IN THE
SUPREME COURT OF FLORIDA

CASE NO.: SC00-331

SHEPPARD AND WHITE, P.A.,

Petitioner,

vs.

THE CITY OF JACKSONVILLE,

Respondent.

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

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RESPONDENT'S ANSWER BRIEF ON THE MERITS

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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, counsel for the City of Jacksonville hereby certify that the instant brief has been prepared with Times Roman, 14 point, 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].

STATEMENT OF THE CASE AND FACTS

Respondent does not agree with the Petitioner's Statement of the Case and Facts and submits its Statement of the Case and Facts as follows:

Petitioner was appointed by the trial court to represent Gerald Murray on direct appeal from his conviction of first degree murder, burglary with an assault and sexual battery, and sentence of death. [R.I., 1]. At the time of the Petitioner's appointment, the Second Amendment to Administrative Order 86-33 of the Fourth Judicial Circuit of Florida, was in effect. [R.II., 284]. This Administrative Order set the hourly rate of compensation for court-appointed appellate counsel at $40.00. At the time that Petitioner accepted the appointment to represent Mr. Murray on direct appeal, it was fully aware of the $40.00 hourly rate of compensation and agreed to accept the appointment. [R.V., 603, 623].

Following the representation of Mr. Murray on direct appeal, Petitioner filed a motion with the trial court for payment of appellate attorney's fees and costs. [R.I., 1-68]. Petitioner sought reimbursement for attorney's fees in the amount of $91,390.00 for 650.25 hours of services performed. [R.I., 1-68].[1] Petitioner did not enumerate a specific hourly rate that it sought for reimbursement, nor did Petitioner

[1] 105.25 hours of the time sought for reimbursement by Petitioner was time spent by "paralegal/clerk". [R.I., 33].

assign different rates of proposed reimbursement for partners, associates, paralegals or law clerks in the firm. By dividing the total amount of fees sought by the amount of time Petitioner claims to have spent on the matter, Petitioner was seeking reimbursement at an hourly rate of $140.55 for all persons, including non-lawyers, who worked on the matter for Petitioner. [R.V., 592, 616]. The Respondent filed an Objection to the Motion for Payment of Appellate Attorney's Fees and Costs [R.I., 76-78], and a Memorandum of Law in Opposition to Appellate Counsel's Motion for Attorney's Fees and Costs. [R.II., 278-286].

On November 24, 1998 the trial court held a hearing on the Petitioner's Motion for Payment of Appellate Attorney's Fees and Costs. [R.V., 589].[2] At the hearing, the Respondent did not contend that the amount of time claimed by Petitioner in his motion was unreasonable, or that the trial court could not exceed the statutory cap on fees enumerated in §925.036(2), Fla. Stat. (1997). [R.V., 620, 627]. However, Respondent did object to Petitioner's attempt to obtain compensation at an hourly rate greater than that established by the Chief Judge's Administrative Order.[3]

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[2] The amount of costs incurred in Petitioner's representation of Mr. Murray was stipulated to by the parties. [R.IV., 578].

[3] Respondent also objected to reimbursement for time spent by paralegals and law clerks; however, that issue is not before this Court on this appeal.

At the hearing before the trial court, Petitioner submitted a number of affidavits from attorneys stating that they felt the $40.00 hourly rate of compensation, established by the aforementioned administrative order, was inadequate. [R.II., 160]. Contrary to Petitioner's assertations in its Initial Brief that the affiants are "attorneys who regularly practiced in criminal court" [IB. 20] or are "members of the criminal bar in the Fourth Judicial Circuit" [IB. 21], nowhere in the record is it established that these attorneys primarily engage in the practice of criminal law, or are competent to handle capital appeals. In fact, during the hearing before the trial court, Respondent noted that the vast majority of the attorneys who signed the affidavits are not appointed to handle appeals on capital cases, are not competent to handle such appeals, and are not competent to provide sworn testimony on the issue. [R.V., 616]. Contrary to Petitioner's assertation in its Initial Brief that "the evidence presented by Petitioner is uncontroverted in the record" [IB. 7], the Respondent submitted to the trial court for consideration the Motion for Interim Payment of Attorney's Fees [R.II., 258], Affidavit as to Attorney Fees of Michael B. Wedner, Esquire [R.II., 263], Affidavit as to Attorney's Fees of Joshua A. Whitman, Esquire [R.II., 264], Motion for Discharge and Final Award of Attorney's Fees [R.II., 265], Order for Interim Payment of Attorney's Fees [R.II., 269] and Order of Discharge and Payment of Attorney's Fees [R.II., 270] in the case of State of Florida v. Marc Christmas, (Case

