceptional circumstances exist in the case at bar.

The trial court, Judge Bentley presiding, in its order appointing special public defender dated September 7, 1984 in appointing Petitioner Schommer as Special Public Defender granted Mr. Schommer the authority to use other members of his firm as may be necessary in representing Mr. Alexander. The Court recognized the potential necessity of having more than one attorney represent the Defendant in this case. This is in no way to infer that the Court intended at that time to abrogate §925.036 Florida Statutes (1983) and award fees in excess of the cap stated therein.

The brief history of this case has been recited in the argument addressed to certified question III. It was a case that had been in the Court system for years, received daily publicity prior to and during trial. The trial of the cause took five (5) days. There were over seventy (70) potential witnesses. The witnesses included experts in the field of psychiatry and psychology because there was an insanity defense asserted. As shown by the affidavits Petitioner Schommer expended in excess of one hundred fifty (150) hours on the matter, Petitioner Lobozzo expended in excess of ninety (90) hours on the matter. It is to be remembered that Petitioners herein were appointed after there

had been hearings on the indigent defendant's competency to stand trial and after some discovery had already been taken. Based upon a fifty (50) hour work week, it would have taken a single attorney representing the indigent defendant approximately five (5) weeks of time and labor to work on this case to the exclusion of all others.

Judge Bentley found the fees requested to be so reasonable that he took judicial notice and though Petitioners had a witness ready, willing and able to testify as to the reasonableness of the fee, the Judge at Page 12 of his transcript at said motion hearing stated, "I'll take notice of the fact that I think everybody knows that the work done on a capital case in one such as this is on the marketplace worth far more than $3,500.00."

If in fact, this Court determines that the trial court can exceed statutory fee caps then a determination of whether extraordinary circumstances exist, the criteria being addressed in Metropolitan Dade County v. Bridges, specifically the extraordinary amount of time required, the number of issues and the complexity of the issues involved, the number of witnesses potentially to be called at a trial, should be determined by the trial court.

CONCLUSION

Petitioners submit that §925.036 Florida Statutes (1983), is an unconstitutional usurpation of judicial authority by the legislature on its face and should be adjudged unconstitutional.

If this Court determines that said section is constitutional on its face it is submitted by Petitioners that said section is unconstitutionaly applied because it does not provide an outlet to the trial court to award fees in excess of the statutory caps in extraordinary circumstances.

Should this Court find said section be constitutional, it is submitted that proper construction of §925.035 Florida Statutes (1983) in conjunction with §925.036 Florida Statutes (1983) authorizes the trial court to award fees up to and including the maximum allowed to more than one attorney appointed to represent a single defendant.

It is submitted that the criteria to determine if extraordinary circumstances exist have been laid out in prior decisions and that a determination of whether those extraordinary

circumstances existed in the instant case should be made by the trial court herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioners/Appellants' Initial Brief has been furnished by regular U.S. Mail to THE HONORABLE E. RANDOLPH BENTLEY, Circuit Judge, P.O. Box 103, Bartow, Florida 33830, THE ATTORNEY GENERAL, Park Trammel Building, 1313 Tampa Street, Suite 804, Tampa, Forida 33602, DUNTY & HARRIS, 312 Interlake Blvd., Lake Placid, Florida 33852, Attorneys for Board of County Commissioners of Highlands County, this 11th day of March, 1986.

By: _____
JAMES V. LOBOZZO, JR.