IN THE
SUPREME COURT OF FLORIDA

CASE NO.: SC00-331

SHEPPARD AND WHITE, P.A.

Petitioner,

vs.

CITY OF JACKSONVILLE,

Respondent.

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

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PETITIONER'S INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

City of Jacksonville	Respondent
Howard M. Maltz, Esquire	Counsel for Respondent
Richard Mullaney, Esquire	Counsel for Respondent
Sheppard and White, P.A.	Petitioner

CERTIFICATE OF INTERESTED PERSONS (Continued)

Wm. J. Sheppard, Esquire	Counsel for Petitioner
D. Gray Thomas, Esquire	Counsel for Petitioner

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 Sheppard and White, P.A., hereby certify that the instant brief has been prepared with 14 point, Times Roman, a font that is proportionately spaced.

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PETITIONER'S INITIAL BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Sheppard & White, P.A., will be referred to herein by name, or as "Petitioner". Respondent, The City of Jacksonville, will be referred to herein by name, or as "Respondent". 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].

STATEMENT OF THE CASE AND FACTS

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 550 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 effective assistance of counsel.

In 1994, Gerald D. Murray was convicted of first degree murder, burglary with an assault, and sexual battery, and he was sentenced to death. [R.I,1,8]. Wm. J. Sheppard, Esquire, of Sheppard and White, P.A., and Professor Fletcher N. Baldwin of the University of Florida College of Law were appointed by the Circuit Court, Fourth Judicial Circuit, Duval County, Florida, to represent Mr. Murray on direct appeal to the Supreme Court of Florida due to the sentence of death and Mr. Murray's insolvency. [R1, 1]. Undersigned counsel raised, briefed and argued 23 claims of error on appeal. Those claims are as follows:

(1) The trial court abused its discretion in permitting the state to peremptorily challenge three jurors;

(2) The trial court abused its discretion in denying Murray's motion to suppress hair evidence seized pursuant to an allegedly defective search warrant.

(3) The trial court abused its discretion in allowing the state's expert to testify about the results of DNA typing because the state's method of DNA typing and probability calculations did not meet the *Frye* test for admissibility;

(4) The trial court abused its discretion in admitting hair evidence where the testimony of the state's witnesses at trial revealed evidence of probable tampering;

(5) The trial court abused its discretion in denying Murray's motions for continuance of the trial and penalty phase;

(6) The trial court abused its discretion in admitting evidence of Murray's pre-trial escape, theft of automobiles and possession of false identification.

(7) The trial court abused its discretion in excluding the testimony of three defense witnesses concerning Murray's true motive for escape;

(8) The prosecutor's comments during the guilt phase closing argument deprived Murray of a fair trial;

(9) The evidence at trial was insufficient to support Murray's convictions;

(10) The trial court erred in finding the especially heinous, atrocious or cruel aggravating factor;

(11) The trial court abused its discretion in overruling Murray's objection to the standard heinous, atrocious, or cruel instruction and denying Murray's requested instruction on that aggravator;

(12) The trial court abused its discretion in rejecting Murray's statutory and nonstatutory mitigating factors;

(13) The trial court improperly doubled the felony murder and pecuniary gain aggravating factors;

(14) The trial court erred in finding that the murder was committed for pecuniary gain;

(15) The trial court abused its discretion in admitting hearsay evidence concerning Murray's prior violent felonies at the penalty phase;

(16) The prosecutor's comments during the penalty phase closing argument deprived Murray of a fair trial;

(17) Section 921.141(7), Florida Statutes (1995), which allows presentation of victim impact evidence in a capital sentencing proceeding unconstitutional;

(18) The trial court's use of Murray's contemporaneous convictions for burglary and sexual battery to support the felony murder aggravating factor violated Murray's right against double jeopardy;

(19) The trial court improperly instructed the jury regarding its role in the sentencing process;

(20) The record does not support the death penalty;

(21) Florida's death penalty statute is unconstitutional because electrocution constitutes cruel and unusual punishment;

(22) Murray death sentence is disproportionate; and finally,

(23) The trial court erred in enhancing Murray's sentence for burglary and imposing it to run consecutively to his sentence of death. [R.1, 2-4].