Number: 91-1504 CF, Fourth Judicial Circuit of Florida), as well as the Motion for Discharge and Final Award of Attorney's Fees and Costs [R.II., 272] and Order for Payment of Attorney's Fees [R.II., 276], in the case of State of Florida v. Ronnie Ferrell, (Case Number: 91-8142 CF, Fourth Judicial Circuit of Florida). Respondent submitted these documents to the trial court to establish that despite Petitioner's contention that the $40.00 fixed hourly rate of compensation was inadequate, there were still attorneys, including board certified criminal trial attorneys, who were accepting court-appointments on capital appeals at this rate of compensation [R.V., 615], and there are attorneys who believe that this rate of compensation is reasonable [R.II., 263-264]; therefore, indigent criminal defendants in the Fourth Judicial Circuit are not being denied effective assistance of counsel on capital appeals.

Following the hearing on the Petitioner's motion, the trial court entered a Final Order for Payment of Appellate Attorney's fees and Costs. The trial court rejected the Petitioner's argument that the established hourly rate denied indigent criminal defendants effective assistance of counsel. The trial court further noted that:

> "[t]his administrative order is in the nature of a contract to this extent. If you take it [the appointment], you know going in what it pays $40 an hour ..."

[R.V., 623]. The trial court awarded Petitioner fees for 650.25 hours of work, calculated at the $40.00 fixed hourly rate, totaling $26,010.00.[4]

Petitioner filed a Notice of Appeal which the First District Court of Appeal treated as a Petition for Writ of Certiorari. The First District Court of Appeal granted the petition for the limited purpose of increasing the hourly rate of compensation for attorney's fees to $50.00 based on the amendment to the Administrative Order, but denied the bulk of relief sought by the Petitioner. See Sheppard & White, P.A. v. City of Jacksonville, 751 So.2d 731 (Fla. 1st DCA 2000). In unanimously denying the Petitioner's contention that the fixed hourly rate of compensation established by the Administrative Order of the Fourth Judicial Circuit was unconstitutional, the District Court concluded:

> "Here, there was evidence before the trial court that at least one board-certified attorney was accepting representation at the $40 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

[4] During the pendency of the proceedings in the First District Court of Appeal, the Chief Judge for the Fourth Judicial Circuit issued an amendment to Administrative Order 86-33 which increased the hourly rate of compensation for the representation provided by Petitioner to $50.00. Pursuant to the order of the First District Court of Appeal, the trial court increased the hourly rate of compensation for attorney's fees sought by Petitioner to $50.00. This brought Petitioner's total compensation for attorney's fees to $31,460.00.

> the hourly rate did not materially impair the ability of lawyers to fulfill their roles or that it curtailed the power of the court to appoint attorneys. Accordingly, we reject the relief requested by petitioner."

Id. at 736.

The First District Court certified the following question pursuant to Art. V, §3(b)(4), Fla. Const., and Rule 9.030(a)(2)(v), Fla. R. App. P.:

> Is the fixed rate of $50.00 per hour for appellate attorney's fees confiscatory when applied in a capital case requiring 550 hours of attorney's time?

Id.

SUMMARY OF THE ARGUMENT

The trial court did not depart from the essential requirements of law and the First District Court of Appeal did not err in affirming the trial court's award of court-appointed attorney's fees based upon the hourly rate established by the Administrative Order of the Chief Judge of the Fourth Judicial Circuit enacted pursuant to §925.036(1), Fla. Stat. (1997). The Petitioner accepted the court-appointment with full knowledge of the hourly rate of compensation established by the Chief Judge; therefore, the Petitioner is estopped from challenging the constitutionality of the hourly rate, and this Court need not address the constitutional issues raised by the Petitioner. Even if this Court were to address the constitutional issues, the orders of the trial court and District Court must be affirmed. The legislature has entrusted the chief judge of each judicial circuit with the responsibility of setting an hourly rate of compensation for court-appointed counsel which assures that the indigent criminally accused obtain effective assistance of counsel while taking into consideration the expenditure of public funds. This Court's previous rulings which declared the caps or ceilings on court-appointed attorney's fees enumerated in §925.036(2), Fla. Stat. (1997) unconstitutional when applied in extraordinary and unusual cases, are inapplicable to the hourly rates established by the chief judges pursuant to §925.036(1), Fla. Stat. (1997). The record below contains competent substantial

