IN THE
SUPREME COURT OF FLORIDA

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CASE NO.: SC00-331

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SHEPPARD AND WHITE, P.A.

Petitioner,

vs.

CITY OF JACKSONVILLE,

Respondent.

On Discretionary Review from the District Court of Appeal
of Florida, First District

_____

AMENDED
AMICUS BRIEF OF FLORIDA ASSOCIATION OF COUNTY ATTORNEYS AND ORANGE COUNTY INITIAL BRIEF ON THE MERITS
(IN RESPONSE TO REQUIREMENT OF CLERK OF SUPREME COURT)

_____

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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, undersigned counsel hereby certifies that the instant brief has been prepared with 12 point, Courier, a font that is proportionately spaced.

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PRELIMINARY STATEMENT

Respondent, the City of Jacksonville, will be referred to herein by name or as “Respondent”. Petitioner, Sheppard & White, P.A., will be referred to herein by name or as “Petitioner”. References to the Record on Appeal will be designated by reference to the relevant volume and page, set forth in brackets. Example [R.I., 1]. References to the Petitioner’s Initial Brief on the Merits will be designated by reference to the relevant page, set forth in brackets. Example [IB. 1], and the Florida Association of County Attorneys and Orange County will be referred to as FACA.

STATEMENT OF THE CASE AND FACTS

With regard to the Petitioner's Statement of the Case, the Florida Association of County Attorneys, (FACA) and Orange County, would adopt the response filed in this case by Respondent, but in addition, would respond as follows:

The question certified was defined as:

> Is the fixed rate of $50.00 per hour for appellant attorney's fee confiscatory when applied in a capitol case requiring five hundred fifty (550) hours of attorney's time.

Further, Petitioner states:

> On discretionary review, the Petitioner challenges the holding of the First District Court of Appeal that it could not upset a $50.00 hourly rate established by administrative order for compensation of court-appointed counsel in a successful capital appeal requiring almost five 50 hours of attorney time. The Petitioner asserts that such hourly rate is so unreasonably low as to be unconstitutionally confiscatory and a threat to the right of indigent capital defendants to receive constitutionally effect assistance of counsel.

By making the statement of the case as it does, Petitioner implies something that would surprise the First District Court of Appeal. Their holding was much different. They stated that:

> we find the Second District Court of Appeal's decision in *Hillsborough County v. Unterberger*, 534 So. 2d 838 (Fla. 2d DCA 1988), persuasive. In *Unterberger*, the Second District reversed the trial court's determination that the $40.00 hourly rate established by the chief judge was unconstitutional, because there had been no showing the $40.00 rate did not adequate representation of indigent criminal defendants or that the rights of counsel were violated. As in the instant case, if the counsel in *Unterberger* relied upon evidence of the cost

> of overhead and the fair market value of his services, but the court rejected this approach focusing instead on whether "the hourly rate fixed by the chief judge of the circuit deprives indigent criminal defendants of effect counsel and is thus, unconstitutional." *Id.* at 842. The *Unterberger* court concluded that, "unless that rate impacts on the rights of indigent criminal defendants, we are not free to declare the rate unconstitutional." *Id.* We agree.
>
> There was no showing in *Unterberger* that indigent criminal defendants were being deprived of adequate representation. *Id.*
>
> Here there was evidence before the trial court that at least one board certified attorney was accepting representation at the $40.00 hourly rate set by the administrative order, and indeed, despite the hourly rate, counsel accepted representation in this case. It is not our role to reweigh the evidence presented below. We find there was competent, substantial evidence on which the trial court could find that the hourly rate did not materially impair the ability of lawyers to fulfil their roles or that it curtail the power of the court to appoint attorneys. Accordingly, we reject this relief requested by Petitioner.

The holding therefore of the First District Court of Appeal certainly was not as simple as saying that it "could not upset the $50.00 hourly rate established by administrative order." Rather, the Court held that in circumstances where an attorney <u>accepted</u> the appointment of a case at a given rate it could not hold that the attorney could, after completing his service, ask for a higher rate.