This Court unanimously reversed the convictions and sentence of death and remanded the case for a new trial on the basis of erroneous admission of DNA opinion testimony. [R.I, 1, 8]; *see Murray v. State*, 692 So.2d 157 (Fla. 1997).

Thereafter, appellate counsel filed a Motion for Payment of Appellate Attorney's Fees and Costs on July 15, 1997. A hearing was held on the motion on November 24, 1998. [R.V, 589]. On December 17, 1998, the trial court issued its Final Order for Motion for Payment of Appellate Attorney's Fees and Costs, awarding $29,864.05 in legal fees and costs for the appellate representation of Mr. Murray, based on an hourly rate of $40.00 fixed by administrative order of the chief circuit judge. [R.IV, 577]. Petitioner[1] had requested $95,807.11 in the motion [R.I, 6]. At

[1] The District Court of Appeal changed the style of this case to that reflected in this brief, although the hourly rate applied below and challenged herein includes that for time incurred by appellate co-counsel, Professor Baldwin. The term "petitioner" as used herein describes Mr. Murray's appellate counsel collectively, including Professor Baldwin.

the hearing on the motion, the parties stipulated to the amount of costs to be awarded totaling $3,854.05. [R.IV, 578].

At the hearing, petitioner submitted numerous affidavits from members of the criminal bar in the Fourth Judicial Circuit asserting that the current hourly rate fixed by the Chief Judge is inadequate. [R. II, 158]. Petitioner likewise submitted affidavits from two board certified criminal appellate attorneys, both of whom have practiced over 17 years, stating that the fees requested by Petitioner were reasonable. [R. I, 69-74; V, 600]. Talbot D'Alemberte, Esquire, President of Florida State University, testified by affidavit that a reasonable attorney's fee and costs award in the appeal of Defendant Gerald Murray should exceed $100,000. [R. II, 79-82; V, 600]. Additional evidence that the $40.00 fixed hourly rate was confiscatory was presented at the November 24, 1998 hearing on the Motion for Payment of Appellate Attorney's Fees and Costs. [R. V, 589]. The rate was the lowest in Florida. [R.I, 87, 89].

Further, Wm. J. Sheppard, Esquire, the senior partner of the law firm of Sheppard & White, P.A., testified at the hearing that the $40.00 fixed hourly rate is "wholly inadequate." [R. V, 603]. Mr. Sheppard went on to explain the financial difficulty a firm encounters with a complex capital appeal:

> Now, the economic impact of one of these cases on a law firm is overwhelming and I testify it drains. We are

> a busy law firm. We never have a spare moment where we sit without paying work to do. We turn work away and did during this time period.
>
> * * *
>
> This representation went over a period of two years. I would testify that it is the reputation in Jacksonville, Florida among the criminal defense bar that you don't want to do death penalty representation by court-appointed appointments because the compensation is inadequate and it drains on your firm timewise, and economically it is too great to undertake that responsibility.

[R. V, 605-606]. The evidence presented by petitioner is uncontroverted in the record.

The trial court found that the actual work by court appointed counsel was 545 hours and found all 545 hours, to be compensable. [R.IV, 578]. The lower court compensated those hours at the hourly rate of $40.00, which was then the maximum rate set by the Chief Judge of the Fourth Judicial Circuit, pursuant to Administrative Order 86-33, as amended. [R.IV, 578].[2] The lower court also awarded time spent by "paralegals/clerks" under the supervision of Murray's appellate counsel in compliance with Section 57.104, Fla.Stat., at a rate of $40.00 per hour. [R.IV, 578].

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[2] During the pendency of proceedings in the First District Court of Appeal, the rate was increased by administrative order to $50.00 per hour, and, pursuant to direction from the First District, the trial court ordered compensation for the difference during a temporary relinquishment of this Court's jurisdiction.

After the timely filing of petitioner's notice of appeal, [R. IV, 580], the First District treated the matter as a petition for certiorari. The court below subsequently granted the petition, quashed the trial court's order in part regarding the intervening change in the hourly rate, denied the bulk of relief sought and certified the critical issue as one of great public importance. *Sheppard and White, P.A. v. City of Jacksonville,* 751 So.2d 731, 736 (Fla. 1st DCA 2000). The First District found itself "constrained to deny the constitutional arguments raised by petitioner" but agreed that "the hourly rate set by administrative order is problematic given the extraordinary and unusual circumstances of this capital case." *Id.* at 736. Noting that this Court has yet to address the issue, but held $26.12 per hour "'far from reasonable' in 1989," the First District certified as a question of great public importance:

> IS THE FIXED RATE OF $50.00 PER HOUR FOR APPELLATE ATTORNEY'S FEE CONFISCATORY WHEN APPLIED IN A CAPITAL CASE REQUIRING 550 HOURS OF ATTORNEY'S TIME?