evidence to support the trial court's order and establishes that the fixed hourly rate of the Fourth Judicial Circuit does not deny the indigent criminally accused of effective assistance of counsel and is not confiscatory of an attorney's time. The trial court and First District Court of Appeal should be affirmed and the certified question answered negatively.

ARGUMENT

I. BY ACCEPTING THE COURT-APPOINTED REPRESENTATION WITH FULL KNOWLEDGE OF THE HOURLY RATE ESTABLISHED BY THE CHIEF JUDGE OF THE FOURTH JUDICIAL CIRCUIT, PETITIONER IS ESTOPPED FROM CHALLENGING THE CONSTITUTIONALITY OF THE HOURLY RATE.

The trial court did not depart from the essential requirements of law when it properly awarded the Petitioner attorney's fees based on the hourly rate established by the Administrative Order of the Chief Judge. The First District Court of Appeal properly affirmed the trial court's award of attorney's fees based on the rate established by the Administrative Order. See Sheppard & White, P.A. v. City of Jacksonville, 751 So.2d 731 (Fla. 1st DCA 2000).

By accepting representation of Mr. Murray with full knowledge of the hourly rate for court-appointed representation of the indigent criminally accused, established by the Administrative Order of the Chief Judge of Fourth Judicial Circuit, the Petitioner is now estopped from challenging constitutionality of the hourly rate. The trial court and the First District Court of Appeal both noted that the Petitioner was not required to accept the court appointment in this case and that when it accepted the representation it knew going in that it would be reimbursed at the rate established by the Chief Judge's administrative order. [R.V., 603, 623]; Sheppard, 751 So.2d at 733. Petitioner, or any other attorney in the Fourth Judicial Circuit, could have challenged

the administrative order at issue, prior to accepting court appointments but that was never done. See 1-888-Traffic Schools v. Chief Circuit Judge, Fourth Judicial Circuit, 734 So.2d 413 (Fla. 1999) (administrative orders of the Chief Judge of a judicial circuit may be challenged by common law writ). Furthermore, there is nothing in the record to indicate that the Petitioner attempted to negotiate or obtain an hourly rate greater than that fixed by the administrative order at the time the trial court entered its order appointing Petitioner. By accepting the court appointment with full knowledge of the fixed rate, Petitioner entered into an agreement with the Respondent to provide legal services to Mr. Murray at that fixed hourly rate. Now Petitioner seeks to set aside the terms of its agreement, by seeking reimbursement at an hourly rate three and one-half times that to which it agreed. However, by accepting the court appointment, Petitioner is now estopped from challenging the constitutionality of the rate established by the Administrative Order of the Chief Judge.

It is well established that an oral attorney's fee agreement is enforceable, and that the general principal of contract, that competent persons have liberty of contracting and when the agreements are shown to be voluntarily and freely made and entered into, courts will upheld and enforce them, is applicable to attorney's fees agreements. See In re Estate of McQueen v. First Guaranty Bank and Trust Co., 699 So.2d 747 (Fla. 1st DCA 1997); Lugassy v. Independent Fire Insurance Co., 636

So.2d 1332 (Fla. 1994). By accepting representation on a case with a known fee schedule, "an attorney necessarily agrees that the fee is customary and reasonable as to all persons included..." Sotolongo v. Brake, 616 So.2d 413 (Fla. 1992). By entering into an enforceable contract for representation, Petitioner is now estopped from challenging the constitutionality of the rate of compensation.

This Court has consistently held that when a party enters into an agreement, with full knowledge of its terms, that party may not later come back and challenge legislation which created some of the terms of the agreement. This was illustrated in Billings v. City of Orlando, 287 So.2d 316 (Fla. 1973), where a police officer challenged the constitutionality of a special act which provided that a police officer may only receive a 50% refund of his pension contributions if he left the city's employment prior to vesting in the pension plan. This Court concluded that the police officer was estopped from challenging the constitutionality of the special act, since he was aware of this provision when he accepted employment with the city, and if he was unsatisfied with this provision, he did not have to accept the employment.