As to the facts of the case, Petitioner mentioned that Petitioner was appointed to represent Mr. Murray without alluding to any details of the process of appointment. Petitioner goes on

to be very elaborate about the appeal he was appointed to handle, listing the many abuses of discretion which were claimed and brought up by them during the appeal, that the Supreme Court reversed the conviction and sentence of death and remanded the case for a new trial and that the appellant counsel filed their motion for payment of appellant attorney's fees. In relating these facts, Appellants skip over some important matters which the First District Court of Appeals found highly relevant. The Court stated:

Factual and Procedural Background

> In 1994, Gerald D. Murray was convicted of 1st degree murder . . . a circuit judge in the 4th Judicial Circuit approached William J. Sheppard . . . about handling the appeal in Murray's case. Sheppard initially declined advising the Judge that the $40.00 per hour rate at which appointed attorneys were paid in the 4th Judicial Circuit was inadequate. Unable to secure other counsel, the Circuit Judge eventually prevailed upon Sheppard to accept the representation of Murray in the case, with the condition that Professor Fletcher Baldwin of the University of Florida, College of Law, serve as co-counsel.

Sheppard and White v. Jacksonville, So. 51 So. 2d 731 at 732 (Fla. 1st DCA 2000).

> Here there was evidence before the trial court that at least one board certified attorney was accepting representation at the $40.00 hourly rate set by the administrative order, and indeed, despite the hourly rate, counsel accepted representation in this case.

Sheppard, *supra* at 736.

The critical evidence that the 1st DCA identified as having been available to the Circuit Court below was that the board

certified attorney accepted the representation at the hourly rate. They found that such acceptance was competent substantial evidence, supporting the Circuit Court decision. *Sheppard, supra* at 736.

SUMMARY OF ARGUMENT

The attorneys in this case waived the fees they now seek. The issue therefore, of whether the rate per hour is confiscatory under the Constitution is moot, because even if answered in the affirmative, it could not affect the outcome of the case below. Answering the question would be a sterile, abstract exercise, which courts usually shun. The legislation, section 925.036 Fla. Stat., establishing the right of the chief judges of the circuits to set the rate for such legal services, was never questioned below as being unconstitutional, and therefore the constitutionality issue should be dismissed. Such a question as the constitutionality of a rate implies a mechanism which, if followed the way appellant would imply it should be, i.e., to have each circuit trial judge determine it, would prevent any county budget planning at all.

ARGUMENT

I. ANSWERING THE QUESTION AS TO WHETHER THE FIXED HOURLY RATE OF $50.00 PER HOUR FOR APPELLANT ATTORNEY'S FEE IS CONFISCATORY OR NOT WHEN APPLIED IN A CAPITAL CASE REQUIRING 550 HOURS OF ATTORNEY'S TIME WOULD BE SUPPLYING AN ANSWER FOR A PURPOSE WHICH WILL NOT EFFECT AND CANNOT IMPACT ON THE CASE BELOW AND IS THEREFORE UNRIPE AND MOOT.

FACA would generally adopt the position taken by Respondent but would add the additional comments as follows: It is uncontested, and was determined to be a fact which could be relied upon by the 1st district court of appeals, that the only condition placed upon the agreement to accept appointment for the case by Sheppard was that he be allowed to have his choice of co-counsel, though such choice is not normally allowed. The 1st DCA clearly was able to discern that whether or not Sheppard thought that the amount of compensation per hour was reasonable or not, he waived objection to it and was therefore estopped to complain about it, by accepting the case. Answering the question as to whether a fixed hourly rate of $50.00 per hour is confiscatory or not is answering a moot issue. Even if, for example, this court were to determine that in its opinion $50.00 per hour is confiscatory, it would have to also determine that the attorney in the circuit court below did not waive or is not estopped to ask for a higher amount after having done the work, because he did not do so prior to accepting the work.

There is no indication that, at any point below, the attorney, Sheppard or his co-counsel ever attempted after

accepting, but prior to having done the work, to get a higher rate per hour. Further, as their efforts continued and they progressed through the case and they began to do more work and pile on a greater number of hours, never at any time did they stop, go back to court, and request a higher rate based on the fact that, for example, they had a displacement of other work, or because they had more hours in the case than they had imagined they would have when they first started. They never at any time, either before they commenced work or before they completed the work ever stopped to ask for more money per hour. They simply completed the work and then asked afterwards for more money.