Id. Petitioner timely filed a notice and amended notice to invoke discretionary review. The Court having postponed its decision on jurisdiction and established a briefing schedule, this brief follows.

SUMMARY OF THE ARGUMENT

Compensation at the rate of $50.00 per hour in attorney's fees for successful capital appellate representation by court-appointed counsel is unconstitutionally confiscatory of the time, energy and talents of attorneys, and also impinges on the right of indigent capital defendants to the effective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution. The First District Court of Appeal erred in concluding that an hourly rate established by administrative order

of a chief circuit judge is not subject to the same legal considerations on review as statutory caps on fees for appointed counsel set by the legislature. Hourly rates established by administrative order, entered *ex parte* and without opportunity for effective review, fail to establish reasonable local prevailing rates because such hourly rates lack any relationship to prevailing rates for any form of legal representation, much less representation where a human life hangs in the balance. Capital cases by their very nature involve extraordinary circumstances warranting application of the same principles invoked by this Court in concluding that legislatively-established attorney's fee caps are not binding. Accordingly, the question certified by the First District should be answered in the affirmative, and the judgment of the First District reversed.

ARGUMENT

I.

THE FIXED HOURLY RATE OF $50.00 PER HOUR FOR APPELLATE ATTORNEY'S FEE IS CONFISCATORY WHEN APPLIED IN A CAPITAL CASE REQUIRING 550 HOURS OF ATTORNEY'S TIME.

The question certified by the First District should be answered in the affirmative because the fixed rate of $50.00 per hour for the services of appointed capital appellate counsel is confiscatory and infringes the constitutional right of capital defendants to effective counsel.

The Court of Appeal mistakenly concluded that it lacked the legal authority to reject an hourly rate for compensation of court-appointed capital appellate counsel established by Administrative Order of a chief circuit judge, while a cap on total compensation established by the Legislature could lawfully be exceeded. The court below, however, appropriately recognized that an hourly rate as low as that involved in this case "does seem to approach a confiscatory rate in a capital case, as here, requiring nearly 550 hours of an attorney's time." *Sheppard and White, P.A. v. City of Jacksonville,* 751 So.2d 731, 736 (Fla. 1st DCA 2000). No principled reason exists to treat a judicially established hourly rate in a manner different from a legislatively-established cap on fees for court-appointed counsel in capital cases.

While being troubled with its result, the court below erred in relying upon what it found to be an appearance that this Court has assumed that fees set in accordance with a judicial administrative order's establishment of an hourly rate constitutes a determination of a reasonable local prevailing rate. *Id.* at 735, *citing, White v. Board of County Commissioners of Pinellas County,* 537 So.2d 1376, 1379 (Fla. 1989). The

Court of Appeal reads more into *White* than was litigated and decided in that case, or, if not, the Court should recede from any portion of *White* that justifies treating judicially-established hourly rates differently than legislatively-established fee caps for court-appointed counsel in the circumstances of this case. This is particularly so where administrative orders setting such rates are entered *ex parte,* without record proceedings involving affected parties, and are not readily subject to appellate review. Accordingly, the opinion and judgment of the First District in this case should be reversed in this regard.

In a manner similar to the First District, the Second District strongly criticized an hourly rate established by administrative order while finding "itself in the unenviable position of being required to quash an order that purports to right that wrong" of grossly inadequate rates. *Charlotte County v. Shirley,* 750 So.2d 706, 707 (Fla. 2nd DCA 2000). The court in *Shirley* found that it had no authority to upset an administrative order but concluded that this Court has such authority. *Id.* at 708. The Second District flatly found a $50.00 hourly rate to constitute "inadequate compensation," particularly "in capital cases where a person's life is on the line" and where "reasonable" rates in civil and other matters are routinely far more than double that rate. *Id.* at 708. The court in *Shirley* certified essentially the same question as did the court below. *Id.*

The Court in *Makemson v. Martin County,* 491 So.2d 1109, 1112 (Fla. 1986) found the statutory maximum fee of Fla. Stat. §925.036 unconstitutional when applied in a manner which curtailed the court's inherent power to ensure adequate representation of the criminally accused and likewise interfered with the accused's right to effective representation by counsel. In reaching its holding, the Court remained mindful

> 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. We find the two inextricably interlinked.