Likewise, in Steigerwalt v. City of St. Petersburg, 316 So.2d 554 (Fla. 1975), a police officer challenged the constitutionality of legislation that resulted in the forfeiture of his pension due to the nature of his discharge from employment. This Court again stated that by accepting employment with the city with full knowledge of

this condition, the police officer was estopped from challenging the constitutionality of the legislation. See also, Seaboard Coast Line Railroad Co. v. McKelvey, 259 So.2d 777 (Fla. 3d DCA 1972).

Petitioner did not have to accept the court appointment at issue in this case. Likewise, Petitioner could have challenged the constitutionality of the Administrative Order prior to accepting the appointment through use of a common law writ. However, none of that was done here, and Petitioner accepted the appointment with full knowledge of the fixed hourly rate. Therefore, Petitioner is now estopped from challenging the constitutionality of the hourly rate established by the Chief Judge.

Since Petitioner is estopped from challenging the constitutionality of the established hourly rate, this Court need not address the certified question. This Court has consistently held, and it is a fundamental maxim of judicial restraint, that courts should not decide constitutional issues where cases can be disposed of on other grounds. State v. Mozo, 655 So.2d 1115 (Fla. 1995); Singletary v. State, 322 So.2d 555 (Fla. 1975); State ex. rel. v. Mager, 356 So.2d 267 (Fla. 1978); State v. Tsavaris, 394 So.2d 418 (Fla. 1981). Since the Petitioner is estopped from challenging the constitutionality of the hourly rate of compensation, this Court may dispose of this case

without addressing the constitutionality issues raised by Petitioner and this Court should deny the relief sought by Petitioner without further consideration.

II. THE HOURLY RATE FOR COURT-APPOINTED REPRESENTATION, ESTABLISHED BY THE CHIEF JUDGE OF THE FOURTH JUDICIAL CIRCUIT, IS NOT UNCONSTITUTIONAL AND THE CERTIFIED QUESTION SHOULD BE ANSWERED NEGATIVELY.

Even if this Court addresses the constitutional issues raised by Petitioner, the decisions of the trial court and First District must be affirmed. The fixed hourly rate of compensation established by the Chief Judge of the Fourth Judicial Circuit pursuant to Administrative Order, does not deny indigent capital criminal defendants of their right to effective assistance of counsel and is not confiscatory; therefore, the certified question should be answered negatively.

§925.036, Fla. Stat. (1997) addresses the compensation of court-appointed counsel for indigent criminal defendants. This statute provides in relevant part:

> (1) An attorney appointed pursuant to s. 925.035 or s. 27.53 shall, at the conclusion of representation, <u>be compensated at an hourly rate fixed by the chief judge or senior judge of the circuit</u> ... (emphasis added)

At the time of Petitioner's appointment to represent Mr. Murray on direct appeal, the Second Amendment to Administrative Order 86-33 for the Fourth Judicial Circuit of Florida [R.II., 284] was in effect. This Administrative Order, enacted pursuant to §925.036(1), Fla. Stat., and Fla. R. Jud. Admin. 2.050(b), established the

hourly rate of compensation for appellate court-appointed counsel at $40.00[5]. At the time that the Petitioner accepted the court-appointment to represent Mr. Murray on direct appeal, it was fully aware of the existence of the Administrative Order, and the $40.00 hourly rate [R.V., 603, 623]. Petitioner now seeks to declare the fixed hourly rate unconstitutional, and seeks reimbursement at an hourly rate three and one-half times the rate it agreed to at the time it accepted the court-appointment. The District Court of Appeal properly held that the trial court did not depart from the essential requirements of law when it rejected the Petitioner's argument and awarded attorney's fees based on the hourly rate established by the Administrative Order of the Chief Judge of the Fourth Judicial Circuit.

Every District Court of Appeal in this state has held that in determining the amount of attorney's fees to be awarded to court-appointed counsel, a trial court is bound to calculate the fee based upon the hourly rate established by the administrative order of the chief judge of the judicial circuit, and to exceed the established hourly rate constitutes a departure from the essential requirements of law. See Escambia County v. Ratchford, 650 So.2d 154 (Fla. 1st DCA 1995); Bd. of County Commissioners of Hillsborough County v. Cunningham, 529 So.2d 724 (Fla. 2d DCA

[5] During the pendency of this matter before the District Court of Appeal, the Chief Judge of the Fourth Judicial Circuit amended Administrative Order 86-33 to increase the hourly rate of court-appointed appellate counsel to $50.00.