This court should not determine whether or not a $50.00 an hour appellant attorney's fee is confiscatory first, and then address the issue of whether or not the attorneys involved can benefit from that decision. Instead, this court should ask whether or not such a determination would make any difference in this case, as far as whether or not these attorneys could receive a higher amount per hour, after having waived any increase by accepting the case. If this court determines that the attorneys waived any right to ask for an additional amount per hour by not making that a condition for acceptance of the appointment, or later while they were working on the case, or by not making it a condition for continuing to represent the defendant on appeal, then it is not necessary for this court to determine whether or not the amount per hour is confiscatory or not. Such a determination, if made, would then be in the nature

of an advisory opinion, or it would be an analysis of the constitutionality of a statute as a hypothetical question, dealing with it abstractly or in the manner of an academic discussion. Courts generally do not have the power to give legal advice or opinions. *Schwartz v. Norris*, 390 So. 2d 389 (Fla. 4th DCA 1980).

This case, it's true, does consist of a present live controversy. However, courts normally do not reach constitutional questions when an issue can be decided on other grounds. In this case, the other grounds are simply the waiver and estoppel grounds. It is not necessary to reach the issue of whether or not the amount per hour is confiscatory under the constitution.

II. THE FIXED HOURLY RATE OF $50.00 PER HOUR FOR APPELLATE ATTORNEY'S FEE IS NOT CONFISCATORY WHEN APPLIED IN A CAPITAL CASE REQUIRING 550 HOURS OF ATTORNEY'S TIME WHERE OBJECTION THERETO IS WAIVED

FACA would generally adopt Respondents position, specifically that of Respondents point I, but would add that it is possible to bargain away such claimed rights by waiver. That is what the petitioners have done here, and should not be heard to claim a Constitutional violation now.

III. IN ORDER TO DETERMINE THE RATE TO BE UNCONSTITUTIONAL, THIS COURT WOULD HAVE TO SAY THAT THE LEGISLATION ALLOWING THE JUDICIAL BRANCH THE DISCRETION TO DETERMINE THE RATE LEVEL THROUGH THE CHIEF JUDGES ADMINISTRATIVE ORDERS IS UNCONSTITUTIONAL.

FACA would generally adopt Respondents position, specifically that of Respondents point II, but would add that Section 925.036, which establishes that the chief judges of the circuits set the rate of pay levels, is, while unquestionably "legislation," still a granting to the judicial branch the power to set the rates. It even, conceivably, makes it possible for individual circuit judges to do so if the chief judges want to make the issue one for them, by saying so by administrative order. But here, no one has explained what mechanism should be used to change the rate to a constitutional one, even if this court should say that such a rate as here disputed is unconstitutional, or explain just how the chief judges should be instructed to behave.

Should they be told, under this Court's supervisory jurisdiction, not to establish a rate less than a certain amount per hour? Or should the mechanism be by way of a finding by this Court of a specific rate as being constitutional? If so, that would mean that the legislation allowing them the discretion to set the rate would be unconstitutional if they award less than a certain rate, and no one has challenged the constitutionality of that legislation. This Court has held that where it affirmatively appears from the record on an appeal that the

purported appeal was from a decision of the lower court which did *not* initially pass upon the validity of a state or federal statute or treaty or initially construe controlling provision of the Florida or the federal Constitutions, the appeal must be dismissed. *Meyer v. Miller,* 121 So. 2d 33 (Fla. 1959).

IV. THE LEGISLATION ESTABLISHING THE MECHANISM FOR THE CHIEF JUDGES TO ESTABLISH THE RATE, PARTLY CREATES SOME SEMBLANCE OF AN ABILITY ON THE PART OF COUNTIES TO PLAN AND ESTABLISH THEIR BUDGETS. A FINDING THAT THE RATE IS UNCONSTITUTIONAL IN THE WAY THE MATTER IS PRESENTED HERE COULD CREATE GREAT DIFFICULTIES FOR COUNTIES TO PLAN.

The various Counties now have some idea as to the rate established by the chief judges. Put simply, if the many circuit judges are given complete discretion to award any rate they like, no real planning can be done by the counties at all. Conversely, if this Court should simply say that a given rate will be allowed, always, then it will be answering a question which has not been asked, specifically, whether Section 925.036 is constitutional, as to its awarding of the power to set the rate to the chief judges.

CONCLUSION

In conclusion, the trial court's order and the opinion of the First District Court of Appeal should be affirmed. Since Petitioner agreed to the court-appointed representation at the fixed hourly rate, and waived any objection, it should be estopped from challenging the constitutionality of that rate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William. J. Sheppard, Esquire and D. Gray Thomas, Esquire, 215 Washington Street, Jacksonville, Florida 32202, and Howard M. Maltz, Esquire, Assistant General Counsel, 117 West Duval St., Suite 480, Jacksonville, Florida 32202, by U.S. Mail, this 6th day of June, 2000.

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