Id. Accordingly, the Court declared that token compensation is no longer to be an alternative, but rather a reasonable fee must be awarded. *Id.* at 1113 (emphasis added); *see Leon County v. McClure*, 541 So.2d 630 (Fla. 1st DCA 1989) ("Rather, as *Makemson* emphasized, the court should award a reasonable fee which is not confiscatory of the attorney's time, energy and talents.").

Agreeing with a dissent in a Second District case, the Court reiterated the same holding in *White v. Board of County Commissioners of Pinellas County*, 537 So.2d 1376 (Fla. 1989), that a court may exercise its inherent power to depart from the statutory maximum fee

> when legislatively-fixed attorney's fees become so out of line with reality that they materially impair the abilities of

> officers of the courts to fulfill their roles of defending the indigent and curtail the inherent powers of the courts to appoint attorneys to those roles.

Id. at 1378, *quoting, White v. Board of County Commissioners*, 524 So.2d 428, 431 (Fla. 2d DCA 1988) (Lehan, J., dissenting). Again, the Court emphasized that the defendant's right to competent and effective representation, not the attorney's right to compensation, gave rise to the necessity of exceeding the statutory maximum fee. However, as the Court further noted:

> The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored. It may be difficult for an attorney to disregard that he or she may not be reasonably compensated for the legal services provided due to the statutory fee limit. As a result, there is a risk that the attorney may spend fewer hours than required representing the defendant or may prematurely accept a negotiated plea that is not in the best interests of the defendant. A specter is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy.

Id. at 1380. Significantly, the Court also found that virtually every capital case involves extraordinary circumstances and unusual representation. *Id.*

Indeed, the American Bar Association has published its Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989). As part of

its guideline, the American Bar Association approved the following guidelines for compensation:

> A. Capital counsel should be compensated for actual time and service performed. The objective should be to provide a reasonable rate of hourly compensation which is commensurate with the provision of effective assistance of counsel and which reflects the extraordinary responsibilities inherent in death penalty litigation.
>
> B. Capital counsel should also be fully reimbursed for reasonable incidental expenses.
>
> C. Periodic billing and payment during the course of counsel's representation should be provided for in the representation plan.

Commentary:

> This guideline is rooted in the constitutional obligation of government to provide effective representation for poor people charged with crimes. In order to fulfill that obligation, government is required to adequately compensate court-appointed counsel for the representation they provide. As the Florida Supreme Court has noted, the defendant's right to effective representation is "inextricably interlinked" with the attorney's right to fair compensation.
>
> Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require. As of 1985, Virginia was paying defense lawyers in capital cases an average of $687.00 per case -- an amount representing an hourly wage of $1.00 in

some cases. Such token compensation is plainly insufficient to cover even overhead expenses of an attorney assigned to a capital case, much less to adequately reimburse the attorney for his or her time and skill. Florida's compensation scheme (permitting a maximum payment of $3,500.00 per case as of 1985), while somewhat higher than Virginia's, must still be described as inadequate since there have been instances where the effective rate counsel received was close to the Federal minimum wage. These are but two examples of drastic underfunding of capital representation.

In such situations, the temptation is too great for a lawyer to shortchange the client because he or she is not adequately being compensated for his or her time. For example, a study conducted by the National Legal Aid & Defender Association documents that in 1985, 36% of the assigned counsel in Massachusetts who responded to a survey on the issue admitted they omitted some appropriate defense activity because of inadequate compensation. Specific types of activities omitted included: interviewing the client; a full investigation of the facts; interviewing witnesses or the police; filing pretrial motions; and adequate research of the law. Omissions of such critical activities, shocking in any case, would be unconscionable in cases involving defendants who face the prospect of death. For this reason alone, counsel in capital cases ought to receive adequate reimbursement for their services.