1988); Metropolitan Dade County v. Gold, 509 So.2d 407 (Fla. 3d DCA 1987); Palm Beach County v. Butler, 524 So.2d 507 (Fla. 4th DCA 1988); Volusia County v. Vedder, 717 So.2d 206 (Fla. 5th DCA 1998).

The issues raised by the Petitioner and the certified question are not novel. This court has repeatedly denied review of District Courts of Appeal opinions which held that the trial court is bound to award court-appointed attorney's fees based on the fixed hourly rate established by administrative order where court-appointed counsel made the same arguments presented in the instant case. See Hillsborough County v. Unterberger, 534 So.2d 838 (Fla. 2d DCA 1988) rev. denied 544 So.2d 201 (Fla. 1989); Hillsborough County v. Lopez, 518 So.2d 372 (Fla. 2d DCA 1987) rev. denied 529 So.2d 694 (Fla. 1988); Hillsborough County v. Marchese, 519 So.2d 728 (Fla. 2d DCA 1988) cause dismissed 526 So.2d 75 (Fla. 1988); Bobbitt v. State, 726 So.2d 848 (Fla. 5th DCA 1999) rev. denied 733 So.2d 515 (Fla. 1999).

A trial court is bound to award court-appointed counsel fees at the rate established by the chief judge of the judicial circuit because the legislature has entrusted the chief judge of each circuit with the responsibility of being cognizant of the local rates for attorney's fees in order to assure effective assistance of counsel for indigent criminal defendants, while also taking into consideration the expenditure of public funds. The District Court of Appeal considered this in the instant case when

it stated:

> "[t]he importance of the administrative order setting the hourly rate cannot be ignored, because the chief judge, in setting the hourly rate is charged with being advised of the community rates for similar representation and the ability of the county budget to accommodate the expenditure of public funds for representation." (citation omitted)

Sheppard, 751 So.2d at 735.

As this Court stated in White v. Bd. of County Commissioners of Pinellas County, 537 So.2d 1376 (Fla. 1988), the intent of the legislature with regards to the appropriations of funds for public purposes must be upheld unless it is shown it curtails the court's ability to secure effective assistance of counsel for indigent defendants. In the instant case, competent substantial record evidence exists to show that the fixed hourly rate of the Fourth Judicial Circuit does not curtail the judiciary's ability to secure effective assistance of counsel for indigent defendants.

As noted by the First District Court of Appeal, the Petitioner's reliance on Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986) and White, supra, is misplaced and these cases do not support its position. Sheppard, 751 So.2d at 733. In Makemson, this Court held that the caps or ceiling on court-appointed counsel's fees enumerated in §925.036(2), Fla. Stat. could be exceeded in cases involving extraordinary circumstances and unusual representations. This Court did not declare that the hourly rates, which §925.036(1), Fla. Stat. establishes shall be set by the chief

judge of the judicial circuit, are unconstitutional or subject to exception.

In Makemson, court-appointed counsel represented an individual charged with first degree murder, kidnaping and armed robbery. The representation spanned nine months and the case was tried in a different county based on a venue change. Court-appointed counsel sought compensation for 248.3 hours of service, calculated using the rate established by the chief judge of the circuit totaling $9,500.00, despite expert testimony establishing the value of his services at a minimum of $25,000.00. This Court declared the $3,5000.00 ceiling on the fee unconstitutional as applied. This Court did not state that the hourly rate established by the chief judge was unconstitutional or that court-appointed counsel should be compensated in the amount that the expert witness said was the minimum value of his services.

This Court declared the cap or ceiling on fees unconstitutional as applied because:

> "[s]tatutory maximum fees, as inflexibly imposed in cases involving unusual or extraordinary circumstances, interfere with the defendant's sixth amendment right to have the assistance of counsel for his defense.
>
> * * * *
>
> Although facially valid, we find the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused."

Makemson, 491 So.2d at 1112. This Court went on to state:

> "[w]e must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus."

Id.

