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FILED
BY [Signature]

IN THE SUPREME COURT OF FLORIDA

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

Petitioners/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,)

Respondents/Appellees)

Case No. 68-335

Second District Court of
Appeal No. 85-1289

Circuit Court
Case No. CR-83-63

PETITIONERS/APPELLANTS' REPLY BRIEF

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ARGUMENT IN RESPONSE AND REBUTTAL TO ANSWER BRIEF

Petitioners/Appellants in this reply brief shall only offer argument in response and rebuttal to the argument presented in the answer brief filed by DUNTY AND HARRIS, Attorneys for Highlands County and E. RANDOLPH BENTLEY, Circuit Judge and shall not direct rebuttal to argument presented in any Amicus Curiae briefs.

Petitioners/Appellants shall specifically address points raised by the Respondent/Appellees in chronological order as they appear in the Respondents/Appellees Summary of Argument and each certified question.

SUMMARY OF ARGUMENT

Respondents/Appellees state in their Summary of Argument, paragraph 2,

"There have been no substantial changes in law which would require this Court to recede from or clarify Bridges." (Metropolitan Dade County v. Bridges, 402 So.2d 411 (1981))

Petitioners/Appellants would take issue with the above statement. There was a substantial change in the law immediately following Bridges when the Florida Legislature amended Florida Statutes 925.036 by precluding "stacking". And, the Court in Metropolitan Dade County v. Bridges through Justice Alderman stated

"Unless it is demonstrated that the maximum amounts designated for representation in criminal cases by §925.036 are so unreasonably insufficient as to make it impossible for the Courts to appoint competent counsel to represent indigent Defendants, we cannot say that §925.036 violates the Sixth Amendment right to Counsel."

Therefore, it appears that the constitutionality of 925.036 was upheld in Metropolitan Dade County v. Bridges only because it could be construed in such a manner to allow "stacking". Justices England and McDonald concur in Justice Alderman's opinion.

Petitioners/Appellants would also point out that Chief Justice Sundberg in Metropolitan Dade County v. Bridges stated

"Should it be demonstrated that the monetary 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 Court's to strike down such limitations in favor of reasonable compensation. "

England concurred with Chief Justice Sundberg's concurrence.

Justice Boyd, in an opinion with which Justice Adkins concurred stated that the Trial Court should have the power to grant a fee in excess of the amounts allowed by 925.036 in "extraordinary circumstances". Under the premise that 925.036 "must be construed in pari materia with the legislative principal, announced in §924.035 (1), Florida Statute (1977), calling for "reasonable compensation for court appointed attorneys in

capital cases."

Justice Overton, in an opinion in which Justice Adkins concurred, said "I would consequently find the statute directory and not mandatory" when a case had multiple issues and large numbers of witnesses and required "an exceedingly large amount of an attorney's time for adequate representation". Justice Overton did not limit this to capital cases.

Therefore, Petitioner/Appellants would submit that there has been a substantial change in the law since Metropolitan Dade County v. Bridges by the elimination of "stacking" and by the fact that the Courts are finding it exceedingly difficult to find competent criminal law attorneys who are qualified and agreeable to taking appointed cases, especially capital cases, and that \$3,500.00 in today's marketplace is "so unreasonably insufficient as to make it impossible for courts to appoint competent counsel" and "so unreasonable as to make it impossible to secure effective counsel.

Petitioners/Appellants would further submit that a Defendant's right to competent and effective assistance of counsel, according to the Sixth Amendment, cannot be denied based on monetary reasons. Petitioners/Appellants would submit that giving the Courts the power to award a reasonable fee, or a fee above those allowed by 925.936 as the circumstances warrant would not result in a enormous invasion of the public treasuries because you still would have a Trial Court Judge making the determination

of what is a reasonable fee in order to assure a Defendant of competent effective assistance of counsel, keeping in mind the obligation of all attorneys to handle appointed cases at a lesser hourly rate, protection of the public treasuries, yet mindful of the fact that the state and county have an obligation to pay for competent and effective assistance of counsel.

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?

Counsel for Respondents/Appellees makes much of the allegation that the Trial Court did not enter an Order authorizing two separate attorneys to represent the Defendant and therefore the first certified question is not properly framed. Petitioners/Appellants believe counsel for Respondents/Appellees is unnecessarily splitting hairs whether the certified question is framed as it is or is framed as counsel for Respondents/Appellees suggest, the issue is the same. Whether its two attorneys requesting a total of \$8,581.10 or one attorney requesting \$8,581.10 the root question is whether 925.036 is constitutional and whether the Trial Court, under any set of circumstances, may exceed the amounts now mandated as maximums by 925.036.

It is evident that Attorney Schommer anticipated the potential consumption of time involved in representing a Defendant on a capital case, and the strain it would place upon the rest of his legal practice both timewise and monetarily, and for that reason requested the Trial Court to authorize other members of his firm to aid him in the Defendant's representation at the early stages of accepting and undertaking representation of the Defendant. Indeed, the question of being able to render competent and effective assistance of counsel might be more acute had Attorney Schommer or Attorney Lobozzo represented the

Defendant alone. If that had been the case either Attorney Schommer or Attorney LoboZZo would have requested the same total amount that Attorney Schommer and LoboZZo had jointly requested by their Motion and Affidavits for Attorneys' fees.

Furthermore, Attorney Schommer premised his acceptance of the appointment upon the Court's authorization to use other members of his firm to aid him in the Defendant's representation and had the Court not so authorized, Attorney Schommer would have declined the appointment and asked the Trial Court to appoint another Attorney to represent the Defendant.