Unreasonably low fees not only deny the defendant the right to effective representation, however. They also place an unfair burden on skilled criminal defense lawyers, especially those skilled in the highly specialized capital area. These attorneys are forced to work for next to nothing after assuming the responsibility of representing someone who faces a possible sentence of death. Failure to provide appropriate compensation discourages experienced criminal

defense practitioners from accepting assignments in capital cases (which require counsel to expend substantial amounts of time and effort).

This Guideline provides for "reasonable" compensation, which should be distinguished from "token" compensation. In the words of one court: "The statute (imposing a fee cap upon attorney compensation in capital cases) as applied to many of today's cases, provides for only token compensation. The availability of effective counsel is therefore called into question in those cases when it is needed most." The court concluded that attorney fees which are set at "confiscatory rates" in capital cases impermissibly interfere with the Sixth Amendment right to counsel.

Some courts have argued that criminal defense lawyers have a pro bono obligation to provide free (or almost free, where fees are low) services to poor defendants. This argument ignores the government's responsibility to provide effective, adequately funded representation in these cases. Furthermore, prosecutors and judges are not required or asked to work for nothing or next to nothing. It is unconscionable to impose such a burden on defense lawyers:

> No citizen can be expected to perform civilian services for the government when to do so is clearly confiscatory of his time, energy and skills, his public service is inadequately compensated and his industry is unrewarded...I do not believe that good public conscience approves such shoddy, tawdry treatment of an attorney called upon by the courts to represent an indigent defendant in a capital case. (Emphasis added).

> It should be the responsibility of each jurisdiction to develop flexible standards for compensation which take into consideration the number of hours expended plus the effort, efficiency, and skill of capital counsel. Among the criteria might be the role and experience of the attorney; less experienced co-counsel might be compensated at a lower rate than lead defense attorneys. See Guidelines 4.1 and 5.1. Flat payment rates or arbitrary ceilings should be discouraged since they impact adversely upon vigorous defense. Rather, assigned counsel should be provided a rate of hourly compensation which reflects the extraordinary responsibilities and commitment required of counsel in death penalty cases. It is also important that the compensation plan provide for extra payments to counsel when representation is provided in unusually protracted or extraordinary cases.
>
> * * *
>
> This Guideline acknowledges the strong tension which exists between the public treasury and the obligation to fund the often high cost of providing defense in capital cases, but asserts that the obligation to provide adequate and effective representation cannot be ignored or diminished. In order to safeguard the defendant's right to effective representation, "it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter."

ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 79-83 (1989) (footnotes omitted).

Just as a statutory maximum fee may be confiscatory of an attorney's time, energy, and talents, *see Makemson, supra* at 1115, an hourly rate fixed by the Chief

Judge of the circuit may likewise be confiscatory and impact on the rights of indigent criminal defendants. *See Hillsborough County v. Untenberger*, 534 So.2d 838, 842 (Fla. 2d DCA 1988). The court of appeal mistakenly concluded that decisions of this Court failed to establish authority for an award of fees at an hourly rate greater than that established by an administrative order of a chief circuit judge.

The appointed hourly rate for criminal appellate work as fixed by the Fourth Judicial Circuit is $50.00. [R.I, 87, 89; *Sheppard & White, P.A. v. City of Jacksonville,* 751 So.2d 731, 736 (Fla. 1st DCA 2000)]. This is among the lowest fixed rate throughout Florida's twenty circuits. [R.I, 87, 89]. Indeed, the hourly rate of $40.00 has been held by the Third District to be confiscatory. In *Zelman v. Metropolitan Dade County*, 645 So.2d 57, 58 (Fla. 3d DCA 1994), the court held that the $40.00-50.00 hourly rate awarded by the trial court was not even close to a reasonable fee in that capital appeal. Instead, the district court awarded attorney's fees at an hourly rate of $100.00 for out-of-court services and $125.00 for in-court services rendered. *Id.* The district court refused to consider the fact that the county had never previously paid more than $40.00-50.00 per hour and that an hourly computation of the salaries paid assistant public defenders yielded lower amounts. *Id.* at 58 n.4. And although the *Zelman* case did not involve an administrative order setting the hourly

appointed rate, the court squarely rejected the $40.00-50.00 as unreasonable and confiscatory.[3]