Not only is Makemson inapplicable to this case since it applies to the ceiling on fees, rather than the hourly rate, but the record in the instant case contains competent substantial evidence that the hourly rate, which takes into account unique and complex cases by reimbursing counsel for actual time spent on the case, does not deny indigent defendants in the Fourth Judicial Circuit of their right to effective assistance of counsel.

In White, supra, counsel was court-appointed to represent an indigent defendant in a first degree murder case. Court-appointed counsel sought reimbursement based on the hourly rate set by the chief judge of the circuit pursuant to §925.036(1), Fla. Stat. This Court reaffirmed its position in Makemson, that the statutory caps on attorney's fees in §925.036(2) were unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused and may be exceeded in cased involving extraordinary circumstances and unusual representations. This Court went on to state that "all capital cases due to their very nature, can be considered extraordinary and unusual and arguably justify an award of attorney's fees in excess of the current statutory

maximum fee cap." White, 537 So.2d at 1378.

It is important to note however, that in the record in White, "the trial court expressed concern over the difficulty of securing competent effective counsel to handle capital cases at the current statutory fee levels." Id. The record in the instant case reveals no such concern from the trial court, and in fact, contains competent substantial evidence that the courts in the Fourth Judicial Circuit have had no difficulty in obtaining competent effective counsel on such cases.

It is also important to note that in White, this Court stated:

> "[i]f the statutory cap is exceeded and fees awarded based upon the local prevailing hourly rate for indigent cases, the compensation would be "reasonable" and would then balance the state's constitutional obligation and the attorney's ethical obligation."

Id. at 1379. The First District, in the instant case, correctly concluded:

> "[t]he reference 'local prevailing hourly rate' can refer to nothing other than the rate established by order of the chief judge, since the fee requested in White was in accordance with the $50 hourly rate then set by the chief judge of the circuit.
>
> * * * *
>
> When the Florida Supreme Court addressed the fee cap in White it appears to us that the court assumed that the fees set in accordance with local prevailing rate are reasonable."

Sheppard, 751 So.2d at 735.

At the time this Court decided White, §925.036(1) Fla. Stat. mandated that the chief judge set the hourly rate of compensation for attorneys appointed to represent indigent criminal defendants. Therefore, the "local prevailing hourly rate for indigent cases" can logically mean nothing other than the rate established by the chief judge in an administrative order enacted pursuant to §925.036(1). Therefore, attorney's fees calculated based on the chief judge's fixed hourly rate will be "reasonable" so long as the cap on fees enumerated in §925.036(2) is exceeded in unusual or extraordinary cases.

The distinction between the fee caps struck down in Makemson and White and the hourly rate was explained in Hillsborough County v. Unterberger, 534 So.2d 838 (Fla. 2d DCA 1988), rev. denied 544 So.2d 201 (Fla. 1989), which contained essentially the same facts and issues as those presented in the instant case. In Unterberger, counsel was appointed to represent an indigent criminal defendant on appeal from his first degree murder conviction and sentence of death. Upon completion of the appellate representation, court-appointed counsel sought fees exceeding the $40.00 hourly rate established by the administrative order of the chief judge of the judicial circuit. The court-appointed counsel sought to declare the $40.00 hourly rate unconstitutional as applied to extraordinary and unusual cases and claimed it failed to insure adequate representation of indigent criminal defendants, interfered

with the Sixth Amendment Right to Counsel, constituted only token compensation, was insufficient to cover overhead, cut the link between fair compensation and quality of representation and was confiscatory of attorney time and talent. The court-appointed counsel presented expert testimony from another attorney in the community that a reasonable fee for the services performed would be between $100.00 and $175.00 per hour. The court-appointed counsel argued that Makemson, supra, supported his position. In opposition, Hillsborough County argued that despite the court-appointed counsel's contention that the $40.00 hourly rate was too low, there were still members of the county bar willing to accept representation at that rate. The trial court declared the $40.00 rate set by the chief judge unconstitutional in extraordinary and unusual cases claiming it failed to insure adequate representation of criminal defendants and interfered with the constitutional right to effective assistance of counsel.

The Second District Court of Appeal reversed the trial court's ruling and declared that the $40.00 fixed rate was constitutional. The Court rejected the analogy of the statutory caps declared unconstitutional in Makemson, supra, to the fixed hourly rate. The Court pointed out that court-appointed counsel had agreed to represent the Defendant in the extraordinary and unusual case at the hourly rate established by the chief judge.