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?

Counsel for Respondent/Appellees makes the point that the Court in Bridges, supra, stated "that there is a common law duty upon the Bar to represent an indigent party when directed to do so by the Court" (emphasis added). Petitioners/Appellants would remake the point that it is the Bars duty to represent indigent parties and that the Bar is not now representing indigent Defendants but rather, as pointed out in our Initial Brief, and as pointed out in the Academy of Florida Trial Lawyer's Brief, a small percentage of the Bar is currently representing indigent Defendants in all types of cases, not merely capital cases. Therefore, the duty to represent an indigent party is unduly falling upon a small percentage of attorneys and if they are constantly required to represent indigent defendants then such requirement would be an unfair, unconstitutional deprivation of their time, talent, and property.

More and more Trial Courts are expressing the concern that it is getting more difficult to find Attorneys willing, competent and able to represent indigent Defendants. The question might be asked what does a Trial Court do if this pattern continues and fewer and fewer criminal attorneys volunteer to take appointed indigent Defendant cases. As Judge Bentley stated during the Motion for Attorneys' Fees proceedings (T9, line

21-25; T10, line 1-7) there were five lawyers willing to accept appointments in criminal cases and at one time it was down to three. What would the Court do in the event this small number of attorneys refused to take any more appointed cases. Could the Court force them to accept an appointed case, which Petitioner/Appellants would urge would be unfair, improper, and unconstitutional because you would then be forcing a small percentage of the Bar to take these cases and allowing a large percentage of the Bar to escape a duty which falls upon the entire Bar. Forcing only criminal attorneys to represent indigent Defendants would indirectly make them Public Defenders and deprive them of their ability to engage in their chosen profession. This scenario has not occurred yet but may well occur in the future since Judge Bentley and other Trial Judges have expressed the continuing and expanding difficulty of finding willing, competent attorneys who will voluntarily accept appointed cases.

III-A. IF §925.036 IS CONSTITUTIONAL, MAY THE
STATUTE BE HELD UNCONSTITUTIONAL AS APPLIED
TO EXCEPTIONAL CIRCUMSTANCES.

Counsel for Respondents/Appellees allege that the Court is prohibited from finding 925.036 unconstitutional as applied in this cause because there is no allegation, fact or finding that the Defendants right to counsel was denied. Taking this approach the Court would, most likely, always be prohibited from finding §925.036 unconstitutional because no attorney volunteering to accept an appointed case would purposely render ineffective assistance of counsel in order to thereafter attack §925.036 as being unconstitutional. An Attorney would have to invite the rendering of ineffective assistance of counsel in order to challenge the constitutionality of §925.036 which Petitioner/Appellants submit no Attorney would purposely engage in. Thus, applying counsel for the Respondents/Appellees' reasoning would result in the inability of any attorney ever being able to challenge the constitutionality of §925.036.

III-B. 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?

Respondents/Appellees cite to the the four rules of statutory construction stated in Bridges, supra. Respondents/Appellees then state that these principles were the corner stones used by this Court to hold \$925.036 constitutional and to prevent "stacking" in Bridges, supra. This is an incorrect statement regarding the holding of Bridges, supra. The holding of Bridges was that "stacking" was allowed when an attorney represented a Defendant charged with two life felonies.

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?

Respondents/Appellees state that the instant case is simply a capital case of normal complexity and not exceptional difficulty and therefore the Court would be without basis for awarding a fee above the statutory maximum based upon exceptional circumstances. Petitioners/Appellants take issue with that statement and would reiterate that the trial of this case took five days. There were over seventy potential witnesses. The witnesses included experts in the field of psychiatry and psychology because there was an insanity defense asserted. Also, a defense that the Defendant did not commit the crime was asserted. A total of 240 hours was devoted to the case by Attorneys Schommer and Lobo. Petitioners/Appellants were appointed after there had been hearings on the Defendant's competency to stand trial and after some discovery had already been taken. Based upon a fifty hour work week it would have taken a single attorney representing the indigent Defendant approximately five weeks of time and labor to work on this case to the exclusion of all others. Petitioners/Appellants would submit that even for a capital case this was not a routine case. Petitioners/Appellants would submit that if there is any doubt about the matter, and this Honorable Court decides that the Trial Court does have the authority to award a greater fee than the statutory maximum in exceptional

circumstances, then the matter should be referred to the Trial Court for additional hearings to determine whether Attorneys Schommer and LoboZZo should be awarded a greater fee than the statutory maximum due to exceptional circumstances.

CONCLUSION

Petitioners/Appellants reiterate that the relief requested by their conclusion in their initial brief be granted and/or relief requested by the conclusion contained in the brief of Amicus Curiae, Academy of Florida Trial Lawyers be granted.

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' Reply 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, Florida 33602, DUNTY & HARRIS, 312 Interlake Blvd., Lake Placid, Florida 33852, Attorneys for Board of County Commissioners of Highlands County, and THE HONORABLE E. RANDOLPH BENTLEY; PAUL M. RASHKIND, Chairman, Criminal Law Section, Academy of Florida Trial Lawyers, 4770 Biscayne Blvd. Suite 950, Miami, Florida 33137; ERIC GRESSMAN, Assistant County Attorney, Office of ROBERT A. GINSBURG, Dade County Attorney, Metro-Dade Center, Suite 2810, 111 N.W. 1st St., Miami, Florida 33128-1993, this 18th day of April, 1986.

By: Nicholas G. Schommer
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For Petitioners/Appellants