The Chief Judge of the Fourth Judicial Circuit fixed the hourly rate for appointed capital appellate counsel at $40.00, since amended to $50.00. Of the forty-six (46) affidavits filed by attorneys who regularly practice in criminal courts in the Fourth Judicial Circuit, forty-one (41) of those attorneys stated that they have considered being appointed for capital appeals and that the appointed rate of $40.00 per hour is inadequate or that they have not considered being appointed for capital appeals because the appointment rate of $40.00 per hour is inadequate. [R.II, 158; V, 600-601]. Only five (5) of the forty-six (46) responding attorneys stated that they would not consider being appointed for capital appeals for a reason other than the fixed hourly rate. [R.II, 158, 173-182; V, 600-601]. However, two of those five attorneys nonetheless stated that the appointed rate of $40.00 per hour is inadequate. [R.II, 173, 175].

Based on the foregoing evidence, it would be difficult for an attorney to disregard that he or she will not be reasonably compensated for the legal services

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[3] Cases supporting low hourly rates, *see e.g., Escabmia County v. Ratchford*, 650 So.2d 154 (Fla. 1st DCA 1995); *Bobbitt v. State*, 726 So.2d 848 (Fla. 5th DCA 1999), do not reach the issue of whether the rate of the Fourth Judicial Circuit applied in the instant case is confiscatory under the circumstances. Also, the decision in *Bobbitt*, for instance, fails to accord proper significance to *Makemson* and *White, supra*.

provided due to the fixed hourly rate. As a result, a real risk exists that the attorney may attempt to avoid such financial situations by not accepting any appointed capital appellate work. Similarly, 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. The question is raised then that an appellant/defendant consequently is subjected to less than adequate, effective representation as guaranteed by the Sixth Amendment to the United States Constitution, which is the exact injustice appointed counsel was intended to remedy. *White v. Board of County Commissioners of Pinellas County*, 537 So.2d 1376, 1380 (Fla. 1989).

The hourly fixed rate is unreasonable and confiscatory of an attorney's time, energy and talents. The Petitioner, at the hearing on the Motion for Payment of Appellate Attorney's Fees and Costs, submitted to the lower court numerous affidavits from members of the criminal bar in the Fourth Judicial Circuit supporting that the current hourly rate fixed by the Chief Judge is inadequate. [R. II, 158]. Petitioner likewise submitted affidavits from two board certified criminal appellate attorneys, both of whom have practiced over 17 years, stating that the fees requested by Petitioner were reasonable. [R. I, 69-74; V, 600]. Talbot D'Alemberte, Esquire, President of Florida State University, testified by affidavit that a reasonable attorney's

fee and costs award in the appeal of Defendant Gerald Murray should exceed $100,000. [R. II, 79-82; V, 600]. Additional evidence that the $40.00 fixed hourly rate was confiscatory was presented at the November 24, 1998 hearing on the Motion for Payment of Appellate Attorney's Fees and Costs. [R. V, 589]. The rate is the lowest in Florida. [R.I, 87, 89].

Further, Wm. J. Sheppard, Esquire, the senior partner of the law firm of Sheppard & White, P.A., testified at the hearing that the $40.00 fixed hourly rate is "wholly inadequate." [R. V, 603]. Mr. Sheppard went on to explain the financial difficulty a firm encounters with a complex capital appeal:

> Now, the economic impact of one of these cases on a law firm is overwhelming and I testify it drains. We are a busy law firm. We never have a spare moment where we sit without paying work to do. We turn work away and did during this time period.
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> This representation went over a period of two years. I would testify that it is the reputation in Jacksonville, Florida among the criminal defense bar that you don't want to do death penalty representation by court-appointed appointments because the compensation is inadequate and it drains on your firm timewise, and economically it is too great to undertake that responsibility.

[R. V, 605-606]. The evidence presented by petitioner is uncontroverted in the record.