The Court further stated:

> "... the maximum fee rate which the supreme court struck down had no relationship to the time an attorney spent representing the defendant. The hourly rate, on the other hand, takes into account the amount of time an attorney spends in an "extraordinary and unusual case" and is thus, no "token compensation".
>
> * * * *
>
> The supreme court's discussion on "token compensation" for court-appointed counsel in Makemson, however, is predicated on a showing that such compensation deprives indigent criminal defendants of adequate representation of counsel. That must be the threshold determination. Such a showing was not met in this case. We do not read Makemson to hold even in the absence of a showing that the rights of criminal defendants are being violated, that it is unconstitutional to compensate an attorney at a rate that he or she believes will not cover the overhead or at a rate that he or she believes is not in line with his or her experience or reputation in the community.
>
> * * * *
>
> We are not insensitive to the burden that the hourly rate places upon appointed counsel (citations omitted), but unless that rate impacts on the rights of indigent criminal defendants we are not free to declare the rate unconstitutional."

Id. at 842. See also Bobbitt v. State, 726 So.2d 848 (Fla. 5th DCA 1999) rev. denied 733 So.2d 515 (Fla. 1999) (the decision in Makemson did not render the $50.00 hourly fixed rate used to calculate court-appointed attorney's fees in a complex murder case unreasonable, confiscatory or unconstitutional). The First District found Unterberger to be persuasive in this case.

Likewise, in the instant case Petitioner has failed to demonstrate that the fixed hourly rate of the Fourth Judicial Circuit denies indigent criminal defendants of effective assistance of counsel. At the hearing before the trial court, Petitioner submitted a number of affidavits from attorneys stating that they felt the $40.00 hourly rate was "inadequate". [R.II., 158]. However, it was never established in the record what was meant by "inadequate". It is unknown if these attorneys felt the rate was inadequate to cover their overhead, to provide adequate representation, or inadequate for some other purpose. Contrary to Petitioner's representations in its Initial Brief that the affiants are "attorneys who regularly practiced in criminal court" [IB. 20] or are "members of the criminal bar in the Fourth Judicial Circuit" [IB. 21], nowhere in the record is it established that these attorneys who signed the affidavits primarily engage in the practice of criminal law, or are competent to handle capital appeals. During the hearing before the trial court, Respondent noted that the vast majority of the attorneys who signed the affidavits are not appointed to handle appeals on capital cases, are not competent to handle such appeals, and are not competent to provide sworn testimony on that issue. [R.V., 616]. The First District even commented that:

> "[i]n the proceeding below, the City pointed out that, of the 28 attorneys who stated they would not undertake representation because of inadequate pay, the majority of those attorneys were not criminal trial attorneys."

Sheppard, 751 So.2d at 732. However, despite the contentions of these attorneys that the fixed hourly rate is "inadequate", thirteen (13) of the affiants stated that they still consider accepting court appointments on capital cases. [R.II., 159]. The Respondent submitted to the lower court for review the Motion for Interim Payment of Attorney's Fees [R.II., 258], Affidavits as to Attorney's Fees of Michael Wedner, Esquire and Joshua Whitman, Esquire [R.II., 263-264], Motion for Discharge and Final Award of Attorney's Fees [R.II., 265], and Orders for the Payment of Attorney's Fees [R.II., 269-270] in the case of State of Florida v. Christmas, (Case Number 91-1504 CF, Fourth Judicial Circuit of Florida) as well as the Motion for Discharge and Final Award of Attorney's Fees and Costs [R.II., 272] and Order for Payment of Attorney's Fees [R.II., 276] in the case of State of Florida v. Ferrell, (Case Number 91-8141 CF, Fourth Judicial Circuit of Florida). These documents established that despite Petitioner's contention that the fixed hourly rate is inadequate, there are still attorneys, including board certified criminal trial attorneys, who accept court-appointments on capital appeals in the Fourth Judicial Circuit at the fixed hourly rate of compensation [R.V., 615], and there are attorneys who believe that this rate of compensation is reasonable [R.II., 263-264].