Section 925.036(1), Fla. Stat. (1997), provides that compensation of appointed counsel in criminal cases be established at an hourly rate set by the chief judge or senior judge of each circuit, but further provides that such hourly rate set by the circuit court merely not exceed the prevailing hourly rate for similar representation in each circuit. The reference to a prevailing hourly rate constitutes mere surplusage unless the administrative order setting such a rate is entered in and after consideration of the circuit's hourly rate for the type of representation at issue. The record in this case is utterly devoid of any evidence that the administrative order setting the Fourth Circuit's hourly court appointment rate included any consideration whatsoever of what the actual prevailing rate is, or even was at the time of entry of the administrative order some 12 years ago. [R. V, 611]. In the absence of such record evidence, the court below erred as a matter of law in merely utilizing the hourly rate established 12 years ago by administrative court order without further inquiry into constitutional reasonableness, the statutorily-required reference to prevailing rate in the circuit or the factors enumerated by the supreme court in Rule 4-1.5(b).

In promulgating rules governing the legal profession, this Court has set forth a number of factors, all of which are to be considered and applied, in determining what constitutes a reasonable fee. Rule 4-1.5(c), Rules Regulating the Florida Bar. These factors are:

> (1) The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (4) The significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (5) The time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, diligence and ability of the lawyer or lawyers performing the service and the skill, expertise or efficiency of effort reflected in the actual providing of such services; and
>
> (8) Whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Rule 4-1.5(b), Rules Regulating the Florida Bar. In applying these factors to the fee request in this case, it is clear that substantial time and labor was required in the *Murray* appeal, that the issues involved in the appeal were novel, complex and

difficult, requiring substantial skill in order to perform the legal service properly, and that the representation of Mr. Murray precluded other employment by counsel. [R. V, 627-28]. Similarly, the record evidence demonstrates that the fee or rate customarily charged for comparable services would substantially exceed the amount sought by the petitioner. [R. II, 79-82; V, 600].

The significance of the DNA admissibility issue in the *Murray* appeal also is beyond question, and the responsibility of counsel can never be greater than in representation of a defendant in death penalty case litigation. The result of a unanimous reversal of the client's convictions by the Florida Supreme Court is unquestionably the best result that could have been obtained in the appellate representation. Additionally, the experience, reputation, diligence, ability, skill, expertise and efficiency of effort by the lawyers and the petitioner firm in providing the service is unquestioned. Accordingly, when considered under the standards adopted by the Florida Supreme Court for determining reasonableness of a legal fee, the fee request of the petitioner law firm clearly is reasonable and should have been awarded below.

The Court of Appeal concludes that the Court's decisions in *Makemson* and *White* have nothing to do with the inquiry involved in the present proceeding because they directly address only the statutory caps on total fees set in the same statute that

provides for judicial establishment of hourly rates. The constitutional inquiry, however, can only be the same. The court below overlooks or misapprehends the significance of *White* in this regard.

First, the administrative order setting hourly rates must be grounded in a determination of the local prevailing hourly rate (which may not be exceeded), and the record in this case contains absolutely no indication that any local prevailing rate was determined or considered in the chief judge's 1986 or 1999 decisions as to the hourly rate to set. Secondly, because the *White* court was confronted solely with the statutory cap on total fees, its shorthand reference to the "local prevailing hourly rate for indigent cases" overlooks that this language is circular. The "prevailing" indigent representation rate is set by court order, without any apparent reference to prevailing rates for any other representation of criminal defendants. Under this logic, whatever rate is set by the chief judge of any circuit automatically becomes the "prevailing" rate and is self-fulfilling to bar further inquiry. Such a result would render the statute's reference to the prevailing rate meaningless surplusage, a conclusion that this Court cannot reach.

The court below erred by deferring to an hourly rate set *ex parte* by a chief judge. Application of the correct legal principles to the undisputed facts of this case compels the conclusion that the Fourth Judicial Circuit's hourly rate is confiscatory,

particularly as applied in capital cases, and impinges the constitutional right of capital defendants to the effective assistance of counsel. Accordingly, the certified question should be answered in the affirmative, and the opinion of the First District, in failing to reject the Fourth Circuit's hourly rate for capital appellate counsel, should be reversed.

CONCLUSION

For all of the foregoing reasons, the decision of the First District in this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Howard Maltz, Esquire,** Assistant General Counsel, Office of General Counsel, City Hall at St. James, 117 W. Duval Street, Suite 400, Jacksonville, Florida 32202, by Hand Delivery on the 15th day of May, 2000.

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ATTORNEY

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