The First District Court correctly noted that:

> "[i]n addition, the City introduced evidence that there were attorneys, one of whom was a board-certified criminal trial attorney, who would undertake representation of defendants in capital cases, for the fixed hourly rate of $40 an hour. (Footnote omitted).
>
> * * * *
>
> Here, there was evidence before the trial court that at least one board-certified attorney was accepting representation at the $40 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 fulfill their roles or that it curtailed the power of the court to appoint attorneys. Accordingly, we reject this relief requested by petitioner."

Sheppard, 751 So.2d at 732-733. Even if this Court were to apply the principals in Makemson and White to the instant case, competent substantial evidence exists in the record to support the trial court's order and the Petitioner has failed to establish that the fixed hourly rate at issue infringes upon the rights of indigent criminal defendants to effective representation. An order of a trial court comes to the appellate courts clothed with a presumption of correctness, and if the record reflects competent substantial evidence supporting the trial court's findings, the order must be affirmed. See Greenwood v. Oates, 251 So.2d 665 (Fla. 1971); Shaw v. Shaw, 334 So.2d 13 (Fla. 1977).

The Petitioner cites Zelman v. Metropolitan Dade County, 645 So.2d 57 (Fla. 3d DCA 1994) in support of its position. [IB. 19]. Again, Petitioner's reliance is misplaced. In Zelman, unlike the instant case, the portions of the applicable administrative order governing court-appointed counsel's representation did not fix an hourly rate. See Zelman v. Metropolitan Dade County, 586 So.2d 1286 (Fla. 3d DCA 1991). Therefore, the court did not have an hourly rate set by an administrative order for that type of representation to use in calculating the fee. In that situation, unlike the situation here, the district court ordered the trial court to look toward the fees for similar private representation to determine a reasonable hourly rate of compensation. Nowhere in the Zelman opinion did the Third District find a $40.00 hourly rate to be "confiscatory" as Petitioner states in its brief. [IB. 19]. Since there is an administrative order in the instant case which sets the hourly rate of compensation for Petitioner's representation, Zelman has no applicability.

In posing the certified question in the instant case, the First District commented that while the $50.00 per hour may be a reasonable rate for a criminal appeal not involving the death penalty and requiring only a few hundred hours of work, such an hourly rate may approach a confiscatory rate in a capital case requiring a large expenditure of time. This statement logically fails because the more involved or complex the case, the more hours that are spent on the case by court-appointed

counsel, thus resulting in a larger fee. To illustrate this point, a relatively simple appeal that takes court-appointed counsel 100 hours to prepare would result in a $5,000.00 fee, while a more complex appeal which takes court-appointed counsel 500 hours to prepare would result in a $25,000.00 fee. As long as there is no cap or ceiling on the fee, the fees determined by the fixed hourly rate will always be commensurate to the complexity of the case. However, with a cap or ceiling on fees, the effective hourly rate will be reduced as the work increases, thus creating a situation where lawyers may try to cut corners to save time which could potentially result in ineffective assistance of counsel. Where there is no cap or ceiling on fees, the hourly rate always remains the same and the appointed attorney has no incentive to cut corners or save time, in fact, he or she would be inclined to do extra work in order to generate a larger fee. Therefore, Petitioner's assertation that due to the fixed hourly rate of the Fourth Judicial Circuit "there is the substantial potential that the attorney may seek to minimize his financial obligations by spending fewer hours than required representing an appellant/defendant which could easily result in overlooked meritorious appellate issues" [IB. 21] is illogical and without merit. As the Second District stated in Unterberger:

> "The maximum fee rate which the Supreme Court struck down [in Makemson] had no relationship to the time an attorney spent representing the defendant. The hourly rate, on the other hand, takes into account the amount of time an attorney spends in an "extraordinary and unusual case", and is thus, no "token compensation".

534 So.2d at 842. Therefore, the First District's certified question must be answered in the negative.

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, it should be estopped from challenging the constitutionality of that rate. Furthermore, even if this Court does address the constitutionality of the hourly rate, the Petitioner's argument fails because the fixed hourly rate established by the Chief Judge of the Fourth Judicial Circuit does not deny indigent criminal defendants of their right to effective assistance of counsel and is not confiscatory of an attorney's time; the relief sought should be denied and the certified question answered negatively.

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, by U.S. Mail, this _____ day of June, 2000.

RESPECTFULLY SUBMITTED,

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